

Northern Territory Licensing Commission

Reasons for Decision

Premises:	21 On the Wharf
Applicant:	2 Fresh Pty Ltd
Director:	Mr Brian Barnes
Proceeding:	Application for a New Liquor Licence
Heard Before:	Mr Richard O'Sullivan (Chairman) Mr Walter Grimshaw Mrs Jane Large
Date of Hearing:	26 June 2012
Appearances:	Mr Ian Rowbottam, Counsel for Mr Brian Barnes Mr Duncan McConnel, Counsel for Mr Thanh (Tommy) D Huynh Ms Rachel Waugh Mr James Lau Mr Ronald Choong (Traders of Stoke Hill Wharf) Licensing Inspector Jeffrey Paull

Background

- 1) 2 Fresh Pty Ltd has made application through its sole Director, Mr Brian Barnes, for a liquor licence to sell alcohol at the Stokes Hill Wharf from the premises to be known as 21 On The Wharf. This application was advertised in the Northern Territory News on 22 and 24 February 2012 and contained the following:

Proposed trading details for the sale of liquor are as follows:

- *The concept of the premises will be that of a café, with alcohol available for takeaway by customers of "21 on the Wharf" and other wharf patrons to consume at the wharf during liquor trading hours. Patrons will be able to purchase their food and beverages from the café and consume it at the seating areas provided within the wharf precinct.*
 - *Patrons may purchase alcohol without the requirement of purchasing or consuming a meal. Consumption of liquor without a meal is not to be advertised or promoted.*
 - *Liquor may be sold from 10:00 hours until 22:00 hours, seven days a week.*
 - *All alcoholic beverages to be sold in opened containers.*
 - *No more than six (6) units of beverage to be sold to an individual customer on each occasion.*
- 2) The Stokes Hill Wharf area provides a number of food and eatery outlets, a liquor sales outlet, a restaurant and other related retail services. It has become a popular destination for locals and tourists alike to purchase meals and a drink and consume these meals in the alfresco area of the Wharf. It has become a significant tourist attraction during the years of its operation.

- 3) Following this advertisement eight objections were lodged with the Director of Licensing. On reviewing these objections and by a Decision dated 15 May 2012 the Legal Member determined that objections lodged by:
- The Traders of Stokes Hill Wharf
 - Mr James Lau
 - Ms Lisa Price

were valid and required a Hearing pursuant to Section 47I(7) of the *Liquor Act* ("the Act"). The Legal Member also determined that a number of the objections did not fall within the relevant criteria for objections specified in the Act and as a result determined that these objections were not required to be referred to a Hearing and were to be dismissed.

- 4) Following this decision Mr Tommy Huynh and Ms Rachel Waugh sought a review of the dismissal of their objections under Section 47J of the Act. In seeking a review Mr Huynh contested that his objection was based on commercial interest and advised his objection was based on an adverse impact on the neighbourhood from the grant of a further liquor licence.
- 5) Ms Waugh objected to a potential for increase in anti-social behaviour from having another liquor outlet in the area and maintained that control and monitoring of alcohol consumption would be more difficult with another licensed outlet. Ms Waugh's objection also raised the issue of proximity of the applicant's business to a child safe area and an ice cream shop popular with children. She also contested that her objection was commercially motivated.
- 6) On review the Commission determined that the objections of Mr Huynh and Ms Waugh were valid and were required to go to Hearing. The Commission Decision of 21 June 2012 stated:

"At Hearing the Commission can and will seek to determine to what extent these and other objections have a commercial interest basis. Weight accorded to objections will be assessed in conjunction with this determination."

- 7) Comments on the application were sought from Northern Territory Police, Fire and Emergency Services, the Darwin Waterfront Corporation, Department of Health and Community Services and the Development Consent Authority. None of these bodies objected. Police and the Darwin Waterfront Corporation did raise issues relating to the moratorium on takeaway liquor licences and control of alcohol purchased from the proposed premises. The issue of Waterfront patrons bringing their own alcohol into the area was also raised by Police.
- 8) Darwin Port Corporation ("DPC") made a submission to the Director of Licensing outlining investment of approximately \$21 million on upgrading of Stokes Hill Wharf. DPC correspondence referred to visitation numbers in excess of 2,000 people per day at the Stokes Hill Wharf area in busy periods and raised the issue that at peak times the public had to queue to purchase a meal and then separately queue to purchase alcohol.
- 9) DPC's correspondence supported the grant of a licence stating *"this will also encourage fair competition"*.

