

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

Applicant: Commissioner of Police
(represented by Ms Dianne Scaddan)

Respondent: Troy Desmond Mercanti

Commission: Mr Jim Freemantle (Chairman)
Mr Eddie Watling
Mr Greg Joyce

Matter: Applications pursuant to section 152B of the *Liquor Control Act 1988* for Prohibitions Orders

Date of Hearing: 2 August 2010

Date of Determination: 24 August 2010

Determination: Pursuant to sections 152E and 152F of the Act Troy Desmond Mercanti is:

- (1) prohibited from entering any licensed premises for a period of five years; and
- (2) prohibited from being employed by a licensee at any licensed premises for a period of five years.

Authorities cited in determination:

Re Minister for Resources; ex parte Cazaly Iron Pty Ltd[2007] WASCA 175

McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 per Tamberlin J

Sean Investments Pty Limited v McKellar [1981] 38 ALR 363 per Dean J

Introduction

- 1 On 9 February 2010 the Commissioner of Police lodged with the Director of Liquor Licensing two applications for Prohibition Orders against Troy Desmond Mercanti under the provisions of sections 152B, 152E(2) and 152F of Pt. 5A of the *Liquor Control Act 1988* ("the Act").
- 2 The first application seeks to prohibit Mr Mercanti from entering any licensed premises for a period of five years and the second application seeks to prohibit Mr Mercanti from being employed by a licensee at any licensed premises for a period of five years.
- 3 On 9 February 2010 the Director of Liquor Licensing referred the applications to the Commission for determination pursuant to section 24 of the Act.
- 4 A hearing before the Commission was held on 2 August 2010.

Submissions on behalf of the Commissioner of Police in support of the applications

- 5 The applications are made on the basis of a demonstrated course of conduct where Mr Mercanti engages in violent, intimidatory and anti-social behaviour, particularly in licensed premises.
- 6 From 1986 to 2008 Mr Mercanti has 31 recorded criminal and traffic outcomes, including:
 - four convictions for assault type offences. The most recent conviction was in December 2008 for the offence of grievous bodily harm committed in May 2007 in licensed premises (the Geisha Bar) and Mr Mercanti is currently in custody for this offence. Prior to this conviction, Mr Mercanti was convicted of common assault in May 2008 and received a monetary penalty for an incident that occurred at licensed premises (Coolbellup Hotel) in June 2007;
 - five disorderly or hindering type offences;
 - three drug related offences;
 - two possession of weapons and ammunition offences;
 - one damage offence;
 - one breach of bail offence;
 - one re-enter licensed premises offence; and
 - 14 traffic related offences.
- 7 The circumstances of the incident which resulted in the December 2008 conviction are contained in the documents submitted in support of the applications, however briefly, Mr

Mercanti punched the victim to the head three times resulting in the victim suffering a fractured jaw and suffering permanent injury to his health. Not only was Mr Mercanti sentenced to a term of imprisonment of 2 years 4 months but is also the subject of a permanent lifetime violence restraining order to protect the victim.

8 Both the sentencing judge and the Court of Appeal (refer *Mercanti v The State of Western Australia [2009] WASCA 109*) held that the offence was too serious to allow for suspension of the term of imprisonment.

9 In respect of the incident resulting in the May 2008 conviction, Mr Mercanti punched his victim to the face, knocking him to the ground. The victim was unconscious and received a large laceration to the back of his head, requiring hospitalisation. This offence occurred within one month of the offence at the Geisha Bar, while Mr Mercanti was on bail.

10 Mr Mercanti has also either been acquitted, the charges dismissed or the charges discontinued for seven other assault type offences, including three assaults which were alleged to have occurred in August 2006 and January 2005 in licensed premises. It is also alleged that Mr Mercanti was involved in two other offences in January 2005 in licensed premises where criminal charges were not preferred as the two victims and a witness indicated to police that they did not want to take the matter further for fear of reprisals. Of particular concern to police was Mr Mercanti's alleged involvement in:

- an incident at the Harbourside Nightclub in August 2006 when a crowd controller was assaulted; and
- an incident at Metro City Nightclub in January 2005 in which Mr Mercanti was stabbed and another person was shot several times.

11 It was submitted by the Commissioner of Police that notwithstanding that Mr Mercanti has been acquitted of the above charges or the charges were dismissed, when determining matters under the Act the Commission is to make its determinations on the balance of probabilities, not the criminal standard of beyond reasonable doubt, and therefore the Commission may draw various conclusions from the material submitted by the police surrounding these incidents.

12 Finally, it was submitted that Mr Mercanti's behaviour demonstrates violent and unprovoked attacks on vulnerable people, a complete disregard for the law, the safety of other people and a lack of remorse. Mr Mercanti's convictions display an escalation in violence in licensed premises and other allegations of assault demonstrate that when Mr Mercanti is on licensed premises there is a possibility that a violent incident will occur.

