

## **Tasmanian Liquor and Gaming Commission: Appeal - Reasons for Decision**

### **Purpose**

Under Section 211 of the *Liquor Licensing Act 1990*, the Tasmanian Liquor and Gaming Commission (the Commission) is required to conduct a hearing into an appeal against a decision of the Commissioner for Licensing in relation to:

Applicant: Mr Dennis Behrakis, Salamanca Fresh, 19 Main Street, Huonville and Salamanca Fresh, shop 101, Channel Court Kingston

Type of Application: Special Licence (Section 11 *Liquor Licensing Act 1990*)

The appeal was heard in Hobart on 4 December 2017.

Decision: 29 January 2018

### **Background and hearing of the appeal**

The Commissioner for Licensing delivered his Reasons for Decision on 14 September 2017. The Commissioner determined:

“The licence applied for is not granted for the Kingston and Huonville premises as the Act prohibits granting of a licence to a supermarket.”

Section 25A of the *Liquor Licensing Act 1990* states that:

A liquor licence must not be granted in connection with the activities of a supermarket.

The applicant lodged an appeal on 27 September 2017 on the grounds that the Commissioner for Licensing erred in finding that the premises at Kingston and Huonville are supermarkets as referred to in Section 25A of the *Liquor Licensing Act 1990* and subsequently did not grant to the applicant special licences to sell liquor from the Kingston and Huonville stores. A submission dated 7 November 2017 with accompanying documentation (listed below) was received.

### **The Commission deliberations**

The Commission must decide whether the premises of Salamanca Fresh Kingston and Salamanca Fresh Huonville are supermarkets.

In making its decision, the Commission considered:

- Memo to the Commissioner for Licensing dated 10 April 2017 in relation to Salamanca Fresh, Kingston;
- Reasons for Decision of the Liquor Licensing Board dated 9 April 2015;
- Memo to the Commissioner for Licensing dated 10 April 2017 in relation to Salamanca Fresh, Huonville;
- Location map and image of Salamanca Fresh, Huonville;
- Applications for a Liquor Licence for Ziggy's, Salamanca Fresh, Huonville and Salamanca Fresh, Kingston all dated 28 November 2016;
- Police Record of Dennis Behrakis dated 20 March 2017;

- Equifax report dated 15 March 2017;
- Letter from Butler McIntyre & Butler, Lawyers dated 2 February 2017;
- Submission to the Commissioner for Licensing from Dennis Behrakis dated 28 November 2016;
- Emails between the Behrakis Group, Butler McIntyre & Butler and the Liquor and Gaming Branch between the dates 6 March 2017 to 21 April 2017;
- Email to the Behrakis Group from the Liquor and Gaming Branch dated 10 May 2017;
- Further submission from Dennis Behrakis dated 25 May 2017;
- Email between Butler McIntyre & Butler and the Liquor and Gaming Branch dated 3 July 2017 and 12 July 2017 respectively;
- Supplementary submission on behalf of Dennis Behrakis dated 21 July 2017;
- Letter and Notice of Appeal from Butler McIntyre & Butler, Lawyers on behalf of Dennis Behrakis dated 27 September 2017;
- Letter to Butler McIntyre & Butler, Lawyers dated 4 October 2017;
- Emails between Butler McIntyre & Butler and the Liquor and Gaming Branch both dated 12 October 2017, with articulated documentation;
- Letter from Butler McIntyre & Butler, Lawyers dated 7 November 2017, with articulated documentation;
- Reasons for Decision of the Commissioner for Licensing dated 14 September 2017 in relation to Ziggy's, Salamanca Fresh, Kingston and Salamanca Fresh, Huonville;
- Written decision Tasmanian Liquor and Gaming Commission, 22 December 2016 – Stephen Longmore, Hill Street Grocer Devonport.

Commission members visited the premises separately on 12 November and 2 and 3 December 2017 (Huonville) and 19 November and 3 December 2017 (Kingston).

