

Director-General of Licensing

Decision Notice

MATTER:	Review of Delegate Decision – Cancellation of Liquor Licence
APPLICANT:	Mr Matt McCourt
LICENSEE:	Nundor Pty Ltd
PREMISES:	The Fox Ale House 85 Mitchell Street Darwin NT 0800
LEGISLATION:	Section 47 and Part VII of the <i>Liquor Act</i> and Part 3 of the <i>Licensing (Director-General) Act</i>
DECISION OF:	Director-General of Licensing
DATE OF DECISION:	22 February 2017

BACKGROUND

1. The Fox Ale House was formerly a tavern located in Mitchell Street in the Darwin CBD that held a tavern liquor licence issued in October 2000. The licensee for the premises was Nundor Pty Ltd. The premises have not traded since 7 September 2012. Of significance in terms of this review, the building in which The Fox Ale House was previously located has been demolished and is under redevelopment.
2. By decision dated 11 October 2016, a delegate of the Director-General of Licensing (the Director-General) determined to cancel the liquor licence for The Fox Ale House pursuant to section 47(5) of the *Liquor Act* (the Act) on the grounds the licensee was unable to conduct the business under the liquor licence.
3. Prior to the cancellation of the liquor licence, the licensee also held a gaming machine licence authorising the licensee to operate ten gaming machines at the premises. Section 48 of the *Gaming Machine Act* provides that where the liquor licence for premises operating gaming machines is cancelled the gaming machine licence is cancelled. As a result the delegate's decision to cancel the liquor licence for the Fox Ale House the gaming machine licence was also cancelled.

CURRENT SITUATION

4. On 8 November 2016 Mr Matt McCourt, on behalf of Nundor Pty Ltd, sought a review by the Director-General of the delegate's decision to cancel the liquor licence for The Fox Ale House. Mr McCourt also sought the reinstatement of the gaming machine licence. In support of the request to review the delegate's decision Mr McCourt made the following submissions:

- the remedy being requested is the reinstatement of the liquor licence associated with The Fox Ale House, together with the entitlement for ten gaming machines previously located at the premises;
 - in the event the licence is reinstated it is the intention of Nundor Pty Ltd to resume business at different premises, being 48 Mitchell Street, which comprise licensed premises that currently trade as Wisdom Bar and Café. Mr McCourt states that this intent was conveyed to staff of the Licensing and Gaming Division (now Licensing NT) in meetings held in December 2014;
 - subsequent to those discussions Nundor Pty Ltd decided to hold over on an application to bring those changes into effect due to amendments to the *Gaming Machine Act* which came into effect on 1 July 2015. As a result of those amendments, and particularly the lifting of the moratorium on the grant of new gaming machine licences, AFS Realty and Business Brokers Pty Ltd (AFS) successfully applied for a licence to operate ten gaming machines at Wisdom Bar and Café. The gaming machine licence was issued to AFS in June 2016¹;
 - should the liquor licence for The Fox Ale House be reinstated the applicant intends to apply to substitute that liquor licence to the Wisdom Bar and Café premises and subsequently surrender the liquor licence currently held by AFS;
 - Nundor Pty Ltd also intends to make application for the substitution of the gaming machine licence for The Fox Ale House to the Wisdom Bar and Café premises and to seek amendment to the Nundor Pty Ltd liquor licence to authorise trading on Good Friday and Christmas day, as is currently authorised under the AFS liquor licence.
5. Part 3 of the *Licensing (Director-General) Act* provides for the review of delegate decisions by the Director-General. Section 14 of that Act provides that in conducting a review of a delegate decision, the Director-General must take into account any matter that the Act under which the delegate decision was made that the Director-General is required to take into account in reviewing the decision.
 6. After reviewing the delegate decision, the Director-General must affirm the decision, vary the decision or set aside the decision and substitute a new decision.

