Civil and Administrative Tribunal

New South Wales

Case Name:	Quo Warranto Pty Ltd v Goodman
Medium Neutral Citation:	[2022] NSWCATAP 315
Hearing Date(s):	7 March 2022
Date of Orders:	30 September 2022
Decision Date:	30 September 2022
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member C Fougere, Principal Member
Decision:	(1) The appeal is allowed. (2) Order 1 made by the Tribunal on 15 October 2021 in SC 21/18734 is set aside. (3) Proceedings SC 21/18734 are dismissed. (4) If an application for costs is made, the following orders apply: (a) The application is to be filed and served, supported by evidence and submissions not exceeding five pages in length, within 14 days of the date of these orders; (b) Evidence and submissions in response to the costs application are to be filed and served 14 days thereafter; (c) Any material in reply is to be filed and served seven days thereafter. (d) In their submissions the parties are to address whether a hearing on costs should be dispensed with and costs determined on the papers.
Catchwords:	APPEAL – Strata - Contributions to a special levy - power to alter contributions – ambit of order making power under s 87 and s 232(1) – effect of order varying unit entitlement

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Environmental and Planning Regulation 2021 Environmental Planning and Assessment Act 1979 Strata Schemes Management Act 1996 Strata Schemes Management Act 2015
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Coscuez International Pty Ltd v The Owners-Strata Plan No 46433 [2022] NSWCATAP 147 Dehsabzi v The Owners Corporation – Strata Plan No 83556 [2020] NSWCATAP 142 EB 9 & 10 Pty Ltd v The Owners – SP 934 [2018] NSWCA 288 EB 9 & 10 Pty Ltd v The Owners – SP 934 [2018] NSWSC 546 North East Developments Pty Limited v The Owners - Strata Plan No. 53374 [2007] NSWSC 1063 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 The Owners – Strata Plan No 76830 v Byron Moon Pty Limited [2020] NSWCATAP 186 The Owners Strata Plan No 74698 v Jacinta Investments Pty Ltd [2021] NSWCATAP 387 The Owners-Strata Plan 62713 v Liberant [2022] NSWCATAP 80 Trentelman v The Owners – Strata Plan No 76700 [2021] NSWCATAP 222 Vickery v The Owners-Strata Plan No 80412 [2020] NSWCA 284
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Quo Warranto Pty Ltd (Appellant) Jonathan Mark and Barbara Beth Goodman (First Respondents) William Theo Locke and Nicolette Jeanne Locke (Second Respondents) Strata Choice Pty Ltd (Third Respondent) The Owners – Strata Plan No. 15482 (Fourth Respondent) Michael Braham Joel and Anna Joel (Fifth Respondents)

Representation:	Counsel: M Forgacs (First and Second Respondents) Solicitors: J Atanaskovic (Appellant) Le Page Lawyers (First and Second Respondents) K Maclachlan (Agent) (Third Respondent) Bannermans Lawyers (Fourth Respondent) Speirs Ryan (Fifth Respondents)
File Number(s):	2021/325119
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	15 October 2021
Before:	G Ellis SC, Senior Member
File Number(s):	SC 21/18734

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 15 October 2021.

2 The appellant is a lot owner in SP 15482, as are the first, second and fifth respondents, who in these reasons for decision are referred to respectively as the Goodmans, the Lockes and the Joels. The third respondent is the former compulsory strata managing agent of SP 15482 (the SMA) and the fourth respondent is the Owners Corporation (the OC). The SMA, the OC and the Joels played no part in the appeal proceedings.

3 The appellant appeals against the Tribunal's decision to vary the respective contributions of the four lot owners to a special levy in the sum of $950,000, which was struck by the SMA on 30 November 2020.

4 The issues in the appeal are whether the Tribunal had the power to vary the contributions under s 87 and/or s 232 of the *Strata Schemes Management Act* 2015 (the SSM Act) and, if so, whether it properly exercised the discretion to do so.

5 For the reasons set out below, we have decided to allow the appeal, set aside the order varying contributions made by the Tribunal below and dismiss the application made to the Tribunal by the Goodmans and the Lockes.

Background

6 The lots owned by the appellant, the Goodmans, the Lockes and the Joels resulted from a strata plan of subdivision registered on 30 April 1992.

7 On 13 December 2018, the Joels' predecessor in title, their mother Lady Joel, applied for an order appointing a compulsory strata managing agent. The Joels conducted the proceedings on her behalf, as Michael Joel held a power of attorney. On 20 March 2019 the Tribunal appointed Kooper & Levi Strata Management Pty Ltd as compulsory strata managing agent for a period of two years: SC 18/53094. The Tribunal found that the management structure of the strata scheme was not functioning satisfactorily, noting disputes between the Goodmans and the Lockes on the one hand and the appellant and Lady Joel on the other in respect of works required to maintain the common property. At that time, the Goodmans had 25% unit entitlement, the Lockes had 30% unit entitlement, the appellant had 25% unit entitlement and Lady Joel had 20% unit entitlement.

8 Kooper & Levi retained Preservation Technologies Pty Ltd to undertake works to the common property. Work commenced on 4 May 2020.

9 On 23 June 2020 the Joels lodged an application in the Tribunal seeking an order for reallocation of unit entitlements: SC 20/27260. During the proceedings, the appellant, the Lockes and the Goodmans were added as respondents.

10 On 12 August 2020, Kooper & Levi struck a special levy in the sum of $950,000. The lot owners' contributions were payable on 1 September 2020.

11 On 17 August 2020, Preservation Technlogies Pty Ltd suspended work because of non-payment of invoices.

12 On 2 October 2020, the Joels lodged an application in the Tribunal seeking an order replacing Kooper & Levi as the compulsory strata manager: SC 20/41916. On 23 October 2020, the Tribunal appointed the SMA, extending the term of appointment until 19 March 2022.

