

Northern Territory Licensing Commission

Decision on whether Objections will proceed to Hearing

Premises:	Chow! A Taste of South East Asia
Applicant:	Happy Mekong Pty Ltd
Nominee:	Mr Jason Hanna
Licence Number:	80518216
Objectors:	Mr Terry O'Neill, Deputy CEO, Darwin Waterfront Corporation Ms Kay Withnall, Resident A/Superintendent Michael Hebb, Northern Territory Police
Legislation:	Sections 47F to 47I of the <i>Liquor Act</i> and Section 28 of the <i>Interpretation Act</i>
Decision of:	Richard O'Sullivan (Chairman)
Date of Decision:	4 September 2013

Background

- 1) Mr Jason Hanna, a Director of Happy Mekong Pty Ltd, has applied pursuant to Section 32A of the *Liquor Act* ("the Act") for a permanent variation to the trading hours for Chow! A Taste of South East Asia, which is located at D1, D2 Wharf One Retail Precinct, Kitchener Drive, Darwin.
- 2) The applicant has submitted that the current closing time of the current Restaurant Liquor Licence of 22:00 hours inhibits his ability to be competitive with other Restaurants within the Waterfront Precinct and the wider Darwin area. His initial application sought an extension of trading hours until 02:00 (the following day) but he has since revised this application to enable trading until 23:59 hours.
- 3) The applicant has also sought an earlier opening for the commencement of liquor sales, that being at 10:00 hours to be competitive with his adjoining neighbour, Fiddler's Green, which has a 10:00 hour liquor licence commencement.
- 4) The Application was advertised in the NT News on Wednesday 26 June 2013 and Friday 28 June 2013 pursuant to Section 32A(3)(a) of the Act.
- 5) The advertisement was as follows:

I, Jason Hanna, on behalf of Happy Mekong Pty Ltd, hereby give notice that I have applied to the Northern Territory Licensing Commission for a variation of restaurant Liquor Licence conditions for the premises known as Chow! A Taste of South East Asia located at Shop D1, D2 Wharf One Retail Precinct, Kitchener Drive Darwin NT.

Proposed variations include:

The current trading hours of the premise are:

Seven days a week between 11:30 hours and 22:00 hours.

The proposed variation includes extending the trading hours as follows:

Seven days a week between 10:00 hours and 23:59 hours.

All other conditions remain the same.

This is the first notice of application. The notice will be published again on Friday, 28 June 2013.

The objection period is deemed to commence from Friday, 28 June 2013. (date of publication of second notice).

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

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

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

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

Dated this 26 Day of June 2013.

- 6) Pursuant to Section 47F(4)(d) an objection must be lodged within thirty (30) days after the publication of the last notice, namely on or before Monday 29 July 2013.
- 7) Section 47F of the Act prescribes the circumstances in which an objection may be made, specifies the grounds for objection and identifies the persons entitled to object to a particular application -

47F Person may object to certain applications

- (1) *Subject to this section, a person, organisation or group may make an objection to the following applications:*
 - (b) *an application for a variation of the conditions of a licence, as notified under section 32A;*
- (2) *The objection may only be made on the ground that the grant of the licence, variation of conditions, substitution of other premises or material alteration may or will adversely affect –*
 - (a) *the amenity of the neighbourhood where the premises the subject of the application are or will be located; or*
 - (b) *health, education, public safety or social conditions in the community.*

- (3) Only the following persons, organisations or groups may make an objection under sub-Section (1):
- (a) a person residing or working in the neighbourhood where the premises the subject of the application are or will be located;
 - (b) a person holding an estate in fee simple in land, or a lease over land, in the neighbourhood where the premises the subject of the application are or will be located;
 - (c) a member or employee of the Police Force acting in that capacity;
 - (d) a member or employee of the Fire and Rescue Service within the meaning of the Fire and Emergency Act acting in that capacity;
 - (e) an Agency or public authority that performs functions relating to public amenities, including health, education and public safety;
 - (f) a community-based organisation or group (for example, a local action group or a charity).

8) Three objections have been lodged in response to the application and the applicant has provided a response to two of these objections pursuant to Section 47G of the Act. Under Section 47I of the Act the Commission must determine whether objections received are to proceed to Hearing.

Objection from Mr Terry O'Neill, Deputy CEO, Darwin Waterfront Corporation

- 9) Section 47F(3)(e) provides that an Agency or public authority that performs functions relating to public amenities, including health, education and public safety may lodge an objection to an application for variation of licence conditions.
- 10) The Darwin Waterfront Corporation ("DWC") is an authority that performs such functions and has provided an objection on Wednesday 3 July 2013, well within the objection time frame. The grounds for the objection list:
 - The proposed hours sought by the applicant not being in accordance with the DWC Liquor Guidelines of April 2013.
 - The residential apartments above the licence could be subject to noise intrusion, particularly from the Alfresco Area.
 - The proposed hours are not consistent with the adjoining licence.
 - Any granting of the request for variation would set a precedent for other Licensees.
- 11) The DWC states it would not object if the application was for the same hours as for the adjoining premises, being 10:00 hours to 23:00 hours for the Alfresco Area and 10:00 hours until 23:30 hours for the internal area.
- 12) The objection raises issues of noise and impacts on residents and therefore meets the requirement of the Act in relation to amenity of the neighbourhood and social conditions of the community.

