



Civil and Administrative Tribunal
New South Wales

Case Name:	EJH v Independent Liquor and Gaming Authority
Medium Neutral Citation:	[2021] NSWCATAD 7
Hearing Date(s):	On the papers
Date of Orders:	13 January 2021
Decision Date:	13 January 2021
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	A Britton, Principal Member
Decision:	The application made by EJH seeking review of the “banning order” made by the Independent Liquor and Gaming Authority under s 78 of the Liquor Act 2007 (NSW) is dismissed under s 55(1)(b) of the Civil and Administrative Tribunal Act 2013 (NSW).
Catchwords:	ADMINISTRATIVE REVIEW — jurisdiction of NCAT to review “banning orders” made by the Independent Liquor and Gaming Authority
Legislation Cited:	Administrative Decisions Review Act 1997 (NSW) Anti-Discrimination Act 1977 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Liquor Act 2007 (NSW)
Cases Cited:	DLH v Nationwide News Pty Ltd [2018] NSWCATAD 92 Frost v TAFE NSW (No 2) [2019] NSWCATAD 129
Texts Cited:	Nil
Category:	Principal judgment
Parties:	EJH (Applicant) Independent Liquor and Gaming Authority (Respondent)

Representation: Solicitors:
Applicant (Self Represented)
Crown Solicitor (Respondent)

File Number(s): 2020/000295279

Publication Restriction: Pursuant to s 64 of the Civil and Administrative Tribunal Act 2013, the disclosure of the Applicant's name is prohibited.

REASONS FOR DECISION

- 1 On 3 July 2019, the Independent Liquor and Gaming Authority (the Authority) notified EJH, the applicant in these proceedings (the Applicant), of its decision to make a "banning order" under s 78(1) of the *Liquor Act 2007* (NSW). That order banned the Applicant from entering or remaining on "licensed premises", Bar Broadway, for a period of six months commencing 8 July 2019 (the Banning Order). That order has now expired.
- 2 In October 2019, the Applicant applied to the NSW Civil and Administrative Tribunal (NCAT) for administrative review of that decision stating:

"The Banning Order was made against me after I was thrown out of my local bar (Bar Broadway) where I have been an excellent customer for more than 5 years. The Licensee has continuously made false allegations against me (which have been dismissed)..."
- 3 For the reasons explained below the Tribunal does not have power to review the decision made by the Authority to make the Banning Order. It follows that the application for administrative review of that decision must be dismissed.

Statutory framework

- 4 NCAT is a creature of statute. Its jurisdiction is circumscribed by the statute establishing it, namely the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). Section 28(1) of that Act states that the Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under that Act or any other legislation. One of the types of jurisdiction conferred on NCAT is the "administrative review jurisdiction": s 28(2)(b) NCAT Act.
- 5 The *Administrative Decisions Review Act 1997* (NSW) provides for the circumstances in which the Tribunal has "administrative review jurisdiction" over a decision of an administrator: s 30(1) of the NCAT Act. Section 9(1) of

that Act gives NCAT administrative review jurisdiction over a decision (or class of decision) of an administrator if enabling legislation provides that applications may be made to the Tribunal for administrative review of such decision (or class of decision). An "administrator" in relation to an administratively reviewable decision is the person or body that makes (or is taken to have made) the decision under enabling legislation: s 30(4) NCAT Act, s 8(1) of *Administrative Decisions Review Act*.

6 Here, the *Liquor Act* is the relevant "enabling legislation". That Act gives certain people the right to apply to NCAT for administrative review of some but not all decisions made by the administrator, namely the Authority, including decisions:

- a) to impose "long-term banning orders" on a person in respect of licensed venue (see ss 116G and 116H);
- b) to suspend the liquor licence of a licensee for the provision of liquor to minors on licences premises (see s 130F);
- c) to take disciplinary action against a licensee under Part 9 (see s 144); and
- d) to take disciplinary action against a licensee under Part 9A (see s 144N in respect of "reviewable decisions", as defined in s 144B).

7 The order the subject of the Applicant's application to NCAT was made under s 78(1) of the *Liquor Act* which states: "the Authority may, by order in writing given to a person, prohibit the person from entering or remaining on the licensed premises specified in the order". Broadway Bar is a "licensed premises": s 4 of the *Liquor Act*. Neither the *Liquor Act* nor the regulations made under that Act, give NCAT "administrative review jurisdiction" in respect of a decision to make a banning order under s 78 of the *Liquor Act*.

8 As stated above, the Tribunal has administrative review jurisdiction in respect of "long term banning" orders made under s 116G. Such orders and banning order made under s 78 are not one and the same thing. Contained in Division 4 (Prescribed Precincts) of Part 6 (Miscellaneous Offences and Regulatory Controls), s 116G gives the Authority the power to make a "long-term banning order" prohibiting a person from entering or remaining *on any "high risk venue"* for a period not exceeding 12 months. In contrast, s 78 which is contained in Division 2 (Exclusion of Persons from Licensed Premises) of Part 5 (Regulation and Control of Licensed Premises), gives the Authority power to make an order

prohibiting a person from entering or remaining *in the licensed premises specified in that order*. 78(1).

- 9 A further point of difference between s 116G and s 78 is that the power to make a long-term banning order can only be exercised if the Authority is satisfied that the person 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; 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 the licensee or manager of the premises, or working or performing services of any kind on the premises, or has been given three temporary banning orders during a period of 12 consecutive months: s 116G.
- 10 In contrast, the pre-condition to the exercise of the power to make a banning order under s 78 is less onerous and requires the Authority to be satisfied that the person the subject of the proposed order “has repeatedly been intoxicated, violent, quarrelsome or disorderly on or in the immediate vicinity of licensed premises”: s 78(4).
- 11 The Authority stated that the decision challenged by the Applicant was made under s 78(1) of the *Liquor Act*. There is no reason to doubt that claim. It follows the Tribunal does not have administrative review jurisdiction in respect of that decision. The application is misconceived and must be dismissed.

Non-publication of complainant’s name

- 12 The Applicant seeks a non-publication order in respect of his name. He asserts that the circumstances surrounding the making of the banning order have been damaging to his mental health. He points out that in unrelated proceedings currently before the Tribunal commenced under the *Anti-Discrimination Act 1977* (NSW), the Tribunal decided to exercise the power to make an order prohibiting the disclosure of his name “to further protect publication of my orientation and disabilities”. The Authority neither consents to nor opposes the request for a non-publication order.

- 13 There is a risk, as the Applicant apprehends, that if a non-publication order is not granted in these proceedings his identity might be disclosed in the proceedings referred to above commenced under the *Anti-Discrimination Act*. For that reason, despite the presumption of open justice (see for example, *DLH v Nationwide News Pty Ltd* [2018] NSWCATAD 92 at [5]-[11], *Frost v TAFE NSW (No 2)* [2019] NSWCATAD 129 at [9]-[12]), I have decided to exercise the power conferred by s 64 of the NCAT Act to prohibit the disclosure of the Applicant's name. In these proceedings, the Applicant will be referred to by the pseudonym "EJH".

Orders

- (1) The application made by EJH seeking review of the "banning order" made by the Independent Liquor and Gaming Authority under s 78 of the Liquor Act 2007 (NSW) is dismissed under s 55(1)(b) of the Civil and Administrative Tribunal Act 2013 (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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