

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

Applicant: JH

Respondent: Commissioner of Police
(Represented by Ms Megan Barry of the State Solicitor's Office)

Commission: Ms Kate Pedersen (Chairperson)

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

Date of Hearing: On Papers

Date of Determination: 25 February 2022

Determination: The Barring Notice to the Applicant is varied pursuant to section 115AD(7) of the *Liquor Control Act 1988* to permit JH to enter [REDACTED], and sporting clubs (i.e., hockey clubs) with licences issued under section 48 of the Act.

The remainder of the barring notice remains in full force.

Authorities considered in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618
- *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) WASC 75
- *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261
- *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205
- *Barrington v Austin* [1939] SASR 130
- *Heanes v Herangi* [2007] WASC 175
- *DJB v Commissioner of Police* (LC05/2017)
- *SVS v Commissioner of Police* (LC19/2011)
- *AC v Commissioner of Police* (LC01/2018)

Background

1. On 31 October 2021 an Incident (the **Incident**) occurred at licensed premises, namely the [REDACTED] (the **Premises**) involving the Applicant.
2. As a result of the Incident the Applicant was issued an infringement notice for disorderly behaviour in public, contrary to section 74A(2)(a) of the *Criminal Code* with a modified penalty of \$500.
3. Following the Incident, the Commissioner of Police (the **Respondent**) issued a Barring Notice dated 5 December 2021 (the **Barring Notice**) pursuant to section 115AA(2) of the *Liquor Control Act 1988* (the **Act**), prohibiting the Applicant from entering the following specified licensed premises in Western Australia for a period of approximately 5 months, expiring 31 April 2022:
 - a) All hotel licences issued under section 41;
 - b) All small bar licences issued under section 41A;
 - c) All nightclub licences issued under section 42;
 - d) Casino licence 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 served on the Applicant on 5 December 2021.
5. On 22 December 2021, the Applicant lodged an Application for Review of the Barring Notice under section 115AD of the Act. The Applicant has elected to have the review determined on the papers.

Overview of parties' positions

6. The Applicant seeks that the Barring Notice be quashed on the basis that his behaviour was not disorderly, or alternatively varied because it is said there is no need to protect the public from his behaviour, and that the consequences of the barring notice upon him are punitive.
7. The Respondent submits that the Barring Notice should be affirmed because the Applicant's conduct was disorderly within the meaning of that term in the Act, and indeed even on a more stringent criminal test; there is a risk the Applicant will behave in a similar manner in the future;

and matters personal to the Applicant are of little significance to the exercise of the discretion to impose a barring notice.

The Incident

8. The Incident took place in the early hours of 31 October 2021 at the Premises. It is captured on three files of body worn camera (**BWC**) footage captured by police officers outside the Premises, which shows:
- a) the Applicant standing outside of the Premises amongst a group of men who are being spoken to by police, a short distance from the entrance to the Premises where a separate group of people can be seen standing;
 - b) the Applicant can be seen and heard to yell across the group in the direction of other members of the public who cannot be seen, including shouting the words "f**king country";
 - c) he can then be seen and heard to again shout across to the unseen members of the public "f**k your cousin" and other indecipherable words prompting another man in the group to say "[REDACTED]" and then a police officer to approach him and speak to him;
 - d) when speaking to the police officer, the Applicant says "I am sober as f**k" and is told by the police officer that he will be moved on;
 - e) a short time later, the Applicant and another male are captured in an argumentative discussion with two police officers about his swearing. The Applicant says "me saying f**k off means nothing" to which a police officer responds "one more time and you'll be arrested;"
 - f) the Applicant remained in the area and continues to argue with police. A short time later he says, "this is bullshit", and "you boys are just pissed off because you're stationed here." At this point the Applicant's companion tells a police officer "not to be such a f**king asshole" and is warned "one more time and you'll get arrested...for disorderly", following which the Applicant's companion is told to walk away by police (and does). The Applicant stays in the area and says to police "you guys are just pissed off because you're getting f**king paid 25 bucks and hour to be here"; and
 - g) the Applicant was then arrested for disorderly behaviour.