13 On 30 November 2020, the SMA rescinded the levy struck on 12 August 2020 and struck a new levy in the same sum, with contributions payable on 19 January 2021.

14 On 15 December 2020, the Tribunal made orders by consent of the Joels and the OC in SC 20/27260. The Lockes, the Goodmans and the appellant did not appear at the hearing. Relevantly, the orders varied the unit entitlements in accordance with a joint expert report and required the OC to take all necessary steps to lodge the orders with the Registrar-General of the Land Registry Services and to have them recorded on the common property title of Strata Plan No 15482 within 42 days of the date of the orders. As a result of the Tribunal's orders in SC 20/27260, the Goodmans now have 15% unit entitlement, the Lockes have 24% unit entitlement, the appellant has 33% unit entitlement and the Joels have 28% unit entitlement.

15 On 15 January 2021 the Goodmans' solicitor requested a revision of contributions to the special levy, which was due to be paid by 19 January. The SMA refused that request on 15 February.

16 The Tribunal's orders varying the unit entitlements were lodged with the Registrar-General of the Land Registry Services on 18 February 2021, although in accordance with the Tribunal's orders, they should have been lodged by 26 January 2021.

17 The Goodmans and the Lockes commenced proceedings in the Tribunal on 29 April 2021 seeking orders either setting aside or varying the contributions to

reflect the change in unit entitlements: SC 21/18734. The appellant, the SMA, the OC and the Joels were respondents in the Tribunal proceedings.

Tribunal proceedings and decision

18 The matter was listed before the Tribunal for directions on 21 May 2021 and for final hearing on 12 October 2021. The appellant did not appear at or otherwise take part in the proceedings. The Tribunal's reasons for decision (the reasons) were published on 15 October 2021.

19 At [35] of the reasons the Tribunal found that that the special levy of $950,000 was not excessive. The Tribunal also found that the SMA was required to calculate the contributions payable by the lot owners according to the unit entitlements when the special levy was struck on 30 November 2020: reasons at [36].

20 The Tribunal found that the Goodmans and Lockes could rely on s 87 of the SSM Act. In relation to this, the Tribunal stated at [41] to [47]:

> 41 The power granted by s 87 can only be exercised "if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions in unreasonable". A strict reading of those quoted words suggests an applicant can only avail of s 87 either when the amount of the levy is either inadequate or excessive (situation 1) or when the manner of payment of contributions is unreasonable (situation 2).
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> 42 It is the second respondent's contention that the amount of the levy is neither inadequate or excessive and that the words "manner of payment" should be taken to refer to matters such as whether contributions are payable by a lump sum or in instalments and the date when contributions become payable. In other words, it is suggested that s 87 does not assist the applicants as their case is that what is excessive is their contributions rather that the levy. The construction for which the second respondent contends would also suggest that the adjective "unreasonable" only applies to the manner of payment of contributions and not to the amount of those contributions.
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> 43 The fact that paragraphs (a) and (b) within s 87(1) permit the Tribunal to make "an order for payment of contributions of a different amount" or "an order for payment of contributions in a different manner" could be read as enabling either the amount of contributions to be adjusted when the levy is considered to be either inadequate or excessive or to change the manner of payment of contributions when they are considered to be unreasonable. In other words, paragraph (a) relates to situation 1 and paragraph (b) relates to situation 2.

> 44 In relation to contributions resulting from a decision in favour of a levy there are three questions which could arise: (1) whether the amount of the levy is inadequate or excessive, (2) whether the amount of any contribution is inadequate or excessive, (3) whether the manner of payment of contributions is unreasonable. It is understandable that the second of those three situations could not normally arise since s 83(2) requires that contributions to a levy must be calculated by reference to unit entitlements. However, it does arise in this case.
>
> 45 There is nothing to suggest that the words "manner of payment of contributions is unreasonable" are confined to whether payment is to be made by way of a lump sum or instalments or the date when contributions become payable. In this case, it could be said that the manner of payments is unreasonable in that the applicants, who together now hold only 39% of the voting rights are being required to pay 55% of the levy and, conversely, that the third and fourth respondents, who together hold 61% of the voting rights, are only required to pay 45% of the levy.
>
> 46 Further, there is nothing in s 87 which suggests the Tribunal's assessment of the position is confined to the situation as at the time when the levy decision was made on 30 November 2020. Also, it is noted that s 236(6) provides a facility for making orders in relation to "overpayments" due to unit allocations found to have been unreasonable.
>
> 47 Accordingly, the Tribunal considers that the applicants are entitled to rely on s 87 in this case. However, that is not the end of the matter since the opening words of s 87, namely "The Tribunal may …", indicate that Tribunal's exercise of the power granted by s 87 is discretionary, being an issue considered below.

21 The Tribunal also considered whether the order sought by the Goodmans and the Lockes could be made under s 232(1) of the SSM Act. In relation to this, the Tribunal relevantly stated:

> 51 It is neither necessary nor appropriate to here consider the breadth of the power provided to the Tribunal under s 232(1) as the Tribunal is satisfied that statutory power can be used to address the present situation if s 87 does not apply. In other words, if this case is not covered by s 87 then s 232 provides a broad discretionary power in circumstances where it is contended that the contributions are excessive and unreasonable by reason of the reallocation of unit entitlements.
>
> 52 Thus, if s 87 of the SSMA, which is headed "Orders varying contributions or payment methods", is to be interpreted as not covering an adjustment of contributions when a variation in unit entitlements renders those contributions unreasonable, then s 232(1) enables that gap to be filled.

22 Having found that the Tribunal had the power to make the orders sought by the Goodmans and the Lockes under s 87(1) and/or s 232(1) of the SSM Act, the Tribunal went on to consider how the discretion to make the orders sought should be exercised at [56] to [68] of the reasons.

