

**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

recipient, it is a protective and not punitive mechanism: *SVS v Commissioner of Police* (LC19/2011). Accordingly, when determining a review application, as well as considering the appropriateness of issuing a barring notice, the Commission should consider its punitive effect, and whether the length and terms of the barring notice uphold the objects of the Act (which are not to punish individuals for their behaviour): *AC v Commissioner of Police* (LC01/2018).

23. In light of all of these factors, in determining whether to quash the Barring Notice, it is necessary to take into account:
- a) the nature and circumstances of the incident giving rise to the Barring Notice;
 - b) whether there is a degree of probability or possibility that the applicant will behave in a similar manner in the future on licensed premises and, if so, if there is a need to protect the general public or the applicant himself; and
 - c) whether the length and terms of the barring notice are sufficient to uphold the objects of the Act.

Material for review

24. The Commission may have regard to the material that was before the Commissioner of Police when making its decision as well as any information or documents provided by the Applicant: section 115AD(6).
25. The Applicant filed an application for review dated 22 December 2021. The Application is accompanied by a letter from the Applicant comprising the grounds for the Application.
26. The Respondent filed and served the following material relied upon to make the decision to issue the Barring Notice:
- a) a document entitled "Evidence presented before the Commissioner's delegate" dated 1 December 2021;
 - b) an endorsed copy of the Barring Notice; and
 - c) BWC footage from police officers present at the time of the incident.

Applicant's Submissions

27. The Applicant's submissions deal with his characterisation of the Incident;³ his subsequent conduct;⁴ the impact of the barring notice on him;⁵ and public interest considerations.

Applicant's characterisation of the Incident

28. The Applicant describes his own conduct as engaging with the police officers and being "cheeky and disrespectful." He says that he was asked to move on and said he would not do so unless he was issued with a move on notice. The Applicant says he told the officer "aw mate f**k off, you're taking the piss, this is bullshit." He says he was told he would be arrested

³ Applicant's Submission's [1]-[19].

⁴ Applicant's Submission's [20]-[21].

⁵ Applicant's Submission's [22]-[26].

if he didn't move on, and was told to wait for a move on notice to be issued to him. At that point he told the officer "you guys are just pissed off because you're getting f**king paid \$25 an hour to be here."

29. The Applicant accepts that he used swear words when talking to police but does not accept that his behaviour or language could be considered disorderly. The Applicant submits that he was a considerable distance from the Premises, and there were no members of the public in the vicinity and that he wasn't shouting so nobody at the hotel or nearby would have been able to hear him swearing.

Applicant's subsequent conduct

30. The Applicant explains that he went to 19 licensed venues in the period from 31 October 2021 and 5 December 2021 without incident, including the Premises.

Impact of barring notice

31. The Applicant explains that he will be prevented from many social activities with friends, family and colleagues. [REDACTED]

Public interest considerations

32. The Applicant submits that although he was "cheeky, rude and disrespectful to the police officer", the language he used could not be considered disorderly, taking into account the time, place, nature and circumstances of the incident. Accordingly, it is submitted that the threshold criteria for the issuing of a barring notice could not have been met.
33. The Applicant also submits that if the Commission considers his conduct to be disorderly, he does not pose a risk to public safety and there is no need for the protective mechanisms that a barring notice aims to provide because:
 - a) the Incident did not involve violence, damage to property, obscene or threatening language, or any other behaviour that would cause harm to any member of the public;
 - b) he has demonstrated there is no risk he will behave in a similar manner as he has attended licensed venues since the Incident without further incident;
 - c) he has no criminal record; and
 - d) he is otherwise of good character and repute.
34. The Applicant also submits that the Barring Notice has an unnecessary and punitive effect on him preventing him from participating in sports, hobbies, significant family events and social gatherings.

Respondent's Submissions

35. The Respondent's Submissions are comprehensive, and:
- a) explain the background to the Barring Notice and the Incident;
 - b) explain the review process under section 115AD of the Act;
 - c) assert that the Barring Notice should be affirmed because:
 - a. there are reasonable grounds for granting the Barring Notice because there are reasonable grounds to believe the Applicant:
 - i. has been disorderly even if the more stringent definition of 'disorderly conduct' in the criminal context is applied; and/or
 - ii. has contravened a provision of the written law, namely section 74A of the *Criminal Code*;
 - b. the discretion should be exercised to affirm the Barring Notice because the Applicant was disorderly and verbally abusive to police officers and others in the vicinity of the Premises and there is a risk he will behave in a similar manner in the future; and
 - c. the Commission should pay minimal, if any, heed to matters personal to the Applicant, such as the impact of the Barring Notice on his social life; and
 - d) submit that if the Commission is satisfied that the Respondent had the basis for its belief that the Applicant engaged in disorderly conduct or contravened the provision of a written law in the vicinity of a licensed premises, the order should only be varied where the terms of the Barring Notice do not give effect to the objects and purposes of the Act.

