

NORTHERN TERRITORY LICENSING COMMISSION

Reason for Decision

PREMISES:	Oyster Bar Darwin
APPLICANT:	Europa (SA) Pty Ltd and JK (SA) Investments Pty Ltd
NOMINEE:	Mr Jarrad Carter
PROCEEDINGS:	Application for Liquor Licence s26 (Liquor Act) Hearing pursuant to s47I(7)
HEARING DATES:	29 May 2014 & 2 June 2014
HEARD BEFORE:	Richard O'Sullivan (Chairman) Paul Fitzsimons Cindy Bravos
APPEARANCES:	Graeme Buckley – Counsel for Applicant Colin McCall – Instructing Counsel Jarrad Carter – Applicant Witness Martin Potts – Applicant Witness Ivailo Dimitrou – Applicant Witness Matthew Knight – Applicant Witness Terry O'Neil (Darwin Waterfront Corporation) – on invitation of Commission Mick Caldwell – Objector Katherine Thompson – Objector (for Gloria Thompson) Superintendent Evans - Objector

BACKGROUND

- 1) An application has been made by the Directors of Europa (SA) Pty Ltd and JK (SA) Investments Pty Ltd (the “applicant”) for an On Licence for a restaurant to be known as the Oyster Bar Darwin. The premises will be located at Tenancy E5 and E6 situated at Building Two of Wharf One of the Darwin Waterfront Precinct.
- 2) The advertisement of the application placed in the NT News in December 2013 was as follows:

"Europa (SA) Pty Ltd and JK (SA) Investments Pty Ltd, HEREBY GIVE NOTICE that it has applied to the Northern Territory Licensing Commission for an "ON LICENCE" Liquor Licence with Alfresco Dining to sell liquor at the premises to be known as Oyster Bar Darwin, located at Tenancy E5 and E6, Wharf One Retail, 19 Kitchener Drive, Darwin NT.

PROPOSED TRADING DETAILS for the sale of liquor are as follows:

- *This licence allows for one (1) quality restaurant and ancillary bar. The premises shall at all times have the predominant appearance of and shall trade principally as a restaurant where persons may consume alcohol without the requirement of consuming a meal.*
- *The consumption of liquor without a meal shall not be advertised or promoted.*
- *The premises shall portray a relaxed family friendly atmosphere where comfortable conversation can be achieved in a venue that provides quality food, beverages and service.*
- *The Licensee shall not permit or suffer the emanation of noise from the area of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises.*
- *This licence allows for patrons to stand at high tables and chairs. Service of liquor in the internal area need not be by wait staff. Bar stools are permitted in this area.*
- *Liquor may be sold from 10:00 hours until 24:00 hours, seven days a week.*

This is the first notice of application. The notice will be published again on Friday, 13 December 2013.

The objection period is deemed to commence from Friday, 13 December 2013. (date of publication of second notice).

Pursuant to Section 47F(2) of the Liquor Act an objection may only be made on the ground that the grant of the licence may or will adversely affect:

- (a) the amenity of the neighbourhood where the premises the subject of the application are or will be located; or*
- (b) the health, education, public safety or social conditions in the community.*

Only those persons, organisations or groups described in Section 47F(3) of the Liquor Act may make an objection. Section 47G of the Liquor Act requires the Director of Licensing to inform the applicant of the substance of any objection. This will include the identity and where relevant the address of the objector.

For further information regarding this application contact the Director of Licensing on telephone 8999 1800. Objections to this application should be lodged in writing with the Director of Licensing, Gambling and Licensing Services, GPO Box 1154, Darwin, within thirty (30) days of the commencement date of the objection period.

Dated this Eleventh Day of December 2013"

- 3) The applicant proposes a similar Business Model to other restaurants operated by them, being The Oyster Bar at Holdfast Shores, Glenelg, South Australia and The Oyster Bar at Mandurah, Western Australia.
- 4) Following the advertising of the application twenty seven objections were lodged. A "Decision on Whether Objections Will Proceed to Hearing" was handed down by the Chairman of the Northern Territory Licensing Commission ("the Commission") on 1 April 2014. Pursuant to Section 471 (7) of the Liquor Act ("the Act") the Chairman determined that seventeen of the objections were valid and required a Hearing. A further ten objections were determined as not valid as they did not, as required under Section 471(3)(c)(i)B of the Act, "describe circumstances that may or will adversely affect the amenity of the neighbourhood or health, education, public safety or social conditions in the community".
- 5) In making this determination the Decision stated:

"87) A number of objections have not been ruled to be valid. In ruling that the objections have not met the grounds required under the Act, the Commission is aware that a number of those accepted and deemed valid objections are somewhat similar in nature. The accepted objections have amplified or specified the grounds for objection and thus they meet the prescribed requirements of the Act and they have been determined as requiring a Hearing."

