

Director-General of Licensing

Decision Notice

Matter:	Review of Delegate Decision – Refusal to grant special liquor licence
Applicant:	The Chippo 31 Bishop Street Woolner NT 0820
Legislation:	Part VI 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:	24 May 2017

BACKGROUND

- 1) The Chippo premises are located at 31 Bishop Street, Darwin and operate as a live music and entertainment venue. The premises are marketed as Darwin's premier live music venue and have held a special liquor licence since 13 November 2013, issued pursuant to section 59 of the *Liquor Act* (the Act) and authorising the sale of liquor to patrons for on-premise consumption. The venue is operated and managed by Mr Rod Fitzgerald and Ms Renee Fitzgerald.
- 2) Part VI of the Act deals with special licences and provides that a special licence authorises the holder to sell liquor on the premises during a defined period and subject to any conditions that may be imposed on the special licence. Special liquor licences are usually granted to entities such as work social clubs, sporting clubs and not for profit associations. For some time a view has been held within Licensing NT that, given the on-going and commercial nature of the business conducted at The Chippo, a continuing special liquor licence is not the appropriate authority for the sale of liquor at the venue and that the premises should be operating under the authority of a full liquor licence issued pursuant to section 26 of the Act.
- 3) In June 2015, the special licence issued for The Chippo was cancelled due to the premises being non-compliant with regulated fire safety standards. On 1 June 2016, some 12 months after the cancellation of the special licence, Mr Fitzgerald advised Licensing NT that the premises were compliant with fire safety requirements and that a certificate of occupancy would be issued on 7 or 8 June 2016. At that time Mr Fitzgerald was encouraged by officers of Licensing NT to lodge an application for the grant of a full liquor licence. He was further advised that any further applications for a continuing special liquor licence for The Chippo were likely to be refused.
- 4) At the time, Mr Fitzgerald confirmed that he would lodge an application for a full liquor licence however he advised that he had arranged an opening weekend at The Chippo scheduled for the following weekend, 10 to 12 June 2016, and sought a further special licence to cover the weekend's activities, subject to receipt of the Certificate of Occupancy and formal sign-off by NT Fire and Rescue Services in respect of the fire safety standards. A special liquor licence covering the period from 10 to 12 June 2016 was issued by a delegate of the Director-General of Licensing on 10 June 2016.

- 5) Despite the concerns expressed by officers of Licensing NT regarding risks associated with the operation of the premises under an on-going special licence, a further special licence was issued for the Chippo for the period 17 June 2016 to 17 October 2016 in the anticipation that Mr Fitzgerald would lodge an application for a full liquor licence in the immediate future.
- 6) Despite the urgency of the situation and the advice that further special licences were unlikely to be issued, it was not until 9 September 2016 that Mr Fitzgerald lodged an application under section 29 of the Act for the grant of a full liquor licence. That application was incomplete and lacking information required to accompany such an application and, following Mr Fitzgerald's failure to address the deficiencies, the application was returned to Mr Fitzgerald on 11 November 2016.
- 7) As an interim measure to authorise the premises to continue to sell alcohol to its patrons a further special licence was issued for The Chippo covering the period from 20 October 2016 to 20 April 2017. At the time of the issue of that special licence Mr Fitzgerald was again advised of the requirement to progress the application for a full liquor licence for the premises and that it was unlikely that further extensions of the special licence would be approved.
- 8) Despite the earlier advice from Licensing NT, on 9 March 2017 Mr Fitzgerald again applied for an extension of the special licence for The Chippo. By decision dated 13 March 2017 a delegate of the Director-General of Licensing refused to grant a further special licence pursuant to section 59(1)(b) of the Act, essentially on the grounds the premises require a full liquor licence to continue to operate in the manner that it has previously and that Mr Fitzgerald had taken no significant steps in advancing that application, despite advice on numerous occasions that he do so.

CURRENT SITUATION

- 9) By an email dated 26 April 2017, Mr Fitzgerald lodged an "objection" to the Decision Notice issued by the delegate on 13 March 2017.
- 10) Section 11(2) of the *Licensing (Director-General) Act* provides that an application for review of a delegate decision must be made within 28 days after written notice of the decision is received by the affected person, unless the Director-General extends the time for making the application. The prescribed time in which to seek a review of the decision relating to The Chippo expired on 11 April 2017. Mr Fitzgerald's email requesting a review was received on 26 April 2017, which places it outside the period prescribed for an application for review of a delegate's decision, however, I have determined to extend the time and accepted the application for review.
- 11) Mr Fitzgerald set out the grounds on which he sought a review of the delegate's decision in an attachment to his email of 26 April 2017. He acknowledged that he had received considerable assistance from the staff of Licensing NT and noted that it had taken longer than anticipated to put together the application for a full liquor licence.
- 12) Mr Fitzgerald stated that the sale of alcohol was an integral part of the business conducted at The Chippo and the income generated was necessary to cover the operating costs of the venue. He stated that should the special licence not be granted pending the lodgement of the application for a full licence he would need to close the doors for good as they simply cannot afford to temporarily shut down the premises again. He noted that closure of The Chippo would be devastating for a number of local musicians and artists who rely on the venue, as well as members of the general public seeking a venue offering alternative entertainment to that available elsewhere in Darwin.

- 13) Mr Fitzgerald submitted further that they had worked hard over 12 months with NT Fire and Rescue Services to bring the premises up to the required standards. He stated that the premises had not been subject to any complaints from NT Police with the exception of an incident that occurred in mid-January 2017 that was still under investigation.
- 14) Mt Fitzgerald concluded by noting that the application for a full liquor licence had been lodged with NT Licensing the previous week.

CONSIDERATION OF THE ISSUES

- 15) The Chippo is a late night trading venue that presents live music and entertainment performed predominantly by local musicians and artists. The venue commenced trading in the sale of liquor under the authority of a continuing special liquor licence, first issued on 13 November 2013. The trading hours approved for the venue at the time, and continuing with the grant of further special licences, were:
 - Fridays from 6.00 pm to 1.00 am the following day;
 - Saturdays from 6.00 pm to 1.00 am the following day; and
 - Sundays from 2.00 pm to 10.00 pm.
- 16) As noted above, Part IV of the Act deals with the grant of special licences and section 57 of the Act provides that a special licence authorises the holder of the licence to sell liquor at specified premises during specified periods, subject to the conditions specified in the special licence. The Act provides no further guidance as to the circumstances where a special licence may be issued, as opposed to the issue of a full liquor licence.
- 17) An application for a special licence is made via a prescribed application form. The notes attached to the form advise applicants as follows:
 - Continuing special licenses are generally granted by the Director-General of Licensing to work place "social clubs", sporting and non-profit associations/organisations.
 - Where the prime purpose of the Applicant is to utilise the licence as a profit making venture, with no specified use of funds for purposes relating to sport, education, community or charity, such Applicants will be required to apply for a Full Licence.
 - Continuing special licence hours must not exceed 30 hours per week in total. If Applicants wish to trade longer hours they will be required to apply for a Full Liquor Licence.
 - A completed Authority to Release Criminal History Form must be submitted with this application.
 - Applicants must obtain the approval of the owner/controller of the venue, prior to consideration of the application.
 - Applicants are to include full details of proposed dates and times with each application, maximum trading 30 hours per week.
 - Applicants are required to provide all relevant information before a licence can be considered for approval.

- 18) Under the special licences granted to date, The Chippo is authorised to trade in the sale of alcohol for a total of 22 hours per week, which falls within the criteria set out in the notes included on the application form. However, the licensee is not a work or sport social club nor is it a not for profit organisation. The Chippo, whilst it provides opportunities and a venue for local musicians and artists to perform, is a profit making business venture. It must also be noted that the type of activity conducted under the special licence, being the offering of live music and entertainment at a late night trading venue, falls within the category of licensed venues that present the greatest level of risk in terms of potential harms arising to patrons of the venue and disturbances to the neighbourhood within which the venue is located.
- 19) Taking those factors into account, I am of the firm view that a special licence should not have been granted for the premises in the first instance, nor should it have been renewed periodically, as the appropriate course in the circumstances would have been for the licensee to conduct the business under the authority of a full liquor licence. Having said that, it is a fact that The Chippo has operated under a special licence since 2013, apart from the period when the special licence was cancelled due to the fire safety issues, with the special licence being renewed on several occasions.
- 20) With that history in mind, it would be open to Mr Fitzgerald to hold a reasonable expectation that the special licence would continue to be granted, subject only to compliance with the conditions associated with the special licence and compliance with the requirements of the Act. However, any reasonable expectation that Mr Fitzgerald may have held in that regard was denounced on 10 June 2016 at the time when the special licence was reinstated following resolution of the fire safety issues. At the time of the grant of that special licence Mr Fitzgerald was advised by Licensing NT that no further special licences would be issued for The Chippo. Mr Fitzgerald was clearly advised that should he wish to continue to sell alcohol at the venue, he would need to apply for a full liquor licence.
- 21) Whilst Mr Fitzgerald undertook to lodge an application for a full liquor licence as soon as possible he did not make that application until 9 September 2016, some three months after being advised to do so. The application was defective and a number of matters were referred to Mr Fitzgerald for his attention. On 20 October 2016 Mr Fitzgerald was granted a further special licence, valid from 20 October 2016 to 20 April 2017, to further authorise the sale of liquor at the venue pending the processing of the application for a full liquor licence.
- 22) As noted above, the application that was lodged by Mr Fitzgerald on 9 September 2016 was defective to the point it was ultimately rejected by Licensing NT and returned to him on 11 November 2016 due to his failure to correct the deficiencies identified in the application over the preceding two months.
- 23) Mr Fitzgerald lodged a further application for a full liquor licence on 19 April 2017. That application was lodged one day prior to the expiry of the latest special licence issued for The Chippo on 20 October 2016. It is of significance, in terms of the consideration of the application for a further extension of the special licence, that Mr Fitzgerald took no action to lodge a further application for a full liquor licence between 20 October 2016 and 19 April 2017, despite the clear advice from Licensing NT that no further special licences were likely to be approved.
- 24) On 9 March 2017 Mr Fitzgerald applied for further special licence for The Chippo, despite the earlier warnings that no further special licences would be issued for the premises and despite the fact that at that time, he had failed to re-lodge and progress the application for a full liquor licence. On 13 March 2017 a delegate of the Director-General rejected the application for a further special liquor licence.

- 25) As set out in the notes to an application for a continuing special liquor licence, such licences are not intended for commercial operations. The business operating model at The Chippo is commercial in nature and does not fall within the description of activities that would normally be authorised under a special liquor licence. Mr Fitzgerald has been advised consistently on a number of occasions since June 2016 that a special liquor licence was not the appropriate licence for The Chippo and that he should apply for a full liquor licence. He was also advised on several occasions that further special liquor licences were unlikely to be approved. Whilst he has agreed to do so, as of the date of this decision Mr Fitzgerald has not lodged a compliant application for a full liquor licence. Any expectation on his part that The Chippo would continue to be authorised under a special liquor licence was dispelled on 10 June 2016 when he was first advised to apply for a full liquor licence as no further special liquor licences would be approved.¹
- 26) Mr Fitzgerald lodged a second application for a full liquor licence on 19 April 2017, one day before the most recent special licence expired, that is some six months after the first defective application was returned to him. Mr Fitzgerald has provided no plausible reason for the six month delay in re-lodging the application and, in any event, the second application is also materially defective.
- 27) On 24 April 2016 Mr Fitzgerald was advised that significant defects had been identified in the second application, including the following matters:
- a) No financial information in respect of assets and liabilities has been provided in respect of the proposed licensee company;
 - b) The affidavit under section 26A of the Act was defective;
 - c) The application was not signed by a major shareholder of Chippo Pty Ltd, Mr Jarred Kersten;
 - d) The National Police Certificate provided for Mr Fitzgerald with the first application was out of date due to the time taken by Fitzgerald to progress the application;
 - e) No Police certificate for other director, Mr Jarred Kersten, had been provided;
 - f) The food registration certificate was not in the name of the proposed new business entity; and
 - g) No CCTV Plan for the premises has been submitted.
- 28) Mr Fitzgerald responded to the issues raised in an email dated 25 April 2017 and advised as follows:
- a) An assets and liabilities statement will be provided within the next working week;
 - b) An affidavit required under section 26A of the Act will be lodged ASAP;
 - c) Mr Kersten would send an email promptly confirming his approval of the application;
 - d) The National Police Certificate receipt for Mr Fitzgerald would be provided by late the following week;
 - e) The National Police Certificate receipt for Mr Kersten would be provided by late the following week;
 - f) Notice has been received from the Department of Health regarding the food certificate and this will be registered before the approval of the (liquor licence) application; and

¹ Despite the advice in June 2016 that no further special liquor licences would be issued a further special licence was in fact approved on 20 October 2016 due to fact the application for a full liquor licence lodged by Mr Fitzgerald was defective to the point it could not be progressed through the assessment process.

