



## Civil and Administrative Tribunal New South Wales

### Medium Neutral Citation:

**Von Furstenrecht v Independent Liquor and Gaming Authority [2019] NSWCATAD 78**

### Hearing dates:

6 March 2019 and 25 March 2019

### Date of orders:

02 May 2019

### Decision date:

02 May 2019

### Jurisdiction:

Administrative and Equal Opportunity Division

### Before:

Dr J Lucy, Senior Member

### Decision:

The first respondent's decisions are set aside and, in substitution for those decisions, the Tribunal determines to make no order under s 116G of the Liquor Act 2007 (NSW).

### Catchwords:

ADMINISTRATIVE REVIEW – Long term banning orders – Where applicant is a former licensee and a hotel owner – Where applicant assaulted man not far from the hotel he owns - Whether preconditions for making banning orders met - Whether the victim of the assault was affected by alcohol – Whether applicant was performing services on the hotel premises at the time of the offence – Discretionary considerations

### Legislation Cited:

Administrative Decisions Review Act 1997 (NSW)  
Crimes Act 1900 (NSW)  
Liquor Act 2007 (NSW)

### Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27  
Aporo v Minister for Immigration and Citizenship (2009) 113 ALD 46; [2009] FCAFC 123  
Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1  
Bronze Wing Ammunition v Safe Work New South Wales (No. 2) [2016] NSWSC 988  
Bushell v Repatriation Commission [1992] HCA 47; (1992) 175 CLR 408  
Comcare v Power (2015) 149 ALD 286; [2015] FCA 1502  
Commissioner of Police, NSW Police Force v Monastirski [2017] NSWCATAP 225

Lithgow City Council v Jackson (2011) 244 CLR 352  
Magerovski v Commissioner for Fair Trading, Department of Finance, Services and Innovation; Service Today NSW v Commissioner for Fair Trading, Department of Finance, Services and Innovation [2018] NSWCATAD 192  
Marshall v Prescott [2015] NSWCA 110  
McDonald v Director-General of Social Security [1984] FCA 591; (1984) FCR 354  
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332  
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259  
Monastirski v Independent Liquor & Gaming Authority [2017] NSWCATAD 115  
Nakad v Commissioner of Police, New South Wales Police Force [2014] NSWCATAP 10  
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152  
Seltsam Pty Ltd v McGuinness (2000) 49 NSWLR 262  
TB v New South Wales [2015] NSWSC 575

**Category:**

Principal judgment

**Parties:**

Adam Micola von Furstenrecht (Applicant)  
Independent Liquor and Gaming Authority (First Respondent)  
Commissioner of Police, NSW Police Force (Second Respondent)

**Representation:**

Counsel: Mr A Jordan  
Mr H El Hage (Second Respondent)

Solicitors: Korn MacDougall Legal (Applicant)  
Crown Solicitor (Respondents)

**File Number(s):**

2018/356461

**Publication restriction:**

Nil

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**REASONS FOR DECISION**

- 1 Mr von Furstenrecht applied for review of a decision to issue him with two long-term banning orders, each of twelve months duration. The banning orders were issued after he assaulted a man in the vicinity of a hotel he owned.
- 2 I am not satisfied that the preconditions for making the orders were met. The first precondition relied upon does not apply because the victim of the assault was not affected by alcohol (and it was accepted that Mr von Furstenrecht was not). The second precondition relied upon does not apply because Mr von Furstenrecht was not working or performing services on the licensed premises at the time of the offence.

3 Even if, contrary to my view, the preconditions for making a banning order are satisfied, the correct and preferable decision is not to issue the orders. This is broadly because the assault was a one-off incident, Mr von Furstenrecht has sought professional help since the assault occurred, he has shown remorse and insight into his conduct and there is little risk of him reoffending.

