

## Delegate of the Director-General of Licensing

### Decision Notice

---

<b>MATTER:</b>	<b>Cancellation of a liquor licence</b>
<b>PREMISES:</b>	<b>Premises formerly known as Evolution Cafe</b>
<b>LICENSEE:</b>	<b>The Alice Springs Property Syndicate Pty Ltd</b>
<b>NOMINEE:</b>	<b>Mr Charlie Martell</b>
<b>LEGISLATION:</b>	<b>Section 47(5) of the Liquor Act</b>
<b>DECISION OF:</b>	<b>Delegate of the Director-General of Licensing</b>
<b>DATE OF DECISION:</b>	<b>11 November 2016</b>

---

### BACKGROUND

1. On 6 December 2014 the premises known as Evolution Café, 21 Hartley Street Alice Springs ceased trading. The liquor licence for the premises, 80303858 was held by The Pink Bus Pty Ltd, Mr Jason Wright as the lessee and nominee. Mr Wright advised Licensing NT of the closure by email on 10 December 2014.
2. The licence was subsequently transferred to the owner of the premises so that they may retain the licence whilst a new tenant was secured. The licence was transferred to The Alice Springs Property Syndicate Pty Ltd on 9 February 2015.
3. The premises have not operated since 6 December 2014 and the current licensee has not at any time operated the business.
4. A decision notice was provided to the licensee dated 9 February 2015 approving the transfer of the liquor licence as below:

I have considered your application and determined;

  1. to approve the transfer of liquor licence number 80303858 to ASPS without the need to provide the pre-requisite documentation for a licence transfer on the conditions;
    - a) the licence is held in escrow until a suitable tenant can be found; and
    - b) that ASPS will not trade under the licence; and
    - c) if a suitable tenant has not been found within 6 months the Director-General may cancel the licence on the grounds of failure to trade.
5. No application has been received for the transfer of the liquor licence to date.

## CURRENT SITUATION

6. The *Liquor Act* (the Act) prescribes the following in relation to the conduct of the business of the licensee;

### 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.

...

(4) Unless the Director-General otherwise determines, a person appointed under subsection (1) or (2) must not act as a licensee for more than 42 days during any period of 12 months that the licence is in force.

(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.

7. Section 47(5) mandates the cancellation of the liquor licence where the licensee is unable or unwilling to conduct the business of a licensee, if the licence is not transferred to another party within 42 days.
8. On 16 July 2015 a letter was received from Mr Charlie Martel of HWL Ebsworth Lawyers on behalf of the licensee, the letter advised the licensee was;

"...currently in negotiations with two prospective tenants of the above premises. If unsuccessful with those two prospective tenants our client will continue to actively seek new tenants to lease the premises to use as a bar and/or a licence restaurant, with the intent that any such tenant will be the ultimate holder of the Liquor Licence."

9. Accordingly the licensee sought a six (6) month extension of the original six (6) month period granted in February 2015.
10. On 22 July 2015 the licensee's request was granted providing a further six (6) months in which they may deal with the licence.

11. A further six (6) months was granted on 13 January 2016 on the basis of a request from counsel for the licensee on 23 December 2015.
12. Further correspondence was received in relation to the liquor licence on 22 June 2016 from Mr Luke Gardiner of Gardiner and Associates who advised he was now acting for the licensee. Mr Gardiner stated his client was;

"...in advanced negotiations with a prospective tenant and are confident that will precipitate an application for the transfer of the licence on or before 8<sup>th</sup> November 2016."
13. The nominee proffered by the licensee was Mr Charlie Martel, who at that time was also counsel for the licensee in his capacity as an employee of HWL Ebsworth Lawyers. Given it appears HWL Ebsworth no longer has carriage of this matter for the licensee, it would support a consideration that the licensee remains unable to conduct the business of licensee.
14. On 23 September 2016 Mr Gardiner again confirmed his client was "...in discussions with a prospective purchaser". A response was provided to Mr Gardiner on 26 September 2016 that an application to transfer the liquor licence must be received with 42 days, otherwise cancellation activity would be commenced in relation to the licence.
15. Again, no application has been received seeking the transfer of the liquor licence as at the close of business, 8 November 2016 as submitted by Mr Gardiner.

