

Liquor Commission of Western Australia
(Liquor Control Act)

Applicant: Nickolas Thomas Martin
(Represented by Mr Sam Van Dongen SC, instructed by Michael Tudori and Associates)

Respondent: The Commissioner of Police
(Represented by Ms Leanne Atkins of WA Police)

Commission: Mr Eddie Watling (Deputy Chairperson)
Dr Eric Isaachsen
Mr Greg Joyce

Matter: Application for Review under Section 25 of the *Liquor Control Act 1988* of a Decision by the Director of Liquor Licensing, dated 8 February 2011, to issue a Prohibition Order against Mr. Nicholas Thomas Martin

Date of Hearing: 23 June 2011

Date of Determination: 1 August 2011

Determination:

Under section 25(4)(a) of the Act the decision of the Director of Liquor Licensing is varied as follows:

- 1 Mr. NICHOLAS THOMAS MARTIN is prohibited from entering any licensed premises within Western Australia except:
 - (a) those premises licensed under a liquor store licence;
 - (b) those premises licensed under a restaurant licence; and
 - (c) the following sub-classes of premises licensed under a special facility licence:
 - Works canteen
 - Theatre or cinema
 - Sporting arena
 - Transport
 - Vocational education and training institution
 - Foodhall
 - Catering
 - Bed and breakfast facility
 - Room service restaurant and
 - Auction

- 2 Pursuant to section 152F of the *Liquor Control Act 1988* the prohibition order shall have effect as from the date of the original order (8 February 2011) for a period of three (3) years.

Authorities considered in the determination

Hancock v Executive Director of Public Health [2008] WASC 224
Kapinkoff Nominees Pty Ltd v Director Liquor Licensing [2010] WASC 345
McKinnon v Secretary, Department of Treasury [2009] FCAF 142
Re Minister for Resources; ex parte Cazaly Iron Pty Ltd [2007] WASCA 175
Commissioner of Police v Mercanti (LC 27/2010)
Commissioner of Police v Dorrington (LC 16/2010)
John Fairfax Publications Pty Ltd v Hitchcock [2007] NSWCA 364

Introduction

- 1 On 14 October 2010 the Commissioner of Police lodged an application with the Director of Liquor Licensing (“the Director”) under section 152B of the Liquor Control Act (“the Act”) for a Prohibition Order pursuant to section 152E(2)(b) and 152F of the Act to prohibit Nickolas Thomas Martin (“the Applicant”) from entering any licensed premises within Western Australia, except those premises licensed under a liquor store licence, for a period of five years.
- 2 Pursuant to section 152D of the Act, on 19 October 2010 the Applicant was given written notice of the Application, together with supporting information and was given a reasonable opportunity to respond.
- 3 On 14 December 2010 a submission was received on behalf of the Applicant from Michael Tudori and Associates.
- 4 On 14 January 2011 a further submission was received from the Commissioner of Police with additional statements from Detective Constable Walker (dated 12 January 2011) and Detective Superintendent J M Migro (dated 13 January 2011).
- 5 In decision Z0083 dated 8 February 2011 the Director granted the Prohibition Order against the Applicant for a period of (5) five years from the date of the Order, except:
 - Those premises licensed under a liquor store licence
 - Gianni’s Restorante, 16/267 Scarborough Beach Road, Mount Hawthorn, Licence No. 6060107319 and
 - Villa Picasso’s Italian Seafood Ristorante, 232 Main Street. Osborne Park, Licence No. 6060043091
- 6 On 8 March 2011 the Applicant lodged an Application for a review of the Director’s decision pursuant to section 25 of the Act.
- 7 A hearing was conducted on 23 June 2011.

Submissions on behalf of NickolasThomas Martin

- 8 The Applicant cited *Hancock v Executive Director of Public Health [2008] WASC 224* and the principle expressed by Martin CJ that in conducting a review under section 25 of the Act the Commission is not constrained by a finding of error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.
- 9 By operation of section 25(2c) of the Act and *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345* it is important for the Commission to identify with some precision what material was properly before the Director when making his decision.
- 10 The expression “public interest” does not have any fixed meaning and is of wide import (*McKinnon v Secretary, Department of Treasury [2009] FCAF 142* and *Re Minister for Resources; ex parte Cazaly Iron Pty Ltd [2007] WASCA 175*). Nevertheless it is not a test of unfettered discretion and is confined by the subject matter and the scope of the legislation.
- 11 It is difficult to see why the Director has allowed the Applicant to frequent two nominated licensed restaurants and preclude other restaurants on the basis of public interest. On the face of it this appears inconsistent with the concept of the public interest.
- 12 The Applicant referred to a further submission and two signed statements that were provided by the Respondent on 14 January 2011, namely:
 - Undated submission on behalf of the Commissioner of Police
 - Statement of Detective Senior Constable Walker dated 12 January 2011 together with a series of 10 photographs
 - Statement of Detective Superintendent J M Migro dated 13 January 2011

The Applicant argued that at least the latter two documents were not properly before the Director and hence could not be considered by the Commission. This submission was based on the literal interpretation of the meaning of section 152C(1)(b) of the Act which requires an application to “set out any other information and be accompanied by any document that the Commissioner of Police considers relevant to the application” and section 152E(3)(b)(i) which provides for the Director having regard to “any information or document provided by the Commissioner of Police in or with the application”. This places a requirement on the Respondent to ensure that all information is contained in the initial application. Whilst section 16(7)(a)(b) and (c) requires the Commission to act without technicalities, legal forms and with as little formality and technicality as possible these provisions cannot derogate from the specific requirements of Part 5A of the Act.

