

Director-General of Licensing

Decision Notice

MATTER:	Review of Delegate Decision – Cancellation of Liquor Licence
APPLICANT:	Mr Matt Mulga
LICENSEE:	Annie's Place (NT) Pty Ltd
PREMISES:	Annie's Place 4 Traeger Avenue Alice Springs NT 0870
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:	13 January 2017

BACKGROUND

1. Annie's Place is a tourist accommodation venue located in Alice Springs. The premises has held a public hotel liquor licence since 1990. The current licensee is Annie's Place (NT) Pty Ltd and Mr Matt Mulga is the manager/nominee for the premises. Annie's Place (NT) Pty Ltd is also the owner of the premises.
2. For a number of years the premises were leased to Mulgannie's Pty Ltd who also held the liquor licence. On 26 August 2014 Ms Janice Knappstein, a director of Mulgannie's Pty Ltd, advised Licensing NT that the business had been placed in voluntary administration and would cease trading as of 1 September 2014. Shortly afterwards an application was made to transfer the liquor licence to the liquidator so as to enable the transfer of the business, including the liquor licence, to a potential buyer.
3. Prior to the transfer of the liquor licence to the liquidator being brought into effect, the licence was transferred to Annie's Place (NT) Pty Ltd pursuant to a reversionary clause contained in the lease of the premises to Mulgannie's Pty Ltd. Mr Mulga advised Licensing NT that the premises had been listed for lease with a real estate company and, in the event a suitable tenant had not been secured by June 2015, Annie's Place (NT) Pty Ltd would re-open the premises and recommence trading whilst the search for a tenant continued.
4. Contact was made with Mr Mulga on a number of occasions during 2015 and 2016 seeking an update on the trading status of the business. Mr Mulga responded to the effect that interested parties were looking at the premises however no application for the transfer of the liquor licence was received by Licensing NT during that period.
5. Further enquiries revealed that the business was not trading under the liquor licence and that no bar was operational at the premises as of 11 October 2016.

6. By decision dated 11 October 2016, a delegate of the Director-General of Licensing (the Director-General) determined to cancel the liquor licence for Annie's Place pursuant to section 47(5) of the *Liquor Act* (the Act) on the basis the licensee was unable to conduct the business under the liquor licence.

CURRENT SITUATION

7. On 22 October 2016 Mr Mulga, on behalf of Annie's Place (NT) Pty Ltd sought a review of the delegate's decision to cancel the liquor licence for Annie's Place. The grounds on which Mr Mulga seeks the review may be summarised as follows:
 - in late June 2016 Mr Mulga received a letter from Licensing NT requesting evidence that the premises would re-open for business and recommence trade under the liquor licence. A response was requested within 90 days;
 - in September 2016 Mr Mulga held discussions with Mr Alec Turner and Ms Lin Yeu-Tyng who were interested in leasing the premises and re-opening the business;
 - on 21 September 2016 Mr Turner and Ms Yeu-Tyng met with an officer of Licensing NT. Following that meeting they advised Mr Mulga that everything was OK with the liquor licence and once they had provided the information required by Licensing NT, including a copy of the lease agreement, the liquor licence could be transferred to them and they could re-open the business;
 - Mr Mulga then instructed lawyers to prepare the lease agreement. The lease agreement was ready for execution by the parties in early October 2016;
 - on 11 October 2016 the liquor licence for Annie's Place was cancelled "*as no evidence was provided that the business would be trading again in the near future*";
 - Mr Turner and Ms Yeu-Ting are now reluctant to execute the lease agreement as the liquor licence has been cancelled;
 - Mr Mulga seeks to have the decision to cancel the liquor licence reversed as, he believes, the meeting between Mr Turner and Ms Yeu-Tyng and the officer of Licensing NT was an indication that the business was about to begin trading again;
 - Mr Mulga submits that Annie's Place needs to re-open as it has catered for the dining, drinking and entertainment requirements of both locals and visitors for many years and that the accommodation side of the business is in great need in Alice Springs and will be a tremendous bonus to the tourism industry.
8. 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 requires the Director-General to take into account in reviewing the decision.
9. 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

10. The conduct of this review of the delegate's decision 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.

11. The second issue that arises is whether section 47 of the Act was the appropriate provision for the cancellation of a liquor licence in the circumstances existing for the venue just prior to the cancellation of the liquor licence. 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.

CONSIDERATION OF THE ISSUES

12. A question arises at the outset of this review as to whether section 47(5) of the Act is designed to be used for the purpose of cancelling a liquor licence where the premises has ceased to trade in the sale of liquor. A corollary to that question is whether it is more appropriate in circumstances where a licensed premises has ceased to trade in the sale or supply of liquor to lay a complaint against the licensee pursuant to section 68 of the Act.
13. 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.*

14. 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.
15. 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.
16. 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.
17. Obviously, if licenced premises have ceased to trade, for whatever reason, 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.
18. 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 currently apply to Annie's Place. 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. 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 liquor business ceasing to trade.
19. 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.
20. 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;*

21. 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. For example, a liquor business may cease to trade where the business is not financially viable, where the previously licensed premises have been demolished, where a landlord of licensed premises declines to renew a lease etc.
22. 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 utilised only in circumstances where an issue arises specifically relating to the status of a licensee or temporary licensee and not in circumstances where the operation of the business itself is in question.
23. It appears to me that any confusion relating to this issue arises from the use in Part VII of the words "disciplinary action" and "complaint". Those words, in the context of the *Liquor Act*, generally import an element of alleged wrongdoing on the part of a licensee. As noted above, there are circumstances in which a liquor business may cease to trade through no fault at all on the part of the licensee. The lodgement of a complaint and subsequent disciplinary action against a licensee who was not directly responsible for or involved in the demise of the business appears to be at odds with the normal situation where disciplinary action is taken against a licensee who has committed a breach of some nature.
24. However, I do not believe that any particular significance attaches to the use of the words "complaint" and "disciplinary action" in the circumstances described immediately above. The Act, through section 67(3)(g) clearly provides for the taking of "disciplinary action", including the cancellation of a liquor licence, where licensed premises are no longer used for the sale or supply of liquor.
25. In my view, Part VII of the Act should be utilised for the cancellation of liquor licences where premises have ceased to trade in the sale or supply of liquor. The cancellation provision contained in section 47 should be reserved only for specific instances where the cessation of the business is a direct result of the failure of a licensee to nominate an acting licensee to act in his or her stead as licensee.
26. 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.
27. 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 a prospective 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.
28. 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 Annie's Place. 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 Annie's Place must be reinstated.

29. Having reached that determination it remains apparent that Annie's Place is not currently trading under its liquor licence and has not done so since September 2014. However, Mr Mulga has advised that he has secured tenants for the premises who have executed a lease agreement. 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 a complaint is lodged with the Director-General, alleging that Annie's Place 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, including the prospect of disciplinary action, as set out in section 67(2) of the Act, being taken against the licensee.

Summary

30. 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.
31. As a result the purported cancellation of the liquor licence by the delegate in his decision of 11 October 2016 is invalid and must be set aside.

Decision

32. 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 Annie's Place 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 80105018 remains current with Annie's Place (NT) Pty Ltd as the licensee and Mr Mulga as the Manager/Nominee

Review of Decision

33. 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.



Cindy Bravos
Director-General of Licensing

Date: 13 January 2017