

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

Applicant: [REDACTED]
(represented by Ms Kelly Thompson)

Respondent: Commissioner of Police
(represented by Ms Caitlin Gilchrist of the State Solicitor's Office)

Commission: Mr Nicholas van Hattem (Presiding Member)

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

Date of lodgement of Application: 12 November 2020

Date of Determination: 5 July 2021

Determination

1. The barring notice to the Applicant is varied pursuant to section 115AD(7) of the Act to permit the Applicant to enter licensed premises when such attendance is connected with the Applicant's playing of club Australian Rules football.
2. The Applicant is precluded from purchasing or consuming alcohol at the venues noted in Order 1.
3. The remainder of the Barring Notice is to remain.

Authorities referred to in Determination

- [REDACTED] v *Commissioner of Police* (LC19/2011)
- [REDACTED] v *Commissioner of Taxation* [2010] FCAFC 137

Review of Barring Notice

- 1 On 26 July 2020, an incident occurred near [REDACTED] (Incident). During an altercation between two groups of people, the Applicant punched a person in the face. That other person fell to the ground, hit their head on impact and became unconscious. That person (Injured Person) required surgery, which resulted in steel plates being inserted into their head.
- 2 On 9 October 2020, a delegate of the Respondent issued a barring notice under section 115AA(2) of the of the *Liquor Control Act 1988* (Act) prohibiting the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - (a) all hotel licences, however referred to, issued under section 41;
 - (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* (regulations).
- 3 The barring notice was served on the Applicant on 15 October 2020 to expire on 26 July 2021, being for a total period of approximately nine months.
- 4 On 12 November 2020, the Applicant appealed to the Liquor Commission (Commission) for a review of the barring notice.
- 5 The Applicant elected to have the review determined on the papers pursuant to section 115AD of the Act.
- 6 The Incident giving rise to the barring notice is referred to in the following documents:
 - (a) The Applicant's application for review dated 12 November 2020;
 - (b) The police evidence presented before the Commissioner of Police's Delegate including:
 - (i) barring notice dated 9 October 2020;
 - (ii) statement of Material Facts dated 13 August 2020;
 - (iii) Incident Report dated 27 August 2020;

- (iv) statement of the Injured Person;
 - (v) photographs of the Injured Person in hospital and their injuries;
 - (vi) statement of Detective Senior Constable Christopher Matier;
 - (vii) screenshots of the ScanTek registration of the Applicant at [REDACTED];
 - (viii) CCTV footage and stills of the Applicant waiting in line to enter [REDACTED];
 - (ix) CCTV footage and stills of the Injured Person unconscious on the ground;
 - (x) CCTV footage and stills of the Applicant walking at various points along [REDACTED];
 - (xi) History for Court – Criminal and Traffic.
- (c) The Commissioner of Police (Respondent) outline of submissions filed 16 February 2021;
 - (d) The Applicant's outline of submissions filed 23 December 2020 and further submissions filed 24 February 2021 including:
 - (i) Transcript of proceedings for the application to vary the Applicant's bail at the Magistrates Court dated 1 September 2020; and
 - (ii) the Commissioner of Police's responsive submissions dated 2 March 2021.

Submissions by the Applicant

- 7 The Applicant has made submissions requesting the Commission to quash or vary the barring notice on the grounds that:
 - (a) there was no proper basis to believe the Applicant committed grievous bodily harm; and
 - (b) The incident did not occur in the vicinity of a licensed premises.
- 8 The Applicant also submits that, even if there had been a proper basis for a barring notice, then:
 - (a) the barring notice was too wide;
 - (b) barring of the Applicant, who plays competitive club football, from attending his local sports house, a licensed premise, is overly onerous and unnecessary; and
 - (c) the barring notice could be varied to only apply to nightclub licences.

Submissions on behalf of the Commissioner of Police

- 9 The Respondent submits that it did have a proper basis to issue the barring notice, with reference to the Police Statement of Material Facts, a Police Incident Report, CCTV footage and stills, screenshots of a ScanTek registration and statements by a police officer and the Injured Person.
- 10 The Respondent submits that:

- (a) there are reasonable grounds to believe the Applicant was violent in the vicinity of licensed premises;
 - (b) statutory interpretation of the phrase 'in the vicinity of' involves, in light of the objects of the Act, both a physical and relational proximity which encompasses the facts of the incident;
 - (c) the incident is precisely the type that barring notices seek to address;
 - (d) the barring notice reinforces community expectations that such behaviour is not acceptable;
 - (e) the 9-month period of the barring notice will provide the Applicant with an opportunity to reassess his actions and the nature of his interactions with alcohol; and
 - (f) if the Commission is minded to vary the barring notice any variation should be limited to:
 - (i) allowing attendance at licensed premises when such attendance is in connection with the playing of competitive AFL by the Applicant.
- 11 Counsel for the Respondent also provided detailed written submissions both in the respondent's outline of submissions and outline of responsive submissions addressing each of the Applicant's submissions and on the applicable law.