Submissions on behalf of Mr Mercanti

13 At the commencement of the hearing, which was conducted via a video link with Casuarina Prison, Mr Mercanti stated that he had not received and accepted the documentation relevant to these applications. Furthermore, Mr Mercanti indicated that

he was not prepared to participate in the hearing before the Commission or make any comment until he had sought legal advice.

- 14 The records of the Commission indicate that that all relevant material and advice of these proceedings have been properly served upon Mr Mercanti at Casuarina Prison either by officers of the Department of Racing, Gaming and Liquor who left the material with prison officers for delivery to Mr Mercanti or using registered post and addressed to Mr Mercanti via the Superintendent of Casuarina Prison. In this regard, sections 75 and 76 of the *Interpretations Act 1984* are relevant.
- 15 It is the conclusion of the Commission that Mr Mercanti has chosen not to read the material or acknowledge receipt of the material in an attempt to frustrate these proceedings.
- 16 The Commission is satisfied that all care has been taken to ensure that Mr Mercanti was fully informed of the proceedings before the Commission; had access to all documentation relied upon by the Commissioner of Police; and has been afforded a reasonable opportunity to make submissions and be heard in relation to the applications as required under section 152E(3)(a) of the Act.
- 17 The Commission is satisfied that Mr Mercanti was made aware of his right to legal representation and elected not to avail himself of that option.

Determination

- 18 Pursuant to section 152E of the Act, the Commission may make a Prohibition Order only if satisfied that it is in the public interest to do so after giving the relevant person a reasonable opportunity to make submissions and be heard and regard is given to any information or document provided by the parties.
- 19 Mr Mercanti was afforded a reasonable opportunity to make submissions and be heard in respect of the applications but declined to participate.
- 20 Pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
- 21 In determining what constitutes the public interest in the context of a Prohibition Order, the Commission also notes the following precedents –

"The expression "in the public interest", when used as the criterion for the exercise of a statutory discretion, usually imports a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation" (Re Minister for Resources; ex parte Cazaly Iron Pty Ltd[2007] WASCA 175).

and

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

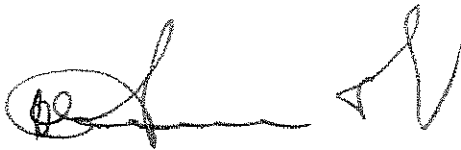
The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.” (McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 per Tamberlin J)

and

“In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.” (Sean Investments Pty Limited v McKellar [1981] 38 ALR 363 per Dean J).

- 22 A Prohibition Order is not about punishing the respondent; it is about protecting the public. Violence in and about licensed premises is of increasing concern to the community. Licensed premises should be safe environments and patrons and employees of licensed premises have a right to expect that they will be protected from violence and anti-social behaviour.
- 23 The incident at the Geisha Bar, which resulted in Mr Merchant receiving a custodial sentence, was extremely violent with no mitigating circumstances, with both the sentencing Judge and Appeal Judge considering that the offence was too serious for suspension of the term of imprisonment. Shortly after the incident at the Geisha Bar, Mr Merchant assaulted another person at the Coolbellup Hotel which resulted in his conviction in May 2008 for common assault. The Commission also notes Mr Merchant's involvement in other serious violent incidents at licensed premises, particularly at the Metro City Nightclub and the Harbourside Nightclub and whilst he was not convicted of a criminal offence in respect of these incidents, the Commission is entitled to give some weight to the circumstances surrounding the events at these premises.
- 24 In reviewing the evidence submitted on behalf of the Commissioner of Police, the Commission can only conclude that it is not a matter of coincidence that a significant level of violence seems to frequently occur in Mr Merchant's presence.

- 25 In determining these applications, the Commission needs to weigh and balance the competing interests of Mr Mercanti being able to attend licensed premises and the public's right to safe drinking environments.
- 26 The Commission can only make a Prohibition Order if satisfied that it is in the public interest to do so. As stated by Tamberlin J (refer *McKinnon v Secretary, Department of Treasury* supra), making a determination in the public interest is about the advancement of the interest or welfare of the public. The gravity and frequency of violent incidents involving Mr Mercanti, either directly or indirectly, leads the Commission to the conclusion that his presence on licensed premises increases the possibility that a violent incident may occur, which could result in a member of the public or an employee of licensed premises being injured.
- 27 The Commission is satisfied, based upon the evidence presented, that the granting of the applications sought by the Commissioner of Police is in the public interest.
- 28 According, pursuant to sections 152E and 152F of the Act, Troy Desmond Mercanti is:
- Prohibited from entering any licensed premises for a period of five years; and
 - Prohibited from being employed by a licensee at any licensed premises for a period of five years.



JIM FREEMANTLE
CHAIRPERSON