Civil and Administrative Tribunal

New South Wales

Case Name:	Feedback Deli Pty Ltd v The Owners – Strata Plan No 36613
Medium Neutral Citation:	[2019] NSWCATAP 6
Hearing Date(s):	6 December 2018
Date of Orders:	2 January 2019
Decision Date:	2 January 2019
Jurisdiction:	Appeal Panel
Before:	R C Titterton, Principal Member A Boxall, Senior Member
Decision:	(1) Leave to appeal granted; (2) Appeal allowed; (3) Matter remitted to the Tribunal constituted by a different Member for reconsideration; (4) Feedback Holdings Pty Ltd is joined as an applicant to the remitted proceedings; (5) If the appellants seek costs, they should file and serve submissions by 14 January 2019; (6) The respondent may respond by 29 January 2019.
Catchwords:	PRACTICE AND PROCEDURE – whether Tribunal erred in failing to join a party, and subsequently dismissing proceedings
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	John Alexander's Clubs Pty Ltd v White City Tennis Club Limited [2010] HCA 19 Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69

	Walsh v The Owners-Strata Plan No 10349 [2017] NSWCATAP 230
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Feedback Deli Pty Ltd (First Appellant) Feedback Holdings Pty Ltd (Second Appellant) Mr M Lipschitz (Third Appellant) The Owners – Strata Plan No 36613 (Respondent)
Representation:	Counsel: C Birch, Appellants M Bradford (Respondent) Solicitors: Le Page Solicitors (Appellants) Madison Marcus (Respondent)
File Number(s):	AP 18/40139, AP18/52754
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	16 August 2018, 3 October 2018
Before:	J Smith, Senior Member
File Number(s):	SC 17/48241

REASONS FOR DECISION

Summary

1 The appellants appeal in respect of two decisions of the Civil and Administrative Tribunal (the Tribunal) in proceedings SC 17/48241.

2 The first decision was published on 16 August 2018. The Tribunal dismissed the application of Feedback Deli Pty Ltd (Feedback Deli) that Feedback

Holdings Pty Ltd (Feedback Holdings) be joined as a second applicant, and subsequently dismissed the substantive application.

3 We have decided to allow this appeal, to set aside the orders of the Tribunal, to remit the matter to the Tribunal for determination by a member other than Senior Member Smith and to join Feedback Holdings as a party to the remitted proceedings.

4 As to the costs of this appeal, the appellants are to file and serve submissions within 14 days of the date of publication of these reasons. The respondent may respond within a further 14 days.

5 The second decision was published on 3 October 2018. The Tribunal ordered the third appellant, Mr Martin Lipschitz to pay the costs of The Owners – Strata Plan No 36613 (hereafter the respondent) on the ordinary basis.

6 The appellants filed a cross-appeal in relation to the costs decision. They say that the Tribunal should have awarded it costs on the indemnity basis.

7 As we have allowed the appeal, it follows that the costs order must also be set aside. Those costs should be determined by the Tribunal on remitter.

Background

The Strata Plan

8 The appellants submit, and the respondent does not dispute, the following matters.

9 The strata scheme is in Elizabeth Street, in Surry Hills.

10 The building has six levels:

- the ground level (Level 1) has four lots (including Lot 19)used for commercial purposes, and common property. The common property includes the male and female toilets that are the subject of these proceedings;
- Level 2 has one lot, originally for commercial use but converted to residential use in 2014. It also has eight car spaces, some of which form part of the commercial lots;
- Level 3 has 14 car spaces which form part of the residential lots;
- Levels 4-6 contain 14 lots intended for residential use;

11 The lots intended for commercial use on Level 1 were constructed without internal toilets.

Ownership of Lot 19

12 Feedback Deli purchased Lot 19 in or about 1991.

13 On 20 June 1991, South Sydney City Council granted development consent to Feedback Deli to use Lot 19 on the Ground Floor as a refreshment room, and to construct a wooden deck at the front of the site. The development consent was modified on 15 October 1991, so as to permit the construction of a reinforced concrete terrace instead of a timber deck.

14 Feedback Deli was given a right of exclusive use and enjoyment of this area by By-Law 32, made by the respondent on 9 October 1991, and was given permission to construct alterations and additions, subject to conditions.