Determination

36. It is for the Commission to determine, on the balance of probabilities, whether the Applicant's behaviour warrants the issue of a Barring Notice. I have considered all the evidence before me and I am satisfied that there were reasonable grounds to conclude that the Applicant was disorderly in the vicinity of the Premises.
37. The BWC footage reveals that the Applicant actively involved himself in an incident outside the Premises. He repeatedly used offensive language, including by shouting obscenities across a group of people being spoken to by police towards a separate group in the vicinity of the Hotel entry. He was asked by police to stop swearing, and to leave, but remained outside in the vicinity of the Hotel footpath and continued to use offensive language. He was argumentative and offensive towards police.
38. The Applicant describes his conduct as "cheeky and disrespectful" and "cheeky and provocative." He also submits that he was "a considerable distance" from the Premises and only those involved in the interaction were present, with no members of the public that he could see.

39. However, the BWC shows clearly that the Applicant was not far from the entry to the Premises, with members of the public standing at the entrance. The Applicant's account also omits the fact that he actively engaged with other members of the public using obscene language as described in [8(b)] and [8(c)] above. This behaviour was brazen and took place in the presence of many police officers. This squarely raises the question of how the Applicant would have behaved had police officers not been present. Not only did the Applicant attempt to provoke police, he also sought to provoke other people in the vicinity of the Premises.
40. After being given repeated warnings, he was finally arrested by police. While it can be accepted that the Applicant's behaviour was not on the more serious end of the scale of disorderly conduct, it nonetheless falls within the description of disorderly as defined in the *Macquarie Dictionary*, being 'contrary to public order or morality', as well as the more stringent definition applicable in the criminal context of 'any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, a street or public place': *Barrington v Austin* [1939] SASR 130, 132.
41. Indeed, in *Heanes v Herangi* [2007] WASC 175 a Magistrate's decision that "to tell a police officer, loudly, in Forrest Chase to "f**k off" is a clear case of disorderly behaviour" was upheld on appeal on the more stringent criminal standard. Here, the Applicant repeatedly used offensive language towards police officers and others in the vicinity of licensed premises.
42. Accordingly, I find there is a clear and proper basis for the Respondent's Delegate to exercise the power conferred by section 115A of the Act and impose a Barring Notice.
43. Therefore, it is for the Commission to determine in the relevant circumstances, whether the length and terms of the Barring Notice are sufficient to uphold the objects of the Act. It is relevant to take into account the nature and circumstances of the Incident giving rise to the Barring Notice; the risk of the Applicant behaving in a similar manner again; and the need to protect the general public, the licensee and the Applicant.
44. The nature of the Incident as outlined above was serious enough to warrant police action. It is also clear from viewing the BWC footage that the Applicant had the opportunity to stop using offensive language, and to walk away and failed to do so repeatedly.
45. Given his conduct there must, on the balance of probabilities, be a risk that he could behave in a similar manner again if he is intoxicated. It is particularly concerning that the Applicant described his behaviour as 'cheeky' and has failed to appreciate its inappropriateness as well as its potential impact on people in the vicinity of the Premises.
46. I take into account the Applicant's previous good record and his attendances without incident at licensed venues in the period following the Incident until service of the Barring Notice.
47. However, it appears to me that there is some risk that the Applicant will behave in a similar manner in the future and that risk can be minimalised by the terms of the Barring Notice. He explains that he was not excessively intoxicated on the night of the Incident, but he failed to heed multiple police warnings to stop using offensive language. Therefore, the risk remains that in similar circumstances he will behave in the same way again.
48. It is acknowledged that barring notices are not intended as punishment. Instead they serve as a measure to protect the public from anti-social behaviour in and around licensed

premises. Barring notices are also a mechanism to protect a licensee and in some cases the Applicant from his/her own actions.

49. In balancing the above, I note that members of the public must be able, when they frequent licensed premises, to be assured that they are in safe environments and not become victims of, or witness, anti-social behaviour or disorderly conduct. On the evening in question that could not be said to be the case. From a viewing of BWC footage, it is clear that the Applicant chose to continue to engage in inappropriate and offensive language around members of the public, even though he had ample opportunity to walk away.
50. The Commission agrees with the decision of the Delegate and has concluded that there was a clear and proper basis for the delegate to exercise the power conferred under section 115AA of the Act and further that it is not appropriate to vary the length of the Barring Notice.
51. The Applicant has made submissions as to the impact of the scope of the Barring Notice on him. While this is a relevant factor to the exercise of discretion, the impact on the Applicant is a lesser consideration to the object and purposes of the Act, particularly the need to minimise antisocial behaviour around licensed premises.
52. While I do not find the Applicant's arguments wholly convincing or substantiated, I note the potential impact on him of being unable to attend two wedding receptions (one of which has already occurred) and being unable to attend hockey training and preseason fixtures as they take place at a licensed premises. Given that these venues do not have the same innate similarities with the venue where the Incident occurred, and consequently the same risk of antisocial behaviour impacting on members of the public, I have determined to vary the Order so that the Applicant will be able to enter certain licensed premises, [REDACTED], and sporting clubs with club licences under section 48 of the Act for the purposes of hockey training and preseason games.
53. The Variation of the Order will allow the Applicant to continue to engage in sporting club activities while also providing a sufficient degree of protection to the community in that he will not, for the length of the Barring Notice, be able to attend all specified classes of venues listed in paragraph 3 with the exception of the [REDACTED] and sporting clubs with club licences for the purposes of hockey training and preseason games, as well as [REDACTED] venues. The barring notice otherwise remains in full force.



Kate Pedersen
CHAIRPERSON

