Civil and Administrative Tribunal

New South Wales

Case Name:	Wrigley v Owners Corporation SP 53413
Medium Neutral Citation:	[2017] NSWCATAP 100
Hearing Date(s):	10 April 2017
Date of Orders:	5 May 2017
Decision Date:	5 May 2017
Jurisdiction:	Appeal Panel
Before:	Wright J, President M Harrowell, Principal Member R Seiden SC, Principal Member
Decision:	1. The appellant's, Mr Wrigley's, amended notice of appeal in this matter filed on 24 January 2017 is to stand as an application for Tribunal orders under the Strata Schemes Management Act 1996 for an external appeal from an order of an adjudicator. 2. This matter was, and is taken for all purposes to have been, commenced on 20 December 2016. 3. The matter is remitted to the Consumer and Commercial Division to be heard as an external appeal under ss 177 and 181 of the Strata Schemes Management Act 1996 and s 79 of the Civil and Administrative Tribunal Act 2013.
Catchwords:	STATUTORY CONSTRUCTION – whether appeal rights abolished or affected by repeal of the statute creating those rights – effect of transitional provisions of Strata Schemes Management Act 2015 (NSW) on appeal rights under s 177 of Strata Schemes Management Act 1996 (NSW) – Sch 3 Cl 7 operates to preserve appeal right under s 177

APPEAL RIGHTS – whether appeal rights accrue when proceedings are commenced or when an order is made – appeal rights "inhere" from commencement of proceedings

WORDS AND PHRASES – meaning of "proceedings" – meaning of "determined or finalised" – proceedings have been "determined" if a decision or order has been made – proceedings have not been "finalised" before rights of appeal have been exhausted

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW) ss 27, 28, 29, 31, 32, 79, 80, 81
Interpretation Act 1987 (NSW) ss 5, 30
Strata Schemes Management Act 1996 (NSW) ss 150, 170, 171, 172 177, 181
Strata Schemes Management Act 2015 (NSW) s 275; Sch 3 Cll 2, 3, 7, 8, 9

Cases Cited:

ADCO Constructions Pty Ltd v Goudappel (2014) 254 CLR 1; [2014] HCA 18
Amaca Pty Ltd v Cremer (2006) 66 NSWLR 400; [2006] NSWCA 164
Cheney v Spooner (1929) 41 CLR 532; [1929] HCA 12
Clarence v Electricity Commission of New South Wales (1990) 20 NSWLR 1
Colley v Futurebrand FHA Pty Ltd (2005) 63 NSWLR 291; [2005] NSWCA 223
Colonial Sugar Refining Co Ltd v Irving [1905] AC 369
Crawley v The Owners Strata Plan 22481 [1999] NSWSC 950
Dionisatos v Acrow Formwork & Scaffolding Pty Ltd (2015) 91 NSWLR 34; [2015] NSWCA 281
Esber v The Commonwealth of Australia (1992) 174 CLR 430; [1992] HCA 20
Maxwell v Murphy (1957) 96 CLR 261; [1957] HCA 7
Moallem v Consumer Trader and Tenancy Tribunal [2013] NSWSC 1700
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
R v Hamra [2016] SASCFC 130
Robins v Wood (1917) 87 LJ KB 224
Saeed v Minister for Immigration and Citizenship (2010)

	241 CLR 252; [2010] HCA 23 Sunskill Investments Pty Ltd v Townsville Office Services Pty Ltd [1991] 2 Qd R 210 Torrac Nominees Pty Ltd v Karabay (2007) 69 NSWLR 669; [2007] NSWCA 96
Texts Cited:	Oxford English Dictionary, Online Ed
Category:	Principal judgment
Parties:	Matthew Wrigley (Appellant) Owners Corporation SP 53413 (Respondent)
Representation:	D Thomas, Solicitor (Appellant) J Moir, Solicitor (Respondent) Solicitors: James Tuite and Associates (Appellant) Polczynski Lawyers (Respondent)
File Number(s):	AP 16/55243
Decision under appeal:	
Court or Tribunal:	Strata Scheme Adjudicator
Date of Decision:	24 November 2016
Before:	D Ziegler, Strata Scheme Adjudicator
File Number(s):	SCS 16/40001

REASONS FOR DECISION

Effect of this decision

1 In summary, the effect of this decision is that an appeal against any order made by an adjudicator under the *Strata Schemes Management Act 1996* (NSW) is to be dealt with as an external appeal to the Tribunal, within s 79 of the *Civil and Administrative Tribunal Act 2013* (NSW), whether the adjudicator's decision was made before or after the repeal of the *Strata Schemes Management Act 1996* on 30 November 2016.

Introduction

2 The appellant, Mr Wrigley, is the owner of a lot in Strata Plan 53413. The respondent is the Owners Corporation. The Owners Corporation made an application on 6 September 2016 for an order from a Strata Scheme Adjudicator, under s 150 of the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act), that Mr Wrigley's dog, Lola, be removed, and kept away, from the parcel.

3 On 24 November 2016, an adjudicator made the order sought by the Owners Corporation. On 29 November 2016, Mr Wrigley received notice of the adjudicator's decision.

4 On 30 November 2016, the 1996 Act was repealed by s 275 of the *Strata Schemes Management Act 2015* (NSW) (the 2015 Act).

5 On 20 December 2016, Mr Wrigley lodged with the Tribunal a notice of appeal against the adjudicator's decision. Prior to the repeal of the 1996 Act, Mr Wrigley could have lodged an external appeal to the Tribunal against the adjudicator's decision, under ss 177 and 181 of the 1996 Act and s 79 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act). With the repeal of the 1996 Act, Mr Wrigley contended that he could lodge an internal appeal to the Appeal Panel under s 80 of the NCAT Act. He relied on s 30(1)(c) of the *Interpretation Act 1987* (NSW) (the Interpretation Act), the common law and the transitional provisions of the 2015 Act to support this contention. The notice of appeal form used was the form appropriate for an internal appeal not an external appeal. By leave of the Tribunal granted on 10 January 2017, Mr Wrigley filed an amended notice of (internal) appeal on 24 January 2017.

6 In preparing this appeal for hearing, the Appeal Panel determined that it was appropriate to consider first, as a separate question, whether the Appeal Panel could hear and determine the appeal.

7 For the reasons given below, we have concluded that the Appeal Panel cannot hear and determine this appeal. Rather it should be treated as an external appeal under s 79 of the NCAT Act to be heard by a Member sitting in the Consumer and Commercial Division.

Relevant legislative provisions and background

The 1996 Act and the original decision

8 The resolution of disputes and the making of orders concerning the operation and management of strata schemes was the subject of Chapter 5 (ss 123 – 210) of the 1996 Act. Two bodies could make orders or decisions under Ch 5:

(1) the Civil and Administrative Tribunal, NCAT, (or its predecessor, the Consumer, Trader and Tenancy Tribunal, before 2014); and

(2) a Strata Scheme Adjudicator, appointed under s 217 of the 1996 Act.

9 Adjudicators were often also Members of the Tribunal. The Principal Registrar of the Tribunal was responsible for receiving applications under Ch 5 and for the provision of registry support for decision making by adjudicators. Nonetheless, when exercising their functions as Strata Scheme Adjudicators under the 1996 Act, adjudicators were not the Tribunal nor were they exercising the powers of the Tribunal, see for example, *Moallem v Consumer Trader and Tenancy Tribunal* [2013] NSWSC 1700 at [57] to [60].

10 Parts 1, 2 and 3 of Ch 5 made provision for who could make applications and how applications were dealt with prior to being considered by an adjudicator or the Tribunal.

