

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

Applicant:	GC
Intervener:	Commissioner of Police (<i>represented by Mr Toby Bishop of the State Solicitor's Office</i>)
Commission:	Mr Nicholas van Hattem (Presiding Member)
Matter:	Application seeking review of a barring notice pursuant to section 115AD of the <i>Liquor Control Act 1988</i> .
Date of lodgement of Application:	17 January 2022
Date of Hearing:	Determined on the Papers
Date of Determination:	13 May 2022
Determination:	The Barring Notice to the Applicant is varied pursuant to section 115AD(7) of the <i>Liquor Control Act 1988</i> to include an exemption provision.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *KRB v Commissioner of Police* (LC 33/2011)
- *ARQ v Commissioner of Police* (LC 46/2011)
- *MRP v Commissioner of Police* (LC 55/2011)
- *GML v Commissioner of Police* (LC 58/2011)
- *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR
- *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611
- *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
- *DJB v Commissioner of Police* (LC05/2017)
- *SVS v Commissioner of Police* (LC19/2011)
- *AC v Commissioner of Police* (LC01/2018)

Background

- 1 This is an application for the review of a Barring Notice pursuant to section 115AD(3) of the *Liquor Control Act 1988* (WA) (“**the Act**”) made by [REDACTED] (“**the Applicant**”).
- 2 On 8 October 2021 an incident (“**the Incident**”) occurred at and in the vicinity of a licensed premises, namely [REDACTED] (“**the Premises**”), involving the Applicant.
- 3 As a result of the Incident, a delegate officer for the Commissioner of Police (“**the Respondent**”) issued a Barring Notice dated 13 December 2021 (“**the Barring Notice**”) pursuant to section 115AA(2) of the Act, prohibiting the Applicant from entering premises within Western Australia of the following licence classes for a period expiring 8 October 2022:
 - a. All hotel licences issued under section 41 (includes hotel, hotel restricted, tavern, and tavern restricted licences);
 - 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*.
- 4 The Barring Notice was served on the Applicant on or about 4 January 2022 and is for a period of approximately nine months, expiring on 8 October 2022.
- 5 The Applicant lodged an Application for Review of the Barring Notice, dated 17 January 2022, under section 115AD of the Act (“**the Application**”).
- 6 The Applicant has elected to have the review determined on the papers.

Overview of parties' positions

- 7 [REDACTED] The Applicant seeks that the Barring Notice be reviewed on the basis that it is excessively punitive and negatively impacts his family, notably his two children. [REDACTED]
[REDACTED]
[REDACTED]
- 8 The Applicant states that as a result of the Incident he was charged for two counts of assault occasioning bodily harm under section 317(1) of the *Criminal Code*. The Applicant admitted guilt at the first opportunity. The Applicant has experienced further distress from the Barring Notice as it restricts him from attending his children's sporting activities, take them to restaurants for their birthdays, or take them on holiday.

- 9 The Respondent submits that the Barring Notice should be affirmed. The Respondent submits that the Applicant's conduct was aggressive, unprovoked and disproportionate to the situation, and caused significant harm to the two victims. The Respondent submits that the Applicant poses a risk of behaving in a similar manner in the future and as such the Barring Notice should remain in effect.
- 10 The Respondents submits that matters personal to the Applicant are of little significance to the discretion of the Commission in affirming the Barring Notice. The Respondent accepts that the Applicant is experiencing a difficult period due to his personal circumstances, however the health and grief issues the Applicant refers to as matters that affected him at the time of the assault are matters likely to increase the risk of similar future behaviour rather than reduce it.