15 In September 2015, Feedback Deli transferred Lot 19 to Feedback Holdings. At all material times, Mr Martin and Ms Maree Lipschitz were the sole directors and members of each company. Each company acted as trustee for the family trust.

16 From 1991 until 2010, Feedback Deli operated a cafe in Lot 19. Lot 19 was leased thereafter to the operator of an Indian restaurant (from August 2011 until March 2016) and to the operator of an Indonesian restaurant, Medan Ciak (from September 2016 to date).

Use of Common Property Toilets

17 Since 1991 until the Senior Member's orders, the patrons of the cafe or restaurant conducted in Lot 19 have used the male and female toilets on Level 1 (the Common Property Toilets). Apart from those patrons, the toilets have also been used by the staff of the cafe/restaurant, the operator and the staff of the business conducted from Lot 20 and the staff of the North Shore Coaching College conducted in Lots 21 and 22.

18 The residents of the building do not use the Common Property Toilets. Keys to the toilets are held only by the operators of the businesses conducted from the commercial lots, by the respondent's cleaner and its secretary.

19 The development consent granted on 20 June 1991 required that the restaurant be open for business only between 7:00 am and 6:00 pm Monday to Sunday. On 18 February 2010, the Council extended the trading hours for Lot 19 to 10:00 pm, Monday to Sunday.

20 On 7 December 2015, the Council extended the trading hours for the outdoor area to 8:00 pm Monday to Sunday, subject to approval of a Plan of Management, for a trial period of 12 months from the date of approval of the Plan of Management.

21 It was a term of the amended development approval that patrons and visitors to Shop 3 (Lot 19) have access to the sanitary facilities identified in the Plan of Management (being the Common Property Toilets).

Special By-Law 14

22 At the Annual General Meeting on 31 August 2017, the respondent made "Special By-Law 14 (Common Property Toilets)" (the Special By-Law). The Special By-Law is relevantly in the following terms:

> **Special By-Law No 14 (Common Property Toilets)**
>
> 1. Introduction
>
> 1.1 This by-law applies to the Common Property Toilets.
>
> 1.2 The purposes of this by-law is:
>
> (a) to clarify the proper use of the Common Property Toilets;
>
> (b) to prevent future vandalism and misuses of the Common Property Toilets;
>
> (c) to prevent future compromises of the Building's security;
>
> (d) to prevent avoidable health and safety issues for the Owners Corporation's cleaners and users of the Common Property Toilets;
>
> (e) to prevent avoidable repair costs for the Owners Corporation; and
>
> (f) to prevent additional insurance obligations of the Owners Corporation.

23 The Special By-Law continues for a further four and half pages. Relevantly, cl 3 sets out conditions for access to the Common Property Toilets, namely:

- "Permitted Persons", "Permitted Staff Members" and Permitted Tradespersons" are permitted access to the Common Property Toilets;

- “Excluded Persons” are not permitted access.

24 “Excluded persons” are defined in cl 2.1(d) as:

- members of the general public;
- visitors and invitees of owners, tenants or occupiers of residential lots in the Building (as defined in the Special By-Law).

The proceedings

25 On 9 November 2017, Feedback Deli filed application SC 17/48241. It sought the following orders:

> 1. That special By-Law 14 (Common Property Toilets[)] be invalidated pursuant to s. 150 of the Strata Schemes Management Act 2015 (“the Act”).
>
> 2. That Special By-Law be repealed pursuant to s. 148 of the Act.
>
> 3. That notwithstanding Special By-Law 14, the Owners Corporation not obstruct or impede the visitors or invitees to Shop 3 and customers of the restaurant business conducted in Shop 3 in their proper use of the common property toilets on the ground floor of the building.

26 On the same day that Feedback Deli filed application SC 17/48241, it also filed application SC 17/48246. That application sought interim relief pursuant to s 232 of the *Strata Schemes Management Act 2015* (NSW) (the Act), namely:

> That the Respondent Owners Corporation not register Special By-Law 14 purportedly made on 31 August 2017, nor take any action (if the by-law has been registered) to enforce the by-law against the Applicant and the lessee of Lot 19, until determination of the substantive application, prior expiry of the interim order or further order of the Tribunal.

