

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Darwin City Waterfront
<b>Applicant:</b>	DCWH Hospitality Pty Ltd
<b>Proceedings:</b>	Hearing into Application for the grant of In Principle New Liquor Licence and to Consider Objections Pursuant to Section 47F(2) of the <i>Liquor Act</i> (a) the amenity of the neighbourhood where the premises subject of the application are or will be located; or (b) health, education, public safety or social conditions in the community.
<b>Members:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr John Brears
<b>Objectors:</b>	Brevet Sergeant ES Mitchell (NT Police) Mr Ian Morris, Chairman Bridgeport Body Corporate Mr Chas Carter, Resident, Bridgeport Mr Richard Layton, Resident Bridgeport
<b>Appearances:</b>	Ms Judith Kelly SC for the applicant, instructed by Mr Graeme Buckley Mr Alastair Wyvill for the Bridgeport Objectors Mr Richard Bruxner for the Commissioner of Police instructed by Ms Alison Worsnop Licensing Inspector Peter Boyle
<b>Date of Hearing:</b>	6 & 7 November 2008

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## Background

- 1) Mr Adrian Findlay, on behalf DCW Hospitality Pty Limited ("DCWH"), has made an application for the grant of an in principle Tavern Licence for the sale of liquor from premises situated on the ground floor of the Hospitality Building and located within the Medina Hotel at the Darwin City Waterfront ("the Premises"). DCWH, ACN 112 313 185, is a subsidiary of the Toga Group of Companies (TOGA). DCWH advised in the application that it is seeking the grant of an in principle liquor licence to assist in the leasing of the Premises with a view to the in principle Tavern Licence being transferred to the eventual lessee / licensee once the prospective lessee is identified.
- 2) The Application was advertised in the Northern Territory News on 25 and 27 June 2008 pursuant to Section 32A of the *Liquor Act* ("the Act"). The application states that the applicant applies for "in principle" approval for a Tavern Licence for consumption of liquor on the premises. The application as advertised sought trading hours for the sale of liquor from 10.00am until 3.00am the following day seven (7) days a week, with bar service ceasing at 2.00am.
- 3) Following advertising and placement of the advertising signage four (4) objections to the application were received. These were from:
  - Brevet Sergeant ES Mitchell (Northern Territory Police);

- Mr Ian Morris, Chairman, Bridgeport Body Corporate;
- Mr Chas Carter, Resident, Bridgeport;
- Mr Richard Layton, Resident, Bridgeport.

#### **Objection from Brevet Sergeant ES Mitchell, Northern Territory Police**

- 6) The grounds of the objections raised by Mr Mitchell included -
- a) Objection to the proposed trading hours of 10.00am to 3.00am seven (7) days a week,
  - b) Proximity of the proposed premises to existing and similar licensed premises,
  - c) Proximity of the proposed premises to residential areas and potential for noise and property damage issues,
  - d) Waterfront access of the proposed premises and potential harm for patrons of the proposed premises, and
  - e) Security issues, including security for the safety of patrons leaving the premises late in the evening on foot.

#### **Objection from Mr Ian Morris, Chairman, Bridgeport Body Corporate**

- 7) Mr Morris is a resident of Bridgeport and the Chairman of the Body Corporate for the residential complex. Mr Carter and Mr Layton are also residents of Bridgeport. The objections lodged by those parties are similar in nature, and for the purposes of this decision, may be dealt with collectively.
- 8) Mr Morris' objection raised the issue of the applicant's failure to demonstrate the need for the trading hours specified by the application and the need for the entertainment proposed for the premises.

The three (3) objectors raise issues of:

- Objections to the proposed trading hours of 10.00am to 3.00am seven (7) days a week;
- The proximity of the proposed premises to residential properties and the potential for noise and anti-social behaviour problems, including property damage, likely to effect residents;
- The lack of a suitable area for dropping off and picking up patrons of the proposed premises and potential traffic hazards;
- The potential for noise issues affecting residents of Bridgeport given the extended trading hours and the possibility of "outside" entertainment; and
- The prospect of a further application for a second tavern licence at the Darwin City Waterfront site in the future.

#### **Applicant's Response to Objections**

- 9) The objections were forwarded to the applicant under cover of a letter dated 30 July 2008. Mr Findlay provided a response to the objections by letter dated 18 August 2008. Mr Findlay did not refer specifically to the objections in his response but rather provided "additional information" as follows:
  - (a) Preserving the amenity of the area will be paramount to ensure the quiet and comfortable enjoyment of the area by hotel patrons;

- (b) There will be no access to the premises from Kitchener Drive, and no outdoor seating along this frontage, and any outdoor entertainment area will be on the water frontage side of the building;
- (c) Increased security staff will be engaged for high volume patronage events;
- (d) The ultimate licensee will employ measures to provide for the responsible service of alcohol; and
- (e) Measures will be implemented to limit noise emanations from the premises for the comfort of hotel guests and residents in the vicinity.

## Hearing

- 10) All four (4) objections were assessed as being valid and in accordance with the requirements of the Act. As a result the application was referred to a hearing before the Commission, convened on 6 and 7 November 2008 in Darwin.
- 11) At the commencement of the hearing Mr Buckley advised the Commission that the applicant had prepared maps showing the location of the Premises in respect of the Darwin City Waterfront precinct. Ms Kelly suggested that a viewing of the Premises by the Commission may be of assistance. The Chairman confirmed that the Commission was agreeable to and would benefit from a site inspection.

## Application for Adjournment

- 12) At this point Mr Wyvill sought to make preliminary submissions in respect of the application generally and, in particular, in support of an application for an adjournment of the proceeding. Mr Wyvill tendered into evidence the following materials:
  - Extract from Part 8 of the NT Planning Scheme – Darwin City Waterfront Planning Principles and Area Plan (Exhibit 1)
  - Report dated 13 June 2008 - VIPAC Engineers and Scientists – Darwin Waterfront Hospitality Building: Tavern – Acoustics (Exhibit 2)
  - Bridgeport's proposed License Conditions re Application by DCWH (Exhibit 3)
- 13) Mr Wyvill then sought an adjournment of the hearing on the basis that his clients had only received the VIPAC acoustics report on the day before the hearing and had not had time to consider the report in detail or to obtain their own assessment of that report. Mr Wyvill noted that the VIPAC report was dated 13 June 2008 and submitted that the applicant had ample opportunity to provide the objectors with a copy of the report well before the hearing date.
- 14) Mr Wyvill further submitted that, as far as he understood the situation, there were a number of liquor licence applications on foot for the Darwin City Waterfront precinct and that these should be heard at the same time. He submitted that a piece meal consideration of numerous licence applications prevented the Commission from properly exercising its functions in respect of the impact of the grant of various licences on the Waterfront precinct and the neighbouring community. Mr Wyvill added that the separate consideration of numerous licence applications in the Waterfront precinct would severely stretch the resources of residents in the neighbourhood in terms of their capacity to legitimately participate in licence application hearings.
- 15) In support of his submission, Mr Wyvill advised the Commission that building works for stage 1 of the development were complete and any proposed licences for that stage could and should be brought now. Also, the VIPAC report sets out noise abatement standards and conditions that the objectors from the Bridgeport apartments wish to be taken into account in the Commission's deliberations.

- 16) Ms Kelly, on behalf of the applicant, opposed the application for an adjournment. She informed the Commission that it was not possible to bring any further liquor licence applications before the Commission at this stage as the Waterfront precinct was intended as a mixed use area including a variety of restaurants, retail outlets, residential premises and hotel accommodation. Tenants likely to take up leases over the commercial premises had yet to be identified in many instances. Ms Kelly advised further that applications for liquor licences associated with the Medina and Vibe hotels were in train and that, whilst DCWH would be the licensee for some of those licenses, it would not be the licensee for the Premises the subject of this hearing.
- 17) Ms Kelly further informed the Commission that the date on the VIPAC report was incorrect and the report was in fact an extract prepared on 24 October 2008 from an earlier report prepared by VIPAC providing recommendations to the developer in respect of acoustic requirements and recommended noise abatement measures. The date shown on the report was in fact the date of the original report and not the date on which the extract was prepared. She submitted that there was no requirement for the objectors to obtain their own acoustics report as the engineer responsible for the VIPAC report was available to give evidence at the hearing, including being available for cross examination by counsel for the objectors.
- 18) Ms Kelly submitted that the VIPAC report presented the worst case scenario in terms of the impact of noise emanating from the Premises on neighbouring properties. She stated that DCWH will impose stringent noise conditions in the lease with the ultimate licensee of the Premises. Ms Kelly added that the Medina Hotel will be developed as a 5 star hotel and Premises will not be operated as a tavern of the type found in Mitchell Street.
- 19) Ms Kelly submitted that the factors included in the extract from the Planning Scheme in terms of noise issues could be taken into account by the Commission but not to the extent suggested by Mr Wyvill. The objectors had availed themselves of the opportunity to the development of the Hospitality Building itself when the application was under consideration by the Development Consent Authority ("the DCA") and yet the DCA had approved the proposal. Ms Kelly confirmed that the applicant was bound to comply with the Planning Scheme and any directives issued by the DCA in terms of the development. Ms Kelly noted particularly that the DCA had specifically approved the development of a hotel with a tavern / bar on the ground floor.
- 20) Mr Bruxner, on behalf of the Commissioner of Police, advised the Commission that he supported the application for an adjournment and the submissions of Mr Wyvill in terms of noise issues and a response to the VIPAC report. He suggested that the applicant could use the time to present a more detailed proposal of the concept of the Premises and the type of business proposed to be operated from the Premises. He submitted that whilst a tavern within a 5 star hotel development may not present the same types of problems experienced at other venues the current application does not contain sufficient detail regarding the nature of the business and the concept of the Premises for the Commission to make a properly informed decision.
- 21) Mr Bruxner advised that he also understood that further applications for liquor licences within the Waterfront precinct had been lodged and that the Commission should be considering such applications in the totality of the development and not on an ad hoc basis. In closing, Mr Bruxner queried the principles applicable to the Commission's deliberations in respect of an application for the grant of an in principle licence where the prospective licensee and the precise nature of the business to be conducted on the Premises have yet to be determined.
- 22) Ms Kelly responded by advising the Commission that Mr Copland, a representative of TOGA, would be able to provide advice regarding other licence applications to be made by DCWH. Inspector Boyle confirmed that no further applications for liquor licences at

