

# **The NSW Civil & Administrative Tribunal (NCAT) – Appeals Process & Operation**

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## **Introduction:**

1. This paper examines the appeals process and operation for matters heard in the recently established NCAT.
2. NCAT was established by the *Civil & Administrative Tribunal Act 2013* (NSW) (the “**Act**”), this Act provides for the powers and jurisdiction of NCAT.
3. Further, the cognate *Civil & Administrative Legislation (Repeal & Amendment) Act 2013* (NSW) was enacted in late 2013, this Act amended all legislative provisions in NSW that referred to the various tribunals which were subsumed into NCAT.
4. NCAT formally commenced operation on 1 January 2014 and has appellate jurisdiction consisting of both an internal appeals process<sup>2</sup> as well as the jurisdiction to hear appeals from a limited number of external bodies<sup>3</sup>. Further some matters which are heard in NCAT may be appealed to the Court system.
5. NCAT is a complex tribunal that incorporated 23 pre-existing tribunals exercising their jurisdiction across many areas of law.

## **Tribunal Appeals:**

6. Prior to the establishment of NCAT the only tribunal that had an internal appeals panel was the Administrative Decisions Tribunal (“ADT”) that also had the power to hear appeals from the Guardianship Tribunal (“GT”). The Consumer Trade & Tenancy tribunal (“CTTT”) allowed parties to apply for a rehearing, though this was not

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<sup>2</sup> S32, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>3</sup> S31, *Civil & Administrative Tribunal Act 2013* (NSW).

technically an appeal. The majority of other tribunals maintained avenues of appeal to the court system.

7. Some other states and territories that have implemented similar "super tribunals" which have made provision for an internal appeals process. For example Queensland (QCAT) has an extensive internal appeals process. In Western Australia (SAT) there exists no general right of internal appeal though there is provision for an appeal in particular types or categories of matters, more commonly termed as a right of review. Finally, in the ACT (ACAT) there is provision for an internal appeal that is controlled by the Appeal President though there is no particular appeal division.
8. Relevant to appeals the Act promotes the object of enabling NCAT to determine appeals against decisions made by certain persons and bodies<sup>4</sup>.

### **The Structure of NCAT & the Appeals Process:**

9. NCAT is made up of 4 divisions that operate individually much like the list system in the NSW District & Supreme Courts. Each division is headed by a Deputy President with specialist knowledge of that area of practice. The divisions are:
  - a. Consumer & Commercial Division;
  - a. Administrative & Equal Opportunity Division;
  - b. Occupational Division;
  - c. Guardianship Division.
10. Further, NCAT has an Appeals Panel which services all 4 divisions in the internal appeals process as well as hearing appeals from some certain external bodies. The Appeals Panel is not a part of any of the 4 divisions of NCAT<sup>5</sup>. The structure of NCAT is shown at Schedule 1.

### **The constitution of the Appeal Panel:**

11. The Appeal Panel may be constituted by various members of NCAT, though there are certain rules which apply to the make up of the Appeal Panel. For example internal

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<sup>4</sup> S3(b)(iii), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>5</sup> S16(4), *Civil & Administrative Tribunal Act 2013* (NSW).

appeals must have 1 member who is an Australian lawyer or 2 or more members, with at least one being an Australian lawyer<sup>6</sup>.

### **Where are the rules for appeals found?**

12. The Act provides for the general rules of practice of NCAT at Part 4 of the Act. Part 6 of the Act provides rules that are specific to appeals in NCAT. Further, there may be rules provided for in the Tribunal Rules and regulations. The hierarchy of instruments which provides rules for practice and procedure within NCAT is as follows:
  - a. Part 4 of the *Civil & Administrative Tribunal Act 2013* (NSW).
  - b. The various schedules relating to particular divisions of the *Civil & Administrative Tribunal Act 2013* (NSW).
  - c. Regulations (statutory instruments).
  - d. Tribunal Rules drafted by the Rule Committee.
  - e. Practice directions drafted as Practice Notes and dispensed by the President or Deputy Presidents.
  
13. It is noted, above at paragraph 11b, that each of the 4 divisions of NCAT has rules of practice and procedure that may be special, or peculiar, to the general rules of NCAT found in Part 6. These rules can be found in Part 6 of Schedules 3 – 6 respectively, and may relate to the appeals process or rules of appeal for appeals emanating from each of the 4 Divisions of NCAT.
  
14. If there is any inconsistency between the Schedules of the Act and the Act itself the Schedule will prevail. That is, the particular rules for the individual divisions of NCAT will prevail over the general rules of practice for NCAT, this applies to matters heard by the Appeal Panel as well as generally.

### **Internal Appeals:**

15. NCAT has the jurisdiction to hear internal appeals from each of its 4 Divisions related to any decision made by the NCAT in proceedings for a general decision or administrative review decisions and for any decision made by a Registrar which is

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<sup>6</sup> S27, *Civil & Administrative Tribunal Act 2013* (NSW).

declared by the Act or the procedural rules to be internally appellable. The internal appeal jurisdiction does not extend to decisions of the Appeal Panel itself, any decisions made by NCAT in an external panel, decisions from its enforcement jurisdiction or proceedings relating to the imposition of a civil penalty<sup>7</sup>.

16. Part 6, Division 2 of the Act discusses the general rules of internal appeals in NCAT. Any interlocutory decision which is being sought to be appealed must have leave of Appeal Panel, any other decision of NCAT at first instance may appeal to the Appeal Panel as of right on a question of law or with leave of the Appeal Panel on any other grounds<sup>8</sup>.
17. The Appeal Panel may decide to rehear the matter and can permit new evidence or further evidence to be adduced<sup>9</sup>. The ultimate benefit in this is that new evidence that may be relevant can be utilised by the tribunal to make the decision.
18. The Appeal Panel has a wide range of orders which it may make as a result of the internal appeal, these can include that the appeal be allowed or dismissed, the decision under the appeal can be affirmed, confirmed or varied, it may be quashed or set aside and further another decision can be substituted for it or the whole or part of the case may be reconsidered by NCAT either with or without any further evidence<sup>10</sup>.
19. It is noted that the Appeal Panel is to hear the matter as if it has the same powers and discretions as the tribunal which heard the matter in the first instance<sup>11</sup>.
20. As outlined at paragraph 12 the various schedules relating to the particular divisions will provide for the rules of practice in relation to appeals from that particular division. These, by necessity, can differ from the general appeal rules of NCAT and when making an appeal from a particular division it is necessary to understand the differences that exist.
21. For example, in the Administrative & Equal Opportunity Division there are certain types, or classes, of decisions which are not internally appellable at all and other types

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<sup>7</sup> S32, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>8</sup> S80(1) & (2), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>9</sup> S80(3), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>10</sup> S81, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>11</sup> *Shi v Migration Agents Registration Authority* [2008] HCA 31 per Kirby J.

of matters, such as appeals against interim orders under the *Anti Discrimination Act 1977* (NSW) may require leave of the Appeal Panel<sup>12</sup>.

22. There can be provision that certain types of matter may only be appealed to the Supreme Court or the Land and Environment Court, examples of this include appeals from the Occupation Division relating to the *Architects Act 2003* (NSW) or the *Building Professionals Act 2005* (NSW).
23. Further, there may be limitations on internal appeals such as in the Consumer & Commercial Division where the Appeal Panel may only grant leave for the matter to be appealed to the Appeal Panel if it is satisfied that there has been a substantial miscarriage of justice because the decision of NCAT originally was not fair and equitable or the decision was against the weight of evidence or significant new evidence has arisen which was not reasonably available at when the matter was heard at first instance<sup>13</sup>.
24. There are numerous benefits to be found in NCAT having an internal appeals process; most importantly:
  - a. it allows for consistency and transparency of decision making and processes in relation to matters at first instance and appeals;
  - b. it provides for accountability of the decision makers at first instance and then again on decisions made by the Appeal Panel in accordance with the objects of the Act<sup>14</sup>;
  - c. the cost and time benefits to the parties cannot be discounted. An internal appeals process allows the matter to stay within the realm of NCAT to be heard on appeal so there is no need to transfer the matter to the separate court system. This means matters can be determined in a timely manner without imposing excessive extra costs on those involved which is in accordance with the objects of the Act<sup>15</sup>.

### **External Appeals:**

25. NCAT has an external appeals jurisdiction and the Appeals Panel is able to hear appeals from a limited number of external bodies over a decision or class of decisions

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<sup>12</sup> Schedule 3, Part 6, Division 2 *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>13</sup> Schedule 4, Part 6, Para 12 *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>14</sup> S3(f), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>15</sup> S3(d) & (e), *Civil & Administrative Tribunal Act 2013* (NSW).

if the enabling legislation provides that an appeal may be made to NCAT<sup>16</sup>. An example of this is an appeal from the Mental Health Review Tribunal under the *Drug & Alcohol Treatment Act 2007* (NSW).

26. In determining an external appeal NCAT may make any order that is provided for in the enabling legislation and in any other case make a range of orders including that the appeal be allowed or dismissed, the decision under appeal can be confirmed, affirmed or varied, the decision can be quashed or set aside or that another decision can be substituted for it and, finally, that the whole or any part of the case should be reconsidered by the decision maker whose decision is under appeal, either with or without further evidence being adduced<sup>17</sup>.
27. The rules which apply to practice and procedure for appeals in NCAT apply to external appeals and can be found at Part 6 of the Act.

**General considerations when making an internal/external appeal to NCAT:**

28. The party seeking to appeal any decision of NCAT should first apply for a stay on the decision if they are planning on making an appeal. There is no automatic stay<sup>18</sup> implemented when the appeal is made as the decision of the proceedings takes effect from the date on which it is given<sup>19</sup>.
29. The appeal to NCAT must be made in the time and manner prescribed by the enabling legislation or the procedural rules of NCAT<sup>20</sup>.
30. Lawyers seeking to represent a party in NCAT are required to seek leave to appear as a general rule<sup>21</sup>. It is noted however that this rule is dependent on the rules of each of the particular divisions that are outlined in the Schedules to the Act. Parties who have been represented by a lawyer in the original proceedings do not need to seek further leave to appear<sup>22</sup>.

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<sup>16</sup> S31, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>17</sup> S79, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>18</sup> S43(2), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>19</sup> S61, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>20</sup> S40, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>21</sup> S45, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>22</sup> S45(2), *Civil & Administrative Tribunal Act 2013* (NSW).

31. The necessary forms for appeals and reply to appeals can be downloaded from the forms section of the NCAT website:

[http://www.ncat.nsw.gov.au/ncat/ncat\\_common\\_forms.html](http://www.ncat.nsw.gov.au/ncat/ncat_common_forms.html).

### **Appeal Panel referral of questions of law to the Supreme Court:**

32. The Appeal Panel may, at its own motion or at the request of either party, refer questions of law to the Supreme Court for the opinion of the Court<sup>23</sup>. The President of NCAT must consent in writing and the Court has the jurisdiction to hear and determine any question of law. It is noted however that the Court may decline to hear the question and may refuse to exercise its jurisdiction.

### **Appeals from NCAT to the court system:**

33. NCAT may have matters which, when appealed, are heard in the Court system. An appeal may be made to the Court system from NCAT on<sup>24</sup>:

- a. a decision made by the Appeal Panel in an internal appeal;
- b. a decision made by NCAT from an external appeal;
- c. Any decision made by NCAT which imposes a civil penalty in the exercise of its enforcement jurisdiction.

34. The appropriate appeal court in relation to decisions made by NCAT which imposes a civil penalty in the exercise of its enforcement jurisdiction, at paragraph 23c above, depends upon the constitution of the tribunal that heard the original matter. If the tribunal was constituted by one or more senior judicial officer it is to be heard by the Supreme Court and, if no senior judicial officer heard the matter, it is to be heard by the District Court<sup>25</sup>.

35. Further, in relation to paragraph 23c above, the party wishing to make the appeal requires leave of the Supreme Court if it is to be heard there or can otherwise make the appeal to the District Court without leave.

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<sup>23</sup> S54, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>24</sup> S82, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>25</sup> S82(3), *Civil & Administrative Tribunal Act 2013* (NSW).

36. The Court which hears the appeal can affirm, vary or set aside the decision of the tribunal or can remit the case to be reheard, either with or without new evidence<sup>26</sup>. For any matter on appeal relating to the imposition of a civil penalty the Court hearing the appeal can substitute its own decision for that of the tribunal's that is on appeal<sup>27</sup>.

### **Judicial Review:**

37. NCAT has an administrative review jurisdiction<sup>28</sup>, within this jurisdiction the Tribunal may review decisions of administrators. Further application can be made to the Supreme Court for judicial review of an administratively reviewable decision. An "administratively reviewable decision" is defined as 'a decision of an administrator over which the Tribunal has administrative review jurisdiction'. To establish if NCAT has this jurisdiction the enabling legislation must be consulted<sup>29</sup>.

38. The Supreme Court can hear the matter or refuse to hear it if it is satisfied that adequate provision is made for the review of the decision by NCAT by way of external appeal or can refuse to conduct a judicial review of the decision if an internal appeal, or appeal to the Court system, has been lodged against the decision<sup>30</sup>.

### **Tribunal Decision appeals prior to the establishment of NCAT:**

39. For any appeal of a decision of an existing tribunal which was instituted before the establishment day (1 January 2014) and has not been finally determined by the court before the establishment day must be determined as if NCAT had not been enacted. That is it should continue as per the previous procedure and any rules, regulations or other law that would be relevant to the proceedings would continue to operate as if NCAT did not exist<sup>31</sup>.

40. For any unexercised right of appeal the applicant may appeal to NCAT for the exercise of the same functions that could have been exercised by the tribunal had that tribunal

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<sup>26</sup> S83(3), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>27</sup> S83(4), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>28</sup> S28(2)(b), *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>29</sup> S9, *Administrative Decisions Review Act 1997* (NSW).

<sup>30</sup> S34, *Civil & Administrative Tribunal Act 2013* (NSW).

<sup>31</sup> Schedule 1, Subdivision 2, Para 8, *Civil & Administrative Tribunal Act 2013* (NSW).



not been abolished. NCAT has and may exercise all of the powers that the tribunal had<sup>32</sup> prior to the tribunal being abolished.

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<sup>32</sup> Schedule 1, Subdivision 3, Para 10 *Civil & Administrative Tribunal Act 2013* (NSW).

## Schedule 1

# The Structure of NCAT