11 Part 4 of Ch 5 (ss 138 – 181) governed the orders that adjudicators could make. Sections 138 – 139 gave adjudicators general powers to settle disputes and rectify complaints. Adjudicators' powers to make specific types of orders were contained in ss 140 – 162. In the present case, the Owners Corporation's application lodged on 6 September 2016 sought an order under s 150 of the 1996 Act which relevantly provided:

> "(1) An Adjudicator may order a person who the Adjudicator considers is keeping an animal on a lot or common property in contravention of the by-laws to cause the animal to be removed from the parcel within a specified time, and to be kept away from the parcel.
>
> (2) An order under subsection (1) ceases to have effect if the keeping of the animal on the lot or common property is subsequently authorised in accordance with the by-laws.
>
> (3) An application for an order under subsection (1) may be made only by an owners corporation, a strata managing agent, the lessor of a leasehold strata scheme, an owner, any person having an estate or interest in a lot or an occupier of a lot.
>
> …"

12 Sections 162A – 176, Div 11 of Pt 4, of the 1996 Act dealt with the processes and powers of an adjudicator when determining an application. Applications were almost invariably dealt on the basis of written submissions and evidence, without an oral hearing, as was permitted under ss 167, 168 and 173. Generally, an adjudicator's order only remained in force for 2 years. Section 172 provided:

> "Except to the extent that the order otherwise provides, an order made by an Adjudicator under this Part (other than an interim order) ceases to have any force or effect on the expiration of the period of 2 years that commences on the making of the order."

13 In the present matter, on 24 November 2016, the adjudicator ordered that:

> "The respondent [Mr Wrigley] is to remove the animal currently kept in lot 2 from the parcel within twenty-eight (28) days and is to ensure the animal is kept from the parcel".

14 Section 210 of the 1996 Act governed when decisions took effect. It provided:

> "**210 Time at which order takes effect**
>
> (1) An order takes effect when a copy of the order is served:
>
> (a) if the order requires a person to do or refrain from doing a specified act, on that person, or
>
> (b) in any other case, on the owners corporation for the strata scheme to which the order relates.
>
> (2) This section does not apply if express provision is otherwise made by this Act or in the order itself."

15 It was not in dispute that a copy of the order was served on Mr Wrigley on 29 November 2016. Thus, the order took effect on 29 November 2016 when it was served.

The 1996 Act and Mr Wrigley's appeal

16 Sections 177 – 181, Div 12 of Pt 4, of the 1996 Act permitted persons affected by an adjudicator's order to appeal against the order. Those sections relevantly provided:

> "**177 Appeal against order of Adjudicator**
>
> (1) Each of the following persons may appeal against an order made by an Adjudicator under this Part:
>
> (a) the applicant for the order,
>
> (b) a person who made a written submission on the application for the order,

(c) a person required by the order to do or refrain from doing a specified act,

(d) in the case of a leasehold strata scheme, the lessor of the strata scheme.

Note.

An appeal under this section is an external appeal to the Tribunal for the purposes of the *Civil and Administrative Tribunal Act 2013*.

…

(3) An appeal must be lodged:

(a) in the case of an appeal against an order dismissing an application—not later than 21 days after the order takes effect, or

(b) in the case of an appeal against any other order:

(i) not later than 21 days after the order takes effect, or

(ii) by leave of the Tribunal (given on sufficient cause being shown why the notice was not lodged within the time limited by paragraph (a))—not later than 90 days after the order takes effect.

(4) Section 41 of the *Civil and Administrative Tribunal Act 2013* does not apply in relation to the periods referred to in subsection (3).

178–180 (Repealed)

181 Determination of appeal from order of Adjudicator

(1) This section applies to the determination by the Tribunal of an appeal from an order of an Adjudicator.

(2) The Tribunal may admit new evidence.

(3) Unless the order appealed against is an interim order, the Tribunal may determine an appeal by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

(4) If the order appealed against is an interim order, the Tribunal may determine the appeal by an order revoking the interim order or dismissing the appeal.

(5) An order made by the Tribunal under subsection (3) has effect, and the provisions of this Act (other than the provisions conferring a right of appeal to the Tribunal) apply to it, as if it were an order made under the same provision as the order appealed against.

(6) Subsection (5) does not exclude an appeal from an order of the Tribunal made under this section."

17 Mr Wrigley, as "a person required by the order to do or refrain from doing a specified act" within s 177(1)(c) of the 1996 Act, could appeal against the adjudicator's order.

18 At 29 November 2016, as the note to s 177(1) correctly identifies, Mr Wrigley's appeal would have been an external appeal to the Tribunal, by virtue of s 31, the definition of "external decision-maker" in s 4(1) of the NCAT Act and ss 177 and 181 of the 1996 Act.

19 On an external appeal under s 177 of the 1996 Act, the Tribunal could admit new evidence, under s 181(2). Since applications before adjudicators were almost invariably determined without an oral hearing, the Tribunal frequently conducted external appeals under s 177 by way of a new hearing, relying on, among other provisions, s 181(2) of the 1996 Act.

20 Under s 177(3) of the 1996 Act, Mr Wrigley's ability to appeal was conditioned on the appeal being lodged within 21 days of the decision taking effect on 29 November 2016. After that time, the Tribunal could grant leave to appeal but only if the appeal was lodged not later than 90 days after the order took effect.

The 2015 Act and the repeal of the 1996 Act

21 The date of commencement for the relevant provisions of the 2015 Act was 30 November 2016. Consequently, on that day, s 275 of the 2015 Act repealed the 1996 Act, including the provisions that established the position of Strata Scheme Adjudicator, empowered them to make orders and permitted persons affected by adjudicators' orders to appeal against them.

22 Immediately prior to the repeal of the 1996 Act, there was an order of an adjudicator in force requiring Mr Wrigley to do a specified act. Consequently under s 177, he had the right to appeal against that order for 21 days after it took effect.

23 Schedule 3 to the 2015 Act contains saving and transitional provisions dealing with the effect of repealing the 1996 Act. The relevant provisions of Sch 3 include:

> "**2 Definitions**
>
> In this Part:
>
> …
>
> **"former Act"** means the *Strata Schemes Management Act 1996*.
>
> **3 General savings**

(1) Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.

(2) This clause does not apply:

(a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation made under this Schedule, or

(b) to the extent that its application would be inappropriate in a particular case.

…

7 Existing proceedings

Any proceedings commenced but not determined or finalised under a provision of the former Act are to be dealt with and determined as if the former Act had not been repealed.

8 Adjudicators

(1) A person who held office as an Adjudicator under the former Act immediately before the commencement of this clause ceases to hold the office on a day appointed by the Secretary, being a day not earlier than the determination or finalisation of all proceedings referred to in clause 7.

(2) (Repealed)

(3) An Adjudicator who ceases to be an Adjudicator under this clause is not entitled to any compensation for loss of office.

9 Existing orders under former Act

An order made by an Adjudicator or a Tribunal under the former Act, and in force immediately before the commencement of this clause, is taken to have been made by the Tribunal under the corresponding provision of this Act.

…".

The Interpretation Act

24 In addition, s 30 of the Interpretation Act deals with the effect of repealing an Act. Section 30 relevantly provides:

"**30 Effect of amendment or repeal of Acts and statutory rules**

(1) The amendment or repeal of an Act or statutory rule does not:

…

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule, or

…

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty,

> and any such penalty may be imposed and enforced, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, as if the Act or statutory rule had not been amended or repealed.
>
> …
>
> (3) This section applies to the amendment or repeal of an Act or statutory rule in addition to, and without limiting the effect of, any provision of the Act or statutory rule by which the amendment or repeal is effected.
>
> (4) In this section, a reference to the amendment or repeal of an Act or statutory rule includes:
>
> (a) a reference to the expiration of the Act or statutory rule,
>
> (b) a reference to an amendment or repeal of the Act or statutory rule effected by implication,
>
> (c) a reference to the abrogation, limitation or extension of the effect of the Act or statutory rule, and
>
> (d) a reference to:
>
> (i) the exclusion from the application of the Act or statutory rule, or
>
> (ii) the inclusion within the application of the Act or statutory rule, of any person, subject-matter or circumstance."