the Waterfront precinct had been lodged to date. Ms Kelly responded to the effect that further applications would be lodged in the very near future.

- 23) Following a brief adjournment the Chairman advised the parties that the Commission was not minded to grant the adjournment and that Commissioners would benefit from hearing details of the proposed development from the applicant, including the evidence of the sound expert to be called on behalf of the applicant. Further, any prejudice arising to the objectors as a result of the late receipt of the VIPAC report could be remedied by adjourning the hearing part heard or, alternatively, by allowing the objectors to make written submissions, including obtaining their own expert advice, following the conclusion of the hearing.

### **Evidence Presented on Behalf of the Applicant-Mr Bruce Copland**

- 24) Ms Kelly tendered a letter from Mr Pat Coleman, Chief Executive Officer of the Darwin Waterfront Corporation, in support of the application (marked as Exhibit 4). The Chairman also noted that the Commission had received a copy of a letter from Mr Ian Morris to the solicitors for the applicant, dated 3 November 2008, seeking details of all proposed liquor licence applications for the DCWH. That letter was admitted in evidence and marked as Exhibit 5.
- 25) At this point Ms Kelly was invited to present evidence on behalf of the applicant. Mr Bruce Copland, a director of a number of companies in the Toga Group was called to give evidence. Mr Copland referred to two (2) maps depicting the building plan for the Medina Hotel and an overall site plan for the DCWH development, subsequently marked as Exhibit 12.
- 26) Mr Copland is a current board member of Toga Hospitality and prior to 30 June 2007 was the CEO of Toga Hospitality. However he is not a director of the applicant company, DCWH. The Toga Group operates a number of hotels throughout Australia trading as Medina Hotels, Vibe Hotels and the Travelodge chain.
- 27) Mr Copland advised that TOGA had incorporated DCWH to develop and operate a Medina Hotel and Vibe Hotel within the Waterfront precinct. He also advised the Commission that the main public car park within the precinct would be managed by Government. The neighbouring residential area, described as "Wharf One", was intended as a mixed use building with retail outlets, professional offices and residential apartments. The retail outlets may include licensed premises, such as restaurants and the like, however at this stage it was not possible to predict what liquor licences may eventually be required. At this point a folder of promotional brochures for various TOGA properties was tendered as Exhibit 6.
- 28) Mr Copland informed the Commission that both hotels, the Medina and the Vibe, would be in the 4 to 5 star range and comparable to similar hotels operated by TOGA in other locations. The Medina Hotel was planned as a multi purpose venue including a bar and restaurant and meeting rooms. The Waterfront precinct master plan had been developed in conjunction with the NT Government and various partners in the development consortium were involved in specific aspects of the development, with the Hospitality Building being a key obligation of DCWH under its agreement with Government.
- 29) Mr Copland stated that the Premises would be located in the Medina Hotel area of the Hospitality Building with other areas of the Hospitality Building to be occupied by a bar/restaurant, day spa, cafes and specialty stores, namely a similar concept as that proposed for the residential building at Wharf One. The development includes the building of a bridge from the end of Smith Street to the rooftop level of the Hospitality Building, allowing access to retail premises proposed for the building, including the elevated areas adjoining the elevated walkway. Whilst there were no confirmed tenants for the commercial areas of the Hospitality Building at present, Mr Copland indicated

that he expected the development to include two (2) to three (3) restaurants and possibly a wine bar. He advised that the bridge and walkway to the CBD are to be managed by the Darwin Waterfront Corporation.

- 30) Mr Copeland advised that the Medina Hotel would include an internal car park exclusively for the use of guests of the Hotel and that patrons of the Premises were expected to use the 500 space public car park or to access the ground level via the overhead bridge and lifts. In addition, taxi drop off / pick up for patrons of the Premises would be at the same point as the taxi drop off and pick up for the Medina and Vibe Hotel guests.
- 31) The majority of guests of the hotels were expected to be drawn from delegates attending conferences at the Darwin Convention Centre, business people and holiday visitors. Significant interest had been shown to date on the part of tour operators. Mr Copeland estimated that the mix of business and tourist guests was expected to be in the range of 65% / 35%. He submitted hotel guests and residents at the Waterfront precinct are estimated at approximately 1,000 generating a requirement for five (5) to six (6) restaurants or bars.
- 32) Mr Copeland advised that DCWH (and TOGA), is not in the business of operating themed bars and was seeking a lessee to operate a tavern at the Premises including a micro brewery similar to those operating in Canada and the USA. The Premises are intended to have a themed atmosphere with a deliberate "old" feel, for example an Irish pub theme.
- 33) Mr Copeland advised that DCWH was aware of the impact that potential noise emanating from the Premises may have on house guests of the Medina and Vibe Hotels. He referred to the Medina Design Manual and the extract relating to the Acoustic Brief (Exhibit 7) which sets out maximum tolerable internal noise levels at various places within the Hotel. The maximum noise level tolerable for bedrooms is specified in that document as 35 dB(A), that is the level stipulated in arrangements for accommodating air flight staff. Mr Copeland stated that compliance with the standards specified in the Acoustic Brief would eliminate the issues raised by the objectors in terms of noise from the Premises affecting surrounding residences.
- 34) The VIPAC report (Exhibit 2) was commissioned in order to obtain advice in regard to noise attenuation issues. Mr Copeland advised that the wall thicknesses recommended by the noise experts have in fact been exceeded in the construction of the Hospitality Building. Similarly, the report specified laminated glass thickness at a minimum of 13 mm whereas DCWH had specified 19 mm minimum thickness. Those components of the construction are already in place and are not part of the fit out to be carried out by the prospective lessee. Mr Copeland advised further that the glazing comprised fixed and operating windows and that some of the windows are capable of being opened.
- 35) Referring to the recommendations contained at page one (1) in the VIPAC report, Mr Copeland made the following observations.
  - It will be a condition of the lease with the prospective licensee that music played at the Premises will not exceed 80 dB at 3 metres from any speaker at any time;
  - The glazing installed at the Premises will exceed the thickness recommended by the VIPAC report;
  - All doors and operable windows, with the exception of toilet vents, will be fitted with acoustic seals;
  - Mr Copeland submitted that the recommendation to keep all doors and windows closed whilst entertainment was provided was excessive and unnecessary;

- A condition will be included in the lease that no speakers are to be installed outside the Premises;
  - Mr Copeland advised that DCWH did not agree that the VIPAC recommendations should be incorporated as conditions of the liquor licence. He advised that such a recommendation exceed the expert's brief;
  - The vergola blades were no longer an issue as they would not be installed as originally planned;
  - Mr Copeland submitted that the requirement to post signs advising patrons to respect residents rights when exiting the Premises was over the top and an excessive impost;
  - Mr Copeland also submitted that the requirement to have security officers patrolling the area outside the tavern to monitor the noise generated by and the behaviour of exiting patrons of the tavern was excessive and, in his experience, such a requirement was not necessary at venues of the similar nature to that proposed for the Medina Hotel. He added that no Medina or Vibe premises elsewhere have problems requiring that level of preventative measure.
- 36) At this stage Ms Kelly formally tendered a statement of Mr Copeland including attachments, marked as Exhibit 8, and advised the Commission that she had concluded with Mr Copland's evidence in chief. Annexure "E" to the statement is a document setting out the condition relating to Noise Control to be included in the lease with the lessee/licensee of the Premises.