27 The application for interim relief is not presently relevant.

The hearing and outcome

28 Directions were made for the management of SC 17/48241 in the usual way, and the matter listed for hearing on 16 August 2018. Feedback Deli was represented by Mr D Le Page, solicitor. The respondent was represented by Mr M Bradford of counsel.

29 At the commencement of the hearing, Mr Le Page made an application that Feedback Holdings be joined as a second applicant. The parties also indicated a willingness to enter into settlement discussions.

30 There then followed five hours of settlement discussions. A transcript of hearings before the Senior Member has been provided. The transcript is not time stamped, nor does it record the times at which the parties and their legal

advisers left and subsequently left the hearing room. We understand however, that the hearing commenced at 9:15AM. Page 8 records a “short adjournment”. At T p 14.14 the Senior Member indicates “feeling” that, on the basis that orders 1 and 2 were withdrawn, he would allow the joinder of Feedback Holdings. Further discussion ensued, at T p 17.25-.26 the Senior Member states that he had already indicated that he would grant leave to join Feedback Holdings as an applicant in the proceedings. At the foot of T p 17 the Senior Member (implicitly) referred to s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), and allows the parties to have further discussions, on the proviso they return by 12pm.

31 Upon their return after a further “short adjournment”, the Senior Member indicates that he was not convinced that he should permit joinder of Feedback Holdings. He states that he had been reading s 135 of the Act and considering the implications of that provision. He states that he would hear the parties further “on it” and tells Mr Le Page that he can make some further submissions if he wishes. At T p 25.06, it appears the matter was adjourned to 1:15 PM (see T p 20.20).

32 The parties return, there is further discussion and later in the afternoon the sea member allows the parties a further 30 minutes settlement discussions: T p 24.11. Upon their return, Mr Le Page indicates that the matter was not going to settle, and that he wished to press ahead with the applicants’ joinder application. At this point the parties then make that are effectively final oral submissions in the joinder application. Following these submissions, the Senior Member gave oral reasons for refusing the joinder application and dismissing the application SC 17/48241.

33 The oral reasons stated by the Senior Member in relation to the joinder application were as follows:

> SENIOR MEMBER SMITH: Thank you. Okay. I am refusing the application to join Feedback Holdings Pty Ltd as an applicant in the proceedings. I am or was initially attracted by the argument that Mr Le Page makes that the tribunal has a fundamental obligation to deal with matters expeditiously and to explore the real issues in dispute. However, it can't do that in a vacuum. It must do it within the confines of the law and, in this case, Mr Le Page is seeking to join Feedback Holdings and to withdraw the application in relation to [order] 1 and [order] 2.

If that were to take place, I am satisfied the withdrawal of the application for o 1 25 and [order] 2 would resolve the standing issue because there is no longer any need to establish that the applicant is a person entitled to vote on the by-law 14. By-law 14, when we look at it, seeks to limit the use of the common property toilets to permitted persons, as defined in that by-law. Effectively, it means that any invitee of the applicant's tenant is not a permitted person and, 30 therefore, is not permitted to use the common property toilets on level 1.

The order that is being sought, [order] 3, the last remaining order that is being sought, seeks to allow people other than permitted persons to use the common property toilets. In the words of the order it is saying, "The owners corporation 35 is not to obstruct or impede the visitors and invitees to shop 3 and customers of the restaurant business in their proper use of the common property toilets." "Not to impede or obstruct" really effectively means "to allow", to allow them to ^ exercise the proper use of the common property toilets.

There is no proper use of the common property toilets. By-law 14 precludes it for people who don't come within the definition of permitted persons. Section 135 of the Strata Schemes Management Act to which I referred you provides that by-laws are intended to bind the owners corporation and the lot owners as though they had entered into a deed and I'm not satisfied the tribunal under s 232 or 241 or any other provisions of the Strata Schemes Management Act has the power to order the owners corporation to breach its obligations under s 135 of the Act, because that's effectively what you're asking the tribunal to make an order to do. So, for those reasons, I believe there is no utility in making an order to join Feedback Holdings.

