

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

Applicant: MJG

Respondent: Commissioner of Police
(represented by Mr Sam Pack of State Solicitor's Office)

Commission: Mr Rudolf Alexander Zilkens (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: 26 September 2017

Date of Hearing: 1 November 2017

Date of Determination: 16 November 2017

Determination The terms of the barring notice dated 18 August 2017 are varied as follows:

- 1 The third paragraph of the barring notice is varied as follows:

MJG is barred from entering specified licensed premises in Western Australia for a period of 6 months ending on 17 February 2018, with the exception of [REDACTED].
- 2 The barring notice shall otherwise remain in its current terms.

Authorities referred to in Determination:

- *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 All ER 1441
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241

Introduction

1. On 18 August 2017, a delegate of the Commissioner of Police (“the respondent”) issued a barring notice pursuant to section 115AA(2) of the *Liquor Control Act 1988* (“the Act”) to prohibit MJG (“the applicant”) from entering specified licensed premises in Western Australia for a period of 6 months, namely:
 - a. All hotel licences, however referred to, issued under section 41;
 - b. All nightclub licences issued under section 42;
 - c. Casino licence issued under section 44;
 - d. All club licences issued to under section 48;
 - e. All restaurant licences issued under section 50;
 - f. All occasional licences issued under section 59; and
 - g. All special facility licences issued under section 46 and regulation 9A of the *Liquor Control Regulations 1989*.
2. The barring notice was served on the applicant on 24 August 2017 and on 26 September 2017, the applicant lodged an application for review in respect of the barring notice pursuant to section 115AD(3) of the Act. The respondent has opposed the application.
3. The application is dated 22 September 2017 but was received on 26 September 2017, just outside of the one month period allowed by section 115AD(4) of the Act. On 10 October 2017, the Commission exercised its discretion to hear the matter out of time.
4. The application was heard on 1 November 2017. At the conclusion of the hearing, I advised the parties that I would reserve my decision.
5. For the reason set out below, I have decided that the terms of the barring notice should be varied to allow the applicant to enter [REDACTED], but should otherwise remain as is.

Background

6. The applicant has been charged with the offence of assault occasioning bodily harm. The applicant has pleaded not guilty to that offence.
7. The respondent has provided the Commission with a copy of the Statement of Material Facts relating to the alleged offence, which states as follows:

“On Saturday 17 June 2017 the accused was at [REDACTED]. At about 10.00pm the accused and her friends approached the victim who was standing outside the toilets in [REDACTED]. The victim refused to talk to the accused and her friend’s [sic] and turned away from them. The accused’s friend tried to grab the victims [sic] arm which the victim brushed off. The accused’s friend has hit the victim to the side

of the head causing her head to hit a concrete pillar. The victim fell to the floor and curled up to protect herself. The accused and her friends continued to punch and kick the victim as she lay on the floor.

The accused then pinned the victim by her throat, causing her face to turn blue, while her friend stood in the way of the victims [sic] feet and yelled abuse at the victim and encouragement to the accused. A friend of the victim attempted to shield the victim but the accused and her friend continued to attack the victim.

Security separated the accused and her friend away from the victim. While the accused and the victim were being restrained they continued to try and rush at the victim while the victim was retreating. The victims [sic] friend took her to the hospital to be treated for her injuries.

The victim sustained bruising to both eyes, cuts behind her left ear, cuts on both eyelids, cuts underneath her left eye, cuts on her forehead, bruising on her neck, bruising on her left arm, bruising on her left shoulder and bruising on her left leg.”

- 8 The respondent also provided the Commission with copies of:
 - a. a witness statement of the victim;
 - b. a witness statement of the victim’s friend present during the incident;
 - c. a witness statement of a security guard working at [REDACTED] at the time of the incident that observed the incident;
 - d. photographs of the victim’s injuries evidencing the injuries set out in the Statement of Material Facts.
- 9 Each of the witness statements is consistent with the Statement of Material Facts.
- 10 Other than stating that the applicant has pleaded not guilty to the charge, the applicant has not put forward any material to refute the allegations made against her.
- 11 I find, on the balance of probabilities, that the applicant engaged in the alleged conduct set out in the Statement of Material Facts.
- 12 Accordingly, it appears that the respondent has reasonable grounds for imposing the barring notice and at the hearing, the applicant accepted this to be the case. I must now determine whether to exercise my discretion to quash, vary or affirm the barring notice.

