THE GUIDE TO APPEALS FROM THE NCAT

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ARE YOU APPEALING AN NCAT DECISION?

TENANCY – LIQUOR AND FIREARMS LICENSING – WORKING WITH CHILDREN CLEARANCES – FREEDOM OF INFORMATION

This booklet explains what to do if you would like to challenge an NCAT decision:

- How to choose the orders you will challenge on appeal
- Help to draft your grounds of appeal for your Notice of Appeal
- What else you can consider doing

In addition to this booklet, you should consider getting legal advice to help you with your appeal. A list of legal advice resources is at the back of this booklet.

This Guide uses the phrase "**your NCAT decision**" to refer to a decision of the NCAT which names you as a party. This Guide does not deal with decisions made by a Registrar of the NCAT.

This Guide states the law as at November 2019.

YOUR NCAT DECISION MIGHT RELATE TO:

- Tenancy
- Liquor licensing
- Working with children clearances
- Freedom of information

IS THIS BOOKLET RIGHT FOR YOU?

- **Have you got a decision of the NCAT?**
  - Has the NCAT made a final decision?
  - Have written reasons been given?
- **If so - is it possible to have the decision set aside?**
  - You will need to apply within 7 days.
    See Part 1 of this booklet.
- **If not - is an internal appeal available?**
  - In most cases, internal appeal is available.
    See Part 2 of this booklet.
- **If not - is an appeal to a court available?**
  - In limited cases, you can appeal to a court.
    See Part 4 of this booklet.
- **If not - is judicial review in a court available?**
  - You should consider this avenue only if no other avenue is available.
    See Part 5 of this booklet.

QUESTIONS YOU MIGHT HAVE

What is an internal appeal?

In an internal appeal, one party argues that the NCAT made an error in reaching its decision. The Appeal Panel or Court can overturn (cancel the effect of) the decision, but usually only on a question of law.

When is the right time to appeal?

An appeal can be made as soon as you receive the decision from NCAT (or, in some cases, as soon as you receive written reasons). It is very important to act quickly, as time limits apply.

Does my NCAT decision continue in effect while I appeal?

Yes. You can make an application to the Appeal Panel for a stay, which suspends the effect of the NCAT decision while you appeal.

What if I only want to appeal part of the decision?

You can seek orders setting aside part of the decision only. There are sample orders set out at the end of this Guide.

TIME LIMITS IN THE NCAT

Time limits apply strictly in the NCAT, and in courts in New South Wales.

These time limits are identified through this Guide, and must be observed. If you do not comply with a time limit, the NCAT may dismiss your application. **Where a time limit is not stated in this Guide, you should contact the NCAT to inquire whether a time limit applies.**

You should seek legal advice if you think you have a problem with meeting a time limit, or if you have already missed a time limit.

QUICK GUIDE TO TIME LIMITS

This page is a quick reference guide to the time limits which apply to avenues in this Guide.

Applying to set aside or vary the decision

Time limit of **7 days**.

See Part 1 of this Guide.

Applying to a court

The time limit for an appeal to a court is generally 28 days from the date of the decision.

See Parts 4 and 5 of this Guide.

Internal appeal

Time limit of **28 days** applies in most cases (14 days for residential proceedings).

Available on limited grounds (question of law). Leave must otherwise be sought.

See Parts 2 and 3 of this Guide.

PART 1 – HAVING YOUR NCAT DECISION SET ASIDE

Important: Generally, a time limit of 7 days applies to an application to set aside (see below). If you have a problem with meeting this time limit, you should seek legal advice immediately.

Consider an application to set aside or vary if you were absent or if both parties consent.

1.1 How do I apply?

You should complete the form **Application to set aside or vary Tribunal decision,** available on the NCAT's website, (www.ncat.nsw.gov.au/Pages/ncat_decisions/set_aside_or_vary_decision.aspx) within 7 days of the date of the decision.

There is a standard fee of $105 (concession fee of $26).

1.2 What does set aside mean?

If a decision is **set aside**, the decision ceases to have effect. You will need to show a reason for setting aside the decision (see below).

However, this does **not mean** that the proceedings are dismissed.

Instead the Tribunal will begin the decision making process again.

1.3 What reasons must I show for setting aside a decision?

The Tribunal can set aside or vary a decision:

- Where all parties have consented to the setting aside or varying of the decision. **A time limit of 7 days applies from the date of the decision.**
- Where the decision was made in the absence of a party and the Tribunal is satisfied that the party's absence has resulted in the party's case not being adequately put to the Tribunal. **A time limit of 7 days applies from the date of the decision.**

1.4 Other grounds for setting aside or varying

The Tribunal also has power to set aside or vary a decision in other circumstances.

- Where a provision of the *Civil and Administrative Tribunal Act 2013* (NSW) or the Tribunal's procedural rules has not been met. See section 53(4), *Civil and Administrative Tribunal Act.*
- Where there is an obvious error in the decision, such as a clerical or typographical error. See section 63(1), *Civil and*

2. MAKING AN INTERNAL APPEAL TO THE APPEAL PANEL

In order to make an internal appeal, you will need to complete the Notice of Appeal form. The form will ask you for **grounds of appeal**.

Importantly, if you cannot identify a "question of law", you will need "leave" (permission) to appeal. This Part will help you understand what a "question of law" is, to help you with your grounds of appeal.

2.1 How do I make an internal appeal?

An application for an internal appeal must be made by lodging a **Notice of Appeal** form, available from the NCAT's website. You may also wish to seek a stay (which suspends the decision). You should use the form **Stay of original decision pending appeal** for this, available at the same page.

The standard fee is $429 (with a concession fee of $107).

You must find out the time limit in relation to your internal appeal. A time limit of **28 days** applies in most cases (**14 days** for residential proceedings) unless the Tribunal grants an extension under section 41 of the Civil and Administrative Tribunal Act. The enabling legislation in each case must be checked for time limits.

Schedule 1 of this Guide also sets out some limits on internal appeals, which you should check before proceeding.

2.2 What is a question of law?

The Appeal Panel (or the Court) decides whether an appeal is on a question of law or not.

Importantly, questions of "law" are to be distinguished from questions of "fact". Questions of fact generally relate to the merits of the decision or the facts on which it was based (e.g. whether the original Tribunal made the "right" decision or whether they accepted a particular party's explanation of events).

For example, where the Tribunal made a finding that a health practitioner posed a risk to the health of the public, no question of law would arise merely if that finding was wrong. These matters are generally **not** questions of law.

Use this Part if you wish to appeal from an error in your NCAT decision, including: tenancy; liquor licensing; firearms; and freedom of information decisions.

Within seven days of the decision: Have you considered trying to have your NCAT decision set aside? You can do this in certain limited circumstances. See Part 1 for more information.

Questions of law are to be distinguished from questions of fact.

On the other hand, "questions of law" are generally questions about what the law is, how it operates and whether it has been applied properly in a particular case.

Common examples of a "question of law" include:

- Did the Tribunal properly interpret the words of the legislation?
- Did the Tribunal fail to provide procedural fairness?
- Did the Tribunal give adequate reasons for the decision? (This applies, for example, where reasons were requested (seesection 62, *Civil and Administrative Tribunal Act*) or incertain Guardianship decisions (see Schedule 6, clause 11, of the *Civil and Administrative Tribunal Act*).)
- Did the Tribunal have any evidence to support a particular factual finding?
- Did the Tribunal misapply the law to the facts that it found?

The last two definitions demonstrate the difficulty in distinguishing between "questions of law" and "questions of fact". A wrong, or questionable, finding of fact by the Tribunal does not raise a question of law.

