

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

- Applicant:** Mr Calum Thomas Shultz  
*(Represented by Mr Jordan Larcher of Forbes Kirby Lawyers)*
- Respondent:** Commissioner of Police  
*(Represented by Mr Thomas Ledger of the State Solicitor's Office)*
- Commission:** Ms Kate Pedersen (Chairperson)  
Ms Pamela Hass (Member)  
Mr Paul Shanahan (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to dismiss an application to vary or revoke a Prohibition Order under section 152G of the Act, which Prohibition Order prohibits the Applicant from entering any licensed premises until 17 October 2023.
- Date of hearing:** 3 May 2022
- Date of determination:** 7 June 2022
- Determination:** The decision of the Director of Liquor Licensing to dismiss the Applicant's application to revoke or vary a prohibition order is affirmed pursuant to section 25(4)(a) of the Act.

**Authorities referred to in Determination**

- *Hancock -v- Executive Director of Public Health* [2008] WASC 224
- *Woolworths -v- Director of Liquor Licensing* [2013] WASCA 227
- *Australian Leisure & Hospitality Group Pty Ltd -v- Commissioner of Police and Others* (LC 01/2017)

## Background

1. This application is brought under section 25 of the *Liquor Control Act 1988* (the **Act**) to review an application to vary or revoke a Prohibition Order dismissed by the Director of Liquor Licensing (the **Director**).
2. On 13 April 2021, the Commissioner of Police (the **Respondent**) applied to the Director to prohibit Mr Calum Thomas Schultz (the **Applicant**) from entering all licensed premises for a period of three years (the **Prohibition Order**) from 18 October 2020, pursuant to section 152B of the Act.
3. The incident that gave rise to the Prohibition Order occurred on 18 October 2020 at the Ocean Beach Hotel at 140 Marine Parade, Cottesloe (the **Premises**). At about 6.40pm, an altercation occurred involving the Applicant and [REDACTED] (the **Victim**) in which the Victim sustained a deep gash above his right eyebrow, which required four stitches (the **Incident**).
4. Immediately following the Incident, the Applicant was charged with unlawful wounding contrary to section 301(1) of the *Criminal Code Act Compilation Act 1913* (WA) (the **Charge**).
5. As a result of the incident, the Respondent also issued a Barring Notice on 24 November 2020.
6. On 22 April 2021, the Applicant's lawyer wrote to the Respondent about the Prohibition Order Application advising that the Charge was listed for trial on 1 September 2021 and reserving the right to respond to the Application pending the outcome of trial, because 'any response may impact on [the Applicant's] right to silence at trial.'
7. On 25 May 2021, a delegate of the Director of Liquor Licensing issued the Prohibition Order.
8. On 24 August 2021, the Western Australia Police Force (**WAPOL**) advised the Applicant's solicitor that the Charge would be discontinued on 1 September 2021. On 8 September 2021, the Applicant was awarded costs in the sum of \$8,360.00 as a result of the Charge being discontinued.
9. On 19 October 2021, the Applicant's solicitors applied to vary or revoke the Prohibition Order pursuant to section 152G of the Act.
10. Both the Applicant and the Respondent filed submissions in relation to that application. By letter dated 4 January 2022, the Director provided reasons for dismissing the Application (the **Director's Decision**). The Director's Decision explained:
  - a) WAPOL's decision to discontinue prosecution of the Charge was an irrelevant consideration;
  - b) the CCTV footage of the Incident is the best objective evidence available and 'clearly' showed the Applicant with '*an object*' in his hand which he used to assault the Victim;
  - c) based on the CCTV footage the Applicant's actions were entirely disproportionate and unwarranted; the outcome of the Incident for the Victim could have been more severe; and other innocent members of the public could have been injured; and
  - d) having regard to the public interest considerations under the Act, the Prohibition Order issued to the Applicant was appropriate in the circumstances.

11. By Application dated 28 January 2022, the Applicant sought a review of the Director's Decision pursuant to section 25 of the Act (the **Application**). The Applicant asks the Commission 'to vary or revoke the Prohibition Order, so that it is no longer in effect, or give directions to the Director to do the same.'
12. The Application for review was supported by written submission filed by both parties and was heard by the Commission on 3 May 2022 by video link.