### **Cross Examination of Mr Copland by Counsel for the Objectors**

- 37) Mr Wyvill queried Mr Copland regarding the floor area of the tavern that was used in the calculation of the rent for the premises. Ms Kelly objected to the question on the basis of commercial sensitivity. Mr Wyvill responded that his question was not in respect of commercial viability but rather the volume of people that may patronise the premises at any given time. Ms Kelly stated that her objection was also based on Section 47H of the Act, namely the limitation of the evidence of objectors to the grounds set out in the formal letter of objection.
- 38) Mr Bruxner submitted that this application for a licence in principle, if granted, would result in a licence being issued to DCWH and subsequently transferred to a third party, unknown at the this stage. That process would provide no opportunity for the objectors to make further submissions at the time of the prospective transfer, regardless of the type of business to be operated from the Premises by the incoming Licensee.
- 39) Commissioner Brears queried Mr Copland as to whether he could obtain the information requested by Mr Wyvill over the luncheon break, including traffic numbers anticipated for the tavern. At this stage the hearing was adjourned for the luncheon break.

### **Viewing of the Premises**

- 40) Following the luncheon adjournment the Commission and the parties took part in an inspection of the Medina Hotel site and the proposed tavern premises.

### **Resumption of Hearing**

- 41) The hearing resumed at 3.05 pm with the continuation of the cross examination of Mr Copland. He advised the Commission that similar venues currently under TOGA's management were the Medina on Crown, Surrey Hills, with a bar/hotel area of 348 square metres and the Vibe North Sydney with an area of 1200 square metres.

- 42) Mr Wyvill then resumed his cross examination of Mr Copland who advised that no analysis of prospective patron numbers for the Premises had been conducted. In response to further questions, Mr Copland advised that whilst no prospective tenant had been identified at this stage DCWH had a view of the type of tenant being sought and that whilst other concepts may be viable his organisation was keen for a micro brewery following the theme established at a number of premises in Canada. Mr Copland advised that whilst the Premises would not be styled as a family restaurant there would be such a facility in the Medina Hotel although there were no plans for fast food outlets.
- 43) In response to further questions, Mr Copland informed the Commission that a tavern could not be located elsewhere in the Medina Hotel due to limitations on ceilings heights and the like, nor was it practical to locate the tavern elsewhere in the Waterfront Precinct due to distances from the Medina and Vibe Hotels and the Darwin Convention Centre. He confirmed that the Premises, as currently located, had been specifically designed for the purpose of a tavern.
- 44) Mr Wyvill referred Mr Copland to the Medina Design Manual, Exhibit 7, and submitted that whilst internal noise issues had been addressed there was no consideration of the impact of noise on neighbouring residences. Mr Copland confirmed that the sound experts were not specifically requested to address noise issues beyond the bounds of the Medina Hotel.
- 45) Mr Wyvill then referred Mr Copland to the application for a development permit referred to the DCA, suggesting that there was no disclosure to the DCA regarding prospective patron numbers or traffic issues that may arise from patrons accessing and leaving the Premises. Mr Copland advised that the DCA submission was prepared by Barclay Mowlem and was not a DCWH document. However, he confirmed that potential patron numbers were not presented to the DCA as, at that earlier stage, the developers were similarly not aware what those numbers may be.
- 46) Mr Bruxner queried when the premises were likely to be open to the public. Mr Copland advised that they hoped to open the Premises at the same time as the Medina Hotel and that DCWH was in negotiations with prospective tenants now. He also advised that whilst themes had been discussed none of the parties currently involved in negotiations to lease the Premises had committed to a theme or concept for the proposed tavern. Mr Copland confirmed that DCWH is however committed to a strongly themed bar and restaurant, preferably including a micro brewery.
- 47) In response to a question regarding crowd controllers and patron security, Mr Copland responded that DCWH did not intend to engage crowd controllers at this Medina Hotel any more than they do at other Medina premises as they do not experience the type of issues likely to warrant crowd controllers. He stated further that security arrangements would be a matter for the management of the Premises once the lease was taken up.

## **Adjournment**

- 48) Mr Copland stood down and the hearing was adjourned at 4.45 pm to be resumed at 9.45 pm the following day.

## **Resumption**

- 49) The Hearing resumed at 10.05 am on Friday 7 November 2008 with Mr Copland re-entering the witness box. In response to a query from the Chairman, Mr Copland advised that there would be two (2) drop off points for patrons attending the Premises by taxi. Firstly towards the centre of the hospitality building (the Medina Hotel entrance) and secondly at the car park at the front of the Convention Centre, which already included a permanent taxi rank.



- 50) Mr Wyvill advised the Commission that he had no further questions of Mr Copland. Mr Bruxner reserved his position in that regard pending discussions with his client, Superintendent Mark Stevens.
- 51) Ms Kelly, in re-examination, raised the issue of patron number with Mr Copland. He advised that whilst the total floor space of the tavern was approximately 900 square metres 200 to 300 square metres would be lost to “back of house” facilities, including potential patron space lost to the area required for the micro brewery. Décor and dining furniture would further reduce the useable area to around 500 square metres.
- 52) Commissioner Brears expressed his surprise that the Fire Service had not already been consulted in respect of patron numbers. Mr Copland responded that the final fit out and patron numbers that could be accommodated would be a matter for the prospective tenant. He added that whilst DCWH does not have expertise in the operation of themed taverns he could not conceive that more than 600 square metres would ultimately be available for patron use once fittings and furniture were installed.
- 53) Mr Wyvill queried whether patron numbers had been examined in terms of the financial viability of the venture. Mr Copland responded that figures and patrons numbers may have been looked at for the purpose of calculating rent there had been no firm establishment of potential patron capacity of the Premises. He indicated he had provided the best available information regarding potential floor space for the Premises and that patron numbers could not exceed the normal patron / square ratio specified by the Fire Service.
- 54) Mr Wyvill submitted that, in the absence of information regarding the specific patron numbers that may be able to use the Premises at any given time the Commission was unable to properly perform its statutory function of assessing whether or not the licence in principle should be granted. He added that without details of potential patron numbers the Commission could not assess the objections properly as they related to noise and traffic issues affecting neighbouring residents nor could it properly consider the application in terms of the objects of the Act.

## **Evidence of Mr Ivailo Dimitrov**

- 55) Mr Dimitrov informed the Commission that he was engaged as the Principal Engineer, Acoustics with VIPAC Engineers and Scientists Ltd. He has been with the company since 2000 and has held the position of Project Team Leader NT / WA since 2005. Mr Dimitrov confirmed he is the author of the VIPAC report tendered as Exhibit 2.
- 56) Mr Dimitrov confirmed in evidence that the recommendations set out on the front page of his report, if adhered to, would achieve the purpose of limiting noise emanating from the premises to the levels set out in the report. The reference point for noise measurements was taken as being 4 metres from the balcony of a hotel room in the Medina Hotel. He noted that the Bridgeport complex was some 50 metres from the Medina Hotel and he estimated that noise levels at Bridgeport would be approximately 20 dB lower than experienced at the Hotel. That estimate was based on there being a 6 dB reduction in noise for every doubling of the distance from the source of the noise. He advised that there would be a further reduction in noise emanation so far as Bridgeport is concerned as the Medina Hotel and proposed tavern face in the opposite direction and that opening windows face onto the wave lagoon side of the site. In addition, Mr Dimitrov advised that the noise reaching Bridgeport from the Premises would be further reduced as there was no direct line of sight between the 2 buildings.
- 57) So far as the proposed alfresco dining area is concerned, Mr Dimitrov commented that the Medina Hotel building would act as a shield to deflect noise towards the Convention Centre and wave lagoon. Referring to page 7 of his report, Mr Dimitrov advised that, in his opinion, noise emanating from the alfresco area would be further reduced with the construction of some form of canopy over that area. He noted that the report referred to

vergola blades being installed for this purpose however that is no longer the intention of the developer and a fixed canopy structure is now proposed.

- 58) Mr Dimitrov confirmed that his brief from DCWH was to provide acoustic advice in respect of the design and commercial fit out of the Hotel and the Premises. He confirmed that his intent was that the acoustic recommendations would be incorporated as conditions of the lease entered with the ultimate tenant.