Similarly, provided there is *some* evidence which supports the Tribunal's factual findings, whether the Tribunal should or could have made a different finding on the evidence before it, or given more or less weight to a particular argument, are not questions of law, but questions which go to the facts found by the Tribunal.

As you can see, identifying what is a "question of law" is a difficult process and often comes down to questions of degree, and the context of the particular case.

Some tips in identifying, and explaining a question of law in your NCAT decision:

- Your question of law should identify the key "issue" which you have with the primary decision and should be phrased as a question. For example:

  Instead of: "I think NCAT was wrong when it found me to be a 'lodger', because I think I'm covered by the *Residential Tenancies Act 2010* (NSW)"

  You could say: "What is the proper meaning of the phrase 'agreement under which a person boards', in section 8(1)(c) of the *Residential Tenancies Act 2010* (NSW)?"

- Your question of law must relate to something which either did, or could have, affected the outcome of your

Questions of law generally arise when the Tribunal has to **apply a law** (such as an Act or a regulation).

A mistake of fact does not generally give you a right to appeal.

case. If the question of law is determined in your favour, it should be clear that the Tribunal decision would, or could, have been different.

Unfortunately, if you're not able to precisely identify a "question of law", you are unlikely to have a right to appeal. However, you may have other options, including seeking leave to appeal (as set out in Part 3 of this Guide) and appealing to a court.

To give you a further idea of what may or may not be considered a "question of law", Part 2.3 below sets out a series of case studies from each Division. You should also note the special principles for certain kinds of decision (discretionary decisions and findings of fact). Part 2.4 will help you determine if your NCAT decision involves a discretionary decision or a finding of fact.

2.3 Examples of internal appeals from each Division on a question of law

The following are examples of appeals from decisions of the Tribunal on a question of law. Remember that, ultimately, the Appeal Panel will decide whether there is a question of law in your NCAT decision.

2.3.1 Questions of law in the Consumer and Commercial Division

Alta Building and Developments Pty Ltd v McAllery [2015] NSWCATAP 14

In *Alta Building and Developments Pty Ltd v McAllery* [2015] NSWCATAP 14, a dispute had arisen as to payment for construction works between homeowners and a builder. The Tribunal found that the builder had to show that the costs of construction were reasonable before claiming them from the owners. The Tribunal found that two items of expenditure were not reasonably or properly incurred, and thus the owners were not required to pay for them.

The builder sought to appeal this decision to the Appeal Panel. The Appeal Panel found that the question of whether the contract contained an implied term, and the wording of that term, was a question of law. This is because it was a question which related to the meaning of the words of the contract between the parties: at [65]-[68].

Draper v Gibbs [2014] NSWCATAP 54

The Tribunal dealt with an application for an order for fencing work under the *Dividing Fences Act 1991* (NSW). Part of the dividing fence was also to function as a swimming pool

Instead of: "NCAT was wrong when it found that my building costs were not reasonable."

You could say: "NCAT made an error of law in interpreting the contract to mean that my costs had to be reasonable."

The interpretation of legislation, including the interaction between different pieces of legislation, raises a question of law.

Instead of: "NCAT was wrong to find that the dividing fence was solely the swimming pool owner's responsibility."

You could say: "NCAT made an error of law in concluding that the *Dividing Fences Act* did not apply."

fence for a pool on the applicant's property. The Tribunal found that the material used and the method of construction of that part of the fence was solely the swimming pool owner's responsibility and the *Dividing Fences Act* did not apply to it. The Appeal Panel held that the Tribunal had made an error of law in that conclusion: at [86]. The correct interpretation of the *Swimming Pools Act 1992* (NSW) and the *Dividing Fences Act* was that both Acts continued to apply to the standard of the fence. Unless there was only one type of fence which would comply with the *Swimming Pools Act,* there was no inconsistency between the two Acts, and the swimming pool owner had to comply with both: at [82]-[83]. There being an error in the Tribunal's approach to a question of law, the appeal was allowed.

2.3.2 Questions of law in the Administrative and Equal Opportunity Division

Masterson v Commissioner of Police [2017] NSWCATAP 206

Mr Masterson appealed from a decision of the Administrative and Equal Opportunity Division affirming the Commissioner's decision to revoke his firearms licence under the *Firearms Act 1996* (NSW).[1]

One of the reasons given by the NCAT was that Mr Masterson's activities in producing firearms parts with a 3D printer undermined the objects of the *Firearms Act*. The Appeal Panel held that the NCAT had interpreted the *Firearms Act* incorrectly and this was an error of law. The correct interpretation of the legislation was that the attempted manufacture of firearms parts for the repair or maintenance of firearms for which he held a licence was within the scope of the authority granted to Mr Masterson by his licence: at [113].

Commissioner of Police v Martin [2018] NSWCATAP 27

In *Commissioner of Police v Martin* the Appeal Panelheld that the Tribunal had erred in taking into account thefact that Mr Martin held licences or permits permitting possession and use of prohibited firearms in determining which conditions were reasonable to ensure public safety in respect of a permit issued for a *different* use (public displays of the firearms to commemorate Australian military history). Whether the Tribunal had taken into account an irrelevant consideration raised a question of law.

BKW v Department of Family and Community Services [2015] NSWCATAP 232

In the primary decision, the applicant had sought

Instead of: "NCAT was wrong to find that I was not a proper person to hold a licence."

You could say: "NCAT made an error of law by interpreting the *Firearms Act* incorrectly."

Instead of: "NCAT was wrong to find that my possession of firearms meant I should not be allowed to hold public displays of firearms."

You could say: "NCAT made an error of law by taking into account an irrelevant consideration."

Whether the Tribunal has taken into account an irrelevant consideration when imposing a condition on a licence is a question of law.

Whether the Tribunal has acted under the correct legislation is a question of law.

an extension of time to file her administrative review application. The Tribunal referred to section 41 of the *Civil and Administrative Tribunal Act* as the source of its power to extend time. This was an error – the Tribunal should have referred to the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW). This was important because a decision in the community services jurisdiction should be informed by the special considerations which derive from the enabling legislation: at [44]. The Appeal Panel held that this raised a question of law and the Tribunal had made an error.

Commissioner of Police v Monastirski [2017] NSWCATAP 225

In *Commissioner of Police v Monastirski,* the NCAT had exercised its discretion, under the *Liquor Act 2007* (NSW), to vary a long term banning order prohibiting Mr Monastirski from entering a "high risk venue" for a period not exceeding 12 months. The Appeal Panel held that it would be an error of law for the Tribunal to concludethat a consideration was mandatory if it was not in factmandatory: at [52]. The Tribunal had wrongly stated thatMr Monastirski's personal interest in attending licensed venues was a mandatory consideration. However, as the Tribunal's reasoning showed that it treated Mr Monastirski's personal interest as a merely relevant, not a mandatory, consideration, the Appeal Panel held there was no error of law: at [56].

2.3.3 Questions of law in the Guardianship Division

BZE v NSW Public Guardian [2015] NSWCATAP 64

In *BZE v NSW Public Guardian*, the Appeal Panel held that a question of law arises where the Tribunal fails to take into account all factors or principles prescribed by section 14(2) of the *Guardianship Act*. The Appeal Panel held that the Tribunal failed to consider whether BZF's vulnerability meant that it was necessary to restrict BZF's freedom of decision and freedom of action. The Tribunal had also failed to consider whether services, including decisions about access, could be provided in relation to BZF without the need for a guardianship order. The Appeal Panel allowed the appeal.

ZBC v ZBD [2016] NSWCATAP 264

In *ZBC v ZBD,* the Appeal Panel held that a question of law arises where the Tribunal fails to provide adequate reasons for its decision. The Tribunal had made findings that the appellant's financial interests conflicted with those of ZCG. The Appeal Panel held that the Tribunal had failed to set out

Instead of: "NCAT made the wrong decision about access."