## Background

- 4 Mr von Furstenrecht was the licensee of the Frisco Hotel in Wolloomooloo until November 2017 when Rebecca Wakelin became the licensee.
- 5 In April 2018, Mr von Furstenrecht was the sole director of the company which owned the hotel and the sole director of the company which owned the business conducted at the hotel. He typically spent one day a week at the Frisco Hotel doing administrative tasks such as accounting and contract administration. He was not paid a wage for doing these tasks.
- 6 In March 2018, Mr von Furstenrecht assisted Ms Wakelin to prepare applications to Liquor and Gaming NSW and to Sydney City Council for approval to use a street adjacent to the hotel on Anzac Day for a two-up event.
- 7 Attached to both applications was a plan of management for the Anzac Day event. The plan of management describes Mr von Furstenrecht as being rostered on until close and describes his position as “management.” It makes detailed provision for matters on Anzac Day such as the hotel’s hours of operation, management measures, security and fire safety. Mr von Furstenrecht helped to prepare the plan and signed off on it.
- 8 Mr von Furstenrecht arrived at the hotel at 8am on Anzac Day in 2018 to set up for the two-up event the hotel was holding. He helped set up a temporary two-up stage. He spent just under an hour doing the traffic mitigation, filling up orange bats with water, and putting up cyclone fencing.
- 9 Although Mr von Furstenrecht was rostered to work on Anzac Day, his evidence was that he did not work at the hotel once it had opened. He stated that this was because “the Hotel was not as busy as we had expected and had enough paid staff working.”
- 10 Around lunch time, Mr von Furstenrecht said that he started to consume alcohol. His undisputed evidence was that he had about 3-4 beverages of mid strength alcohol over the next eight and a half hours.
- 11 Mr von Furstenrecht was at the hotel with friends and was socialising, at least by the afternoon.
- 12 Towards the end of the day, Mr von Furstenrecht helped to pack up the infrastructure used for the two-up event so that the adjacent street could be re-opened. By 8pm, the infrastructure was packed up.
- 13 At about 8.30pm, Mr Hespe, who had been a friend of Mr von Furstenrecht for fifteen years, was assaulted by a male patron at the hotel near the bar on the first floor (“the assailant”).

- 14 Mr von Furstenrecht was in the office at the time of the assault. The office was also located on the first floor of the hotel. Mr von Furstenrecht's brother was standing in the doorway of the office, where he could see the bar area, and notified him of the altercation. Mr von Furstenrecht came out of the office and saw a security guard escorting the assailant to the stairwell. He then followed the security guard down the stairs. He did not see that Mr Hespe was the victim.
- 15 The security guard took the assailant outside the premises. Mr von Furstenrecht said to the security guard, "Don't let him back in." Mr von Furstenrecht returned to the first floor of the hotel and stood in the bar area with his brother. He then moved to the corridor where he saw Mr Hespe. His face was covered in blood and Mr von Furstenrecht observed that Mr Hespe's nose appeared to be broken. His wife was standing next to him crying.
- 16 Mr von Furstenrecht ran back down the stairs. He asked a security guard where the male who assaulted Mr Hespe was. The security guard pointed to a man walking away from the hotel along the street. Mr Hespe chased after the assailant, down the street adjacent to the hotel. Other people followed him. When he reached the assailant, Mr von Furstenrecht jumped on him and kicked him in the torso from behind. Other men, who had followed him, also became involved. The incident lasted about twenty seconds.
- 17 The assailant apparently left the scene after the incident. His identity is unknown.
- 18 When the incident was over, Mr von Furstenrecht returned to the hotel. He went to the private dining room for a short time, then left the hotel through a rear fire exit.
- 19 On 3 May 2018, the Commissioner of Police ("the Commissioner") applied to the Independent Liquor and Gaming Authority ("the Authority"), under s 116G(2) of the *Liquor Act 2007* (NSW), for an order prohibiting Mr von Furstenrecht from entering or remaining on any high risk venue for a period of 12 months (a "long-term banning order").
- 20 Mr von Furstenrecht was charged with the offence of affray under s 93C of the *Crimes Act 1900* (NSW). On 27 May 2018, he entered a plea of guilty.
- 21 In August 2018, Mr von Furstenrecht attended a clinical psychologist, Mr Anton Aronstan, on two occasions, to assess whether he had underlying issues with anger.
- 22 In September and October 2018, Mr von Furstenrecht undertook and completed a six-week anger management course.
- 23 On 29 October 2018, the Authority wrote to Mr von Furstenrecht to inform him that it was issuing him with two long-term banning orders for the Sydney CBD Entertainment Precinct and the Kings Cross Precinct. The period of each banning order was from 8 November 2018 to 7 November 2019.
- 24 On 9 November 2018, Mr von Furstenrecht was found guilty of the offence of affray, but without proceeding to a conviction, the court imposed a conditional release order for a period of two years.

