



Health Professional Councils Authority

LEGAL PRACTICE NOTE

No. 3, 2014

SECTION 175 APPEALS

Introduction

This practice note is designed to provide background information about how these appeals operate in NSW. For more detailed information about relevant Tribunal processes in NSW regard should be had to the NCAT practice direction in this area, which can be accessed at [insert link]. Legislative references in this practice note refer to the Health Practitioner Regulation National Law (NSW), unless otherwise specified.

Section 175 appeals are appeals against a National Board decision concerning a person's registration. The person bringing the appeal (the appellant) may be a registered health practitioner, a registered student or a person seeking registration as a health practitioner or student. The right to appeal only arises when the applicant's application has been determined by the relevant National Board [s. 175A]. The other party to the appeal is the relevant National Board who made the decision (the respondent).

Appropriate Tribunal for hearing section 175 appeals in NSW

In NSW the appropriate responsible tribunal under the Health Practitioner Regulation National Law (NSW) is the Civil and Administrative Tribunal (NCAT).

NCAT was established by the *Civil and Administrative Tribunal Act 2013*. Schedule 5 of that Act establishes an Occupational Division, which exercises the functions of a Tribunal under the Health Practitioner Regulation National Law (NSW). Within the Occupational Division of the Tribunal there is a separate Health Practitioner Division List (clause 10) with a List Manager (clause 11) who is responsible for the overall management of matters in the List. The List Manager routinely presides at directions hearings.

How to determine if NCAT has jurisdiction to hear the appeal?

A section 175 appeal will be heard by NCAT if:

- the health practitioner's principal place of practice is located in NSW,
- the student is undertaking an approved program of study or clinical training in NSW.
- where the person is not a registered practitioner or a registered student, if they live in NSW or if the relevant National Board has nominated NCAT as the responsible tribunal.

If the relevant practice/ training location or domicile is in another State or Territory, the appeal should be made to the appropriate responsible tribunal in that State or Territory.

Where to lodge the appeal to NCAT

The appeal must be lodged directly with NCAT. The Occupational Division registry of NCAT is located at.

Level 10, John Maddison Tower
86-90 Goulburn Street
SYDNEY NSW 2000

Enquiries of the Occupational Division Registry can be by phone on **1300 006 228** or email to: **od@ncat.nsw.gov.au**.

After lodgement registry staff will contact the parties about a date and time for the first directions listing before a Principal Member of NCAT. The purpose of this initial listing is to determine a timetable for the serving of relevant evidence and to determine an appeal hearing date, if appropriate.

The Occupational Division Registry can list a number of cases on the same day for directions. A list of the relevant cases for directions is posted on the day on Level 10. The list will also indicate in which room the directions hearing will occur. If a party elects to attend the direction hearing by telephone they should contact the other party and the registry well before the directions hearing date to ascertain if there are any particular requirements.

Each directions listing as well as the appeal proceedings is sound recorded.

Nature of appeal under section 175

The nature of an appeal under section 175 is not specified in the Health Practitioner Regulation National Law (NSW). This matter has been considered in decisions of the former Nurses and Midwives Tribunal of NSW¹ and the former Medical Tribunal of NSW². Those decisions indicate that the appeals under section 175 are “de novo” i.e. heard anew.

However, observations in a recent NCAT case³ reference a Victoria Court of Appeal decision⁴ discussion about the appeal categories (i.e. *stricto sensu*, an appeal by way of rehearing and an appeal *de novo*) as not being closed and the possibility of a statutory variant or hybrid category.

Outcomes from a section 175 appeal hearing

After hearing the appeal, the Tribunal can take action as set out in section 175C. This action includes:

- Confirming the National Board decision, or,
- Amending the National Board decision or
- Making a substitute decision and in doing so exercising the same powers as the National Board.

¹ *McMahon v Nursing and Midwifery Board of Australia* [2013] NSWMT 4

² *Barratt v Medical Board of Australia* [2012] NSWMT 22

³ *Bova v Pharmacy Council of NSW* [2014] NSWCATOD 40 at paras [26] – [29]

⁴ *Kozanoglu v Pharmacy Board of Australia* [2012] VSCA 295

Costs orders?

The Tribunal also has the power to award costs in section 175 appeal proceedings pursuant to section 175B. The amount of such costs is not fixed and is determined by what the Tribunal considers appropriate having regard to the proceedings. This means that the appellant might be required to pay the legal costs of the National Board's representatives at the appeal hearing, if his/her appeal is unsuccessful. Conversely, the Tribunal may determine that the National Board is to pay the appellant's legal costs for the appeal or that each party is to bear their own costs. Submissions can generally be made to the Tribunal about costs.

National Board involvement in the section 175 appeal proceedings

In NSW, the National Board engages legal representatives, which can also extend to having a barrister at the proceedings. The NSW state office of the Australian Health Practitioner Regulation Agency (AHPRA) provides administrative support for the relevant National Board in these proceedings.

Unrepresented appellants

Frequently, persons making a section 175 appeal are not legally represented. The appellant will need to attend at least one directions listing (depending on the complexity of the case) and the appeal hearing (generally up to one day). At the hearing the appellant could be asked questions by the Tribunal panel and the legal representatives for the National Board.

Written decision

The Tribunal must supply a written statement of its decision to the parties pursuant to section 165M. The statement will include:

- (a) any findings on material questions of fact, and
- (b) any evidence or material on which the findings were based, and
- (c) reasons for the Tribunal's decision.

The Tribunal is also required to provide a written statement of the decision to the relevant Health Professional Council [section 165M (1) (b)]. If the decision imposes conditions on practice, which relate to a practitioner's health or performance or a student's health, they will be monitored by the relevant Health Professional Council in NSW. In many cases the imposed conditions will be published on the publicly available electronic National Register. Tribunal decisions in these appeals are also published on the [Caselaw](#) site.

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NOTE:

This HPCA *Legal Practice Note* (Our Ref.: HP14/5947) has been prepared by legal staff of the Health Professional Councils Authority and is to be read in conjunction with the applicable legislation and any relevant case law. Its content is information not advice and is not a substitute for the provisions of the legislation or relevant case law. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.