

Publication Date: August 1, 2017
**YSP Podcast Transcript: Episode 072. In Conversation: what strata managers
should be doing about insurance commissions**

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Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer, and I have with me today the lovely Reena Van Aalst. Hi, Reena.

Reena Van Aalst: Hi Amanda. How are you?

Amanda Farmer: I'm doing very well. I am just about packed up and ready to head over to Europe for a few weeks, woohoo.

Reena Van Aalst: Lucky you.

Amanda Farmer: Very exciting. Many of my clients and colleagues know all about this because I've been talking about it for a long time, and even on the podcast. It's finally happening. I am jetting off, taking a little break with my family, and don't worry, you're not going to miss any podcast episodes because I am super organised and have recorded plenty for you. You can be kept up to date in strata world while I'm sipping on a beer in Belgium, I think.

Reena Van Aalst: Oh, lucky you. That sounds wonderful.

Amanda Farmer: Yes. How's life been for you?

Reena Van Aalst: Yes, very busy actually, at the moment. Yes, really busy. Hopefully, it might calm down a bit soon so I can catch my breath, but yes, it's all good.

Amanda Farmer: News for you, Reena. It's not going to calm down. This is strata. You have to escape overseas.

Reena Van Aalst: I know, there's always something.

Amanda Farmer: If you want a break.

Reena Van Aalst: Yes, you're right, actually.

Amanda Farmer: Now, I'm going to introduce a joint challenge for us this week, Reena. We have had a listener who has asked us to have a chat about insurance commissions, and particularly what the new regime is in New South Wales with the new strata law. Now, our reforms, of course, came in in November 2016, and there were a few changes when it came to insurance commissions. In particular, and I will have a link to this in the show notes for this episode, in particular, section 60 of the Strata Schemes Management Act 2015 now expressly requires the disclosure of commissions.

Strata managing agents must report at each Annual General Meeting whether any commissions or training services have been provided to or paid for by the agent in the preceding 12 months, and provide the particulars of those commissions or training services. The agent also has to set out an estimate of any commissions that they expect to receive in the following 12 months. Now, if an agent doesn't do this, they are actually subject to a penalty of up to \$2000. 20 penalty units, up to \$2000, so it's actually an offence for an agent not to make this disclosure.

Reena Van Aalst: Regardless of whether there is a penalty or not, agents should be disclosing what commissions they're receiving Amanda, because I think when there is a policy in place that the owners corporation must have, so that every building must be insured, and where there is a commission payable, I think that the strata manager, regardless of what the act says, and

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the this is something that I've always done historically when I used to work in my previous company, we disclosed the insurance commission at every AGM.

Because in a sense, that was a payment that you had a received as an agent in your capacity as their managing agent. Now obviously it's been legislated that that must be done at every AGM.

Amanda Farmer: That's right, yes, and if your actual commission ends up being different from the estimate that you've provided, you actually have to notify your owners corporation of that as soon as you become aware, and give an explanation for why it is more, for example than the commission that you estimated. Again, if you don't do that, if you don't provide that variation, you are once again subject to an up to \$2000 penalty. So, the legislature's really treating this very seriously.

Reena Van Aalst: Yes. Well, that second part of the legislation is a bit tricky, I believe. Because when you're estimating for the next 12 months, what you think you're going to be receiving, obviously that's based on the insurance premium at the time, and who knows in 12 months' time what the premium will be. Then, it also depends on the building sum insured by the valuation, and so I think most agents I've seen are estimating 5 to 10% increase the following year-

Amanda Farmer: Just as a rule of thumb.

Reena Van Aalst: ... but again, I mean that's ... Yes, but there's no real science behind that calculation.

Amanda Farmer: Yes. The other interesting thing, Reena, in section 60, is that the owners corporation can apply for an order from the tribunal requiring a strata managing agent to pay to them the value of any commission that has not been disclosed. They can actually seek a refund where the agent hasn't complied with their obligations to disclose. Even if it was disclosed, if the tribunal finds that the disclosure was not made in good faith, then that's also grounds for a refund. I'm not quite sure what that means, the disclosure not being made in good faith.

Is that that the estimate wasn't correct? Is there a risk there, as you say, Reena, if managing agents, they don't know what the sum insured's going to be, so it's difficult for them to estimate what their future commissions are? Are they exposing themselves to the risk that they could be accused by the owners corporation of not making disclosure in good faith and a refund being sought from the tribunal? I suppose what my advice as a lawyer in that situation would be to be explaining to your owners corporation, "Hey, it's difficult for me to provide an accurate estimate at this time because I don't know the sum insured. We've got a building valuation coming up, but from my experience and with other buildings that I'm involved in, I think that an increase of 5 to 10% is a reasonable estimate, and that's the estimate that I'm giving."

That would be, in my view, a disclosure made in good faith, and it would be a good defence, I think, to an application under this section 60 subsection 3. Interesting to see whether we'll see many of those applications, I doubt it.

