

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **FIDDLER'S GREEN**
Wharf One
Darwin City Waterfront
Kitchener Drive
Darwin NT 0800

LICENSEE/APPLICANT: FINSIO PTY LTD

LICENCE NUMBER: 80117506

PROCEEDINGS: To Undertake a Hearing to Consider an Application to Vary Liquor Licence Conditions and Objections to the Application

MEMBERS: Mr R O'Sullivan, Chairman
Mr P Timney, Legal Member
Mrs J M Large, Member

APPEARANCES: Mr G Finestone, Director Finsio Pty Ltd
Ms P Pech, Licensing Inspector

Objectors:

Mr T O'Neill, Deputy Chief Executive Officer,
Darwin Waterfront Corporation
Ms D Richards, Resident Darwin Waterfront

DATE OF HEARING: 3 March 2011

BACKGROUND

- 1) In June 2010 a Restaurant Licence with an On Licence was granted, subject to sighting of a signed lease, to Finsio Pty. Ltd for the premises Fiddler's Green, Darwin City Waterfront Kitchener Drive, Darwin NT. The licence was granted with specific conditions, in addition to the standard licence conditions, namely:

- **Concept:** The premises will be a family owned and operated fully licensed restaurant with an internal dining area and an Alfresco Area which portray a relaxed atmosphere where comfortable conversation can be achieved. A venue providing quality food, beverages, service and civility.
- At all times the premises must have the appearance of a restaurant and there will be no advertising of the On Licence.
- **Hours of Operation:** 11.30 am to 11.30 pm seven days a week with the Alfresco Area closing at 11.00 pm each day. These hours are extended from 11.30 am to 2.00 am (the following day) on New Year's Eve. No trading on Good Friday or Christmas Day.

Breakfast to be available from 07.00 am to 11.30 am, with no alcohol to be sold.

The kitchen will close between 9.30 pm and 10.00 pm.

- **Seating Arrangements:** Inside the premises 80% of all patrons will be seated at all times. In the Alfresco Area of the premises all patrons will be seated at low set tables and chairs and a waiter service provided.
- **Patron Numbers:** Subject to fire and safety regulations there will be a maximum of two hundred (200) patron capacity for the internal area and a maximum of one hundred and thirty two (132) in the Alfresco Area.
- **Alfresco Area:** The licensed external area is to be fully covered overhead with canopy providing noise attenuation for apartments situated above.
- **Entertainment:** Entertainment is to be allowed internally only and be 'easy listening'. There will be no bi-fold doors and solid doors will be installed between the inside and the Alfresco Area. These doors will be closed when music is playing inside. There will be no amplification of music in any part of the premises and all music will cease at 11.00 pm.
- **Pedestrian Thoroughfare:** At no time will the structure or the operations of the premises impede upon the public footpath or the residents entrance and exit of the building.
- **Noise:** The Licensee must ensure that there is no excessive noise caused by the operations on the premises which affect the amenity of the neighbourhood. This includes ensuring the delivery of stock or removal of rubbish is at appropriate hours and that patrons, whilst on the premises or in the course of leaving the premises (including after close of trading), are not rowdy or noisy and do not cause any disturbance to the vicinity of the premises.

- 2) The special conditions were agreed to and in most case proposed by the Licensee in order to alleviate concerns by the Darwin Waterfront Corporation and objectors who were residents in the same building.
- 3) On 11 November 2010 Mr Finestone, on behalf of the Licensee, Finsio Pty Ltd, applied for a variation to the licence conditions for Fiddler's Green to allow for low key, easy listening music to be played in the Alfresco Area, for the licensing opening hours to be brought forward from 11.30 am to 10.00 am daily and for standing to be available in the Alfresco Area for guests attending pre booked corporate functions, cocktail parties and product releases if prior notice is provided to the Director of Licensing.
- 4) The reasons given for the variations were that the change in opening hours was to service tourist requests; the music in the Alfresco Area was consistent with the other Licensed Alfresco Areas within the precinct and had the full backing from Toga Pty Ltd ("Toga"); and there had been many requests for functions in the Alfresco Area where guests wished to stand and mingle freely.
- 5) The application was advertised in the NT News on 17 and 19 November 2010. Objections to this application were received from Mr P Coleman, CEO Darwin Waterfront Corporation on 20 November 2010, Mr A Moo, on 25 November 2010 and Ms D Richards, on 18 December 2010 residents of the building which contains Fiddler's Green.
- 6) The written submissions from the objectors set out the following reasons for their objections:
 - **Darwin Waterfront Corporation** submitted that the variations were not consistent with the Corporations 2010 Liquor Guidelines nor in the best interest of the residents and general public. There were specific concerns that the variations were not in line with creating a family friendly environment and were a divergence from the approved use of the premises as a restaurant with an On Licence. Rather, the variations would alter the premises towards a themed public bar. The variations would have adverse impacts on the amenity of residents living in close proximity to the licensed premises with additional noise from the extended hours and from allowing music in the Alfresco Area. The stand-up corporate functions, cocktail parties and the like generate high noise levels and do not take into account the location of the premises within a residential building where there is significant potential for nuisance noise impact if such events are held in the Alfresco Area. It would also increase the risk of transport of glass from the premises to the public domain.

