

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

Applicant: Mr Deegan Charles Sutherland

Intervener: Commissioner of Police
(represented by Ms Isabel Inkster 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: On the papers

Date of Determination: 14 February 2022

Determination: The prohibition order issued by the delegate of the Director of Liquor Licensing to Mr Deegan Charles Sutherland 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 of 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, to prohibit Deegan Charles Sutherland (“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”). The Incident, which resulted in serious injuries to the victim (“the Victim”), involved an altercation between the Applicant, the Applicant’s friend and 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”). At the time of the Application, the Charge had not been heard in court.
5. As a result of the Incident, the Commissioner also issued a Barring Notice on 3 February 2021.
6. On 9 July 2021, the Director made the decision (“Decision”) to grant the Prohibition Order in the terms as set out in paragraph 2 above.
7. On 11 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.
8. The Applicant requested for the Application to 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 asked for the Decision to be quashed, in order that he may be allowed to attend family celebrations and anniversaries, along with his fiancé, on licensed premises.
10. The Applicant submitted that he is twenty-one (21) years of age and currently a third-year apprentice plumber. He expects that he will qualify as a tradesman in July 2022.
11. He and his fiancé have recently purchased their first home together.
12. He has reflected on the Incident over the last few months and the impact that the Prohibition Order has had on him. It has caused him stress and has taken a toll on his mental health. He also submitted that it had had a negative effect on various relationships and his future.

Submissions on behalf of the Commissioner

13. The Commissioner submits that after having taken all the evidence into account, the Prohibition Order is in the public interest. Therefore, the Decision should be affirmed and ought not to be varied.

The Incident

14. The Commissioner put forth the facts of the Incident as follows:
- a. At the time of the Incident, the Applicant was in the company of a male friend (“Friend”) and had consumed liquor throughout the day and evening.
 - b. The Victim was in the beer garden area of the Premises. The Victim was unknown to the Applicant.
 - c. At approximately 10.50pm, the Applicant approached the Victim. Shortly thereafter, an altercation ensued, “*the genesis of which is unclear.*” The Applicant pushed the Victim in the chest, causing him to stumble backwards. The Friend then punched the Victim in the head, causing him to stumble and fall backwards onto the ground.
 - d. The Applicant then stood over the Victim and punched him three times in the head as he lay on the ground. After that, the Applicant stood the Victim up, before punching him a further two times to the head. The Friend then punched and kicked the Victim.
 - e. Security staff intervened and broke-apart the altercation.
15. The Victim was given medical assistance at the Venue. He was then conveyed to Joondalup Health Campus for medical attention where medical staff recorded that, as a result of the Incident, the Victim had suffered superficial lacerations to the right upper eyebrow and upper nose bridge, bruising under the left eye, and a deformed nose. Medical staff had to debride and suture the lacerations and support the Victim’s nose with a splint. A subsequent MRI scan showed that the Victim also suffered a bulging disc.

Public Interest

16. The Prohibition Order is in the public interest because:
- a. the Applicant’s conduct that gave rise to the Prohibition Order was serious;
 - b. the term and scope of the Prohibition Order reasonably succeed in achieving the purpose of the Act; and
 - c. the welfare of the public of Western Australia is best served by maintaining the Prohibition Order in its current form.

Risk of Applicant behaving in a similar manner

17. The Applicant’s violent actions did appear to have been unprovoked. The Victim was outnumbered and outpowered. Significantly, the Applicant’s actions escalated the violence and he was “*backed up*” by his Friend. The Applicant continued to physically assault the Victim after he was on the ground. The Applicant and the Co-Accused did not desist until security staff intervened.
18. The Applicant did not provide any explanation for the Incident. The Statement of Material Facts records that the Applicant’s explanation was that “[i]t was stupid and in the moment.”

19. The Applicant's unprovoked, violent conduct while under the influence of alcohol at a licensed premises justifies a temporary restriction to his access to licensed premises. The Prohibition Order is reasonable in light of the purposes of the Act.