Reena Van Aalst: Yes. I think these applications will only happen, Amanda, if there is any disagreement or any conflict between the managing agent and the owners corporation when things get ugly. The other thing I've always tried to do is ask the broker because sometimes in terms of the insurance market, what the rates are being charged per dollar of square meter of bricks and mortar, et cetera, that rate can change. You have two factors playing here. You've got the building sum insured changing, you've also got the rates, so when there's a lot of events happening around the world, if there's a lot of cyclones or weather things, and premiums go up, as the insurer's risk increases.

I think it's a twofold thing. I think maybe asking the broker for some guidance if you're using a broker, would be helpful as well, as to what they think how the market's playing out in the next 12 months.

Amanda Farmer: Yes, absolutely. Another component of this question that we've been asked by a listener in relation to commissions is whether insurance commissions can be refunded to an owners corporation upon request. So, are there owners corporations out there saying, "Oh wow, that commission's just been disclosed to us. That's significant. We would like that rebated

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to us to offset the management fee." Does a manager have to do that? It's not in the legislation, I can tell you that.

Reena Van Aalst: No, I don't think they have to, unless the agency agreement dictates whether or not you are to receive a commission or not. The new SCA agreement has three options and one of them is with a commission, one is without, and one of them is limited amounts of commissions. I think that once you have an agreement and you're allowed to receive the commission, then the owners corporation can't ... There's [discretions 00:07:49] decide ... Basically, they're altering the terms of your agreement and your remuneration, which they really can't do unless there's a third party involved in the tribunal making an order on that.

Amanda Farmer: Yes, so it all comes back to what are the terms of your agreement, and I suppose, Reena, what you see in practice is this all is relevant when you're negotiating the terms of your engagement. You might have some buildings say, "Look, we don't want you to take insurance commissions, but let us know what the usual value of that is and tack it onto our management fee," so you're still recovering what you would otherwise recover. The owners corporation may have a philosophical or an in principle objection to insurance commissions, but that needs to be sorted out at the time the agency agreement is being negotiated, and if it's not dealt with in there, then there is no entitlement for an owners corporation to receive some rebate or reduction in management fees, simply because your agent happens to disclose that they are receiving commissions.

Reena Van Aalst: That's correct. Personally, I believe that managers would be better off if they didn't receive a commission. I mean, I personally don't like insurance commissions because I think that whenever you're compensated based on someone else's building sum insured or what premium they're paying, then in a sense you're just benefiting from their own situation. It's better to be paid for that work and not have to rely on a commission to subsidise the management fees. On the other hand, Amanda, what happens in schemes and many of us as managers have come across this, people don't want to spend any extra money. In a sense, I think that if people want to subsidise their management fee, then they'll have to accept an insurance commission, but by the same token, they have to then pay for that.

It's one of those things. You're paying in some way, and also I think it would be a bit naive for people to think that the insurance premium they're paying doesn't factor in the commission. In a sense, you're paying it either way. You just have to decide how you want to pay it because I don't think insurance companies are paying premiums that don't contain some remuneration for the manager in that premium.

Amanda Farmer: Sure. Managing agents have these schedules that are attached to their agreements that is set out by the management fee and what is an additional service, and there's an additional fee. If you are receiving an insurance commission, does that change the scope of your agreed services at all?

Reena Van Aalst: Yes, well I think yes, it does, for the most part, Amanda. I think most agents you'll find who do receive a commission, they will attend to routine insurance claims up to 15 minutes for example, without any fee. It's included in the agreed services because they're getting an insurance commission. Also, it allows them to deal and arrange, et cetera, so I think that in that respect, there is some value when you are getting a commission. Because then that's subsidising insurance claims that otherwise would be charged as an additional service fee.

Amanda Farmer: Okay. That's really interesting. I suppose this listener, in particular, was looking for advice that we might have for strata managers who were dealing with this topic of insurance commissions. From my point of view, this is something that you would discuss and should discuss with your particular building that you are about to take on management of, so a really big part of this discussion happens before you've even entered into the agency agreement. What are the building's thoughts on insurance commissions? Do they have any objection to insurance commissions being accepted by the agent? If they do, why?

And having that conversation, and then of course, once you are engaged, making sure that you are complying with section 60 of the new Strata Schemes Management Act, and you are disclosing commissions received and commissions that you expect over the next 12 months at every AGM.

Reena Van Aalst: That's right, Amanda, and I also think that even if you're still with your assisting manager, and you're

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renegotiating a new contract because of the act, and you might be using a new form of agency agreement, the previous STA ones, ones for example, didn't have this option where you could go either with a commission or without a commission. Whereas the new ones do and I think a lot of people just go automatically to the figure plus commission. It probably would be better at this stage, if perhaps some managers knowing the climate regarding insurance commissions and how people feel about them to say, "You are able to dispense of an insurance commission if you want to pay a higher fee, and this is what the new fee would be."