23 At [69] the Tribunal concluded:

> 69 Given the accepted need for remedial work and for contributions to enable that work to be completed, it does not make sense to set aside the existing levy since that would create the need for a new levy and any such levy could not be made payable for at least 30 days after notice of that levy is given, by reason of s 83(3) of the SSMA. The clearly preferable course is to maintain the total amount of the existing levy but vary the amount of the contributions to reflect the revised unit entitlements.

24 The Tribunal relevantly made the following order:

> 1. Pursuant to section 87 or, in the alternative, section 232 of the Strata Schemes Management Act 2015, the contributions to be made in respect of the Special Capital Works Levy of $950,000 that was determined on 30 November 2020 are varied as follows:
>
> (a) The amount payable by owners of Lot 4 [the Goodmans] is $142,500,
>
> (b) The amount payable by owners of Lot 5 [the Lockes] is $228,000,
>
> (c) The amount payable by owners of Lot 6 [the Joels] is $266,000, and
>
> (d) The amount payable by owner of Lot 7 [the appellant] is $313,500.

25 The Tribunal subsequently ordered the parties to pay their own costs of the proceedings. That order is not at issue in the appeal.

26 The appellant appeals the decision in respect of its findings concerning s 87, s 232 and the exercise of the discretion. The Goodes and the Lockes oppose the appeal. As noted above, the other parties played no active role in the appeal proceedings.

Scope and nature of internal appeals

27 Internal appeals may be made as of right on a question of law and otherwise with leave of the Appeal Panel: s 80(2) NCAT Act.

28 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

29 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

30 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

31 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

32 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

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

Submissions and evidence

33 In deciding the appeal, we have had regard to the following:

- The Notice of Appeal lodged on 16 November 2021;
- The Reply to Appeal lodged on 10 December 2021;
- The appellant's submissions lodged on 1 February 2022;
- The Goodmans' and Lockes' submissions lodged on 22 February 2022;
- The appellant's submissions in reply, dated 4 March 2022;
- A two volume bundle filed on 9 March 2022;
- The procedural directions made at callover;
- The Tribunal's reasons for decision;
- The application to the Tribunal;
- The oral submissions made during the appeal hearing;

34 Because of our conclusion that the Tribunal had no power to make the orders it made under s 87 and s 232, we have not needed to consider written submissions filed after the appeal hearing, which concerned an issue relevant to the Tribunal's discretion in the event that it had the power to make the orders sought.

Notice of Appeal

35 The Notice of Appeal was lodged on 16 November 2021, which is within the 28 day time period specified in cl 25(4) of the Civil and Administrative Tribunal Rules 2014 (the Rules). The appeal is therefore within time.

Grounds of Appeal

36 The grounds of appeal specified in the Notice of Appeal are:

(1) Section 87 of the SSM Act confers no power to make order 1 made by the Tribunal.

(2) Section 232 of the SSM Act has not been enlivened to confer power on the Tribunal to make order 1.

(3) Order 1 made by the Tribunal is wrong in law, being contrary to express provisions of the SSM Act.

(4) The Tribunal took into account irrelevant considerations.

(5) The Tribunal failed to take into account relevant considerations.

37 The appellant seeks leave to appeal on the basis that the decision is not fair and equitable and against the weight of evidence.

Submissions

38 The appellant's submissions are lengthy, discursive and because of this at times difficult to follow. However, in summary, we understood the appellant to submit that:

- The Tribunal has no jurisdiction to vary a contribution to a levy under s 87 of the SSM Act;
- The Tribunal has no jurisdiction to vary a contribution under s 232(1) of the SSM Act;
- If the Tribunal does have jurisdiction to make an order either under s 87 or under s 232, the discretion to do so miscarried.

39 Only the Goodes and the Lockes participated in the appeal proceedings. In summary, their position is the opposite to that of the appellant and they submit that the decision below should be upheld. Specific submissions the parties made are, as relevant, referred to in our reasons in respect of each of the issues raised by the appeal.

Issues

40 The issues for determination in the appeal are:

(1) Did the Tribunal have power to alter contributions to the November 2020 special levy under s 87(1) of the SSM Act?

(2) Did the Tribunal have power to alter contributions to the November 2020 special levy under s 232(1) of the SSM Act?

(3) If the Tribunal had power to alter contributions to the November 2020 special levy under s 87(1) and/or s 232(1) of the SSM Act, did the discretion to do so miscarry?

(4) If no question of law arises on the appeal, has the appellant suffered a substantial miscarriage of justice on the basis that the Tribunal's decision was not fair and equitable or against the weight of evidence?

(5) If so, should the discretion to grant leave to appeal be exercised in favour of the appellant?

41 Whether the Tribunal has the power to alter contributions under s 87 and/or s 232(1) are issues of statutory interpretation. These give rise to questions of law for which leave to appeal is not required.

Consideration

Did the Tribunal have power to alter contributions to the November 2020 special levy under s 87(1) of the SSM Act?

42 One of an owners corporation's central obligations is to manage the finances of the strata scheme: s 9(3)(a) SSM Act. Legislative provisions concerning this obligation are set out in Part 5 of the SSM Act.

43 In accordance with ss 73 and 74 of the SSM Act, an owners corporation is obliged to establish an administrative fund and a capital works fund. Section 79 of the SSM Act requires an owners corporation to estimate at each annual general meeting how much money it will need to credit to the administrative and capital works funds for actual and expected expenditure.

44 Section 81 of the SSM Act states:

> **81 Owners corporation to set contributions to administrative and capital works funds**
>
> (1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds.
>
> (2) That determination must be made at the same meeting at which those estimated amounts are determined.
>
> (3) The owners corporation must levy on each person liable for it such a contribution.

