

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

- Complainant:** The Commissioner of Police
(*represented by Mr Alan Sefton*)
- Respondent:** Mr Edward Horace Withnell
(*represented by Ms Vesna Amidzic of Amidzic Lawyers*)
- Present:** Mr Edward Horace Withnell
Detective Superintendent James Martin Migro
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Dr Eric Isaachsen (Member)
- Matter:** Application for a Prohibition Order pursuant to section 152B of the *Liquor Control Act 1988*
- Date of Hearing:** 21 February 2012
- Date of Determination:** 11 April 2012
- Determination:** The application pursuant to section 152B(b) of the *Liquor Control Act 1988* is granted and Mr Edward Horace Withnell is prohibited from entering for a period of five years:
- a. "The Blue To The Bone"(Licence Number 6070020131) being licensed premises at 174 James Street Northbridge Western Australia; and
 - b. any other licensed premises within the meaning of the Act in Western Australia during the permitted hours of trading specified for those premises under Division 1 of Part 4 of the Act, except premises licensed under a :
 - i) restaurant licence; or
 - ii) liquor store licence.

Background

- 1 Pursuant to section 152B of the *Liquor Control Act 1988* (“the Act”), an application for a Prohibition Order against Mr Edward Horace Withnell was lodged with the Director of Liquor Licensing (“the Director”) by the Commissioner of Police (“the Police”) on 19 April 2011.
- 2 The following orders were sought:
 1. For a period of five (5) years from the date of this order, Edward Horace Withnell is prohibited from entering:
 - a) “Blue To The Bone”, being licensed premises at 174 James Street, Northbridge, Western Australia, Licence Number 6070020131; and
 - b) Any other licensed premises within the meaning of the *Liquor Control Act 1988* in Western Australia during the permitted hours of trading specified for those premises under Division 1 Part 4 of the *Liquor Control Act 1988*, except premises licensed under a:
 - i) restaurant licence; or
 - ii) liquor store licence.
- 3 The application stated the following grounds as the basis for seeking the grant of a Prohibition Order:
 1. Mr Withnell’s lengthy and serious criminal history;
 2. Mr Withnell’s membership of, and continuing association with, the Coffin Cheaters of WA, an “Outlaw Motorcycle Gang” (“OMCG”);
 3. Mr Withnell’s suspected involvement in the supervision and management of the “Blue To The Bone” nightclub, in circumstances where at all material times he has not been a licensee or an approved manager; and
 4. Mr Withnell’s suspected involvement in serious and organised crime.
- 4 In support of the application the following material was submitted:
 - (a) The first affidavit of Detective Superintendent James Martin Migro sworn on 19 April 2011 together with attachments “JM1” to “JM106” inclusive; and
 - (b) In a sealed envelope, the second affidavit of Detective Superintendent James Martin Migro sworn on 19 April 2011 together with attachments “A” to “C” inclusive; attachment “C” being classified as confidential police information pursuant to section 30(1) of the Act.
- 5 On 28 April 2011, the Director referred the matter to the Liquor Commission (“the Commission”) under section 24 of the Act.

- 6 On 13 July 2011, the Commission conducted a directions hearing and issued the following orders:
1. A précis of the material contained in annexure C of the confidential material submitted to the licensing authority will be supplied to the respondent's solicitor no later than 14 days from the date of this determination together with any further non-confidential information on which the complainant may wish to rely.
 2. Précis of material in respect of which Order 1 is made will be accompanied by what submission the complainant may wish to make in respect of the issue of confidentiality.
 3. The respondent will have a further 14 days from the date of the material to which Orders 1 and 2 refer to respond and to seek further and better particulars in relation to the complainant's submission.
 4. If the parties cannot satisfactorily resolve matters outstanding by correspondence the parties may seek further direction from the Commission.
- 7 On 27 July 2011, the Police lodged submissions regarding:
- confidential police information;
 - supplementary affidavit of James Martin Migro;
 - précis of aspects of classified confidential information.
- 8 On 28 August 2011, the respondent lodged a submission in response to the materials filed by the applicant on 27 July 2011 – refer 7 above.
- 9 On 19 September 2011, the Police lodged a responsive submission to the respondent's submission (refer 8 above) regarding the confidential police information.
- 10 On 7 October 2011, the Commission conducted a further directions hearing and issued the following Orders:
1. The complainant is not required to provide any further redacted police information to the respondent in this matter.
 2. The application shall be set down for hearing at the first available date after 7 November 2011.
 3. Any additional submissions in this matter are to be filed and served by close of business Monday, 24 October 2011.
 4. Responsive submissions are to be filed and served by close of business Monday, 31 October 2011.
- 11 Further submissions were lodged by both parties in the lead-up to the hearing.
- 12 The Commission conducted a hearing of the application on 21 February 2011.