THE HEARING

- 6) Mr Buckley commenced proceedings at the Hearing on 29 May 2014 and advised that following NT Police being provided with CCTV footage of the applicants Holdfast Shores and Mandurah Oyster Bar operations and advised of the amendment of proposed licensing hours from 10:00am to 12:00 midnight to 11:00am to 12:00 midnight, Police had withdrawn their objection. Superintendent Kristopher Evans confirmed that Police had indeed withdrawn their objection to the application.
- 7) Under cross examination by Mr Mick Caldwell, the Superintendent stated that there had not been an escalation of alcohol problems at the Waterfront Precinct when comparing the first 6 months of 2013 to 2014. The Superintendent also advised that there would be a continuance of the high visibility reassurance patrols in the area and confirmed that these patrols are a preventative measure against incidents and anti-social behaviour.
- 8) Mr Martin Potts, a director and partner in the interstate and proposed Darwin Oyster Bar businesses outlined the history of the parties involved in the interstate and Darwin businesses. He submitted that the business model of the Oyster Bar operations in Western Australia and South Australia had worked well and that the Mandurah restaurant had exceeded expectations. He advised the Hearing that the operating model, customer service practices and specialty of oyster sales all helped ensure the restaurants were not a base for drinkers on a night out.

- 9) Mr Caldwell questioned Mr Potts over whether the Darwin premises would operate as a bar or restaurant. Mr Potts responded by describing the interstate operations and proposed Darwin premises as presenting a casual, informal and relaxed atmosphere and that it was difficult to put a precise tag on the nature of the business. He stated Directors were advised by Gambling and Licensing Services within the Department of Business that the appropriate licence category for the business was that of a restaurant and an application had been lodged accordingly.
- 10) Following questioning on the zoning of the interstate operations Mr Potts stated that both premises were zoned appropriate to their use and both had been designed accordingly. He also advised that both interstate localities had residential accommodation above the restaurant and both were within and part of a residential precinct.
- 11) In response to further questioning over whether the premises was a bar disguised under the restaurant On Licence category applied for, Mr Potts stated that food would be ordered at the bar, but served to the table by wait staff. He referred to contemporary dining establishments which no longer fitted into the restaurant or pub delineation. The establishments with which he was involved were oyster bars.
- 12) Mr Jarrad Carter, a Director of the application entity and proposed nominee of the licence, gave evidence as to his background and hands on management of interstate Oyster Bar operations. The Hearing was advised that Mr Carter with his wife Kirsty would move to Darwin to manage the new business if the application was successful.
- 13) Mr Carter gave evidence that there had been no complaints from Police or the relevant licensing authority over their existing Oyster Bars and that both interstate venues have never breached their licence conditions. He had received complaint calls from residents over noise or similar disturbance issues at the Mandurah premises but had adjusted sound levels or removed the cause of the disturbance as a way of satisfactorily dealing with the matters.
- 14) Mr Cater advised that takings break down for the interstate businesses would in aggregate be 55% - 60% beverage and 40% - 45% food (subsequently confirmed with a beverage to food breakdown of 55% to 45%). In relation to venue capacity he informed the Hearing that the Mandurah operation accommodated approximately 120 patrons and Glenelg approximately 130 patrons. While patron numbers for the Waterfront Precinct business would need to be established by Police, Fire and Emergency Services, the proposed layout and fit out indicated a capacity of around 78 in the internal area and 80 in the alfresco area, totalling a preliminary estimated capacity of 158 patrons.
- 15) In addressing issues raised in written objections to the licence application Mr Carter advised the Hearing that deliveries and pick-up services would be undertaken in business hours, Monday to Friday with fresh produce deliveries also occurring on weekends. On other noise issues he stated the application would work with acoustic engineers, VIPAC, who had provided an acoustic proposal report. Through Counsel, Mr Buckley, the Hearing was also advised of

the applicant's preference that the entire licensed premises be a non-smoking zone.