That essentially deals with the joinder application and we're left with the original application seeking three orders. Mr Le Page, you need to make a decision about what you want to do in relation to this application and I'll tell you my preliminary view on it because you need to dissuade me differently if you're going to take any other course of action. It would seem to me that the

applicant cannot maintain the claim for any of the three orders being made. The reason I say that is, on the face of it, it seems that Feedback Deli Pty Ltd was not the owner of lot 19 at the time the by-law was made and, therefore, was not able to vote on that issue, even had their nominee been on the strata roll, which appears wasn’t the case.

So it seems to me that, in relation to [order] 1 and [order] 2, there applicant to bring either of that application for either of those two orders. In relation to the third order there are two difficulties. Firstly, although they don't 15 need to be the applicant for o 3 if it is made under s 232 or doesn't need to be a person entitled to vote on the by-law, it needs to be an interested party and an interested party is defined in the Act as well and I don't think that Feedback Deli Pty Ltd is an interested party.

I'll just see if I can find "interested party". I'll go to s 4 of the Act; let me have a look there.

MOIR: 226.

SENIOR MEMBER SMITH: Thank you, you're right, 226, yes.

"The following persons are 'interested persons' for the purposes of making an application to the tribunal: the owners corporation, an officer of the owners corporation, a strata managing agent of the scheme, an owner of the lot in the scheme, a person having an estate or interest in a lot or an occupier of a lot."

So Feedback Deli Pty Ltd was not an owner of the scheme, full stop. Even if that were wrong, I mentioned there were two problems with that issue and the 35 second one is exactly the same as the problem that Feedback Holdings have in that, even if Feedback Deli was an interested person for the purposes of s 226, the applicant would be asking the tribunal to make the same order that it was proposed for Feedback Holdings and, again, I say that I don't accept that the tribunal has the power to make an order contrary to the obligations to imposed on the owners corporation by the legislation.

So that's my preliminary view on it, Mr Le Page. If you wish to make any submissions, if you wish to tell me how you wish to proceed and make any submissions on it, I'm happy to hear them.

34 The written reasons are as follows:

The applicant's representative at an early stage acknowledged that the owner of lot 19 in the strata scheme was Feedback Holdings Pty Ltd a related company to the applicant. Accordingly the applicant's representative sought an order pursuant to the NCAT Act s 44 for joinder of Feedback Holdings Pty Ltd as a second applicant. After the parties were given several opportunities to make submissions on the issue the application for joinder was dismissed for the following reasons.

It was acknowledged by the applicant that Feedback Holdings Pty Ltd was not at any relevant time listed on the strata roll and was therefore not entitled to vote on a motion in general meeting to introduce a new by-law. Accordingly the applicant did not dispute that Feedback Holdings did not have standing to seek either order (1) or order (2) made pursuant to the provisions of the Strata Schemes Management Act s 148 and s 150. In making the application for joinder the applicant made it clear that the application for orders (1) and (2) was withdrawn but it would pursue the application for order (3).

Initially the Tribunal was attracted by the argument that it should allow the joinder so that the real issues in dispute between the parties could be ventilated. However, on reflection it was determined that there was no utility in the proposed joinder for the following reason.

Bylaw 14 (the bylaw in dispute made in general meeting on 31 August 2017) purports to create a class of "permitted persons" and prevent all others from using the common property toilets on level 1. The essence of the by-law was that the invitees of the operator of the restaurant on lot 19 would no longer be permitted to use the common property toilets. The remaining order being sought (order 3) was that the Owners Corporation is not to obstruct or impede visitors and invitees to lot 19 from their proper use of the common property toilets.

The Strata Schemes Management Act 2015 s 135 provides that all by-laws are to bind the Owners Corporation and lot owners as if they had entered into a deed of agreement. That is, the Owners Corporation by the operation of s 135 is obliged to meet its obligations under a bylaw, as is the lot owner. The order sought effectively required the Tribunal to order the Owners Corporation not to prevent invitees of the restaurant from using the common property toilets whilst the bylaw (14) provided that they were not entitled to do so. Clearly the order sought was a contradiction of the obligations imposed on the Owners Corporation by the operation of

the by-law and s 135.