- **Mr A Moo** submitted that the variations sought were in complete contradiction to what was presented to and considered by the Commission a mere six months ago. The variations showed that the Licensee was endeavoring to operate Fiddler's Green as a "pub" with dining facilities instead of a Restaurant with an On Licence. Each variation sought was directly aimed at liquor consumption via trading hours, outdoor drinking areas (standing) and outdoor music which will increase the noise emanating from the premises and the disruption to residents of the building.
- **Ms D Richards** submitted that serving liquor from 10.00 am was not an appropriate activity for a restaurant; it will affect the amenity of the neighbourhood and does not adhere to the previous decision by the Licensing Commission. The addition of 'easy listening music' and the allowing of patrons to stand in the Alfresco Area will add to the noise level already being experienced by residential apartments above the premises.

- 7) Comment on the application was received on 20 December 2010 from Mr N Wright, Senior Policy Advisor, Alcohol and Other Drugs Program, Department of Health and Families. He submitted that a number of issues were raised in the original licence application and subsequently addressed in the approved licence conditions. He stated that:

*" this was particularly relevant to the 'no standing in the Alfresco Area' as this has proven to be a contributing factor in increasing the potential for alcohol related harm and poor patron behavior. As we all know, corporate functions and cocktail parties do not **guarantee** an acceptable level of behaviour"*

- 8) The response provided by the Licensee to the objections was received on 7 January 2011 and reiterated the reasons given when the application was lodged and added the following:

Trading Hours – this was necessary to cater for requests from tourists on holiday and passengers from the cruise lines that generally docked in the morning. As the premises was already open for business (can serve breakfast from 7.00 am to 11.30 am), this variation would have no impact on any noise issues.

Background Music in the Alfresco Area – the music is allowed in every other licensed area within the public domain. The music played in the Alfresco Area of Ocean Fresh is in the same building and affects the same residents and no noise complaints or objections have been received by the Licensing Commission or Toga. Therefore, it would be fair to say there would be no new noise impact on residents from this variation.

Corporate Functions – People mix and mingle at such events and when controlled and managed, such activity will have no negative impact on the waterfront community. These functions are more in line with normal restaurant practice and not as stated by the Darwin Waterfront Corporation an indication of a ‘themed public bar’.

- 9) On 21 January, 2011 in a Decision of the Legal Member, all three objections lodged were found to be valid and require a Hearing.

HEARING

- 10) At the commencement of the Hearing the Chairman, Licensing Commission accepted Mr A Moo’s apology for not attendance and his request for his written submission to be taken into consideration. Further he stated that the Darwin Waterfront Corporation Liquor Guidelines would be taken into account in any application for a liquor licence or any variation to such licence.
- 11) Mr Finestone in speaking to the application tendered a statement and a series of photographs. The statement outlined that the requests for variations were justified on the basis that they had been trading for some months and now had a better understanding of the added requirements of the business. There had been strong customer support for the premises and there had been no objections by any of the Bodies Corporate within the residential, commercial and retail development. Darwin Centrepoint Corporation and Toga permit outdoor easy listening music and had strict noise conditions as part of the lease arrangements. The suggestion that the extended licensing hours would cause a major change to the responsible service of alcohol is unjustified.
- 12) Mr Finestone advised that he had held a 10.00 am licence at Schooners Restaurant, Cullen Bay with no negative incidents or breach of licence. In regards to the request to hold corporate functions in the Alfresco Area there was a requirement for guests to stand and mingle freely during the function thus negating the need of raised voices as when seated trying to hold conversation. It is a part of normal restaurant trade to cater for these types of functions.
- 13) When questioned by the Commission Mr Finestone stated that he had received approximately twenty requests for functions and numerous requests to provide alcohol drinks prior to patrons having a lunch.
- 14) Mr Finestone did not specifically address individual photographs tendered but they show other licensed premises within the waterfront development with outside music capabilities.