Hearing

- 10) The Hearing was conducted on 26 June 2012 under separated proceedings, with the Objections Hearing conducted under Section 47I(7) of the Act with all parties present, followed by an Application Hearing in camera where evidence on the applicant's probity and financial standing was presented.

- 11) At the commencement of the Hearing the Commission advised it would be in a better position to make assessment of evidence and submissions presented if it were to undertake a viewing of the area at the commencement of proceedings. It also sought and received agreement from all parties to receive a briefing from the DPC on plans for usage and expansion of the Stokes Hill Wharf area as it related to the current application.
- 12) Mr Peter Raines, General Manager, City Wharves, Darwin Port Corporation, addressed the Hearing and outlined that the DPC was spending \$20 million in revitalising the Wharf, including a significant concrete replacement program and a \$1 million upgrade of Stokes Hill visitor facilities. He stated that it was the DPC intention to foster variation in food sold as currently outlets provided *“very much same, same”*.
- 13) Mr Raines provided a background to the lease and subsequent application for a liquor licence. A Pearl Shop had recently ceased trading and this enabled the additional shop space to be tendered out, along with a separate and smaller area which had formerly been utilised as a First Aid Room, with Café 21 being the successful tenderer of the former Pearl Shop area who would trade at the Wharf as 21 On The Wharf. He added DPC *“wants some sort of variety down on the Wharf”*. He outlined that Café 21, a business operated by Mr Barnes, has a licence to sell alcohol in its current Mall location and that when Mr Barnes had sought consideration of alcohol as being permitted within his Wharf lease, DPC had agreed.
- 14) He outlined that 21 On the Wharf would have approximately one hundred square metres of food preparation, storage, refrigeration and servery space. He also advised the Hearing of plans for a children’s play area to provide a fenced and secure area within the Precinct. Recently the DPC purchased and installed new tables and umbrellas at a cost of \$100,000. Further plans to enliven the Precinct involved proposals for live entertainment on Mondays and Wednesdays
- 15) The Commission, objectors and all other parties of the Hearing then attended a viewing of the Precinct with Mr Peter Raines providing in situ an outline of the facilities and future plans.
- 16) Following the viewing, Mr Rowbottam, on behalf of the applicant, then outlined the concept for the operation for 21 On the Wharf. The applicant would trade as a food and beverage outlet located within the food court at Stokes Hill Wharf. Meals would be served on plates for consumption at the Wharf, with take-away in containers also available. He identified that the concerns over the proximity of its proposed liquor sales area to the children’s play area were unfounded as in fact the existing liquor outlet is located closer to the play area. He outlined that all proposed sales would have containers opened and that all staff would have certification for Responsible Service of Alcohol.
- 17) He further outlined that Café 21 on the Mall would soon likely cease operation due to the redevelopment of the site and therefore the applicant could have proceeded with this venture through application for a Licence Transfer and Substitution to the Wharf area.
- 18) Mr Rowbottam stated that the business model would be heavily dependent on food sales for its viability.
- 19) Mr Brian Barnes, as Director of 2 Fresh Pty Ltd (*“the Applicant”*), then addressed the Hearing. He submitted that he had been the Proprietor and Nominee of Café 21 for around five years and that he was also the proprietor and operator of other food outlets at Casuarina and Berrimah. He presented an extensive background and involvement in the hospitality industry, including the management of nightclubs, adding that his family owns a hotel.
- 20) He advised that initially he considered applying for a liquor licence containing an *“ancillary to a meal”* condition. However this would cause operational difficulties as to who had been served a meal from his outlet. He concluded with advice on the menu which he stated

would be a little different from those currently operating and added “*we know food, that’s what we do*”.

