Licensing Board of Tasmania	Decision
Legislation:	*Liquor Licensing Act 1990*
Applicant:	Dean Geoffrey Krueger
Nature of application:	For an off licence
Premises: name	The Ferry Road Store
Premises: address	40 Ferry Road, Kettering
Name of decision:	Ferry Road Store Off Licence
Date & place of hearing:	Hobart, 24th January, 19th March 2008
Date of decision:	15th April 2008.
Members of the Board:	PA Kimber (chairman), K Sarten and D Logie (members)

DECISION

The Board directs the Commissioner to refuse the application, pursuant to s214(1)(ii) of the Liquor Licensing Act 1990.

Application

The application was made by Mr and Mrs Krueger for a proposed bottle shop for 40 Ferry Road, Kettering.

The application was supported by a written 'Business Plan'. The Applicants both gave evidence.

The application was opposed by the Australian Hotels Association (Tas Branch) (represented by Counsel Victoria Sales) and the licensee of the Bruny Hotel, Brendan Lowry.

In summary the application advanced the following propositions:

The Applicants already run a general store, providing fuel fast foods, grocery lines, newspapers, magazines, take-away coffee and tea etc from the Ferry Road Store. They have sought to change the use of part of the premises so that a take-away liquor outlet can be established in roughly half of the premises. In order to seek to comply with the provisions of the Liquor Licensing Act, s24A(2) (that the Board must be satisfied that *the principal activity to be carried on at the premises will be the sale of liquor*) the Applicants stated they would put a dividing wall in the existing premises

and construct an additional ramp and separate entrance door on the left side of the building. The applicants also stated that they would cease the sale of petrol.

The ingress and egress to both businesses would remain the same, that is, from Ferry Road, up a slightly elevated driveway, to park between petrol bowsers on a small platform. The Applicants said that if it would improve their chance of obtaining the licence, they would remove the bowsers.

The area to be given over to the sale of liquor business is presently an under-utilised café/dining area.

The Applicants themselves intend to manage the bottle shop business, and intend to employ management or staff to provide the day to day service in the general store. They say they will register the bottle shop as an independent business and operate it separately from the existing take away food business. They say it will be staffed independently of the existing shop and be accountable for its own overheads and tax.

They say the business will offer a selection of liquor, with the main product focus on wine, Tasmanian and mainland Australian.

The Applicants say that Kettering business and accommodation places would benefit from this, and the bottle shop would help to promote the local Tasmanian wines and Tasmania in general. Other main product lines would be beer, spirits and 'ready to drink' liquor.

There is no bottle shop in Kettering. The Oyster Cove Inn (general licence) operates a public bar, but only over the counter liquor sales; obviously a minimal service in variety and presentation.

The Applicants' main purpose in establishing the additional business on the same site as the present business is to maximise the return from their premises, and to obtain an income return to themselves. They have personal reasons for doing this, generally it was expressed as providing them with flexibility in their ability to generate an income

by their own contribution by personal exertion, to enable them to more readily manage their time to start a family.

They asserted that the bottle shop would provide a ‘great service’ to the community. It would operate 10am to 8pm 7 days a week. The shop operates 7am to 8pm daily, and the Applicants live on site. The hours of operation will generally co-incide with those of the shop. The Applicants gave evidence of their presentation and marketing intentions – which follow normal lines for small bottle shops in non-urban and non-shopping centre premises.

The business would be structured as a partnership of the Applicants. It would have 2 casual staff, being staff not employed in the contiguous take-away /store.

It appears that the present business is also a partnership of the Applicants.

The Applicants gave evidence of the split up of responsibilities between themselves.

They gave evidence that they would find out what the market wants in the way of liquor services and would seek to meet that demand. It is implicit that they would test the market with the business, and amend product lines as they became more aware of local demand.

They would arrange the premises so that customers could park in the driveway, and come into the shop for service. There would be no driveway service.

Responsible service of alcohol plans were expressed as being that staff would do the 4 hour RSA course.

They expect local trade to be 83% of the business income and tourist trade 17%, reflective of use of their store business at present. They indicated that notwithstanding a likely significantly lower trade in winter months, that they would retain the same hours of opening year round, to provide consistency. They felt that was important to the business, to avoid loss of custom and reduced customer base.