Your Notice of Appeal could say: "NCAT made an error of law by failing to take into account the factors stipulated by the statute."

Instead of: "NCAT was wrong to find that there was a conflict of financial interest."

Your Notice of Appeal could say: "NCAT made an error of law by failing to give an adequate explanation of its reasoning process."

any evidence or reasoning process that led to those findings. The Appeal Panel also held that the Tribunal had failed to expose its reasons for deciding it was in the best interests of ZCG to appoint the appellant as her private financial manager. As a result, the Appeal Panel allowed the appeal.

BTK v The Public Guardian [2015] NSWCATAP 89

In *BTK v The Public Guardian*, BTK submitted that he had been deprived of a fair hearing and natural justice. The reason for this was because the Tribunal had failed to evaluate and explore the significance of the change in relations between BTK and his mother (BTL), and her cognitive condition. The Appeal Panel held that a question of law arises where the Tribunal fails to take into account a relevant consideration. The appeal was allowed because the Tribunal had failed to take into account (amongst other things) issues about undue influence and BTL's cognitive condition.

ZAN v The Public Guardian [2016] NSWCATAP 20

In *ZAN v Public Guardian,* the Appeal Panel held that whether each party was given adequate notice of the hearing raises a question of law. ZAN, the father of ZAL, only received one day's notice of the hearing before the Tribunal, and the Tribunal conducted the hearing without affording ZAN an opportunity to see the applications or the documentary evidence. The Appeal Panel held that the Tribunal had failed to afford procedural fairness to ZAN.

2.3.4 Questions of law in the Occupational Division

Kaye v Health Care Complaints Commission [2018] NSWCATAP 146

The Tribunal made a decision pursuant to section 41A(2) of the *Health Care Complaints Act 1993* (NSW) permanently prohibiting Mr Kaye from providing a health service in either a voluntary or a paid capacity. On appeal to the Appeal Panel, Mr Kaye relied on several grounds, including: that the Tribunal erred in ordering that he be permanently prohibited from providing any health service; and that the Tribunal erred in finding that he posed a risk to the health and safety of the public. The Appeal Panel held that none of these grounds raised a question of law, as distinct from a mere error.

Commissioner for Fair Trading v Younan [2016] NSWCATAP 270

In the original decision, the Commissioner for Fair Trading had decided that Mr Younan, the director of a company which was a licensed contractor under the *Home Building Act 1989* (NSW), had engaged in conduct which would warrant disciplinary action. The grounds for that decision included the contractor's non-compliance with the "Gosford rectification

Failing to give proper reasons raises a question of law.

The correctness of a finding which determines the application of a statute is a question of law.

Instead of: "NCAT was wrong to impose a caution."

You could say: "NCAT's reasons do not disclose the reasons for imposing a caution."

order". The Tribunal set aside the Commissioner's decision, concluding that the "Gosford rectification order" was not a "rectification order" within the meaning of the *Home Building Act*. The Commissioner appealed. One of the Commissioner's grounds of appeal was that the Tribunal had erred in finding that the Gosford rectification order did not comply with the *Home Building Act* (because it did not set out the "steps" required for compliance with it). Although it had the appearance of a question of fact, the Appeal Panel accepted that this raised a question of law. That was because the Tribunal's finding was necessary to determine whether the *Home Building Act* applied. The Appeal Panel said it was a case where the facts adduced before the Tribunal were directed towards proving an ultimate fact which was a term used in a statute: at [28]. This meant that a question of law was raised by the Tribunal's decision.

2.4 How to identify findings of fact and discretionary decisions

It is particularly difficult to establish an error raising a question of law where the Tribunal has made a discretionary decision or a finding of fact. If you wish to appeal against this kind of decision, it is highly likely that you will need "leave" to appeal (see Part 3 of this Guide).

The below case studies explain the terms "finding of fact" and "discretionary decision", so that you can determine if the part of your NCAT decision from which you wish to appeal contains this kind of decision.

2.4.1 The Tribunal makes a finding of fact

ZBD v The University of Newcastle [2017] NSWCATAP 70

The Tribunal had been required to determine whether the imposition by the University of a minimum mark of 75% for entry into an engineering Masters degree was "not reasonable having regard to the circumstances of the case" (section 49B(1)(b) of the *Anti-Discrimination Act 1977* (NSW). The Appeal Panel held that the Tribunal's conclusion was a finding of fact, saying (at [277]) that "[i]n determining whether the 75% requirement was 'not reasonable having regard to the circumstances of the case', it could be said that the Tribunal was required to make a broadly based value judgment having regard to the material before it. In our view, the Tribunal's conclusion in this regard at [99] is clearly a finding of fact". Unless affected by an error of law, the appellant would require leave to appeal in respect of that finding.

A conclusion which requires the Tribunal to make a broad-based value judgment is likely to be a finding of fact.

The making of a finding of fact does not raise a question of law as long as there is sufficient evidence to support the finding.

A discretionary decision is one on which reasonable minds could differ. The Appeal Panel will not interfere with a discretionary decision just because it thinks it was wrong.

Johnson v Wilson [2018] NSWCATAP 40

In *Johnson v Wilson*, a dispute arose between tenants and their landlord as to an amount of compensation owed in respect of damage allegedly caused by the tenants during the term of their tenancy. The Tribunal found – amongst other things – that the landlord was entitled to be paid compensation to resurface the kitchen doors, which had been scratched and chipped. The Tribunal considered that these scratches and chips went far beyond "fair wear and tear".

The tenants sought to appeal to the Appeal Panel. The Appeal Panel held that there was no question of law arising out of the Tribunal's decision, because the Tribunal had sufficient evidence before it to lead to the finding that the kitchen cabinetry needed replacement, to find that there was damage to the door jambs, and to make certain discounts: at [26].

2.4.2 The Tribunal makes a discretionary decision

BKW v Department of Family and Community Services [2015] NSWCATAP 232

A decision whether or not to extend time is discretionary. This means that the Appeal Panel should not overturn the decision simply because it would have reached a different decision: [at 50]. In *BKW,* the Tribunal had dismissed an application for administrative review as out of time. The Appeal Panel held that that decision was not just wrong, but unfair. The Tribunal had chosen the wrong date for the running of time: at [18]; [59]. Had the Tribunal measured time correctly, it "may well have altered in a significant way its calculus in relation to the appropriate exercise of discretion".

Most decisions will contain at least one finding of fact. Examples are where:

-The NCAT makes a finding about whether something happened or not.

-The NCAT decides whether something is "reasonable", or "fair wear and tear".

-The NCAT evaluates personal circumstances.

Instead of: "NCAT was wrong to find that I damaged the doors in the property."

Your Notice of Appeal could say: "There was no evidence that I damaged the doors in the property."

3. CAN YOU OBTAIN LEAVE TO APPEAL?

If you cannot identify a question of law in your NCAT decision, you will need to apply for leave to appeal. This is also done using the **Notice of Appeal** form found on the NCAT website [www.ncat.nsw.gov.au/Pages/ncat_decisions/appeals.aspx.](www.ncat.nsw.gov.au/Pages/ncat_decisions/appeals.aspx)

3.1 Principles applying to the grant of leave to appeal

The Appeal Panel will consider whether to grant you leave to appeal. In *Collins v Urban* [2014] NSWCATAP 17 at [84], the Appeal Panel said that an applicant for leave to appeal must show "something more" than that the Tribunal was arguably wrong on the point raised. The Appeal Panel also said that applications for leave to appeal are to be approached with restraint. Ordinarily, therefore, it is appropriate to grant permission to appeal only in matters that involve:

- "issues of principle"; or
- "questions of public importance or matters of administration or policy which might have general application"; or
- "an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand"; or
- "a factual error that was unreasonably arrived at and clearly mistaken"; or
- "the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed".