## **Legal framework and principles**

### The Commission's role on review

13. The Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review and make a determination on the basis of the same materials that were before the Director (*Hancock v Executive Director of public Health* [2008] WASC 224, [54]; section 25(2c) of the Act).
14. On review the Commission may:
  - a) affirm, vary or quash the decision of the Director (section 25(4)(a));
  - b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance (section 25(4)(b));
  - c) give directions:
    - (i) as to any questions of law reviewed; or
    - (ii) to the Director, to which effect shall be given (section 25(4)(c)); and
  - d) make any incidental order (section 25(4)(d)).
15. When conducting a review, the Commission:
  - a) may make its determination on the balance of probabilities (section 16(1)(b)(ii));
  - 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 (section 16(7)(a));
  - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (section 16(7)(b)); and
  - d) is to act speedily and with as little formality and technicality as is practicable (section 16(7)(c)).

### The decision under review and the public interest

16. The Decision under review is a decision by the Director to dismiss an application to vary or revoke a prohibition order under section 152G of the Act. Section 152J(2) of the Act provides:

*"The Director may make an order varying or revoking a prohibition order only if satisfied that it is in the public interest to do so –*

- (a) *having given the respondent a reasonable opportunity to make submissions or to be heard in relation to the application; and*
  - (b) *having regard to –*
    - i. *any information or document provided by the applicant in or with the application; and*
    - ii. *any information or document provided by the respondent under paragraph (a)."*
17. Section 152J, like the entirety of Part 5A is indicative of Parliament's intention to promote "*lower risk drinking environments*" and address "*alcohol-related anti-social behaviour*": (Western Australia, Parliamentary Debates, Legislative Assembly, 20 September 2006, 6341 (Mark McGowan, Minister for Racing and Gaming); Explanatory Memorandum, Liquor and Gaming Legislation Amendment Bill 2006 (WA) 1).
  18. Section 152J(2) provides that the Director may make such an order only if satisfied that it is in the public interest to do so after having given the person an opportunity to make submissions and to be heard in relation to the application, and after having had regard to any information or document provided by the Commissioner of Police or provided by the relevant person. It is also important to appreciate that section 152H provides that an application under section 152G is to set out the reasons why the applicant considers a prohibition order should be varied or revoked *as well as* set out any other information and be accompanied by any document that the applicant considers relevant to the application.
  19. The term 'public interest' is not defined in the Act. Nor does the Act expressly state the nature of the factors to be considered by the Commission in determining whether it is satisfied that it is in the public interest for a prohibition order to be made. The term imports a discretionary value judgment, and where there is no positive indication of the considerations by which a decision is to be made, such a general discretion will be confined only by the scope and purposes of the statute: *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, [48].
  20. Here, the primary objects of the Act include the minimisation of harm or ill-health caused to people, or any group of people, due to the use of liquor. The secondary objects of the Act include the provision of "*adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor*" (sections 5(1)(b) and 5(2)(d)). It is apparent from the subject matter and purposes of Part 5A (including as expressed in the extrinsic materials), and the objects of the Act generally, that matters relevant to the "*public interest*" when considering an application for a prohibition order include the protection of members of the public from alcohol-fuelled anti-social behaviour.
  21. The public interest test, understood by reference to the scope, subject matter and express objects of the Act, directs attention to considerations of public safety in the context of alcohol consumption. It is not concerned with the punishment of the person subject to the order. In other words, the granting of a prohibition order is not an exercise in sentencing – the jurisdiction is protective rather than punitive.

### **Material on review**

22. The material that was before the Director when making the decision to impose a Prohibition Notice was as follows:
  - a) Application for Prohibition Order dated 13 April 2021;

- b) Statement of Material Facts - brief no 2052716-1;
- c) Police incident Report 181020 1900 15347;
- d) 7 witness statements about the Incident;
- e) Medical report dated 18 October 2020;
- f) Images of injuries to the Victim;
- g) CCTV footage x 2 dated 18 October 2020 from the Ocean Beach Hotel;
- h) Ocean Beach Hotel CCTV Still Images dated 18 October 2020;
- i) Barring Notice LEU200345;
- j) Disclosable court outcomes for the Applicant;
- k) Police image of the Applicant;
- l) Certificate of service dated 15 April 2021;
- m) Notice of Prohibition Order Application dated 21 April 2021;
- n) Email approval of Prohibition Order dated 19 May 2021;
- o) Application to vary or revoke Prohibition Order dated 19 October 2021 and attachments CTS1-CTS5;
- p) Commissioner of Police Submissions dated 24 November 2021;
- q) Email to applicant dated 25 November 2021;
- r) Applicant's Responsive Submissions dated 2 December 2021 and annexures 1 to 4 (being four character references in support of the Application); and
- s) Decision of the Director dismissing the application dated 4 January 2022.

### **Applicant's Submissions**

- 23. The Applicant relies upon its Outline of Submissions dated 28 January 2022 as well as its oral submissions made at hearing.
- 24. The Applicant's Outline of Submissions relies on two grounds:
  - a) first, that the Director erred at law in finding that WAPOL's decision to discontinue prosecution of the Charge was an irrelevant consideration (**Ground 1**); and
  - b) second, upon review of all the evidence before the Director, the Director's finding that the Applicant "*clearly*" used the "*object*" to assault the Victim was an error of fact (**Ground 2**).
- 25. At the hearing, the Applicant acknowledged that demonstration of either error was unnecessary in review proceedings.

*The Applicant's right to silence and impact on the application*

26. The Applicant submits that he did not initially respond to the decision to impose the Prohibition Order on the advice of his lawyers because:
- a) the Charge was still being prosecuted at that time; and
  - b) his lawyers advised him to exercise his right to silence in relation to the prosecution and were concerned he might prejudice that right if he responded to the Prohibition Order.
27. The Applicant described the key dates as follows:
- a) on 14 April 2021, the application for the prohibition order was made;
  - b) by 22 April 2021, the Applicant instructed his lawyers to write to the Respondent reserving the right to respond, but noting his right to silence;
  - c) on 25 May 2021, a delegate for the Director issued the Prohibition Order;
  - d) by September 2021, WAPOL had discontinued the Charge; and
  - e) on 19 October 2021, the Applicant applied to vary or revoke the Prohibition Order.
28. The Applicant did not make a submission that he was constrained in applying to the Director for an order to vary or revoke the Prohibition Order under section 152G of the Act (in October 2021 after the Charge had been dismissed), or indeed in putting on evidence in support of the application pursuant to section 152H of the Act.

*Whether the Applicant struck the Victim with a bottle (Ground 2)*

29. The Applicant submits that the WAPOL documents before the Director do not show the Applicant using a bottle to strike the Victim. It is said that the WAPOL Incident Report, the Statement of Material Facts in support of the charge and the WAPOL witness statements do not provide firsthand evidence of having seen the Applicant strike the Victim with the bottle. Similarly, the Applicant submits that the medical evidence supports the contention the Victim was not struck with a bottle because the medical summary stated that there was 'no glass' found in the Victim's wound.
30. The Applicant referred to the CCTV footage at length in both oral and written submissions. The Applicant submits that the first and second videos are low-quality format. One of the two video segments is said to be of very poor quality and appears to be video footage of CCTV Footage being played on a video screen on a separate device. The other video segment is said to be 'jerky' at the very start, that the video footage may 'skip' during that time, and that it is possible that some relevant action may be missing from that video segment.
31. The Applicant submits that the CCTV footage does not show the incident in its full length and does not show with certainty an object being used to strike the Victim. The Applicant says that the CCTV footage does not 'clearly' show the Applicant striking the Victim with a bottle as found by the Director.
32. The Applicant also says that no conclusion can be drawn as to the nature of the Applicant's arm movement on the CCTV footage, and that in particular, whether the Applicant's 'straight arm action' suggests the Applicant was wielding an object, as opposed to a bare fist, and conclusions about such matters would require expert evidence.

33. In oral submission it was also submitted on behalf of the Applicant that he does not know how the Victim's injuries were caused, although it was suggested that the Victim's injuries could have occurred when he fell to the floor or in some other way during the Incident. The Applicant denies he struck the Victim with a glass bottle.

*Oral submissions about public interest considerations*

34. At the hearing, a number of oral submissions were made about the Applicant's personal circumstances and remorse. He was said to be deeply remorseful for his actions, which it was said can be inferred by the Commission. It was conceded at the hearing that there was no evidence in support of this submission. The Applicant's counsel submitted that the Applicant could not express remorse before the Prohibition Order was imposed as WAPOL had not yet decided to withdraw prosecution of the Charge at that time and as the Applicant did not wish to waive his right to silence in relation to that prosecution. The Applicant was also said to be of good character, and to have himself been the victim of violence during the Incident.
35. It was explained that the Applicant is only twenty years old, has no criminal record, has no history of violence before or after the Incident, and is no danger to the public. It was also submitted that there was no evidence that he had been drinking excessively before the Incident and no evidence that alcohol was a factor in the Incident.
36. As for whether the Incident could have been avoided, it was submitted on behalf of the Applicant that he was reacting to being punched by the Victim, and the Incident happened so quickly that he could not simply move away so as to avoid the injuries to the Victim and the risk of injury to other bystanders.
37. It was also submitted that the Applicant has been negatively affected by the Prohibition Order, including socially and financially, which it was also said can be inferred by the Commission. This was understood as a submission that the Prohibition Order has a punitive effect on the Applicant.

**Respondent's Submissions**

38. The Respondent relied upon Primary Submissions dated 12 April 2022 as well as oral submissions made at the hearing.

*Grounds 1 and 2*

39. The Respondent submitted that because the Commission is to undertake a review by way of rehearing, it is not constrained by a need to find error. Accordingly, the Respondent submitted it was strictly unnecessary to address Ground 1 and Ground 2 alleged by the Applicant.
40. Nonetheless, the Respondent explained that Ground 1 alleging an error of law by the Director in finding the discontinuance of the Applicant's criminal proceedings to be an 'irrelevant consideration' was misconceived. The Applicant noted that there may be many reasons why a criminal charge is discontinued, which would have no bearing on whether a Prohibition Order should be made. Indeed, the making of a prohibition order is not linked to, or reliant upon, a criminal conviction in respect of any aspect of the conduct the subject of the application. Rather, the Commission is entitled to make findings of fact on the balance of probabilities irrespective of whether the Applicant is convicted of, or even charged with, a criminal offence. This is said to be consistent with the different objectives of the proceedings before the Commission, as compared to criminal proceedings. The Respondent submitted



that the prohibition order regime is protective, being to maintain public safety in and around licensed premises from violent and anti-social behaviour, as opposed to criminal proceedings which are punitive in nature.

41. The Respondent also submitted that the weight of evidence supported the conclusion that the Applicant struck the Victim three times to the face with a bottle, and that, accordingly, it is proper to impose (or in this case, maintain) the Prohibition Order even if the Applicant is innocent of a specific criminal charge.
42. As to Ground 2 (i.e., as to the allegation that there was no factual or evidentiary basis for the Director to find the Applicant used an object to assault the Victim), the Respondent contends that the Applicant struck the Victim with a glass bottle during the Incident, causing the injury to the Victim's face. The Respondent submits that there is no evidence that any other type of object was used, and the Victim's laceration was inconsistent with the force of either a human fist or palm. Further, the Respondent submits that the Applicant can be seen on the CCTV footage 'winding up' his right arm in a motion consistent with someone holding an object of some kind of weight, rather than having an open fist.
43. The Applicant further submits that the evidence with respect to the Incident (notably including the CCTV Footage) and the nature of the Victim's injury (described on the Fiona Stanley Hospital Emergency Medicine Summary as a "*3cm laceration to left forehead, deep*" and shown in the photos of the Victim) both indicate that the Applicant struck the Victim with a glass bottle, rather than with the Applicant's hand or fist, or being caused by falling to the floor of the Premises.
44. In any event, the Respondent submits that even if the Commission is not satisfied that there was a glass bottle involved in the altercation, the Applicant's striking of the Victim is the kind of behaviour a Prohibition Order aims to prevent.
45. The Respondent also submits that there is no evidence to support the assertion that the Applicant was acting in self-defence, and there is also no evidence in the materials to support the assertion that the Victim's injuries were caused by anything other than being struck with a bottle by the Applicant.

#### *Public interest considerations*

46. The Respondent expressly relies upon its Outline of Submissions dated 24 November 2021 provided to the Director, which include the facts of the incident, the operation of Part 5A of the Act, and the public interest aspects of the Application. As to the public interest, the Respondent refers to the objects of the Act to minimise harm or ill health caused due to the use of liquor and submitted that the Applicant's striking of the Victim is the type of behaviour that Prohibition Orders aim to remove from licensed venues to protect the public.
47. The Respondent also submits that:
  - a) the submission that it is not in the public interest for innocent parties without a history of violence to be excluded from attending licensed premises fails to acknowledge the proven violence in this matter and the public interest in minimising harm to people who attend licensed venues; and
  - b) the absence of prior convictions does not provide a factual basis for concluding the Applicant is of good character.

48. The Respondent submits that the public interest test, understood by reference to the scope, subject matter and express objects of the Act, directs attention to considerations of public safety in and around licensed premises. Given the Applicant's actions were violent, and resulted in a serious wound to the Victim, the Respondent contends that revoking or varying the Prohibition Order would not be in the public interest.
49. In response to the Applicant's submission about remorse, the Respondent submitted that there was no evidence before the Commission to allow a finding on remorse to be made.
50. While the Respondent acknowledged that the character references submitted on behalf of the Applicant are to his credit, it was submitted that they are nonetheless of limited weight as they do not address his drinking habits or liquor use.
51. Finally, the Respondent submitted that the length of the Prohibition Order was not punitive in nature but rather protective given the violence involved in the Incident.

### **Determination**

52. All evidence and submissions tendered before the Commission has been considered in the determination of this application. The failure to refer to specific evidence in these written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)).
53. The Commission accepts that the two angles of CCTV footage of the Incident are not of high quality, and do not provide an unimpeded view of the Incident as it unfolded. However, both segments provide footage of the same event from different angles, and together provide a more complete picture of events as they unfolded than either video does alone. Despite its inadequacies, it is nonetheless possible to make various observations about the Incident. The Commission is satisfied that in the course of the Incident:
  - a) the Applicant was standing in a group of people at the Ocean Beach Hotel holding a bottle in his right hand (which was accepted by the Applicant's counsel);
  - b) following a brief exchange which the Commission accepts the Victim may have initiated, the Applicant swung his right arm back and then toward the Victim in what can be described as a winding up motion;
  - c) although the footage is of poor quality, the Applicant can be seen to still be holding something in his right hand while he undertakes the winding up motion;
  - d) the Applicant advances towards the Victim with his arm swinging towards him;
  - e) an altercation ensued between the Applicant and the Victim, and the Victim sustained a deep laceration to his forehead which required stitches; and
  - f) the Applicant and the Victim had to be separated by security staff and bystanders.
54. Based on the materials supplied, it is the Commission's view that while the CCTV footage may not 'clearly' show the Applicant striking the Victim with a bottle, the Commission is nevertheless satisfied on the balance of probabilities that the Applicant did so. Such material includes the CCTV footage, witness statements referring to the bottle, and the nature of the injuries suffered by the Victim.

55. Accordingly, the Commission is satisfied that there were reasonable grounds to conclude that there was a clear and proper basis for the Director to issue the Prohibition Order, and that the grant and continuance of the Prohibition Order is in the public interest.
56. Therefore, it is for the Commission to determine, in the relevant circumstances, whether the length and terms of the Prohibition Order are sufficient to uphold the objects of the Act and are not punitive in nature. The public interest must be balanced against the impact of the Prohibition Order on the Applicant.

*Public interest considerations*

57. The Applicant provided four references as to his character, which are to his credit. However, the Commission also notes that those references do not speak to the Applicant's alcohol consumption or behaviour while drinking. The Commission also accepts that there was no prior criminal record against the Applicant, and that the Applicant had no history of violent or aggressive behaviour prior to the Incident.
58. The Commission deems the Applicant's conduct during the Incident to have been very serious in nature. It is well known that one punch can cause serious damage to a person, let alone when another object is used. The Applicant exposed the public to some very violent and disorderly behaviour.
59. The Applicant's submissions with respect to remorse were of limited assistance to the Commission. The Commission rejects the submission that remorse can be inferred without evidence. Furthermore, the Applicant did not seek to explain his conduct to the Director or to provide any evidence that he had sought any help or had taken any steps to address the factors that may have led to or contributed to his offending behaviour. Indeed, the Applicant's apparent remorse (as expressed by his counsel and not supported by evidence) is at odds with his lack of acceptance that he caused the Victim's injuries, as well as his submissions about reacting to being punched by the Victim. The CCTV footage does not show the Applicant merely trying to defend himself, or reacting to a single punch. Instead, that footage shows the Applicant aggressively and offensively (rather than defensively) engaging with the Victim.
60. The Applicant, through his counsel, repeatedly sought to justify his actions towards the Victim rather than providing evidence to show that the Applicant is unlikely to engage in the same behaviour again. There was no evidence that the Applicant has taken any steps to address the factors which led to him behaving violently on the night of the Incident. Any suggestion that the Applicant was impeded in leading such evidence by concern to maintain his right to silence in his criminal proceedings is rejected by the Commission. This is because at the time the Applicant made the application for the Director to vary or revoke the Prohibition Order, his criminal proceedings had been discontinued and there was no impediment to him availing himself of section 152H(b) of the Act by providing information and documents (such as a statutory declaration made by the Applicant) to the Director in order to adduce that evidence. The Commission has no comfort that the Applicant will not behave in this way again.
61. The Applicant's submission that there was no evidence that alcohol was a factor in the Incident is also of little assistance to the Commission's determination of the public interest. The Applicant has provided no evidence with respect to his alcohol consumption during and since the Incident, and it is uncontentious that the Applicant had a drink in his hand on the evening of the Incident. In these circumstances, it is reasonable to infer that the Applicant

had been drinking and that alcohol may have been a contributing factor to the Incident unfolding.

62. The Commission also does not find the Applicant's submissions that the Commission should infer the impact that this matter has had on the Applicant to be very compelling, particularly when the Commission considers the need to protect the public. While it may be accepted that the Incident and associated criminal proceeding have been a source of considerable cost and distress for the Applicant, the Commission's primary concern is the public interest factors which bear on this matter.
63. Having regard to all of the circumstances, and in particular to the serious nature of the Applicant's conduct, the Commission considers that the public interest lies in favour of the protection of members of the public attending licensed premises from violence. The interests of the community must outweigh the interests of the individual in this case and the risk that the Applicant will behave in similar manner again, can be minimised by the terms of the Prohibition Order.
64. The Prohibition Order that has been imposed prevents the Applicant from attending any class of licensed premises for the duration of the Order. That should prevent the Applicant from engaging in any similar violent incident at a licensed premises during that time. The Commission is also of the view that it is not in the public interest to make any exceptions to the class of licensed premises that the Applicant is prohibited from entering.
65. However, the Commission has also taken into consideration that the Applicant has no prior criminal record. The purpose of the Prohibition Order is not intended as a punishment. Rather it serves as a measure to protect the public from anti-social behaviour, such as the Applicant's, in and around licensed premises. In the circumstances, the Commission finds that to ban the Applicant from all licensed premises for a period of three years from the date of the Incident will allow the Applicant the opportunity for introspection regarding his behaviour and to seek help.
66. The decision of the Director of Liquor Licensing to dismiss the Applicant's application to revoke or vary a prohibition order is affirmed by the Commission pursuant to section 25(4)(a) of the Act.



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**KATE PEDERSEN**  
**CHAIRPERSON**



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**PAMELA HASS**  
**MEMBER**



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**PAUL SHANAHAN**  
**MEMBER**