- 16) Mr Caldwell questioned Mr Carter over the status of Oyster Bar Darwin and whether he considered it to be a bar or a restaurant. Mr Caldwell also referred to the advertisement which stated "The premises shall portray a relaxed family friendly atmosphere..." and queried the menu tabled in the Hearing brief. Specifically Mr Caldwell queried why there was an absence of entrees and desserts and no reference to children's menu, whereas the venue was advertised as family friendly, implying catering for children and giving an expectation of providing normal restaurant courses such as entrée and desserts.
- 17) Mr Caldwell also sought response from Mr Carter over the need to have an approved loading zone for supplies, what was proposed for dealing with likely resident complaints and issues and what elements of the VIPAC acoustic report would be implemented. Mr Carter advised that he would seek to engage with residents over issues identified and that he personally had dealt with similar issues at Glenelg and Mandurah where residents live above the premises. He also advised of his and his partners intentions of working with VIPAC to overcome noise issues. He committed to having a canopy constructed over the alfresco, whether at the expense of the landlord, Toga, or at the applicant's expense.
- 18) Mr Terry O'Neill, Deputy CEO, Darwin Waterfront Corporation appeared at the invitation of the Commission to outline the concept of the Waterfront, including how the mix of user groups were expected to accommodate differing needs. Mr O'Neil explained that the area was intended as a mixed use area combining a residential element with retail, hospitality and office/commercial. Facilities provided are also to cater to families, particularly during the day and at weekends. Amenity and public safety are paramount needs. The Corporation had issued "Darwin Waterfront Corporation Liquor Guidelines" which applicants for liquor licences in the Waterfront Precinct are to address. Mr O'Neil advised these guidelines established parameters for trading hours, noise control, security and safety. Resident needs were the main reason for the Corporation developing such guidelines.
- 19) Mr O'Neil was asked by the Commission if he was aware of any restriction in the use of the ground floor area of Building Two at Wharf One. He responded that the use and type of tenancy were to be driven by market forces. He also stated that he was unaware of any undertaking by the developer/landlord, Toga, or its agents, to restrict the usage of Building Two or to not approve hospitality service uses.
- 20) Mr Ivailo Dimitrou, Principal Engineer-Acoustics, VIPAC gave evidence of noise levels likely to be generated from the Oyster Bar Darwin and alleviation measures he recommended be implemented to minimise noise emission from the premises. He advised that he had been engaged by the applicant and would work with the applicant during fit out, should the application be granted.
- 21) Mr Caldwell made submission on behalf of residents and including the Darwin Waterfront Principle Body Corporate Committee and the Darwin Waterfront

- Residents Body Corporate Committee. Mr Buckley proffered legal argument questioning the validity of Mr Caldwell representing the Committees due to failure to follow and record proceeding instructing or giving rise to Mr Caldwell lodging objections on their behalf. It was submitted that those procedural deficiencies could breach requirements of the Units Title Scheme Act.
- 22) In order for the Hearing to continue the Commission advised it wished to hear the evidence of Mr Caldwell and then consider what weight or probative value it should assign to the evidence afterwards. The Commission noted that the nature of the objection lodged by Mr Caldwell on behalf of the Principle and Resident Committees were similar to the numerous other objections lodged, although elaborated in more detail.
- 23) The Hearing adjourned and resumed on 2 June 2014.
- 24) As evidence that there was Body Corporate support for the objections lodged, Mr Caldwell tabled (Exhibit 12) a copy of Minutes of the Management Committee Meeting of the Residents Body Corporate of 2 December 2013. These Minutes record:
- “9 *Liquor Licences Building 2*
- 9.1 *Despite assurances from both Toga and Knight Frank that no liquor licences would ever be granted for Building 2 because of residential apartments on the first floor, and Oyster Bar is being planned for this building.*
- 9.3 *The committee agreed to put in a Residential Body Corp objection to the Licensing Commission. There was one abstention to this vote.*”
- 25) The Minutes were tabled as evidence of authorisation of the objection subsequently submitted by Mr Caldwell on behalf of the Residents Body Corporate Committee. Mr Caldwell advised the Hearing that similar authorisation had been provided for the objection of the Principle Body Corporate Committee but that he was unable to produce the relevant Minutes as the Secretary to that Committee was overseas and not contactable.
- 26) Mr Caldwell referred to a meeting with Toga and agents acting on their behalf, at which residents were assured that there would not be licensed premises at Building two.
- 27) Mr Buckley provided the Hearing (Exhibit 13) with version one, two and three of a document titled “Information Memorandum, Wharf One Apartments” prepared by Ward Keller Lawyers. He drew the Commission’s attention to the wording of clause 7.1 of version one prepared in 2006 in which it states:
- “*The Development comprises the construction of three buildings served by a common underground car park, to be known collectively as “Wharf One”.*”

The Wharf One Development is a mixed used development that will include a retail component in which retail trade will be conducted (including food and drink outlets and the supply of other goods and services), a commercial component in which various office use activity will take place, and a residential component in which residential apartments will be situated.

The Wharf One Development will be part of a tourism and entertainment precinct, and accordingly there may from time to time be events and functions hosted within the vicinity of residential apartments."