> I am therefore satisfied that the Strata Schemes Management Act s 232 and/or s 241, pursuant to which the application for order (3) is made, do not give the Tribunal the power to make an order for the Owners Corporation to act contrary to its obligations under a valid by-law.
>
> Hence, as there is no capacity for the Tribunal to make the order that would be sought by Feedback Holdings Pty Ltd there is no utility in joining that company as an applicant. The application to do so is dismissed.
>
> Following the dismissal of the application for joinder of Feedback Holdings, the applicant's representative agreed that the applicant, Feedback Deli Pty Ltd, did not have standing to seek orders (1), (2) or (3) because Feedback Deli Pty Ltd was not a person entitled to vote on bylaw 14 at the AGM conducted on 31 August 2017 so as to enliven the provisions of s 148 or s 150, and also because Feedback Deli Pty Ltd was not an interested person so as to enliven the provisions of s 232.
>
> Accordingly the application was dismissed.

35 It can be seen that the two sets of reasons are, in substance, similar, but not identical. The Appeal Panel has previously been critical of the practice of the Tribunal (at least in the Consumer and Commercial Division) providing both oral and written reasons, finding that such a practice can lead to confusion: *P & N NSW Pty Ltd t/as Euro Solar v Park* [2018] NSWCATAP 202 at [50], and generally at [45] to [51].

36 We repeat, in particular, the observations of the Appeal Panel at [50] that:

> . . . Here the written reasons were an additional version of reasons. Such a practice can potentially lead to confusion. We consider that the better practice (at least for the work of the Tribunal in its Consumer and Commercial Division) is, at the conclusion of the hearing, to:
>
> (1) make orders and give oral reasons; or
>
> (2) make no orders (and therefore give no reasons), with both orders and reasons following later; or
>
> (3) at the conclusion of the hearing, make orders only, with written reasons following.

Grounds of Appeal

37 By Amended Notice of Appeal filed 9 October 2018, the appellants submit that the Senior Member erred:

(1) in finding that s 135 of the Act imposed a duty on the respondent to enforce the Special By-Law;

(2) in finding that the Tribunal could not make order 3 because it would contradict that duty;

(3) in failing to take into a material consideration into account, being the authority of the Tribunal to restrain the respondent by order under ss

232 and/or s 241 of the Act from taking steps to enforce a by-law, to the extent that it was of no force or effect, by virtue of s 136(2) and/or s 139(1) of the Act;

(4) in dismissing the application, without resolving the real issues raised by the application, based on the erroneous dismissal of the application for joinder;

(5) in denying the respondent a reasonable opportunity to prepare considered submissions and to be heard on the Senior Member's reasons for finding the proposed joinder futile, and for dismissing the joinder application.

Is leave required?

38 There was some debate about whether the appellants required leave. In our view, the decision of the Tribunal to refuse the joinder application is an interlocutory one. Section 4(g) of the NCAT Act (Definitions) provides that "interlocutory decision" of the Tribunal means a decision made by the Tribunal under legislation concerning the joinder or misjoinder of a party to proceedings.

39 However, the decision to dismiss the proceedings is, in our view, not an interlocutory decision. It falls into the category of "any other kind of decision" referred to in s 80(2)(b) of the NCAT Act. That section provides:

> (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.

40 In relation to the dismissal decision, the appellant can proceed as of right on any question of law (or otherwise with leave). One of the appellants' principal grounds of appeal is that it was denied procedural fairness, and that is an error of law: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13](4).

41 Accordingly, in our view, the appeal in relation to the dismissal decision has somewhat overtaken the appeal in relation to the joinder decision. As the appellants submit, the final dismissal flows from the joinder decision. It submits that in the event that the Tribunal was to conclude that leave was required under s 80(2)(a) in regard to the joinder application, they seek that leave. They

say that leave ought to be granted because the joinder application was pivotal to the ultimate determination of the Tribunal to dismiss the proceedings.

42 We agree. To the extent necessary, we grant the appellants leave to appeal the joinder decision.

The Appeal

Overview

43 In our view, there are two principal issues to be determined.

44 The first is whether or not the appellants were denied procedural fairness when the Tribunal dismissed the joinder application and consequently the substantive application.

45 The second is whether the Tribunal erred in determining that, even if Feedback Holdings was joined as an applicant, it would not have been entitled to obtain any of the orders sought. We shall describe this as the "utility point".