### **Appellant's submission**

According to the appellant, “store size is critical” and the issue of size would appear to be central to many aspects of the applicant’s appeal. As part of the original application, a supplementary submission (dated 21 July 2017) focussed on (the smaller) size of the premises with particular reference to the decision made by the Commission in December 2016 that Hill Street Grocer Devonport (HSGD) is a supermarket. The floor spaces of the stores in question in this appeal are “significantly less” (at 740m<sup>2</sup> (Kingston) and 410m<sup>2</sup> (Huonville)) than HSGD (with 967m<sup>2</sup> of retail space).

The applicant draws further differences from the HSGD supermarket in describing product type and mix, number of aisles, car parking, shopping trolleys, cash points, advertising and marketing.

Acknowledging that the Act contains no definition of “supermarket”, the appellant provides a definition from Wikipedia’s free public encyclopaedia with marked up sections (see below), presumably for the Commission’s specific attention. These include:

A supermarket is a self-service shop offering a wide variety of food and household products, organized (sic) into aisles. It is larger and has a wider selection than a traditional grocery store, but is smaller and more limited in the range of merchandise than a hypermarket or big-box market.

The traditional supermarket occupies a large amount of floor space, usually on a single level. It is usually situated near a residential area in order to be convenient to consumers. The basic appeal is the availability of a broad selection of goods under a single roof, at relatively low prices.

Supermarkets are typically supplied by the distribution centres of their parent companies, usually in the largest city in the area.

(American institutions) defined the attributes of a supermarket as “self service, separate product departments, discount pricing, marketing and volume selling.”

The appellant goes on to rely heavily on the work of Dr Louise Grimmer, an academic at the University of Tasmania, who describes herself as “one of Australia’s leading experts on retail, with a particular focus on small retail firms, and an interest in supermarket retailing”. Articulating her credentials for this claim, she goes on to assert that, in her expert opinion, the stores in question are not supermarkets because they do not meet “a number of characteristics (or criteria) that a store should possess in order for it to be classified as a “supermarket”.”

In Dr Grimmer’s opinion, “these include, but are not limited to, size of store (e.g. the floor space), the number of stock keeping units, the number of product departments, the range and type of products available for sale, including the breadth and depth of the product offering, the number of checkouts and the provision of “express” and “self service” checkouts etc.” She further enumerates some other characteristics including layout, trolley and basket provision, and sale of tobacco products.

Dr Grimmer states, “a supermarket is most characterised as such by the floor size of the store.” She summarises her submission by stating that neither store should be classified as a supermarket because “neither store meets the main (her emphasis) criteria of store size, product type, breadth and depth.

The appellant’s submission relies also on written supporting information from a number of clients (5) of the Salamanca Fresh Kingston store, none of whom perceive this store as a supermarket, using it mainly for fruit and vegetable and delicatessen purchases. Additionally, a submission from Professor Ian Duncan is submitted as a quasi-expert opinion in that he has acted as a legal representative for many applicants in Tasmania seeking liquor licences in the past. Professor Duncan does not see the size of a shop as determinative but rather focuses on the range of stock carried and by the nature of the operation (including shop layout and advertising of discounts).

The appellant submits that other Salamanca Fresh stores (in Salamanca Place and Davey Street) are very similar to the stores in question and have been granted special licences to sell liquor and therefore it would be inconsistent for the Commission to categorise the stores in question as supermarkets when these other two similar stores have not been deemed to be. Continuing the consistency argument, the appellant submits that other similar stores have been granted limited special licences over the past two decades.

The appellant asks the Commission to take account of the objects of the legislation and that nothing in the running of the stores would offend the factors in the objects, particularly the prospect of (no) harm caused by the granting of a licence.

## **Commission's view**

In hearing this appeal, the Commission has returned to the territory it interrogated in December 2016 when considering the application for the HSGD and whether it was a supermarket in accordance with Section 25A of the *Liquor Licensing Act 1990*.