Statutory Framework

The power to issue a barring notice

9. The Commissioner of Police (or the Commissioner's delegate under section 115AB) has a discretionary power¹ to give a notice to prohibit a person from entering specified licensed premises, or a specified class of licensed premises, for a period of up to twelve months if the Commissioner (or the Commissioner's delegate) believes on reasonable grounds that the person has, on or in the vicinity of licensed premises:

¹ *Interpretation Act 1984* (WA), section 56(1).

- a) been violent or disorderly;
- b) engaged in indecent behaviour; or
- c) contravened a provision of any written law: section 115AA of the Act.

Applications for review

10. If a person is dissatisfied with the decision of the Commissioner of Police to give a barring notice for a period exceeding one month, the person may apply to the Commission for a review of the decision: section 115AD(2),(3).
11. An application for review must be made within one month after an applicant is served with the notice or such longer period as the Commission allows: section 115AD(4). In this case, the Application was made within one month of the Applicant being served with the Barring Notice.
12. On review the Commission may affirm, vary or quash the decision of the Respondent to issue the barring notice. A barring notice remains in force during the review process: section 115AD(7).
13. 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).
14. When considering an application for a review of a barring notice, the Commission is to conduct a review of the decision on its merits, effectively by way of a rehearing.² Accordingly, the Commission is required to consider whether there are reasonable grounds for a belief under section 115AA(2) that the barred person has, on or in the vicinity of a licensed premises, been violent or disorderly; engaged in indecent behaviour; or contravened a provision of a written law.
15. Section 115AA(2) does not specify or require that the person to whom a barring notice may be issued must have been charged or convicted of an offence. Nor does the section require that the person to whom the barring notice is issued must have engaged in habitual or

² In *Hancock v Executive Director of Public Health* [2008] WASC 224, [53]-[54] (Martin CJ) found that the same phrase used elsewhere in the Act required merits review by way of rehearing, requiring the Commission to undertake a full review of the materials before the Director and to make its own determination on the basis of those materials. It is accepted that the words 'affirm, vary or quash' should be construed consistently throughout the Act: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J); *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) 228 A Crim R 201; [2013] WASC 75 [26].

repetitious behaviour of the type specified in the section. A single incident can establish the belief required by section 115AA(2): *DJB v Commissioner of Police* (LC05/2017)[5].

16. If there is sufficient material on which to be satisfied on reasonable grounds of one of those three matters, the Commission must then decide whether it should exercise its discretion to affirm, vary or quash the Barring Notice. In exercising its discretion, the Commission is to have regard to the objects and purpose of the Act: *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261 [44]-[46] (Martin CJ, Wheeler and Pullin JJA agreeing).

Objects and purpose of the Act

17. The objects of the Act are plain from its express terms. The long title of the Act refers to minimising harm or ill-health caused to people due to the use of liquor. Similarly, the primary objects of the Act include to minimise harm or ill-health cause to people, or any group of people, due to the use of liquor: section 5(1)(b)). The secondary objects include to provide controls over the sale, disposal and consumption of liquor: section 5(2)(d)).
18. The purpose of the Act is to be derived from its text, having regard to context and purpose: *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205, [32], [35]. Context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed: *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205, [33] citing *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408.
19. The relevant provisions of the Act were inserted to address the mischief of antisocial behaviour in and around licensed premises. The Minister for Racing and Gaming explained:

“The Commissioner of Police will be provided with the power to issue barring notices to patrons of licensed premises who engage in antisocial behaviour. Licensees will be encouraged to request the Commissioner of Police to issue barring notices to patrons engaging in antisocial behaviour on their premises” (Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2010, 5715).
20. The Minister later further explained:

“This legislation seeks 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. The whole idea of this legislation is to protect the general public, the licensee...and also the person” (Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 2010, 7925).
21. The purposes enunciated by the Minister closely accord with the primary object of the Act to minimise "harm or ill-health caused to people, or any group of people, due to the use of liquor". The primary and secondary objects of the Act also reveal that parliament intended to minimise instances of antisocial behaviour in and around licensed premises and protect the general public from people who have engaged in disorderly or offensive behaviour.
22. Barring notice provisions are designed to protect the public from people who engage in disorderly or offence behaviour on licensed premises, rather than to punish an individual for their antisocial behaviour. While a barring notice may have a detrimental effect on the