(4) If the owners corporation is subsequently faced with other expenses it cannot at once meet from either fund, it must levy on each owner of a lot in the strata scheme a contribution to the administrative fund or capital works fund, determined at a general meeting of the owners corporation, in order to meet the expenses.

(5) A contribution is, if an owners corporation so determines, payable by the regular periodic instalments specified in the determination setting the amount of the contribution.

45 The contribution referred to in s 81(4) of the SSM Act is commonly known as a "special levy".

46 Section 83 of the SSM Act provides:

83 Levying of contributions

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.

(4) Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.

47 "Unit entitlement of a lot" is defined in s 4 of the SSM Act as "the unit entitlement of the lot shown on the schedule of unit entitlement for the strata scheme". In accordance with s 4, "schedule of unit entitlement for the strata scheme" has the same meaning as it has in s 4 of the *Strata Schemes Development Act* 2015; namely, "the schedule recorded as the schedule of unit entitlement in the folio for the common property in the scheme".

48 Section 82 of the SSM Act relevantly provides:

82 Individual contributions may be larger if greater insurance costs

(1) If the use to which a lot in a strata scheme is put causes an insurance premium for the strata scheme to be greater than it would be if it were not put to that use, so much of a contribution payable by the owner of the lot as is attributable to insurance premiums may, with the

consent of the owner, be increased to reflect the extra amount of the premium.

….

49 In summary, the process set out in Part 5 requires an owners corporation to:

- Decide on an annual basis the aggregate amount required to be paid into the administrative and capital works funds in order for the owners corporation to meet its expenses; and
- Levy on each lot owner that lot owner's contribution to the required amount, calculated in accordance with the unit entitlement of the lot (unless s 82(1) applies), by giving each lot owner a written notice of the contribution payable.

50 Given that contributions are levied on a lot owner by giving the lot owner written notice of the contribution payable, as a practical matter the calculation of each owner's contribution in accordance with unit entitlement (subject to s 82(1)), must be carried out prior to the owner being given written notice of the contribution. Calculation of the contribution payable must be based on the unit entitlement shown on the schedule of unit entitlement in the folio for the common property in the scheme.

51 The Goodmans and the Lockes argue and the Tribunal found that the Tribunal has the power under s 87 to alter the amount of an individual contribution to the amount determined in accordance with s 81. In this case, the amount concerns a special levy.

52 Section 87 of the SSM Act states:

> **87 Orders varying contributions or payment methods**
>
> (1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—
>
> (a) an order for payment of contributions of a different amount,
>
> (b) an order for payment of contributions in a different manner.
>
> (2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

53 Whether the Tribunal has power to amend contributions under s 87 was at issue in *The Owners – Strata Plan No 76830 v Byron Moon Pty Limited* [2020]

NSWCATAP 186 (Byron Moon). The position put by the Goodmans and the Lockes was the position put by the applicant to the Tribunal in the matter that was subject to appeal in *Byron Moon*.

54 The dispute in *Byron Moon* concerned liability for electricity costs associated with hot water tanks that serviced twenty-two residential lots in SP 76830, which is composed of thirty lots and common property. Residential units were supplied with hot water from three water tanks situated on common property and connected to the common electricity supply for the strata scheme. From 2006 the cost of heating the water in the three tanks was paid by the owners corporation through contributions paid to the administrative fund by all lot owners, including those whose lots were not being supplied with water from the tanks.

55 The respondents on the appeal (the applicants at first instance) were the owners of two commercial lots. Their position was that the water heating costs should be paid for solely by the proprietors of the twenty-two residential lots serviced by the common property water tanks. At an Extraordinary General Meeting, the appellant resolved to create an additional by-law, the effect of which was that the owners of lots 1 to 22 would be responsible for payment of all electricity metered charges for the hot water system located on common property which serviced those lots effective from 1 May 2019.

56 The respondents on the appeal applied to the Tribunal seeking orders relating to several issues. The application was said to be based on the provisions of sections 87 and 232 of the SSM Act. The Tribunal found in favour of the respondents, ordering the appellant to repay to the respondents so much of their contributions to the administrative fund that were attributed to the cost of electricity for the heating of the three hot water tanks. The owners corporation appealed that decision. The issue for the Appeal Panel was whether the Tribunal had the power to make the order it made under s 87 or s 232 of the SSM Act. The appeal was allowed. In respect of s 87, the Appeal Panel found at [21]:

> 21 The respondents sought to rely on the provisions of section 87 as entitling the Tribunal to make the orders which are the subject of these appeal proceedings. We reject this submission because section 87 (1)

> refers to the aggregate amount of the levy or the amount proposed to be levied by way of contributions, and does not in its terms permit any differential treatment of any individual lot owner by reference to the amount of contributions. The same approach applies when considering the "manner of payment of contributions". In this latter regard ordinary English usage dictates that the manner of payment of contributions refers to the way in which the contributions are to be paid. We reject any suggestion that this expression would justify a differential approach as contended for by the respondents in their submissions.

57 We agree with the Appeal Panel's conclusion in *Byron Moon*. In our view, the expression "any amount levied or proposed to be levied by way of contributions" in s 87(1) refers to the aggregate amount levied and not to a particular contribution to the amount levied. In our view, this interpretation of s 87(1) is consistent with the plain meaning of the words. If the legislature had intended it to have the meaning contended for by the Goodmans and the Lockes, s 87(1) would have said "any amount levied or proposed to be levied by way of a contribution", or "any amount levied or proposed to be levied by way of a contribution or contributions".

58 This interpretation is also consistent with the context of the provision, which sits within the legislative process described above by which an owners corporation estimates how much money needs to be credited to the administrative or capital works funds, determines to raise that sum by contributions to be paid by those liable to pay them and determines a special levy in circumstances where it cannot meet its expenses from the relevant fund and levies.