Incident

- 11 The Incident took place in the evening of 8 October 2021 at the Premises. The Incident involved the Applicant and two separate victims during the same sequence of events. The Incident is captured on CCTV footage from [REDACTED] and described in the Statement of Material Facts and witness statements as follows:
- a. at approximately 10.40pm on Friday 8 October 2021 the Applicant was at the Premises with a group of males;
 - b. the first victim and his wife ("the witness") were playing pool;
 - c. the Applicant was standing in the pool table area of the Premises at a table across from the first victim who was standing at the end of the pool table;
 - d. the witness was attempting to take a pool shot;
 - e. the Applicant was standing close behind the witness and was dancing and sticking out his buttocks which prevented the witness from taking her shot;
 - f. the witness looked back at the Applicant and he stopped;
 - g. the witness bent over again to take the pool shot, the Applicant looked over his shoulder at the witness and stuck out his buttocks to cause the witness to hit the Applicant with the pool cue, which affected the shot she was attempting to take;
 - h. the first victim was standing at the end of the pool table and said words to the effect of 'don't do that';
 - i. the Applicant walked over to the first victim where they had a short conversation;
 - j. the Applicant headbutted and punched the first victim in the head, causing the first victim to fall to the floor;
 - k. the second victim observed the Applicant headbutt and punch the first victim;
 - l. the second victim approached the Applicant and intervened by pushing the Applicant back and away from the first victim with his hands;
 - m. as the second victim was pushing the Applicant back, the Applicant punched the second victim in the face three times in short succession.

- 12 The first victim suffered a cut across the bridge of his nose, a blood nose that was bleeding the next morning, and bruising around the nose, cheek, and lip area of his face. The Respondent submits that it appears the first victim may have suffered a concussion due to his loss of memory between the time he was headbutted to the time he got back to his feet.
- 13 The second victim suffered a blood nose and a concussion. The second victim took one week off work in accordance with medical advice because of the injuries.
- 14 Following the Incident, the Applicant was arrested and charged with two counts of assault occasioning bodily harm under section 317(1) of the *Criminal Code* and subsequently bailed with a condition not to attend licenced premises. He entered a plea of guilty to the two charges.

Statutory Framework

The power to issue a barring notice

- 15 The Commissioner of Police has the power to ban people from entering specified licensed premises, or a specified class of licensed premises, for a period of up to twelve months pursuant to section 115AA of the Act if the Commissioner believes on reasonable grounds that the person has, on licensed premises:
 - a. contravened a provision of any written law;
 - b. been violent or disorderly; or
 - c. engaged in indecent behaviour.
- 16 The Commissioner may delegate the power conferred by section 115AA of the Act to a delegate, pursuant to section 115AB of the Act.
- 17 A single incident is sufficient to give rise to a barring notice. There is no necessity for the person to whom the barring notice is issued to have engaged in a series of similar conduct or have engaged in habitual behaviour of the type specified: *DJB v Commissioner of Police* (LC05/2017), [5].
- 18 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.

Applications for review

- 19 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 pursuant to section 115AD.
- 20 On review, the Commission may affirm, vary, or quash the decision of the Commissioner of Police to issue the barring notice: section 115AD(7).
- 21 In conducting the review, 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 documents provided by the Applicant: section 115AD(6).

- 22 Section 16 of the Act prescribes that 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).
- 23 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.¹ 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.
- 24 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

- 25 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 caused 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)).
- 26 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.

¹ 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].

- 27 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).
- 28 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).
- 29 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.
- 30 Barring notice provisions are designed to protect the public from people who engage in disorderly or offensive 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).
- 31 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).
- 32 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

- 33 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).