- 25 Mr von Furstenrecht commenced these proceedings for review of the decision to issue the long-term banning orders on 20 November 2018.

## Evidence and Hearing

- 26 The Commissioner took an active role in the proceedings, opposing the application. The decision-maker, the Authority, filed a submitting appearance.
- 27 Mr von Furstenrecht swore an affidavit which annexed a report of Mr Aronstan, the transcript of his sentencing hearing, CCTV footage from the Frisco Hotel and two references he relied upon before the sentencing magistrate.
- 28 Mr von Furstenrecht and Mr Aronstan also gave oral evidence in the proceedings and were cross-examined.
- 29 The respondents provided the Tribunal with documents under s 58(1)(b) of the *Administrative Decisions Review Act 1997*. These included a document entitled “Anzac Day 2018 Event Information – Frisco Hotel” (“the plan of management”), CCTV footage of the events of the evening of Anzac Day 2018, a Computerised Operational Policing System (“COPS”) report about the assault by the assailant at the Frisco Hotel, a statement given by a police officer about an attendance at the Frisco Hotel at about 8.30pm on 25 April 2018 in response to a police broadcast of a fight outside the premises, a statement given by a security guard, Masoud Jaizan, about the events of the evening of 25 April 2018, the agreed facts in the prosecution of Mr von Furstenrecht, and the affidavit of Mr von Furstenrecht which was tendered in those criminal proceedings.
- 30 The Authority provided the Tribunal with its reasons for issuing the long-term banning orders.
- 31 The Commissioner tendered a diagram showing a plan of each floor of the Frisco Hotel and read an affidavit of Lara Dopson, a solicitor, annexing COPS reports relating to assaults which took place at the Frisco Hotel.
- 32 At the hearing, the Commissioner played parts of the CCTV footage which recorded events at the Frisco Hotel on the night of 25 April 2018. After the hearing, the Commissioner filed video files extracted from the CCTV footage and audio files comprising the sound recording of the hearing.

## Are the preconditions for making a long-term banning order satisfied?

- 33 Section 116G(1) and (3) of the *Liquor Act* provide:

“(1) The Authority may, by order in writing (a **long-term banning order**), prohibit a person from entering or remaining on any high risk venue for such period (not exceeding 12 months) as is specified in the order.

...

(3) The Authority may make a long-term banning order only if the Authority is satisfied that the person the subject of the proposed order:

(a) has been charged with, or found guilty of, a serious indictable offence involving violence that was committed by the person in a public place or on relevant premises while the person or any victim of the offence was affected by alcohol, or

(a1) has been charged with, or found guilty of, a serious indictable offence involving violence that was committed by the person on or in the vicinity of licensed premises and the person was, at the time of the offence:

(i) the licensee or manager of the premises, or

(ii) working or performing services of any kind on the premises in the course of any employment (whether paid or unpaid) or in a volunteer capacity, being work or services related to the business carried on under the licence, or

(b) has been given 3 temporary banning orders during a period of 12 consecutive months.”