They perceive their immediate market is the Kettering community, including the marina residents, and surrounding towns of Snug, Conningham, Woodbridge and Allens Rivulet, and further south where there are little or no services (Middleton, Gordon). Kettering, being on the route to Bruny, and that Island having substantial visitor traffic, would provide some market potential, but the evidence from the Applicants was that they expected most travellers to Bruny to have already obtained liquor supplies before they arrived at Kettering.

The Applicants had a form in their store advising patrons that they were seeking a liquor licence, and inviting comment. The form was on site for 3 weeks over the December 2007-January 2008 period. The form invited positive comment. It was entitled "Liquor Licence Vote of confidence". It was apparently signed by many people indicating such positive comment. Common comments were "great idea" and "good" and "good luck".

The business plan prepared by the Applicants gave financial predictions as to sales, income and expenditure, and profit. They candidly stated that actual figures would only be evident after opening and trading, and that the figures were based on sale from their store in previous years. It was not explained how those figures provided any basis for assumptions regarding sales of the entirely different product: liquor. The Applicants stated they expected to break even from their initial investment in 24 months. We think that means they expected to recoup the entirety of their initial investment from profits over the first 24 months – but that is not entirely clear.

The business plan evidenced a detailed approach to the business, no doubt assisted by the Applicants' previous business experience, and current experience in the Ferry Road Store. The reality of income may well be entirely different from the projections. The approach to estimating expenses appears realistic but is itself based on the income projections.

The cost of works has been cited as $55,000, but later revised on presentation of written details to $38,103 of which $14,000 was stock in trade. The breakdown indicated building costs of $12,000 were the major capital cost. Balance items include $5,000 for refrigerators, and $3,000 for electrical.

We have taken account of the financial information provided.

In regard to the objections by the AHA and Mr Lowry (see below), the Applicants responded that

- Their business plan evidenced the need in the community for the service intended to be provided;
- That little evidence, if any, was provided by the objectors, and that they were a union representing commercial interests (in the first case) and an existing licensee concerned at profitability for the Bruny Hotel (in the second) and not really advancing any evidence or proposals of concern to the primary question; as to whether the grant of the licence would be in the best interests of the community;
- Ms Sales's assertion that the new business would not be profitable were answered by their projections (above);
- That the business was a separate business from the Ferry Store due to the differences in operation and separateness indicated in their evidence (summarised above). They asserted the businesses would be separate and distinct. They asserted that they were two completely different types of business, operated separately and independently with the only integrated element being Mrs Krueger's management of both;
- That Kettering has a population of 310, with smaller surrounding towns making up the majority intended customer base. Bruny, they say, has a population of 600 'residence' (we are not sure whether that is to indicate there are 600 homes, or 600 residents), who are Mr Lowry's captive audience, and that the Ferry Store proposed liquor sales would be of minimal impact to Mr Lowry's business.

Objectors

The objectors assert that the grant would contravene s24A because liquor sales would not be the principal activity conducted on the premises, and in any event the grant would not be in the best interests of the community.

The AHA rely on *Gaghan v LLC [2000]VCAT 1871* for analogous circumstances and description of what would be separate premises, and as the premises being used for the store/take-away business is one and the same as the intended liquor sales business, that they must be treated together, and hence there is no evidence that the principal activity will be sale of liquor. Rather, they say, the principal activity would be mixed store, take-away food, and sale of petrol and sale of liquor.

The assertion regarding s24A(1) was based on the likely impact (adverse financial) on the Bruny Island Hotel, and consequent reduction of ability of that business to sponsor community events and contribute to the community.

Mr Lowry was principally concerned at the negative impact on his business from an additional operative in the off-sales market, and in a geographical location where many of his customers would pass on a regular basis. The Bruny Hotel is on South Bruny at Alonnah, and is about 40km from where the ferry docks at Roberts Point. Alonnah is the administrative centre for Bruny, but social, recreational and business activity is also at Adventure Bay. The Bruny Hotel is the only general licensed premises on the Island. It serves tourists and locals, however predominantly locals on the southern island. It provides counter meals, and bar sales, and off sales from the bar.

Mr Lowry indicated that his perception was that the Applicants sought to improve their financial circumstances by tacking a bottle shop onto their take-away business, for obvious profit reasons, and that there would be minimal community gain.