ISSUES

7. As noted in a previous decision notice issued by the Director-General relating to similar issues,² the conduct of the review of the delegate's decision in this instance involves the resolution of two issues. Firstly, was the decision of the delegate to cancel the licence pursuant to section 47 of the Act the correct and preferable decision in the circumstances?
8. The second issue is whether section 47 of the Act was the appropriate provision for the cancellation of a liquor licence in the circumstances existing for The Fox Ale House just prior to the delegate's decision. As will become apparent from the considerations set out below, the resolution of the second issue results in a situation where it is unnecessary to resolve the first issue in order to finally determine the outcome of this review.

¹ AFS is the licensee of a tavern liquor licence trading as Wisdom Bar and Café and located at 48 Mitchell Street, Darwin. Whilst AFS and Nundor Pty Ltd are separate business entities they share common directors.

² Director-General Decision Notice - Review of Delegate Decision - Annie's Place - 13 Jan 2017

CONSIDERATION OF THE ISSUES

9. A question arises at the outset of this review as to whether section 47(5) of the Act is intended to be used for the purpose of cancelling a liquor licence where the licensed premises have ceased to trade in the sale of liquor. Ancillary to that question is whether it is more appropriate in circumstances where licensed premises have ceased to trade in the sale or supply of liquor to lay a complaint against the licensee pursuant to section 68 of the Act.
10. Section 47 of the Act deals specifically with the appointment of acting licensees for periods where the actual licensee is unable to conduct the business under the liquor licence, and provides:

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.*

Maximum penalty: 20 penalty units.

- (2) *If the licensee has not appointed anyone under subsection (1), the Director-General may appoint a person to act as the licensee to conduct the licensee's business during that period.*
- (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.*

Maximum penalty: 20 penalty units.

- (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.

- (6) *A person appointed to act as a licensee has all the rights, powers, authorities, functions, duties and obligations of a licensee under this Act.*

11. The interpretation of section 47 of the Act is relatively straight forward. Section 47(1) provides that a licensee who is unable to conduct the business under the licence for a period of time

must appoint a person to act as licensee and must advise the Director-General of the person's details. Section 47(2) provides that if the licensee does not appoint an acting licensee in circumstances where that should occur then the Director-General may appoint an acting licensee. Former subsections 47(2A) and 47(3) have been repealed. Neither subsection was relevant in respect of the issue currently under consideration.

12. Section 47(4) provides that an acting licensee shall not be appointed for a period exceeding 42 days in a calendar year without the approval of the Director-General. Section 47(6) provides that an acting licensee has the same functions, powers, and obligations etc. of a licensee.
13. Of relevance in the context of this review, section 47(5) provides that where a licensee's inability to conduct the business under the licence is, or is expected to be, permanent and no application for the transfer of the liquor licence has been made the Director-General must cancel the liquor licence. That section clearly provides for the cancellation of liquor licence where the licensee's inability to conduct the business under the licence is permanent or expected to be permanent.
14. Obviously, where licenced premises have ceased to trade as the building that housed the licenced premises has been demolished the licensee is unable to conduct the business under the licence. If the business under a liquor licence has ceased to trade permanently then clearly the licensee's inability to conduct the business of a licensee would also be permanent, regardless of the reasons that lead to the demise of the business. In those circumstances, and where an application for the transfer of the liquor licence has not been made, it is at least arguable that section 47(5) is enlivened and the Director-General must cancel the liquor licence.
15. However, it is clear from a reading of the Act in totality that section 47(5) is not the most appropriate provision under which a licence should be cancelled in the circumstances that applied to The Fox Ale House at the time of the delegate's decision. Section 47 deals specifically with the appointment of acting licensees in specified circumstances. Section 47(5) clearly provides for the cancellation of a liquor licence where a licensee's inability to conduct the business of a licensee is permanent. However, that section does not provide for the cancellation of a liquor licence in any other circumstances, as for example where the licensee personally remains able to conduct the business but is prevented from doing so due to the demolition of the licensed premises.
16. Section 67 of the Act specifically provides a mechanism for the cancellation of a liquor licence where the business under the licence has ceased to trade. Part VII of the Act deals with enforcement provisions for licences and special licences and, amongst other matters, provides for the lodging of complaints against licensees. Part VII prescribes the manner in which complaints are to be lodged and sets out the types of disciplinary action that may be taken against a licensee by the Director-General where a licensee has been found to have breached a provision of the Act or a condition of a liquor licence.
17. Section 67 of the Act sets out the various grounds for complaints against licensees and section 67(3)(g) prescribes a ground for complaint in circumstances where licensed premises are no longer used for the purpose for which they were initially licensed:
 - (g) *the licensee's licensed premises are no longer being used:*
 - (i) *for the sale or supply of liquor; or*
 - (ii) *consistently with the business of the licence;*