### *Tribunal’s task and onus of proof*

- 34 The Tribunal, when conducting a review, “stands in the shoes” of the decision-maker (the Authority). Thus, the Tribunal needs to be satisfied that one of the matters in s 116G(3) applies, in order to be persuaded that the making of a long-term banning order could be the correct and preferable decision (see *Administrative Decisions Review Act*, s 63(1)).
- 35 In merits review cases such as these, there is no onus of proof: *Nakad v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAP 10 at [34]; *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 at 424-425; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [40]; *Magerovski v Commissioner for Fair Trading, Department of Finance, Services and Innovation; Service Today NSW v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2018] NSWCATAD 192 at [22].
- 36 It is not helpful to refer to a party bearing a practical or evidential onus, because this imports notions relating to civil disputes. As Katzmann J said in *Comcare v Power* (2015) 149 ALD 286; [2015] FCA 1502 at [57] in relation to the Administrative Appeals Tribunal “[t]o speak in terms of a party having any onus of proof (whether legal or evidential) in proceedings before the Tribunal is apt to mislead.” However, “it is for an applicant to provide their evidence and arguments in sufficient detail to enable the decision-maker to establish the relevant facts” (*Aporo v Minister for Immigration and Citizenship* (2009) 113 ALD 46; [2009] FCAFC 123 at [45]).
- 37 As there is no onus of proof cast upon either party, there is no standard of proof: *Bronze Wing Ammunition v Safe Work New South Wales (No. 2)* [2016] NSWSC 988 at [77]. The term “balance of probabilities,” which is “borrowed from the universe of discourse which has civil litigation as its subject” is “of little assistance” in merits review proceedings and is “apt to mislead”: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 to 283.

In determining what to do if it is unable to reach a clear conclusion on an issue, the Tribunal “is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts” (*McDonald v Director-General of Social Security* [1984] FCA 591; (1984) FCR 354 at 356).

- 39 Here, s 116G(3) of the *Liquor Act* requires the Tribunal to be “satisfied” of certain matters. Further, the Tribunal’s task is to put itself in the position of the administrator who made the decision under review (here, the Authority) and to make the correct and preferable decision on the material before it: *McDonald v Director-General of Social Security* [1984] FCA 591; (1984) FCR 354 at 357 and *Administrative Decisions Review Act*, s 63(1).

#### *Application of s 116G(3)*

- 40 The Commissioner relied upon s 116G(3)(a) and (a1)(ii) as being applicable in the circumstances of this case.
- 41 Both parties accepted that Mr von Furstenrecht had been found guilty of a serious indictable offence involving violence that was committed by him in a public place in the vicinity of licensed premises and that Mr von Furstenrecht was not affected by alcohol at the time of the offence.
- 42 In relation to s 116G(3)(a), there was a dispute as to whether Mr von Furstenrecht’s victim was affected by alcohol.
- 43 In relation to s 116G(3)(a1)(ii), the issue between the parties was whether Mr von Furstenrecht was, at the time of the offence, “working or performing services of any kind on the premises in the course of any employment (whether paid or unpaid) or in a volunteer capacity, being work or services related to the business carried on under the licence.”

#### *Was the assailant affected by alcohol at the time of the offence (s 116G(3)(a))?*

- 44 The Commissioner relied upon CCTV footage showing the assailant taking a number of sips of clear liquid from a glass in the moments leading up to his assault on Mr Hespe. Mr El Hage, for the Commissioner, submitted that it can be inferred that the liquid was alcohol, given the location. The Commissioner also submitted that it may be inferred from the assailant’s conduct towards Mr Hespe that he was affected by alcohol.
- 45 To ground an inference where direct proof is not available, “it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture” (*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5; see also *TB v New South Wales* [2015] NSWSC 575 at [85] and [86]; *Marshall v Prescott* [2015] NSWCA 110 at [83]). The inference that I am asked to draw, that the assailant was drinking alcohol, does not

“avoid guess or conjecture” (*Lithgow City Council v Jackson* (2011) 244 CLR 352, Crennan J at 386 [94]; see also *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at 274 [79] - 276 [88]). It is not apparent what the assailant was drinking.

46 Even if the assailant was drinking alcohol, I do not consider that the evidence establishes that he was affected by alcohol. Immediately prior to the assault, the CCTV footage shows the assailant standing in the bar area. He appears to be steady on his feet. When he does start to move, his movements appear to be controlled. He does not appear to be affected by alcohol.

