

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr Joshua Jaxon Monk

Intervener: Commissioner of Police
(represented by Ms Lauren Italiano of the State Solicitor's Office)

Commission: Ms Elanor Rowe (Presiding Member)
Dr Kim Hames (Member)
Mr Paul Shanahan (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* (WA) ("the Act") for review of the decision of the delegate of the Director of Liquor Licensing to issue a prohibition order, under section 152E of the Act, prohibiting the Applicant from entering any licensed premises from 9 July 2021 until 17 December 2023.

Date of Hearing: Determined on the Papers.

Date of Determination: 8 February 2022

Determination: The prohibition order issued by the delegate of the Director of Liquor Licensing to Mr Joshua Jaxon Monk dated 9 July 2021 is varied to prohibit the Applicant from entering any licensed premises within Western Australia issued under the *Liquor Control Act 1988* (WA) until 17 December 2022.

Authorities referred to in Determination

- *Commissioner of Police v Bloo Moons Pty Ltd* LC 05/2010
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *McKinnon v Secretary, Department of Treasury* (2005)145 FCR 70

Background

1. This is an application brought under section 25 of the *Liquor Control Act 1988* (WA) (“**the Act**”) to review a Prohibition Order (“**the Prohibition Order**”) made by the delegate to the Director of Liquor Licensing (“**the Director**”).
2. The Commissioner of Police (“**the Commissioner**”) applied to the Director for an order, pursuant to section 152E of the Act, prohibiting Joshua Jaxon Monk (“**the Applicant**”) from entering all licensed premises for a period of three years from 18 December 2020 until 17 December 2023.
3. The incident (“**the Incident**”) that gave rise to the Prohibition Order occurred on 18 December 2020 at The Camfield, located at Roger Mackay Drive, Burswood (“**the Premises**”) and involved an altercation between the Applicant, the Applicant’s friend and the Victim and resulted in serious injuries to the Victim.
4. Following the Incident, the Applicant was charged with one count of Assault Occasioning Bodily Harm contrary to section 317(1) of the *Criminal Code Act Compilation Act 1913* (“**Charge**”) on 3 February 2021. At the time of the Application, the Charge had not been heard in court.
5. As a further result of the Incident, the Commissioner issued a Barring Notice on 3 February 2021.
6. On 9 July 2021, the Director made a decision (“**Decision**”) to grant the Prohibition Order in the terms as set out in paragraph 2 above.
7. On 6 August 2021, the Applicant made an Application, pursuant to section 25 of the Act (“**Application**”), to review the Prohibition Order. The Applicant seeks the Decision to be quashed or alternatively, the length of time the Prohibition Order is in force to be reduced to the same length of time as the Barring Notice.
8. The Applicant requested that the Application be determined on the papers. Both the Applicant and the Commissioner have provided written submissions to the Commission.

Submissions on behalf of the Applicant

9. The Applicant submits that the decision of the Director should be quashed or varied.

The Incident

10. The Prohibition Order fails to adequately address the circumstances of the Incident. There are reasonable grounds to conclude the Applicant was not the aggressor and his use of force was reasonable.
11. The Applicant was attending a work function at the Premises. He had been sitting with colleagues at the same table for several hours and had consumed the occasional drink. Over the course of the evening, his colleagues departed, and only the Applicant and his friend (“**Friend**”) were left at the table.

12. Around 10.45pm, the Victim and two companions approached the Applicant and his Friend. Words were exchanged between the parties and the Victim asked the Applicant's Friend to buy him a drink, which he refused to do.
13. Both the Applicant and the Friend, who were seated, started to feel threatened as they were surrounded by three "*older, larger men.*"
14. More words were exchanged when the Victim began to forcefully push the Applicant's Friend. His Friend, who was now being attacked, started using reasonable force to protect himself. The altercation continued for a short time, during which the Applicant tried to break it up. The Applicant was then grabbed from behind by one of the Victim's friends. The Applicant felt immediately threatened as it was a "*two-on-one*" situation, and he was being attacked for no reason. The Applicant struggled to get free and tried to get away from the situation. However, he did not want to leave his Friend, who would have been outnumbered, so he stayed and tried to assist him in getting away.
15. Security arrived to break up the altercation, and the people who fell on the Victim at that moment could have caused some of the Victim's injuries. The Applicant and his Friend were then escorted off the Premises.
16. From a review of the CCTV footage, the altercation lasted less than forty (40) seconds. It also revealed that it was the Victim and his two companions who approached the Applicant and his Friend. Furthermore, the Victim's companions were present throughout.
17. The Victim was the first to make contact with the Applicant's Friend. He too was at fault and should also have been issued with a Prohibition Order.
18. The Commissioner had assumed the Applicant was guilty, based on the Victim's statement as well as the "*unclear*" CCTV footage. However, it should be for the courts to decide the issue of guilt. At the time that the Application was made, it had not been found that the Applicant was responsible in relation to the Charge against him.
19. Violence is never the answer. However, it is reasonable that if a person is "*grabbed*" from behind, they would feel threatened and under attack, and would do whatever they could to escape.