59 We also agree with the Appeal Panel's decision in *Byron Moon* that the "manner of payment of contributions" refers to the way in which contributions are to be paid; that is, for example, whether contributions will be paid in a lump sum or by instalments, whether they will be paid immediately or at a later date, or whether they will be paid by bank transfer or by cheque. In our view, this is consistent with the ordinary meaning of the words "manner of payment of contributions". We consider that it would be inconsistent with the requirement for lot owners' contributions to be calculated in accordance with unit entitlements (subject to s 82(1)) to define "manner of payment of contributions" as broadly as contended for by the respondents and in such a manner that would permit the amount of an individual contribution to be altered in the

absence of an order that the overall amount to be levied by way of contributions is excessive or inadequate.

60 We note a later decision made by an Appeal Panel differently constituted to that in *Byron Moon: Trentelman v The Owners – Strata Plan No 76700* [2021] NSWCATAP 222 (*Trentelman*). In the Tribunal proceedings giving rise to the appeal, the appellant sought an order varying contributions to levies, which had been struck prior to a reallocation of unit entitlements which had led to a decrease in the appellant's unit entitlement. The Tribunal dismissed the application and, in doing so, found that the Tribunal had no power to make such an order under s 87 of the SSM Act. While the Appeal Panel dismissed the appeal, it stated that it had "serious reservations" about the Tribunal's approach in respect of s 87. The Appeal Panel stated at [55]:

> 55 … We have formed a preliminary view that what was proposed was not a change in the amount of levies but a change in the manner of payment of contributions. The Tribunal was therefore required to consider under s 87(1)(b) whether the change was unreasonable, but it did not do so. We are also inclined to the view that the fact that the orders sought followed on from a reallocation of unit entitlements is not necessarily a barrier to the making of an order under s 87 (but may be a factor going to the exercise of the discretion).

61 We have set out at [57]-[59] our view as to the correct approach to be taken to s 87(1). The Appeal Panel's comments concerning s 87 in *Trentelman* are clearly obiter dicta and there is nothing in the reasons for decision to indicate that the Appeal Panel was referred to the earlier decision in *Byron Moon.* In such circumstances, we place no weight on the obiter dicta in *Trentelman*.

62 We conclude that the Tribunal erred in concluding that it had the power to make an order varying an individual contribution under s 87, in the absence of a finding that the aggregate amount levied or proposed to be levied by way of contributions was inadequate or excessive or that the manner of payment of contributions was unreasonable.

63 This ground of appeal is established.

Did the Tribunal have power to alter contributions to the November 2020 special levy under s 232(1) of the SSM Act?

64 Section 232(1) of the SSM Act provides:

232 Orders to settle disputes or rectify complaints

(1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—

(a) the operation, administration or management of a strata scheme under this Act,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

65 The extent of the Tribunal's powers under s 232(1) was considered in *Vickery v The Owners-Strata Plan No 80412* [2020] NSWCA 284 (V*ickery*). That matter specifically concerned whether the Tribunal has the power to award damages for breach of s 106(1) and s 106(2) of the SSM Act. The NSW Court of Appeal held by majority (Basten JA and White JA; Leeming JA dissenting) that:

(a) Section 106 of the SSM Act creates a statutory right to recovery rather than reflecting a general law cause of action; and

(b) Section 232 of the SSM Act confers jurisdiction and power to hear and determine a claim for damages under s 106 (5) of the SSM Act.

66 Since the Court of Appeal's judgment in *Vickery*, the Appeal Panel has considered the breadth of the Tribunal's powers under s 232(1) on several occasions: see, for example, *The Owners-Strata Plan No 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387 (*Jacinta*), *The Owners-Strata Plan 62713 v Liberant* [2022] NSWCATAP 80 (*Liberant*) and *Coscuez International Pty Ltd v The Owners-Strata Plan No 46433* [2022] NSWCATAP 147 (*Coscuez*).

67 In *Jacinta* and *Liberant*, the Appeal Panel considered the Tribunal's powers under s 232(1) in the context of the Tribunal's power to make an order equivalent to a Court's power under s 90 of the SSM Act; that is, to order that monies ordered to be paid by the owners corporation not be levied against a lot

owner who was successful against the owners corporation in the proceedings (*Jacinta* at [183]-[202]; *Liberant* at [115]-[132]). In *Coscuez*, the issue concerned the Tribunal's power to award damages otherwise than in connection with a claim under s 106(5) of the SSM Act.

68 The authorities dealing with the extent of the Tribunal's powers under s 232(1) do not specify the ambit of the Tribunal's powers under that provision. That said, the power to make an order under s 232(1) to "settle a dispute or complaint" is clearly limited to making an order to settle a dispute or a complaint that falls within s 232(1)(a) to s 232(1)(f) of the SSM Act.

69 In this case, the dispute concerns the levying of contributions. We accept that this falls within s 232(1)(a) as it concerns the administration of the strata scheme and within s 232(1)(f) as it concerns the exercise of function conferred or imposed under the SSM Act; that is, the Owners Corporation's function of levying contributions.

70 In *Jacinta*, the Appeal Panel stated at [183]-[185]:

> 183 The types of orders that can be made are not specified, other than for the requirement that the order be one "to settle a complaint or dispute". There is no reason to construe such a grant in a limited way: *Shin Kobe* (above); Vickery per Basten JA at [26]-[28] and White JA at [167].
>
> 184 Such an approach when construing a general order making power was also adopted by White J (as he then was) in construing the general order making power in s 21(1)(a) of the Agricultural Tenancies Act 1990 (NSW) which permits the Tribunal to make "an order giving effect to a determination that may be made by the Tribunal under this Act": *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 at [79] and following.
>
> 185 The question is whether there is a relevant dispute which would attract jurisdiction and enliven the order making power and whether the SSMA otherwise specifies which lot owners are to be levied in funding any liability of an owners corporation to a lot owner in respect of such disputes.