47 The Commissioner submits that it is open to a decision-maker to conclude that a person is “affected by alcohol” within 116G(3)(a) even if the person does not display outward signs of being influenced by alcohol. That may be so, but there must be some probative evidence that the person was influenced by alcohol. Evidence that a person took a few sips of a drink, even if it were to be accepted that the drink was alcoholic, is insufficient.

48 I do not accept the Commissioner’s submission that it may be inferred from the assailant’s conduct towards Mr Hespe that he was affected by alcohol. It does not necessarily follow from the act of violence that the assailant was affected by alcohol.

49 I am not satisfied that Mr von Furstenrecht’s offence was committed by him while any victim of the offence was affected by alcohol, within s 116G(3)(a).

*Was Mr von Furstenrecht working or performing services on the licensed premises as an employee or volunteer at the time of his offence?*

50 Mr von Furstenrecht was not a paid employee of the licensee or the company which operated the business at the hotel. However, s 116G(3)(a1)(ii) contemplates that employment may be unpaid. The term “employee” includes a person engaged under a contract for services (*Liquor Act*, s 4(1)). There is no evidence of Mr von Furstenrecht having entered into any contract for services with the licensee or the company which operated the business at the hotel.

51 The management plan referred to Mr von Furstenrecht, Ms Wakelin and one other person as “management” in the summary of the staff roster for Anzac Day 2018. I accept Mr von Furstenrecht’s evidence that, despite the management plan, he did not remain on the roster for that day. He said, and I accept, that he would not have consumed alcohol if he had considered himself to be working.

52 The question of whether Mr von Furstenrecht was working or performing services “in the course of any employment” within s 116G(3) is not straightforward. The parties did not address this question in their submissions. Ultimately, it is not necessary to do so because s 116G(3)(a) also applies if a person is “working or performing services of any kind on the premises ... in a volunteer capacity.” I find that, to the extent that Mr von Furstenrecht worked or performed services on Anzac Day 2018, it was in a volunteer capacity.



A security guard, Masoud Jaizan, provided a witness statement dated 10 May 2018 to the police in the matter of “Frisco Hotel – 25 January 2018.” Mr Jaizan describes, in his statement, attending a police station on 10 May 2018 and viewing CCTV footage from 25 April 2018 at 20:37 from the upstairs hall. He states:

“The man in the photo, he work there, he pick up the glass, he everywhere. If people need help he go there. He move furniture and the fence stuff when they close the street. I help him. I also see him talk to the manager Rebecca through the day.”

54 Having viewed the footage, it is not entirely clear whether the man shown in the footage of the hallway at 20:37 is Mr von Furstenrecht. Assuming that it is, it is not clear whether Mr Jaizan’s evidence that “he work there, he pick up the glass, he everywhere” relates to 25 April 2018 only, or is a more general comment. Mr von Furstenrecht’s own evidence is that he did pick up glasses over the course of the day when he saw they had been left out, and put them on the bar. He said he did this because “hospitality runs in his blood.” He accepts that he also assisted staff to move furniture when asked.

55 The agreed facts in Mr von Furstenrecht’s criminal prosecution stated that, on 25 April 2018, he “had organised a two-up event at the premises for Anzac Day and had been conducting duties at the premises such as liaising with police and general organisation of the event.” In an affidavit which was before the sentencing magistrate, Mr von Furstenrecht stated that he attended the venue in a social capacity and was not overseeing any management or operations duties. After referring to the statement in the Facts Sheet, set out above, he continued:

“The only contact I had with Police during the evening was when I had walked in to my licensee’s office. My licensee was speaking with the Officer about the side street next to the venue being closed. My only involvement in this conversation was that I explained to the Officer why there may be a difference between the Council and Police regulation regarding the closure of the side street. I left the Office and they continued the conversation.”