### **Cross Examination of Mr Dimitrov**

- 59) Mr Wyvill referred the Commission to a further memorandum from VIPAC dated 19 August 2008 and noted that his was not included as part of Exhibit 2. Ms Kelly informed the Commission that the document referred to was a draft that should not have been provided to Mr Wyvill.
- 60) Under cross examination Mr Dimitrov confirmed that the VIPAC report (Exhibit 2) was based on noise standards applicable in South Australia and that the document tendered to the Commission was an extract from a larger document that considered the noise implications of music / entertainment, traffic and people noise.
- 61) In response to a question regarding the recommendation in the VIPAC report that certain measures be made conditions of licence, Mr Dimitrov responded that that was an error in the drafting of the report. He confirmed that some of the recommendations would be suitable for inclusion as a licence condition, such as the requirement that no speakers be placed outside the building and that noise levels emanating from the tavern be kept below 80 dB at all times.
- 62) Mr Dimitrov stated, in response to a question from Mr Wyvill, that he did not see that it was necessary to know the number of people patronising the Premises to be able to assess the impact of noise on the residents of Bridgeport. His report and recommendations were more concerned with the type of activity conducted on the Premises rather than the number of patrons at any time.
- 63) Mr Dimitrov stated that, so far as sound travelling was concerned, there was no measurable difference between sound travelling horizontally compared to sound travelling vertically. Mr Dimitrov stated that he thought his brief included a requirement to assess noise level once the development was completed and operational. He confirmed that this was the normal approach for his line of work.
- 64) At this point Mr Copland informed the Commission that he could not recall the precise terms of the agreement with VIPAC however he did anticipate that any noise management plan produced for the Premises would contain minimal requirements so long as the premises complied with the DCA requirements. Noise emanations post completion will need to be assessed and measured to ensure compliance with the matters specified by the DCA.
- 65) The Chairman questioned Mr Dimitrov as to whether he had made any assessment of the impact of noise generated by people congregating at the roundabout at the rear of the Premises. Mr Dimitrov referred to page 7 of the VIPAC report where an assessment was provided of the likely noise impact of "late night revellers leaving the tavern" (assumed maximum 77dBA) and vehicle noise (assumed maximum 88 dBA). The report however comments on anticipated noise levels at the apartments in the Medina Hotel and not at neighbouring premises such as Bridgeport. Mr Dimitrov stated that he believed his estimates assumed 5 to 7 people congregating and that doubling the number of people involved would potentially increase the noise level by up to 3dBA. He added that such estimates were not precise and the noise level may increase with more people or it may stay the same.
- 66) In response to questions from Ms Kelly in re-examination, Mr Dimitrov stated that noise from the Premises would not necessarily be reflected off the Convention Centre back

towards Bridgeport and any such noise is more likely to spread and dissipate. He also stated that the human ear cannot detect an increase in noise level of less than 3dB.

- 67) At this point Ms Kelly tendered the draft document, referred to earlier by Mr Wyvill, prepared by VIPAC dated 19 August 2008 and titled "Commercial Fit-outs – Performance Criteria Summary" (Exhibit 10) and confirmed that the ultimate tenant of the Premises will be required to comply with the recommendations contained in that document.
- 68) Ms Kelly then informed the Commission that she did not intend to call any further witnesses in support of the application.

## **Evidence of the Objectors**

- 69) Mr Wyvill informed the Commission that he intended to call six (6) witnesses. He confirmed that his clients were not opposed to the development per se, including the proposed tavern, however they did not want to see the development turn into "Shenanigans on the Wharf" with the noise and nuisance issues that would inevitably follow and impact on his clients and the amenity of their residences.

## **Dr Adam Tominson**

- 70) Dr Adam Tominson, the proprietor of Unit 8 at Bridgeport, entered the witness box. He informed the Commission that he had resided in the NT for 4 ½ years and had lived at Bridgeport for 3 to 4 years. Mr Tominson stated that was aware of the Waterfront precinct development when he purchased the property at Bridgeport and he saw that as a positive. He advised that Unit 8 was on the east side of Bridgeport, overlooking the roundabout on the corner of Kitchener Drive and McMinn Street
- 71) Mr Tominson gave evidence that since the commencement of construction he had been disturbed by issues such as construction noise, noise from passing trucks and traffic, swearing and shouting by people leaving the Waterfront Precinct, graffiti and criminal damage by trespassers, including youths painting graffiti near the Bridgeport pool area and damage to vehicles and fixtures at Bridgeport. He stated that the problems were increasing as patronage of the area increases. Whilst busses and taxis were able to clear most people exiting the Convention Centre this was not always the case and the waiting time for the arrival of taxis appeared to be a problem. He stated that he had observed people congregating at and being picked up from the roundabout.
- 72) Mr Tominson stated that noise from the Waterfront precinct was intrusive and that he had been forced to close the windows of his unit and turn on the air conditioning to minimise that impact inside his unit. He advised that he was most disturbed on weekends between 12.00 noon and 1.00 am and that the noise disturbance was not constant but regular. Mr Tominson stated that he did not use his balcony often due to the noise and that he had on occasion been required to turn on the sub title facility on his TV due to noise from traffic and passers by.
- 73) Mr Tominson concluded his evidence by stating that he was not convinced that noise from the alfresco venue at the Premises will be kept at an acceptable level or that patrons will exit the Premises by the routes intended for that purpose by the developers. He stated that Bridgeport was a residential complex with a genteel environment, occupied predominantly by professionals and that the development, including the proposed tavern, had the serious potential to impact on that lifestyle.

## **Mr Bill Stuchbury**

- 74) Mr Stuchbury is the joint proprietor of Unit 10 at Bridgeport. He informed the Commission that he had been a resident of the Territory for 26 years and had resided at Bridgeport, where he intended to retire, for 2 years. He advised that he concurred with

the evidence of Dr Tominson in terms of the impact of noise from the construction and increased patronage of the Waterfront precinct.

- 75) Mr Stuchbury advised that noise generated by pedestrian traffic had increased significantly in recent times, including from persons visiting the World War II tunnels. He said that he could hear normal level conversations of passers-by at street level and from workers on the construction site from 50 to 80 metres away from his residence and that even low volume noises seemed to be amplified at his unit.
- 76) Mr Stuchbury stated that the problems were further exacerbated by numerous people leaving the Convention Centre on foot and making their way to the CBD via Travellers Walkway that runs directly past Bridgeport. He said the noise at some times was such as to make it impossible for him to comfortably use his balcony. Mr Stuchbury also stated that he had noticed a recent increase in traffic, including drivers speeding in the area and, on a couple of occasions, driving across the roundabout on Kitchener Drive.
- 77) Mr Stuchbury informed the Commission that he was not opposed to the development of the Waterfront precinct however he was concerned about the impact that the development, including the proposed tavern, may have on the amenity of his residence. He stated that, as he saw it, if the licence in principle was granted the objectors would have no further recourse in respect of the type of venue that would be operated from the Premises. Mr Stuchbury concluded his evidence by stating that his major concern was the type of venue that would operate at the Premises and the noise it may generate and at present he had insufficient information of what the developer, and more relevantly the proposed licensee, had in mind for the venue.

### **Ms Jill Morris**

- 78) Ms Morris is the joint proprietor of Unit 9 at Bridgeport. She informed the Commission that she had been a resident of the Territory for 28 years, has resided at Bridgeport since August 2003 and intends to reside there for the foreseeable future.
- 79) Ms Morris advised the Commission that it has been a difficult time for Bridgeport residents over the past 4 years since the Waterfront precinct development commenced. Noise from street level seems to be amplified in the Bridgeport apartments and residents have been subjected to construction noise seven (7) days a week.
- 80) Ms Morris stated that the development itself and the increase in pedestrian traffic are a concern to residents who have had to consider additional security including fencing to prevent trespassing by people moving from the Waterfront to the CBD via Travellers Walk, which runs very close to Bridgeport.
- 81) Ms Morris advised that she and her husband had installed double glazing in the main bedroom of their apartment in an attempt to reduce noise emanating from development construction, general traffic noise and revellers making their way home from functions at the Convention Centre and elsewhere in the Waterfront Precinct. Ms Morris stated that the double glazing had some positive effect however this did not eliminate all noise emanating from the Waterfront Precinct and certainly not in other rooms of the apartment, including the balcony.

### **Mr Charles (Chas) Carter**

- 82) Mr Carter is the proprietor of Unit 13 at Bridgeport. He has been a resident of the NT for 31 years and has resided at Bridgeport for approximately 11 years, having purchased the unit for his retirement.
- 83) Mr Carter referred the Commission to the hammering noise that was audible during the site visit the previous day and advised that such noises were clearly audible from within his unit. He stated that he personally doubted the expert evidence that sound does not

readily travel upwards any more than horizontally. Mr Carter stated that conversations conducted at normal volumes at street level were clearly audible from his balcony and interfered with him being able to entertain on the balcony. He stated that he expected that noise emanating from the proposed tavern at the Premises would further impinge on the amenity of his residence, particularly his use of the balcony. In Mr Carter's opinion the disturbance from noise has increased since the hotel buildings have been constructed.