18. That ground for complaint could be enlivened in a myriad of circumstances, some of which may involve fault on the part of the licensee and some which arise from circumstances beyond a licensee's control. In this case Nundor Pty Ltd has ceased to trade, through no fault of the licensee, due to the demolition of the premises by the landlord with no apparent intention for The Fox Ale House to re-commence trade at the premises.
19. It is clear, in my view, that the appropriate process for cancellation of a liquor licence attached to premises that are no longer being used for the sale and supply of liquor is that prescribed by the complaint and disciplinary processes set out in Part VII of the Act. In my view, cancellation of a liquor licence under section 47 of the Act should be reserved only for specific instances where the cessation of the business is a direct result of the incapacity of a licensee and the failure to nominate an acting licensee to act in his or her stead as licensee.
20. I also note that the cancellation of a liquor licence where the circumstances set out in section 47 of the Act apply is mandatory. That is, if the Director-General is satisfied that a licensee is permanently unable to conduct the business of a licensee the Director-General must cancel the licence, presumably without the need to conduct any further investigations or inquiries.
21. The process for the possible cancellation of a liquor licence under the complaint and disciplinary process set out in Part VII entails a much more rigorous process, including the requirement for the application of natural justice considerations, whereby the licensee is afforded an opportunity to respond to the proposed cancellation of his or her liquor licence. It may well be that following the complaint and disciplinary process the Director-General is not inclined to cancel a liquor licence on the basis of submissions made by the licensee, for example submissions in respect of the future conduct of the business.
22. For the reasons set out above, it appears to me that the Part VII process is the correct and preferable means for the cancellation of liquor licences in the circumstances under consideration as they apply to The Fox Ale House. As a consequence, the purported cancellation of the liquor licence by the delegate under 47 of the Act is invalid and the liquor licence for The Fox Ale must be reinstated.
23. Having reached that determination it remains apparent that The Fox Ale House is not currently trading under its liquor licence and has not done so since 7 September 2012. In his application for review Mr McCourt confirms there is no intention to re-open The Fox Ale House and recommence trade under the liquor licence at the former premises. The intention of Nundor Pty Ltd, as set out in the submission from Mr McCourt, is to apply to substitute The Fox Ale House liquor licence to the Wisdom Bar and Café premises and subsequently surrender the liquor licence currently in force for the Wisdom Bar and Café.
24. As noted above, section 67(3)(g) prescribes a ground for complaint in circumstances where licensed premises are no longer used for the sale or supply of liquor. In the event that an application for substitution of premises is not made within a reasonable time and a complaint is lodged with the Director-General, alleging that The Fox Ale House continues to not trade under its liquor licence, the complaint will be dealt with in accordance with the requirements of Part VII of the Act. That process includes the prospect of disciplinary action being taken against the licensee, as set out in section 67(2) of the Act.

The Gaming Machine Licence

25. At the time of considering the cancellation of The Fox Ale House liquor licence no information was provided to the delegate in respect of the gaming machine licence. As a consequence, the delegate made no reference to the gaming machine licence in his decision notice, nor does the legislation require that to occur. Section 48(a) of the *Gaming Machine Act* provides that where a

liquor licence for premises licensed under the *Gaming Machine Act* is cancelled the gaming machine licence is also cancelled.

26. The cancellation of a gaming machine licence in those circumstances occurs as a result of the provisions of the legislation itself and not on the basis of a decision made by the Director-General or a delegate. The gaming machine licence for The Fox Ale House was cancelled as of the date of publication of the delegate's decision notice cancelling the liquor licence. Allowing that the decision to cancel the liquor licence was invalidly made pursuant to section 47 of the *Liquor Act* the consequential and automatic cancellation of the gaming machine licence was also invalid.

