

Delegate of the Director-General of Licensing

Decision Notice

MATTER:	Conduct of the Business of a Licensee
PREMISES:	Stuart Park Supermarket
LICENSEE:	D & R Community Services Pty Ltd
NOMINEE:	Mr Chi Bilicki
LEGISLATION:	Section 47(5) of the <i>Liquor Act</i>
DECISION OF:	Delegate of the Director-General of Licensing
DATE OF DECISION:	15 December 2016

BACKGROUND

1. D&R Community Services Pty Ltd, trading as the Stuart Park Supermarket, was issued liquor licence 80900169 - "AUTHORITY - STORE" on 10 February 2014 for the premises at 3 Westralia Street, Stuart Park.
2. The licence has operated at the premises under several licensees since 16 August 1990.
3. The licensee subsequently ceased trading on or about the end of January 2016 with the licensee being placed soon after into voluntary administration.
4. Correspondence has been ongoing between Licensing NT, the licensee, administrators and prospective purchasers since February 2016.
5. The Administrators were advised on 19 February 2016 that in the absence of a transfer of the liquor licence to another party within 90 days of cessation of trade, cancellation action will be commenced in relation to the licence.

CURRENT SITUATION

6. As at this date there has been no application for transfer lodged in relation to this liquor licence.
7. Correspondence has been ongoing between Licensing NT and Ms Emmy Tran of Ernst & Young, the Administrators in which Ms Tran submitted on 18 February 2016:

"...please be advised the Administrators are currently working towards a sale for the Stuart Park Supermarket located at 3 Westralia Street, Stuart Park ("the Supermarket").

Accordingly, we request that you please provide an extension of time for the consideration of regrating liquor licence number 80900189 and tobacco licence number T-2003-0064."

8. The Liquor Act (the Act) prescribes the following in relation to liquor licences:

47 Acting licensee

(1) If a licensee is, or is expected to be, unable for any reason to conduct the business of the licensee during any period of time, the licensee must:

(a) appoint a person to act as the licensee to conduct the licensee's business during that period; and

(b) give written notice to the Director-General of the full name, address and occupation of the person within 3 days after the date of the appointment.

...

(5) Where:

(a) a licensee's inability to conduct the business of a licensee is, or is expected to be, permanent; and

(b) an application for transfer of the licence of that licensee is not made in accordance with section 41 within the period referred to in subsection (4) of this section,

the Director-General must cancel that licence at the expiration of that period, unless arrangements which are satisfactory to the Director-General are made during that period to conduct the business of the licensee.

9. Correspondence was sent by Senior Compliance Officer David Neall to Ms Emmy Tran of Ernst & Young, the administrators on 19 February 2016 advising:

"Thank you for your email. I have been asked to request from you an approximate timeframe of when the sale of the of the Stuart Park Supermarket will be finalised. While I appreciate these matters can be somewhat time consuming and therefore difficult to predict a settlement date, the current Director-General policy requires that a licence transfer occur within a 90 day period from the date of non-trade otherwise the cancellation of the liquor licence will commence."

10. Ms Tran responded on 19 February 2016:

"Thank your for your email. Your advice regarding the requirement for the sale to be completed within 90 days is noted."

11. On 15 March 2016 SCO Neall again made contact with Ms Tran enquiring as to the progress of the proposed sale and also advising the following:

"I write to you in respect of the transfer of liquor licence for the Stuart Park Supermarket.

As I have previously explained, the current Director-General policy requires that a licence transfer occur within a 90 day period from the date of non-trade otherwise the cancellation of the liquor licence will commence, this period has now expired.

Please be advised that if a settlement date is not provided within 72 hours the Director-General will take action to cancel the licence."

12. Ms Tran responded on 16 March 2016 as below:

"As discussed in our telephone conversation this afternoon, we are currently not in a position to provide a settlement date for the sale of the Stuart Park Supermarket.

As you may be aware, the supermarket was previously subject to the Receiver and Managers' appointment. The Receivers have provided notice that they will be retiring over the assets of the supermarket, however until such time this occurs, the Receivers and Managers remain in control of the assets, and the Administrators are unable to complete a sale.

I note a sale agreement has been drawn up, and we in the process of negotiating a sale with a potential purchaser to sell the assets of the business including the liquor licence. The potential purchaser has expressly requested the liquor licence be part of the sale.

Given the above, we request that the Director-General please extend the 90 day non-trade period, and not cancel the licence as the licence is vital to the sale. Unfortunately I am unable to provide an exact timeframe as this is dependent on the timing of the Receivers retirement."

13. In July 2016 a letter was sent to the licensee on or about 27 July 2016 from Senior Compliance Officer Steve Holehouse, the letter advised the licensee of the requirements of Section 47(5) and afforded a further 90 days after which the licence would be cancelled.
14. An email was subsequently received by Licensing NT on 6 September 2016 from Mr Michael Chin of the law firm Finlaysons, representing clients who were in negotiations with the Administrator for the sale of the business.
15. Mr Chin was aware of the issues concerning the potential cancellation of the liquor licence and submitted:

"My clients wish to operate the business but consider that the business of the supermarket would not be viable without the liquor licence and would not purchase the business or lease the premise unless the licence could be transferred to them.

