

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

- Applicant:** JHB
(represented by Ms Claire Bass of Nigams Legal)
- Respondent:** Commissioner of Police
(represented by Ms Isabelle Inkster of the State Solicitor's Office)
- Commission:** Mr Nicholas van Hattem (Deputy Chairperson)
- Matter:** Application seeking review of a barring notice pursuant to section 115AD of the *Liquor Control Act 1988*. Application for costs by Applicant against the respondent pursuant to section 21 the *Liquor Control Act 1988*
- Date of lodgement of Application:** 24 May 2023
- Date of Hearing:** 29 June 2023
- Date of Determination:** 29 June 2023. Written reasons published 17 June 2024.
- Determination:**
1. The Barring Notice is quashed pursuant to section 115AD(7) of the *Liquor Control Act 1988*.
 2. The Respondent is to pay the Applicant's legal costs, fixed in the sum of \$4,000.

Authorities referred to in Determination:

- *Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* (LC37/2010)
- *George v Rockett* (1990) 170 CLR 104
- *Keft v Fraser* (unreported, WASC, Library No 6251, 21 April 1986)
- *Kruger v The Commonwealth* (1997) 190 CLR 1
- *Minister for Immigration v Eshethu* 197 CLR 611; [1999] HCA 21 at [124] – [126] (Gleeson CJ and McHugh J).
- *Moylan v Lee* [2022] WASC 195
- *Peterson v Hawley* [2022] WASC 368
- *SVS v Commissioner of Police* (LC19/2011)

Overview

1. At the hearing, the parties agreed that the Barring Notice should be quashed.
2. The Applicant said there had been no proper basis for issuing the Barring Notice.
3. The Respondent said there was a proper basis for the Barring Notice, but having regard to the character evidence provided in the review proceedings, it could be accepted that the Applicant’s conduct on the relevant night was a “one off”. Therefore, the Barring Notice could now be quashed, although it had been properly issued.
4. At the end of the hearing, I ordered that the Barring Notice be quashed.
5. The hearing was focused on the question of costs. The only matter I am now required to determine is whether the Respondent should pay all or any of the Applicant’s costs.

Summary

6. For the purposes of this costs application, I find that there was a reasonable basis for the Delegate to issue a narrow Barring Notice.
7. I also hold that the Delegate had a duty to act reasonably.
8. The scope of the Barring Notice issued, which barred the Applicant from all categories of licensed premises, was not reasonable.
9. I find that the Respondent’s decisions to issue the unreasonable notice and defend its decision to issue the unreasonable notice in these proceedings, provide a basis for an order for costs under the Commission’s discretionary cost power under the Act.
10. The current practice of the Respondent appears to be issuing barring notices prohibiting access to all licensed premises in all cases. If that is the case, it is undesirable. That practice can lead to unreasonable notices being issued, as it did in this case.
11. I hold that there was insufficient basis for the Applicant to contend that the Barring Notice was issued for a collateral purpose. I have reduced the sum sought by the Applicant by \$1,500.
12. I order the Respondent to pay the Applicant’s legal costs fixed in the sum of \$4,000.

Review of Barring Notice

13. [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

14. On 2 May 2023, the Applicant was served with the Barring Notice by an Acting Inspector ("the Delegate") on behalf of the Commissioner of Police.
15. The Barring Notice was made under section 115AA(2) of the of the *Liquor Control Act 1988* (WA) ("the Act") and prohibited the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - a) All hotel licences, however referred to, issued under section 41;
 - b) All small bar licences issued under section 41A;
 - c) All nightclub licences issued under section 42;
 - d) Casino licence issued under section 44;
 - e) All liquor store licences issued under section 47;
 - f) All club licences issued under section 48;
 - g) All restaurant licences issued under section 50;
 - h) All producer's licences issued under section 55;
 - i) All wholesaler's licences issued under section 58; and
 - j) All special facility licences issued under section 46 and regulation 9A of the *Liquor Control Regulations 1989*.
16. The Barring Notice was to expire on 16 August 2023, being for a total period of approximately four months.
17. On 29 May 2023, the Applicant applied to the Liquor Commission ("the Commission") for a review of the Barring Notice under section 115AD of the Act.
18. On 12 June 2023, the Applicant filed a Book of References and Vocational Certificates in support of the Application (some 40 pages).
19. On 12 June 2023, the Respondent provided copies of:
 - a) The Police evidence presented before the Commissioner of Police's Delegate including:
 - i. Statement of Material Facts, [REDACTED];
 - ii. Stills from Body Worn Camera Footage;
 - iii. Criminal History (i.e., no record); and
 - iv. Body Worn Camera Footage.
20. On 16 June 2023, the Respondent wrote to the Applicant. In subsequent documents filed by the parties, the parties agreed that the 16 June 2023 correspondence was not relevant to the Commission's determination of the matter. I received and read the 16 June 2023 correspondence, but have determined this matter without reference to that correspondence.