Barring Notice

20. Prior to the Prohibition Order being issued, the Applicant was issued with a Barring Notice in relation to the same Incident that banned him from all licensed premises for a period of twelve months.
21. The Applicant has been using that time to learn from the situation, improve himself and ensure that a similar Incident will not occur again in the future.
22. The Barring Notice was to have the most positive effect on the Applicant's mental wellbeing. However, as the Prohibition Order is to continue for three years, this length of time could seriously damage his mental health.

Risk of the Applicant behaving in a similar manner

23. Although the Applicant is deeply remorseful for his actions, he believed he was being attacked from behind and was just helping a colleague.
24. The Applicant has on other occasions consumed alcohol but has never been involved in this sort of Incident.
25. The Applicant is a person who is of otherwise good character, and he is highly regarded in his local community, as is shown in the witness statements submitted in support of the Application. He does not have a criminal record.
26. He understands that the public needs to be protected from violent behaviour. However, this was the first time he had been involved in anything like this and the Incident itself actually lasted for less than fifteen (15) seconds.

Broad scope of Order and impact on the Applicant

27. The Applicant is a very sociable person who has several different circles of friends. He is in the habit of socialising during the week and on weekends, and alcohol is sometimes involved. To stop him from relaxing and socialising with friends for twelve (12) months (the length of the Barring Notice) would be detrimental to his mental health and general wellbeing; but to deprive him for three years (the length of the Prohibition Order) will be devastating.
28. He is passionate about building a strong spirit within the community and whether it is through fundraising or a simple get-together, he always tries to contribute and have a positive impact on those around him. The local sporting club that he belongs to is licensed. If he is barred from the venue, and if he is unable to attend events or socialise and meet friends there, the Prohibition Order will no doubt have a negative effect instead of the positive impact the proposed punishment is desired to have.
29. It is difficult to meet people and develop close relationships outside of licensed premises, which include movie theatres, sporting clubs, etc. The Applicant is also seeking a partner, and if banned, will find it very hard to do so.
30. With regard to his mental health, the Applicant has acknowledged that he has a problem and that he will need to seek help. However, as the Incident was his first offence, a three-year ban will do more harm than good, to both himself and those close to him. While alcohol may have been a contributing factor, particular people he was with on the night of the Incident could also have played a part. The Applicant has not since socialised with that particular Friend and he had actually not done so previously before.
31. The Barring Notice that had already been imposed was sufficient to protect the public, whereas, the Prohibition Order is excessive in the circumstances. Furthermore, the evidence used to determine the length of the Barring Notice was the same as that for the Prohibition Order. Therefore, the Prohibition Order should be revoked or reduced to the same length of time as the Barring Notice.

Submissions on behalf of the Commissioner

32. The Commissioner submits that taking all the evidence into account, the Prohibition Order is in the public interest.

The Incident

33. The Commissioner disputes some of the facts of the Incident as put forward by the Applicant:
- a. The Statement of Material Facts states that both the Applicant and the Victim had been consuming alcohol throughout the day and evening of the Incident.
 - b. The Victim and a colleague were in the Premises' beer garden. They purchased their final drinks for the evening and the Victim's colleague went to the bathroom.
 - c. During the time that the Victim was standing alone, the Applicant's Friend approached the Victim. The Victim believed that the Friend wanted the Victim's drink. The Victim stated that he was not rude to the Friend and tried to defuse the situation by complimenting the Friend's hair. However, after about two minutes, a physical altercation began between the Victim and the Friend. The Victim and the Friend began shoving and struggling with each other, while gripping each other's hands.
 - d. The Friend managed to free his right hand and then used it to punch the Victim. The Victim fell to the ground as the Friend continued to punch him.
 - e. As to the Applicant's submission that he was attacked from behind by one of the Victim's friends, the Commissioner submits that the CCTV footage shows that the Victim's companion, who came up behind the Applicant, did not attack him, but instead attempted to restrain him from joining in the assault on the Victim.
 - f. After the Victim was on the ground, the Applicant began to attack him by punching him to the head multiple times within the space of about fifteen (15) seconds. The Applicant did not stop punching the Victim until he was restrained by security staff.
 - g. Therefore, the Applicant's submission that he had wanted to "*get away*" from the situation but found that he could not leave his work colleague and was trying to assist him in getting away, is again not consistent with the CCTV footage. The footage shows the Applicant appearing to push his Friend off the Victim, but also shows that the Applicant then proceeded to attack the Victim himself.
34. The Applicant and the Friend were escorted from the Premises and the Applicant did not appear to be particularly "*bothered*" by his actions.
35. There was no apparent reason for the Applicant's violence towards the Victim. There is a possible inference that the Applicant joined in the attack on the Victim because he wanted to support his Friend, but if so, it is very concerning that the Applicant chose to provide support by resorting to violence.