We note that the business has not been trading for some time and we ask that you do not take any action in relation to the liquor licence pending my clients purchase of the assets of the business and entering into a lease of the premises.

As part of the sale/purchase, the administrator will sign a transfer of the licence to my clients."

16. No further correspondence has been received suggesting a sale has taken place, nor has there been an application lodged for the transfer of the liquor licence.
17. On 14 December 2016 I rang Mr Chin to enquire about the status of the negotiations with the Administrator. Mr Chin stated that his client's had withdrawn from negotiations and were not proceeding with the purchase.

ASSESSMENT OF MATTER

18. Whilst it may be accepted the existence of the liquor licence, particularly one that allows for the sale of takeaway liquor is highly desirable insofar as attracting prospective purchasers, the Act is clear in what is prescribed.
19. A liquor licence cannot remain dormant and in the event the licensee is unable to conduct the business of the licence, on a permanent basis, the licence must be transferred or cancelled.
20. Given the circumstances it is easily accepted that the licensee is not conducting the business of the licensee and it is a permanent situation. No application has been received for the transfer of the licence and no arrangements, which are satisfactory to the Director-General, have been made to conduct the business of the licensee.
21. The licensee and Administrators have been afforded the benefit of the discretion provided to the Director-General to abridge time. This has resulted in a period of approximately 300 days since the cessation of trade. The Act only provides 42 days.
22. Accordingly the licensee has been afforded a substantial grace period in which it is accepted they have been genuinely attempting to sell the business.
23. As written earlier, the Act is highly prescriptive and mandates the action of the Director-General in the event the licensee has is not conducting the business of the licensee. In such circumstances if it is considered the inability to conduct the business is permanent and no transfer application has been received, after the expiration of 42 days the Director-General must cancel the licence.
24. The requirements have been clearly advised to the licensee and as evidenced by the correspondence from Ms Tran, the licensee and Administrator have been suitably informed of the possible outcome.
25. The circumstances now suggest that the licence should be cancelled as prescribed by the Act as there is no evidence to suggest an application for transfer is imminent.
26. For completeness a reference was made by Ms Tran in her correspondence of 18 February 2016 regarding the "regranting" of the liquor licence:

"Accordingly, we request that you please provide an extension of time for the consideration of regranting liquor licence number 80900189 and tobacco licence number T-2003-0064." (emphasis added)

Although the licence is considered to be "non-trading" at this time, there is no record to suggest the licence has at any time been cancelled. This may perhaps simply be a reference to the potential transfer of the licence from one to another.

CONSIDERATION CRITERIA

27. In considering this matter the Act requires me to be satisfied the licensee is no longer conducting the business of the licensee that the inability of the licensee is or expected to be, permanent and that no application has been made to transfer the liquor licence.

28. I have considered all the materials before me and the circumstances that exist in this matter. I am satisfied that the above criteria have been met.

SUMMARY

29. The licensee has not conducted the business of the licensee at the premises for a considerable period of time. The licensee was placed into administration and the Administrator has been attempting to sell the business.
30. The licensee has not operated the premises for approximately 300 days and was given due notification to deal with the licence.
31. The licensee has not re-commenced trade at the premises and no party has sought to transfer the liquor licence. The period within which the licensee was given to deal with the licence has expired and the licensee was aware of the outcome in the event no activity was evident.

DECISION

32. Pursuant to Section 47(5) of the Act, it is the determination in this matter that the licensee is unable to conduct the business of the licensee, that being 80900169 – D&R Community Services Pty Ltd trading as Stuart Park Supermarket at 3 Westralia Street, Stuart Park. No application has been received to transfer the aforementioned liquor licence. Accordingly the licence must be cancelled as no arrangements which are satisfactory to the Director-General have been made during the extended period afforded the licensee, to conduct the business of the licensee.
33. Liquor Licence 80900169 is cancelled pursuant to Section 47(5) of the *Liquor Act* from the date of this notice.

REVIEW OF DECISION

34. Determinations under Section 47(5) are not reviewable decisions when made by the Director-General; this decision however is made by a delegate and therefore subject to separate review provisions.
35. Section 8 of the *Licensing (Director-General) Act* prescribes a delegate decision is a decision, under any Act, of the Director-General that is made by a delegate of the Director-General. The Director-General delegated the determination of applications made under Section 47(5) of the *Liquor Act* by instrument to the person from time to time holding, acting in or performing the duties of the Delegate of the Director-General of Licensing. Section 10 of the *Licensing (Director-General) Act* provides that an affected person for a delegate decision may apply to the Director-General for a review of the decision. This application for review must be made within 28 days after written notice of the delegate decision is given to the affected person, or within any additional time that the Director-General allows. Section 9 of the *Licensing (Director-General) Act* prescribes an affected person for a delegate decision to be the licensee and a person who made a submission, complaint or objection (however described) during the process that resulted in the decision being made.

36. Accordingly the affected person in relation to this matter is D&R Community Services Pty Ltd.

A handwritten signature in blue ink, appearing to be 'Mark Wood', written over a faint blue line.

Mark Wood

Delegate of the Director-General of Licensing

15 December 2016