The following case studies provide examples of cases where leave to appeal has been granted. You should also note the special principles which apply in the Consumer and Commercial Division (Part 3.3).

3.2 Examples of cases where the Appeal Panel has granted leave to appeal

AIN v Medical Council of New South Wales [2017] NSWCATAP 23

The Administrative and Equal Opportunity Division made findings about the nature and extent of an online publication of AIN's personal information (in contravention of section 18 of the *Privacy and Personal Information Protection Act 1998* (NSW)). The Appeal Panel held that, in making a finding that

Leave to appeal should be granted where a finding of fact has been unreasonably arrived at, or is unsafe, producing unfairness to one party.

Example applications for leave to appeal:

NCAT's decision raises an issue of principle about …

NCAT's decision contains an error which raises a question of public importance, which is …

The NCAT's finding contains a plain and readily apparent error, which is … , so that it would be unjust to allow it to stand.

the breach of section 18 had continued up to 12 June 2011, the Tribunal had failed to take into account data from a particular computer program. Those data indicated continued publication through to 30 April 2012. That evidence was "objective evidence" which ought to have been given "particular weight" because the Medical Council's own evidence about duration was unsatisfactory. The Appeal Panel said (at [55]) that it was "sufficient for us to conclude that the Tribunal's finding as to the duration of the Contravening Publication was an error of fact". Leave to appeal should be granted "because the finding was unreasonably arrived at and is unsafe. It would be unfair to AIN to uphold the finding as to duration of breach".

ATX v Victims Compensation Fund Corporation [2015] NSWCATAP 42

ATX appealed from a decision of the Administrative and Equal Opportunity Division that she was not entitled to compensation under the *Victims Support and Rehabilitation Act 1996* (NSW). By an unknown error, the Tribunal had never been provided with a copy of some handwritten notes made by ATX detailing the alleged assaults. The Appeal Panel held that the handwritten notes were "directly relevant to the issue of whether ATX was the victim of violence" and that "[t]he Tribunal should have taken them into account": at [22]. The Appeal Panel therefore granted leave to appeal.

Leave to appeal should be granted where the Tribunal has failed to take into account directly relevant evidence.

3.3 Special principles for Consumer and Commercial Division decisions

In addition, before granting leave to appeal from a decision of the Consumer and Commercial Division, the Appeal Panel must be satisfied that the applicant may have suffered a substantial miscarriage of justice because the decision of the Tribunal under appeal was not fair and equitable;[3] or the decision was against the weight of the evidence;[4] or "significant new evidence" has arisen:[5] see *Civil and Administrative Tribunal Act,* Schedule 4, clause 12

(1).The following cases provide some examples.

3.3.1 Thiessen v Poolsurf Qld Pty Ltd [2015] NSWCATAP 250

The Tribunal had failed to make specific findings about a critical matter (the manner in which work was undertaken). The Appeal Panel held that there was a significant possibility that a different result would have followed if that finding had been made, and therefore that a substantial miscarriage may have occurred: at [38]; [41].

3.3.2 Hayes v Williams [2015] NSWCATAP 268

Leave to appeal was granted because the Tribunal had used the wrong percentage of floor area to calculate a rent reduction; the percentage was "a central aspect of the reasoning" and the

Appeal Panel described it as "a clearly wrong factual premise".

3.3.2 Claydon v NSW Land and Housing Corporation [2015] NSWCATAP 192

The Appeal Panel held that a decision by prosecutors (to withdraw charges of supply of prohibited drugs) was "significant new evidence" in relation to the termination of the appellant's NSW Housing tenancy, even though it occurred after the Tribunal's termination decision: at [30].

4. CAN YOU APPEAL TO COURT?

4.1 When can an appeal be made to the District Court, Supreme Court or Land and Environment Court?

A statutory appeal to a court may be available to you if:

(a) Your NCAT decision is a general decision made in the Guardianship Division;

(b) Your NCAT decision is an external appeal decision;

(c) Your NCAT decision imposes a civil penalty;

(d) Your NCAT decision is one of certain types of Administrative and Equal Opportunity Division decision, or

(e) You have a decision of the Appeal Panel deciding an internal appeal.

Each of these categories is further explained below.

4.1.1 Your NCAT decision is a certain type of Guardianship Division decision

A party in a Guardianship Division proceeding for a "general decision" (see Schedule 1 for an explanation of this term) may appeal the decision to the Supreme Court. [6]

If your NCAT decision is an interlocutory decision, the Supreme Court's leave is required before the appeal will be heard. (See the Glossary for the meaning of "interlocutory decision".) In the case of any other type of decision, you are entitled to appeal if your decision raises a question of law (see Part 2 for the meaning of this term), but you will require leave if it does not. [7]

Part 4.2 explains the principles the Court will apply in considering the grant of leave.

4.1.2 Your NCAT decision is an external appeal decision

If your NCAT decision is an external appeal decision (see Schedule 1 for an explanation of this term), you may, with the leave of the Supreme Court, appeal to the Supreme Court on a question of law. Part 4.2 explains the principles the Court will apply in considering the grant of leave.

4.1.3 Your NCAT decision imposes a civil penalty

A person on whom a civil penalty has been imposed by the Tribunal in proceedings in the exercise of its enforcement or general jurisdiction may appeal on a question of law to:

The time limit for an appeal to a court is generally 28 days from the date of the decision.

When an application is made to the Supreme Court to appeal a Guardianship Division decision, the decision is stayed pursuant to clause 14(5) of Schedule 6 of the *Civil and Administrative Tribunal Act.*

- The Supreme Court (if the Tribunal was constituted by one or more senior judicial officers); or
- Otherwise - the District Court.[8]

4.1.4 Certain Administrative and Equal Opportunity Division decisions

A party to proceedings in which any of the following decisions is made may appeal to the Supreme Court on a question of law against the decision:[9]

- A decision by the Administrative and Equal Opportunity Division for the purposes of the *Child Protection (Working With Children) Act 2012* (NSW)*;*
- A decision by the Administrative and Equal Opportunity Division for the purposes of the *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW).

A party to proceedings in which a decision by the Administrative and Equal Opportunity Division is made for the purpose of lands legislation[10] may appeal to the Land and Environment Court against the decision.[11]

4.1.5 You wish to appeal a decision of the Appeal Panel on an internal appeal

If you have already appealed your NCAT decision to the Appeal Panel, and you are dissatisfied with the Appeal Panel's decision, you may, with the leave of the Supreme Court, appeal to the Supreme Court on a question of law: s 83(1), *Civil and Administrative Tribunal Act*. It will be necessary to identify a question of law in the Appeal Panel's decision. Part 4.2 explains the principles the Court will apply in considering the grant of leave.

4.2 Principles relevant to the grant of leave to appeal to a court

In many instances when applying to a court to appeal from an NCAT decision, you will need leave to appeal. The court to which you are appealing will decide whether to grant you leave. Only if leave is granted will the court proceed to consider your appeal.

You should note that there are many considerations relevant to the grant of leave to appeal to a court, but some of the factors which the court may take into account are:

- In *John Maiolo t/a M & N Peninsular Kitchens & Joinery v Chiarelli* [2017] NSWSC 982, Davies J said that a party seeking leave to appeal from the NCAT to the Supreme Court must point to something more than error (at [29]). Davies J also approved a statement that, where small

claims are involved, “it is important that there be early finality in determination of litigation” (at [30]-[32]).
- An applicant for leave to appeal must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at: *Zelden v Sewell* [2011] NSWCA 56 at [22].
- The Court generally will not grant leave to appeal if the issue on which the appeal is founded was not raised before the original decision-maker: *Abdel-Messih v Marshall* [2018] NSWSC 648 at [48].

