

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

Applicant: NY
(represented by Ms Zoe Gilders of ZG Criminal Law)

Respondent: Commissioner of Police
(represented by Mr Toby Bishop of State Solicitor's Office)

Commission: Ms Emma Power (Deputy Chairperson)

Matter: Application seeking review of a barring notice pursuant to section 115AD of the *Liquor Control Act 1988*.

Date of lodgement of Application: 20 January 2022

Date of Hearing: 21 January 2022

Date of Determination: 21 January 2022

Date of Written Reasons: 14 February 2022

Determination: The Barring Notice is varied pursuant to section 115AD(7) of the *Liquor Control Act 1988* to permit [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

The remainder of the barring notice remains in full force.

Authorities referred to in Determination:

- *Van Styn v Commissioner of Police* (LC19/2011)
- *Batty v Commissioner of Police* (LC 33/2011)
- *Quartermaine v Commissioner of Police* (LC 46/2011)
- *Piscopo v Commissioner of Police* (LC 55/2011)
- *Lewer v Commissioner of Police* (LC 58/2011)

Review of Barring Notice

- 1 On 30 December 2021, an incident occurred at [REDACTED] (“the Premises”) involving alleged offences by the Applicant of:
 - a. failing to comply with a direction not wearing a face mask in accordance with section 85(1)(a) of the *Emergency Management Act 2005*; and
 - b. displaying an insignia of an identified organisation in a public place contrary to section 25(2) *Criminal Law (unlawful Consorting and Prohibited Insignia) Act 2021*,together, “the Incident”.
- 2 As a result of the Incident, the Applicant was:
 - a. issued with an infringement in respect to the failure to comply with a direction; and
 - b. with respect to the display of an insignia charged with an offence under the relevant *Criminal Law (unlawful Consorting and Prohibited Insignia) Act 2021*.
- 3 As a further result of the Incident, the Commissioner of Police (“the Respondent”) issued a barring notice under section 115AA(2) of the *Liquor Control Act 1988* (“the Act”) prohibiting the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - a. All hotel licences issued under section 41 (includes hotel, hotel restricted, tavern and tavern restricted licences);
 - 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;
 - j. All occasional licences issued under section 59; and
 - k. All special facility licences issued under section 46 and regulation 9A of the *Liquor Control Regulations 1989*.
- 4 The barring notice was dated 14 January 2022 and served on the Applicant on 15 January 2022 to expire on 30 June 2022.
- 5 On 20 January 2022, the Applicant appealed to the Liquor Commission (“the Commission”) for a review of the barring notice.
- 6 A hearing was held on 21 January 2022 in respect to the application (“the Hearing”) and the determination handed down verbally. These are the written reasons for such determination.

- 7 As the matter was urgent and expedited, the parties did not provide written submissions, but instead proved only verbal submissions at the hearing.
- 8 The relevant information regarding the Incident giving rise to the barring notice is referred to in the following documents:
- a. The Applicant's application for review dated 20 January 2022 and annexed Grounds for Variation and Review of Barring Notice and Affidavit In Support of Application For Exemption to Barring Notice Issued Pursuant to S115AA(2) of the Act by the Applicant dated 17 January 2022.
 - b. The police evidence presented before the Commissioner of Police's Delegate including:
 - i. barring notice dated 14 January 2022;
 - ii. statement of Material Facts Brief Number [REDACTED];
 - iii. Emergency Management Infringement Notice dated 7 January 2022;
 - iv. Report of alleged offence under Emergency Management Act;
 - v. Detected Incidents Report (Confidential) [REDACTED];
 - vi. statement of [REDACTED];
 - vii. various photographs from video footage and others;
 - viii. Disclosable Court Outcomes Criminal and Traffic - Statement of the Applicant; and
 - ix. CCTV Footage.

Submissions by the Applicant

- 9 The Applicant's legal representation made submissions requesting the Commission vary the barring notice to allow the Applicant to attend [REDACTED].
- 10 The Applicant's legal representation also made the following verbal submissions as summarised by the Commission:
- a. it is not disputed that a convention of a written law occurred;
 - b. the CCTV footage, at most, shows a quarrel with the staff member;
 - c. the Incidents were not intrinsically linked to the consumption of liquor;
 - d. the Applicant's conduct is of no threat to the public;
- [REDACTED]
- f. there is no concern of like behaviour occurring [REDACTED] and
 - g. to prevent the Applicant from [REDACTED] would create a significant disadvantage, including financial which far outweighs the seriousness of the Incident.

Submissions on behalf of the Commissioner of Police

- 11 The circumstances upon which the decision of the Respondent to issue the barring notice is based, are contained within the documents referred to above.
- 12 The representative for the Respondent submitted verbally the following (as summarised by the Commission):
 - a. the evidence submitted clearly establishes on the balance of probabilities that the Applicant contravened a written law on licensed premises;
 - b. the fact that the incident could be construed as a “quarrel” was not a matter relied upon for the basis of issuing the Notice;
 - c. there is no requirement under section 115AA that any incident must occur while the relevant party is intoxicated;
 - d. there may be no threat to the public as to violence or physical behaviour, however, the possible impact of not wearing a mask in practical terms may be immeasurable;
 - e. there is established reasons for wearing masks as directed to prevent the spread of COVID-19;
 - f. licensed premises and staff need to be protected;
 - g. with respect to the insignia, the relevant legislation was put in place to prevent the risk of violence in public places; and
 - h. although the Applicant may have “significant disadvantage” as a result of the Notice this must be balanced by requirements of the Act and the protection of the public.