56 I accept this evidence about the extent of Mr von Furstenrecht’s contact with the police on Anzac Day, which is not inconsistent with the statement in the Facts Sheet that he liaised with the police that day.

57 I find that Mr von Furstenrecht was performing services on the licensed premises, on an ad hoc basis, at various times on Anzac Day, notwithstanding that he was also socialising in the afternoon and evening. These services, which related to the business carried on under the licence, included picking up glasses on occasion, setting up and packing up the infrastructure for the two-up event and participating in a short conversation with a police officer.

58 The critical question, however, is whether Mr von Furstenrecht was working or performing services on the licensed premises *at the time of his offence*.

59 Mr El Hage submitted, for the Commissioner, that the words “at the time of the offence” in s 116G(3)(a1) of the *Liquor Act* do not require that the person be performing the relevant service or doing work at the precise time of the offence. It is sufficient if the person was doing so immediately before the commission of the offence.

I accept this submission. The legislature contemplates that the doing of work or performance of services on the premises and the commission of the offence do not have to be simultaneous, because the offence may be committed “in the vicinity of licensed premises.” It would not be possible to commit an offence in the vicinity of the premises whilst, at the time of the offence, working on the premises within s 116G(3)(a1)(ii), if “at the time of” meant simultaneously.

- 61 Before the altercation between the assailant and Mr Hespe, Mr von Furstenrecht was in the office. I accept his evidence that he was not working but rather was “chilling out.” He was not performing services at this time.
- 62 Immediately after the assault on Mr Hespe, Mr von Furstenrecht followed the security guard downstairs and told him not to let the assailant back in. He accepted, under cross examination, that he had given the security guard a direction. I consider that this was “performing services” because it was managing the security guard and the security of the licensed premises. These services were related to the business carried on under the licence.
- 63 After telling the security guard not to let the assailant back in, Mr von Furstenrecht went upstairs. He can be seen on CCTV camera briefly standing next to his brother in the bar area before departing that area. His brother was neither an employee nor performing services for the hotel. Mr von Furstenrecht does not appear to be performing services at this time. He then went into the hallway where he saw his friend, Mr Hespe, and realised that he had been injured. Again, there is nothing to suggest that he was performing services related to the business carried on under the licence whilst in the hallway. I find that he was upstairs at the hotel in a social capacity, as he had been earlier in the day.
- 64 It was not submitted, and I do not consider, that Mr von Furstenrecht’s pursuit of the assailant was performing services related to the business carried on under the licence. This was a personal response to seeing his friend injured.
- 65 After the assault, Mr von Furstenrecht returned to the hotel but did not perform any services relating to the business of the hotel. Rather, he went into the private dining room with his brother before leaving the hotel.
- 66 For these reasons, I am not satisfied that Mr von Furstenrecht was performing services on the licensed premises at the time of his offence within s 116G(3)(a1) of the *Liquor Act*.
- 67 It follows that the preconditions to the making of a long-term banning order were not met and the decision to issue a long-term banning order is not the correct and preferable decision.

### Discretionary considerations

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In case I am wrong about the preconditions to making a long-term banning order not being met, I have gone on to consider whether it would be the correct and preferable decision to issue a long-term banning order if, contrary to my view, one of the preconditions was met. I have done this, in part, due to the parties' detailed submissions on the matter.