- 21) Mr Duncan McConnel, on behalf of objector Mr Huynh, cross examined Mr Barnes and raised the history of the tender process. He tabled (Exhibit 3) the DPC tender documentation “*Expression of Interest, Lease of Retail Takeaway Outlet, Stokes Hill Wharf Eatery*”. Mr Barnes conceded that in his first expression of interest or response to the DPC, his proposal did not include a liquor licence. However, through the commercial negotiations it became apparent that a higher rent may be applicable and he then sought DPC support to incorporate a liquor licence in the business.
- 22) Mr Barnes advised the Hearing that he was not hiding from the fact that a liquor licence was an afterthought. The issue of a licence only allowing the sale of alcohol to customers purchasing a meal was raised, with the response that practicality would make this difficult.
- 23) Mr McConnel referred to the large bar servery area and the dedicated point of sale illustrated in Exhibit 1 and queried if this indicated that a significant element of the business was dedicated to liquor sales. Mr Barnes responded that the area would display and sell a variety of beverages, both alcoholic and non-alcoholic.
- 24) In response to further questions Mr Barnes advised the Hearing that he would continue with the lease if a liquor licence was not granted.
- 25) In answer to a question from Ms Rachel Waugh on the issue of secondary supply of alcohol to persons in the Wharf area who might not necessarily be consuming a meal, Mr Barnes stated that if people were attempting secondary supply to persons who have no dining intentions at the Wharf, security is present and would assist in detecting and preventing such practices.
- 26) The Commission then sought to hear evidence from objectors who wished to speak to or elaborate on their written objections.
- 27) Mr Ronald Choong, representing the Traders of Stokes Hill Wharf, addressed the Hearing on their objection and stated that the sale of alcohol from 21 On the Wharf would have potential to increase anti-social behaviour and impact on the family friendly environment currently offered by the Precinct. Mr Choong referred to the Traders’ objection submission which outlined the early history of the Wharf during which it had experienced problem drinking in the area. He submitted that a single liquor licence had enabled effective control of this problem.
- 28) All Traders at the Wharf were signatories to the objection as contained in the Hearing Brief. The signatories are the following Traders:
 - Wharf Oyster Bar and Take-Away
 - Siam Thai
 - Ice Cream Shop
 - Fish and Chips on the Wharf
 - Portside Char Grill
 - Harbour Cruises
 - Kim’s on the Wharf
 - Schnitzel Magic
 - Crustaceans Restaurant

- 29) Mr Ronald Choong also outlined that with his wife he had run eatery businesses on the Wharf for about eleven years. He advised that the Wharf area currently has three licences; the licensed takeaway (Wharf Oyster Bar and Take-Away), a licensed restaurant, (Crustacean on the Wharf), and a licensed functions building. He submitted that an additional licence outlet would encourage patrons to drink more. He submitted that his current business and trading outlets would be at a competitive disadvantage to 21 On the Wharf if it is granted a liquor licence.
- 30) Under cross examination from Mr Rowbottam, Mr Choong advised that he did not author or type up the Traders' objection letter.
- 31) Counsel Mr Duncan McConnell introduced a background to his client. He outlined that since 2002 Mr Huynh's business at the Wharf, trading as Wharf Oyster Bar and Take-Away, had been restricted to selling alcohol only. Previously it was stated Mr Huynh's lease had enabled the sale of food. McConnell tabled as Exhibit 4 a copy of a current lease document entitled "*Permitted Use of Premises*". This document referred to the premises as being a takeaway liquor bar with trading hours of 10.00am to 10.00pm seven days a week.
- 32) This lease allows for the sale of beer, mixed spirits and wine, all to be sold in open containers for consumption in the area. The only food able to be sold under this lease condition is "*sealed packets of chips, peanuts and associated other sealed snack items normally sold at a liquor outlet*".
- 33) Mr O'Connell outlined that the premises was operated as a family business and that the business had received no complaint over its conduct. He also disputed a claim raised in correspondence from the applicant contained in the Hearing Brief that persons wishing to purchase alcohol had to wait unduly for service.
- 34) Mr O'Connell advised that his client, Mr Huynh, had organised the petition containing several hundred signatures and headed "*Petition Against New Proposed Alcohol Outlets*".
- 35) The Petition states:

Stokes Hill Wharf management has proposed to allow two new venues at which alcohol can be directly served to the public alongside the provision of food. This is a petition against the approval of a liquor licence/s on the grounds of:

- *Stokes Hill Wharf is a family orientated venue where a large number of families with children come to enjoy a relaxed atmosphere without having to be surrounded by large quantities of alcohol outlets similar to Mitchell Street.*
- *A higher density of alcohol outlets suffers more frequent alcohol related incidences.*
- *For almost 20 years there have been no alcohol related incidences at the Wharf with the current management of alcohol providers, introducing two new venues may change this.*
- *Having alcohol being sold alongside food gives the misconception to the youth that having an alcoholic beverage is the norm. Thus influencing underage drinking which can heavily affect their mental and physical wellbeing.*

Action Petitioned For: We, the undersigned, are concerned citizens who urge our strong disagreement against the proposal of granting liquor licences at the new venues at Stokes Hill Wharf."

- 36) Mr Rowbottam, representing the applicant, queried the employment background of an objector, Ms Rachel Waugh, an employee of Mr Huynh, and was advised that Ms Waugh had worked for Mr Huynh for approximately six years. In relation to proximity of the playground area to licensed premises, Mr Rowbottam pointed out that Mr Huynh's liquor outlet was closer to the playground equipment than the 21 On the Wharf premises.

- 37) The issue of whether a further licensed outlet at the Wharf area would give rise to a greater attraction for itinerants, Mr Huynh advised that itinerant numbers were few but *“on the rise”*. In this regard it was noted that based on purchase price of alcohol at the Wharf, it would represent a cost of \$132.00 per carton of beer.
- 38) Ms Rachel Waugh then gave evidence and stated that a second liquor licence was not needed and would increase the duties of or make harder the Precinct oversight to prevent drunkenness and related behaviour. She submitted that a second liquor licence would have an impact on increasing liquor sales. She stated that the current licensed liquor outlet had refused service to people in the last month due to their level of intoxication, implicitly querying whether a new Licensee would act similarly.
- 39) She stated that the current liquor outlet was well managed and she had only once in over six years of employment called Police in relation to conduct of a person and that in this instance the person had been on a boat charter and was intoxicated.
- 40) Mr Rowbottam cross examined Ms Waugh and pointed out that security were currently engaged to maintain control over the Stokes Wharf Precinct. In relation to visitor numbers and access capacity for the Wharf, it was also pointed out that the parking capacity for the Wharf is for approximately 150 vehicles with a further 200 parking bays being available at the Convention Centre.
- 41) Mr James Lau addressed the Hearing in relation to his objection and outlined that the Wharf area is a popular family venue which currently does not have problems of anti-social or alcohol influenced behaviour.
- 42) Mr McConnel then made summary submission on behalf of his client, Mr Huynh, whose objection he submitted, was somewhat similar to all other objectors. He stated that:
- The grounds for objection do exist and that a commercial competitor can have the right to object to a liquor licence application.
 - He would submit cases from Australian Courts which would help define the term “ambience” in a public place.
 - The current mix of traders has a settled and working formula which will be changed if the current licence application is granted.
 - The applicant’s plans show a large bar servery area.
 - The calls for expression of interest for the lease of food outlets was based on a poor food choice perception.
 - 21 On the Wharf had initially indicated it would make application solely as a takeaway food business.
 - The amenity presented through the jetty lifestyle and the traders is critical and must be preserved.
 - An additional liquor licence is not wanted by Police, the Darwin Waterfront Corporation, Petitioners and Traders.
- 43) He concluded by submitting that licence consideration could await a period of time to see how the venue traded and to see whether the new business would attract new clientele and therefore visitors to the Wharf.
- 44) Mr Rowbottam then made summary submission on behalf of the applicant. He stated:
- The primary aim of the business is the sale of food with alcohol adding value to such sales.