At that time – and now – the absence of a definitive legal definition creates a situation where regulators must use their best judgement to decide on a case-by-case basis what constitutes a supermarket.

We have looked at the original intention of legislators expressed in the Second Reading of the *Liquor and Accommodation Amendment Bill 1995* where the introduction of this provision (Section 25A) was debated. Like the Commission today, members of Parliament grappled with the definition of a supermarket. The relevant Minister presented advice he had received from Parliamentary Counsel:

Parliamentary Counsel advise in the strongest possible terms against attempting to define the term “supermarket”. Supermarket is a word in common usage and is defined in English dictionaries. As far as Parliamentary Counsel is able to ascertain there is no legal or judicial definition to the word supermarket but as a proper noun judges take judicial notice. Any attempt to define the term would open up a Pandora’s box of attempts to get around the definition.<sup>1</sup>

So we accept that, from its inception, this is a contestable area and one that will be open to interpretation on a case-by-case basis.

It is widely recognised that Woolworths and Coles are supermarkets but does that mean that only those entities are “supermarkets” and other differently owned or operated entities cannot also be described as supermarkets? The answer clearly is “no” but where is the line drawn? The Commission has found it useful to think of all stores selling groceries comprising food (fresh and packaged/tinned) and household products as placed somewhere on a continuum of type and to look at the various characterisations along that continuum.

We have considered the set of supermarket characteristics provided by the appellant that are the work of his expert source, Dr Louise Grimmer.

Dr Grimmer submits a number of characteristics that she says a supermarket should possess in order to be so classified. She elaborates in some areas with quantitative descriptions that define this type operation: for example, an average size of 2700m<sup>2</sup>; 30,000 – 50,000 stock keeping units; 35 – 40 distinct product departments; median weekly sales of \$515,429; 10 checkout stations. The characteristics and their elaborations she says constitute a supermarket and anything that falls outside this description is, by (her) definition, not a supermarket.

The Commission notes that Dr Grimmer’s premise (her template of supermarket) is based on what currently exists in the large premises of a “traditional” supermarket such as Coles/Woolworths. It does not entertain the notion that entities that fall outside her “template” might also be considered supermarkets. To this extent, we do not accept Dr Grimmer’s premise.

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<sup>1</sup> <http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/4eed067f-ba84-4e10-8adc-68c0d8e003af/6/doc/>

The Commission has canvassed dictionary definitions of supermarket in the past (Hill Street Grocer Devonport decision 2016) and the characteristics of large, self-service, variety of food and household goods appear common (Random House Dictionary, 2014; Collins English Dictionary, complete and unabridged edition, 2011; Oxford Dictionary; Merriam-Webster Dictionary); along with aisle organisation, single level, situated near residential areas, convenient spread of opening hours that extend into the evening, ease of parking, allocation of budget for advertising typically through newspapers (Wikipedia, 2014).

### **Size**

According to the appellant, the average size of a Coles or Woolworths supermarket is 2700m<sup>2</sup>. While this may be relevant when considering Coles/Woolworths type stores, the Commission is not of the view that we must accept that particular size as the benchmark that defines supermarkets.

The Licensing Board ruled in 2014 that the IGA store in Bicheno was a supermarket with a size of 450m<sup>2</sup>. The Commission ruled in 2016 that the Hill Street Grocer Devonport was a supermarket with a retail space of 967m<sup>2</sup>. At 740m<sup>2</sup>, Salamanca Fresh Kingston falls somewhere in this range and Salamanca Fresh Huonville is slightly smaller but approximates the size of the IGA Bicheno.

We refer to the material used in our decision that Hill Street Grocer Devonport is a supermarket, namely the Victorian Civil and Administrative Tribunal<sup>2</sup> finding of Senior Member (Mr Robert Davis) where he said:

In my view, clearly one would expect more modern and bigger stores operated by large public companies to be a lot bigger than other stores operated privately. However, that does not mean that they are not also supermarkets. I do not think it is helpful to draw such a distinction. The photographs I saw of the IGA shop looked like a supermarket and generally one can say if it looks like a supermarket, it is a supermarket and that is the view I will take in this case.<sup>3</sup>

On the matter of “traditional” supermarkets, the Commission notes (as an aside) the trend for traditional supermarkets to open smaller style stores. This trend further blurs the boundary between supermarkets and other store types and may lessen the ability to use size as a characteristic of a supermarket. For example, Woolworths has opened a number (42) of small stores - called “metro” - across Australia with an average size of 600m<sup>2</sup>. Its smallest such store is 310m<sup>2</sup> in the Sydney CBD. The key offerings are household staples, but at the same price as a larger supermarket. It is said that these scaled-down city supermarkets are some of the busiest and most lucrative outlets in the Woolworths' network.<sup>4</sup> The establishment of these smaller stores is part of a national and global trend to segment formats according to demographic and consumer profiles in the area<sup>5</sup> and will be an increasing feature of the retail (supermarket) landscape.

The Commission's view is that a certain size is important but that there is not a specific size that defines supermarkets. In this, we agree with the Commissioner for Licensing that the

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<sup>2</sup> VCAT decision No. B45/2009

<sup>3</sup> VCAT decision para 21

<sup>4</sup> <http://www.smh.com.au/business/property/woolworths-takes-on-convenience-stores-20160620-gpn2ca.html>

<sup>5</sup> <https://www.c-store.com.au/2015/12/17/woolworths-opens-metro-store>

size of both the Salamanca Fresh stores in question is sufficient to qualify as supermarkets should other characteristics apply.

### **Product type and range**

In *Australian Hotels Association (Tasmanian Branch) vs. Licensing Board* (2006) TASSC 91 (8 November, 2006), Evans J. stated at 25 that:

“The Act does not define “supermarket”. The meaning ascribed to that noun by the Macquarie dictionary, 2<sup>nd</sup> edn, is:

“A large, usually self service, retail store or market selling food and other domestic goods.”

I find it instructive that the activity that defines a large store or market as a supermarket is the retail sale of food and other domestic goods; this is a core, in fact defining activity of a supermarket as without it premises could not be so described.”

Returning to the 2009 decision of the Victorian Civil and Administrative Tribunal<sup>6</sup> mentioned above, the Senior Member (Mr Robert Davis) cited a Victorian Supreme Court decision of *Seldan Pty Ltd v Liquor Licensing Commission and Wonga Park Village Supermarket Pty Ltd* (unreported 15 May 1990) in which his Honour, Nathan J. stated at p3:

A supermarket is commonly recognised as a place from which grocery items, dairy produce, some stationery and perishable food items are obtained.

Mr Davis went on to say:

In my view, that appears to depict the definition of “supermarket”

Both the stores in question sell food and other domestic goods. The appellant argues (using the characteristics of a supermarket outlined in Dr Grimmer’s paper) that stock keeping units, product departments and types of products (and breadth and depth and size) are significantly less at the Salamanca Fresh stores than that expected to be found in a supermarket.

It is self-evident that if the size of the stores is smaller than that which Dr Grimmer ascribes to supermarkets, then the other characteristics will also be found to a lesser degree.

In terms of types of products, the Commission observes that Salamanca Fresh Kingston does contain a large selection of fresh fruit and vegetable, much of it from Tasmania. Salamanca Fresh Huonville displays a more limited range of fresh fruit and vegetables compared to the other store with the ratio of offerings in favour of standard packaged/tinned type products.

While brand breadth and depth may not be as extensive as a Coles/Woolworths (by virtue of size), the Commission members located most types of products that one would expect to find in a supermarket on the shelves during their visits to both stores. This includes tobacco products at Salamanca Fresh Huonville.

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<sup>6</sup> VCAT decision No. B45/2009

The applicant submits that the Kingston and Huonville premises are “substantially the same” and the Commission observes that the stores’ product offerings common to supermarkets include:

- An extensive range of domestic, household packaged grocery items – a number of brands of some individual products;
- An extensive range of frozen products, cooled drinks, standard dairy items (ice-cream, butter, cheese) – multiple brands and choice;
- Discounted specials of everyday items located around the stores;
- A large circular column of 60+ large soft drink bottles (mainly Coca Cola and Fanta); another stand holding approximately 70 bottles of water.

### **Other characteristics**

Both stores have staffed delicatessen sections but are predominantly self-service with products arranged in aisles, with walls of refrigerated cabinets for frozen and chilled goods, with the availability of trolleys and baskets, and multiple checkouts (6 in the Kingston store). None of these is present to the same extent as a large supermarket but reflect the smaller overall size of the stores in question.

The opening hours are extensive and mirror general supermarket opening hours – generally 7.00 a.m.- 7.00 p.m. (Kingston) and 7.30 a.m.-7.30 p.m. (Huonville) 7 days a week, with closure only on Christmas day.

The applicant submits that “our pricing is competitive and very often less than the supermarkets”. The Salamanca Fresh Huonville is an IGA associated store and offers catalogue specials (online and in hard copy) that cover an extensive range of products. For example, it advertised (in December 2017) on special in the IGA catalogue a 30 pack of Coca Cola for \$17.99 – a bulk product at discounted price.

Returning again to the 2009 decision of the Victorian Civil and Administrative Tribunal<sup>7</sup> mentioned above, the Senior Member went on to say:

I am fortified in this view (that the store on question was a supermarket) by the fact that it is serviced by a 48 space car park. Such a car park is usual for a supermarket but would be rare for a convenience store or mixed business.<sup>8</sup>

As part of the Channel Court Shopping complex, Salamanca Fresh Kingston has access to a large under and above ground car park.

### **Client perceptions**

In regards the supporting information provided by clients of this store, the Commission notes the way in which these particular individuals use and perceive the store. No such claims are made in support of the Huonville store. In any case, while their perceptions are relevant, they are not determinative.

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<sup>7</sup> VCAT decision No. B45/2009

<sup>8</sup> VCAT decision para 20

## **Inconsistency**

Regarding the appellant's submission that similar stores (including other Salamanca Fresh stores) have been granted special licences in the past, we reiterate that we see all retail stores selling food and domestic products as sitting somewhere on a continuum of characterisation and that regulators must employ their best judgment in determining, on balance, whether they are supermarkets on a case-by-case basis.

## **Conclusion**

As previously stated, in the absence of an easy and agreed supermarket definition, the Commission has placed the stores in question on a continuum of characteristics on which there is a point where a premises is/is not a supermarket. This point can only be identified on a case-by-case basis and each case demands subjective investigation. The changing nature of consumer driven household shopping for groceries and the subsequent expansion of the traditional supermarket industry into small scale operation make this point harder and harder to identify and it could be that Government may need to re-visit its intentions regarding prohibitions on the sale of alcohol in this State in the future.

Weighing all relevant considerations, the Commission is unanimously of the view that Salamanca Fresh Huonville is a supermarket. The majority of Commission members believes the same to be true of Salamanca Fresh Kingston. Hence, the Commission believes that the Commissioner for Licensing was correct in his determination with regards to the two stores in question.

## **Decision**

Having considered the written evidence that the Commissioner for Licensing had before him at the time of making his decision and subsequent further submissions from the appellant as described above, under the provisions of subsection 214(1)(c)(i) of the *Liquor Licensing Act 1990*, the Tasmanian Liquor and Gaming Commission confirms the decision of the Commissioner for Licensing that the licence applied for the Kingston and Huonville premises of Salamanca Fresh is not granted as the Act prohibits the granting of a licence to a supermarket.

**Jenny Cranston (Chair), Stuart Barry (Member), Leanne Topfer (Member)**

29 January 2018