Broad scope of the Prohibition Order and impact on Applicant

20. The Applicant stated that the reason for the Application was that he wished to "*attend licensed family celebrations and anniversaries with [his] fiancé.*" Consequently, the Applicant had limited the scope of his intention to go to licensed premises, when only attending events with his family and fiancé. However, it is clear that it would not be feasible to regulate whether his attendance at licensed premises were limited to such occasions, if the Prohibition Order were to be lifted or varied in those terms. Accordingly, the Applicant's expressed intention did not ameliorate the risk of him being in similar circumstances as those which gave rise to the Incident.
21. Furthermore, if the Applicant were permitted to attend licensed premises with his family or fiancé, the Prohibition Order would cease to have any practical effect. He could simply be accompanied by one of those persons any time he wished to attend a licensed premises.
22. The Applicant stated that he had "*reflected on the incident.*" However, the Applicant had not provided any evidence to suggest that he had learned from the Incident, nor that he had taken any steps to manage his alcohol consumption and violent behaviour.
23. The Applicant stated that the commencement of the Prohibition Order had "*taken a toll on his mental health, relationships and [his] future.*" However, nothing in the Act directs the Commission to take into account the personal impact of the Prohibition Order on the Applicant. Accordingly, those particular submissions should be given limited consideration.
24. It is nonetheless recognised that the Commission seeks to balance the privilege of an individual to enjoy licensed premises with the public's right not to be subjected to antisocial and offensive behaviour. To this end, it is submitted that the Applicant can attend family functions and celebrate anniversaries with his fiancé, in private dwellings and unlicensed venues.
25. The Prohibition Order does not go beyond what is necessary to protect the public. The term and scope of the Prohibition Order are appropriate. The Applicant's conduct caused severe injuries to the Victim, put patrons and staff at risk of being caught up in the physical altercation, and put himself and his Friend at risk.

Statutory Framework

26. 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.

27. 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
28. 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
29. 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.
30. 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
31. 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.
32. 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.
33. 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
34. 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).
35. 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

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.

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

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.

36. 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

37. The Commission has considered all the evidence before it, including the CCTV footage (which showed the Incident reasonably clearly), and makes the factual finding that the following occurred:
- a. Following an initial exchange of words, the Victim pushed the Applicant in the chest. The Applicant responded by pushing the Victim backward. The Victim returned to the conflict by grappling with the Applicant, and the Applicant then threw the first punch.
 - b. The Applicant continued to punch the Victim after the Victim was effectively subdued.
 - c. The Applicant's Friend 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 Friend was then restrained by security, but broke free and resumed punching the Victim, until he was pulled away once again.
38. The conduct engaged in by the Applicant during the Incident was extremely serious. It was excessive and seemed totally unwarranted. It involved a violent assault upon the Victim during which the Victim was punched to the head multiple times after he was on the ground. It does not appear to be in dispute that the Applicant did in fact punch the Victim. Worryingly, it also appeared from the footage that the Applicant and his Friend found the situation somewhat amusing while being escorted off the Premises.
39. The Victim sustained a broken nose (requiring surgery) and a dislodged vertebrae.
40. Based 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.
41. 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.
42. The Applicant did not provide any references as to his character. However, the Commission accepts that there was no prior criminal record against the Applicant, and he has no history of violent or aggressive behavior.

43. However, as already stated, the Commission deems the Applicant's conduct during the Incident to have been very serious in nature. It is well known that one punch can cause serious damage to a person. 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.
44. With regard to the Applicant's submissions to the Commission, the Panel found these to be limited; he focused only on the negative impact of the Prohibition Order on himself rather than actually address his violent conduct or show any remorse. He did not provide any evidence that he had sought any help or had taken any steps to address the factors that may have led to or contributed to his offending behaviour.
45. 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.
46. 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.
47. Having regard to all of the circumstances, and in particular to the serious nature of the Applicant's conduct, 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.
48. 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.
49. However, the Commission has also taken into consideration that the Applicant has the support of his fiancé and his family, and that he has no prior criminal record. 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

50. 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



Dr Kim Hames
MEMBER



Paul Shanahan
MEMBER