Objection from Ms Kay Withnall a Resident within the Neighbourhood

- 13) Section 47F(3)(a) provides that a person residing or working in the neighbourhood where the premises, the subject of the application, are or will be located, may lodge an objection to an application for variation of licence conditions.
- 14) Ms Kay Withnall is a resident within the neighbourhood of the premises and she has objected to the application in correspondence dated 23 July 2013 and is therefore within the time prescribed under the Act. Her objection advises that her apartment is positioned above the unroofed area between the Chow! A Taste of South East Asia Restaurant and Fiddler's Green and that she suffers from sleep deprivation due to noise from the area.
- 15) In raising the issue of noise and sleep deprivation, Ms Withnall's objection conforms with the requirements of the Act in relation to the amenity of the neighbourhood.

Objection from Acting Superintendent Michael Hebb on behalf of the Northern Territory Police

- 16) Section 47(3)(c) allows members of the Northern Territory Police to object to an Application. Acting Superintendent Michael Hebb is a member of the Police Force acting in that capacity within the meaning of Section 47(3)(c) and stationed at the Darwin Metropolitan Division. As such Acting Superintendent Hebb is a valid objector.
- 17) From information provided to the Commission there has been ongoing correspondence over the application commencing on 24 June 2013 and upon the Licensing Inspector handling the matter seeking whether the Police comments constituted an objection, he received formal correspondence from the Police dated 23 August 2013, objecting to the application. This formal objection is beyond time and no request was received by the Commission for time to be extended.
- 18) It is noted that the applicant has made response to the objections of Ms Withnall lodged on 23 July 2013 and the DWC objection lodged on 3 July 2013. There is no evidence that the applicant has been afforded the opportunity to comment on the specific Police objection lodged out of time. This therefore does not conform with requirements of Section 47G of the Act which provides for the application to be given sufficient time to reply to the objection.
- 19) The Commission must also consider procedural fairness for the applicant in this instance and therefore pursuant to Section 47F(4)(d) of the Act it is determined that the objection was not lodged within time and is therefore not to be considered valid.

Applicant's Response to Objections

- 20) The applicant advises that the current 22:00 hours closing time for liquor sales has had a part in causing the demise or closure of the premises by the previous Licensee. The applicant also advises without some extension to trading hours the Restaurant would be unviable.
- 21) The applicant refers to wanting to be competitive with his neighbour, Fiddler's Green, which is also in the process of making an application for extended trading hours.
- 22) He states "*as an experienced bar and restaurant operator it is my professional opinion that the hours we have requested are necessary for this operation*".

- 23) In response to the DWC's objection, the applicant states he has applied for revised opening hours similar to that currently applying to Fiddler's Green, that is 10:00 hours and the closing hours sought are similar to the current application being pursued by Fiddler's Green.
- 24) There is no direct response, other than reference to window closure, to the issue raised by the DWC and Ms Withnall over noise intrusion, especially from the Al Fresco Area, into the above apartments.

Consideration of the Issues

- 25) The objection by Ms Withnall raises concerns over noise reaching her apartment above the area roughly between Fiddler's Green and Chow! A Taste of South East Asia. Her objection advises that a canopy which has an impact to noise abatement to residents above does not cover all the area below her apartment. This objection is determined as valid and requiring a Hearing. Noise issues have been paramount in previous objections to licence applications in the Darwin Waterfront area.
- 26) The DWC in its Guidelines issued in April 2013 deals with the issue of noise and amenity of the neighbourhood. Its Guidelines states:
- "In buildings that accommodate residential apartments the preferred maximum operating time of licensed premises is limited to 11.30pm. Outdoor areas within the boundary of the premises including verandas, alfresco areas, and smoking areas should not be occupied after 10.30pm."*
- 27) Whilst the Commission is not bound by these Guidelines, the Commission does expect these Guidelines to be addressed in liquor licence applications. The DWC objections raise issues that validly constitute an objection under the Act that need to be considered in the context of this application which under the Act are required to be pursued through the conduct of a Hearing.
- 28) The Police objection has been determined to be out of time and the applicant has not responded or been afforded the opportunity to respond to the specific matters raised. It is noted that some of the matters raised by Police are covered in the objections which will be the subject of Hearing.

Decision

- 29) The Commission has determined that the objections lodged by Ms Withnall and Mr Terry O'Neill of DWC are valid and require a Hearing pursuant to Section 47I(7) of the Act.
- 30) The objection of A/Superintendent Michael Hebb of Northern Territory Police is dismissed for the reasons set out above and pursuant to Section 47I(4) of the Act I direct the Director to inform A/Superintendent Michael Hebb of my Decision. The A/Superintendent is also to be advised that pursuant to Section 47J(1) of the Act he may apply within fourteen days to the Commission for a review of this Decision.