- 84) Mr Carter advised that increased foot traffic past the Bridgeport complex had led to an increase in anti-social behaviour and that residents' vehicles had been interfered with several times. In addition, security lights installed at Bridgeport had been vandalised by trespassers. Mr Carter suggested that this type of behaviour was likely to increase with the opening of the tavern and the increase in patrons using the venue, more so as he understood the walkway to the CBD was to be closed at midnight leaving late night revellers exiting by foot with little option other than to access the CBD via Travellers Way.
- 85) Mr Carter also expressed to the Commission his concerns that antisocial behaviour would increase with the opening of a tavern, bringing with it the potential for arguments and brawls on the street below his residence together with a potential increase in crime. Mr Carter also expressed his concerns regarding the impact of noise from service, garbage and delivery vehicles accessing the rear of the Medina Hotel located immediately below his unit.
- 86) Mr Carter noted and commended the measures being implemented by the developers to minimise noise emanating from the Medina Hotel and proposed tavern. However, he submitted that should a licence be granted for the Premises there should be a condition incorporated in the licence requiring monitoring of the performance of the prospective licensee to ensure compliance with their own imposed noise levels and standards as well as any conditions the Commission may impose.

## **Superintendent Mike Stevens**

- 87) Mr Stevens informed the Commission that he is currently OIC Darwin Operations, which includes the Darwin CBD. He currently has approximately 70 officers under his command.
- 88) Mr Stevens gave evidence that alcohol related matters amounted to approximately 70% of the work of his command with the focal points in the CBD being Mitchell Street and the City Mall. So far as licensed premises are concerned, problems requiring Police intervention begin at opening time for licensed premises and then escalate throughout the day. In Mr Stevens' opinion one of the triggers for problems is the management of licensed premises. Whilst hotel security looks after patrons when they are inside the premises, intoxicated and troublesome patrons become a police problem once they are ejected onto the streets, leaving those patrons to be dealt with by Police either as potential victims of crime or alternatively the cause of antisocial and criminal behaviour.
- 89) Mr Stevens advised the Commission that he had concerns that some patrons leaving the proposed tavern at the closing time of 2.00 am would make their way to late night trading venues in the CBD that remained open until 4.00 am. He advised that Police resources were currently stretched, including the manning of Operation City Safe which involved a number of uniformed officers operating from 10.00 pm to 6.00 am on weekends in high visibility roles at licensed premises. Mr Stevens opined that The City Safe initiative was resulting in a downward trend in problems associated with late night venues.
- 90) A further concern of Mr Stevens is the lack of transport available for patrons of licensed venues leaving the CBD late at night and the drain that an additional venue would place on the availability of taxis to ferry passengers home. Mr Stevens confirmed that the safe

taxi rank in the city appeared to be slowly improving the situation however many taxi drivers were still not prepared pick up fares from the city late at night.

- 91) Mr Stevens stated that currently there was significant demand for taxis in Mitchell Street at closing time and taxis were, in his opinion, unlikely to travel the extra distance to pick up fares from the Waterfront Precinct. He added that despite the fact there was a car park at the front of the Convention Centre the roundabout was the easiest point for pick ups and that was likely to be the place used by persons exiting the Premises. Similarly, Mr Stevens is of the view that patrons returning to the CBD on foot would be likely to leave the Premises via the roundabout and Traveller's way, more so if the overhead bridge was closed as midnight.
- 92) Referring specifically to this licence application, Mr Stevens advised the Commission his main concern was the opening of another late night trading venue at the other end of town from the Mitchell Street precinct, where most of the alcohol related problems currently occur. In Mr Steven's opinion granting a licence to 3.00 am to a venue at the Waterfront precinct was likely to attract late night revellers from Mitchell Street. He advised that a further licence would place an additional burden on Police resources and potentially add to antisocial behaviour in the CBD.
- 93) Mr Stevens also expressed his concern in regards to the safety of patrons of the proposed Premises given its location. He advised that the walk from the CBD (Mitchell Street) to the Waterfront Precinct was through areas that were not particularly well lit at night, creating the potential for assaults and robbery on persons travelling to the Premises on foot. In Ms Smith's opinion the area concerned would also present opportunities for gangs who target drunks moving between licensed premises and further venues for antisocial and criminal behaviour.
- 94) Note: At this point the hearing was adjourned for the luncheon break. On resumption, Mr Morris was interposed to provide evidence in support of his objection. Mr Steven continued with his evidence following that of Mr Morris.
- 95) Mr Stevens stated that minimising harm from licensed venues involved three (3) aspects namely trading hours, the type of venue and the provision of adequate security by the licensee. The worst case scenario from a Police point of view would be the establishment of another "walk in pub" open to the public until 3.00 am in the morning. Mr Stevens suggested that a restaurant / bar, licensed according would be a preferable option in the opinion of Police.
- 96) Mr Stevens suggested it was somewhat naïve on the part of the developers to assume that its clientele would be predominantly business people and that higher prices for alcohol would deter the younger group of drinkers. He stated that in his experience a significant percentage of the 20 to 30 year age group of revellers in Darwin were employed, had good incomes and "hit the grog hard" when out at night. Mr Stevens suggested that, were a tavern licence to be granted, it should include a condition relating to security requiring at least two (2) security officers for the first 100 patrons and additional security officer for each 100 after that.
- 97) Mr Stevens advised that, whilst not an obvious factor, noise issues did have an impact of Policing and the use of Police resources. In his experience residents affected by noise from neighbouring premises are likely to contact Police to complain. As an example, he advised the Commission that the most recent Greek Glenti held on The Esplanade had resulted in approximately 20 noise complaint calls to Police from residents in the vicinity. Mr Stevens advised that he was unaware of whether conditions on licence intended to reduce noise were effective. He advised that Police officers do not generally measure noise on receipt of a complaint but rather make a subjective assessment when they attend the premises the subject of the complaint.

## Cross Examination of Mr Stevens

- 98) In response to a question from Ms Kelly, Mr Stevens advised that Police do not experience the same level of complaints from licensed premises such as the Crown Plaza, Holiday Inn and The Saville as it does from other premises and that those venues do not generate the type of patron behaviour issues as are experienced at other venues in CBD and particularly Mitchell Street. Mr Stevens agreed that the manner in which premises were managed had a significant impact on patron behaviour. He added that the fact that some licensed premises were entitled to remain open until 3.00 or 4.00 am, while others closed earlier, was an encouragement for crowd movement over an evening. In conclusion Mr Stevens advised that he anticipated there would be patrons travelling to Mitchell Street from the proposed tavern if the tavern ceased trading at 1.00 am.

## Mr Ian Morris

- 99) Ms Morris is the joint proprietor of unit 8 at Bridgeport. He has resided at Bridgeport since August 2003 and is currently the chairman of the Body Corporate for the complex.
- 100) Mr Morris advised that he had been in contact with the developers of Arkaba House, a development next to Bridgeport, and that they shared the concerns of the Bridgeport objectors and supported the objection to the grant of a licence. Ms Kelly objected to that evidence on the basis it was outside the scope of Mr Morris' written objection. The Chairman determined that he would allow the evidence to stand and it would be a matter for the Commission as to the weight to be attached to that evidence.
- 101) Mr Morris advised that since the commencement of the Waterfront precinct development he had been involved in many meetings and discussions with the developers, both in his own capacity and as representative of the residents of Bridgeport. The concerns raised related to the impact of the development on the amenity of the residents of Bridgeport, particularly in respect of noise generated by the construction and heavy transport accessing the site.
- 102) Mr Morris advised that noise from patrons congregating at the front of the Convention Centre was clearly audible and intrusive from the balcony of his unit. That noise further exacerbated his use of the balcony that had already been affected by construction noise from the development itself.
- 103) Mr Morris confirmed that he had been aware of the Waterfront precinct development for some time and, in many aspects, saw the development as a positive. He anticipated that a hotel such as the proposed Medina Hotel would include a dining room and bar of some type however he did not anticipate that a tavern or pub would be incorporated in the Hotel. Mr Morris' major concerns is that noise likely to be generated by entertainment at the venue and patrons using and exiting the Premises creates the real potential for those issues to further impinge on his enjoyment of his residence.
- 104) Mr Morris also expressed his concern that one of the major access points for the Premises being put forward by the developer, that is the overhead walkway connecting to the CBD, was likely to be closed at midnight. If the proposed Premises remained open for business beyond midnight the most direct egress for patrons leaving on foot would be via Traveller's Way which would further add to the problems experienced by the residents of Bridgeport with noise, antisocial behaviour and property damage.
- 105) In response to a question from the Chairman Mr Morris advised that so far as he was aware none of the residents of Bridgeport had monitored noise levels to the point of obtaining decibel readings. He added that should a licence be granted it should include a meaningful noise condition that was capable of being enforced.

## **Sergeant Steven Martin**

- 106) Mr Martin advised the Commission that he was currently the OIC of the Darwin Police Station. He advised that he had concerns regarding the safety of people travelling from the Waterfront precinct to the CBD and vice versa. He stated that there are many dark and bushy areas along those routes, whether people move via Traveller's Walkway or Hughes Avenue. Mr Martin suggested the area in question would benefit from an assessment of the Environment Design Impact on Criminal Behaviour.
- 107) Mr Martin advised that Police had concerns with vehicle and pedestrian access to the Waterfront precinct given that the permanent / semi-permanent population of the area is set to increase with the construction of some 1,000 hotel rooms and units/apartments. Mr Martin suggested that those types of problems would arise whether or not a licence was granted to the Premises however such a licence was likely to further impact on issues related to vehicle access and traffic congestion.
- 108) At this point Mr Bruxner tendered a copy of a report titled "Commercial and Social Evaluation of Licensed Premises" prepared in September 2006 by The Allen Consulting Group. Mr Bruxner referred the Commission specifically to the paragraph on page 46 relating to the effect on public interest of granting additional liquor licences. The report was marked as Exhibit 11.
- 109) Ms Kelly formally tendered the two (2) maps referred to by Mr Copland in the course of his evidence, marked together as Exhibit 12.

## **Closing Submissions**

- 110) Following a brief adjournment the Chairman called for closing submission on behalf of the parties.

## **Ms Kelly for the Applicant**

- 111) Ms Kelly tendered a written outline of submissions for the Applicant, marked as Exhibit 14. She then addressed the access issues raised by Mr Martin in terms of the location of the Premises in comparison to the CBD and the potential security risks for persons travelling on foot between those areas. Ms Kelly submitted that those issues will need to be resolved however they are not specifically an issue for the prospective licensee. The same issues would arise if there were no licensed premises at the Waterfront precinct as residents and hotel guests would still travel to the CBD for entertainment, a meal and a drink. Similarly, Ms Kelly submitted that the proposal to close the overnight bridge at midnight required further consideration. She submitted that this is not an issue that the developer or the prospective licensee can control.
- 112) Ms Kelly referred to the issues raised by Mr Stevens in terms of the operating hours of the proposed tavern and advised that her client would be prepared to accept a licence with shorter opening hours than set out in the original application, namely a closing time of 1.00 am with patrons to vacate the premises by no later than 2.00 am.
- 113) Ms Kelly submitted that whilst the application was for a tavern licence her client intended that a bar/restaurant be established and operated by the selected lessee. DCWH will have control of the concept and nature of the venue though conditions to be incorporated into the lease. Ms Kelly stressed that her client intended the tavern to be of a concept and style commensurate with what would be expected in a 5 star establishment and referred the Commission to the written submissions in that regard.
- 114) In respect of security issues raised by a number of the objectors, Ms Kelly submitted that with the right management and the right venue there would be no requirement for a security presence. Her client intended to obtain the right management for the tavern and



would have significant influence over the type of venue and concept that would be developed and operated.

- 115) Ms Kelly acknowledged the noise issues that were currently impacting on neighbouring residences, including those of the objectors who reside at Bridgeport. She submitted however that many of those issues did not relate to the liquor licence application, nor were they matters of concern to the Commission in exercising its current function. Ms Kelly stated that it was inevitable that a development of the magnitude of the Waterfront project would impact on neighbouring premises as it was inevitable that there would be an increase in traffic and the noise issues associated with such a venture. She submitted that it was unrealistic on the part of the Bridgeport objectors to expect there would be no noise emanating from the Waterfront precinct. However, any additional noise generated by the Medina Hotel and the proposed tavern would, in Ms Kelly's submission, have little additional impact of the amenity of the residents of Bridgeport.
- 116) Ms Kelly informed the Commission that her client would be content if a noise condition was included as part of the licence granted, including a reasonable decibel limit on the permissible noise emanating from the Premises. Ms Kelly referred also to the evidence of Mr Copeland and his assurance that a condition of the lease would be included to the effect there were to be no speakers located outside the building.
- 117) Ms Kelly noted the submission of Mr Bruxner on behalf of the Police that, should a licence in principle be granted, the current objectors would have no further opportunity for objection at the time of the application to transfer the licence to the prospective tenant and when more specific details of the concept of the tavern were known. She submitted however that the objectors had availed themselves of the opportunity to object to the establishment of a tavern when the application for building approval was before the DCA. At that stage it had been properly disclosed that the development included a tavern and yet DCA approval was obtained, despite the objections. Ms Kelly submitted that the objectors were aggrieved by the application for approval in principle and had exercised their right to object and be heard. Ms Kelly suggested that the objectors were now seeking a third opportunity to object, namely when a tenant was secured and an application for transfer of the licence is made.

### **Mr Wyvill for the Bridgeport Objectors**

- 118) Mr Wyvill also tendered a written outline of submissions, marked as Exhibit 15. Mr Wyvill submitted that DCWH's current application for a licence in principle was so under prepared and lacking in detail as to render it impossible for the Commission to properly exercise its statutory functions and properly consider the application and the potential impact on the community, including his clients. He submitted that the application was vague and imprecise and, if granted, had the potential to subvert the objection process on the basis the objectors were currently unsure of precisely what was planned for the operation of the Premises.
- 119) Mr Wyvill submitted that the Commission should reject the application outright on merit and on the basis of the matters raised by the objectors. He stated that, were the Commission minded to grant a licence in principle, the licence should be limited to the grant of a restaurant licence, to which his clients do not object. Mr Wyvill reinforced that his clients object strongly to the establishment of a walk in walk out type of tavern/bar open to all members of the public with the potential for up to 500 people to be consuming alcohol until the early hours of the morning on a regular basis.
- 120) Mr Wyvill referred the Commission to Exhibit 4, being the letter and attachment from Mr Pat Coleman, CEO of the Darwin Waterfront Corporation, highlighting the concerns of that organisation in respect of noise, safety and security of patrons and car parking. Mr Wyvill submitted that these were the same concerns expressed by the objectors residing at Bridgeport and in the course of the hearing the applicant had not adequately responded to these concerns, primarily on the basis those issues will need to be

addressed by the ultimate tenant who is at present unknown. Mr Wyvill stated that Mr Copeland's evidence had not properly dealt with those issues.

- 121) Mr Wyvill noted that the proposed tavern was in a sensitive area so far as neighbouring residences are concerned. Immediately above the Hospitality Building site are Bridgeport with 24 apartments, L'Esperence which includes 20 apartments and Arcaba House which is currently under construction and will include 48 apartments when completed. Mr Wyvill submitted that the proposed tavern, without proper measures in place, had the real potential to impact on the lifestyle and amenity of a large number of people once all the cliff top apartments were completed and fully occupied. He stated that, on the face of the current application, it was unknown what measures the prospective licensee intended to put in place to eliminate or minimise that impact.
- 122) Mr Wyvill referred the Commission to Section 6 of the Act and the public interest criteria to which the Commission must have regard to in considering an application for a licence. He referred specifically to Section 6(2)(c) – public order and safety, Section 6(2)(e) noise emanations, Section 6(2)(f) disturbance to neighbouring premises and Section 6(2)(g) regulation of the sale and consumption of liquor. Mr Wyvill emphasised that the applicant had provided insufficient detail in respect of many aspects of the proposed tavern such that the Commission is not properly able to assess the application against the prescribed criteria.
- 123) Mr Wyvill submitted that the Commission and the objectors knew very little about how the Premises was to be operated by the ultimate licensee other than that the applicant was seeking a tavern licence to cater for walk in/walk out patrons, the tavern would remain open until the early hours of the morning and would have a capacity of up to 500 patrons. He submitted that the eventual licensee would need to sell a large volume of alcohol to cover overheads and that was not in the interest of his clients or the community at large.
- 124) Mr Wyvill submitted that the application did not disclose the maximum patron numbers that was expected to be able to utilise the premises at any one time and that the evidence of Mr Copland at the hearing had done nothing to clarify that position and was unable to advise the Commission of expected patron capacity. Mr Wyvill stated this situation supported his earlier submission that the Commission was not sufficiently informed in respect of the detail of the operation of the proposed licence so as to be able to make an informed determination of the license application.
- 125) In respect of the level of security required for the premises, Mr Wyvill submitted that it was unrealistic on the part of Mr Copland to suggest that security would not be required at all. Mr Coleman's letter (Exhibit 4) advises that the security in the public areas and wave lagoon provided through the Darwin Waterfront Corporation would cease when the wave lagoon was closed to the public, that is from 6.00 pm daily. He submitted that security may well be a requirement after that time and this would be a matter for the licensee and not the Corporation.
- 126) Mr Wyvill noted that the applicant had provided no risk assessment in support of its claim that security was not required other than to suggest security was not an issue at other hotel venues operated by the TOGA Group. Mr Wyvill submitted that the issue of the level of security ultimately required for the premises was unknown at this stage as the details of the type of venue to be established were simply too vague to make such an assessment.
- 127) Mr Wyvill submitted that the issue of patrons exiting the premises would inevitably be of concern to his clients and other person residing in the neighbourhood. Whilst the applicant has stressed that the area near the Kitchener Drive roundabout is not the preferred entry/exit point for the Premises it had provided no indication as to how it intended to prevent that from becoming the case and had presented no option in respect of preventing patrons for exiting the Premises in that area.