71 While the Tribunal's power to make orders to settle disputes or complaints under s 232(1) is broad and should not be construed in a limited way, this does not mean that the power is limitless. The authorities concerning s 232(1) – including the majority decision of the Court of Appeal in *Vickery* - do not support a conclusion that the Tribunal can make any order it wants to settle a

dispute or complaint – even in respect of a matter that falls within s 232(1)(a) to s 232(1)(f) - in the absence of a cause of action arising from a substantive legal right or obligation. In our view, and contrary to the submission made by the Goodmans and the Lockes, s 232(1) empowers the Tribunal to make orders in circumstances where substantive rights and obligations exist. A cause of action that enlivens the Tribunal's power to make orders under s 232(1) may be found elsewhere in the SSMA Act, in the strata scheme's by-laws, in other statute law or in the general law.

72 We note the submission made by the Goodmans and the Lockes in relation to the Appeal Panel's decision in *Dehsabzi v The Owners Corporation – Strata Plan No 83556* [2020] NSWCATAP 142 (*Dehsabzi*), in which the Appeal Panel held at [53] that the Tribunal at first instance was correct in holding that the Tribunal has jurisdiction to make an order that an owners corporation consent to the submission of a development application involving common property. The Goodmans and the Lockes rely on *Dehsabzi* in support of their position that the power to make orders under s 232(1) is not dependant on the existence of substantive law requirements. They state in relation to the issue in *Dehsabzi:*

> That is clearly the intention of s 232(6) of the Act. Such power exists despite the fact that, in withholding consent to the submission of a development application, an owners corporation would not be in breach of any duties owed by it under the SSMA or any other legislation. The power to make the order is confirmed by section 232(1) not s 232(6): s 232(6) merely regulates the exercise of the power under s 232(1) with respect to disputes concerning the failure of an owners corporation to consent to the making of a development application.

73 We agree that s 232(6) regulates the exercise of the power under s 232(1) to make an order concerning a dispute about the failure of an owners corporation to consent to the making of a development application. We also accept that withholding consent to making such an application would not place (or at least, would not necessarily place) an owners corporation in breach of its duties under the SSM Act or other legislation. However, we do not accept that this demonstrates that the power under s 232(1) exists independently of substantive legal rights and obligations.

74 In relation to the power to make an order requiring an owners corporation to consent to a development application, s 4.2 of the *Environmental Planning and Assessment Act* 1979 relevantly provides:

> (1) **General** If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless—
>
> (a) such a consent has been obtained and is in force, and
>
> (b) the development is carried out in accordance with the consent and the instrument.
>
> Maximum penalty—Tier 1 monetary penalty.
>
> (2) For the purposes of subsection (1), development consent may be obtained—
>
> (a) by the making of a determination by a consent authority to grant development consent, or
>
> (b) in the case of complying development, by the issue of a complying development certificate.

75 Clause 23 of the Environmental and Planning Assessment Regulation 2021 relevantly provides:

> **23 Persons who may make development applications**
>
> (1) A development application may be made by—
>
> (a) the owner of the land to which the development application relates, or
>
> (b) another person, with the consent of the owner of the land.

76 It is not controversial that in strata schemes, the common property is owned by the owners corporation. Where a lot owner wishes to undertake works, is obliged to make a development application in respect of those works and the works involve works to the common property, the lot owner requires the consent of the owners corporation because the owners corporation owns the common property. The issue in relation to the Tribunal's power under s 232(1) to order an owners corporation to give its consent to a development application is not whether the owners corporation is obliged to give its consent or whether it is in breach of the law if it fails to do so. The substantive obligation giving rise to the Tribunal's jurisdiction to make such an order under s 232(1) is, in our view, the lot owner's obligation under planning law to obtain the owners

corporation's consent to the making of a development application which involves the common property.

77 The Goodes and the Lockes argue that to the extent a separate legal obligation is required, that obligation is found in s 9(2) of the SSM Act, which provides:

> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
>
> (a) the management and control of the use of the common property of the strata scheme, and
>
> (b) the administration of the strata scheme.

78 In support of their position, they rely on the Court of Appeal's decision in *EB 9 & 10 Pty Ltd v The Owners – SP 934* [2018] NSWCA 288 (*EB 9 & 10*).

79 The Court of Appeal proceedings in *EB 9 & 10* concerned a costs order made in the Supreme Court against the appellant, a lot owner in SP 934: *EB 9 & 10 Pty Ltd v The Owners – SP 934* [2018] NSWSC 546. In the Supreme Court proceedings Kunc J made a declaration that the lot owner had a right to reasonable use of a small strip of the strata scheme's common property to allow for a motor vehicle to be manoeuvred into and out of a parking space which was part of the lot property. That finding was not in dispute in the Court of Appeal proceedings.

80 As contemplated by s 253(2) of the SSM Act (or s 226(2) of the *Strata Schemes Management Act* 1996 (the 1996 SSM Act)) the unsuccessful owners corporation sought a costs order against the successful lot owner.

81 Section 253 of the SSM Act and s 226 of the 1996 SSM Act are in relevantly the same terms and provide:

> **Other rights and remedies not affected by this Act**
>
> (1) Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot or an owners corporation or covenant chargee may have in relation to any lot or common property apart from this Act.
>
> (2) In any proceedings to enforce any such right or remedy, the court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the court is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not justified because this Act or Part 4 of the *Community Land Management*

> *Act* 2021 makes adequate provision for the enforcement of those rights or remedies
>
> (3) The defendant's costs are to be as determined by the court.

82 It is noted that the reference to the *Community Land Management Act* in s 226(2) of the 1996 SSM Act and in s 253(2) of the SSM Act at the time *EB 9 & 10* was decided was to the now repealed *Community Land Management Act* 1989.