- 15) In answer to questions from the Commission, Mr Finestone advised that Toga managed the commercial premises but had no involvement with the residential units. Mr Finestone did not address the requirements of the Darwin Waterfront Corporation's Liquor Guidelines as he had only recently received a copy but said that he would like to ask some questions of the (Waterfront Corporation) objector following their verbal submission and evidence to the Commission.
- 16) Mr T O'Neill representing the Darwin Waterfront Corporation told the Commission that the prime reason for the Liquor Guidelines was the security and safety of the residents. He tendered two incident reports from the Corporation's Security Service which showed that on 10 and 15 December 2010 the Security Officers had reported several incidents where patrons of Fiddler's Green were drinking alcohol outside the licensed area.
- 17) He stated that there was no evidence of the need for making the opening hours at 10.00 am and the expectation that tourists from the cruise ships require access to alcohol at 10.00 am lacked credibility. He tendered a Tourism Research Australian Destination Visitor Survey which showed the age of cruise ship passengers was heavily skewed towards the older age group with half being aged 65+ and overall 85% were aged over 55 years. He advised that the survey listed the main activities undertaken by passengers as shopping, taking organised tours, walking around Darwin city centre and eating at local restaurants.
- 18) Mr O'Neill explained differences in the situations of other licensed premises within the precinct with regard to noise issues, for example he said the nearby Coffee Club did have outside music but it has a large canopy above the outside area and is located below a hotel where the windows are double glazed. In contrast, Fiddler's Green is located below residential apartments with balconies and the Alfresco Area is not fully covered by the canopy.
- 19) During cross examination of the witness Mr Finestone tendered a document showing that a security incident reported on 5 December 2010 was unrelated to Fiddler's Green. He stated that the general public were often seen drinking and carrying alcohol within the waterfront precinct. He tendered further a document relating to an incident of persons drinking at the tables of Fiddler's Green in the early hours of the morning of 27th February 2011. They were not associated with the premises which at that hour was closed.
- 20) Ms D Richards gave evidence that she was a resident at Wharf One and her apartment was directly above Fiddler's Green. She explained that at a previous Hearing she had represented the Body Corporate for the building but as that was no longer active she was now only representing herself.

- 21) Ms. Richards maintained that currently her lifestyle was disrupted by the noise emanating from Fiddler's Green. Whilst the first half of the week was peaceful, from Thursday to Sunday the noise was so extreme that she was unable to hold a conversation on her balcony and even with windows closed she had to turn up the volume on the television. The noise was generated by the number of people attending the restaurant and the canopy did not cover the whole of the Alfresco Area. Ms Richards stated that all of the three variations sought by the Licensee would increase the noise levels and worsen the problem.
- 22) At this point Mr Finestone advised the Commission that the owner of the building, Toga, had agreed to extending the canopy above the Alfresco Area, including putting in a noise abatement lining, which would alleviate the noise disturbance experienced by the residents.
- 23) Following the Hearing the Commission received a letter and an attached drawing from Mr P Coleman, CEO Darwin Waterfront Corporation in relation to the proposed canopy to be installed at Fiddler's Green. Mr Coleman wrote that he had been advised by Toga's agent that the proposed works to the canopy area are as follows:
- "Toga proposes to install a timber ceiling fixed to the underside of the roof purlins as indicated on the attached drawing titled 'Proposed Shading Solution'. The work does not include any acoustic or thermal insulation within the ceiling/roof structure.*
- Danpalon polycarbonate cladding to match the canopy is to be installed over the gap adjoining the building except that one metre will be left open at each end of the canopy. Contrary to the drawing it is not intended to extend the ceiling timber across the gap."*
- 24) Mr Coleman wrote that it was his understanding that the works were intended to increase the shade effect of the canopy and reduce temperatures in the Alfresco Area but were not designed to improve acoustic performance and he would expect any acoustic improvement to be minimal. He advised that a proper assessment of the sound transmission to the adjoining apartments from speakers located in the Alfresco Area would need to be undertaken by an appropriately qualified acoustic consultant such as Vipac.
- 25) Due to the late notification of the installation of the canopy by Mr Finestone, the Commission accepted the letter and drawing provided by Mr Coleman and forwarded a copy to Mr Finestone for comment.
- 26) The comment received from Dual Nominees Mr Finestone and Ms Walsh on 11 March 2011 made the following points:

- No objections have been made to any premises with roofed (unlined) Alfresco Areas, therefore it can be presumed that no noise issues are prevalent in the playing of low key music in the Alfresco Areas of existing premises.
- The Darwin Waterfront Corporation Guidelines state that the Alfresco Areas must be roofed and provide effective noise attenuation. The Alfresco Area of Fiddler's Green is fully roofed with the same noise attenuation as all the other Alfresco Areas at the waterfront.
- Fiddler's Green strongly object to Darwin City Waterfront singling out Fiddler's Green and ask for a fair and level playing field throughout the precinct.

CONSIDERATION OF THE ISSUES

- 27) The Commission has carefully considered all the written and oral evidence presented and acknowledges that Mr Finestone has extensive experience and a good reputation in the management of restaurants in Darwin. However, when considering any liquor licence or variation thereto the Commission must take into account the location of the premises, the residential neighbourhood in the vicinity of the premises and the overall ambience of the area as designated by the Darwin Waterfront Corporation.
- 28) Mr Finestone has provided very little evidence to support his proposal to extend the trading hours by opening at 10.00 am versus the current 11.30 am. The 2009/10 Destination Visitors Survey of cruise ship passengers tendered by Mr O'Neill does not show that the availability of alcohol at that time in the morning is of any priority to passengers and the current licence condition, which allows service of alcohol at 11.30 am, should adequately provide for pre luncheon drinks.
- 29) In support of his application to vary the condition requiring all patrons to be seated in the Alfresco Area, Mr Finestone stated that he had received numerous requests to hold corporate functions in the Alfresco Area where there was a requirement for guests to stand and mingle freely during the function thus negating the need of raised voices as when seated and trying to hold conversations. It was a part of normal restaurant trade to cater for these types of functions. He did not provide any evidence of these requests or elaborate on whether he had offered to hold the functions inside the premises or in the Alfresco Area with patrons seated at all times.
- 30) The Commission is very reluctant to give carte blanche approval to allowing patrons to stand in the Alfresco Area when attending corporate functions, cocktail parties etc even when prior notice is given to the Director of

Licensing. In recent times all Alfresco Areas which directly front a public area are required to have patrons seated. Even with a specific and well organised group of people standing and drinking in the outside area of the premises there is likely to be a propensity for others, whether from inside the premises or from the public areas, wanting to join the group. The Commission notes the comments submitted by Mr N Wright, Senior Policy Advisor, Alcohol and Other Drugs Program, Department of Health and Families and feels that there is unlikely to be any lessening of noise arising from a group of patrons standing outside rather than sitting.

- 31) Mr Finestone may apply for a Special Licence for any specific event he wishes to host at which time he would need to provide details of the organisation, number of guests, the area to be occupied, limited times for the event, arrangements for returning the area to a fully seated dining area and the security that has been arranged.
- 32) The provision of low key, easy listening music in the Alfresco Area is allowed in other restaurants at the Waterfront but each case has to be considered by the Commission on its merits and the evidence provided. In this case we have evidence from Ms. Richards, a resident of the building, that she currently experiences a disruption to her lifestyle during the latter part of the week from the noise emanating from Fiddler's Green.
- 33) The Commission has also taken into consideration the submissions on this issue from both the Darwin Waterfront Corporation and the Licensee. There is obviously a disparity of views as to whether the proposed installation of a canopy will significantly negate the sound transmission to the adjoining apartments. Mr Finestone and Ms Walsh have commented on the lack of objections to other premises which have music in the outside areas and stated a wish for a fair and level playing field. They have, however, not addressed the fact that nine months ago, when the Commission was considering the application for a liquor licence for Fiddler's Green, there were numerous objections to the issue of a licence, largely based on the likelihood of noise problems. At that time, Mr Finestone gave evidence that there would be no music outside and that solid doors between the inside and the Alfresco Area would be closed when music is playing inside. Despite this there is evidence of noise, from patrons on the premises, disrupting the lifestyle of residential occupants in the building.
- 34) At the original Hearing Mr Finestone tendered a Vipac Engineers Acoustic Report which specifically recommended that no speakers be installed outside the proposed licensed area. Until evidence is provided that the proposed canopy does alleviate the noise problem the Commission feels that the current licence condition should stand.

DECISION

35) The Commission having considered all the evidence has decided:

- (a) to refuse the application to extend the liquor trading hours to allow opening at 10.00 am on the grounds that there is very little evidence to support a need for the early opening times;
- (b) to refuse the application to allow guests of Corporate functions cocktail parties etc to be allowed to stand in the Alfresco Area, following prior notice to the Director of Licensing. However, the Licensee may apply to the Director of Licensing for a Special Liquor Licence for any specific event he wishes to host at which time he would need to provide details of the organisation, number of guests, the area to be occupied, limited times for the event, arrangements for returning the area to a fully seated dining area and the security that has been arranged; and
- (c) to refuse the application for low, easy listening music to be allowed to be played in the Alfresco Area as evidence has been given that currently there is a noise level emanating from the premises which disrupts the lifestyle of other residents in the building and any music played in the outside area will exacerbate the problem. If the proposed new canopy is proven to alleviate the problem then a further application could be made by the Licensee.

Richard O'Sullivan
CHAIRMAN

28 March 2011