- 128) In the event the Commission determined to grant the licence in principle Mr Wyvill submitted that specific conditions should be attached. In that regard he referred the Commission to Exhibit 3 – Bridgeport’s Proposed Licence Conditions. He noted that the applicant had agreed during the course of the hearing that an adequate noise control condition be incorporated as a condition of licence. Mr Wyvill emphasised that his clients saw a number of the conditions set out in Exhibit 3 as being vital. Namely, the restriction of the sale of alcohol for consumption outside the tavern building, signage advising patrons to be conscious of the amenity of neighbours of the tavern and the requirement for security officers.
- 129) Mr Wyvill referred to his opening submission in respect of the disadvantage to his clients in receiving the VIPAC noise report just prior to the commencement of the hearing. He advised the Commission that he would be seeking to make written submissions in response to that report. The Chairman responded that the Commission agreed with that request. Ms Kelly submitted that her client may wish to respond to any submission or report on noise issues submitted by the objectors. The Commission agreed to this request as well and directed that the objectors were to file and serve any additional materials by Monday 19 November 2008 with the applicant to file and serve any further material within 7 days of service of materials filed by the objectors.

### **Mr Bruxner for the Commissioner of Police**

- 130) Mr Bruxner submitted that it would be a dangerous precedent for the Commission to treat this particular application as a genuine application for an in principle liquor licence. He added that such applications should be reserved for applications where the business conducted under the licence granted would be carried on by the applicant himself and not by some unknown third party, as was the case with the current application. Mr Bruxner submitted further that, on the basis of the evidence presented by the applicant at the hearing, the Commission was entitled to conclude that the application was vague to the point of precluding the Commission from considering the matters prescribed by the Act.
- 131) In the alternative, Mr Bruxner submitted that, were the Commission inclined to grant an in principle licence, then the Commission should err on the side of caution and impose strict conditions on the manner in which the prospective licensee was permitted to operate the business. In the event that those conditions proved unworkable once the Premises was operation it would be open to the licensee to apply to the Commission for variations. That option would at least provide the opportunity for the current objectors to be heard further should they take issue with any variations sought. Mr Bruxner submitted that in this instance the Commission should not be troubled by the imposition of strict licence conditions given there was no certainty as this stage as to the type of operation that would be conducted at the Premises, for that matter, as to the identity of the eventual operator of the Premises.
- 132) Mr Bruxner stated that, generally speaking, objections to the grant of new licences were inversely proportional to the type of venue proposed. In this case his client does not know in any detail what type of venue is proposed, nor is he aware of who will be the eventual licensee. Mr Bruxner submitted that two (2) major factors would determine the type of clientele who patronised the Premises, the nature and concept of the venue and the hours of trade.
- 133) In respect of the hours of trade proposed by the applicant, Mr Bruxner advised that his client took no particular issue with the tavern being open for the sale of alcohol to in-house patrons of the Medina Hotel and their guests until 1.00 pm. However, he also submitted that trading hours for non-residents of the Hotel should be more limited to, say, midnight on any trading day.
- 134) Mr Bruxner indicated that Police would support the imposition of a noise condition on the licence of the Premises, including a specified maximum decibel level permitted to

emanate from the Premises. He added that the more specific the condition relating to noise the more amenable it was to enforcement by Police or other agencies.

- 135) Mr Bruxner submitted that the Commission should incorporate a requirement for security control as a condition of licence at the outset. If, as suggested by Mr Copland in his evidence, the actual operation of the Premises indicated that security was not a requirement the condition could be readily relaxed.

## Ms Kelly in Response

- 136) Ms Kelly submitted that the applicant had never intended that patrons exiting the tavern would do so via the roundabout on Kitchener Drive. The designated drop off/pick up point was further down Kitchener Drive towards the middle of the hospitality building. Whilst not directly conceding that the congregation of people at the roundabout would create a traffic or safety problem, Ms Kelly emphasised that this was more of a planning issue and not a matter for the Commission.
- 137) In closing Ms Kelly urged the Commission to grant the licence in principle so as to permit the development of an up market venue in a 5 star environment and as an alternative for people who do not wish to visit Mitchell Street.

## Consideration of the Issues

- 138) Section 26 of the Act sets out the requirements for an application for a liquor licence. Of particular relevance in terms of the application by DCWH is Section 26(2) which provides:

*(2) An application under subsection (1) may be made in respect of premises which are to be constructed or which are under construction and, in respect of such premises or proposed premises, by a person who does not intend to carry on any business under the licence being applied for. (Emphasis added).*

- 139) In the case of this application, the Premises to which the application relates are under construction. DCWH has advised from the outset that it does not intend to carry on business under the licence. Rather it is seeking a grant of licence for the purpose of facilitating negotiations with an unknown third party with the intention that the third party will enter a lease arrangement with DCWH and conduct the business under the licence.
- 140) Whilst the Commission is conscious of the rationale behind the submission by Mr Bruxner that it should not grant a licence in principle where the eventual licensee is unknown, the legislation clearly contemplates that such applications will be made by developers who do not intend to operate the licensed business. On a plain reading of the legislation DCWH's application falls legitimately within the ambit of Section 26(2).
- 141) Section 26(3) provides:

*(3) The applicant for a licence must demonstrate in the application that the grant of the licence will be in the public interest:*

*(a) by providing information about any relevant criteria referred to in section 6(2); and*

*(b) by specifying any other matter relevant to the public interest in the sale, provision, promotion and consumption of liquor.*

- 142) In considering whether to grant a licence, the Act prescribes that the Commission must have regard to the objects of the Act as set out in Section 6. The Commission notes and accepts Mr Wyvill's submission that that the critical subsections of Section 6, so far as this application is concerned are Section 6(2)(c) – public order and safety, Section 6(2)(e) noise emanations, Section 6(2)(f) disturbance to neighbouring premises and Section 6(2)(g) regulation of the sale and consumption of liquor.

- 143) In his evidence Mr Copland informed the Commission that the concept proposed was for the tavern to include a micro brewery in a themed atmosphere similar to those operating in Canada and the USA. The application itself included four (4) optional floor plans for the "Darwin Micro Brewery and Restaurant", each depicting a different floor plan layout but each including a micro brewery. Mr Copland gave evidence that the concept of a tavern themed around the incorporation of a micro-brewery was DCWH's preferred option. He did however concede frankly that DCWH was not in the business of operating themed licensed premises and the concept actually adopted would depend to a large degree on the wishes of the ultimate licensee and lessee of the Premises.
- 144) In that sense the Applicant is seeking approval of a proposed concept, to be firmed up and/or modified once a suitable lessee of the premises is identified.
- 145) When one looks at Section 26(2) in combination with Section 31(3) it is obvious that what is referred to as a licence "in principle" is nevertheless a licence which is to be regarded as having been granted. As such, the requirements of Section 32 must be satisfied at the time of the grant, which is to say the date of approval of the application, rather than at some future time when the licensee is actually identified and ready to commence business. That is, the Commission must have regard to the objects of the Act at the time of considering the application for a licence in principle.
- 146) Generally speaking, where the Commission grants a licence in principle to a developer the obvious next step, once the premises are constructed and fitted out, is for the developer to apply to transfer the licence to the person or entity who is to operate the business under the licence. Having previously granted the licence in principle the only task left for the Commission in considering the transfer application is whether or not the proposed transferee/licensee is a fit and proper person. As Mr Bruxner rightly pointed out in his submissions, should the Commission be minded to grant a licence in principle in this instance, the current objectors, and anyone else who may have an interest in the transfer for that matter, would be precluded from objecting to the transfer of licence. In that sense, and subject to the proviso below, the grant of the in principle licence becomes a final determination of the application. There is nothing more for the incoming licensee to do other than to demonstrate to the Commission that he/it is a fit and proper person to hold the licence.
- 147) The proviso to the position set out in the preceding paragraph would arise where the person or entity who is to operate the business under the licence wishes to change the concept of the business as described in the original application for the licence. In this application DCWH describes the concept of the Bar/Tavern as follows:
- 148) "The character of the tenancy is planned as a blend of the classic and comfortable Aussie pub with the sophistication of a boutique brewery."
- 149) As advised by Mr Copland in the course of his evidence, that description is DCWH's concept for the tavern and whilst DCWH may press the incoming lessee in that regard the final concept will be an issue for the incoming licensee, based no doubt to some extent on the financial viability of the Premises operating within that concept. Mr Copland conceded that the incoming licensee may have different ideas that may not also be acceptable to DCWH. The fact that DCWH submitted four (4) alternate floor plans for the Premises is a further indication that the final concept and design of the premises are negotiable and not set in stone at this stage.
- 150) Obviously, where the Commission grants a licence in principle that licence is granted on the basis the business will be operated in accordance with the concept and theme set out in the developer's application. If the licence was to be subsequently transferred and the incoming licensee intended to operate the business under a different concept from that originally proposed, the application for transfer would need to be accompanied by an application for variation of licence. An application for variation of concept would most likely invoke the advertising requirements of the Act and, as a consequence, attract potential objections.