## ASSESSMENT OF MATTER

16. The first consideration must be whether the licensee is conducting the business of a licensee and if not whether this is expected to be permanent.
17. It cannot be disputed the premises have not operated since 6 December 2014 when the previous licensee ceased trading and handed the premises back to the owners, the current licensee.
18. The transfer of the licence to the current licensee specified they were not to trade under the licence and must actively seek to transfer the licence to a third party. It therefore cannot be disputed that the licensee is unable to conduct the business of a licensee and this is a permanent situation.
19. The Act is highly prescriptive and requires the Director-General to cancel a licence in the circumstances where a licensee's inability to conduct the business of a licensee is, or is expected to be, permanent; and an application for transfer of the licence of that licensee is not made within 42 days.

20. Whilst the Act prescribes 42 days the delegate of the Director-General has exercised their discretion provided for, to extend the 42 day period. The licensee has been afforded several such extensions of time on the basis that they were in negotiation with prospective purchasers.
21. Whilst no written materials have been received to confirm these prospective purchasers, the submissions are accepted as genuine. Licensing NT personnel have had several conversations with prospective purchasers as recent as September and October 2016, these discussions may only be described as cursory at best. Despite these, there has yet to be an application received to transfer the liquor licence despite the situation being made clear to all parties as to the potential cancellation of the licence.
22. The prospective purchasers, with whom which discussions have been held with Licensing NT personnel, were acutely aware of the potential cancellation of the licence in the absence of a transfer.
23. In the event the licence is cancelled any prospective purchaser may of course seek a new liquor licence.
24. The discussions with the most recent prospective purchaser was that they would not be seeking to operate the licence at the premises, they would be seeking a substitution of premises to their current bakery and café in other premises. Again, regardless of this licence that party may in any event seek a liquor licence for their current operation.
25. Accordingly the premises have not been used for the sale of liquor since the cessation of trade in December 2014. The licensee at that time transferred the licence to the property owner so that they may attempt to find a suitable purchaser or tenant. To date they have not been successful in their attempts.
26. Whilst it is understandable that the licensee wishes to retain the liquor licence as an attractant for prospective purchasers or tenants, the Director-General must as prescribed by Section 47(5);

"...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."
27. The "period" referred to in Section 47(5) is 42 days. The Director-General has utilised their discretionary provisions to extend this period several times acquiescing to the requests of the licensee. As at the date of this decision the licensee has been afforded a total of 642 days in which to deal with the licence, and the premises has not operated for a total of 706 days since its closure.

28. The most recent representations by counsel for the licensee were that negotiations with the prospective party were "advanced", also that they "...will precipitate an application for the transfer of the licence on or before 8<sup>th</sup> November 2016". No such application has been received.
29. Accordingly it is inappropriate in the circumstances to continue to allow the licence to exist; whilst the licensee also must be cognisant of the extreme latitude granted to them to date as to time.
30. The cancellation of this licence does not prevent any future application for a liquor licence in the event a third party is eventually secured for the tenancy.

## CONSIDERATION CRITERIA

31. In considering this matter the Act requires me to be satisfied the licensee is no longer conducting the business of the licensee and that the inability of the licensee is or expected to be, permanent and that no application has been made to transfer the liquor licence.
32. 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

33. The premises have been closed for several years and the licensee has not conducted the business of the licensee.
34. This has been an ongoing situation and the licensee has been afforded several extensions of time to secure a third party to transfer the licence to. To date no party has been secured after over 700 days of non-trading.

35. A cancellation of the liquor licence does not preclude The Alice Property Syndicate Pty Ltd or a third party purchaser from seeking a new licence at the premises in the future if required.

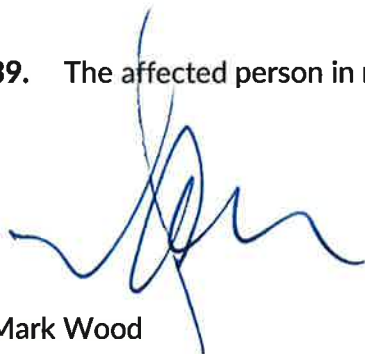
## DECISION

36. 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 80303858 – The Alice Springs Property Syndicate Pty Ltd of the premises formerly known as Evolution Café, 21 Harlley Street Alice Springs. No application has been received to transfer the aforementioned liquor licence and the licensee has been afforded an additional 600 days over and above the prescribed 42 days in order to transfer the 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.
37. Liquor Licence 80303858 is cancelled pursuant to Section 47(5) of the Liquor Act from the date of this notice.

## REVIEW OF DECISION

38. 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 position in the Department of Business specified in Schedule 2 of that instrument. This decision was made by a person referred to in that schedule. 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.

39. The affected person in relation to this matter is The Alice Springs Property Syndicate Pty Ltd.



Mark Wood

Delegate of the Director-General of Licensing

11 November 2016