25 The operation of s 30 is, however, limited by s 5(2) of the *Interpretation Act* which relevantly states:

> "(2) This Act applies to an Act … except in so far as the contrary intention appears in this Act or in the Act … concerned."

The types of appeal available under the NCAT Act

26 As explained above, prior to the repeal of the 1996 Act, Mr Wrigley could have lodged an external appeal to the Tribunal, under s 177 of the 1996 Act. Mr Wrigley contended that, after the repeal of the 1996 Act on 30 November 2016, he could lodge an internal appeal to the Appeal Panel against the order made on 24 November 2016. This submission was principally based on cl 9 of Sch 3 to the 2015 Act.

27 Under s 28(2)(c) of the NCAT Act, the Tribunal has two types of appeal jurisdiction:

(1) External appeal jurisdiction, as provided in s 31 of the NCAT Act; and

(2) Internal appeal jurisdiction, as provided in s 32 of the NCAT Act.

28 Internal appeals to the Appeal Panel and external appeals to the Tribunal are different in significant respects.

29 Sections 31 and 32 of the NCAT Act indicate some of the differences. Those sections provide:

> "**31 External appeal jurisdiction of Tribunal**
>
> (1) The Tribunal has external appeal jurisdiction over a decision (or class of decisions) made by an external decision-maker if legislation provides that an appeal may be made to the Tribunal against any such decision (or class of decisions).
>
> (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its external appeal jurisdiction:
>
> (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,
>
> (b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.
>
> (3) An appealable external decision is a decision of an external decision-maker over which the Tribunal has external appeal jurisdiction.
>
> (4) An external appeal is an appeal to the Tribunal against an appealable external decision.
>
> (5) A provision of enabling legislation that provides for a decision of an external decision-maker to be appealed to the Tribunal extends to the following:
>
> (a) a decision made by a person to whom the function of making the decision has been delegated,
>
> (b) if the provision specifies the decision-maker by reference to the holding of a particular office or appointment—a decision by any person for the time being acting in, or performing any of the duties of, the office or appointment,
>
> (c) a decision made by any other person authorised to exercise the function of making the decision.
>
> (6) Nothing in this section permits external appeal jurisdiction to be conferred on the Tribunal by a statutory rule unless the conferral of jurisdiction by such means is expressly authorised by another Act.
>
> **32 Internal appeal jurisdiction of Tribunal**
>
> (1) The Tribunal has internal appeal jurisdiction over:
>
> (a) any decision made by the Tribunal in proceedings for a general decision or administrative review decision, and
>
> (b) any decision made by a registrar of a kind that is declared by this Act or the procedural rules to be internally appealable for the purposes of this section.
>
> (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal jurisdiction:
>
> (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

(3) However, the internal appeal jurisdiction of the Tribunal does not extend to:

(a) any decision of an Appeal Panel, or

(b) any decision of the Tribunal in an external appeal, or

(c) any decision of the Tribunal in proceedings for the exercise of its enforcement jurisdiction, or

(d) any decision of the Tribunal in proceedings for the imposition of a civil penalty in exercise of its general jurisdiction.

(4) An internally appealable decision is a decision of the Tribunal or a registrar over which the Tribunal has internal appeal jurisdiction.

(5) An internal appeal is an appeal to the Tribunal against an internally appealable decision.

(6) Subject to the procedural rules, if a decision of a registrar is an internally appealable decision, the provisions of this Act relating to the making and determination of an internal appeal are taken to apply as if:

(a) any reference to the Tribunal at first instance (however expressed) included a reference to a registrar, and

(b) any requirement concerning the granting of leave to appeal against particular kinds of decisions of the Tribunal or on particular grounds extended to decisions of the same kind made by a registrar or grounds of the same kind."

30 It is also necessary to look at how external and internal appeals are heard and determined in the Tribunal to understand more fully the differences between them.

External Appeals

31 Except in the case of a "designated external appeal" (as defined in s 27(6) of the NCAT Act), external appeals are heard by one or more Division members of the Division to which the function of dealing with the proceedings is allocated, by operation of s 27(1) and, in particular, s 27(1)(d). An appeal under s 177 of the 1996 Act was not a designated external appeal. Further, cl 3(1) of Sch 4 to the NCAT Act allocated the functions of the Tribunal under the 1996 Act to the Consumer and Commercial Division. Thus, a single Member sitting in the Consumer and Commercial Division of the Tribunal could hear Mr Wrigley's appeal, if the 1996 Act had not been repealed.

32 External appeals are governed by s 79 of the NCAT Act and by the enabling legislation that creates the right of appeal. Sections 177 and 181 of the 1996 Act are the relevant enabling legislation provisions. They have been set out above. Section 79 of the NCAT Act provides:

> "(1) An external appeal may be made to the Tribunal by a person entitled to do so under enabling legislation on such a basis or grounds, or in such circumstances, as may be provided by that legislation.
>
> (2) In determining an external appeal, the Tribunal may:
>
> (a) in the case of enabling legislation that specifies the orders that may be made by the Tribunal on the appeal—make any of those orders, or
>
> (b) in any other case—make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:
>
> (i) the appeal to be allowed or dismissed,
>
> (ii) the decision under appeal to be confirmed, affirmed or varied,
>
> (iii) the decision under appeal to be quashed or set aside,
>
> (iv) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
>
> (v) the whole or any part of the case to be reconsidered by the decision-maker whose decision is under appeal, either with or without further evidence, in accordance with the directions of the Tribunal."

33 Under s 79, the permitted grounds of appeal in an external appeal are limited only to those grounds provided in the enabling legislation. There is nothing in ss 177 and 181 of the 1996 Act that limited the grounds of appeal in any way. Consistent with this and s 181(2), external appeals under the 1996 Act against adjudicators' decisions were usually conducted as an appeal by way of a new hearing (which can also be referred to as an appeal by way of a hearing de novo), with such new evidence as the parties wished to lead.

Internal Appeals

34 Internal appeals are to be heard by the Appeal Panel by virtue of s 27(1)(a) of the NCAT Act.

35 In addition, the right to, and nature of, an internal appeal is generally governed by ss 80 and 81 of the NCAT and not be any enabling legislation. Sections 80 and 81 provide:

80 Making of internal appeals

(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

(2) Any internal appeal may be made:

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may:

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

81 Determination of internal appeals

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

(a) the appeal to be allowed or dismissed,

(b) the decision under appeal to be confirmed, affirmed or varied,

(c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when varying, or making a decision in substitution for, the decision under appeal."

36 Section 80(2) establishes that, in an appeal from a decision of the Tribunal which is not an interlocutory decision:

(1) The appellant only has a right of appeal on a question of law;

(2) The appellant requires leave to appeal on any ground other than a question of law.

37 Such an approach is consistent with an internal appeal being an appeal by way of rehearing, where the appellant is generally required to demonstrate error being either:

(1) an error of law, in an appeal on a question of law; or

(2) an error of fact or some other type of error, in an appeal on a ground other than a question of law for which leave to appeal has been given.

38 Section 80(3)(a) makes clear, however, that if the Appeal Panel considers that the grounds of appeal warrant a new hearing, the appeal can be dealt with by way of a new hearing (or hearing de novo) rather than a rehearing. In such a new hearing, the Appeal Panel can permit the parties to rely on fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, under s 80(3)(b).

Mr Wrigley's Appeal

39 In Mr Wrigley's case, if his appeal is an external appeal, he will have an appeal by way of a new hearing (or hearing de novo) before a Member of the Tribunal sitting in the Consumer and Commercial Division.