Procedural fairness

46 The principal matter on which the appellants relied was that it was denied procedural fairness in that the Senior Member did not indicate that s 135 of the Act and the respondent's obligations to enforce by-laws would be a basis for rejecting the joinder application, and that when Mr Le Page sought an opportunity to provide written submissions on the matter, he was refused. In this later respect, the appellants rely on Mr Le Page's oral application appearing at T p 27.45 to T p 28.07, and the Senior Member's refusal of that request at T p 28.25-.27.

47 We reject the proposition that this particular had not been flagged or identified earlier that day. At T p 11 the following exchanges are recorded:

> SENIOR MEMBER SMITH: I think there's a more fundamental problem with the application, Mr Bradford and Mr Le Page, and I think it's this, that Mr Le Page is saying that if the application for [order] 1 and [order] 2 are set aside, the only application is an application that the owners corporation not obstruct or impede the visitors and invitees to shop 3 and customers of the restaurant in their proper use of the common property toilets. It would seem to me that if the tribunal made that order, such an order would be contrary to by-law 14, and if [order] 1 and [order] 2 are struck out then it leaves by-law 14 clearly on foot, and what you're asking the tribunal to do is make an order that the owners corporation behave in a manner that's contrary to a registered by-law.
>
> LE PAGE: Not behave in a manner contrary to a registered by-law-

> SENIOR MEMBER SMITH: To not enforce a by-law.
>
> LE PAGE: -but not enforce a by-law.
>
> SENIOR MEMBER SMITH: They've got an obligation to enforce by-laws.
>
> LE PAGE: With respect, member, 1 disagree. They've got an obligation to enforce a by-law where it is in the interests of the owners that they do so under section whatever it now it; it used to be s 61. Your considerations in this matter may well come to the conclusion that it is not in the interest of the owners that the owners corporation do so and on that basis you would be entitled to restrain the owners corporation within the terms of s 241 from exercising that function.

48 Accordingly, we think that there is substance in the submission that this matter had been raised in the course of dialogue between the legal representatives and the Senior Member. We consider that the appellants, being represented by an extremely experienced and senior legal representative was on notice of this issue. Indeed, this seems to be apparent as Mr Le Page himself sought to make further submissions on the issue: T p 27.45ff.

The utility argument

49 However, we do accept that there is substance in the appellants' submission that the Senior Member erred in declining the joinder application. He erred in concluding as a matter of law that no order could have been made in favour of Feedback Holdings under s 232 of the Act, and did not consider s 136(2) of the Act.

50 The appellants submis that the Senior Member assumed that Special By-Law was valid. It submits that this position overlooks that, under s 136(2) of the Act, a by-law has no force or effect to the extent that it is inconsistent with the Act or any other Act or law. The appellants contend that, amongst other deficiencies, the Special By-Law 14 was harsh, unconscionable or oppressive, contrary to s 139(1) of the Act (or at least arguably so), and therefore was inconsistent with the Act for the purposes of s 136(2). The appellants submit that the third order sought was consistent with the terms and intention of s 136(2) to the extent that it prevented the use of the common property toilets by the patrons to the restaurant being harsh, unconscionable or oppressive. The appellants say that, to that extent:

- the respondent should be restrained from enforcing it or giving it effect pursuant to s 232 of the Act.

- the Tribunal could order the respondent to refrain from preventing the proper use of the Common Property Toilets by the patrons of the restaurant pursuant to s 241 of the Act.

51 The respondent says an anterior issue arises as to whether the Tribunal has jurisdiction or power to make order 3 under ss 232 and/or 241 of the Act. It submits, in lengthy and developed submissions, that:

- Div 5 of Pt 7 of the Act contains specific provisions, including ss 148 and 150, which impose qualifications and conditions on the making of orders by the Tribunal about by-laws. Sections 232(1)(a) and (e) (which the respondent submits are "the only real possibilities in this case"), are general provisions which confer wide powers on the Tribunal to make orders about the matters which they cover but they should not be interpreted, or applied, in a way which enables the appellants to out-flank the specific requirements in Div 5, requirements which they cannot fulfil;
- the fact that s 245(1)(e) enables the Tribunal to declare that an order made under s 232 is to have effect as a decision of the owners corporation is a further indication that s 232 should not be interpreted or applied in a way which puts that decision in conflict with an earlier decision of the respondent to make a valid and binding by law: Walsh v The Owners-Strata Plan No 10349 [2017] NSWCATAP 230 at [60].
- the express restriction in s 232(3)(b) which prevents an application to the Tribunal being made for an order under s 232(1) if a person has commenced and not discontinued proceedings in connection with the settlement of a dispute or complaint the subject of the application is an "insurmountable obstacle" to the appellants; see Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 at [65].
- neither of ss 232 nor 241, both of which are contained in Div 4 of Pt 12 of the Act, confer on the Tribunal a power to make order 3.

52 There may be force in the respondent's submissions. But this was the subject of neither evidence nor submission before the Senior Member. In our view, the resulting dismissal of the proceedings (after refusing the joinder application) was peremptory and made without any debate or discussion.

53 There was no issue that the Tribunal had authority to order the joinder of Feedback Holdings pursuant to s 44(1) of the NCAT Act, nor that Feedback Holdings was the owner of Lot 19. In our view, it was arguable that Feedback Holdings was an "interested person" for the purposes of s 226, and therefore a person whose rights and liabilities relating to Lot 14 and the common property might be affected by orders made in the proceedings (see John Alexander's Clubs Pty Ltd V White City Tennis Club Limited [2010] HCA 19 at [131]).

54 Minds will differ over whether or not the express restriction in s 232(3)(b) is an "insurmountable obstacle" as claimed, or whether the Special By-Law was invalid, at least in part, by operation of s 139(1) of the Act. However, it seems to us that the position is arguable, and that the Tribunal erred in proceeding on the basis that the position was inarguable.

55 For these reasons, we consider that the Tribunal erred. We would allow the appeal, and remit the application to the Tribunal (differently constituted).

Should Feedback Holdings be joined as a party to the remitted proceedings?

56 All parties urged that the Appeal Panel, if it allowed the appeal, to determine this matter for itself prior to remitter.

57 Section 81(2) of the NCAT Act provides that 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 confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

58 As we have noted, s 44(1) of the NCAT Act empowers the Tribunal to join a person be joined as a party to proceedings if the Tribunal considers that the person should be joined as a party.

59 Feedback Holdings is the owner of Lot 19, a commercial lot which it leases to the operator of an Indonesian restaurant. The relief agitated in the proceedings is sought so as to enable the restaurant operator access to the Common Property Toilets for its patrons and staff. And it was a term of the relevant amended development consent that they have such access. Moreover, as noted above, Mr and Ms Lipschitz at all material times were the sole directors and members of both Feedback Deli and Feedback Holdings, each company acting as trustee for their family trust.

60 Given these matters, and that:

- the guiding principle for the NCAT Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: NCAT Act, s 36(1); and

- the Tribunal must seek to give effect to the guiding principle when it exercises any power given to it by this Act or the procedural rules, or interprets any provision of this Act or the procedural rules: NCAT Act, s 36(2);

61 we consider that the appropriate course is that Feedback Holdings be joined as an applicant in the remitted proceedings.

Costs

62 We turn now to the question of costs. Given that we have allowed the appeal, the costs order of 3 October 2018 of the costs of the Tribunal proceedings should be set aside. It is unnecessary therefore determine the cross-appeal. The Tribunal should determine those costs as part of the remitted proceedings.

63 As to the costs of the appeal, if the appellants seek costs, they should file and serve submissions by 14 January 2019. The respondent may respond by 28 January 2019. We propose to deal with the costs application on the papers and without a hearing. Any party who thinks a different course should be followed should address that issue in their submissions.

Orders

64 For the above reasons, we make the following orders:

(1) Leave to appeal granted;

(2) Appeal allowed;

(3) Matter remitted to the Tribunal constituted by a different Member for reconsideration;

(4) Feedback Holdings Pty Ltd is joined as an applicant to the remitted proceedings;

(5) If the appellants seek costs, they should file and serve submissions by 14 January 2019;

(6) The respondent may respond by 29 January 2019.

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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

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.