83 Kunc J made the order under s 253(2) of the SSM Act, although in the Court of Appeal proceedings the parties agreed that s 226(2) of the 1996 SSM Act was the provision that applied. Nothing turned on that error. Kunc J concluded that, having regard to the subject matter of the proceedings, the taking of the proceedings was not justified because strata titles legislation made adequate provision for the enforcement of the lot owner's rights or remedies. The lot owner appealed, arguing that Kunc J was in error in forming that opinion.

84 The Court of Appeal dismissed the appeal. In doing so, the Court (Barrett AJA; Meagher and Gleeson JJA agreeing) found that an order in terms corresponding with those of the declaration made by Kunc J could have been made by a strata schemes adjudicator under s 138(1)(a) of the 1996 SSM Act, by reference to s 61(1) of that Act.

85 Section 138(1) was the general order making power under the 1996 SSM Act equivalent to s 232(1) under the SSM Act. Section 61(1) was the equivalent of s 9(2) of the SSM Act and provided:

> **61 What are the key management areas for a strata scheme?**
>
> (1) An owners corporation has, for the benefit of the owners:
>
> (a) the management and control of the use of the common property of the strata scheme concerned, and
>
> (b) the administration of the strata scheme concerned.
>
> ….

86 The Court of Appeal stated at [50]

> 50 …. By s 61(1), the corporation has “the management and control of the use of the common property of the strata scheme”. The postulated order, if made, would regulate exercise of the function of managing and controlling the use of common property. It would be of that character because it would require the owners corporation, in managing and

controlling the common property, to respect the appellant's right to limited use of the identified strip and, to that end, to avoid and, so far as reasonably lies within its power, prevent use impeding or restricting exercise of the appellant's right. This "control" of the owners corporation's "use" would, as referred to in the opening words of s 61(1), be for the benefit of the owners as a whole. This is because it would cause the common property (owned at law by the owners corporation and in which each lot owner has an equitable interest) to be administered with due regard to the appellant's right and would protect both the lot owners and the corporation of which they are members from complicity in invasion of that right. The order would therefore be within s 138(1)(a) as an order quelling a dispute or complaint about exercise of the owners corporation's s 61(1)(a) function of managing and controlling, for the benefit of the owners, the use of the common property. There would be a dispute of that kind because of the conflict between the appellant's claim to be entitled to limited use of the identified strip and the owners corporation's right of use which is an incident of its entitlement to possession as legal owner grounding a right of action in trespass….

87 The Goodes and the Lockes submit:

> In this case, it is for the benefit of the owners of the lots in the scheme that a special levy that has been struck on the basis of unit entitlements that have been determined by the Tribunal to be unreasonable and which do not accord with the scheme of the Act be replaced by a levy which has not. The duty of the Owners Corporation under section 9(2)(b) requires that the Owners Corporation exercise the powers available to it to remedy the circumstances arising from the unreasonable allocation of unity entitlements as found by the Tribunal.
>
> To do so would give effect to the scheme of the SMA and the *Strata Schemes Development Act* 2015 (NSW). Pursuant to s 28(1) of the SSDA, "the owners corporation of a strata scheme holds the common property in the scheme as agents for the owners as tenants in common in shares proportional to the unit entitlement of the owners lots". The effect of the provision is to make the proprietors equitable tenants in common for, with a proprietary interest in the common property….
>
> Co-owners who expend money to improve the common property in a share which exceeds their ownership interest have a right to compensation, enforceable in the event of a partition or a distribution of the value of the land amongst the tenants in common: *Houghton v Immer (No 55) Pty Ltd* (1997)44 NSWLR [46] at [56]. It is clear that s 83(2) of the SSMA is intended to ensure that lot owners contribute to the maintenance of the common property in shares which reflect their ownership of it. Equitable rights would otherwise arise between them as tenants in common. By ordering that a determination to raise contributions in proportions which did not reflect the lot owners' ownership interests be revoked and remade in the correct proportions, the Owners Corporation would give effect to the lot owners rights as

tenants in common. Similarly, by ordering that the proportions in which contributions were payable be corrected, the Tribunal gave effect to the parties equitable rights as tenants in common.

88 We have considered whether s 9(2)(b) and the Tribunal's order reallocating unit entitlements enlivens the order making power under s 232(1).

89 We are not satisfied that is the case.

90 As noted above, the special levy was struck on 30 November 2020, with contributions payable on 19 January 2021. The Tribunal's order re-allocating unit entitlements was made on 15 December 2020. While in accordance with the Tribunal's orders, the order should have been registered by 26 January 2021, it was in fact registered on 15 February 2021.

91 An order amending unit entitlements is made under s 236 of the SSM Act, which relevantly provides:

> **236 Order for reallocation of unit entitlements**
>
> (1) Tribunal may make order allocating unit entitlements The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots—
>
> (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or
>
> (b) was unreasonable when a revised schedule of unit entitlement was lodged at the conclusion of a development scheme, or
>
> (c) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the whole or any part of the parcel could lawfully be used, whether with or without planning approval.
>
> ……
>
> (6) Ancillary orders that may be made if original valuation unsatisfactory The Tribunal may, if it makes an order allocating unit entitlements that were not allocated in accordance with a valuation of a qualified valuer and, in the opinion of the Tribunal, were allocated unreasonably by an original owner, also order—
>
> (a) the payment by the original owner to the applicant for the order of the costs incurred by the applicant, including fees and expenses reasonably incurred in obtaining the valuation and the giving of evidence by a qualified valuer, and

(b) the payment by the original owner to any or all of the following people of the amounts (if any) assessed by the Tribunal to represent any overpayments (due to the unreasonable allocation) for which liability arose not earlier than 6 years before the date of the order—

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

(ii) the owners corporation,

(iii) the owners of lots.