Application to vary the Barring Notice to enable the Applicant to work

- 13 The applicant has applied for a review of the barring notice on the ground that it affects her employment.

- 14 In her written submissions to the Commission dated 20 October 2017, the applicant relevantly wrote:

"I am currently employed by [REDACTED] ...

Due to the diversity of my role I am an employee that is heavily relied upon by the Company to be able to fill in any positions at any of the [REDACTED] including [REDACTED] ... and am required to stay at the accommodation the Company has arranged for work purposes.

Since the 8th September, due to an employee resignation I have been required to be in [REDACTED] to fulfil my duties as required by my Employer, but was unable to do so as I would have had to stay in a hotel that is a licenced venue.

The barring notice has affected my professional life and I am now unable to fulfil my duties as outlined in my Contract of Employment. For example, I am unable to stay at licenced premises namely [REDACTED] and I am unable to organise or attend work functions that are held at licenced venues.

I do not wish to have all classes of the Liquor Control Act 1988 lifted, only the ones that directly impact my work. The following are the premises that would have a direct impact on my ability to fulfil my role as an employee:

- (a) all hotel licences, however referred to, issued under section 41;*
- (b) all restaurant licences issued under section 50;*
- (c) all club licences issued under section 48;*
- (d) all occasional licences issued under section 59."*

- 15 The applicant has submitted evidence indicating that the applicant is employed by [REDACTED] as a Recruiter/HR Assistant. A letter dated 22 September 2017 from [REDACTED] indicates she has held this particular position since about March 2017.

- 16 The letter states that as part of the applicant's employment, the applicant is required to access various licenced premises including:

- a. the [REDACTED] (being accommodation provided by the applicant's employer); and
- b. [REDACTED] (being alternative accommodation provided by the applicant's employer) – this appears to me to be a reference to [REDACTED].

Submissions by the applicant

17 At paragraph 11 of the applicant's written submissions, she states that *"the punitive nature of the Barring Notice should not ... extend to infringing her ability to undertake her employment related activities."*

18 The applicant goes on to state:

"12 The Applicant in this case does not seek a setting aside of the Barring Notice however, does seek that the Notice be modified and or amended to enable the Applicant to continue to undertake her work as a Recruiter by being permitted to attend to her duties which will necessarily involve attending at licensed premises including attending functions in conjunction with her employment at venues classified as:

- (a) All hotel licences, however referred to, issued under section 41;*
- (b) All restaurant licences issued under section 50;*
- (c) All club licences issued under section 48;*
- (d) All occasional licences issued under section 59."*

13 In the event that the Barring Notice is amended, the Applicant would give an undertaking that whilst on the premises referred to above, that she would not consume drinks containing alcohol.

14 S.115AA(7A) of the Act provides that 'A person does not commit an offence under subsection (6) if the person enters the premises solely for the purpose of performing duties relating to the person's work'.

15 It is contended that the provisions of s.115A(7A) may not be sufficiently certain to enable the Applicant to attend Licensed premises (as the Respondent asserts), without infringing the provisions of the Act."

19 During oral submissions, the applicant stated that:

- a. she required access to licenced venues in order to perform her work; and
- b. she required access to the [REDACTED] for accommodation purposes, despite that being a licenced venue.

20 The applicant stated that her employer required that she stay at the [REDACTED] when working in [REDACTED] because her employer had an account there, and not at other venues in [REDACTED].