40 If, on the other hand, his appeal is an internal appeal, it will be heard by an Appeal Panel. Mr Wrigley will only have an appeal as of right on a question of law. He must obtain leave from the Appeal Panel to appeal in respect of any other ground. Further, the appeal will be an appeal by way of rehearing, unless the Appeal Panel determines that the grounds of appeal warrant an appeal by way of new hearing (or hearing de novo), with or without fresh, additional or substitute evidence.

Parties' Submissions

Mr Wrigley's submissions

41 As to the survival of his right to appeal after the repeal of the 1996 Act, Mr Wrigley relied upon the statement by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267, regarding the common law presumption against the retrospective operation of repealing or amending legislation on accrued rights or liabilities. He submitted that this principle remained good law and was reflected in ss 30(1)(c) and 5(2) of the *Interpretation Act 1987* (NSW) (the Interpretation Act), see *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at [27].

42 Applying the general principles of statutory construction stated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA

28 at [69], [70]-[71] and [78] and the decision in *Esber v The Commonwealth of Australia* (1992) 174 CLR 430 at 440-441, that the right to review a delegate's decision constituted a right within the meaning of s 8(1)(c) of the *Acts Interpretation Act 1901* (Cth) (which is not materially different from s 30(1)(c) of the Interpretation Act), Mr Wrigley submitted that the 2015 Act evinced no intention to affect the substantive right to appeal from a decision of an adjudicator "which accrued to [Mr Wrigley] under Part 12 of the 1996 Act". Thus, his substantive right of appeal survived the repeal of the 1996 Act.

43 Mr Thomas, solicitor, who appeared for Mr Wrigley, in his well-argued submissions drew attention to the distinction between the substantive right of appeal and the procedures by which the appeal would be heard and determined. Although the substantive right of appeal was preserved by operation of s 30(1)(c) of the Interpretation Act, it was submitted the particular procedures by which the appeal was to be heard and determined might be governed by the terms of the repealing Act, depending on its terms.

44 Mr Thomas relied upon the statement by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267:

> "Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities … notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish L.J. in *Republic of Costa Rica v. Erlanger* [(1876) 3 Ch. D. 62]. 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done' [(1876) 3 Ch. D., at p. 69]"

45 It was then submitted that cl 9 of Sch 3 of the 2015 Act effected such a change in procedure so that the accrued right of appeal from the adjudicator's decision remained but it was to be exercised by way of an internal appeal under s 80 of the NCAT Act not an external appeal under s 79 of the NCAT Act, as had been the case under s 177 of the 1996 Act.

46 Mr Wrigley submitted in effect that the nature of the appeal in the present matter fell to be determined by application of cl 9 of Sch 3 to the 2015 Act. He submitted:

(1) The order appealed against was made under s 150 of the 1996 Act, which concerned orders for the removal of an animal not permitted under by laws. The corresponding provision in the 2015 Act is s 156. The order was in force immediately before 30 November 2016.

(2) Thus, it was an "order made by an Adjudicator … under the former Act [the 1996 Act], and in force immediately before the commencement of [cl 9]".

(3) Consequently, by operation of cl 9, the order was "taken to have been made by the Tribunal under the corresponding provision of [the 2015 Act, namely s 156]".

47 As the order appealed against is now taken to have been made by the Tribunal under s 156 of the 2015 Act it was a "general decision" for the purposes of s 32(1)(a). Consequently, the appeal should be heard as an internal appeal, under s 32 of the NCAT Act.

48 It was also submitted on Mr Wrigley's behalf that this approach was consistent with the decision of Smart AJ in *Crawley v The Owners Strata Plan 22481* [1999] NSWSC 950, which concerned a similar deeming provision in the context of the enactment of the 1996 Act and the repeal of the *Strata Titles Act 1973* (NSW). Thus, it was submitted that cl 9 had been enacted, not only to preserve the enforcement of orders made under 1996 Act, but to ensure consistency in contemporaneous appeal outcomes by implementing a procedural change to the appeal mechanism.

49 Mr Thomas submitted that nothing turned on the fact that s 32(1)(a) of the NCAT Act establishes that the Tribunal's internal appeal jurisdiction extends relevantly only to "any decision made by the Tribunal in proceedings for a general decision …". The appellant submitted that the words "in proceedings", found in s 32(1)(a), were merely inclusions of grammatical necessity and that cl 9 of the transitional provisions by deeming an adjudicator's order to have been made by the Tribunal implicitly deemed that the order had also been made in proceedings in the Tribunal.

50 Further, it was submitted that cl 7 of Sch 3 of the 2015 Act had no relevant operation in respect of an order that had already been made by an adjudicator and that fell within cl 9. The words "determined" and "finalised" in cl 7 were submitted to be synonyms or a composite expression and it was said that they

did not have a role to play in determining whether an existing right of appeal under s 177 of the 1996 Act by way of external appeal had been preserved.

Owners Corporation's submissions

51 In its written submissions, the Owners Corporation generally agreed with Mr Wrigley's submissions. The Corporation submitted that cl 9 of Sch 3 to the 2015 Act resulted in the adjudicator's decision being taken to have been made by the Tribunal. It was then submitted that:

> "[a]ssuming this means that the Adjudicator's decision has become a general decision of the Tribunal in accordance with section 29 of the [NCAT Act], then the Tribunal has internal appeal jurisdiction over the Adjudicator's decision, in accordance s 32(1)(a) of the [NCAT Act]."

52 It was also submitted that the hearing of Mr Wrigley's appeal should proceed by way of a rehearing, and not a new hearing under s 80(3) of the NCAT Act.

Consideration

53 In considering the preliminary question of whether the Appeal Panel can hear and determine this appeal, we shall first address the issue of what effect the repeal of the 1996 Act had on Mr Wrigley's ability to appeal. We shall then consider the nature of any appeal Mr Wrigley may bring in the light of the transitional provisions found in Sch 3 to the 2015 Act.

Effect of the repeal of the 1996 Act on Mr Wrigley's ability to appeal

54 Section 30(1)(c) of the Interpretation Act preserves any right "accrued … under" a repealed Act, subject to the exception in s 5(2), namely if the contrary intention appears in the Interpretation Act or the repealing Act. The concluding portion of s 30(1) preserves the ability to institute proceedings in respect of such an accrued right after the repeal of the Act that conferred the right.

55 Both parties adopted, as a starting point, the position that when the 1996 Act was repealed on 30 November 2016, Mr Wrigley had an "accrued" right to appeal the adjudicator's order, for the purposes of s 30(1)(c) of the Interpretation Act and the common law, as stated for example in *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; [2014] HCA 18 at [27].

56 In our view, this proposition is correct. The right which Mr Wrigley was entitled to exercise under s 177 of the 1996 Act on the making and taking effect of the adjudicator's order was a substantive right of appeal.

57 The Court of Appeal in *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291; [2005] NSWCA 223 (Handley JA with whom Gyles JA agreed) distinguished between mere rights to take advantage of a section or an abstract right on the one hand and an accrued or acquired right on the other. A right of appeal in respect of an order made in proceedings already commenced but not determined at the date of repeal is an example of an accrued right. In this regard, Handley JA noted in *Colley* at [23]:

> "In *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 the Privy Council held that the right of a litigant in pending proceedings to appeal as of right to a higher court was a vested right although the lower court had not yet given judgment and an appeal had not yet been filed. It is clear that a prospective litigant would have no such right."

