Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Monastirski v Independent Liquor & Gaming Authority [2017] NSWCATAD 115**
Hearing dates:	24 February 2017
Date of orders:	11 April 2017
Decision date:	11 April 2017
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	P Durack SC, Senior Member
Decision:	The decision of the Independent Liquor & Gaming Authority to make long-term banning orders against the Applicant under sections 116AE and 116G of the Liquor Act 2007 (NSW) for a period of 12 months from 29 September 2016 to 28 September 2017 is varied so that the banning period is reduced to a period of 3 months from 29 September 2016 to 28 December 2016 and so that the banning order in respect of high risk venues in the Sydney CBD Entertainment precinct does not apply to any such venues at which meetings or functions of the City of Sydney Law Society are held during the period of those meetings or functions.
Catchwords:	ADMINISTRATIVE REVIEW – long-term banning orders from attending high risk venues in the Kings Cross and Sydney CBD Entertainment precincts – interpretation of sections 116AE and 116G of the Liquor Act 2007 (NSW)– protective and punitive purposes - considerations to be taken into account – – period of banning.
Legislation Cited:	Administrative Decisions Review Act 1997 (NSW) Crimes Act 1900 (NSW) Crimes (Sentencing Procedure) Act 1999 Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 Explosives Act 2003 (NSW) Liquor Act 2007 (NSW) Liquor Amendment (Kings Cross Plan of Management) Bill 2013 Liquor Regulation 2008. Summary Offences Act (NSW)1988

Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27 Boyle v WorkCover Authority of New South Wales [2015] NSWCATAD 90 Director General, Transport NSW v AIC [2011] NSWADTAP 65 Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332 NEAT Domestic Trading Pty Ltd v AWB Ltd [2003] HCA 35; (2003) 216 CLR 277 Rich v Australian Securities and Investment Commission [2004] HCA 42; (2004) CLR 129 Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664
Category:	Principal judgment
Parties:	Leon Monastirski (Applicant) Independent Liquor & Gaming Authority (First Respondent) Commissioner of Police, NSW Police Force (Second Respondent)
Representation:	Counsel: B Levet (Applicant) H El- Hage (Second Respondent) Solicitors: Crown Solicitor (Second Respondent)
File Number(s):	2016/00378412, 1610658

REASONS FOR DECISION

Overview

1 Mr Monastirski (**the Applicant**) applies for administrative review of a decision by the Independent Liquor and Gaming Authority (**the ILGA**) to issue two long–term banning orders prohibiting him from entering or remaining on *high risk venues* in the Kings Cross and Sydney CBD Entertainment precincts for a period of 12 months.

2 The period of 12 months is the maximum period provided for in the relevant sections of the *Liquor Act* 2007 (NSW) (**the Liquor Act**).

3 The two banning orders, one for each precinct, were issued on 20 September 2016. The period of banning was from 29 September 2016 to 28 September 2017. The orders followed convictions by the Local Court of various offences committed by the Applicant

on 9 August 2016 arising out of an incident in Oxford Street, Darlinghurst on 24 February 2016. In sentencing for those offences on 9 August 2016, the Local Court imposed fines totalling $700 and a good behaviour bond in respect of the three most serious offences for a period of 18 months.

4 There is no dispute that the pre-condition for the exercise of the banning power was satisfied in respect of each of the banning orders. The only issues on review were whether, in the exercise of the discretion to make banning orders, any banning should be imposed and, if so, the period for which the Applicant should be banned.

5 This is the first case to come before the Tribunal concerning the making of long-term banning orders under the Liquor Act.

6 For the reasons set out below, in my opinion, the correct and preferable decision, on the material presented at the hearing of the application, is that the banning period should be 3 months from 29 September 2016, instead of the period of 12 months from that date. Accordingly, the banning period has now expired. The banning order in respect of the Sydney CBD Entertainment precinct should also be modified so that the Applicant could have attended meetings and functions of the City of Sydney Law Society.

The banning orders

7 On 25 February 2016, not long after his arrest in the circumstances described more fully below, the Applicant was served with a notice of application by the NSW Police for long- term banning orders against him in respect of the Kings Cross and Sydney CBD Entertainment precincts for a period of 12 months.

8 The notice referred to the facts set out in an attached Facts Sheet in respect of five offences for which the Applicant had been arrested at 11pm on 24 February 2016. In that Facts Sheet, under the heading “Full Facts”, the following was stated:

> The accused in the matter is Leon MONASTIRSKI.
>
> About 10.40pm on Wednesday 24th February 2016, Police were called to Pad Thai restaurant located at 95 Oxford Street, Surry Hills. Police were required to attend due to a male harassing members of the public and patrons inside the location.
>
> Police attended a short time later and observed the accused, Leon MONASTIRSKI, who was observed speaking with patrons inside the restaurant, that were eating dinner. Police were informed by a witness and patrons in the premises that the accused had been annoying all of the patrons and had not ordered any food.
>
> Plain clothes police approached the accused and identified themselves by showing them [sic] their official police badges and stating their names, ranks and station. Police noticed that the male was intoxicated and he was slurring his words and had a strong smell of alcohol on his breath.
>
> As the accused was intoxicated in a public place and behaving in an offensive manner, police directed the accused to leave the restaurant and move on from Oxford Street. The accused stated, “Your not real cops, You can’t tell me what to do”.
>
> The accused continued to refuse to leave the location and began saying “You can go […] your self” and raised his middle finger towards police. Police requested the accused to leave a number of times before he continued saying, “your not real cops, you can go […] yourself”. Again putting his middle finger up.

> Police then warned the accused that if he failed to comply with their direction he would be placed under arrest for failing to comply with the direction. The accused continued swearing at police and was getting very loud and still not leaving.
>
> Police then arrested and cautioned the accused before using reasonable force to take the accused outside. Whilst being taken outside the accused dropped all his weight in an attempt to hinder Police. The accused was assisted out and once Constable Evans had hold of his arm, he has swung his left elbow towards the face of Constable Evans causing him to move before being hit by the accused. He was placed in an approved wrist lock. The accused was taken outside and stood outside the shop outside the window.
>
> Police searched the property of the accused and during this time he has stiffened his arms and lunged towards Constable CLAXTON, grabbing his forearms scratching him. Police were required to check drill the accused causing him to end up back against the wall of the restaurant. At this time the accused continued saying, “Your not real cops, you can go […] yourself”.
>
> The accused continued lunging at both officers and he has grabbed [C]onstable Evans arm. Due to his erratic behaviour and police being fearful of another assault the accused was taken to the ground to prevent further assault.
>
> After a struggle, the accused was handcuffed to the rear, and police complied with Section 202 of the Law Enforcement Powers and Responsibilities Act 2002 by once again stating their name, rank and station and arrested and cautioned the accused.
>
> The accused continued to swear and stated, “Your not real cops, I’m going to have you discharged from your duties as a police, I’m a lawyer”. The accused was handcuffed and sat up against the wall. The accused continued asking patrons that were walking past to call the cops, these are not the real police. Police again complied with Section 202 of the Law Enforcement Powers and Responsibilities Act 2002 introduced themselves and arrested and cautioned the accused as he continued stating, “Your not real cops”.
>
> During the altercation Constable Evans sustained scratches on his left knuckle.
>
> The accused was placed in the rear of Surry Hills caged truck and conveyed to the charge room. During his short time in the dock he continued bashing on the door stating, “I’m a lawyer I haven’t done anything wrong. I’m going to make you all eat […]”. The accused then pointed to 2 police and 2 ambulance officers stating, “I will make you eat my […].”
>
> Due to the accused erratic behaviour and intoxication level he was placed in a cell to where he fell asleep. Due to his level of intoxication he was not offered the opportunity to participate in an interview and is now charged with the matter before the court.

9 The application itself for the banning orders was made by the Commissioner of Police to the ILGA and was dated 29 February 2016. It gave the Applicant’s date of birth as 6 October 1967 and his address at a place not far from the Surry Hills police station.

10 Whilst the power to issue a banning order was available where the person the subject of the proposed order had been *charged* with a serious indictable offence of the kind described in the relevant provisions, no banning orders were issued against the Applicant until after the charges were heard and dealt with by the Local Court at a three day hearing on 7 July 2016, and 8 and 9 August 2016.

11 The two banning orders were issued under the signature of the Chairperson of the ILGA and dated 20 September 2016. Each prohibited the Applicant from entering or remaining upon *any* of the *high risk venues* prescribed in the respective precincts.

12 The banning orders were provided to the Applicant under cover of a letter from the ILGA dated 20 September 2016. The letter noted submissions made by the Applicant against the imposition of the orders. In those submissions, by letter dated 14 March

2016, the Applicant had referred to the entry of pleas of not guilty to all the charges and had asked that various matters be taken into account. Those matters included that the Applicant was a qualified solicitor and accountant practising in Sydney, the Applicant had no prior convictions and had never been subjected to a banning order, he was a person of good character and that the making of the orders would be perceived to be oppressive and not in the public interest. It was also submitted that the charges arose out of circumstances in which the Applicant was defending himself against excessive use of force.

13 The covering letter from the ILGA noted that the serious indictable offence of which the Applicant had been charged had been proven and that the Applicant had been convicted. It referred to the intention of the legislation to provide protection to patrons from an increased likelihood of the commission of alcohol and violence related offences at high risk venues in the CBD and Kings Cross and that, accordingly, the ILGA was satisfied that the Applicant should be banned from attending the venues nominated in the orders for a period of 12 months. The letter pointed out that the Applicant may be subject to a maximum fine of $11,000 if he failed to comply with the orders.

14 The banning orders set out the venues the Applicant was prohibited from entering. In all, there were 225 venues from which he was prohibited. In the case of the order concerning the Sydney CBD Entertainment precinct, 190 venues were listed. These were all the venues listed in the relevant regulation as *high risk venues* within the Sydney CBD Entertainment precinct. These cover a large area, including venues located in Surry Hills, as well venues in the CBD, the Rocks and Woolloomooloo.

15 In the case of the order concerning the Kings Cross precinct, 35 venues were listed. These were all the venues prescribed as *high risk venues* in this precinct.

16 The Pad Thai restaurant in Oxford Street, which was the location of the events on 24 February 2016, was not a specified or prescribed *high risk venue.*

The power to issue the banning orders

17 The two banning orders were issued under s 116AE of the Liquor Act (in respect of the Kings Cross precinct) and s 116G of the Liquor Act (in respect of the Sydney CBD Entertainment precinct), respectively. Section 116AE provides:

> **116AE Long-term banning orders—high risk venues**
>
> (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.
>
> (2) A long-term banning order may only be made on application by the Commissioner of Police in the manner approved by the Authority.
>
> (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,

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

(4) The Authority may not make a long-term banning order unless the person the subject of the proposed order has been given notice of the application for the order and has been given a reasonable opportunity to make submissions to the Authority in relation to the application.

(5) In deciding whether to make a long-term banning order on the ground that a person has been given 3 temporary banning orders, the Authority may take into consideration the circumstances that resulted in the person being given those orders.

(6) A long-term banning order takes effect on the date specified by the Authority in the order. Notice of the making of the order is to be given to the person who is the subject of the order, but failure to give notice does not affect the operation of the order if a reasonable attempt has been made to notify the person.

(7) As soon as practicable after the Authority makes a long-term banning order, the Authority is to provide the approved system provider with the following information:

(a) the name and address of the person who is the subject of the order,

(b) the period that the order is in force.

(8) The approved system provider is required to immediately record that information in the Kings Cross precinct ID scanner system.

(8A) A long-term banning order made on the ground that a person has been charged with, or found guilty of, a serious indictable offence is revoked if the charge is withdrawn or dismissed or the finding is overturned on appeal.

(9) A person who is the subject of a long-term banning order must not enter or attempt to enter or remain on any high risk venue during the period specified in the order.

Maximum penalty: 100 penalty units.

(10) In subsection (3)(a):

public place includes a place:

(a) of public resort open to or used by the public as of right, or

(b) for the time being:

(i) used for a public purpose, or

(ii) open to access by the public,

whether on payment or otherwise, or

(c) open to access by the public by the express or implied permission of the owner of the place, whether the place is or is not always open to the public.

relevant premises means any of the following:

(a) licensed premises,

(b) premises declared under section 3 of the Restricted Premises Act 1943 to be premises to which Part 2 of that Act applies,

(c) premises on which the activities of a criminal group (within the meaning of Division 5 of Part 3A of the Crimes Act 1900) are carried out.

> (11) A reference in subsection (3) to a serious indictable offence includes a reference to an offence under the law of another State or Territory that would, had it occurred in New South Wales, have been a serious indictable offence for the purposes of that subsection.

18 Section 116G is in like, but not identical terms.

19 The pre-condition for the making of the long-term banning orders in this case was that contained in s 116AE(3)(a). The identical precondition appears in s 116G(3)(a).

20 For the purposes of s 116AE, the definition of *high risk venue* is contained in s 116AA(2) and reads as follows:

> (2) A high risk venue is a venue situated in the Kings Cross precinct comprising:
>
> (a) licensed premises:
>
> (i) on which liquor may be sold for consumption on the premises, and
>
> (ii) that are authorised to trade after midnight at least once a week on a regular basis, and
>
> (iii) that have a patron capacity (as determined by the Secretary) of more than 120 patrons, or
>
> (b) licensed premises specified by, or of a class specified by, the regulations, or
>
> (c) licensed premises that are designated by the Secretary under subsection (4).

21 The definition of *high risk venue* for the purposes of s 116G is contained in s 116B(2), which is in like, but not identical terms to s 116AA(2).

22 In respect of both precincts, the *high risk venues* from which the Applicant was banned were those prescribed by the regulations.

23 Another precondition for the making of a long-term banning order, although not applicable in this case, is that the person the subject of the proposed order has been given 3 temporary banning orders during a period of 12 months. With respect to the Sydney CBD Entertainment precinct, the power to issue a temporary banning order is contained in s 116F. It is a power given to a police officer to issue an order prohibiting a person, in specified circumstances relating to the prescribed precinct, from entering or remaining on *any relevant licensed premises in the prescribed precinct and in any adjacent precinct specified in the order*, for a period not exceeding 48 hours.

24 One of those specified circumstances is the failure of a person to leave *relevant licensed premises in the prescribed precinct* after being required to do so under s 77(4) of the Liquor Act because the person is intoxicated, violent, quarrelsome or disorderly. The power in s 77(4) is given to a licensee, or agent of the licensee, as well as a police officer. There is a definition of *relevant licensed premises* in s 116B(1). It excludes a licensed restaurant that is not authorised to trade after midnight on any day of the week unless it is a *high risk venue.* I do not know whether the Pad Thai falls within this definition of *relevant licensed premises*.

25 The same power to issue a temporary banning order exists in respect of the Kings Cross precinct: s 116AD.

26

This pre-condition based upon the making of temporary banning orders suggests that the purpose of the long-term banning power was not solely concerned with the prevention of violence.

27 The long-term banning power was first introduced into the Liquor Act in respect of the Kings Cross precinct. The power was part of a series of measures introduced into Division 3 of Part 6 of the Liquor Act in October 2013 by the *Liquor Amendment (Kings Cross Plan of Management) Bill 2013*. In the second reading speech the Bill was described as the second major tranche of the government's plan of management "to reduce alcohol related violence in Kings Cross" (speech by Mr Souris, the then Minister for Tourism, Major Events, Hospitality and Racing on 22 August 2013).

28 The long-term banning power in respect of other precincts was introduced as part of a new Division 4 of Part 6 of the Liquor Act by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014*, which was assented to in February 2014. The second reading speech in respect of that Bill (speech by Mr O'Farrell, the then Premier and Minister for Western Sydney) included:

> The purpose of the [Bill] is to make our streets safer by introducing new measures to tackle drug and alcohol-related violence. Recent months have seen a number of serious violent alcohol and drug-fuelled assaults in the Sydney central business district [CBD] and elsewhere that shocked the community across the State.

29 So far, the Sydney CBD Entertainment precinct is the only precinct prescribed under Division 4 of Part 6 of the Liquor Act.

The application for administrative review

30 By application lodged on 14 October 2016, the Applicant applied for administrative review of the decision to issue the long-term banning orders. The grounds for review were that the decision was unduly oppressive and may constitute an abuse of process in the proper administration of justice pursuant to the relevant legislation. It was also said that the orders were made after an unnecessarily prolonged period after convictions were recorded that are the subject of an appeal. As to the prospect that the convictions might be overturned on appeal, the statute provides that if this occurs the banning orders are revoked: s 116AE (8A) and s 116G (7A).

31 The right to administrative review of the decision is conferred by ss 116AF and 116H of the Liquor Act. It is a right to administrative review under the *Administrative Decisions Review Act* 1997 (NSW) (**the ADR Act**). The internal review right conferred by that Act is excluded: s 116AF (2) and s 116H (2).

32 The nature of the review right is described in s 63 of the ADR Act as follows:

> **63 Determination of administrative review by Tribunal**
>
> (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:
>
> (a) any relevant factual material,
>
> (b) any applicable written or unwritten law.

> (2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision.
>
> (3) In determining an application for the administrative review of an administratively reviewable decision, the Tribunal may decide:
>
> (a) to affirm the administratively reviewable decision, or
>
> (b) to vary the administratively reviewable decision, or
>
> (c) to set aside the administratively reviewable decision and make a decision in substitution for the administratively reviewable decision it set aside, or
>
> (d) to set aside the administratively reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

33 I proceed below to consider the relevant factual material that was presented at the hearing in order to decide, as the statute requires, what *is* the correct and preferable decision on the application for the making of the long-term banning orders. In this respect, I note that some of this material was not before the ILGA in arriving at its decision to impose the banning orders. This includes matters that have occurred since the making of that decision.

The ILGA's Statement of Reasons

34 In accordance with s 58(1) of the ADR Act, the ILGA provided a statement of reasons for its decision. Those reasons, dated 28 November 2016, included that the ILGA:

(1) Accepted the version of events set out in the Facts Sheet.

(2) Accepted that the Applicant was respected in the legal profession and in the local LGBT community.

(3) Considered that the issue of the banning orders was appropriate. The purpose of the banning order provisions was protective rather than penal. The orders reduce the future risk of alcohol related harm to patrons and staff of high risk ventures and to the respondents themselves. In this respect, it was noted that staff and patrons of high risk venues are already exposed to an increased risk of alcohol related violence or anti-social conduct by reason of their late trading hours, patron capacity or a significant degree of alcohol related violence or other anti-social behaviour associated with the premises.

(4) Was aware through material produced by the Bureau of Crime Statistics and Research (**BOCSAR**) that there was a high concentration of alcohol crime related assault incidents in the Sydney CBD and Kings Cross areas, and that a substantial proportion of alcohol related assaults occur during later hours and is elevated in the morning on the weekend.

(5) Long-term banning orders are issued with a view to reducing the scope for persons to contribute to the risk of alcohol related violence posed by the operation of high risk venues – they protect the community and also the person subject to the orders.

(6) The fact that the orders have been made in respect of both precincts will maximise the protective effect of issuing the orders given the concentration of high risk venues in both precincts, the proximity of the precincts to each other and their proximity to Surry Hills where the Applicant lives.

(7) Did not accept that the orders would be oppressive because the Applicant would be able to patronise the many other lower risk licensed premises in the precincts.

(8) In making the decision had regard to the objects of the Liquor Act as set out in s 3 of that Act. It had given particular weight to the objects in s 3(2)(a) – the need to minimise harm associated with the misuse and abuse of alcohol - and s 3(2)(c) – the need to ensure that the sale, supply and consumption of alcohol does not detract from the amenity of the community.

The material before the Tribunal

35 Pursuant to s 58(1)(b) of the ADR Act, the ILGA lodged with the Tribunal the documents which it considered to be relevant to its decision. These included the banning orders, the Facts Sheet, some crime statistics and the reasons for decision, to which I have referred.

36 The ILGA filed a submitting appearance to the decision of the Tribunal. The Commissioner of Police was joined as a party to the proceedings and conducted the case to uphold the banning orders.

37 The evidence from the Applicant consisted of a short affidavit sworn by him, dated 1 December 2016. I accept the correctness of his evidence, which was not challenged, except that some more accurate information about the impact of the orders on his ability to attend meetings of the City of Sydney Law Society was provided in the affidavit evidence relied upon by the Commissioner.

38 In his affidavit the Applicant deposed that he is a Solicitor of the Supreme Court of New South Wales holding a current unrestricted practising certificate.

39 He deposed that he frequently attended the Pad Thai restaurant at 95 Oxford Street for a meal and that on the occasion of his arrest he had been subject to a number of personal, financial and professional pressures. He did not say that he was no longer subject to these pressures.

40 He deposed that his appeal from the convictions was listed to be heard on 3 July 2017. He said that he had disclosed the fact of the convictions to the Law Society of New South Wales and had been informed by letter dated 17 November 2016 that he continued to be regarded as a fit and proper person to hold a practising certificate. He said that he was a person of good character with no previous convictions.

41 He addressed the impact that the orders had upon him. He said he was a member of the City of Sydney Law Society and because of the banning orders was unable to attend meetings of that society. He said that their meetings and functions were usually held at the City Tattersalls Club, the York Hotel or the Castlereagh Hotel. He said that it had been his invariable practice to obtain his CPD points at seminars conducted by the society at licensed premises. He also said that because he lived in the CBD and did not have culinary expertise, it was his practice to have dinner at local restaurants whenever possible, including pubs and clubs. He said that the majority of the venues that he went to for dinner were contained on the list of banned venues. The context of this evidence suggests that he was talking about his inability to eat out at banned venues in the Sydney CBD Entertainment precinct.

42 Annexed to the Applicant’s affidavit were:

(1) A copy of the letter from the Professional Standards section of the Law Society dated 17 November 2016. This letter referred to the Applicant's disclosure of an automatic show cause event and that the Disclosure Committee had determined that the Applicant is a fit and proper person to hold a practising certificate.

(2) A copy of the full Police Brief of Evidence in respect of the charges.

(3) A copy of the transcript of the three day hearing of the charges.

43 The Applicant did not say anything in his affidavit about his alcohol drinking problem, which emerges from other material before the Tribunal and which affected his behaviour the subject of the charges. He did not say anything about any venues where he tended to go to drink alcohol.

44 The Commissioner relied upon an affidavit of Ms Langford, dated 16 December 2016. Included amongst the annexures to this affidavit were:

(1) The good behaviour bond entered into by the Applicant, as directed by the Local Court on 9 August 2016.

(2) Three reports on BOCSAR's website about assault crime statistics.

(3) Sixteen COPS event reports over the period from 31 March 2014 to 26 September 2016, which refer to the Applicant.

45 In her affidavit, Ms Langford also addressed issues raised by the Applicant in his affidavit concerning the impact of the banning orders on his ability to attend CPD seminars and to eat out for dinner. She deposed that from her examination of the City of Sydney Law Society website she had discovered that of the 47 events held by the society in 2016, 35 events (all of which were CPD seminars) were held in the York hotel, which is not a listed *high risk venue*. She said that 8 events (all of which were CPD seminars) were held at the City Tattersalls Club, which is a *high risk venue*. The remaining 4 events were held at venues which were not *high risk venues.*

46 Ms Langford also provided evidence of the large number of restaurants in Surry Hills, the Sydney CBD and Kings Cross which the Applicant was not prevented from eating at under the banning orders.

47 I accept the correctness of Ms Langford's evidence, which evidence was not challenged.

48 A second affidavit from Ms Langford, dated 20 December 2016, was relied upon by the Commissioner. This exhibited a USB flash drive containing CCTV footage of the police station charge room depicting the Applicant after his arrest on the night of 24 February 2016. I have looked at this footage, which commences at 11:20 that evening. There is footage from two cameras, one looking directly at the Applicant sitting on his own in the enclosed charge room dock. The other camera is directed at the police station charge room adjacent to the enclosed charge dock room. There is only about five minutes of footage in which the Applicant appears. At times in that period, the Applicant is, apparently, talking at police officers in the charge room itself. There is no sound, so I do not know what he is saying. At times, it seems clear that he is angry or disturbed whilst he is talking. At the end of this period, two police officers open and enter the charge

dock room and remove the Applicant. In doing so, each officer holds one of his arms. There is no real struggle by the Applicant in response to this step. I assume he was being taken to a cell.

49 The Applicant was cross-examined about some aspects of his evidence. I refer below to some aspects of his cross-examination.

50 **More Facts – the incident on 24 February 2016**

51 At the hearing, Mr Levet for the Applicant informed the Tribunal that it was admitted that the pre-conditions for the exercise of the powers to issue the banning orders set out in s 116AE(3)(a) and s 116G(3)(a) had been met, namely that the ILGA was satisfied that the Applicant had been found guilty of three serious indictable offences involving violence that were committed by the Applicant in a public place or on relevant premises while the Applicant was affected by alcohol.

52 Those three serious indictable offences were:

(1) Assaulting an officer while in the course of his or her duty, namely Constable Jay Claxton, between 10.50pm and 11.15pm on 24 February 2016 at Surry Hills – an offence under s 58 of the Crimes Act.

(2) Assaulting an officer while in the course of his or her duty, namely Constable Adam Evans, between 10.50pm and 11.15pm on 24 February 2016 at Surry Hills – an offence under s 58 of the Crimes Act.

(3) Resisting an officer while in the execution of his or her duty, namely resisting Constable Jay Claxton and Constable Adam Evans, between 10.50pm and 11.15pm – an offence under s 58 of the Crimes Act.

53 These were *serious* indictable offences because the offences attracted a maximum penalty of 5 years imprisonment.

54 It was also not in dispute that on 9 August 2016 the Applicant was found guilty of two offences under the *Summary Offences Act* 1988 arising out of the incident on 24 February 2016, namely:

(1) Using offensive language within hearing of a public place, namely 95 Oxford Street, Surry Hills, between 10.50pm and 11.15pm on 24 February 2016 – an offence under s 4A(1) of the above Act.

(2) Continuing intoxicated behaviour after a move on direction, between 10.50pm and 11.15pm on 24 February 2016 at Surry Hills – an offence under s 9(1) of the above Act.

55 These latter offences provide part of the factual context for a consideration of the exercise of the power to issue the banning orders. The Applicant did not submit otherwise. They concern the conduct of the Applicant in the immediate lead up to the conduct the subject of the serious indictable offences and, it would seem, shortly thereafter.

56 At the hearing, the above facts set out in the Facts Sheet, as supplemented and amended by the findings of the Local Court in its *ex tempore* judgment given on 9 August 2016 (set out from line 12 on page 50 to line 30 on page 55 of the transcript) were not in dispute.

57

I find the pertinent facts concerning these offences to be:

(1) The Pad Thai restaurant at 95 Oxford Street was not a *high risk venue* in any relevant precinct.

(2) The Applicant was not served alcohol at this restaurant.

(3) No charges arose out of any conduct by the Applicant prior to the arrival of the police at the restaurant (transcript page 50, line 33).

(4) There is no evidence that the Applicant assaulted any patrons or staff at the restaurant or was abusive to them, but he made a real nuisance of himself in the manner referred to below.

(5) The degree of the Applicant's intoxication at the time he committed these offences was considerable (transcript, page 50, line 50 and page 55, line 10)

(6) Prior to the arrival of the Police at the restaurant, the Applicant was walking between tables of customers. He was unstable and trying to put headphones on customers. A witness, who was not from the restaurant, but who observed this conduct, called the Police because he was concerned that matters involving the Applicant would escalate (transcript, page 52, lines 10, 15 and 34 and page 51, line 45).

(7) When the Police arrived they observed that the Applicant was talking to some customers whilst they were attempting to eat, singing loudly, and, as they put it in general terms, he was making a scene (transcript, page 52, lines 39 and 45).

(8) Constable Claxton approached the Applicant, showed the Applicant his police identification and asked him to leave. The Applicant responded with foul language and refused to leave the restaurant (transcript, page 53, lines 1-2, 15 – 25, Facts Sheet, sixth paragraph).

(9) The Police informed the Applicant that he was under arrest for refusing to leave the premises. The Applicant became more aggressive and less co-operative. In the process of being removed from the restaurant, the Applicant dropped all of his weight to the floor and moved his elbow quickly towards Constable Evans face. No contact was made with the latter's face. The Local Court found that this was an assault *simpliciter*. It found that it was not at the high end of assaults, but it was a more serious matter than a charge under s 61 of the Crimes Act (transcript, page 54, lines 25-35).

(10) Once outside the restaurant, the Applicant was informed by the Police that he was going to be searched. In the course of the search, Constable Claxton attempted to open the Applicant's wallet. The Applicant stepped toward him, grabbed at the Constable's hands and dug his nails into the officer's hands. He did so in an attempt to grab his wallet and, incidentally, caused discomfit to Constable Claxton (transcript, page 54, lines 38- 45).

(11) It was not suggested that there was actual bodily harm caused in the assaults (transcript, page 56, line 4).

(12) Outside the restaurant, after his arrest, the Applicant needed to be controlled by handcuffing and he continued to verbally abuse the police.

(13) The Applicant was taken back to the police station and was assessed to be well intoxicated. He continued to yell and scream. As a consequence, he was not given the opportunity to be interviewed. He spent the night in custody and bailed the following day (transcript, page 54, line 47 to page 55, line 1).

More Facts - other conduct of the Applicant

58

Annexed to the affidavit of Ms Langford, dated 16 December 2016, are sixteen COPS event reports covering the period from 31 March 2014 to 26 September 2016 (Tab 12). These reports concern the Applicant. Fourteen of these reports concern police attendance at the Applicant's flat from where they arranged for him to be taken to hospital. These events do not involve anyone other than the Applicant and the police. Mr Levet took objection to all of this material on the ground that it was irrelevant.

59 Mr El-Hage for the Commissioner submitted that the material was relevant because it showed the Applicant's history of misusing alcohol. He submitted that this history was relevant because there was a good prospect that the banning orders would encourage the Applicant to control his level of alcohol consumption at venues where he was still able to drink and would steer him towards the responsible drinking of alcohol – one of the objects of the Liquor Act: see s 3(2)(b) of that Act. He also submitted that restricting the Applicant's options for consuming alcohol in public places should reduce the risk of the Applicant repeating his behaviour of 24 February 2016, which would contribute to the amenity of the community – another of the objects of the Liquor Act: see s 3(2)(c).

60 It is difficult to see how these objectives are relevant to the exercise of the banning order power, at least on the facts of this case, given the many and varied sources of alcohol available to the Applicant despite the banning orders and the limited evidence that he drank at *high risk venues.* In any event, I conclude that the submissions on this point are not made out on the facts. As appears from the Statement of Reasons referred to above, the Applicant has many non *high risk* licensed venues at which he is free to drink alcohol – a point that was made in answer to the Applicant's contention that the banning orders are oppressive. I also note that the banning orders have no effect on the ability of the Applicant to buy alcohol for home consumption at the many retail outlets available to him.

61 In the circumstances, I do not see it as realistic to make the connection between the banning orders and the prospect of a change in the Applicant's drinking behaviour, for which the Commissioner contends.

62 However, putting to one side for the moment the COPS report concerning an incident at the Colombian Hotel, to which I refer below, some of these reports do reveal occasions when the Applicant had become abusive or quarrelsome, but not physically violent, in dealing with those in his presence when affected by alcohol, whether at his flat or in a public place; see, for example, COPS reports for events on 31 March 2014, 4 November 2014, 29 December 2014.

63 For present purposes, the most concerning event in this regard is an incident on 30 December 2014 in Oxford Street, Darlinghurst during which the Applicant was observed to be intoxicated and involved in an argument with members of the public. He was issued with a move on direction by the police, with which he complied.

64 As revealed by these reports, it is by no means invariably the case that the Applicant is troublesome in the ways I have just referred to. Nevertheless, I do see this material as having some relevance to the assessment of the risk of harm to patrons, staff and,

more pertinently, to the Applicant himself resulting from any attendance by him at *high risk venues.* Accordingly, I have had regard to this material in arriving at my decision.

65 I did not understand either of the parties to rely on those parts of these COPS reports that concern the mental health of the Applicant.

66 The COPS report of an incident at the Colombian Hotel on 24 June 2016 is of particular relevance because it reveals the Applicant's presence at a *high risk venue* in the Sydney CBD Entertainment District, that he was drinking there, he was in an intoxicated state, he was ejected for that reason, he sought to re-enter and was ejected again, this time with some use of force. This was the only evidence of the Applicant drinking at a *high risk venue*, although, because of the proximity of this hotel to the Applicant's flat, there is no reason to think that this was the only occasion when he did drink at this hotel and be present there whilst affected by alcohol.

67 The COPS report of this event refers to the Applicant having grazes on his face and to the Applicant's complaint that he had been beaten up by security at the hotel. I note that I am not asked to make any finding about this complaint or the cause of these grazes. No other evidence about this incident was adduced at the hearing. I note also that the report indicates that after viewing CCTV footage the police, apparently, rejected the Applicant's complaint on the basis that the Applicant had fallen on to the ground due to his intoxication after security had pushed him out of the venue.

68 The report of this incident does not indicate that the Applicant had been physically violent in any way.

69 Mr El-Hage cross examined the Applicant about this incident and his appreciation that at the time of the incident there was an application on foot for the banning orders. Mr El–Hage submitted that it was of added significance that this incident occurred after the Commissioner's application for the banning orders. I do not draw such a conclusion. At that time, four months had passed without any banning orders having been made; even though the application for them was founded on the fact that charges had been laid. It was open to the Applicant to think that the ILGA did not favour the making of any banning orders, at least until the charges had been heard and determined. Furthermore, there is no evidence that the incident on 24 June 2016 involved any violence by the Applicant or any anti-social behaviour by him of the kind that occurred on 24 February 2016.

70 The incident does, however, indicate that neither the charges in respect of the incident on 24 February 2016 nor the application for banning orders had caused the Applicant to solve his drinking problem.

71 The Applicant was cross-examined about some past charges for offences in 2004 and 2012. These are set out in a criminal history report that was annexed to Ms Langford's first affidavit. I attach no significance to any of these charges because they were all dismissed. It was suggested to the Applicant in cross-examination that he should have referred to these charges in his affidavit, when he said he was a person of good

character and that he had never previously been convicted of any offences. Given that all the charges were dismissed, I do not accept that there was any deficiency in his affidavit in this regard.

Facts – the totality of the Applicant's conduct

72 In setting out below my conclusions concerning the correct and preferable decision, I refer to the totality of the Applicant's conduct. In doing so, I mean the pertinent facts of the incident on 24 February 2016 (paragraph 56), the facts concerning the incident on 24 June 2016 (paragraphs 65 to 69), the facts concerning his other conduct (paragraphs 61 to 63) and the Applicant's drinking problem.

More Facts – impact of banning orders upon the Applicant

73 There was no challenge to the correctness of the Applicant's evidence that the majority of the venues he goes to for dinner are on the banned venues list. Plainly, however, there are very large quantities of other places, including many within the vicinity of his flat, where he can go for dinner. In his affidavit, the Applicant said that the Pad Thai restaurant at 95 Oxford Street was a place that he frequently went for a meal. That restaurant is not on the banned venues list.

74 Nevertheless, this restriction on places to eat is a constraint on the Applicant's habits and, presumably, the enjoyment he derives from the places he prefers to go to. It is an impact that I do not dismiss as insignificant.

75 It is a specific impact that I take into account, in conjunction with the more general adverse effect of the banning orders on the Applicant's freedom of movement.

76 Whilst the evidence establishes that the large majority of meetings and functions of the City of Sydney Law Society do not occur at *high risk venues*, I do take into account that under the current banning orders the Applicant will not be able to attend some of those meetings and functions when those meetings are held at the City Tattersalls Club or the Castlereagh Hotel.

77 It is also plain that there are numerous options available to the Applicant to obtain CPD points from events at places that are not *high risk venues.*

78 Nevertheless, the banning orders impose what is no doubt a degree of unwelcome constraint on the professional and social activity of the Applicant. This interference with his attendance at gatherings of the City of Sydney Law Society serves to illustrate an indiscriminate operation of the orders, applying as they do without regard to the time of day or nature of any function at the *high risk venue*. I note, however, that no reference to this impact was made in the Applicant's submissions to the ILGA in March 2016 before the banning orders were made.

Submissions of the Commissioner

79 The written submissions of the Commissioner in favour of upholding the banning orders included:

(1) The discretion to impose long- term banning orders is broad and there are no provisions limiting the scope of that discretion.

(2) This discretionary power is to be construed in a manner consistent with the subject matter, scope and purpose of the Liquor Act and in the context of that Act read as a whole.

(3) Various contextual and statutory objects are relevant, namely the objects set out in clause 3 of the Liquor Act, the strict requirements for the responsible sale, supply and service of alcohol in Div 1 of Pt 6, the provisions restricting the sale and consumption of alcohol within an area in Div 2 of Pt 6 and the provisions restricting the sale and consumption of alcohol within precincts in ss116A and 116I of the Liquor Act and in Div 1 of Pt 5 and Div 2 of Pt 5B of the *Liquor Regulation* 2008.

(4) An important object of the Liquor Act is to control the sale and consumption of alcohol in a manner that is consistent with the expectations, needs and aspirations of the public, with a view to protecting the public from adverse or violent behaviour by persons affected by alcohol. The powers to issue long-term banning orders under s 116AE(1) and in s 116G(1) are part of a collection of provisions in the Act directed towards achieving that purpose. Undoubtedly, in enacting such provisions, Parliament was mindful of information published by the Bureau of Crime Statistics that there is a relatively high concentration of alcohol related incidents in Kings Cross and Sydney CBD.

(5) The making of the long-term banning orders is appropriate and consistent with the objectives of the Liquor Act because:

(a) First, on any view, the Applicant's conduct on the night of 24 February 2016 was unacceptable. Not only did he disrupt and harass other patrons at the Pad Thai restaurant, he was rude and contemptuous of police, unco-operative and, most significantly, he was aggressive and violent towards police. Such behaviour is antithetical to the expectations and aspirations of the public (see s 3(1)(a)). One purpose of the orders is to reduce the likelihood of the Applicant engaging in such conduct in the foreseeable future and, to that extent, the orders are intended to protect members of the public.

(b) Secondly, aside from the fact that the Applicant's behaviour was anti-social, his aggression and violence towards police, as well as his verbal abuse of police, amounted to serious criminal conduct that made him liable for a penalty of up to five years imprisonment. The Local Court found that, on the night of 24 February 2016, the Applicant was highly affected by alcohol. Consistently with s 3(2)(a) of the Liquor Act, the making of the orders here serves to restrict the number of venues the Applicant is able to attend and, by logical extension, should serve to reduce the Applicant's exposure to the consumption of alcohol in public places. That should assist in reducing the risk of the Applicant engaging in the same behaviour again.

(c) Thirdly, there is a good prospect that restricting the Applicant's options for consuming alcohol in particular public places will serve to encourage the Applicant to control his level of alcohol consumption at venues he still is able to attend and, possibly, serve to steer him towards responsible drinking of alcohol: s 3(2)(b). Furthermore, restricting the Applicant's options for consuming alcohol in public places should reduce the risk of the Applicant repeating his behaviour of 24 February 2016 and, in turn, contribute to the amenity of community life by reducing the prospect of the Applicant harassing members of the public or engaging in disorderly conduct that will attract the attention of police: s 3(2)(c).

(6)

The contention that the orders are punitive should be rejected. The orders are not issued for the purpose of punishing the Applicant. The orders have a protective purpose and are issued with the community's expectations in mind. Here, it is apt to have regard to the observations of the Tribunal in *Boyle v WorkCover Authority of New South Wales* [2015] NSWCATAD 90 at [34] (dealing with a decision to cancel a manufacturing licence and import/export licenses under the *Explosives Act 2003* (NSW)) that "The decision to [issue an LTBO] is not a 'penalty' but rather a decision made in the public interest. It is the exercise of a … power which has as its object protection of the public: *Director General, Transport NSW v AIC* [2011] NSWADTAP 65 at [17]".

(7) Nothing in s 116AE or s 116G requires the Tribunal to take into account the Applicant's personal and private interests when considering whether the orders should be issued. Indeed, as submitted above, those provisions are directed towards meeting the expectations of the public and, as such, the primary issue relevant to the exercise of the discretion is the interests of the community.

(8) In that context, it would be difficult to draw a statutory implication that the Applicant's private interests are a matter that must be taken into account when considering whether to issue a long-term banning order: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39-40 per Mason J, 55-56 per Brennan J; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, at [20] per Gleeson CJ. Indeed, the terms of ss 116AE and 116G and the subject matter, scope and purpose of the Liquor Act indicate that the private interests of the Applicant are an irrelevant consideration. As is apparent from s 3, the Liquor Act is primarily concerned with the interests of the wider community and does not seek to balance, or require a decision-maker to balance the interests of the community against the interests of private individuals.

80 Despite this latter submission in the written submission, in the course of debate in oral submissions, I understood Mr El-Hage to accept that I was not precluded from taking into account the private interests and personal circumstances of the Applicant, including that the orders restrict the freedom of movement of the Applicant. For the reasons below, in my opinion, he was correct to take this position.

Submissions of the Applicant

81 In his oral submissions, Mr Levet submitted that the long-term banning orders were an unwarranted or excessive response to the incident on 24 February 2016. This was because:

(1) It was an overreaction to one incident in which the Applicant, affected by alcohol, had acted in a bad way.

(2) The Applicant's conduct the subject of the convictions was at the low end of the scale of serious indictable offences involving violence. No temporary banning orders had been made as a response to the conduct. The charges had been dealt with summarily. There were indications in the reasons of the Magistrate that had the Applicant reacted differently after his arrest and conducted his defence more skilfully the charges may well have been dealt with by orders under s 10 of the *Crimes (Sentencing Procedure)* Act 1999, without proceeding to conviction.

(3) Despite the convictions the New South Law Society regarded the Applicant as a fit and proper person to continue to practise law.

(4) The incident had not occurred at a *high risk venue.*

(5)

As to the other conduct of the Applicant relied upon in addition to the incident on 24 February 2016, there was no evidence of unlawful behaviour. It is not an offence to be intoxicated. In any event, the relevant conduct for present purposes is the serious indictable offences committed on 24 February 2016, the subject of the condition for the exercise of the banning powers.

(6) All of the conduct of the Applicant relied upon by the Commissioner was within the Sydney CBD Entertainment District. There was no evidence of any conduct by the Applicant in the Kings Cross precinct or that the Applicant ever went to Kings Cross.

(7) The good behaviour bond made before the banning orders addressed the type of mischief that the banning orders were directed to. The banning orders were otiose. The bond lasted for a longer period than the banning orders and the consequences of non-compliance with the bond were more serious than breach of the banning orders.

(8) The banning orders were a kind of extra punishment in circumstances where they were not justified by the protective purpose of the power.

(9) If, contrary to his first position that no banning orders should have been imposed, then the banning had now been for long enough. The maximum period of 12 months had been imposed for conduct at the low end of the scale. Further, the venues in Kings Cross precinct should not have been included in the banning orders. Yet further, there should have been a carve-out for attendance at CPD seminars at venues in the Sydney CBD Entertainment District.

Consideration – the approach to the exercise of the long-term banning powers

82 I now set out my conclusions concerning the correct approach to the exercise of the long-term banning powers and the reasons for those conclusions.

83 First, it is clear that there is no statutory requirement to impose a long-term banning order whenever the conditions for the exercise of that power are satisfied. No such submission was made by the Commissioner. The word “may” in, for example, s 116AE(3), is not to be read as “must”. As the Commissioner submits, a broad discretion is conferred.

84 Second, whilst broad, the discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred: *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [23]; (2013) 249 CLR 332.

85 Third, I construe the power in accordance with the text of the provisions creating the power, the text of the Liquor Act as a whole and the context for the provisions, including the mischief to which the powers are directed: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46-7; *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 at [22].

86 Fourth, the mischief to which the long-term banning powers are directed is apparent from the text of the provisions under which they were introduced and the legislative history to which I have already referred. They are, primarily, directed at the reduction of alcohol fuelled violence at, or emanating from, specified venues in the Kings Cross precinct and the Sydney CBD Entertainment precinct. The banning orders are designed to protect the public’s safety and community amenity.

87

However, that is not to say that the powers are *purely* protective in character. I did not understand the Commissioner to make such a submission. By analogy with the power of a Court to disqualify a person from managing a corporation, it seems to me that the banning powers are both protective and penal. If granted they protect the public but also penalise the person: *Rich v Australian Securities and Investment Commission* [2004] HCA 42 per the plurality at [30] – [32] and per McHugh I at [41] – [43]; (2004) CLR 129. Furthermore, as was said by McHugh J in *Rich*, fixed periods of disqualification suggest punishment rather than protection and if the jurisdiction was purely protective, one might think the proper order would be an indefinite disqualification with the onus on the defendant to show at some future date that he or she was now a fit and proper person to manage a corporation: at [42]. As McHugh J also said in *Rich*, if the disqualification provisions were purely protective, the only issue for the court would be whether the defendant was now or will in the future be a fit and proper person to manage corporations: at [42].

88 Having said that, I recognise that an analogy between the banning orders with which I am dealing and orders for the disqualification of directors is far from perfect. For one thing, the banning orders may be imposed in circumstances where only charges have been laid for the relevant kind of offence.

89 The second reading speech in support of the measures concerning the Kings Cross precinct supports a deterrence purpose associated with the banning orders and, hence, a concern with a factor that is associated with the principles of punishment. In that speech, Mr Souris, the then Minister for Tourism, Major Events, Hospitality and Racing said:

> The bill sends a message to troublemakers that violent and disruptive behaviour can have significant consequences…. A maximum penalty of $5,500 or a $2,200 penalty notice will also apply where a person enters or attempts to re-enter a high-risk licensed venue while subject to a long-term banning order….” (Speech on 22 August 2013, sixth paragraph).

90 Fifth, it seems to me that the nature of the order and the provision for a period not exceeding 12 months invites a proportionate approach to the making of orders so that the order made does reflect the particular conduct in issue and the personal circumstances of the person the subject of the proposed order in comparison to the conduct and circumstances that might arise or has arisen in other cases.

91 Sixth, in view of the breadth of the mandatory consideration in s 3(a) of the Liquor Act concerning *harm* arising from violence and other anti-social behaviour, I regard the protection of the person the subject of the proposed order as within the purpose of the banning provisions.

92 Seventh, whilst confined by the subject matter, scope and purpose of the legislation, it can be presumed that the legislature intended that the range of factors that might be relevant to the exercise of the discretion was not closed and depended upon the circumstances.

93

As to such range of factors regarding the exercise of the discretion founded upon the pre-condition in s 116AE(3)(a) and s 116G(3)(a), to my mind, it is plain that an important factor to be considered in the exercise of the discretion is the risk that the person the subject of the proposed order will be involved in violence, whilst affected by alcohol, at a *high risk venue.* In turn, not only does that require consideration of the potential consequences should the risk eventuate, but also a consideration of factors relating to the degree of risk, such as the circumstances of the original offence, where it occurred, how long ago it occurred, and the current personal circumstances of the person relating to the risk of violent conduct re-occurring.

94 For example, if the person the subject of the proposed order committed the original offence 10 years ago in Batemans Bay, and the person lives in that town and never travels to Sydney, it is very difficult to see how the making of a long-term banning order would be justified.

95 Eighth, the private interests of the person the subject of the proposed order, including the impact of a banning order on the person the subject of the proposed order, is not only a factor that *may* be taken into account, as I understood to be accepted by Counsel for the Commissioner at the hearing, in my opinion, it is a factor that is *required* to be taken into account.

96 I imply this to be a mandatory consideration because:

(a) There is an obvious intrusion of a banning order on an individual's freedom of movement.

(b) The scope of the venues to be the subject of the prohibition needs to be considered (s 116AE(1) and s 116G(1) – prohibition in respect of "any" *high risk venue*).

(c) The period of the prohibition needs to be considered (s 116AE(1) and s 116G(1) – a period "not exceeding 12 months").

(d) It is clear that personal factors of the person the subject of the proposed order might affect the scope and term of the prohibition. They might also affect the question whether to impose any ban – for example, the person might be able to demonstrate that they have completely reformed.

(e) As indicated above, the *harm* to be taken account of may include harm to the person the subject of the proposed orders.

(f) The fact that the exercise of the power is expressed to be conditional upon a reasonable opportunity having been given to the person the subject of the proposed order to make submissions about the making of a banning order (s 116AE(4) and s 116G(4)) contemplates that the private interests of the person concerned should be taken into account.

97 In so concluding, I recognise that the private interests of the person the subject of the proposed order, beyond the issue of *harm* to that person, is not one of the mandatory considerations specified in the objects clause; cl 3(2). However, those mandatory considerations are not expressed to be exhaustive and were not specifically tailored to apply to the banning powers - the introduction of the banning powers into the legislation post-dates the objects clause.

98

Accordingly, in my opinion, the exercise of the discretion to make a long-term banning order does involve a balancing exercise between the interests of the public and the private interests of the person the subject of the proposed order.

Consideration – the correct and preferable decision

99 In my opinion, the correct and preferable decision is that a 12 month banning period through to 28 September 2017 is excessive and that the banning period should be for a period of 3 months from 29 September 2016 to 28 December 2016. The banning order in respect of the Sydney CBD Entertainment precinct should also be modified so that the Applicant could have attended meetings and functions of the City of Sydney Law Society.

100 In arriving at that conclusion, I have taken account of all the facts I have referred to above.

101 Of most significance, I consider that:

(1) The incident on 24 February 2016 involved a low level of violence by the Applicant. Nevertheless, it was serious criminal conduct because it was directed at the police.

(2) Viewed in isolation from the totality of the Applicant's conduct, including the totality of his conduct on 24 February 2016, I doubt whether the conduct that constituted the serious indictable offences under the influence of alcohol, in combination with the fact that such conduct did not take place at a *high risk venue*, would have warranted the making of any long-term banning order.

(3) Leaving aside, for the moment, the good behaviour bond and the apparent compliance with the bond since it was entered, in my opinion, based on the totality of the Applicant's conduct, there was a sufficient risk that the Applicant would attend a *high risk venue(s)* and engage in alcohol-related violence or behave in a way that could lead to alcohol-related violence, at or in the vicinity of such a venue to warrant the making of a banning order.

(4) The sufficient risk to which I have just referred arises because of a combination of matters, namely, his attendance at one *high risk* venue in order to drink (not to attend a CPD occasion), his intoxication whilst there, the proximity of his flat and movements to *high risk venues* in the Sydney CBD Entertainment precinct, his drinking problem, his propensity for anti-social behaviour when affected by alcohol and the absence of any evidence of a change in his personal circumstances which negates this risk. As I see it, the greater risk would be the risk of violence directed at the Applicant provoked by anti-social behaviour by him.

(5) I am inclined to think that the risk extends to *high risk venues* in the Kings Cross precinct, despite the absence of any evidence that the Applicant ever travelled to that area. However, that precinct, whilst not immediately adjacent to the Sydney CBD Entertainment precinct, was about one kilometre from his flat and once a ban was imposed for the Sydney CBD Entertainment precinct, travelling to the Kings Cross precinct would have had its attractions for late hour drinking.

(6) The good behaviour bond *and* the apparent compliance with it, has reduced the risk to which I have referred. I do not think that because of the bond a banning order lacks any utility. Unlike the good behaviour bond, it sends a distinct and specific message to the Applicant (and to others) that he (they) must not be in certain places at all, let alone behave well wherever he may be. However, the Applicant faces a real threat of imprisonment if he breaches the bond and,

therefore, has a powerful incentive not to cause trouble at a *high risk venue.* I am not, however, prepared to conclude that the risk is reduced to the purely theoretical.

(7) In evaluating this risk, I have also taken account of the threat to the Applicant of losing his practising certificate should he engage in any further violent conduct of the nature described in s 116AE (3).

(8) The reduced level of risk is enough to warrant the making of banning orders in respect of both precincts.

(9) In saying this, I take account of the seriousness of the potential consequences should the risk eventuate, including the risk of death from assaults of this nature.

(10) However, in view of the proportionality consideration to which I have referred, the period of banning should be substantially less than 12 months. In my opinion, a 3 month period of banning would be appropriate.

(11) Because of the low level of violence involved in the serious indictable offences and that they did not occur at a *high risk* venue, I do not think that general or personal deterrence factors call for any longer period of banning.

(12) The banning orders should not apply so as to preclude the Applicant from attending CPD seminars and other gatherings of the City of Sydney Law Society.

Orders on review

102 For the above reasons, I order

(1) The decision of the ILGA to make long-term banning orders against the Applicant under sections 116AE and 116G of the Liquor Act for the period from 29 September 2016 to 28 September 2017 be varied so that the banning period is reduced to a period of 3 months from 29 September 2016 to 28 December 2016 and so that the banning order in respect of high risk venues in the Sydney CBD Entertainment precinct does not apply to any such venues at which meetings or functions of the City of Sydney Law Society are held during the period of those meetings or functions

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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

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

Amendments

15 May 2017 - Typographical error paragraph 78, 2014 changed to 2016

Decision last updated: 15 May 2017