(7) Lodgment of order The owners corporation must ensure that a copy of an order made by the Tribunal under this section is lodged with the Registrar-General no more than 6 months after the order is made. Nothing in this section prevents a person who is entitled to apply for an order under this section from lodging a copy of an order made under this section.

92 Section 246(1) of the SSM Act provides:

246 Recording in Register of effect of certain orders

(1) The Registrar-General is to make any recordings in the Register with respect to an order under this Act that appear to the Registrar-General to be necessary or proper to give effect to the order if—

(a) a copy of the order, certified by the Tribunal as a true copy, has been lodged in the office of the Registrar-General, and

(b) (Repealed)

(c) any fee payable for the recordings has been paid.

93 Section 247 of the SSM Act provides:

247 Changes to Register after orders allocating unit entitlements

(1) This section applies if—

(a) a copy of an order allocating unit entitlements among lots in a strata plan is lodged with the Registrar-General in accordance with this Act, or

(b) a copy of an order made by a superior court with respect to any such order is lodged with the Registrar-General and is certified by the appropriate officer of that court to be a true copy.

(2) The Registrar-General must amend the schedule of unit entitlement recorded in the folio of the Register comprising the common property to which the order relates, to the extent necessary to give effect to the order.

94 In *North East Developments Pty Limited v The Owners - Strata Plan No. 53374* [2007] NSWSC 1063 (*North East Developments*), Associate Justice Malpass determined an appeal from a decision of a Magistrate. The issue in dispute was whether a lot owner was entitled to a refund of overpaid contributions in

circumstances where an order varying unit entitlements had been made in 2000, the order was not registered until 2006 and the lot owner had been levied in accordance with the order rather than in accordance with the schedule of unit entitlements recorded in the Register. The Court was considering the construction of s 209(3) of the 1996 SSM Act, which was to the same effect as s 247(2) of the SSM Act:

> 38 The language of that sub-section indicates an intention by Parliament to give the lodgement of a copy order made under s183 the role of bringing about an amendment of the schedule of unit entitlement recorded in the Register. Contributions cannot be levied on the basis of any amendment made by the order until there has been a recording of it in the Register. The presence of the words "to the extent necessary to give effect to the order" may appear to be somewhat puzzling. The better view may be that they simply identify the ambit of the amendment power.
>
> 39 The task of the proper construction of the relevant provisions has not been an easy one. In grappling with those problems, I have come to the view that an owners corporation can only levy contributions that are payable by owners in shares proportional to the unit entitlements recorded in the Register. It seems to me that the statutory language does not permit any other construction.
>
> 40 Further, in respect of any view expressed to the contrary, I observe that I consider that the Register can only be amended by the implementation of the processes contemplated by s 209 (a recording of an amendment in the Register).

95 *North East Developments* is authority for the proposition that an order varying unit entitlements is not effective until it is recorded on the Register in accordance with s 247 of the SSM Act. In this case, registration did not occur until 15 February 2021. Even if registration had occurred in accordance with the order – that is, within 42 days of the making of the order – that time did not expire until 26 January 2021, which is well after the special levy was raised and the lot owners were given notice of their contributions and a week after the contributions were payable.

96 Unlike the situation in *EB 9 & 10*, where Kunc J found that the lot owner had a substantive right to access part of the common property for the purpose of being able to park a motor vehicle on lot property, pursuant to which an adjudicator could have made an order under s 138(1) of the 1996 SSM Act, relying on s 61(1), we are not satisfied that any substantive right is created by s

9(2) in this case, which would enliven the Tribunal's order making power under s 232(1). We do not accept an owners corporation has any obligation arising under 9(2) to alter contributions to a special levy raised before an order varying unit entitlements takes effect, or for that matter, before such an order is made.

97 Those provisions of the SSM Act which concern the payment of contributions make it clear that, otherwise than in respect of a clearly defined exception, contributions are to be calculated in accordance with unit entitlements as recorded on the Register at the time the contribution is calculated, with the contribution levied on each lot owner by giving the owner written notice of the contribution payable. We are not satisfied that other provisions of the SSM Act enliven the Tribunal's powers under s 232(1) to alter the contribution payable by a lot owner on the basis that an order is subsequently made varying unit entitlements. We are also not satisfied that the by-laws, other legislation or general law principles enliven the Tribunal's order making power under s 232(1).

98 We conclude that the Tribunal erred in finding that the Tribunal has the power to vary contributions under s 232(1) of the SSM Act. This ground of appeal is successful.

Conclusion

99 We have concluded that the Tribunal lacked the power to alter contributions to the special levy under s 87 in the absence of a finding that the amount levied by way of contributions was inadequate or excessive. We have also concluded that the Tribunal's order making power under s 232(1) was not enlivened.

100 In view of our conclusions in this regard, it is not necessary to consider whether the Tribunal's discretion miscarried or whether leave to appeal should be granted.

101 We have accordingly allowed the appeal, set aside the Tribunal's order varying contributions, and dismissed the application to the Tribunal.

Costs

102 We did not hear the parties on costs. We have accordingly made orders in the event that an application for costs is made.

Orders

(1) The appeal is allowed.

(2) Order 1 made by the Tribunal on 15 October 2021 in SC 21/18734 is set aside.

(3) Proceedings SC 21/18734 are dismissed.

(4) If an application for costs is made, the following orders apply:

(a) The application is to be filed and served, supported by evidence and submissions not exceeding five pages in length, within 14 days of the date of these orders;

(b) Evidence and submissions in response to the costs application are to be filed and served 14 days thereafter;

(c) Any material in reply is to be filed and served seven days thereafter.

(d) In their submissions the parties are to address whether a hearing on costs should be dispensed with and costs determined on the papers.

****

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