- 69 As the Commissioner acknowledged, the discretion conferred upon the Authority to make a long-term banning order, if a precondition is met, is very broad (*Monastirski v Independent Liquor and Gaming Authority* [2017] NSWCATAD 115 at [83]). This power is to be construed in a manner consistent with the subject matter, scope and purpose of the *Liquor Act* (see, for example, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23]; *Monastirski v Independent Liquor and Gaming Authority* [2017] NSWCATAD 115 at [84]). It is also to be construed in accordance with the text of the *Liquor Act* as a whole and the context of s 116G, including the mischief to which the power is directed (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46-47; *Monastirski v Independent Liquor and Gaming Authority* [2017] NSWCATAD 115 at [85]).
- 70 The objects of the *Liquor Act* are relevant to the exercise of the power. One of those objects is "to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community" (*Liquor Act*, s 3(1)(a)).
- 71 In order to secure the objects of the *Liquor Act*, each person who exercises functions under this Act, including the Authority, and the Tribunal standing in its shoes, is required to have due regard to certain matters (*Liquor Act*, s 3(2); *Commissioner of Police, NSW Police Force v Monastirski* [2017] NSWCATAP 225 at [10]). These matters are:
- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour);
  - (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor; and
  - (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.
- 72 Mr El Hage, for the Commissioner, submitted that a purpose of s 116G is to provide a mechanism by which the Authority can deal with violence involving the consumption of alcohol. He submitted further, that s 116G(3)(a1), which applies irrespective of whether a person is affected by alcohol, indicates that it is an equally important object of s 116G to minimise the risk of violence and to protect the safety of patrons at venues where alcohol is served or consumed. I accept that this is so in broad terms, although it is important to note that the focus of s 116G is upon safety at high risk venues.
- 73 Mr El Hage also submitted that the interests of the community are a "paramount consideration" when exercising the discretionary power under s 116G, whilst acknowledging that the Tribunal may also consider the applicant's private interests in determining the length of a long-term banning order.

- 74 The interests of the community are a very important factor when deciding whether to issue a long-term banning order but I would hesitate to describe such interests as a “paramount consideration.” That would be to put a gloss on the section and to impermissibly constrain the breadth of the discretion.
- 75 In exercising my discretion in the circumstances of the present case, I would not make a long-term banning order. This is for the following reasons.
- 76 I accept the Commissioner’s submission that Mr von Furstenrecht’s behaviour on the night of 25 April 2018 was antithetical to the expectations, needs and aspirations of the community (cf *Liquor Act*, s 3(1)(a)). I also accept that his conduct is more troubling in that he is the sole director of the companies which own and operate the hotel, and a former licensee.
- 77 Mr El Hage referred to aspects of Mr von Furstenrecht’s conduct on the night of the assault in support of his submission that the Authority’s decision to issue a long-term banning order was the correct and preferable decision. He submitted that it was open to the Tribunal to find that Mr von Furstenrecht was the “leader of the pack” when chasing the assailant down the street. Mr El Hage also submitted that the CCTV footage showed Mr von Furstenrecht waving to the people running behind him, towards the assailant, encouraging them to follow him. Mr von Furstenrecht denied that he waved at the people behind him, or encouraged them to follow him. Whilst the footage shows Mr von Furstenrecht making some sort of gesture or movement with his hand after looking behind him, whilst running up the street, I do not consider that it is clear what the gesture or movement was, or what it meant. There is no evidence that he encouraged people to follow him and I do not make this inference.
- 78 Mr El Hage also relies upon a sentence in the agreed facts, in Mr von Furstenrecht’s criminal matter, that upon returning to the Frisco Hotel following the assault, he was told by an employee that the police had arrived. According to the agreed facts, Mr von Furstenrecht then “quickly exited the hotel through a rear fire exit to avoid police.” In cross examination, he denied that this was why he had left. He said that the police had insisted on including this in the agreed facts and he had resisted.
- 79 I find that, on balance, one of the reasons Mr von Furstenrecht left the hotel was to avoid police. He did not correct this aspect of the agreed facts in the affidavit which was before the magistrate, whereas he did correct another aspect of the agreed facts. Nor did he expressly deny this in his affidavit before the Tribunal. Rather, he said he removed himself from the hotel because he no longer found it appropriate to be in a social setting. This may have simply been another reason why he left. A more responsible approach would have been to inform the licensee of what had happened and offer to speak to the police about it.
- 80 Whilst leaving the hotel quickly does not reflect well on Mr von Furstenrecht, he thereafter cooperated with police to some degree, by providing them with information to help them identify the assailant (his victim). He did not attend a police station that night but spoke to a senior constable and was told he was not required to attend.