58 In *Torrac Nominees Pty Ltd v Karabay* [2007] NSWCA 96; (2007) 69 NSWLR 669, the Court of Appeal (Young JA, Ipp JA and Handley AJA agreeing) also emphasised the distinction between substantive or accrued rights and mere rights to apply or procedural rights at [43] – [44] as follows:

> "43 An individual substantive right which came into existence before the repeal of the statute which created it will be saved by the Interpretation Act provisions even if nothing had been done to enforce or claim that right before the repeal: *Re Brandon's Patent* (1884) 9 App Cas 589; *Convex Ltd's Patent* [1980] RPC 423 (CA); *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139; *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778, 1788, 1790 (CA); *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291, 297-8.
>
> 44 There is no relevant substantive right in this case. The opponent's only so-called "rights" were procedural, the right to apply for an extension of the time fixed by Part 1 rule 7A(3) of the District Court Rules and, as Duck DCJ found, the "right" to continue the proceedings begun by the filing of the statement of claim on 26 June 2002. The first so-called right was not exercised before 15 August 2005. In that respect nothing was "begun" which could be "continued and completed"."

59 The Full Court of the South Australian Supreme Court has recently considered whether pre-existing appeal rights were abolished or affected by the repeal or amendment of the statute creating the rights in *R v Hamra* [2016] SASCFC 130. The Chief Justice (with whom the four other members of the Court agreed) said at [22] to [23]:

"22. This Court considered whether an amended appeal regime applies to adjudications made in proceedings commenced before the relevant amendment in *Dolphin v Workers Rehabilitation & Compensation Corporation*. The exegesis of Cox J in that case warrants lengthy citation: [(Unreported, Supreme Court of South Australia, Cox, Lander and Bleby JJ, 9 December 1997)]

> The rule of the common law is that 'in general, when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights': *Continental Liqueurs Pty Ltd v G F Heublein and Bro. Inc.* (1960) 103 CLR 406, per Kitto J at 427. The rule finds expression in s16 of the *Acts Interpretation Act 1915* …
>
> The rule has been held to preserve a right of appeal against the order of a court or tribunal even though the right of appeal had been abolished before the party in question had had an opportunity of exercising it. In *Colonial Sugar Refining Co. Ltd v Irving* [1905] AC 369, an action between the parties in the Supreme Court of Queensland that had been instituted on October 25, 1902 had still to be decided when, on August 25, 1903, the *Judiciary Act 1903* (C/W) came into force and abolished appeals from the Supreme Court to the Privy Council in actions of that kind. In September 1903 the Supreme Court gave judgment in the matter. Subsequently the Court gave the appellant leave to appeal. The respondent argued before the Privy Council that the appeal was incompetent but the point was rejected. Lord MacNaghten on behalf of their Lordships said (at 372-3) -
>
> > 'As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.'
>
> *Colonial Sugar Refining Co. Ltd v Irving* was decided on common law principles. More recent cases in this area have turned on the interpretation of the expression 'any right … accrued … prior to the

repeal, amendment or expiry' in s16 of the *Acts Interpretation Act* or some local equivalent.

In *Esber v Commonwealth of Australia* (1992) 174 CLR 430, the applicant for the review of a determination under a Commonwealth worker's compensation Act had applied for the review before the Act was repealed. It was held by a majority of the High Court that the repeal did not affect the right of review that had accrued to him under the repealed Act once he had lodged his application for review. The right was protected by the Commonwealth analogue to s16. *Esber's* Case is distinguishable on the facts from the present appeal, as the appeal from the Review Officer had not been instituted by the Corporation before the 1995 amendment came into force.

…

In all cases such as these the question arises whether the possible application of the *Acts Interpretation Act* is displaced by the repealing or amending legislation. That was decisive in *Yao v Minister for Immigration* (1996) 69 FCR 583, in which there is a discussion of the notion of an 'accrued' right in these common form interpretation rules.

23. The discussion in *Dolphin's* case supports the proposition that, absent express provision to the contrary, where a first instance proceeding is pending and the parties to that proceeding have rights of appellate review at the time of instituting that proceeding, any amendment of appeal provisions will not apply to them. However, and importantly for present purposes, the common law principle is premised on the potential litigants having no 'right' to a particular trial or appellate procedure at the time of the events which constitute the matter that is later brought before a court. That premise reflects fundamental common law principles. The substantive rights of the parties, absent express statutory provision to the contrary, are determined in accordance with the law as it is at the time of the events. However, when, and if, that controversy is brought before a court it is adjudicated in accordance with the then operative procedures of the court. The procedures then in force will continue to apply to the litigation unless subsequently enacted rules expressly provide otherwise."

60 These authorities deal with situations where first instance proceedings are pending and the parties to those proceedings have rights of appellate review at the time the proceedings were instituted and also at the date of repeal of the provisions creating those rights of appeal. In these cases, the appeal rights have been held to be accrued rights for the purposes of the principle embodied in both s 30(1)(c) of the Interpretation Act and the common law. If a right of appeal vests in, or is accrued by, a party entitled to appeal even before the proceedings are determined by an order being made, it follows that the right of appeal must have accrued by the time the order is made and takes effect.

61 In the present case, Mr Wrigley's right to appeal to the Tribunal under ss 177 and 181 was conditioned on the appeal being lodged within 21 days of the order taking effect. After that time, there was no right of appeal but only the

ability to seek leave to appeal during the following 69 days, that is until the 90 days specified in s 177(3)(b)(ii) had expired. The adjudicator's decision was made on 24 November 2016 and took effect on 29 November 2016. Mr Wrigley then had 21 days in which to appeal. Accordingly, on 30 November 2016 when the 1996 Act was repealed, in our view Mr Wrigley had an accrued right of appeal against the order requiring him to remove his dog.

62 It was not in dispute that Mr Wrigley lodged his appeal before the expiration of the 21 days from the order taking effect.

63 Having concluded that Mr Wrigley had an accrued right of appeal, for the purposes of s 30(1)(c) of the Interpretation Act when the 1996 Act was repealed on 30 November 2016, we now turn to consider whether any of the provisions of the 2015 Act disclosed a contrary intention, within the meaning of s 5(2) of the Interpretation Act. We note that there is nothing in the Interpretation Act itself that would amount to the expression of a contrary intention in the circumstances of the present case.

64 In the substantive provisions of the 2015 Act, there is no mention of adjudicators or rights of appeal from adjudicators nor are these matters implicitly dealt with. This is understandable as the adjudication process has been abolished. The only provisions that relate, or potentially relate, to adjudicators or the completion of proceedings before adjudicators are cll 3, 7, 8 and 9 of the transitional provisions found in Sch 3 to that Act, which we have set out above.

65 Clause 3 is a general saving provision but is not applicable to the extent that would be inconsistent with any other provision of Sch 3. It cannot be seen as expressing an intention contrary to s 30(1)(c) of the Interpretation Act.

66 Clause 7 establishes that proceedings commenced but not determined or finalised under a provision of the 1996 Act are to be dealt with and determined as if the 1996 Act had not been repealed. This includes both proceedings before adjudicators and proceedings before the Tribunal. Clause 7 does not expressly refer to appeals from orders of adjudicators, previously governed by ss 177 and 181 of the 1996 Act. Clause 7 does, however, indicate that the legislature intended that any adjudication proceedings under the 1996 Act

should continue to be dealt with "as if the [1996 Act] had not been repealed". Nothing in cl 7 expressly or implicitly indicates an intention to abolish or restrict appeal rights accrued in those proceedings at the time of the repeal of the 1996 Act.

67 Clause 8 effectively ensures that adjudicators continue to hold office until all proceedings before them. This is necessary to enable the proceedings before adjudicators to be dealt with and determined in the manner required by cl 7. Clause 8 does not refer or relate to appeals from adjudicators' orders.

68 Clause 9 deals with orders made by adjudicators or by the Tribunal under the 1996 Act that were in force immediately before 30 November 2016. The clause deems such orders to be orders of the Tribunal made under the corresponding provision of the 2015 Act. Clause 9 does not expressly or impliedly remove, or prevent the enforcement of, accrued appeal rights under the 1996 Act in respect of adjudicators' orders.