Summary

27. Section 47 of the Act deals specifically with the temporary appointment of a person to act as licensee where the actual licensee for the licensed premises is temporarily unable to conduct the business of a licensee. Whilst section 47 provides for the cancellation of a liquor licence by the Director-General in circumstances where the inability of the licensee to conduct the business is expected to be permanent, it is not a provision that authorises the cancellation of a liquor licence outside those narrow circumstances.
28. As a result the purported cancellation of the liquor licence in respect of The Fox Ale House by the delegate in his decision of 11 October 2016 is invalid and must be set aside.
29. Allowing that the decision of the delegate to cancel the liquor licence was invalid it must follow that the cancellation of the gaming machine licence pursuant to section 48 of the *Gaming Machine Act* was also invalid in that the precursor to that cancellation, the cancellation of the liquor licence, was invalid and of no effect.
30. In his request for review of the delegate's decision, Mr McCourt sets out how Nundor Pty Ltd and AFS propose to deal with the liquor licences and gaming machine licences for the Fox Ale House and Wisdom Bar and Café respectively should the delegate's decision be overturned on review. The intent is to transfer the liquor licence and gaming machine licence for the Fox Ale House to the Wisdom Bar and Café premises and to then surrender the liquor licence for the Wisdom Bar and Café.
31. The substitution of a liquor licence to new premises is provided for in section 46A of the *Liquor Act*, subject to the usual objection process and the approval of the Director-General. Similarly, the substitution of a gaming machine licence to new premises is permissible under section 42B of the *Gaming Machine Act* subject to the approval by the Director-General but only in conjunction with an application to substitute the associated liquor licence and subject also to the licensee complying with the matters set out in sections 42C and 42D of the *Gaming Machine Act*.
32. Mr McCourt has stated that the intent is to then surrender the liquor licence currently in place for the Wisdom Bar and Café and to then somehow merge the current gaming machine licence for the Wisdom Bar and Café with the substituted gaming machine licence from the Fox Ale House premises so as to allow the premises to operate 20 gaming machines. There is no provision under the *Gaming Machine Act* or the *Liquor Act* that would authorise such an application. Since the 2015 amendments, the *Gaming Machine Act* does provide for the transfer and substitution of gaming machine licences however that can only occur in conjunction with the transfer or substitution of the relevant liquor licence. Put another way, the legislation does not provide for the transfer of a gaming machine licence only and once the liquor licence for

the Wisdom Bar and Café is surrendered the gaming machine licence will be cancelled in accordance with section 48(a) of the *Gaming Machine Act*.

Decision

33. On the basis of the matters set out above, and in accordance with section 14(2)(c) of the *Licensing (Director-General) Act*, I have determined to set aside the decision of the delegate dated 11 October 2016 to cancel the liquor licence for The Fox Ale House pursuant to section 47 of the Act. The purported cancellation of the liquor licence pursuant to section 47 was invalid, for the reasons set out above, and must therefore be treated as a nullity. As a consequence liquor licence number 803166631 remains current with Nundor Pty Ltd as the licensee.
34. Having determined that the cancellation of the liquor licence was invalid, the cancellation of the gaming machine licence held by Nundor Pty Ltd in respect of The Fox Ale House pursuant to section 48 of the *Gaming Machine Act* must also be set aside with the result the gaming machine licence remains in force.

Review of Decision

35. Section 120ZA of the Act provides that a decision of the Director-General, as specified in the Schedule to the Act, is a reviewable decision. The cancellation of a liquor licence pursuant to section 47 of the Act is not included in the schedule to the Act and is therefore not a reviewable decision. It necessarily follows that a decision by the Director-General on review to reinstate a licence purportedly cancelled under section 47 is also not a reviewable decision.
36. Similarly, the cancellation of a gaming machine licence by dint of section 48 of the *Gaming Machine Act* is not included in the Schedule to that Act and is therefore not a reviewable decision. As a result this decision to reinstate the gaming machine licence on the grounds the liquor licence had been invalidly cancelled is not a reviewable decision.



Cindy Bravos
Director-General of Licensing

22 February 2017