Submissions

21. The Applicant submitted that the Barring Notice should be quashed on the basis that it was issued on a frivolous basis and was unduly oppressive. The Applicant also made an application for costs.
22. The Respondent submitted that:
 - a) There were reasonable grounds to believe the Applicant contravened a provision of a written law and engaged in disorderly conduct in the vicinity of licensed premises and thus there were reasonable grounds to impose the Barring Notice.
 - b) The Commission, upon review, may exercise its discretion to quash the Barring Notice.
 - c) There should be no order as to costs.

Statutory Framework

23. The Commissioner of Police has the power to ban people from licensed premises pursuant to section 115AA of the Act if the Commissioner believes on reasonable grounds that the person has, on or in the vicinity of licensed premises:
 - a) been violent or disorderly; or
 - b) engaged in indecent behaviour; or
 - c) contravened a provision of any written law.
24. The Commissioner may delegate the power conferred by section 115AA of the Act on any member of the Police Force or above the rank of Inspector pursuant to section 115AB of the Act.
25. Section 115AD(3) provides that where a person is dissatisfied with the decision of the Commissioner of Police to give the notice, the person may apply to the Liquor Commission for a review of the decision.
26. Section 115AD(6) provides that when conducting a review of the decision, the Commission may have regard to the material that was before the Commissioner of Police when making the decision as well as any information or document provided by the Applicant.
27. Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
28. The Act also in section 16 prescribes that the Commission:
 - a) may make its determinations on the balance of probabilities (subsection (1)); and
 - b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply (subsection (7)(a)); and
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].

- 2 Section 5 of the Act set out the objects of the Act. In subsection (1)(b) one of the primary objects of the Act is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. Subsection (2) provides for various secondary objects including to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

Principles

29. In light of the primary and secondary objects of the Act, the effect of a barring notice on a recipient, whilst it may have a detrimental effect on the recipient, is not meant to be a punishment imposed upon the recipient but to be a protective mechanism (*SVS v Commissioner of Police* (LC19/2011)).
30. It is for the Commission to determine whether, on the balance of probabilities, the Barring Notice is warranted.
31. That determination involves consideration of whether the Barring Notice was reasonable.
32. The power to issue a barring notice is a discretionary power conferred on the Commissioner of Police or its Delegate. When a discretionary power is statutorily conferred on a repository (in this case, the Delegate), the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised: *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; and *Minister for Immigration v Eshethu* (1999) 197 CLR 611; [1999] HCA 21 at [124] – [126] (Gleeson CJ and McHugh J).

Analysis

What was the basis of the Barring Notice?

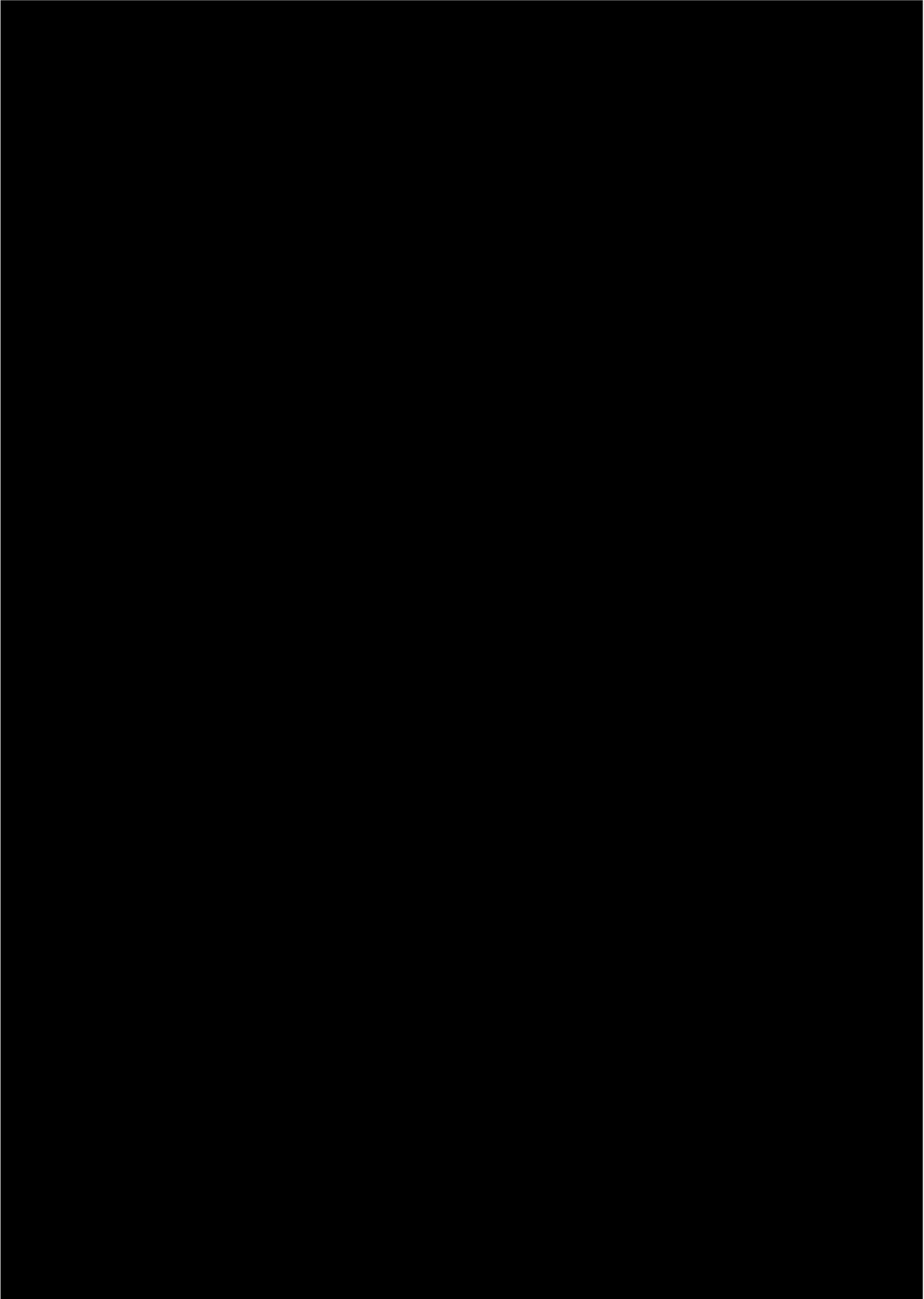
33. The Barring Notice was issued pursuant to section 115AA(2) of the Act on the basis that the Delegate for the Commissioner of Police, Acting Inspector W Hendrie, (“the Delegate”) believed on reasonable grounds that the Applicant contravened a written law in the vicinity of a licensed premises.
34. Paragraph one of the Barring Notice says that evidence has been presented before the Delegate in relation to an incident that occurred on 16 April 2023 in the vicinity of a licensed premises, [REDACTED], where it is alleged that the Applicant committed the offence of obstructing public officers.
35. At the hearing, counsel for the Applicant accepted that the physical location of the interaction between the Applicant and Police was on Lake Street in Northbridge. I find that the event was on the street with [REDACTED] on one side of Lake Street, and [REDACTED] on the other side.
36. I find that the incident occurred in the “vicinity” of [REDACTED], within the ordinary meaning of the word “vicinity”.
37. Paragraph two of the Barring Notice says that pursuant to section 115AA(2) of the Act, the Delegate believes on reasonable grounds that the Applicant contravened a provision of written law in the vicinity of a licensed premises.

38. At the hearing and in its written submissions the Applicant submitted that, primarily for reasons of procedural fairness, the Commission ought to construe this provision narrowly, and read it to mean that the Delegate's basis for the Barring Notice was because the Applicant had breached a written law, namely, the obstruction of Police Officers in the matter as charged: Applicant's primary submissions at [12]-[26].
39. The Respondent submitted that it need not be read so narrowly: Respondent's primary submissions at [11]-[12].
40. I hold that that any of the matters in section 115AA can provide a proper basis for a barring notice.
41. In review proceedings, the task of the Commission is to look at all the circumstances and consider whether a barring notice should be affirmed, amended or quashed. In exercising that power, I consider I must exercise it in accordance with the objects of the Act.
42. For the purposes of determining the costs application, a preliminary question is whether there were any proper bases under section 115AA to issue the Barring Notice.

Does the evidence provide a basis for a belief on reasonable grounds that the Applicant contravened a provision of a written law?

43. Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture: *George v Rockett* (1990) 170 CLR 104 at 116.
44. The parties agree that the only evidence that can establish the requisite belief is the body worn footage. There is no statement of any witness regarding the incident. The parties agreed that the statement of material facts was not evidence for the purpose of this review.
45. Both parties invited me to make various inferences about what the footage shows.
46. I consider that the Delegate's task was to assess the evidence without prejudice or bias, and determine whether that evidence, on its own, grounded a reasonable belief that the Applicant had committed an offence.
47. The Applicant submits it does not do so: Applicant's primary submissions at [29].
48. The Respondent submits that it does. As I understand the Respondent's submissions, there are four moments of the Applicant's conduct that "could" constitute a breach of a written law as per paragraphs [20]-[23] of its primary submissions:
 - a) the first two seconds of the footage (pre-arrest);
 - b) being arrested; or
 - c) calling Police Officers "pusseyos" (on two occasions) after being arrested.

Findings from the body worn footage





Findings as to whether footage evidences a proper basis to issue a barring notice

52. In terms of this costs application, I consider that a relevant question is whether there was evidence for a person in the position of the Delegate, acting reasonably, to have the requisite belief for the issuing of a barring notice.
53. Following some lengthy analysis, and viewing the footage multiple times, and with the benefit of both counsel's submissions, I hold that the evidence did not ground a reasonable belief that the Applicant has engaged in obstruction. I hold that too much is left for conjecture.
54. However, I also find, for the purposes of this cost application, it would be unreasonable to require a person in the position of the Delegate to listen and analyse body worn footage to the extent available to the Commission. It has taken me more than 12 months to deliver these reasons. It was necessary for a person in the position of the Delegate to analyse the evidence more quickly.
55. I raise that in particular, because of the part of the footage at time stamp 1:14. After listening to that passage several times, I find that the Applicant said, "and my lawyer will fight you". On my first listen, I (mistakenly) heard the Applicant say, "and I'll fight you". That would have been a more serious statement.
56. As will become apparent, I consider this costs application turns on a question of reasonableness. I do not think it can be reasonably expected that a person in the position of the Delegate watches footage as many times as I have been able to. I also acknowledge that a person in the position of the Delegate does not have the benefit of counsel's submissions.

57. Both counsel made thoughtful and detailed submissions regarding inferences I could draw from the footage. The submissions were very helpful to my analysis. The Delegate did not have that advantage.
58. Ultimately, I find that reasonable minds could differ on the question of whether the evidence disclosed a reasonable basis to believe the Applicant had engaged in an obstruction, violent conduct, or disorderly conduct.
59. Whether the Applicant's conduct was disorderly depends on whether such behaviour would offend a reasonable person so as to prevent or interfere with that person's lawful use and enjoyment of a public place in the relevant circumstances: *Peterson v Hawley* [2022] WASC 368 at paragraphs [56]-[57] (Forrester J).
60. I find that the footage could provide a basis to believe that the Applicant engaged in disorderly conduct. That finding is based both on the volume of the Applicant's statements and their content and the overall context (being in Northbridge at around 3 am).
61. I find that people in Northbridge at 3 am should have a higher threshold as to what constitutes disorderly conduct than people on the Hay Street Mall at 12 noon: *Keft v Fraser* (unreported, WASC, Library No 6251, 21 April 1986) at 10 – 11 (Burt CJ) cited in *Moylan v Lee* [2022] WASC 195 (Mitchell J) at [33].
62. Still, I find the Applicant does, at times, have his hand in a loose fist, is speaking very loudly, and is saying things [REDACTED]. I find that those statements are made for the purpose of offending or intimidating Mr S. I find that all of this conduct could have interfered with a person's enjoyment of the vicinity, even at Northbridge, even around 3 am.
63. For clarity, I do not find on the balance of probabilities (or any other standard) that the Applicant did engage in disorderly conduct.
64. However, in all the circumstances, I find that a person acting reasonably could view that footage and believe that the Applicant had engaged in disorderly conduct.
65. That belief could have grounded a basis to issue a barring notice.

Was the Barring Notice reasonable?

66. While there may have been a reasonable basis to issue a barring notice, the terms of the Barring Notice issued by the Delegate were not reasonable.
67. It appears that the current practice of the Respondent is to apply a "one size fits all" approach banning people from all categories of licensed premises.
68. It is the experience of the Commission in recent years that all barring notices have barred respondents of all categories of licence, including lower risk venues.
69. This is not desirable. A "one size fits all" approach may from time to time be inconsistent with the Delegate's requirement to consider the punitive effect of the Barring Notice, and to exercise the discretionary power conferred by the statute reasonably. These matters require a consideration of the circumstances of the incident, any evidence of the prior conduct of a respondent (e.g., whether they have a relevant criminal history) and a consideration of what categories of licences should be barred.

70. Having regard to the footage, and the fact that the Applicant had no criminal record, it was not reasonable to issue the Barring Notice, which barred the Applicant from entering all categories of licensed premises.
71. I find that the evidence before the Delegate may have provided a reasonable basis to exclude the Applicant from nightclubs for a short period. I also find that the four months of the notice could have been an appropriately short period.
72. However, the evidence before the Delegate did not provide a reasonable basis to exclude the Applicant from restaurants, liquor stores, or special facility licences (including theatres and sports venues).

Costs

73. The parties have each addressed in their primary and secondary submissions their positions as to costs that should be ordered under the broad power given to the Commission under section 21 of the Act.
74. In *Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* (LC37/2010) at [20] – [22] the Commission summarised principles relevant to the Commission’s costs powers. These relevantly include:
 - a) The general practice of the Commission is not to award costs in favour of successful applicants or objectors; rather, parties bear their own costs.
 - b) Costs may be awarded against a party whose case was not arguable and was without merit.
 - c) The Commission is not bound by previous decisions of the Liquor Licensing Court.
 - d) The discretionary nature of costs does not easily permit the formulation of any concrete rules as to the exercise of that discretion.
 - e) Although there is no merit in trying a hypothetical case or one that has otherwise been resolved, it may be that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.
75. I find that the Delegate’s decisions, in barring the Applicant from all licensed premises, and then seeking to defend that decision in these proceedings, were so unreasonable that the Respondent should pay the reasonable costs of the Applicant.
76. At the hearing, the Applicant’s counsel provided an invoice in the sum of \$5,500. That appears to be a reasonable figure. I accept the submission that that figure represents a discount of the actual work done in this matter.
77. However, I will make a deduction to the total amount to be paid by the Respondent. The Applicant cast its case wide. The Applicant’s Grounds of Review comprised some 14 paragraphs. The Applicant’s case also included a submission that the Delegate acted for a collateral purpose: [27.2] of the Applicant’s responsive submissions.

78. Although the Applicant has been successful in the resolution of this matter, and this costs application, the basis for my decision is that the Respondent was unreasonable, not that it was vexatious, frivolous or acted for a collateral purpose.
79. I do not consider there was a sufficient evidentiary basis to submit that the Barring Notice was made for a collateral purpose. I hold that the Respondent is not obliged to pay the Applicant's costs in relation to that submission.
80. I reduce the sum of costs to be paid by \$1,500.

Order

81. The Barring Notice is quashed pursuant to section 115AD(7) of the *Liquor Control Act 1988*.
82. The Respondent is ordered to pay the Applicant's costs of the review fixed in the sum of \$4,000.



NICHOLAS VAN HATTEM
DEPUTY CHAIRPERSON