69 In these circumstances, the terms of cll 3, 7, 8 and 9 do not provide a basis for concluding that the 2015 Act expressed an intention to remove or abolish any rights of appeal from orders of adjudicators, "accrued" within the meaning of s 30(1)(c) of the Interpretation Act. There are no other provisions of the 2015 Act that could be seen as expressing such an intention contrary to s 30(1)(c). Thus, no intention to remove or abolish accrued rights of appeal from adjudicators' orders under the 1996 Act appears "with reasonable certainty" (to use the words of Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267) from the provisions of the 2015 Act.

70 Accordingly, in our view, the repeal of the 1996 Act did not abolish Mr Wrigley's right of appeal from the adjudicator's order of 24 November 2016.

71 We turn now to consider whether Mr Wrigley's appeal is an external appeal to a Member sitting in the Consumer and Commercial Division or an internal appeal to the Appeal Panel.

The nature of Mr Wrigley's appeal in the light of the transitional provisions in Sch 3 to the 2015 Act

72 The relevant portions of the transitional provisions in Sch 3 to the 2015 Act have been set out in full above.

73 The general saving provision, in cl 3, which deems any act, matter or thing done under the 1996 Act to have been done under the 2015 Act, does not apply to the extent that it is inconsistent with any other provision of Sch 3 or would be inappropriate, see cl 3(2)(a) and (b). As a result, it is necessary to consider the specific provisions in cll 7, 8 and 9, which are the clauses which deal with adjudicators, proceedings before adjudicators and adjudicators' orders, among other things.

74 Each of those clauses concerns a different subject matter. Clause 7 deals with proceedings commenced but not determined or finalised under the 1996 Act at the time of its repeal. Clause 8 makes provision for when adjudicators appointed under the 1996 Act cease to hold office but does not concern any aspect of an appeal against an adjudicator's orders. Clause 9 specifies how orders of an adjudicator or the Tribunal, made under the 1996 Act and still in force at the time of its repeal, are to be treated.

75 How an appeal against orders made in proceedings under the 1996 Act are to be dealt with will, therefore, turn upon the proper construction of cll 7 and 9.

Construction of cl 7

76 Clause 7 states that any "proceedings commenced but not determined or finalised under a provision of the former Act are to be dealt with and determined as if the former Act had not been repealed".

77 The word "proceedings" is not defined in the 2015 Act but it is used in various places to refer to proceedings in the Tribunal (see for example s 229), proceedings in a Court (see for example s 251), legal proceedings generally whether in a court, tribunal or other body (see for example s 223) or proceedings of a body such as a strata committee (see s 38). In one section, the 2015 Act specifically provides that, for the purposes of that section, "a reference to proceedings includes a reference to proceedings on appeal from the Tribunal", see s 104. "Proceedings" was also not defined in the 1996 Act but was used in a similarly wide variety of ways as well as being used to refer to proceedings before an adjudicator (see for example s 140(6) of the 1996 Act).

78 The High Court, in *Cheney v Spooner* (1929) 41 CLR 532; [1929] HCA 12 at 536-537 and 538-539, has held that “proceedings” ordinarily refers to the “method permitted by law for moving a Court or judicial officer to some authorised act” or “any application by a suitor to a Court in its civil jurisdiction for its intervention or action”.

79 Nonetheless, it should be accepted that “proceedings” is a word of “great generality” and takes its precise meaning from the context in which it appears, see *Clarence v Electricity Commission of New South Wales* (1990) 20 NSWLR 1 at 4; *Amaca Pty Ltd v Cremer* (2006) 66 NSWLR 400; [2006] NSWCA 164 at [75]. In this regard, it is significant that cl 7 is concerned with “proceedings commenced … under a provision of [the 1996 Act]” and with how those proceedings should be dealt with after the repeal of the 1996 Act.

80 Given this context, it appears to us that “proceedings” refers to the process set in motion, or commenced, by lodging an application for an order under the 1996 Act either before an adjudicator (for example under s 150) or before the Tribunal (for example under s 183A).

81 When considering whether rights in relation to proceedings under a repealed Act are accrued for these purposes, the Courts have consistently held that rights of appeal from orders made in first instance proceedings should be seen as inhering in those proceedings from their commencement. The Queensland Court of Appeal, in *Sunskill Investments Pty Ltd v Townsville Office Services Pty Ltd* [1991] 2 Qd R 210 at 218, explained it thus:

> "A right of appeal that exists when the proceedings are instituted is considered as inhering in the proceedings from commencement of the action, and so will not be affected by subsequent statutory restriction unless it is plain that the restriction is intended to have retrospective application."

82 The fact that proceedings have inherent in them any right of appeal that exists when the proceedings are commenced also underlies the reasoning of the Privy Council in *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, referred to by the Court of Appeal in *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 at [23], and of the South Australian Full Court in *R v Hamra* [2016] SASCFC 130 at [22] - [23] (both of which have been quoted above).

83 In these circumstances, it appears to us that the phrase “proceedings commenced … under the [1996 Act]”, referred to in cl 7, is not limited to first instance proceedings commenced by the application for an order from an adjudicator or from the Tribunal under the 1996 Act. Rather, the phrase also includes any right of appeal under the 1996 Act in respect of orders made at first instance.

84 Clause 7 only applies to such proceedings, however, if they are “not determined or finalised”. Since cl 7 is one of the transitional provisions in Sch 3 to the 2015 Act and given its evident purpose of providing for how extant proceedings under the 1996 Act are to be dealt with and determined, the clause can be taken to be referring to proceedings not determined or finalised at 30 November 2016, when the 1996 Act was repealed.

85 Two similar words “determined” and “finalised” are used in cl 7. The general meaning of “determine” is to bring to an end (Oxford English Dictionary, Online Ed, meaning I. 1. a). There is a more specific meaning, however, in the context of a dispute, controversy or doubtful matter which, for example, is the subject of proceedings. There, “determine” means to conclude, settle or decide, including to come to a judicial decision (Oxford English Dictionary, Online Ed, meanings II. 4. a and 5. a). When orders disposing of proceedings have been made, the proceedings can be said to have been determined, in the narrower, more specific sense.

86 It can be noted that “determined” is used a second time in cl 7. That clause requires the proceedings to which it applies to be “determined” as if the 1996 Act had not been repealed. This use of “determined” appears to be a reference to how the proceedings should be decided, that is “determined” in the narrower sense referred to above.

87 The same word used in the same provision should be given the same meaning, unless the context or other circumstances indicate that this is clearly inappropriate, *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* (2015) 91 NSWLR 34; [2015] NSWCA 281 at [23]. There is nothing in the context of those words in cl 7 or elsewhere in the 2015 Act or in the circumstances which

would require "determined" to be given different meanings when used on two occasions in cl 7.

88 According to the Oxford English Dictionary (Online Ed), "finalise" means "to complete, bring to an end". Thus, "finalised" can be seen as denoting something that is brought to an end or is completed or disposed of in its entirety or without further review. In this regard "finalised" and "finally disposed of" can be seen as having a similar meaning.

89 In *Robins v Wood* (1917) 87 LJ KB 224, three judges of the King's Bench Division held that an application in a tribunal had not been "finally disposed of" until the appeal tribunal, to which there was an appeal as of right, had ruled on the appeal. Darling J held, at 225:

> "In my view an application … has been finally disposed of within the meaning of the statute when it has been refused by an appeal tribunal ..."

90 Avory J said at 226:

> "It is reasonable to hold that the respondent's application was finally disposed of when it had been dealt with by the appeal tribunal …".

91 Whilst *Robins v Wood* turned on the proper construction of an entirely different statute and the expression "finally disposed of" is not the same as "finalised", the decision indicates that proceedings can in some cases be said not to be finalised, or finally disposed of, until any relevant right of appeal has been exhausted.

92 In considering cl 7, there is an obvious potential overlap between "determined" and "finalised". Nonetheless, the use of the two words rather than just one or other indicates an intention that they each should have a different meaning and field of operation. The presumption is that words are used in a statute for a reason and they should each be given their meaning and effect, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23at [39].