There may be an error of law if the Appeals Panel does not respond to a substantial, clearly articulated argument advanced by a party in a case.

4.3 How to identify a question of law in an appeal to a court

The same principles which have already been outlined in this Guide for the identification of a question of law in the Appeal Panel apply to proceedings in a court. The following is a case example of an appeal to a court from the NCAT.

John Maiolo t/a M & N Peninsular Kitchens & Joinery v Chiarelli [2017] NSWSC 982

The Appeal Panel had made orders for the appellant to install a kitchen, but failed to make orders that the respondents pay the price as previously agreed. The appellant’s solicitors wrote to the Appeal Panel requesting assistance to address this, but did not receive a response from the Appeal Panel.

On appeal, the Supreme Court held that the Appeal Panel, by failing to respond to the appellant’s correspondence, had failed to respond to a substantial, clearly articulated argument, or had failed to address the substance of the applicant’s argument, and had thereby denied procedural fairness to the appellant: at [43]-[44]. Therefore, an error of law had occurred.

4.4 How is an application made?

You will need to check the website of the relevant court, or telephone the Registry, in order to obtain the form. Contact details are contained at the back of this Guide.

There will be fees for filing your appeal at court.

The time limit for an appeal to a court is generally 28 days from the date of the decision (Uniform Civil Procedure Rules 2005 (NSW), rule 50.3). The enabling legislation in each case also must be checked for time limits.

5. CAN YOU SEEK JUDICIAL REVIEW?

5.1 The Supreme Court can conduct judicial review of all kinds of decisions

Judicial review is a process by which the Courts, usually the Supreme Court of New South Wales, may review the decisions of NCAT and its Appeal Panel. Judicial reviews are normally heard by one or more judges of the relevant Court.

Unlike the Appeal Panel, when exercising the power of judicial review, the Court's powers are significantly limited. Generally, the Court only has power to review the decision below for what is called a "jurisdictional" or "legal error" – essentially, some error of law or process which means that the decision-maker was acting outside the limits of their authority, or failed to comply with a particular procedure.

When exercising the power of judicial review, courts will not (and cannot) review the merits of the decision, or whether it was the "right" one in the circumstances.

Ordinarily, judicial review decisions are made on the basis of the material that was before the original decision-maker. It is only in very exceptional cases (usually, where it is argued that the process before the original decision-maker was unfair) that new evidence will be considered by the Court.

In the event that the Court finds that a legal error has been made out, the Court's powers are limited. It may only:

- quash, or set aside the decision below;
- prohibit any further action being taken in regards to the decision below;
- order certain action to be taken in relation to the decision below;
- state what the correct interpretation of the law is, or what the rights of the parties might be; or
- return the matter to the body below for reconsideration.

If no clear legal error can be identified by the Court, the application for judicial review will be dismissed and the original decision will stand.

Importantly – the Court does **not** have the power simply to "remake" the decision below, whether by making a different decision or by varying the decision below.[12] If it is satisfied that an error is made out, the Court will simply return the matter to NCAT or the Appeal Panel for further consideration.

It should also be noted that the Court has a discretion whether to grant any remedy. Accordingly, even if you can

demonstrate some sort of error, the Court may refuse to grant any remedy (e.g. if it would be futile to do so, or the error didn't affect the decision).[13]

Relief is also unlikely to be granted if you still have another avenue of appeal available to you (even if that avenue requires you to apply for leave).[14]

5.2 How is an application made?

The ordinary mechanism for applying for judicial review in the Supreme Court of New South Wales is by filing a summons seeking relief under section 69(1) or section 69(3) of the *Supreme Court Act 1970* (NSW). The powers to grant relief referred to in that section are sometimes called the "inherent jurisdiction" of the Supreme Court. You can obtain the Summons (Judicial Review) form from the website http://www.ucprforms.justice.nsw.gov.au/, or contact the Supreme Court (details are at the back of this Guide).

The Supreme Court will not ordinarily grant a remedy under section 69 if there is another equally effective and convenient remedy. If the Supreme Court decides that it has the power to hear the application, the Supreme Court has a range of procedural powers, including the power to "stay" the decision which is the subject of the application for judicial review.[15] A "stay" is an order stopping the operation of the NCAT decision for a limited period of time.

The time limit for an appeal to a Court is generally 3 months from the date of the decision (Uniform Civil Procedure Rules 2005 (NSW), rule 59.10).

5.3 Examples of "jurisdictional error" by the NCAT

In preparing an application for judicial review, it is necessary to identify "jurisdictional error" in the NCAT's decision. Importantly, not all errors of law are jurisdictional errors. A jurisdictional error can be thought of as a particularly serious error of law. The High Court has said that if an administrative tribunal "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error".[16] The following case studies will help you to consider whether your NCAT decision might be affected by this special kind of error.

Allen v TriCare (Hastings) Pty Ltd [2015] NSWSC 416

In the original NCAT proceedings, the NCAT made orders terminating residential site agreements relating to six dwellings at a holiday park operated by TriCare (Hastings) Pty Ltd. The *Residential Parks Act 1998* (NSW)[17] at the time provided that the Tribunal must not make such an order unless satisfied (relevantly) that compensation for the cost of relocating the dwelling had been determined. In its reasons, the NCAT did not expressly state that it was so satisfied: at [50]. Nor did the NCAT purport to determine an amount of compensation that answered that description: at [50]. The Supreme Court held that, because the NCAT did not expressly state that it was satisfied that compensation had been determined, the power in section 113(3A)(a) was not engaged, and the NCAT's orders terminating the agreements were affected by jurisdictional error. The Supreme Court ordered that the termination orders be quashed.

The Owners - Strata Plan No 13631 v McGrath (No 1) [2016] NSWSC 1929

In *The Owners - Strata Plan No 13631 v McGrath (No 1)*, the Supreme Court held that the Tribunal's decision was affected by jurisdictional error because the Tribunal had purported to make a costs order under section 204 of the *Strata Schemes Management Act 1996* (NSW). That section provides that the Tribunal has power to make a costs order if a pecuniary penalty order had been made. In this instance, that had not occurred: at [14]. The Court doubted whether the Tribunal had any power at all to make costs orders in the circumstances, but it was not necessary to decide that question. The Supreme Court quashed the order.

Navazi v New South Wales [2015] NSWCA 308

The Tribunal made an order terminating a residential tenancy agreement for breach by the tenant. It was a precondition for the exercise of that power that the Tribunal was satisfied that the tenant's breach was sufficient to justify termination of the agreement. The Court of Appeal did not have to decide whether the Tribunal had committed jurisdictional error. (This means that the following statements are "*obiter*" and are not a binding part of the law. However, they would have persuasive value.) If it *had* been necessary to decide, Sackville JA would have held that the decision was affected by jurisdictional error because the Tribunal had formed its satisfaction on the basis of an erroneous understanding of the effect of the cancellation of a rental subsidy: at [60]. The Court of Appeal said that an opinion as to the seriousness of the tenant's breach cannot

be based on a wrong calculation of arrears: this was "an extraneous and legally flawed consideration": at [60].

5.4 Exception to the jurisdictional error requirement: Certiorari for error of law on the face of the record

There is one exception to the rule that "jurisdictional error" is required for the Supreme Court's intervention. The exception is that the Supreme Court has a special power to grant certiorari for an "error of law" that appears "on the face of the record" of proceedings in the NCAT.

Certiorari is a legal term for a type of order which can be made by a court to quash (or overturn) a decision.

"Error of law" has the same meaning as a "question of law", which is a term explained in Part 2.2 of this Guide. The term "face of the record" is a technical term, which means: the documentation originating the application; the NCAT's orders; and the NCAT's reasons. Therefore, if you can show that an "error of law" appears in the NCAT's reasons or orders, this remedy may be available to you.

You may also be able to seek judicial review if there is an "error of law" in the NCAT's reasons or orders.

SAMPLE GROUNDS OF APPEAL

Consumer and Commercial Division	
INSTEAD OF ...	YOUR GROUND OF APPEAL COULD SAY ...
I think NCAT was wrong when it found me to be a 'lodger', because I think I'm covered by the *Residential Tenancies Act.*	What is the proper meaning of the phrase 'agreement under which a person boards', in section 8(1)(c) of the *Residential Tenancies Act?*
NCAT was wrong when it found that my building costs were not reasonable.	NCAT made an error of law in interpreting the contract to mean that my costs had to be reasonable.
NCAT was wrong to find that the dividing fence was solely the swimming pool owner's responsibility.	NCAT made an error of law in concluding that the *Dividing Fences Act* did not apply.
Administrative and Equal Opportunity Division	
INSTEAD OF ...	YOUR GROUND OF APPEAL COULD SAY ...
NCAT was wrong to find that I was not a proper person to hold a licence.	NCAT made an error of law by interpreting the *Firearms Act* incorrectly.
NCAT was wrong to find that my possession of firearms meant I should not be allowed to hold public displays of firearms.	NCAT made an error of law by taking into account an irrelevant consideration.
NCAT was wrong to vary the banning order.	NCAT made an error of law by treating a non-mandatory consideration as mandatory.
Guardianship Division	
INSTEAD OF ...	YOUR GROUND OF APPEAL COULD SAY ...
NCAT made the wrong decision about access.	NCAT made an error of law by failing to take into account the factors stipulated by the statute.
NCAT was wrong to find that there was a conflict of financial interest.	NCAT made an error of law by failing to give an adequate explanation of its reasoning process.
Occupational Division	
INSTEAD OF ...	YOUR GROUND OF APPEAL COULD SAY ...
NCAT was wrong to impose a caution.	NCAT's reasons do not disclose the reasons for imposing a caution.

GLOSSARY

"**Civil penalty**" means a monetary or pecuniary penalty that is imposed on a person (except as punishment for an offence) for a contravention of either a provision of legislation or an order or other decision of a person or body: section 4, *Civil and Administrative Tribunal Act.*

"**Interlocutory decision**" of the Tribunal means a decision made by the Tribunal under legislation concerning any of the following (see section 4, *Civil and Administrative Tribunal Act*):

(a) the granting of a stay or adjournment;

(b) the prohibition or restriction of the disclosure, broadcast or publication of matters;

(c) the issue of a summons;

(d) the extension of time for any matter (including for the lodgment of an application or appeal);

(e) an evidential matter;

(f) the disqualification of any member;

(g) the joinder or misjoinder of a party to proceedings;

(h) the summary dismissal of proceedings;

(h1) the granting of leave for a person to represent a party to proceedings; or

(i) any other interlocutory issue before the Tribunal.

What is an appeal "as of right"?

An internal appeal from a final decision of the Tribunal may be made "as of right" on any question of law: section 80(2), *Civil and Administrative Tribunal Act*.

The phrase "as of right" means that the permission (leave) of the Appeal Panel is not required. You are entitled to an appeal on a question of law from a general or administrative review jurisdiction decision without asking for the permission of the Appeal Panel.

What is an internal appeal?

An internal appeal is an appeal to the Appeal Panel, which is part of the NCAT.

Importantly, internal appeals to NCAT's Appeal Panel are not an opportunity to "re-run" the first hearing, or an opportunity to have your case heard afresh.

This means that the NCAT Appeal Panel generally does not permit parties to rely upon evidence or materials which were not put before the original Tribunal. Additionally, parties are not automatically allowed to be represented by a lawyer before the Appeal Panel, unless they were allowed to be represented by a lawyer before the Tribunal below. However, the Appeal Panel may depart from these general rules and allow fresh evidence, or legal representation, if it wishes.

If the Appeal Panel does find that the Tribunal made some kind of error, the Appeal Panel has a wide range of powers available to it. For example, the Appeal Panel may:

- Allow the appeal;
- Dismiss the appeal;
- Confirm the decision below;
- Set aside the decision below;
- Vary the decision below; or

- Quash or set aside the decision below and send the matter back for re-determination.

In doing so, the Appeal Panel *in effect* occupies the same position, and exercises all the same powers, as the original Tribunal. It also has the power to refer questions of law to the Supreme Court for resolution, either at the request of the parties or at its own motion.

The decisions of the Appeal Panel are generally accepted as being binding on Tribunal Members sitting and persuasive to later Appeal Panels.

Decisions of the Appeal Panel may be further appealed to the Supreme Court of NSW or challenged by way of judicial review.

What is the Appeal Panel?

The NCAT Appeal Panel is an internal appeals body, formed within NCAT to hear appeals against decisions made by the Tribunal. It is usually made up of two to three members drawn from across NCAT's membership. These appointments are based on experience and expertise of the Members, their workloads, and the skills required in the particular case.

Often the NCAT Appeal Panel will hear matters with both parties present and making oral argument. However, the Appeal Panel may decide to deal with a matter "on the papers". This means that the Appeal Panel will make its decision based on the written material before it, and without any further oral hearing. Such a process may be adopted if both the parties consent, or if the Appeal Panel is not satisfied that an oral hearing is necessary.

CONTACTS AND FURTHER INFORMATION

NCAT
Phone: 1300 006 228
Website: www.ncat.nsw.gov.au/
Address: Different for each Registry: see www.ncat.nsw.gov.au/Pages/contact_ncat.aspx

Supreme Court of NSW
Phone: 1300 679 272
Website: www.supremecourt.justice.nsw.gov.au/
Address of Sydney Registry: Level 5, Law Courts Building, 184 Phillip Street, Sydney.

District Court of NSW
Phone: 1300 679 272
Website: www.districtcourt.justice.nsw.gov.au/
Address of Sydney Registry: Level 4 John Maddison Tower
86 Goulburn Street, Sydney NSW 2000

Land and Environment Court of NSW
Phone: + 61 2 9113 8200
Website: www.lec.justice.nsw.gov.au/
Address of Sydney Registry: Level 4, 225 Macquarie Street,
Windeyer Chambers, Sydney NSW 2000

LEGAL RESOURCES

Legal Aid NSW
Website: www.legalaid.nsw.gov.au/

Community Legal Centres NSW
Website: www.clcnsw.org.au/

LawAccess NSW
Website: www.lawaccess.nsw.gov.au/
Phone: 1300 888 529

SCHEDULE 1

Your rights of appeal in relation to your NCAT decision will be determined by the category of your NCAT decision. The four categories of decision are: general decisions; enforcement decisions; external appeal decisions; and administrative review decisions.

Most NCAT decisions are "general" decisions. However, your NCAT decision might fall into one of the other three categories.

IF:
Your NCAT decision is an **enforcement** or **external appeal** decision.

THEN:
No internal appeal to the Appeal Panel is available from your NCAT decision.
You may be able to have the NCAT decision set aside, if you apply within 7 days. See Part 1 of this Guide: *Setting aside or varying a decision*.
You may be able to appeal to a court. See Part 4 of this Guide: *Can you make an appeal to the Local Court, District Court or Supreme Court?*

IF:
Your NCAT decision is an **administrative review** or **general** decision.

THEN:
You may be able to have the NCAT decision set aside, if you apply within 7 days. See Part 1 of this Guide: *Setting aside or varying a decision*.
Internal appeal to the Appeal Panel is likely to be available from your NCAT decision. *However, you should check Schedule 1 to find out whether there is an exclusion.* If there is no exclusion, see Part 2: *Making an internal appeal to the Appeal Panel*.
You may be able to appeal to a court. See Part 4 of this Guide: *Can you make an appeal to the Local Court, District Court or Supreme Court?*

Use this Schedule to help you to determine into which of the following four categories **your NCAT decision** falls. You must also check the list of exclusions which applies to each Division: see section 1.3 below. If you are unsure whether you can make an internal appeal after checking section 1.2 and section 1.3, you should seek legal advice.

1.2 The four categories of NCAT decision

1.2.1 Enforcement jurisdiction

The NCAT's enforcement jurisdiction is comprised of the functions of the Tribunal when dealing with an alleged or apparent contempt of the Tribunal and when dealing with an application under s 77 of the *Civil and Administrative Tribunal Act* in relation to a contravention of a civil penalty provision of the *Civil and Administrative Tribunal Act.* If your NCAT decision concerns:

- contempt of the Tribunal; or
- a civil penalty,

it is likely to be an enforcement jurisdiction decision.

The legislation provides that a decision made in the exercise of the enforcement jurisdiction cannot be appealed to the Appeal Panel. You may be able to appeal to the District Court or the Supreme Court or seek judicial review in the Supreme Court.

Examples of decisions by the NCAT in the exercise of the enforcement jurisdiction are:

- The hearing of an application for a civil penalty order for contravention of section 72 of the *Civil and Administrative Tribunal Act* (see, generally, *The Owners - Strata Plan 82306 v Anderson* [2017] NSWCATCD 85).
- The hearing of an application for an order in relation to contempt of the Tribunal.

1.2.2 External appeal jurisdiction

If you have brought proceedings in the NCAT based on legislation which gives you a right of "appeal" from a decision of some other body, it is likely that your decision is an external appeal decision. You must check the legislation which confers power on the NCAT to make the decision which constitutes your NCAT decision. As a general rule, if the legislation provides than an *appeal* may be made to the NCAT, the NCAT is likely to be exercising external appeal jurisdiction (see below). If the legislation provides for a *review,* the NCAT is likely to be exercising administrative review jurisdiction.

For example, in *CTG v NSW Department of Education, Early Childhood and Care Directorate* [2017] NSWCATAD 60, the NCAT concluded that it was conducting a review, not an external appeal, noting that the legislation which gave power to the NCAT used the phrase "external review".

An NCAT decision in the exercise of the external appeal jurisdiction cannot be appealed to the Appeal Panel. You may be able to appeal to the District Court or the Supreme Court (see Part 5 of this Guide) or seek judicial review in the Supreme Court.

Examples of decisions by the NCAT in the exercise of the external appeal jurisdiction are:

- An appeal from an assessment of notional carrying capacity of land for the purpose of levying rates under the *Local Land Services Act 2013* (NSW) (the right of appeal to the NCAT may be exercised only by the owner or occupier: *Local Land Services Regulation 2014* (NSW), reg 20).[19]
- An appeal from a decision by a health profession council to impose conditions on a health practitioner's registration (*Health Practitioner Regulation National Law* (NSW), s 159(1)) (which will be an appeal by way of a new hearing, and fresh evidence may be given: *Health Practitioner Regulation National Law* (NSW), section 159(2)).[20]

1.2.3 Administrative review jurisdiction

The NCAT has administrative review jurisdiction if the legislation under which it makes orders provides for an application to be made for an administrative review under the *Administrative Decisions Review Act 1997* (NSW): see section 30(1), *Civil and Administrative Tribunal Act;* section 9, *Administrative Decisions Review Act 1997* (NSW). Also, in *CTG v NSW Department of Education, Early Childhood and Care Directorate* [2017] NSWCATAD 60 at [18], the NCAT concluded that it was exercising administrative review jurisdiction, even though the enabling legislation did not make any reference to the *Administrative Decisions Review Act 1997,* because the enabling legislation used the phrase "external review".

A party can generally appeal to the Appeal Panel from an NCAT decision in the exercise of the administrative review jurisdiction: s 32(1)(a), *Civil and Administrative Tribunal Act.* Some exclusions are set out in section 1.3 below.

Examples of decisions by the NCAT in the exercise of the administrative review jurisdiction are:

- A review of a decision to make an interim prohibition order

or prohibition order in respect of a health practitioner (*Health Care Complaints Act 1993* (NSW), section 41C).

- A review of a decision by the NSW Architects Registration Board to refuse a person full registration as an architect (*Architects Act 2003* (NSW), section 31(1)(a)).
- A review of a recommendation by the NSW Education Standards Authority that registration of a non-government school be refused, not renewed, or cancelled (*Education Act 1990* (NSW), s 107(1)(a)-(c)) (only certain persons may apply to the NCAT for such review: section 107(2)).
- A review of a decision of the Commissioner for Fair Trading to direct a landlord to appoint a landlord's agent to manage a tenancy (*Residential Tenancies Act 2010* (NSW), section 207) (only a landlord may apply to the NCAT for such review).

Special rule for Guardianship Division decisions
If your NCAT decision is an administrative review decision made by the Guardianship Division, you may choose to appeal *either* to the Appeal Panel *or* to the Supreme Court.[21] Appeals to the Supreme Court are discussed in Part 4 of this Guide.

1.2.4 General jurisdiction

The last category comprises every decision which does not fall into the above categories. The NCAT has general jurisdiction if legislation other than the *Civil and Administrative Tribunal Act* or the procedural rules enables the Tribunal to make the decision or exercise the function; and if the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal: section 29(1), *Civil and Administrative Tribunal Act.*

A party can generally appeal to the Appeal Panel from an NCAT decision in the exercise of the general jurisdiction: section 32(1)(a), *Civil and Administrative Tribunal Act.* Some exclusions are set out in section 1.3 below.

Examples of decisions by the NCAT in the exercise of the general jurisdiction are:

- An order to restrain a breach of a residential tenancy agreement (*Residential Tenancies Act 2010* (NSW), section 187(1)(a)).[22]
- An order giving effect to a determination under the *Agricultural Tenancies Act 1990* (NSW) (see *Agricultural Tenancies Act 1990* (NSW), section 21(1)(a)).[23]
- An order to restrain a resident or operator of a retirement village from taking any action in breach of a village contract or village rule: *Retirement Villages Act 1998* (NSW), section 128(1)(c).[24]

- An order to restrain a person from making unmeritorious access applications under the *Government Information (Public Access) Act 2009* (NSW) (see *Government Information (Public Access) Act 2009* (NSW), section 110).[25]

- Any other decision which is not an enforcement, external appeal or administrative decision.

Special rule for Guardianship Division decisions
A general jurisdiction decision made by the Guardianship Division may be appealed *either* to the Appeal Panel *or* to the Supreme Court.[26] Appeals to the Supreme Court are discussed in Part 4 of this Guide.

1.3 Limitations upon internal appeals from each Division

There are some specific limitations upon internal appeals which apply in each Division. Before proceeding with an application for an internal appeal, you should check this list of exclusions to see if your ability to make an internal appeal is affected.