- 34 The Applicant filed an Application for Review dated 17 January 2022. The Application is accompanied by:
- a. A letter from the Applicant comprising the grounds for the Application;
 - b. An email from the [REDACTED] to the Applicant, dated 5 November 2021:
 - i. stating that the Applicant's referral was processed, and an initial appointment booked for a date in late September 2021; and
 - ii. confirming that the Applicant had attended appointments with a practitioner on three occasions.
 - c. Correspondence from [REDACTED]
[REDACTED] regarding the Applicant, dated 5 November 2021:
[REDACTED]
[REDACTED]
- 35 The following evidence was presented before the delegate of the Commissioner of Police in making the decision to impose the Barring Notice:
- a. Statement of Material Facts dated 9 December 2021;
 - b. Detected Incidents Report;
 - c. Venue Incident Report dated 9 October 2021;
 - d. Photographs of the Victim's injuries;
 - e. File titled "video of suspect";
 - f. Anonymous Witness Statements dated 13 and 15 October 2021;
 - g. CCTV Footage from the Premises showing the Incident;
 - h. CCTV Timeline Images; and
 - i. Traffic and Criminal History of the Applicant (showing no prior history).

Submissions by the Applicant

- 36 The Applicant lodged an Application for Review dated 17 January 2022.
- 37 The Applicant made submissions requesting the Commission review the Barring Notice. The Applicant's submissions deal with his personal circumstances preceding the event, his subsequent conduct, the impact of the barring notice on him, and the impact of the barring notice on his family.
- 38 The Applicant did not make submissions on the risk of the Applicant behaving in a similar manner again, or the need to protect the general public, the licensee, and the Applicant himself.
- 39 The Applicant does not specify whether he wishes the Barring Notice be quashed, or in the alternative varied.

- 40 The Applicant made the following submissions in support of a review of the Barring Notice:
- a. The Applicant had extenuating personal circumstances at the time of the Incident, including:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
 - b. On the night of the Incident he immediately showed remorse and apologised to the victims and began to explain his situation.
 - c. The Barring Notice is punitive, as the Applicant is being persecuted again for a crime he has already admitted to and been punished for.
 - d. The Incident was a result of [REDACTED] and such behaviour is not typical of the Applicant.
 - e. The Applicant notes that once charged he:
 - i. was barred from all licensed premises until he attended court;
 - ii. admitted guilt at the first opportunity;
 - iii. paid the required fines to the victims; and
 - iv. paid the necessary court fees.
 - f. The Applicant submits that he had been eager to move on from the Incident and focus [REDACTED]
[REDACTED].
 - g. The Applicant submits that subsequently receiving the new Barring Notice has had a detrimental impact on his mental health and an impact on his family, notably his children. The Applicant provides examples of the impact the restrictions have had on his family as follows:
 - i. the family is unable to go to dinner to celebrate his children's birthdays;
 - ii. the Applicant is unable to take his children "anywhere on holidays"; and
 - iii. the Applicant is unable to attend his children's sporting activities due to licensed bars at most venues.
 - h. The Applicant is struggling with grief and depression and had begun moving forward to improve his mental state and focus on helping his children, however the new Barring Notice has had a negative impact on his mental state and his family life.

41 As such the Applicant submits that the Barring Notice should be reviewed.

Submissions on behalf of the Commissioner of Police

- 42 The circumstances upon which the initial decision of the Respondent to issue the Barring Notice is based, are contained within material of review referred to above.

- 43 The Respondent filed submissions on 10 February 2022. 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:
 - i. there is sufficient evidence to establish that the Applicant engaged in an act of violence on the licensed premises;
 - ii. the act of violence contravened a provision of a written law;
 - iii. the conduct giving rise to the Barring Notice is very serious violent behaviour that the Act was designed to address;
 - iv. the Applicant's conduct was aggressive, unprovoked, disproportionate to the situation, and caused significant harm;
 - v. the Applicant's assault of victim two incited further violence, as a result of the Applicant's assault of victim two and subsequent grappling on the ground a third person got involved and placed victim two in a strangle hold and choked victim two;
 - vi. the risk posed by the Applicant is implicit in his unprovoked and violent assaults of victims one and victim two and caused the incident resulting in the assaults;
 - d. assert that the Barring Notice should not be varied because:
 - i. an order should only be varied where the terms of the Barring Notice do not give effect to the objects and purposes of the Act;
 - ii. the order reinforces community expectations that violent behaviour is not acceptable at licensed premises;
 - iii. the Commission should give minimal, if any, consideration to matters personal to the Applicant, including the impact of the Barring Notice on the Applicant's family or social life, given that the object of a barring notice is protective;
 - iv. the Applicant is not barred from socialising with family and friends at unlicensed premises; and
 - v. the Applicant's health and grief issues that affected him at the time of the assault are matters likely to increase the risk of similar future behaviour rather than reduce it.