- The bar servery area would cater for the sale of non-alcoholic drinks and was proportionate to the overall design.
 - His client is an existing licence holder who wants to move his primary business from the Mall to the Wharf area.
 - There has been scant evidence put to the Commission at this Hearing on the impact a new licence will have on amenity of the area.
 - The existing liquor outlet is closer to the playground than the new applicant.
 - The customer base for the purchase of food and drink at the Wharf is similar to that of the Mindil Market.
 - A new alcohol sales venue is unlikely to generate extra visitor numbers or extra alcohol consumption, however, food diversity may add to appeal in numbers attracted to the area.
- 45) He concluded by stating the Commission must ask itself what is the detriment from this application and he also submitted that the objections were commercially based, raised under the shroud of impacts on ambience and heightened risk.
- 46) The Commission then cleared the Hearing room and heard evidence in camera as to the business model, funding, lease arrangements and probity of the applicant.

Consideration of the issues

- 47) Following advertising the application for a new liquor licence at the Stokes Hill Wharf Eatery, it appears that all of the existing Traders have made objection, either in their own right or through their incorporation in the objection of the nine Stokes Hill Traders submitted on 6 March 2012.
- 48) Virtually all of these objections have raised the spectre of an additional liquor licence at the Wharf having the potential to unbalance the current and settled trading environment at the Wharf. The petition against a new alcohol outlet at the Wharf signed by 475 petitioners also referenced the Wharf Eatery area as providing a family oriented venue and the threat of a higher density of liquor outlets threatening this safe and relaxed environment. The applicant in a written response has referred to many of the objectors not providing details of their address as an argument to diminish any weight placed on the numerical number of signatories.
- 49) The Commission has heard that previously DPC sought to protect the trading position of the sole licensed outlet, including opposition to an application for a liquor licence at the Pumphouse, currently called The Jetty. Traders at the Hearing also advised that their lease conditions prohibited the sale of alcohol, giving weight to the conclusion that in the past the DPC has protected the trading monopoly of the Wharf Oyster Bar and Take-Away liquor licence.
- 50) It is with this background that the current Traders view a new licence application as undoing the current order and arrangements. During the Hearing a number of these Traders also expressed concern that if a food outlet also had the ability to sell alcohol, it would undermine their competitiveness as well as undermining the monopoly position currently held by the sole licensed Trader of takeaway liquor.
- 51) The Traders who have objected also point out that the initial expressions of interest documentation released in late 2011, for retail leases at the Stokes Hill Wharf Eatery, did not contain any reference to the possibility of a liquor licence. Given that the existing Trader leases, apart from the Wharf Oyster Bar and Takeaway, are not permitted to sell alcohol and that the current applicant only countenanced a liquor licence at the eleventh

hour, there is concern, with some legitimacy, over their commercial positions being disadvantaged.

- 52) While there may have been lack of transparency by the DPC in granting a lease and giving support to the liquor licence application for 21 On The Wharf, the Commission now is tasked with considering an application under the Act whose objects include:

3 Objects

- (1) *The primary object of this Act is to regulate the sale, provision, promotion and consumption of liquor:*
- (a) *so as to minimise the harm associated with the consumption of liquor; and*
 - (b) *in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor.*
- (2) *The further objects of this Act are:*
- (a) *to protect and enhance community amenity, social harmony and wellbeing through the responsible sale, provision, promotion and consumption of liquor;*
 - (b) *to regulate the sale of liquor in a way that contributes to the responsible development of the liquor and associated industries in the Territory; and*
 - (c) *to facilitate a diversity of licensed premises and associated services for the benefit of the community.*

- 53) The Act under Section 6 further defines Public Interest Criteria:

6 Public interest criteria in respect of licence or licensed premises

- (1) *When the Commission has regard to the objects of this Act in:*
- (a) *considering or determining an application under this Act in respect of a licence or licensed premises; or*
 - (b) *determining the conditions of a licence*
- The Commission must, when taking into account the public interest in the sale, provision, promotion and consumption of liquor, consider any of the criteria specified in subsection (2) that are relevant to the application or conditions.*
- (2) *For subsection (1), the criteria are the following:*
- (a) *Harm or ill-health caused to people, or a group of people, by the consumption of liquor is to be minimised.*
 - (b) *Liquor is to be sold, or sold and consumed, on licensed premises in a responsible manner.*
 - (c) *Public order and safety must not be jeopardised, particularly where circumstances or events are expected to attract large numbers of persons to licensed premises or an area adjacent to those premises.*
 - (d) *The safety, health and welfare of persons who use licensed premises must not be put at risk.*
 - (e) *Noise emanations from licensed premises must not be excessive.*

- (f) *Business conducted at licensed premises must not cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the neighbourhood of the premises or who are making their way to or from, or using the services of, a place of public worship, hospital or school.*

- 54) Therefore, under the Act, the Commission's prime consideration is whether the grant of a further licence is likely to result in harm and whether the grant of such a licence is in the Public Interest. The latter includes harm or ill health, public order and safety and disturbance to people who work or reside in the neighbourhood of a licence.
- 55) The Commission has been advised that the DPC is undertaking a major upgrade of the Wharf infrastructure including amenities to cater for Wharf Eatery visitors. The DPC advises that at peak times 2,000 visitors can attend Stokes Hill Wharf.
- 56) It is evident to the Commission that the design and fitout of the premises at which 21 On the Wharf is to trade represents an upgrade when compared to the existing general food servery and preparation areas. In this aspect it may be considered as not being to the common standard of the existing and older outlets. Whether this in itself warrants a higher rent or other trading conditions, in variance to all other existing outlets, is a purely commercial consideration. Whether this is fair to existing Traders is not a matter for the Commission to determine.
- 57) While objectors to the grant of a new liquor licence did give reference to amenity and adverse impacts on a family friendly environment, repeated mention was made of the adverse position they would be placed in if a licence was to be granted. Therefore the Commission has determined that in all likelihood the majority of objections have an element of self-serving commercial interest and to a degree this is understandable, but does not add value, and indeed diminishes weight the Commission is able to attach to their objections.
- 58) The trading or business model on which 21 On the Wharf will operate is not totally dependent on the securing of the liquor licence. The operator currently has a licensed café in the Mall and the grant of a licence would result in an outlet similar to that operating in the Mall being developed at the Wharf.
- 59) Counsel for the applicant has advised that given the circumstance of Café 21 On the Mall, it could have sought to relocate down at the Wharf Eatery area by applying for a transfer and substitution of this licence to the new locality. Whether through this mechanism or through the application process as has been entered into, the ultimate result is an application for a new licence at the Wharf Eatery, which has a significant impact on the trading position of existing tenants.
- 60) While mindful of the position of these tenants and aware that the DPC has not engaged in a fully transparent process in reaching a decision to support a new licence application at the one venue, the Commission's duty is to consider the application on its merits and under the requirements of the Act. The applicant meets the standard of probity, management ability and financial standing required by the Commission to be eligible for the grant of a liquor licence.
- 61) On the basis that no authoritative or substantial evidence was presented to the Commission on the likely harm from the granting of a liquor licence for 21 On The Wharf, the Commission has determined to grant the liquor licence under the conditions applied for.
- 62) The Commission is also cognisant of the vicarious position of existing Traders should a competitor gain a commercial advantage. However this aspect is a commercial consideration between parties to the businesses conducted at the Wharf, the DPC and lessees, generally referred to as Traders. These Traders, the Commission is advised, may seek variation to their lease conditions to enable the sale of alcohol. Advice to the Commission is that such applications would be considered by the DPC but there is no assurance as to whether ultimately such applications will be supported, opposed or whether

the DPC would adopt a position of acquiescence and leave any liquor licence application to be determined through normal application processes, without the DPC making comment.

Decision

63) The Commission hereby grants the liquor licence under the terms applied for, that is, the sale of liquor from 10.00am to 10.00pm seven days per week with all alcoholic beverages to be sold in open containers. No more than six units of beverage are to be sold to an individual customer on each occasion and consumption of liquor of without a meal is not to be advertised or promoted.

Richard O'Sullivan
Chairman

16 August 2012