Barring Notice

36. The legislative scheme does not set up barring notices and prohibition orders as alternatives. The Commission must determine the application to quash the Decision by determining whether it is in the public interest to issue a prohibition order.
37. The Barring Notice is only relevant to the extent that the Commission may wish to consider the Applicant's conduct while subject to the Barring Notice, as part of the public interest assessment of the risk of further violent incidents involving the Applicant.

Risk of Applicant behaving in a similar manner

38. The Commissioner submits that the Applicant does not appear to have a full appreciation of the violent manner of his involvement in the Incident. He stated that he was deeply remorseful for his actions, but however, he continued to also insist repeatedly that he still believes he was attacked from behind and was just helping a work colleague. The Commission should weigh the Applicant's expression of remorse against his failure to accept the extent of his violent behaviour towards the Victim.
39. The Applicant's actions were serious and had the potential to cause injuries far worse than those that were in fact inflicted on the Victim.
40. The Commissioner accepts that the character references provided in support of the Applicant's submissions speak highly of his character and that his conduct was out of character. However, the Commissioner submits that if such is the case, it remains open for the Commission to conclude that alcohol consumption was a key factor affecting the Applicant's behaviour. If the Commission draws this conclusion, that is another reason why the Prohibition Order is in the public interest.

Broad scope of Order and impact on Applicant

41. An order such as the Prohibition Order is made to protect the public, rather than to "*punish*" the individual. Therefore, some sanctions, which are more burdensome than penalties a criminal court would impose for the same conduct, may be justified.
42. A Prohibition Order for a period of approximately 29 months, expiring three (3) years after the Incident, is appropriate.
43. The Applicant had not provided any information or evidence to suggest that he had learned from the Incident or that he has taken any steps to manage his alcohol consumption or address his violent behaviour. Indeed, several of the Applicant's grounds suggest that the Applicant wishes to be able to attend licensed premises again on a regular basis to socialise and be part of the community. This would put the Applicant in similar circumstances to those that gave rise to the Incident.
44. The Applicant has not provided any medical opinion or other evidence in support of his contention that the Prohibition Order will have a negative impact upon his mental health. Therefore, this ground is without merit.
45. The Prohibition Order does not prohibit the Applicant from attending social or community events on non-licensed premises. The Applicant has not indicated how frequently the social

or community events that he wishes to attend, are held on licensed premises. The bare statement that the Applicant could miss out on social or community events that are held on licensed premises is not a sufficient basis to quash the Decision.

Statutory Framework

46. On a review under section 25 of the Act, the Commission may:
- (a) affirm, vary or quash the decision subject to the review; and
 - (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; and
 - (c) give directions:
 - as to any question of law, reviewed; or
 - to the Director, to which effect shall be given; and
 - (d) make any incidental or ancillary order.
47. In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials.¹
48. The Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record and is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.²
49. In conducting a review, section 25(2c) of the Act provides that the Commission may have regard only to the material that was before the Director when making the Decision.
50. The Decision under review in the present case is a decision by the Director to make the prohibition order pursuant to section 152E(2)(b). Section 152E(2)(b) of the Act provides that “*the Director may make a prohibition order that ... prohibits a person from entering specified licensed premises, licensed premises of a specific class or any licensed premises*”. Section 152E is indicative of Parliament’s intention to promote “*lower risk drinking environments*” and address “*alcohol-related anti-social behaviour*”.³
51. Section 152E(3) 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.

¹ *Hancock v Executive Director of Public Health* [2008] WASC 224 at [54]; *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010) at [7].

² Act, sections 16(7)(a)-(b)

³ 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

52. 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.
53. The term “*public interest*” is defined in the Macquarie Dictionary as “*the benefit or advantage to a whole community*”, as opposed to the individual. It directs attention to a conclusion or determination that best serves the advancement of the interests or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.⁴
54. In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 at [48]-[49], Buss JA (as his Honour then was) observed that where a statute provides no positive indication of the considerations by reference to which a decision is to be made, a general reference to “*the public interest*” will ordinarily only be confined by the scope and purposes of the statute, and in the context of the Act, the decision maker will be bound to take into account factual matters relevant to the objects of the Act set out in section 5(2).
55. 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 antisocial behaviour.
56. 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.