Submissions on behalf of the Commissioner of Police

- 13 The applicant submitted the following information in support of the grounds for the prohibition application – refer 2 above:
- the respondent has a lengthy criminal history with a number of serious violent offences committed in 1974, 1975 and 1978, each committed in the company of others, three in the company of members of the Coffin Cheaters WA. The respondent has continued to commit offences at regular intervals between 1993 and 2010, which although of a less serious nature than convictions prior to 1979, indicate a continued disregard for the law;
 - the respondent commenced as a member of the Coffin Cheaters WA in the early to mid-1970's and has maintained a significant ongoing involvement with the gang, including as a senior representative of the gang, and has a public reputation as such. The Coffin Cheaters WA is an organised motorcycle gang with a culture of criminality, intimidation by actual or threatened violence and blatant disregard for law enforcement authority. The respondent's involvement extends to involvement with other members of the Coffin Cheaters WA in Cheetah Investments Pty Ltd, the registered owner of the Bayswater clubhouse as a director of the company and as a director and shareholder in Catalyst Holdings Pty Ltd, the principal shareholder in Cheetah Investments Pty Ltd;
 - evidence submitted supports at least a reasonable suspicion that the respondent:
 - (a) despite not being the holder of any licence under the Act, has been actively involved in the supervision and management of "Voodoo Lounge" and "Blue To The Bone" nightclub, being licensed premises under the Act; and
 - (b) has been involved in unlawful activities in relation to drug distribution for his personal gain and that of the Coffin Cheaters WA.
 - the classified confidential police report also establishes a reasonable suspicion of the respondent's involvement with his associates in other organised crime activities.
- 14 It was submitted that the past crimes of the respondent are not diminished by the passage of time and that the character and reputation of a person are relevant considerations in determining whether it is in the public interest that the respondent be prohibited from being employed by a licensee or being allowed to be present on a licensed premises.
- 15 The effect of a Prohibition Order on the respondent is in the public interest in that it will:
- (a) maintain public safety in and around licensed premises and the protection of patrons and employees from violent, anti-social, threatening or criminal behaviour;

- (b) maintaining public confidence in members of the public being able to attend licensed premises without their enjoyment being diminished due to concerns about the risk of being exposed to the above types of conduct;
- (c) preventing unsuitable persons being involved in the liquor industry, particularly operating, managing or benefiting from the operation of licensed premises; and
- (d) maintaining the integrity of the liquor industry and it being and appearing to be free from the influence of organised criminal activity.

Submissions on behalf of the respondent

- 16 The respondent submitted that the evidentiary materials relied upon by the Police, if properly tested as to their veracity, accuracy and reliability, would fail to satisfy the Commission of the existence of valid grounds for a Prohibition Order.
- 17 In particular, the respondent contends that:
- (a) on the whole of the material placed before it, the Commission could not properly be satisfied that the making of a Prohibition Order was in the public interest; and moreover that
 - (b) the making of the Prohibition Order would be positively contrary to the public interest in the circumstances of the case.
- 18 It was submitted that the disclosed materials relied upon by the applicant ought to be given little or no weight by a decision maker examining their content critically with due regard to considerations of fairness and good conscience.
- 19 With respect to the evidentiary materials which have not been disclosed to the respondent, namely confidential police information relied upon by the applicant, unless the respondent can be given the opportunity to test its veracity, accuracy and reliability, then the Commission ought to give the material little or no weight in determining the application. Where the material discloses mere suspicion, innuendo, scuttlebutt or uncorroborated information from persons with a demonstrable motive or predisposition to lie or fabricate allegations against the respondent then it ought to be given no weight by the Commission.
- 20 With regard to the grounds of the application – refer 3 and 13 above:
- The respondent's criminal history is of limited relevance due the length of time since the most serious convictions (33 years) and recent history is not suggestive of a current pre-disposition either to violence or abuse of alcohol or similar anti-social behaviour in public places. The respondent has also demonstrated a reformation of character through charitable works of both public and private nature.
 - The Coffin Cheaters WA is not an organised motorcycle gang but simply a club. The club is not involved in serious and organised criminal activity, nor is the club a criminal organisation. Criminal offences committed by particular members of Coffin Cheaters WA say nothing about the pre-disposition of the club itself or of the respondent to commit offences or engage in anti-social conduct such as

might be of concern within or about licensed premises. The respondent has never held a position of authority within Coffin Cheaters WA.

- The respondent is no longer involved in the entertainment industry or the contracting of services whatsoever to licensed venues. At no time has the respondent been party to unlawful activities in or about any of the licensed premises to which he may have provided services in the past. The respondent has no intention of resuming any involvement in the entertainment industry either allied to licensed venues or otherwise. The respondent's interest in opposing the application is confined to preserving his rights of entry to licensed premises only as a patron or consumer of alcohol and related services.
- The respondent denies involvement in serious and/or organised crime or indeed crime of any kind. Despite many years of close police scrutiny and surveillance the respondent has not been charged with any criminal offence since the last of the matters appearing on his criminal history.

21 It was submitted that even if the material were sufficient to satisfy the Commission that the respondent is in some relevant sense of bad character or engaged in some form of criminal activity, given the context of the application and the objects of the Act, the issue reduces to the fundamental question of how it could be said to be in the public interest to prohibit such a person from consuming liquor and related services in licensed premises provided:

- (a) they conduct themselves appropriately within or about licensed premises;
- (b) they do not engage in criminal or other anti-social conduct within or about licensed premises; and
- (c) they do not in any way interfere with the quiet enjoyment of other patrons of such premises.

22 The respondent had submitted additional materials in response to the applicant's précis of aspects of the classified confidential police information, reiterating that it is appropriate that those materials be tested in terms of the veracity, accuracy and reliability in terms of evidentiary value. It was pointed out that the respondent's background makes him particularly vulnerable to false allegations of wrong-doing where the maker of such allegations can be fairly confident of being assured anonymity.

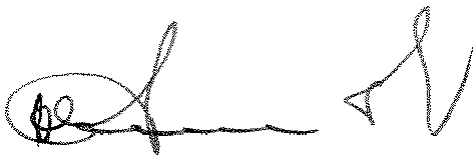
23 A sworn affidavit of Mr Edward Horace Withnell was also submitted in support of the respondent's position.

24 It was submitted that issuing a Prohibition Order in the circumstances of this case is not in the public interest.

Determination

25 The Commission has considered all of the materials before it in relation to the application for a Prohibition Order to be issued against Mr Edward Horace Withnell and has placed particular emphasis on the confidential police information.

- 26 Whilst the Commission is not persuaded that the disclosed information is such as to substantiate the issuing of a Prohibition Order against the respondent, there is sufficient material in the confidential police report to indicate, that on the balance of probabilities, the respondent's relationship with members of OMCG's and associated linkages to the "Blue To The Bone" Nightclub are such that grounds 2, 3 and 4 of the application are made.
- 27 In view of the time that has elapsed since the respondent was subject to criminal proceedings, the Commission has place little weight on ground 1 of the application, albeit when considered in association with grounds 2 and 4 there is an implied relevance.
- 28 Whilst the Commission is of the view that the respondent does not present any threat to the public interest by way of disorderly or violent behaviour in public places, his reported associations and activities within licensed premises are such that the public interest will be best served with the removal of access for such opportunities.
- 28 Accordingly, the Commission is satisfied that it is in the public interest to grant the application sought by the Commissioner of Police.



MR JIM FREEMANTLE
CHAIRPERSON