- 151) In that case the concerns raised by Mr Bruxner would be addressed and potential objectors would not be precluded from being heard, including objectors who may have participated in the hearing in respect of the in principle licence application. In that respect the Commission is satisfied that, should the incoming licensee wish to materially alter the concept of the Premises the legislation provides for the appropriate checks and balances, including the potential for objections to be raised and a further hearing to be convened.
- 152) As noted above, Mr Wyvill submitted, both at the commencement of the hearing and in his closing submissions, that the application for a licence in principle was lacking in detail so as to render it impossible for the Commission to properly exercise its statutory functions. The Commission finds that submission highly persuasive, particularly in respect of the patron numbers for which the Premises may ultimately be licensed. Mr Copland conceded frankly that he could not assist in that regard and the patron numbers could not be established with any certainty prior to the incoming licensee completing the fit out and confirming the nature of the business to be operated under the licence.
- 153) Mr Wyvill's submission in respect of the information that should be included in DCWH's application is in fact in line with the Commission's guidelines for processing applications by developers for in principle liquor licences. Curiously the guidelines were not referred to by any of the parties to the hearing however they were issued on 11 April 2008 by way of media release and remain posted on the Commission's web site. The guidelines include the following advice:
- "The developer's application to the Commission will be required to contain sufficient information to inform both the public (via advertising) and the Commission of relevant matters including:*
- a) The type of licence sought;*
  - b) The concept, target market and anticipated patron capacity;*
  - c) Detailed plans of the proposed premises (as provided to the DCA); and*
  - d) An analysis of the likely community impact of the development in the particular neighbourhood. (Emphasis added).*
- 154) The Commission appreciates that the guidelines are merely that and cannot override general or specific provisions of the Act. In this case however the guidelines simply reflect the public interest criteria, prescribed by the legislation, that the Commission must take into account in considering an application for grant of a licence. Clearly, as submitted on behalf of the Bridgeport objectors and the Police, the capacity of the Premises in terms of patron numbers has the very real potential to impact on the amenity of the neighbourhood in the vicinity of the proposed tavern.
- 155) The floor space of the Premises comprises approximately 900 square metres. The "yardstick" used by Fire Services for specifying patron numbers is one patron per square metre. The Commission accepts Mr Copland's evidence that the floor space actually available to patrons will be significantly reduced due to the fit out, back of house facilities and the potential for the installation of the micro brewery. Accepting Mr Copland's evidence, the Commission is left to estimate the final patron number that the premises will be able to accommodate as being somewhere between 300 and 550, depending again on fit out, furniture and associated restaurant size or patron capacity.
- 156) That span represents a significant difference between the upper and lower ends of the estimated patron numbers. It is a difficult, if not impossible, task for the Commission to properly assess the impact that the Premises will have on the amenity of the neighbourhood in which the tavern is intended to operate. Similarly, unless patron numbers are more precisely defined it is impossible for the Commission to properly assess what licence conditions, if any, would be required for the premises. By way of

example, were the premises to be run primarily as a restaurant/bar with tables and seating for 300 patrons there may be no requirement for conditions relating to security and video surveillance. If on the other hand the premises main focus was a tavern catering for up to 500 patrons, with the provision of meals ancillary to the sale of alcohol, there may well be a requirement for conditions stipulating the number of crowd controllers required and the mandatory installation of a CCTV system.

- 157) The Commission finds that that the application lodged by DCWH is deficient in a material respect, that is it does not disclose with any precision the final patron number that the Premises will be able to accommodate. That deficiency remains and was not resolved in the course of the applicant's evidence at the hearing. Put simply, DCWH, is unable to state with any specificity the final patron number that the Premises will be able to accommodate. The capacity of the premises will not be known until the lessee is selected and the premises are fitted out.
- 158) On the basis of that deficiency the Commission is unable to properly consider the impact the proposed licence would have on the amenity of the neighbourhood, including the amenity of the Bridgeport objectors. Nor is the Commission able to determine at this stage what type of liquor licence would be the most appropriate for the Premises.
- 159) Similarly, the applicant provided conflicting advice/evidence in respect of the requirement for security at the premises. The Police objection raised security issues, including security for the safety of patrons leaving the premises late in the evening on foot. The issue of patron safety and roving security was also raised in the context of the proximity of the premises to the wave lagoon. In a letter of response to the objections Mr Adrian Findlay, DCWH Development Manager, advised that increased security staff will be engaged for high volume patronage events, including the provision of security to patrol the licensed premises and surrounding areas,
- 160) The evidence from Mr Copland during the hearing was unequivocal and contrary in some respects to the advice provided by Mr Findlay. Mr Copland advised the Commission that the Medina chain operated 5 star premises and, given the target clientele, security officers would not be required at all.
- 161) The Commission does not necessarily accept that view. If the premises were to be operated predominantly as a tavern with a patron capacity of 500 patrons it is almost certain that a security presence would be required at peak or late night trading times and a condition would likely be included in the licence. Similarly, it is almost inevitable that a condition relating to CCTV equipment would be included in such a licence. If, on the other hand, the premises was to be operated predominantly as a restaurant with an on-licence with a capacity in the order of 300 patrons it may well be that no security or CCTV equipment would be required. At present the Commission is unable to determine what security arrangements will be required for the proposed tavern as it simply does not know what the precise nature of the business to be operated, the patron numbers or the types of events and special functions the ultimate licensee may have in mind.
- 162) For those reasons DCWH's application for a tavern licence in principle must be rejected.

### **Future Application for Licence for the Medina Premises**

- 163) The Commission finds, in rejecting this application for an in principle tavern licence for the Premises, that it was not satisfied that the materials and evidence presented by the objectors was so compelling as to warrant the refusal of any form of licence to the applicant in the future. For example, the Commission notes and agrees with the submissions of a number of the Bridgeport objectors that the grant of a restaurant with on licence would not be objectionable and would almost certainly have been granted, subject to confirmation of patron numbers.
- 164) The Commission notes the written submissions of Ms Kelly at paragraphs 14.5 to 14.11 in respect of various grounds of objection that are said to be irrelevant to the

consideration of this application. For example, the fact that pedestrian and vehicle traffic in and around the Waterfront precinct will increase with the further development of the precinct as will the noise generated by those activities, regardless of whether or not any liquor licences are issued. However, the Commission is concerned about both the safety and effects of patrons leaving the premises, late in the evening or possible in the early hours of the morning (depending upon the hours of closing), and would benefit from obtaining details of the applicant's strategy for both ensuring the safe transportation of patrons away from the premises, and the minimisation of noise generated by patrons exiting the premises.

- 165) The Commission notes and accepts the submission on behalf of the applicant that adequate noise control of the Premises will be in the interests of DCWH in ensuring the comfort of its guests at the Medina and Vibe Hotels.
- 166) In the likely event of a further application addressing the deficiencies set out above, this decision should not be taken as being a refusal of any future application for a tavern licence. Whilst the Commission is mindful of the purpose behind the legislature's allowance for the grant of an in principle licence to developers, in this instance the Commission would have benefited greatly from being able to hear evidence from the actual licensee as to the type of venue that will actually be operated on the Premises and, critically, the maximum patron numbers that the Premises would accommodate and whether security arrangements were to be put in place to ensure the safety of patrons both at the Premises and when exiting. The current applicant, for genuine reasons, was not able to satisfy the Commission's concerns in regard to those matters.
- 167) In addition, the Commission received a significant volume of evidence in respect of noise issues, including technical reports and the evidence at hearing of Mr Dimitrov. Allowing that the Commission has determined to refuse this application there was no requirement to consider the nature or terms of a condition of licence that may satisfy the legitimate concerns of the objectors. Having said that, the evidence presented at this hearing will no doubt be of significant assistance to the Commission in the future in terms of any further application by DCWH or another proposed licensee.
- 168) The Commission as presently constituted was satisfied, had it been persuaded to grant the licence applied for, that the inclusion of a suitable and enforceable noise condition would have been sufficient to satisfy the legitimate concerns of the Bridgeport objectors. In that respect the Commission notes particularly the Noise Conditions that are proposed to be included in the lease between DCWH and the prospective tenant (annexure "E" to the statement of Mr Copland). Those Noise Conditions are considerably more detailed than the type of noise condition normally associated with a liquor licence and the Commission is of the view that adherence by the licensee to DCWH's Noise Conditions would more than likely satisfy the concerns of the Bridgeport objectors. The Commission particularly notes paragraph 14.15 of Ms Kelly's written submission and the acknowledgement that the applicant would welcome the imposition of a noise condition on the licence.

## Decision

- 169) The Commission, pursuant to Section 29(2)(b) of the Act, having conducted a hearing into the application by DCWH for an in principle Liquor Licence - Authority Tavern, refuses the application pursuant to Section 29(2)(b) of the Act for the reasons set out above.



21 January 2009