Determination

57. There are varying accounts as to what occurred during the Incident. The Commission has considered all the evidence before it, including the CCTV footage (which shows the Incident), and makes the following observations, based on the CCTV footage specifically:
- a. Following an initial exchange of words, the Victim pushed the Applicant’s Friend in the chest. The Friend responded by pushing the Victim backward. The Victim returned to the conflict by grappling with the Friend, and the Friend then threw the first punch.
 - b. The Friend continued to punch the Victim after the Victim was effectively subdued.
 - c. The Applicant also actively became involved in the conflict and was aggressive from the start. He tried to fight and punched the Victim while others were trying to break the altercation up.
 - d. The Applicant was then restrained by security, but broke free and resumed punching the Victim, until he was pulled away once again.

⁴ *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 per Tamberlin J at [9]

58. Clearly, the CCTV footage does not bear out the Applicant's version of events, and the Commission makes the factual finding that the above occurred instead. On that basis, it finds that the Applicant was not acting in self-defence, and was not trying to help his Friend escape, when he was on top of the Victim punching him. Even if he initially wanted to help his Friend, his use of force in the circumstances was totally unwarranted and excessive. Worryingly, it also appeared from the footage, that the Applicant and his Friend found the situation somewhat amusing while being escorted off the Premises.
59. The conduct engaged in by the Applicant during the Incident was extremely serious. It involved the Applicant joining in on a violent assault upon the Victim and attacking the Victim by punching him to the head multiple times after the Victim was on the ground. The Applicant did not stop punching the Victim until he was restrained by security staff.
60. The Victim sustained a broken nose (requiring surgery) and a dislodged vertebrae. The Applicant submitted that it was not clear how the Victim sustained these injuries. However, it does not appear to be in dispute that the Applicant did in fact punch the Victim.
61. On the materials supplied, 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 granting of the Prohibition Order is in the public interest.
62. 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.
63. The Commission acknowledges the four (4) references that were provided by the Applicant, as to his character. These indicate that he is a well-liked and respected member of his community, and that the Incident was out of character for him. The Commission also accepts that there was no prior criminal record against the Applicant, and he has no history of violent or aggressive behavior.
64. However, as already stated, the Commission deems the Applicant's conduct during the Incident to have been very serious in nature. By carrying out a sustained act of violence on a member of the public on licensed premises, the Applicant exposed the public to some very violent and disorderly behaviour.
65. It is well known that one punch can cause serious damage to a person. Therefore, it is concerning that the Applicant appeared to trivialise his violent conduct by submitting that "*the altercation went for less than 40 seconds*" in total, and that his alleged aggressive conduct "*lasted less than 15 seconds*". The Commission deems fifteen seconds to be a considerable amount of time in this case, given the violent nature of the conduct in question.
66. Furthermore, in the Applicant's submissions to the Commission, while stating that he was remorseful and knows that violence is not the answer, rather than showing genuine remorse, he revisited in some detail the circumstances of the Incident and continued to justify his actions. He also did not provide any evidence that he had actually sought any help, despite acknowledging the need to. There was no evidence that he is taking steps to address the factors that may have led to or contributed to his offending behaviour.

67. Therefore, it remains of real concern that there is some risk that the Applicant will behave in a similar manner in the future. The Applicant's actions tend to suggest that he poses a risk of future violence or disorderly behaviour when drinking in licensed premises, because it displays a propensity for the Applicant to make poor decisions whilst intoxicated.
68. With regard to the terms of the Prohibition Order, the Commission does not find the Applicant's arguments compelling in the circumstances, and when considering the needs to protect the public. There are several ways of socialising and spending quality time with others, while not on licensed premises where liquor will be consumed and there is a risk of an escalation into anti-social behaviour. There is also no supporting evidence that the terms of the Prohibition Order will have any detrimental effect on the Applicant's mental health.
69. Having regard to all of the circumstances, and in particular to the serious nature of the offending by the Applicant, 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.
70. The Prohibition Order that has been imposed prevents the Applicant from attending any class of licensed premises for the duration of the Order. That is an effective deterrent, and the Commission is of the view that it would not be in the public interest to make any exceptions to the class of licensed premises that the Applicant is prohibited from entering.
71. However, the Commission has also taken into consideration that the Applicant acknowledged, to some extent, his wrongdoing and that he recognises that he needs help, as well as the positive personal references he provided and the clear support he has from his family. 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 is an unduly punitive measure and has been persuaded that there is a basis for a reduction in the duration of the Prohibition Order. We consider that a lesser period of twenty-four (24) months from the date of the Incident will allow the Applicant the opportunity for introspection regarding his behavior and to seek help.

Conclusion

72. The Commission therefore varies the Prohibition Order by deleting the words "*17 December 2023*" and replacing them with "*17 December 2022*".



ELANOR ROWE
PRESIDING MEMBER



PAUL SHANAHAN
MEMBER



DR KIM HAMES
MEMBER