93 In the present case and when the words "determined" and "finalised" are considered in their context in cl 7 and Sch 3 to the 2015 Act and in the broader context of s 30(1)(c) of the Interpretation Act, we are of the view that these

words should properly be given distinct meanings and not treated as a composite expression.

94 For these reasons, we do not accept Mr Wrigley's submission that "determined" and "finalised" should be construed as effectively synonymous. Rather, bearing in mind the considerations set out above, we are of the view that for the purposes of cl 7:

(1) Proceedings have been "determined" if a decision or order has been made which brings the proceedings to an end, whether or not the decision or order may be the subject of appellate or other review. There has been a determination, even if it is liable to be set aside.

(2) Proceedings, which have inherent in them a right of appeal, have been "finalised" if they have been completed or disposed of in their entirety, that is, if any rights of appeal have been exhausted.

95 The final element of cl 7 is the requirement to deal with and determine the proceedings to which the clause applies as if the 1996 Act had not been repealed. On the construction of "proceedings" set out above, both an application for an adjudicator's order and any appeal as of right from such an order is to be dealt with and determined under the 1996 Act and not the 2015 Act. Consequently, in the present case, proceedings commenced under s 150 of the 1996 Act, including any appeal as of right from an order in such proceedings, not determined or finalised at 30 November 2016 are to be heard and decided applying the law in the 1996 Act, including the appeal provisions in ss 177 and 181.

96 If this construction of cl 7 is accepted, the types of proceedings falling with the clause include:

(1) an application for an adjudicator's order where the application was lodged before 30 November 2016 but no final order had been made by that date;

(2) an appeal from an adjudicator's order where the appeal was lodged before 30 November 2016 but no final order had been made by that date; and

(3) an appeal from an adjudicator's order where the appeal was lodged after 30 November 2016.

97 Mr Wrigley's appeal was lodged after 30 November 2016 and thus falls within cl 7 and is to be heard and determined as if the 1996 Act had not been

repealed. Thus, it would be an external appeal to be determined by a Member sitting in the Consumer and Commercial Division under s 177 and 181 of the 1996 Act and s 79 of the NCAT Act.

98 It is, however, also necessary to consider cl 9 of Sch 3 before reaching a definitive conclusion. This is because relevant provisions of an Act should be construed as a whole and so as to ensure, wherever possible, an harmonious operation for those provisions. It is also appropriate because both parties contended that cl 9 operated, in this case, to convert Mr Wrigley's appeal into an internal appeal to the Appeal Panel falling within s 80 of the NCAT Act.

Construction of cl 9

99 As has been noted above, cl 9 of Sch 3 to the 2015 Act concerns the status and effect of orders made under the 1996 Act by an adjudicator or by the Tribunal which were still in force when the 1996 Act was repealed.

100 Under s 172 of the 1996 Act, adjudicators' orders only remained in force for two years, except to the extent that the order otherwise provided. In addition, interim orders under Ch 5 of the 1996 Act continued in force for a period of three months, or a maximum of 6 months if a renewal was granted, see s 170(6) of the 1996 Act.

101 Clause 9 provides that an order to which the clause applies "is taken to have been made by the Tribunal under the corresponding provision of this Act".

102 In a case such as the present therefore, cl 9 operates so that the order of the adjudicator made on 24 November 2016 under s 150 of the 1996 Act is deemed to have been made by the Tribunal under s 156 of the 2015 Act, following the repeal of the 1996 Act. In this way, orders under the 1996 Act in force at the date of its repeal effectively continue in force but under the 2015 Act.

103 Both parties, however, contended that cl 9 has a wider reaching effect. They argued:

(1) the order made by the adjudicator on 24 November 2016 is taken, by operation of cl 9, to be an order made by the Tribunal under the 2015 Act;

(2) such an order is an "internally appealable decision" within s 32 of the NCAT Act;

(3) consequently, Mr Wrigley's appeal should be heard as an internal appeal by the Appeal Panel in accordance with s 80 of the NCAT Act rather than as an external appeal under ss 177 and 181 of the 1996 Act and s 79 of the NCAT Act.

104 It is apparent that the parties' submissions as to the construction and operation of cl 9 are inconsistent with our view as to the proper construction of cl 7 set out above.

105 Notwithstanding the parties' agreement as to this aspect of the matter, we do not think that cl 9 of Sch 3 should be held to have the effect for which the parties contend in relation to appeals against adjudicators' orders for a number of reasons.

106 First, while cl 9 of Sch 3 to the 2015 Act requires an adjudicator's order in force at 30 November 2016 to be treated as an order of the Tribunal, it does not follow that every such order is "an internally appealable decision" within the meaning of ss 32 and 80 of the NCAT Act.

107 Not every order made by the Tribunal is an "internally appealable decision".

108 For an order to be an "internally appealable decision" within the meaning of the NCAT Act, the decision must be one over which the Tribunal has internal appeal jurisdiction, see s 32(4) of the NCAT Act.

109 Under s 32(1), the Tribunal has internal appeal jurisdiction relevantly only over "any decision made by the Tribunal in proceedings for a general decision …". Under s 5(1) of the NCAT Act, "decision" includes "making … an order". Further, the text, context, scope and purpose of s 32(1) or the NCAT Act make it clear that "proceedings" in that subsection only refers to proceedings in the Tribunal.

110 Consequently, to be an internally appealable decision, the order must satisfy two conditions:

(1) It must be an order made by the Tribunal; and

(2) It must have been made in proceedings in the Tribunal for a general decision.

111 A “general decision” is defined in s 29(3) of the NCAT Act as “a decision of the Tribunal determining a matter over which it has general jurisdiction”. The Tribunal relevantly has general jurisdiction over a matter if “legislation (other than [the NCAT Act] or the procedural rules) enables the Tribunal to make decisions or exercise other functions … of a kind specified by the legislation in respect of that matter” and “the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal”, s 29(1) of the NCAT Act.

112 The adjudicator’s order against Mr Wrigley was not “a decision made in proceedings for a general decision”, within s 32(1) of the NCAT Act. It was made in proceedings before an adjudicator not proceedings in the Tribunal. Furthermore, the jurisdiction being exercised by the adjudicator was not the “general jurisdiction” of the Tribunal.

113 By its terms, cl 9 only deems an adjudicator’s order to have been made by the Tribunal. It does not go further and state that the making of the order is taken to be a “decision made by the Tribunal in proceedings for a general decision …”. Nor should such a further deeming be implied. To do so is not necessary to give the clause an effective scope of operation. In relation to orders made by adjudicators within the two years before the repeal of the 1996 Act and orders of the Tribunal made under that Act, cl 9 ensures that these order, to the extent they were still in force immediately before 30 November 2016, can be enforced under the 2015 Act.

114 To construe cl 9 as having the broader operation as contended by the parties would be inconsistent with cl 7, on the construction we have set out above. Clause 9 does not expressly deem any order of an adjudicator to be “an internally appealable decision” of the Tribunal. In our view, there is no sufficient justification for construing cl 9 as impliedly having that effect when the appeal rights from such an order are already dealt with adequately by cl 7.

115 Even if we were wrong in this regard, it would not be appropriate to have recourse to cl 9 in a case such as Mr Wrigley’s. This is because his appeal expressly falls within cl 7 and that clause requires the Tribunal to deal with and

determine the matter as if the 1996 Act had not been repealed, that is, as if the 2015 Act (including cl 9 of Sch 3) was not in effect or applicable.

