

Delegate of the Director-General of Licensing

Decision Notice

MATTER:	Cancellation of a liquor licence
PREMISES:	Fernanda's
LICENSEE:	Inker Pty Ltd
NOMINEE:	Ms Fernanda De Sousa
LEGISLATION:	Section 47(5) of the Liquor Act
DECISION OF:	Delegate of the Director-General of Licensing
DATE OF DECISION:	2 November 2016

BACKGROUND

1. On 14 October 1999 the liquor licence for the Tennant Creek Squash Courts was transferred to Inker Pty Ltd, with Ms Fernanda De Sousa as nominee. The premises were subsequently renamed Fernanda's.
2. Ms De Souza has retained ownership of the premises since that time.
3. Action was taken by the Licensing Commission in 2007 against the licensee for not conducting the business of the licensee. This action resulted in the suspension of the licence in October 2007.
4. The premises had not been operational for several years.
5. The licence was eventually cancelled and subsequently re-issued, when Ms De Souza provided evidence of the premises being certified as meeting Health and Fire requirements and a genuine intent to recommence trade.
6. Further contact was made by Director-General Parnell OAM in July 2015 in relation to reports the premises was again no longer trading.
7. Subsequent to this correspondence the licensee was hand delivered a letter on 1 June 2016 providing a period of 90 days in which the business of the licensee must be recommenced or a transfer of the licence is undertaken.

8. To date the premises remains non-operational and there has been no application received seeking a transfer of the liquor licence.

CURRENT SITUATION

9. 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.

10. 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.
11. 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.
12. By the licensee's own admissions they have not been conducting the business of the licensee "...for some time" in a letter to the Director-General dated 15 August 2015.
13. The licence contains the following condition in relation to the provision of a meal;

Meal Provision

At all times when the premises are open for the sale of liquor the Licensee shall provide a meal upon request. The range and quality of the meals provided shall be to the satisfaction of the Director.

14. Environmental Health personnel from Tennant Creek have confirmed there is no current registration of Fernanda's, or for Inker Pty Ltd as a Food Business. It was confirmed their file had been closed in August 2015 for inactivity and as the premises was closed and for sale.
15. It is well established the premises has been closed and not operational for several years. The premises have been "on the market" and Ms De Souza has actively been attempting to sell or lease the premises during this period.
16. The current advertisement for the premises describes it as "...the business has ceased active trading".
17. Ms De Souza provided submissions to the Director-General dated 12 August 2015 in relation to possible action being taken to cancel the licence. The same letter was sent dated 24 February 2016 and 30 August 2016.
18. To date no complete applications have been received to transfer the licence.
19. Ms De Souza has submitted the premises opens "...once or twice a week when the squash courts are used". Ms De Souza submitted squash is played at the premises on Tuesday and Thursday between 17:00hrs and 19:00hrs.
20. This is a similar submission to that which was provided by Ms De Souza in 2007 which was refuted and disproved by Police patrols of the premises. It was also a result of a Constable Sanderson's observations as a tenant of the residency at the top of the premises.
21. Observations of the premises would suggest there is no activity at the premises at all. Despite this there is some possibility Ms De Souza is allowing people to use the squash courts inside the premises, however the premises are not registered to sell food. If they are operating then they are in breach of the conditions of their licence.
22. Ms De Souza has submitted the desire to retain the licence as she is "...very concerned that if the building is on the market without a liquor licence this will greatly reduce the likelihood of sale as well as reduce the sale price".
23. On 10 June 2016 the licensee was sent a letter advising the Director-General was providing a period of 90 days within which time an application must be received for the transfer of the licence, that being 13 September 2016.
24. The Director-General advised they were mandated by Section 47(5) of the Act to make a determination in the matter.

ASSESSMENT OF MATTER

25. This is not the first time the premises have been non-operational for an extended period of time.
26. The former Licensing Commission has previously taken action against the licensee for the inability to conduct the business of the licensee. This did however result in Mrs De Souza re-opening the premises for a period.
27. Whilst it is suspected the premises have not been operational from well before August 2015, it has been conceded by the licensee that they have no intention of operating the premises themselves.
28. This is supported by the information contained in the marketing materials of the agent Elders Real Estate who market the premises for sale describing it as "...the business has ceased active trading".
29. Mrs De Souza has attempted to submit, in contradiction of her own material as a means of suggesting the premises are operational, that purchases of liquor have been made from various establishments as "stock". There have been three (3) receipts provided for liquor purchases at retailers between 6 December 2014 and 21 November 2015 totalling \$404.40.
30. No detailed invoices have been provided in the name of Inker Pty Ltd to support a claim the purchases were made for operational stock.
31. It is more likely than not the invoices are liquor purchases intended for personal consumption and not onsale.
32. A request was made to the licensee by Senior Compliance Officer Cross for evidence of sales, being sales reports and figures on 20 September 2016. No response was received to this request.
33. It has been confirmed by the Department of Health that the premises has not been registered as a Food Business since August 2015. In the event the premises are operational they are not certified and therefore would be committing an offence.

34. Mrs De Souza has contacted the department on a number of occasions submitting that a sale of the premises was imminent and that the license should not be cancelled. Whilst such submissions are unable to be refuted, the fact remains no materials have ever been provided that would provide weight to such a submission.
35. Whilst it is not in dispute that the licensee is actively marketing the premises, the fact remains it has not been sold and no applications have been lodged seeking the transfer of the licence.
36. There is no material available to me that would suggest the licensee is genuinely conducting the business of the licence, or that the licensee's inability to conduct the business is not a permanent situation.
37. Mrs De Souza submits the sale of the premises requires the licence to be retained and a cancellation will jeopardise any potential for sale. Empathy may be given for this situation, however the fact remains the Act is prescriptive and provides no real discretion in matters of this nature.
38. It should also be noted in the event the licence is cancelled this does not preclude Mrs De Souza or any subsequent purchaser, from applying for a new liquor licence in the future.

CONSIDERATION CRITERIA

39. 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.
40. 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

41. The premises have been closed for several years and the licensee has not conducted the business of the licensee.
42. This has been an ongoing situation for several years and had earlier resulted in action being taken by the former Licensing Commission.

43. The licensee has submitted they have been operating the premises to allow for squash to be played in the courts. There is no evidence to support this submission and given the licensee is not currently licensed as a Food Business, in the event they are operating they would be in breach of the conditions of their licence.
44. It is not in dispute that the licensee is attempting to sell the premises; it is currently listed with Elders Real Estate. Despite this there have been no applications received by Licensing NT seeking to transfer the liquor licence.
45. A cancellation of the liquor licence does not preclude Inker Pty Ltd, Mrs De Souza or a third party purchaser from seeking a new licence at the premises in the future.

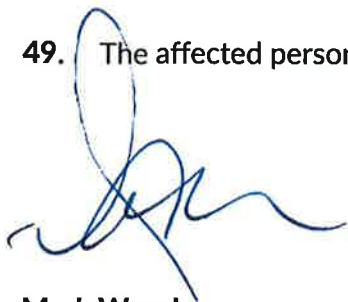
DECISION

46. 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 80300212 – Inker Pty Ltd trading as Fernanda’s at the 1 Noble Street, Tennant Creek. 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.
47. Liquor Licence 80300212 is cancelled pursuant to Section 47(5) of the Liquor Act from the date of this notice.

REVIEW OF DECISION

48. 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.

49. The affected person in relation to this matter is Inker Pty Ltd.

A handwritten signature in blue ink, appearing to be 'Mark Wood', written in a cursive style.

Mark Wood

Delegate of the Director-General of Licensing

2 November 2016