Other subsequent versions (two and three) of the Information Memorandum have similar wording.

- 28) Mr Buckley also tabled two versions of the Contract of Sale used for the sale of residential properties at Wharf One which at clause 27 the contract contains the following wording:

"The Purchaser acknowledges that the Development will include the Commercial Scheme and the Retail Scheme, and as such there will be Lots within the Development that will be used for purposes other than residential accommodation, including without limitation, various office uses and retail trade including food and drink outlets and the supply of other goods and services. The Purchaser is not entitled to Object on the basis of any matter concerning the use of Lots within the Commercial Scheme or the Retail Scheme."

- 29) Mr Matthew Knight, Managing Director Knight Frank Darwin, was introduced as a witness for the applicant. Mr Knight advised his company provided real estate services to Toga, principally being involved in the leasing of commercial premises. He stated that he was unaware of any commitment of Toga not to have leased hospitality businesses at Building Two.
- 30) Ms Katherine Thompson on behalf of her mother Gloria Thompson made submission in objection to the application. She stated that her mother purchased a unit in Building Two as she was attracted to the understanding she had that there would be no bars or restaurants on the ground floor of the building.
- 31) In summary submissions Mr Buckley outlined that a restaurant or oyster bar was within the terms of what was advertised. He referred the Commission (Exhibit 17) to an email from Kirrily Chambers a Planner in the Department of Lands, Planning and the Environment dated 30 May 2014 which states:
- "I can confirm that the DCA when considering the spaces labelled as 'commercial' on the floor plans envisaged and anticipated these spaces would be divided into various tenancies that would be used interchangeably as shops, offices and restaurants."*
- 32) Mr Buckley advised that the applicant had amended the proposed opening hours of the Oyster Bar from 10:00am to 11:00am in response to objections. He stated that Toga had attempted to source other uses for the ground floor space

without success. In relation to the now proposed use he reaffirmed that a noise alleviation canopy would be erected at area E5 and that the applicant would substantially comply with recommendations in the VIPAC acoustic report.

CONSIDERATION OF THE ISSUES

- 33) It is apparent to the Commission that a large number of objections to the proposed liquor licence have arisen through the belief or understanding by residents that Building Two ground floor would not be occupied by liquor licensed businesses. Notwithstanding this commonly held belief, Counsel for the applicant have provided Information Memoranda and Contracts of Sale that clearly advise that Wharf One, which includes Building Two, would contain a mix of commercial users including restaurants.
- 34) Residents have pointed out the problems they are experiencing with noise and alcohol related behaviour. Police however through evidence provided by Superintendent Evans, have stated that there has been no discernable increase in incidents or problems in the Waterfront Precinct in the last twelve months and that the area is under regular Police presence.
- 35) The applicant for the liquor licence has similar venues and business model operating, apparently with some success, in South Australia and Western Australia. Both of those Oyster Bar operations are situated below residential apartments, similar to the situation presented at the proposed Darwin location. Evidence has been provided that the interstate operations co-exist well with residential occupants and that noise related issues have been dealt with so as to mitigate resident concerns.
- 36) The fear of objectors expressed in written submissions and at Hearing is that the premises will trade more as a bar than restaurant. Information has been provided that the food to beverage ratio of sales generated at the interstate locations indicate that they trade predominantly as a restaurant, albeit with an Oyster theme.
- 37) The applicant has advised that recommendations of a VIPAC acoustic report will, in general, be complied with. Noise alleviation measures will include the construction of a canopy over the alfresco area of the premises.
- 38) There are outstanding issues to address with landlord Toga and residents, including that of provision of an adequate loading/unloading bay. Such issues are not insurmountable and require sensible negotiation.
- 39) The trading hours applied for are consistent with other restaurant premises operating in the area. In this regard it is noted that the Darwin Waterfront Corporation Liquor Guidelines seek to restrict alfresco areas to 10:30pm and internal areas to 11:30pm. These guideline hours are largely to limit noise impacts on residents. With careful management oversight and control the Commission considers the trading hours applied for can be accommodated with minimal impact on residents.

- 40) Noise will need to be carefully controlled and be in accord with VIPAC recommendations and take into consideration the limits set in the Waterfront Corporation Guidelines.

DECISION

- 41) The Commission grants the licence applied for at Hearing, that is the Oyster Bar is permitted trading hours from 11:00am to 12:00 midnight, seven days a week.
- 42) A noise condition restricting the noise emanating from the premise so as not to cause unreasonable disturbance to the comfort of residents is to be incorporated in the licence. The licensee will also be required to have a noise alleviation canopy constructed above the alfresco area of the premises.



Richard O'Sullivan

CHAIRMAN

26 June 2014