- 13 The Applicant does not take issue with the facts asserted by the Respondent in paragraphs 7 and 8 of the prohibition application of Detective Superintendent J M Migro dated 13 October 2010. These paragraphs refer to an incident on 4 September 2010 outside the Library Nightclub in which the Applicant was convicted

in the Perth Magistrates Court of assault occasioning bodily harm and fined \$500 and convicted of refusing to leave the area of licensed premises pursuant to section 115(6) of the Act and fined \$50.

- 14 The Applicant pleaded guilty to the charges at an early stage and the penalties imposed were at the bottom end of the range of seriousness for offences of this type.
- 15 The “Court Outcomes History Criminal and Traffic” attached to the Application of the Respondent contained an error in that the charge for the incident of 31 May 2010 was amended from assault occasioning bodily harm to common assault.
- 16 The Applicant is not a member of the Rebels Outlaw Motorcycle Gang.
- 17 There is a stark contrast to the facts in the subject case compared with the facts in the previous decisions of the Commission in *Commissioner of Police v Mercanti (LC 27/2010)* and *Commissioner of Police v Dorrington (LC 16/2010)*. If a prohibition is to be imposed it should be for a period less than that imposed by these two precedents.

Submissions on behalf of the Commissioner of Police

- 18 The Respondent’s Application for a prohibition order was based on the incident of 4 September 2010 which resulted in the Applicant being convicted of assault occasioning bodily harm under section 317(1) of the *Criminal Code (WA) 1913* and of the offence of refusing to leave an area adjacent to licensed premises pursuant to section 115(6) of the Act. The incident involved the Applicant being refused entry to the Library Nightclub in Northbridge by a Crowd Controller and the Applicant subsequently hitting the Crowd Controller twice with his left and right fist to the face and nose. As a consequence of the assault the Crowd Controller received 10 stitches to his right nostril and 2 stitches to his left eyebrow at Sir Charles Gardiner Hospital. This was an assault of a person in authority.
- 19 The Respondent attached to the Prohibition Order Application the Court Outcomes History- Criminal and Traffic of the Applicant. The Respondent is authorised to provide this under section 152C(2)(a) of the Act. This record details a range of events and outcomes the most serious of which was (6) six months imprisonment in July 1995 for common assault.
- 20 In addition the Respondent provided signed statements of six Crowd Controllers, two signed statements of observers, photographs of the injured Crowd Controller and CCTV footage from the City of Perth showing part of the incident of 4 September 2010.
- 21 The principle in the *Hancock* case referred to by the Applicant (refer paragraph 8 above) applies in the consideration of this material by the Commission.
- 22 The “public Interest” takes its proper meaning in the context of the subject matter and the relevant legislative framework. It imports a discretionary value judgment and it is for the decision maker to determine what matters it regards as relevant and their comparative importance. (*John Fairfax Publications Pty Ltd v Hitchcock [2007]*)

NSWCA 364; McKinnon v Secretary, Department Of Treasury [2005]FCAFC 142; Re Minister for Resources; ex parte Cazaly Iron Pty Ltd [2007] WASCA 175).

- 23 The purpose of a prohibition order is not to punish the individual but rather to protect the public.
- 24 The test is whether on the balance of probabilities (section 16(1)(b)(ii)) it is in the public interest to make the prohibition order.
- 25 In respect of the two statements lodged by the Respondent on 14 January 2011 (referred to in paragraph 12 above) these were provided to the Director to controvert the statement of the Applicant (paragraph 35, Submission dated 13 December 2010) that he was not a member of the rebels outlaw motorcycle gang. They form part of the interlocutory process leading up to the decision of the Director and should be properly before the Commission. Moreover the Commission is enjoined by the various provisions of section 16 to act without regard to technicalities and legal forms.