- 81 The relevant statutory object, on which the Commissioner relies, is “to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community” (*Liquor Act*, s 3(1)(a)). Mr El Hage did not explain how the imposition of a long-term banning order is regulating the sale, supply and consumption of liquor. I consider that it does so by prohibiting a person from entering a high risk venue, thus regulating the sale of alcohol to that person and the consumption of liquor by that person.
- 82 I find that, in the circumstances of this case, and for the reasons which follow, it would be consistent with the expectations, needs and aspirations of the community not to impose such an order.
- 83 Mr von Furstenrecht entered a plea of guilty to the assault at an early opportunity. At his sentencing hearing, the magistrate remarked that he was “a young man with a bright future who has absolutely no criminal record.”
- 84 As Mr Jordan submitted, Mr von Furstenrecht does not attend high risk venues, does not have a drinking problem, has no history of alcohol abuse and (with the exception of the incident in question) no record of anti-social behaviour.
- 85 Mr von Furstenrecht took the initiative of attending upon a psychologist, Mr Aronstan, to assess whether he had underlying issues with anger. Mr Aronstan’s opinion is that Mr von Furstenrecht does not have underlying aggression and anger issues but acted out of character in the heat of a highly emotive and stressful situation. He remained firm in this opinion under cross examination. I accept this evidence.
- 86 Mr von Furstenrecht also took the initiative of completing a six-week anger management course to deal with any anger issues and to develop better ways to respond to situations such as that which occurred on Anzac Day. As the sentencing magistrate commented, this reflects on his level of remorse and contrition.
- 87 In evidence before the Tribunal, Mr von Furstenrecht described his actions towards the assailant as a “stupid and irresponsible response” made after seeing the injuries to his friend’s face, the pain he was in, and the distressed state of his wife. In an affidavit relied upon in his criminal proceedings, Mr von Furstenrecht described himself as being “ashamed and disgusted at myself and my actions.” He spoke to Mr Aronstan about experiencing shame in relation to how much he had let himself and his family down. He also told Mr Aronstan that the shame had been exacerbated when he reflected on the harm and anguish he caused the man he kicked and the way his action may have disrupted the general public and the hotel staff and patrons.
- 88 I am satisfied from this that Mr von Furstenrecht has insight into his behaviour and is remorseful.
- 89 I consider, in light of all the evidence discussed above, that there is little risk of Mr von Furstenrecht reoffending.

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In my view, a long-term banning order is not necessary nor desirable to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour) (*Liquor Act*, s 3(2)(a)). There is no evidence that Mr von Furstenrecht has misused or abused liquor, or that his violent conduct was associated with the misuse and abuse of liquor.

- 91 Affirming the Authority's decision to issue a long-term banning order would not, in my view, encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor (*Liquor Act*, s 3(2)(b)). There is nothing to suggest that Mr von Furstenrecht does not hold responsible attitudes, or engage in responsible practices, towards the promotion, sale, supply, service and consumption of liquor. His offence was an uncontrolled, emotional and unlawful response to seeing his friend injured.
- 92 I do not consider that a long-term banning order is appropriate to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life (*Liquor Act*, s 3(2)(c)). Whilst Mr von Furstenrecht's offence detracted from the amenity of community life, there is no evidence that the sale, supply and consumption of liquor contributed to the commission of the offence. Even if it did, I am satisfied that the steps Mr von Furstenrecht has taken to address the causes of his offending, and his commitment to never repeating such an offence, are sufficient to safeguard the amenity of community life.
- 93 The offence involved a relatively low level of violence and was an isolated event.
- 94 For all of these reasons, even if I am wrong and one of the preconditions in s 116G(3) of the *Liquor Act* is met, I would not exercise my discretion to affirm the Authority's decisions to issue long-term banning orders to Mr von Furstenrecht.

## Orders

- 95 I make the following order:
- (1) The first respondent's decisions are set aside and, in substitution for those decisions, the Tribunal determines to make no order under s 116G of the *Liquor Act 2007* (NSW).

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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Decision last updated: 02 May 2019