Submissions on behalf of the Commissioner of Police

- 21 At paragraph 32 of the respondent's written submissions dated 18 October 2017, the respondent states that *"the Commission ought not depart from the decision of the Respondent lightly"*. The respondent referred to the judgments of Edmund Davies LJ and Phillimore LJ in *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 All ER 1441 at 1457 and 1460 respectively.
- 22 The respondent goes on to state that, *"The discretion to issue a barring notice is reposed by the Parliament in the Respondent, who has the specialist knowledge and experience to determine what controls are necessary to be able to (quite literally) police licensed premises in order to minimise harm and ill health."*
- 23 The respondent further states in its submissions:
- 45 *It is neither necessary nor appropriate to vary the barring notice to make allowance for the Applicant's employment.*
- 46 *Parliament has already made allowance for a barred person's employment through the exception in the Act s 115AA(7A).*
- 47 *The exception in the Act is purposive: whether or not it applies depends on why the Applicant enters licensed premises in each particular instance.*
- 48 *By contrast, the terms of a barring notice must refer to specified licensed premises, or a specified class of licensed premises. There is no power for the Respondent at first instance, or the Commission on review, to place any limit on the purposes for which the Applicant may or may not enter licensed premises.*
- 49 *Therefore, if the barring notice is varied to allow the Applicant to attend at particular licensed premises, the Applicant will be allowed to attend those premises not only in the course of her employment but as she pleases.*
- ...
- 51 *It is not necessary to make allowance for the Applicant's employment by varying the barring notice. To the extent that the Applicant is required to attend licensed premises in the course of her duties, the Act already allows her to do so.*
- 52 *It is not appropriate to make any greater allowance for the Applicant's employment. Doing so would necessarily involve allowing the Applicant to attend at licensed premises other than in the course of her employment, would go further than the balance already struck by Parliament, and would undermine the efficacy of the barring notice that has been issued."*
- 24 The respondent goes on to state that the applicant has not produced sufficient evidence to justify varying the barring notice to allow for the applicant's employment.

Determination

- 25 If the applicant enters licensed premises solely for the purpose of performing duties relating to her work, section 115AA(7A) of the Act prevents the applicant's entrance to those premises constituting an offence under section 115AA(6) of the Act.
- 26 It does not appear that the barring notice prohibits the applicant from entering licensed premises to coordinate, organise, set up or clean up work events, or to attend team building sessions, training courses or briefing sessions in the course of her employment duties.
- 27 However, the applicant has also expressed a need to stay at [REDACTED] when she is in [REDACTED] for work purposes because that is the only place of accommodation in [REDACTED] where her employer holds an account. For the purposes of this determination I accept that assertion.
- 28 Section 33(1) gives the licensing authority absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest.
- 29 Section 33(2) provides that an application:
- a. may be refused, even if the applicant meets all the requirements of this Act; or
 - b. may be granted, even if a valid ground of objection is made out,
- but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.
- 30 My discretion is confined to the scope and subject of the Act and is not arbitrary or unlimited: (*Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241).
- 31 The matters I have taken into consideration in reaching my determination are as follows:
- a. As stated at paragraph 42 of the respondent's submissions, the conduct giving rise to the barring notice was the very type of conduct which the amendments to the Act were designed to overcome, that being acts of violence whilst on licensed premises.
 - b. The respondent's view is that it is not necessary or appropriate to vary the barring notice to make allowance for the applicant's employment.
 - c. The applicant has not expressed any remorse for any of her actions surrounding the incident, though it must be borne in mind that the applicant has pleaded not guilty in the Magistrates Court and the matter is ongoing.
 - d. The applicant needs to stay at [REDACTED] in [REDACTED] when working in [REDACTED].
 - e. The applicant entering [REDACTED] in order to reside there while working in town does not appear to me to fall within the scope of the exception under section 115AA(7A) of the Act that allows prohibited persons to enter licensed premises solely for the purpose of performing duties relating to work.

- f. By varying the barring notice to allow the applicant to enter [REDACTED], the applicant will be allowed to enter those premises not only in the course of her employment, but as she pleases.
- g. The conduct of the applicant, while reprehensible and worthy of a barring notice prohibiting the applicant from entering licensed premises generally, appears to have arisen from a pre-existing state of affairs between the victim and the applicant, making it appear to me unlikely that the applicant will, while present at [REDACTED], engage in the kind of conduct listed at section 115AA(2) of the Act.

32 In balancing the above considerations, I have concluded that:

- a. it is appropriate to vary the barring notice to allow the applicant to enter [REDACTED] [REDACTED], enabling the applicant to stay in [REDACTED] at the cost of her employer while performing her employment duties; and
- b. it is not appropriate to otherwise vary the barring notice, such as by removing references to specified classes of venue.

33 The third paragraph of the barring notice is accordingly varied as follows:

MJG is barred from entering specified licensed premises in Western Australia for a period of 6 months ending on 17 February 2018, with the exception of [REDACTED] [REDACTED].

34 The barring notice shall otherwise remain in its current terms.



RUDOLF ALEXANDER ZILKENS
PRESIDING MEMBER