Determination

- 26 There is common ground between the parties on the incident of 4 September 2010 as detailed in paragraphs 7 and 8 of the Prohibition Order Application of the Respondent dated 13 October 2010. Similarly it was conceded at the hearing that the Applicant has been afforded the requirements of procedural fairness set out in the various provisions of Part 5A of the Act.
- 27 The Commission is bound by the principle established in *Hancock* that in conducting a review under section 25 of the Act it is not constrained by a finding of error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.
- 28 The Director has identified the materials that were before him when making the decision and provided these materials to the Commission as required by the principle set out by the Applicant in *Kapinkoff* referred to in paragraph 9 above.
- 29 In respect of the submission made by the Applicant and referred to at Paragraph 12 above the Commission takes the view that the subsequent statements provided by the Respondent were part of the interlocutory process that occurred prior to the Director's decision. The issue of membership of the Rebels Outlaw Motorcycle Gang was first raised at paragraph 6 of the Prohibition Order Application and was responded to in paragraph 35 of the Applicant's submission lodged 15 December 2010. Hence it is not new material but rather the Respondent expanding on the original allegation. The subsequent statements were served on the Applicant by the Director on 14 January 2011 and the Applicant was given a reasonable time to respond.
- 30 Irrespective of this, the Commission notes that there is nothing in the Act, the Regulations or the subject licence that precludes a member of an "outlaw motorcycle gang" from attending these licensed premises. The Director of Liquor Licensing has issued a policy bulletin for "Dress Standards for Licensed Premises" dated 28 July 2009, in which, as a harm minimisation measure, licensees may wish

to use a standard format that precludes persons from wearing the colours or insignia of outlaw motor cycle gangs. A licensee can also impose individual premises admittance criteria.

- 31 Accordingly the Commission places no weight on the subsequent signed statements challenged by the Applicant. This is because it is not material as to whether the Applicant was a member of an outlaw motorcycle gang. What is crucial in this case is the unprovoked assault by the Applicant on an authorised person.
- 32 The Commission found little probative value in the CCTV footage that was provided by the Respondent because it was primarily about other events that occurred after the subject incident.
- 33 By operation of sections 16(1)(b)(ii) and 152E of the Act the Commission may make a prohibition order only if satisfied on the balance of probabilities that it is in the public interest to do so after giving the relevant person a reasonable opportunity to make submissions or to be heard in relation to the application.
- 34 The public interest is an area of the law that has been thoroughly litigated and the Commission takes note of and applies the following principles from the case law:
- It is of wide import and is not defined in the Act
 - Its proper meaning is taken from the subject matter and the legislative framework
 - It imports a value judgment confined to the subject matter and the scope and purpose of the Act
 - It is a balancing exercise between the private interests of the individual and the public good
 - It is for the decision maker to determine what is relevant and what weight is given to these matters
- 35 Important considerations are the objects of the Act found at section 5 and the long title to the Act. In particular the primary objectives at section 5(1)(a) to regulate the sale, supply and consumption of liquor and section 5(1)(b) to minimise harm or ill-health caused to people due to the use of liquor. The secondary objects, in particular section 5(2)(d), calls for adequate controls over the disposal and consumption of liquor. The long title to the Act provides for orders that may prohibit persons from entering licensed premises. Thus the scheme of the Act and the intention of Parliament are about regulation, safety and control.
- 36 The crowd controller in the incident the subject of this application was licensed under the *Securities and Related Activities (Control) Act 1996*, and was an authorised person of the licensee assessing prospective patrons to the nightclub according to the licensee's policy. It is not acceptable behaviour for the Applicant, without provocation except being denied admittance, to assault the crowd controller. The Commission has an expectation that crowd controllers will carry out their duties in a diligent manner and in return crowd controllers can legitimately expect to do this without unprovoked assaults. In the subject case the Crowd controller was confronted by a group of people trying to gain entry by using intimidatory tactics. Crowd Controllers are key personnel in the successful running of licensed premises.

37 The Commission accepts that when compared with the cases *Commissioner of Police v Mercanti (LC 27/2010)* and *Commissioner of Police v Dorrington (LC 16/2010)*, there are mitigating circumstances. The severity of the subject assault was not as grievous as in those cases and the Applicant did plead guilty in a reasonable time. The Commission also accepts that the prohibition order is not about punishing the Applicant but rather protecting the public and persons of authority, including crowd controllers, from future harm.

38 Accordingly in weighing up the competing interests of the Applicant and the public interest of authorised persons being protected from harm the Commission determines that the existing prohibition order should stand but the period be reduced to (3) three years. In addition it is considered, under the circumstances, that the current blanket ban on most license types be varied as follows:

Mr. NICKOLAS THOMAS MARTIN is prohibited from entering any licensed premises within Western Australia except:

(a) those premises licensed under a liquor store licence;

(b) those premises licensed under a restaurant licence; and

(c) the following sub-classes of premises licensed under a special facility licence:

- Works canteen
- Theatre or cinema
- Sporting arena
- Transport
- Vocational education and training institution
- Foodhall
- Catering
- Bed and breakfast facility
- Room service restaurant and
- Auction

39 Pursuant to section 152F of the Act the prohibition order shall have effect as from the date of the original order (8 February 2011) for a period of three (3) years.



EDDIE WATLING
DEPUTY CHAIRPERSON