Statutory Framework

- 12 The Commissioner of Police has the power to ban people from licensed premises pursuant to section 115AA of the Act if the Commissioner 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.
- 13 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.
- 14 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 Liquor Commission for a review of the decision.
- 15 Section 115AD(6) provides 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.
- 16 Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 17 The Act also in section 16 prescribes that the Commission:
- (a) may make its determinations on the balance of probabilities (subsection (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));"
- 18 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 over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.
- 19 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 (██████████ v Commissioner of Police (LC19/2011)).

Principles

- 20 The Commission, in considering an application under section 115AD, must review the decision and determine whether to affirm, vary or quash the decision.
- 21 The matters to be determined on a review are whether:
- (a) there are reasonable grounds for believing the barred person has, on licenced premises or in the vicinity of the same, engaged in indecent behaviour, been violent or disorderly or contravened a provision of a written law; and
 - (b) the length and terms of the barring notice are sufficient to uphold the objects of the Act and are not punitive in nature.
- 22 It is for the Commission to determine whether, on the balance of probabilities, the barring notice is warranted.

Issues

- 23 The following issues are raised by the Applicant:
- (a) There being no reasonable grounds or proper basis to believe the Applicant committed grievous bodily harm.
 - (b) The incident did not occur in the vicinity of a licenced premises.
 - (c) The barring notice is too wide.

Determination

24 I have considered all the evidence before me and the submissions of both parties.

No reasonable grounds to believe that the Applicant committed grievous bodily harm

25 Barring notices issued under section 115AA(2) do not specify or require the charging of or conviction of an offence. Even if conduct does not constitute an offence, it may nevertheless constitute violence, which can be a sufficient basis for a barring notice.

- 26 Whilst the material before the delegate did not include the Applicant's full record of interview with police, the Statement of Material Facts notes the Applicant made full admissions. Also, the Applicant's submission notes that in the record of interview, the Applicant says that he punched the Injured Person.
- 27 On the materials supplied, I am satisfied that there were reasonable grounds for the delegate of the Commissioner to conclude that the Applicant had engaged in violent behaviour.

Was the Incident in the "vicinity of" licensed premises

- 28 "Vicinity" is not defined in the Act. I have not identified any authoritative consideration of "vicinity" as used in the Act.
- 29 The Respondent referred to [REDACTED] v Commissioner of Taxation [2010] FCAFC 137. That case considered the expression "in the vicinity of" in the context of Fringe Benefits Tax Assessment Act 1986 (Cth). In that matter, the parties agreed that "vicinity" meant "near", "proximate" or "close". The Court held (at [33]) "... "near" is a relative term which invites the question "how near?" This is to be answered by reference to the statutory context without regard to the facts of the instant case".
- 30 The *Macquarie Dictionary* defines "vicinity" as "the region near or about a place".
- 31 I consider that "vicinity of licensed premises" ought to be construed with its ordinary meaning, having regard to the statutory context of the Act.
- 32 The Injured Person was found in [REDACTED]. I am satisfied on the balance of probabilities that the Incident occurred at, or very close, to the location where the Injured Person was found.
- 33 That place is some 90m from the entrance to [REDACTED]
- 34 [REDACTED] is at [REDACTED]. [REDACTED] is between [REDACTED] [REDACTED]. Both locations are within the block bordered by [REDACTED].
- 35 I am satisfied that, in the statutory context of the Act and its objectives, the incident did occur within the vicinity of licenced premises.

Is the barring notice too wide?

- 36 In all the circumstances, a barring notice for a period of 9 months is justified in order to:
- (a) assure the members of the public who frequent licensed clubs and 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; and
 - (b) allow the Applicant the opportunity for introspection regarding his behaviour and the serious consequences of his actions for the Injured Person.
- 37 The purpose of the Act is to minimise the likelihood of harm on both the public and the Applicant. Barring notices should be directed at harm minimisation, not punishment.

- 38 The Applicant did not provide specific information regarding the Applicant's participation in competitive football and the detriment that would be caused to the Applicant by the barring notice. Nevertheless, a punitive impact appears likely given the likelihood of sporting clubs having licensed premises.
- 39 On the balance of probabilities, I am satisfied that the barring notice would have a punitive effect of limiting the Applicant's ability to undertake his usual activities related to competitive football.

Orders

- 40 The barring notice is affirmed, but is varied pursuant to section 115AD(7) of the Act to permit the Applicant to enter licensed premises:
- (a) when such attendance is connected with the Applicant's playing of club Australian Rules football; and
 - (b) the Applicant is precluded from purchasing or consuming alcohol whilst attending such licensed premises.



Nicholas van Hattem
PRESIDING MEMBER