In reference to the *Arthur's Lake* decision of 2007, Mr Lowry noted that to be an isolated area, and by comparison Kettering has 7 or 8 liquor outlets within 15 km. He stated that if his venture was not viable, because of adverse impact from a new venture, then both the new venture and his business would suffer, and public service

would decline. He noted that by including the bottle shop, the public also lost a dining facility and would likely lose fuel sales at Ferry Road, Kettering. He also referred to the difficult road conditions at Ferry Road, with traffic bank up from the ferry terminal on busy weekends and Christmas time. That, he said, would only be exacerbated if the store business is expanded, leading to confusion and safety concerns. He said that there was likely to be minimal benefit to the public, because the liquor service is already available in the locality, and on major traffic routes to Kettering.

Mr Lowry stated that he did not expect that if the licence was granted that his business would cease to operate.

Ms Sales concluded by indicating that the premises of the take-away food business and the intended liquor outlet were not separate and hence had to be taken together in determining whether s24A(2) was satisfied, and clearly it was not satisfied. She asserted it could not be considered a separate business. Both were owned by the same people in partnership. Whether termed a separate partnership or not, whether the income data was separate or not, did not impact on the reality that there were so many links between the two for there to be one activity at the premises being the joined activity of sale of the store and liquor outlet, and sale of liquor had not been demonstrated to be the principal activity. She referred to the decision: *Tony Jackson, Latrobe Off Licence 14th Feb 2006.*

Consideration of facts

We have considered all the evidence, documents, and statements and submissions by the Applicants and objectors.

We do not consider that the Applicants have satisfied the criterion regarding principal activity. Notwithstanding that, we have to take account of their intention to close the fuel bowsers and lease the shop at some time in the future. If those stated intentions did become the reality, would it satisfy s24A in that the principal activity 'to be carried on at the premises will be the sale of liquor'?

It is probable that in that case the principal activity 'at the premises' would be judged on the basis of the premises being a separate premises that is, the liquor store, not a combined premises including the take-away/general store.

The stated intentions were not put at such a high level of certainty that we have confidence that on opening or at any particular time thereafter that there will be a separate business, or that if a separate business is formed that it will remain that way into the future.

What will be the 'look and feel' of the 'premises': the perception to an observer will be that they drive into a common and very small car park area (perhaps 6-8 cars maximum) and will go up stairs at one side of a small building for food and the other for liquor. There will be an impression that the premises is one place providing both services, albeit from either end of the building. There will no doubt be come criticism of the lack of convenience by being forced to go in two separate entrances by those seeking to buy both product groups, and no doubt there will be assertions that the law is a farce. But that would arise because the reality is that the degree of separation is simply that which the Applicants' impose to try to circumvent the provisions of s24A(2).

Indications about what are the principal activities undertaken from premises, in similar jurisdictions and with regard to similar products have been given in *FP (Somerton) Pty Ltd – Fasta Pasta Restaurant, LLC, Victoria, 14th June 1998*, p6, Commissioner Horsfall, and in an earlier decision *Euro Café*. We commented on that in the Tony Jackson Latrobe decision (above).

Under the practical test, our impression is that the premises are in terms physically and legally united. They are one legal title, one common ownership, both activities will be owned and operated by the same two people, even though they may have two separate accounting processes and books of accounts for internal record keeping. Profits or losses will appear in the same two people's tax returns. The same people will be managing and controlling the activities in the left half and in the right half of the premises. The same people will live on the residential component of the property nearby (on the same legal title). There may be attempts to indicate some

separateness: clothing of staff, keeping casual staff separate (i.e. not working in both activities – although that won't apply to the proprietors when they work in the activities), signage (although that too will be so close as to be mixed or joined – or certainly would be if it were not deliberately separated in an attempt to give credence to the assertion that there are separate premises).

The reasonable person test: what would a reasonable person conclude on attending the premises? Most likely having driven to the joint car park, and facing the mirror image building, with a little stairway on one side to the bottle shop and the same on the other side for the take-away/grocery/store? Our impression is that the reasonable person would conclude it was 'one premises'.

The purposive test: whether in construing the legislation and considering the context in which the words appear in the section and are used elsewhere in the Act, a certain interpretation is to be preferred. We see that an interpretation which prevents casual circumvention of the intent of the Act is to be preferred to one which does not. Also, that the Applicants would hope and intend that customers of one activity would also be customers of the other activity is clear. Cross selling would be logical. But that is what it appears the Act provision is designed to prevent.

If this simple splitting of a store by a non-structural wall and the sale of liquor from one side and other goods or services from the other of the same structural building, with a common car-park and common ownership of title and right of occupation is sufficient to create 'separate premises' for the purposes of assessing the principal activity test, then the intent of the legislation would be permitted to be evaded. We do not think that is parliament's intention.

The Application does not meet the criteria in s24A(2).

If we are wrong about that, then it is still necessary to consider whether the grant of the application would be in the best interests of the community.

We consider that there is questionable financial viability, notwithstanding the projections put forward. There is no demonstrable basis for the assumptions of

income and hence profitability. But that in itself is not a sufficient reason for rejection. Financial viability is largely a matter for the applicant, and financial impact on other licensees is also not a matter of immediate concern to the Board. Numerous decisions in the past indicate that trade protective issues are not the purview of the Board except in special circumstances.

It is apparent that the business would be unlikely to provide a full time wage, and that further indicates the linking between the store business and liquor business to indicate the premises should be considered together, and returns us to s24A(2). But it is also a factor in considering the best interests of the community.

We gain the impression that it is considered by parliament by these provisions and by the community, and it is a general issue of some concern to the community that liquor should not be available from a proliferation of types of premises. In particular, s24A(2) is intended to prevent liquor in off sales stores from being sold from all sorts of mixed businesses. See our decision in *Bladerunner 2003*.

The Applicants do intend to own both business is what they describe as separate partnerships, but comprised of the same partners; ie themselves. They will have day to day control and managements of both elements of business activity conducted at the address, and they will work in both businesses either as management or hands-on labour.

It is apparent that liquor services are not well provided for in Kettering/Oyster Cove. The local hotel appears, on the evidence, not to be providing an up to date, modern, actively promoted or effective broad range liquor outlet, especially for off premises consumption. Tasmanian wines are available at the ferry terminal café, but that is a limited offering.

Numerous people, many in the locality, indicated they would consider availability of liquor to be an advantage. There was no opposition presented at the hearing, by either letter or presence, except for the AHA and Bruny Hotel licensee. Clearly those members of the public in the area do not see the proposal as of such a concern in regard to their community that they were willing to express opposition to it.

It appears the liquor to be offered will be that one would expect from a small township; it would not be a sophisticated presentation or range, but adequate to meet usual needs: beer, wine and spirits, in presumably limited but adequate range to satisfy majority requirements. Special requirement might not be met from the premises.

We are unable to conclude that the projections of market split up from local trade and tourist or Bruny trade is accurate. There is nothing in the evidence to give confidence that there is any basis for that assumption. We can accept, however, that in all likelihood a significant part of trade will come from locals.

The form presented "Vote of Confidence" is of limited value. We have previously commented on the limited probative value of self serving forms or petitions which have not been obtained with appropriate statistical rigour. Normally, to have any formal relevance they would need to be crafted as a market survey, by experts, and taking account of appropriate statistical processes, with analysis by an independent person.

It is clear from the application documents that minimal expenditure will occur to improve or create the environment in which the business would operate. It appears most of the expenditure is simply to install a wall in the middle of the existing shop. Then there will be shelving, refrigeration, cash register, signage. The premises are old but quaint, and would continue to have the same or similar visual impact.

In conclusion on this point, taking account of the fact of the practical mixing of the two businesses not as a disentitling factor due to application of s24A(2) but as a factor in considering that, in terms of s24A(1) is in the best interests of the community, we conclude that granting the present application is not, on balance, in the best interests of the community. The community to be taken into account is the community as a whole and also the local community. The Tasmanian community as a whole is well served (in the sense of have adequate service and sufficient outlets) by off licensed premises. There is a risk of proliferation if existing stores, take-away outlets or service businesses can simply hive off a part of their building and set up an off

licensed liquor activity. That is not to say that in some instances such may be appropriate, but there is nothing special about the needs of the community in the Channel area including Kettering which indicate this application has special considerations in favour, from the community perspective.

Decision

As stated above, we direct the Commissioner to refuse the application.

PA Kimber: Chairman. K Sarten: Member D Logie: Member