1.3.1 Administrative and Equal Opportunity Division

The following decisions cannot be internally appealed:[27]

- A decision of the Tribunal for the purposes of section 96 of the *Anti-Discrimination Act 1977* (NSW) with respect to the granting of leave for the purposes of that section;
- A decision by the Administrative and Equal Opportunity Division for the purposes of the *Child Protection (Working With Children) Act 2012* (NSW). However, this may be appealed to the Supreme Court on a question of law: see Part 4 of this Guide.
- A decision by the Administrative and Equal Opportunity Division for the purposes of the *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW). However, this may be appealed to the Supreme Court on a question of law: see Part 4 of this Guide;
- A decision by the Administrative and Equal Opportunity Division for the purposes of the lands legislation. However, this may be appealed to the Land and Environment Court;[28]
- A determination of the Tribunal for the purposes of Part 7 of the *Native Title (New South Wales) Act 1994* (NSW);
- An administrative review decision for the purposes of section 21 of the *Plant Diseases Act 1924* (NSW);
- An administrative review decision for the purposes of section 51 of the *Victims Rights and Support Act 2013* (NSW).

An internal appeal against an interim order of the Tribunal

under the *Anti-Discrimination Act 1977* (NSW) may only be made with the leave of the Appeal Panel, even if it is on a question of law.[29]

1.3.2 Consumer and Commercial Division

An internal appeal from a decision by the Consumer and Commercial Division may only be made on a question of law and not on any other grounds if:[30]

- The appellant is a corporation and the appeal relates to a dispute in respect of which the Tribunal had jurisdiction only because of Schedule 3 of the *Credit (Commonwealth Powers) Act 2010* (NSW);
- The appeal is an appeal from an order for the termination of a tenancy under the *Residential Tenancies Act 2010* and a warrant of possession has been executed in relation to that order.

1.3.3 Guardianship Division

As at November 2019 there are no exclusions from the right to an internal appeal from a general jurisdiction decision of the Guardianship Division.[31] Note that the making of an appeal to the Supreme Court precludes an internal appeal in respect of the same decision (while the Supreme Court appeal is on foot).[32]

1.3.4 Occupational Division

The following decisions cannot be internally appealed:[33]

- A decision for the purposes of the *Aboriginal Land Rights Act 1983* (NSW) other than a decision for the purpose of section 198 or section 199 of that Act;
- A decision for the purposes of the *Architects Act 2003* (NSW);
- A decision for the purposes of the *Building Professionals Act 2005* (NSW);
- A decision for the purposes of the *Health Practitioner National Law* (NSW) (other than a decision for the purposes of clause 13 to Schedule 5F to that Law)*;*
- A decision for the purposes of the *Legal Profession Uniform Law* (NSW);
- A decision for the purposes of the *Local Government Act 1993* (NSW) other than a decision for the purposes of section 469 of that Act not to conduct proceedings into a complaint or a decision for the purposes of section 470 of the Act to determine proceedings into a complaint without a hearing;
- A decision for the purposes of the *Surveying and Spatial*

ENDNOTES

1. *Kaye v Health Care Complaints Commission* [2018] NSWCATAP 146 at [10].
2. The original decision to revoke had been made under section 24(2). The Tribunal, in exercise of a reviewing function, was empowered to make the correct and preferable decision on the material before it: s 63, *Civil and Administrative Tribunal Act.*
3. The Appeal Panel granted leave to appeal on this ground in *Thiessen v Poolsurf Qld Pty Ltd* [2015] NSWCATAP 250. There the Tribunal had failed to make specific findings about a critical matter (the manner in which work was undertaken). The Appeal Panel held that there was a significant possibility that a different result would have followed if that finding had been made, and therefore that a substantial miscarriage may have occurred: at [38]; [41].
4. See, for example, *Hayes v Williams* [2015] NSWCATAP 268 at [16] (leave to appeal granted because the Tribunal had used the wrong percentage of floor area to calculate the a rent reduction; the percentage was "a central aspect of the reasoning" and the Appeal Panel described it as "a clearly wrong factual premise").
5. The Appeal Panel has held that "new evidence" is not the same as "fresh evidence": see *Claydon v NSW Land and Housing Corporation* [2015] NSWCATAP 192 at [25]-[28]. In that case, the Appeal Panel held that a decision by prosecuting authorities to withdraw charges against the appellant of supply of prohibited drugs was "significant new evidence" in relation to the termination of the appellant's NSW Housing tenancy, even though it occurred after the Tribunal's termination decision: at [30].
6. *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 6, clause 12(1).
7. *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 6, clause 14(1).
8. See: *Civil and Administrative Tribunal Act,* sections 82(3) and 83(2).
9. *Civil and Administrative Tribunal Act,* Schedule 3, clause 17.
10. "Lands legislation" means: the *Agricultural Industry Services Act 1998* (NSW)*;* the *Australian Oil Refining Agreements Act 1954* (NSW)*;* the *Commons Management Act 1989* (NSW)*;* the *Crown Land Management Act 2016* (NSW)*;* the *Local Land Services Act 2013* (NSW)*;* the *Port Kembla Inner Harbour Construction and Agreement Ratification Act 1955* (NSW)*;* and the *Water Act 1912* (NSW): see *Civil and Administrative Tribunal Act,* Schedule 3, clause 1.
11. *Civil and Administrative Tribunal Act,* Schedule 3, clause 18.
12. See e.g. *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1 at [110].
13. See, e.g., *Transgrid v Siemens* [2004] NSWSC 87 at [91]-[97].
14. *Quach v Health Care Complaints Commission* [2015] NSWCA 63 at [51]. However, a case where the Supreme Court quashed a first-instance NCAT decision despite the fact that not all appeal avenues had been pursued is *Allen v TriCare (Hastings) Pty Ltd* [2015] NSWSC 416: see [56]-[64].
15. See *Quach v Health Care Complaints Commission* [2015] NSWCA 187 at [11].
16. *Craig v South Australia* [1995] HCA 58 at [14] (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
17. Section 113(3A).
18. See *Allen v TriCare (Hastings) Pty Ltd* [2015] NSWSC 416 at [37].
19. In *Buchanan v Local Land Services North West* [2018] NSWCATAD 200, the external appeal was heard in the Administrative and Equal Opportunity Division.
20. In *Ismail v Medical Council of New South Wales* [2014] NSWCATOD 111, the external appeal was heard in the Occupational Division.
21. *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 6, clause 12(1).
22. See *Perez v NSW Land and Housing Corporation* [2015] NSWCATCD 50 at [3]. The application was heard in the Consumer and Commercial Division.
23. See *McCann v Coffs Harbour City Council* [2015] NSWCATCD 150 at [3]. The application was heard in the Consumer and Commercial Division.
24. An application for such an order was allocated to the Consumer and Commercial Division in *Trustees of Catholic Aged Care Sydney v Murphy* [2017] NSWCATCD 46.
25. See *Pittwater Council v Walker* [2015] NSWCATAD 34 at [11]-[12], where the NCAT concluded that in determining an application for restraint the Tribunal was carrying out a "discretionary and somewhat supervisory role", which was properly characterised as an exercise of general jurisdiction, rather than an exercise of administrative review jurisdiction. The application was heard in the Administrative and Equal Opportunity Division.
26. *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 6, clause 12(1).
27. See *Civil and Administrative Tribunal Act,* Schedule 3, clause 15.
28. See note 10 above for the meaning of "lands legislation"
29. *Civil and Administrative Tribunal Act,* Schedule 3, clause 16.
30. *Civil and Administrative Tribunal Act,* Schedule 4, clause 12(2).
31. See generally *Civil and Administrative Tribunal Act,* Schedule 6.
32. *Civil and Administrative Tribunal Act,* Schedule 6, clause 12(4).
33. See *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 5, clause 29.

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