Statutory Framework

- 13 The Commissioner of Police has the power to ban people from licensed premises pursuant to section 115AA of the Act if he believes on reasonable grounds that the person has, on licensed premises:
 - a. been violent or disorderly; or
 - b. engaged in indecent behaviour; or
 - c. contravened a provision of any written law.
- 14 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.
- 15 A single incident is sufficient to give rise to a barring notice and there is no necessity for the relevant party to have engaged in a series of similar conduct.

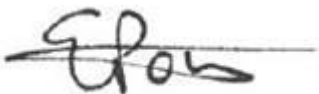
- 16 Section 115AD(3) provides that where a person is dissatisfied with the decision of the Commissioner of Police to give the notice, the person may apply to the Commission for a review of the decision.
- 17 Section 115AD of the Act provides, at subsection (6), that when conducting a review of the decision, 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.
- 18 Subsection 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 19 The Act also in section 16 prescribes that the Commission:
- a. may make its determinations on the balance of probabilities [sub section (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)];”
- 20 In 2010, the Act was amended “*to give protection to the general public from people who have engaged in disorderly or offensive behaviour, who threaten people and who put people in dangerous situations*” (Minister’s statement to the House, Western Australia, Parliamentary Debates, Legislative Assembly 19 October 2010, 7925).
- 21 The Minister further stated that the legislation gave the Respondent the power to issue barring notices to persons engaging in antisocial behaviour at licensed premises.
- 22 Section 5 of the Act sets 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 regarding the sale, disposal and consumption of liquor and the persons directly or indirectly involved in the same.
- 23 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 seen as a punishment imposed upon the recipient but is to be seen as a protective mechanism (*Van Styn v Commissioner of Police* (LC19/2011)).

Determination

- 24 The Commission finds, and it was not in dispute that:
- a. there were reasonable grounds for believing that the Applicant had contravened a provision of a written law; and
 - b. there was a proper basis for the delegate of the Commissioner to exercise the power conferred by section 115AA of the Act.

- 25 Therefore, the review application is to be decided solely on the matter of variation of the barring notice to permit the Applicant [REDACTED]. No further variation of the Barring Notice was sought.
- 26 The Commission must ensure that the terms and condition of any barring notice:
- a. reflect the objects and purpose of the Act; and
 - b. are not punitive in nature.
- 27 A barring notice is not intended to be a judgment as to the Applicant's actions in the context of the charges or infringements brought in respect to the Incident. Nor is its purpose to be punitive in nature but to protect the public.
- 28 In determining whether to quash or vary the barring notice it is relevant to take into account the nature and circumstances of the Incident giving rise to the barring notice, the risk of the Applicant behaving in a similar manner again and the need to protect the general public, the licensee and the Applicant himself. *Batty v Commissioner of Police (LC 33/2011)*; *Quartermaine v Commissioner of Police (LC 46/2011)*; *Piscopo v Commissioner of Police (LC 55/2011)*; and *Lewer v Commissioner of Police (LC 58/2011)*.
- 29 In this case the Commission notes that [REDACTED]. As such, the Commission is satisfied that there is very little risk of any incident occurring at that venue for this particular event.
- 30 Certainly the effect of the Applicant [REDACTED], would be considered overly punitive in these circumstances.
- 31 However the Commission makes the following general comments with respect to the Incident and the Barring Notice.
- 32 The fact that excessive consumption of alcohol did not appear to be a contributing factor in the Incident does not prevent the imposition of a barring order. The barring notice was justified in the circumstances due to the contravention of a written law.
- 33 Staff that serve the public are, in the current health crisis, in a particularly vulnerable position.
- 34 Although the Incident was not violent in nature, it is vitally important that the health and wellbeing of staff in the liquor industry is considered and respected. Part of this is wearing a mask when inside a licensed premises such as a bar or tavern unless eating or drinking, as well as not engaging in disagreements with staff as to such requirements when they have no legal option other than to enforce such requirements.
- 35 Further, the public should not be required to witness any disagreements (whether characterised as a "quarrel" or escalating into a more serious conflict) due to the fact a person simply does not wish to comply with the Emergency Management Act directions.
- 36 Neither should the public health be put at unnecessary risk when attending licensed premises due to the failure of a person to comply with a reasonable requirement.

- 37 In respect to the display of an insignia, this is clearly a legislative measure that was put in place to protect the public.
- 38 Although in this case such offence was not intrinsically linked to the Applicant's conduct at the Premises, it is strong public policy that such insignias are not appropriate to display in licensed premises where the possibility of alcohol fuelled altercations may increase.
- 39 In the circumstances, the barring notice appears justified in order to:
- a. protect workers in the liquor industry by providing a safe environment for them to work; and
 - b. assure the members of the public who frequent licensed premises that they are in safe environments and can expect that they will not become victims of, or have to witness, violence or antisocial and disorderly behaviour, or be exposed to unnecessary health risks.
- 40 Despite the above, the Commission considers that to ban the Applicant [REDACTED] [REDACTED] does not appear to be necessary to protect the general public. Further, the same would likely have an unnecessarily punitive effect on the Applicant. This does not reflect the purposes and scope of the Act.
- 41 The Barring Notice is varied pursuant to section 115AD(7) of the Act to permit the Applicant to [REDACTED]
[REDACTED]
[REDACTED]
- 42 The remainder of the barring notice remains in full force.



EMMA POWER
DEPUTY CHAIRPERSON