116 For these reasons, we conclude that the adjudicator's order of 24 November 2016 was not, despite the operation of cl 9 of Sch 3 to the 2015 Act, an "internally appealable decision" for the purposes of s 80 of the NCAT Act. Thus, the Appeal Panel cannot hear and determine Mr Wrigley's appeal as an internal appeal. By operation of cl 7 on the construction we have put forward above, however, Mr Wrigley's appeal would continue to be dealt with and determined as an external appeal to the Tribunal under ss 177 and 181 of the 1996 Act and s 79 of the NCAT Act, as if the 1996 Act had not been repealed.

117 Adopting this approach to the construction and operation of cll 7 and 9 gives both clauses effective work to do. Clause 9 enables orders made by an adjudicator or by the Tribunal, under the 1996 Act and in force at the date of its repeal, to be enforced as orders of the Tribunal, under the 2015 Act. The question of how appeals from adjudicators' orders under the 1996 Act are to be dealt with after its repeal is governed by cl 7. In this way, cll 7 and 9 are given an harmonious, consistent and practical construction.

118 Secondly, the decision of Smart AJ in *Crawley v The Owners Strata Plan 22481* [1999] NSWSC 950 does not require us to reach a different conclusion. That case concerned similar deeming provisions in the transitional provisions of the 1996 Act, Sch 4 cll 3 and 4. Clauses 3 and 4 dealt with pending proceedings and previous orders of the Commissioner or a strata titles board under the *Strata Titles Act 1973* (NSW). At that time, however, this Tribunal was not in existence and there was no equivalent to the internal appeal jurisdiction of NCAT in any relevant tribunal or body.

119 Whether cl 9 of Sch 3 to the 2015 Act converts what was an external appeal to the Tribunal into an internal appeal, as the parties contend, cannot be considered independently of the appeal provisions of the NCAT Act, including the differentiation between external and internal appeals. Smart AJ's decision has nothing relevant to say concerning those provisions of the NCAT Act and how cll 7 and 9 of Sch 3 to the 2015 Act operate in conjunction with them.

120 Thirdly, we do not accept that the construction of cl 9 of Sch 3 of the 2015 Act, contended for by the parties, would only involve a change in procedure and would not affect the substantive right of appeal under ss 177 and 181 of the 1996 Act. As we have explained above, the right of internal appeal from a non-interlocutory decision, under s 80(2)(b) of the NCAT Act, is limited to an appeal on a question of law. An internal appeal on any other ground is only available by leave of the Appeal Panel. The appeal under ss 177 and 181 of the 1996 Act was an external appeal as of right to the Tribunal that was not limited as to the grounds of appeal. A change from an appeal as of right to an appeal by leave is not merely a change as to procedure, *Sunskill Investments Pty Ltd v Townsville Office Services Pty Ltd* [1991] 2 Qd R 210 at 218 and *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 at 372.

121 In our view, if cl 9 were held, in effect, to replace the right to an external appeal under s 177 and 181 of the 1996 Act with a right to an internal appeal under s 80 of the NCAT Act, this would involve a significant change in the nature of the substantive right of appeal. Such an approach is inconsistent with the principle embodied in s 30(1)(c) of the Interpretation Act. As we have explained above, the wording of cl 9, especially when read with cl 7, does not indicate "with reasonable certainty" that such a substantive change was intended so as to amount to the expression of a contrary intention for the purposes of s 5(2) of the Interpretation Act.

122 Fourthly, the parties' contention that Mr Wrigley's appeal has been converted from an external to an internal appeal by cl 9 should be rejected because it produces anomalous results in the different circumstances in which cll 7 and 9 are required to apply. The construction of cll 7 and 9 which we have adopted in our reasoning above is more harmonious and is to be preferred.

123 Consider two orders made by an adjudicator in proceedings under the 1996 Act commenced before 30 November 2016:

(1) An order made on 24 November 2016;

(2) An order made on 1 December 2016 (as permitted by cl 7).

124 If the parties' construction and application of cl 9 were correct:

(1) The 24 November 2016 order could be appealed to the Tribunal by way of an internal appeal under s 80 of the NCAT Act.

(2) The 1 December 2016 order could not be similarly appealed by way of an internal appeal under s 80 since cl 9 would not apply because the order was not "in force immediately before" the repeal of the 1996 Act.

125 On our construction of cl 7, both orders would be treated similarly. Both could be appealed to the Tribunal by way of an external appeal under ss 177 and 181 of the 1996 Act.

126 There is no compelling reason why orders made under the 1996 Act before its repeal should attract different rights of appeal compared to orders made under the 1996 Act after its repeal.

127 There is also an unsatisfactory illogicality if appeals from adjudicators' orders made on the same date are treated differently depending solely on when the appeal is lodged. Take the case of an adjudicator's order made on 24 November 2016. If an appeal against that order was lodged on 29 November 2016, the appeal would have to be an external appeal under the 1996 Act and s 79 of the NCAT Act. If, however, the appeal against that order was lodged on 1 December 2016, according to the parties' construction of cl 9, the appeal would be an internal appeal to the Tribunal under s 80 of the NCAT Act. This illogical situation is avoided if our construction of cll 7 and 9 is adopted. On our construction, the appeal lodged on 29 November and that lodged on 1 December would both be dealt with in the same way, namely as external appeals under the 1996 Act and s 79 of the NCAT Act.

128 Finally, if the parties' construction of cl 9 were adopted, all adjudicators' order in force immediately before the repeal of the 1996 Act could be the subject of an internal appeal or, at least, an application for an extension of time in which to appeal, under s 41 of the NCAT Act. This is so, notwithstanding that before the repeal of the 1996 Act, any right of appeal in respect of those order had expired 21 days after the order took effect, the ability to seek leave to appeal after that time expired 90 days after the order took effect and no extension under s 41 of the NCAT Act was available, see s 177(3) and (4) of the 1996 Act.

129 In our view, the preferable and more consistent approach is for appeals in respect of all orders of adjudicators under the 1996 Act, whether the order is made or the appeal is lodged before or after the repeal of that Act, to be by way of an external appeal to the Tribunal in accordance with the relevant provisions of the 1996 Act and s 79 of the NCAT Act.

130 For all of these reasons our construction of cll 7 and 9 set out above is to be preferred and should be adopted.

Summary of Conclusions and Orders

131 On the proper construction and application of cll 7 and 9 of Sch 3 to the 2015 Act:

(1) Where an adjudicator has made an order under the 1996 Act before 30 November 2016, a person having a right under the 1996 Act to appeal against that order can exercise that right within any relevant time period specified in the 1996 Act. Such an appeal is an external appeal to the Tribunal, to be dealt with and determined in accordance with the relevant provisions of the 1996 Act and s 79 of the NCAT Act.

(2) Where an adjudicator has made an order under the 1996 Act on or after 30 November 2016, a person having a right under the 1996 Act to appeal against that order can exercise that right within any relevant time period specified in the 1996 Act. Such an appeal is an external appeal to the Tribunal, to be dealt with and determined in accordance with the relevant provisions of the 1996 Act and s 79 of the NCAT Act.

132 Accordingly, Mr Wrigley should have brought his appeal as an external appeal under s 79 of the NCAT Act. It is required to be heard in the Consumer and Commercial Division of the Tribunal and not by the Appeal Panel.

133 Having regard to the obligation to act with as little formality as the circumstances of the case permit and without regard to technicalities or legal forms under s 38(4) of the NCAT Act, the guiding principle in s 36 and the fact that both parties agreed that Mr Wrigley had a right of appeal, the appropriate orders are:

(1) The appellant's, Mr Wrigley's, amended notice of appeal in this matter filed on 24 January 2017 is to stand as an application for Tribunal orders under the *Strata Schemes Management Act 1996* for an external appeal from an order of an adjudicator.

(2) This matter was, and is taken for all purposes to have been, commenced on 20 December 2016.

(3) The matter is remitted to the Consumer and Commercial Division to be heard as an external appeal under ss 177 and 181 of the *Strata Schemes Management Act 1996* and s 79 of the *Civil and Administrative Tribunal Act 2013*.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar