

Decision Notification

Application Details

Application no.	206508, 206509
Licence No.	57003211
Licence Class	General & Hotel
Premises Name	Prince Albert Hotel
Premises Address	254 Wright Street ADELAIDE SA 5000
Licensee	Hotel PA Pty Ltd, Bulerias Pty Ltd
Applicant	ENTERTAINMENT SA PTY LTD
Application Type	Application for Transfer of Licence, Application for Extension of Trading Area (S 69)

Outcome

Decision	Granted
Effective Date	30 Mar 2021

Requirements

The requirement to provide the following in support of the application has been waived:

The requirement to advertise the application by notice placed on the premises

The following requirements in support of the application have been satisfied:

- Landlord's consent has been obtained
- The application has been advertised
- All approvals, consents or exemptions have been obtained

People

Position of Authority

The following persons are approved to occupy any position of authority in the entity holding the licence and to receive proceeds of the business conducted under the licence:

- Darren Paul Brown (77194)

Licensee

Transfer

The licence is transferred to Entertainment SA Pty Ltd effective from 30 Mar 2021.

Determination Details

Submissions from the following persons or corporate entities were received and taken into consideration when determining this application: Anthony Schmidt

Premises

Licence Plan

The licensee is authorised to sell and supply liquor in an area adjacent to the premises for consumption in that area,

as outlined in red on the approved plan.

Reasons for Decision

Under section 81(1)(a) of the *Liquor Licensing Act 1997* (the Act) I exercise my discretion to determine this matter without holding a hearing.

Background

The licence was held by Hotel PA Pty Ltd since 6 June 2018. On 26 May 2020, the landlord of the premises, Bulerias Pty Ltd, lodged an application with this office for approval to carry on business under the licence pursuant to section 73(3) of the Act. Along with the application, the landlord supplied a certificate of title to confirm ownership of the freehold, as well as a notice of re-entry (dated 26 March 2020) issued to the tenant confirming that the landlord took possession of the premises from the tenant. Having satisfied themselves that the licensee had ceased to occupy the premises, the Commissioner's delegate granted the landlord's application for a period of 6 months. Subsequent extensions of this approval were given by this office.

An application has now been lodged to transfer the licence to Entertainment SA Pty Ltd. This is the application currently being considered.

Submission

A submission has been lodged against this application by Anthony Schmidt, in his capacity as director of the former tenant, Hotel PA Pty Ltd. He opposes the grant of the licence on two grounds:

- He contends that the tenancy between the landlord and Hotel PA Pty Ltd was wrongfully terminated, and a claim is intended to be lodged in the Magistrate's Court. Amongst other remedies, Hotel PA Pty Ltd seeks the reinstatement of the tenancy.
- There are various building deficiencies present at the premises.

I note that Mr Schmidt failed to provide a copy of the submission, and subsequent attachment sent through to our office, to the applicant 7 days prior to the date appointed for determination in accordance with s 77(4) of the Act. This fact was not brought to my attention until after the date appointed for determination. However, I exercised my discretion to allow the relevant documents to be provided to the applicant after the date appointed for determination, but prior to me making a decision on the application. I note that Mr Schmidt has complied with these varied requirements.

Tenancy

I will consider first the issue of the tenancy. Mr Schmidt advises that the company begun the required pre-claim actions in the Magistrate's Court last year and attended a settlement conference with the landlord, and their representatives, on 21 September 2020. The conference was not successful in resolving the dispute. Mr Schmidt has also provided our office the draft claim he has prepared to initiate proceedings in the Magistrate's Court, although this has not yet been lodged due to his recent poor health.

First and foremost it is important to note that it is not for this office to determine tenancy disputes, this does not fall within our jurisdiction. These are commercial disputes that are to be dealt with in the appropriate Court.

Looking at the matter purely from the perspective of the liquor licence and who should be entitled to hold and operate under this licence, it appears that this right is held by Entertainment SA Pty Ltd. What I have before me is a copy of the notice of re-entry issued to Hotel PA Pty Ltd demonstrating that they no longer have a right to tenure of the premises. I also have a statutory declaration from one of the directors of the landlord entity, confirming that they terminated the

lease and took possession of the premises on 26 March 2020 and have retained possession since this date. Finally I have a copy of the lease document to be entered into between the landlord and Entertainment SA Pty Ltd. Entertainment SA Pty Ltd have also provided a copy of an outdoor dining permit issued to them by the City of Adelaide which shows they also have a right to occupy the area adjacent to the premises that forms part of the licensed premises under s 69 of the Act.

As I mentioned previously, it is not for this office to determine the lawfulness of the tenancy matters subject to the dispute. Based on the documents currently before me, it appears that at the present moment Entertainment SA Pty Ltd has a right to occupy the premises.

To satisfy the tenure requirements under s 72(1)(c) of the Act, the landlord has provided written consent to the licence being transferred to Entertainment SA Pty Ltd. The landlord company has also consented to the transfer of the licence in their capacity as licensee of the licence, in accordance with the definition provided under s 4 of the Act, having been authorised to carry on business as the licensee.

I appreciate that there is a possibility that this position may change, should the Magistrate's Court reinstate the tenancy as a result of a claim lodged by Hotel PA Pty Ltd. However, I note that the claim is yet to be lodged, furthermore it has already been just shy of 12 months since the landlord was approved by this office to carry on business as the licensee, this dispute has therefore already been on foot for a considerable amount of time.

A similar scenario to this arose in the matter of *Tin Shed Distilling Co* [2014] SALC 11 in which an objector sought a stay of proceedings on the grounds that the two parties had a matter currently before the Supreme Court that was relevant to the application before the Licensing Court. In dismissing the application for a stay of proceedings, the Honourable Judge Gilchrist noted that "...allegations made in private litigation create no presumptions. Without more they are mere allegations. As it currently stands, the statements made by Mr Schmidt in in opposition to the grant of this transfer are simply allegations at this point.

It is unclear when the claim will be lodged with the Court, and even then how long it will take for the matter to be resolved and for any relevant orders made. It would not seem appropriate to deny a party, who has demonstrated a right to tenancy under section 72 of the Act, the opportunity to trade under the licence for an unknown amount of time due to an allegation by another party that they believe they have a right to tenancy over the property.

Having considered all of this, I am satisfied that Entertainment SA Pty Ltd is entitled to have the licence transferred to them and to trade under the licence.

I note again for clarity that this determination is only in relation to who has a right to trade under the liquor licence as it currently stands, and is in no way to be inferred that the Commissioner has made a determination in relation to the lawfulness of the termination of the tenancy that form the basis of Mr Schmidt's civil claim. Should the Court make orders in relation to the tenancy that affect who has a right to trade under the licence then the licensing authority will consider any further applications in relation to the licence in light of such orders.

The building

Mr Schmidt raises a number of alleged issues with the building itself as grounds as to why the transfer of the licence should not proceed. These include claims that there are various building deficiencies present at the premises, as well as noncompliance with the Building Code of Australia (BCA) in relation to disability access and facilities.

Mr Schmidt has provided attachments with his submission from the City of Adelaide in relation to a recently granted development approval to change the use of the first floor to a dwelling. It is unclear how these documents support his submissions. They confirm that the development is still in progress and that as a result of changing the first floor to a dwelling, additional noise limitations have been imposed by Council. It is unclear how this proposed development, as

approved by Council, should render me unable to grant the transfer of the licence as sought. This does not demonstrate that the building itself is in disrepair, nor call into question whether the building itself should continue to be subject to a liquor licence.

Our office has not received any evidence from Mr Schmidt, or any other body, such as local Council, that would suggest that the building is in disrepair.

In relation the allegations that it does not comply with the Building Code of Australia due to inadequate disability access and facilities, this is outside the jurisdiction of the Liquor and Gambling Commissioner and it is not for this office to determine whether the building complies with the relevant laws that regulate this area. The Commissioner has an obligation under section 57 of the Act to be satisfied that the premises will be of sufficient standard for the purpose of properly carrying on business under the licence, however I note that this is only upon the grant of a new licence and I am not required to consider s 57 upon the transfer of the licence.

Whilst there are ongoing obligations of the licensee to ensure the safety of patrons at the premises, I do not consider that this extends as far as requiring the Commissioner to assess compliance with other laws and regulations which the Commissioner is not responsible for administering. Should the relevant authority bring any safety concerns to the attention of the Commissioner, then this office would consider what action is required in relation to the liquor licence.

I have not been satisfied, based on the information before me that sufficient grounds exist to warrant me exercising my discretion under s 53(1) to refuse the application to transfer the licence to the applicant on the grounds put forward by Mr Schmidt in relation to the state of the premises itself.

Conclusion

Having considered all the grounds of submission put forward by Mr Schmidt I am not satisfied that there are sufficient grounds to refuse the application to transfer the licence to Entertainment SA Pty Ltd and grant the application as sought.

Under Delegation from the Liquor and Gambling Commissioner



Ashleigh Hughes
Hearings Delegate
30 Mar 2021