- g) Mr Fitzgerald asked whether Licensing NT would be happy for BH Communications to prepare the CCTV Plan.
- 29) Despite those assurances, as at the date of this decision no financial statements for the business or the applicants have been submitted, the affidavit required under section 26A of the Act has not been amended and resubmitted, Mr Kersten has not executed the application for a full liquor licence, receipts confirming applications for the required National Police Certificates have not been provided and no CCTV plan for the premises has been submitted.
- 30) One of the major differences between the assessment of a special liquor licence application in comparison to an application for a full liquor licence, is the probity examination that is undergone by applicants and their associates. The probity assessments for a full liquor licence include assessment of the personal fitness and propriety of persons who will be associated with the sale of liquor as well as the financial capacity of the proposed licensee to operate licensed premises. Examinations of that nature are not undertaken for special liquor licence applications on the basis that such licences are intended to be operative for relatively short periods and involve liquor sales that are at the lower end of the scale in terms of the volume of liquor sold and risk to patrons and the community at large.
- 31) Given the nature of the business conducted at The Chippo, that is late night trading nightclub and entertainment venue, it is reasonable that the venue and the proposed licensee undergo the same examination as is applicable to other similar commercial operators who apply for a liquor licence. This includes public interest considerations, including the opportunity for members of the public to object to the grant of a liquor licence, as well as an examination of the parties who may derive a benefit from the licence, and whether they are appropriate persons to be involved in the sale of liquor.
- 32) A particularly relevant issue in respect of approval of the venue for the sale of liquor is the fact the premises was closed for a period of time when NT Fire and Rescue Services ordered that the venue be closed due to fire safety concerns. Had Mr Fitzgerald applied for a full liquor licence at the outset, a fire safety check would have been conducted in the normal course of assessing the application and the fire safety issues would have needed to be addressed prior to the premises opening for trade. The fact that the premises operated under a special liquor licence for more than 18 months without the fire safety issues being raised or addressed presents the most cogent reason as to why the business conducted at the venue and the sale of liquor should not have been approved under the authority of a special liquor licence.
- 33) I am satisfied in this instance that Mr Fitzgerald has been given ample notice of the requirement to apply for a full licence and, despite clear warning that the granting of further special licences may not occur, he has failed to lodge a compliant application for a full liquor licence.
- 34) In his submission in support of the grant of a further special liquor licence, Mr Fitzgerald stated that The Chippo had not been the subject of any complaint by Police in all its years of trading, apart from an incident that occurred in January 2017 when the venue was closed for renovations. Whilst it may be correct that there has only been one Police intervention at the premises that statement does not acknowledge that the premises was ordered to close by NT Fire and Rescue Services due to serious fire safety issues. That situation had the potential to result in serious injury or harm to patrons if a fire had occurred prior to remedial action directed by NT Fire and Rescue Services.

- 35) In addition, in July 2016 it was brought to the attention of Licensing NT that Mr Fitzgerald was purchasing liquor supplies for The Chippo from a liquor wholesaler contrary to the following special licence condition:

*"All liquor purchased for sale under the authority of this licence **MUST** be purchased from a licensed retail outlet."* (Emphasis shown is included in the licence conditions).

Mr Fitzgerald was issued with a formal caution in respect of the breach of the licence condition.

- 36) The incident that occurred at The Chippo at approximately 2.00 am on Sunday 15 January 2017, and referred to in Mr Fitzgerald's submission, involved Police intervention at the premises in the early hours of the morning. Police body worn camera surveillance indicates that a number of persons inside The Chippo at the time were seriously affected by illicit drugs and/or alcohol and that two of those persons were unconscious when Police and Paramedics arrived at the venue. The video surveillance shows that Mr Fitzgerald was present at the premises at the time. That incident remains under investigation by Licensing NT and has not to date resulted in a formal complaint against the licensee. For that reason no weight is attached to the incident in regard to this decision in respect of the application to renew the special liquor licence. However, subject to the outcome of the Police and Licensing NT investigations of the incident, it may be relevant in respect of future considerations as to whether the application for a full liquor licence should be approved.
- 37) In all the circumstances, and for the reasons set out above, I have determined to affirm the decision of the delegate and refuse to grant the special liquor licence sought by Mr Fitzgerald for The Chippo in the application dated 9 March 2017. It is acknowledged that this decision is likely to cause some hardship and inconvenience to the operation of the business conducted at The Chippo. Whilst that is regrettable it is entirely a matter of Mr Fitzgerald's own doing in that he has not treated the earlier warnings regarding the unlikely grant of further special liquor licences with sufficient seriousness so as to prompt him to diligently progress an application for a full liquor licence.

DECISION

- 38) On the basis of the matters set out above, and in accordance with section 14(2)(a) of the *Licensing (Director-General) Act*, I have determined to affirm the decision of the delegate dated 13 March 2017 to refuse to grant a further special liquor licence to authorise the sale of liquor at The Chippo premises.
- 39) For the purpose of certainty, a special liquor licence is not the appropriate licence to authorise the sale of liquor at The Chippo given the nature of the business conducted at premises. On the basis of the considerations set out above, no further applications for a continuing special liquor licence for The Chippo will be accepted or considered by the Director-General. To reiterate the advice provided by officers of Licensing NT on several occasions over the past 22 months, should Mr Fitzgerald wish to continue to sell liquor at The Chippo he will need to lodge a compliant application for a full liquor licence. Even were that to be achieved immediately following publication of this decision, it will be some months before the application is able to be finally determined due to the statutory time limits prescribed by the Act in terms of advertising the application and considering any objections should they arise.

REVIEW OF DECISION

- 40) 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. A decision by the Director-General to refuse to issue a special licence pursuant to section 56 of the Act is specified in the Schedule and is therefore a reviewable decision. For the purpose of this decision, and in accordance with section 120ZB(1) of the Act, the affected persons is Mr Rod Fitzgerald, the former licensee under the now expired special liquor licence.



Cindy Bravos
Director-General of Licensing

24 May 2017