Determination

- 44 The Commission finds that:
- a. there were reasonable grounds for believing that the Applicant had contravened a provision of a written law; and
 - b. there was a proper basis for the delegate of the Commissioner to exercise the power conferred by section 115AA of the Act.

- 45 The Commission must ensure that the terms and conditions of any barring notice:
- a. reflect the protective objects and purpose of the Act; and
 - b. are not punitive in nature.
- 46 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.
- 47 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:
- a. the nature and circumstances of the Incident giving rise to the Barring Notice;
 - b. the risk of the Applicant behaving in a similar manner again; and
 - c. the need to protect the general public, the licensee, and the Applicant.

(KRB v Commissioner of Police (LC 33/2011); ARQ v Commissioner of Police (LC 46/2011); MRP v Commissioner of Police (LC 55/2011); and GML v Commissioner of Police (LC 58/2011)).

- 48 The Applicant was experiencing particularly difficult personal circumstances prior to the Incident. The Applicant's [REDACTED] and the Applicant was struggling with his mental health.
- 49 The Applicant accepts that he committed a crime, he submits that he has been punished for that crime and as such should not be penalised through a Barring Notice. However, the Applicant does not acknowledge in his submissions the effect his behaviour and actions had on the victims or witnesses present.
- 50 The Incident was of a serious nature, with two victims being significantly injured, and multiple patrons having to witness and/or experience violence and antisocial behaviour.
- 51 The behaviour of the Applicant was brazen. He headbutted another patron in front of several other patrons and security guards in a busy Premises that one would reasonably expect to have CCTV cameras. The Applicant appears to have given no regard to the potential repercussions at the time of his violence.
- 52 The Applicant has made submissions as to the impact of the scope of the Barring Notice on him and his family, notably his children. While this is a relevant factor to the exercise of the 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.
- 53 The Commission does not accept the Applicant's submission that he is "unable to go out to dinner to celebrate the children's birthdays" and "unable to take them anywhere on holidays" "due to licensed bars at most venues". The Commission finds that there are restaurants and other activities available in this State which do not require entry into a licensed venue.

- 54 A barring notice for the period of 9 months (from the service of the barring notice) does appear justified in order to:
- a. assure the members of the public who frequent licensed premises that they are in safe environments and can expect 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 on licensed premises, his interaction with alcohol, and the effect of his violent and antisocial behaviour on others, to reduce the risk of similar harm in the future.

Conclusion

- 55 The Barring Notice to the Applicant stands, but is varied pursuant to section 115AD(7) of the Act by adding the following terms of exception:

“The Barring Notice does not apply in the following circumstances:

During the hours of 6am and 7pm, where [REDACTED] may attend at a licensed premises adjoining a sports ground, for the purpose of watching one of his children playing in a sporting game at the sports ground as part of a regular, coordinated sporting fixture, which fixture is available in writing, and where there is no capacity for [REDACTED] to watch the game other than by entering the premises, and provided that [REDACTED] does not purchase, possess or consume any liquor whilst on any of those licensed premises.”

- 56 The variation of the order will allow the Applicant to attend and watch his children's sporting events 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 other specified classes of venues listed in the Barring Notice.
- 57 Given the nature and circumstances of [REDACTED] violence, it would undermine the effectiveness of the Barring Notice, and it would not be in the public interest, to extend the exception to allow the Applicant to attend other licensed premises.



NICHOLAS VAN HATTEM
PRESIDING MEMBER