That's another way that you can be proactive and even if it was like a renewal arrangement where you're not negotiating a new contract with a new building, but you're just continuing on with the same building, you may want to change your terms of engagement. At least they've got the option and so that when you do get a commission, they can't say, "Well, we didn't know you got a commission." You might say, "Well, look at the agency agreement," but no one actually ever looks at that. It's like any contract, people don't read things. They read the price and that's about it, so yes, it's a good way to be on the front foot in that respect.

Amanda Farmer: Yes, I like that. Good advice. All right, well I hope that covers off that challenge for our listener and do remember that the transcript of this episode is available at YourStrataProperty.com.au/072. It is episode 72, great to get the transcript of these kind of episodes where we are a bit heavy on the detail. You might be driving the car, you might be at the gym, don't necessarily have a pen to jot these things down, and you may want to share some of this with your strata manager, or if you're a strata manager, share it with your lot owners, so the transcript's a really good way to do that. All right, Reena. Win for the week, what's yours?

Reena Van Aalst: Well this is actually an adjudication application that has been ongoing. There was an AGM in one of my community associations last year, and what happened was one of the subsidiary members, subsidiary owners corporation, their representative wanted to go onto the executive committee, and basically there was an election and they weren't elected to the committee, and obviously there was a lot of proxy farming that had happened in this particular community, and obviously proxy farming is still allowed under the Community Land Management Act, there's no restrictions.

So anyway this disgruntled person ended up going to the tribunal and they made an application as an individual lot owner, to have the EC election nullified, and requested that a new election takes place. So, when I received this application, we sent it to the lawyer, but my initial observations and thoughts were that number one, that person cannot make an application to the tribunal against the community because they are an individual lot owner within a strata plan, a subsidiary within the community association. Only the strata plan could make the application, because a strata plan is the actual lot "owner," and there would have to be a resolution authorising that person to submit that application on its behalf if that were the case.

The second thing I thought that if the tribunal didn't agree with that reasoning, the second argument that I had put forward was that they said the election was invalid because there were voting papers that had been used, and when there was a proxy bearer that was signing the voting form, they didn't use the word "proxy bearer." They just signed their name. Even though there was a record that the lot owner wasn't there at the meeting, there was a record that the proxy had been validly completed, and they were saying, "Well, that person didn't complete the form." Now, there's no statutory form. You don't have to actually say, "I'm a proxy bearer" when you're signing, 'cause you are-

Amanda Farmer: And you're talking about the voting paper, so where they actually record their vote during the meeting?

Reena Van Aalst: Yes, because this is, it's got over 300 lots.

Amanda Farmer: Yes, you need papers.

Reena Van Aalst: You need papers to try and work out all the different people that ... Because there were, of course, more nominees than there were places, and that took time. Then, out of the time, then you have to vote for the nine that you wanted. Basically, they tried to use that argument, and I said, "That's not an argument." Anyway, the lawyer said, "Oh no. The scheme's in the wrong. They should redo the election." I didn't agree, anyway, so I submitted the application based on my thoughts and

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reasoning and basically the tribunal agreed that the person had, they used the first argument that they had no legal standing because they were an individual, and they were not able to submit an application against the tribunal, because they're not a lot owner within the community association, so that was a good win.

Amanda Farmer: Excellent. Congratulations.

Reena Van Aalst: Yes, especially when lawyers don't know what they're doing.

Amanda Farmer: Present company excepted.

Reena Van Aalst: Sorry, some lawyers don't know what they're doing.

Amanda Farmer: Yes, good on you, and kind of technical that one, so there you go. All those years in strata, when are you heading off to get your law degree?

Reena Van Aalst: I've got a husband who's a lawyer who definitely helps me a lot.

Amanda Farmer: That's good. Good on you. Well, my win for this week, and look, it's probably a bit premature to call it a win, but it feels like a win simply because I've raised on this podcast before the difficulty that I have had trying to get the tribunal to accept an application for a penalty order where we are trying to enforce an adjudicator's order made under the old law.

Reena Van Aalst: Oh, yes, I remember you mentioned this before, Amanda.

Amanda Farmer: Yes and the adjudicator's order was made under the old law, the lot owner did not comply with the order, and the owners corporation has come to us saying, "Well, we want to enforce this order." There's a real question around how you enforce this order. Do you enforce it under the old law because the order was made under the old law? Or, do you enforce it under the new law? If the answer is that you enforce it under the new law, well you make that application to the tribunal, and you seek a penalty under the Civil and Administrative Tribunal Act, and that penalty could be up to \$11,000-

Reena Van Aalst: Oh wow.

Amanda Farmer: ... because it deemed to be a breach of an order of the tribunal, as opposed to an order of the adjudicator.

Reena Van Aalst: If you were to enforce it under the previous order, what was the maximum penalty payable at that time?

Amanda Farmer: Yes, so under the old law, if you breach an order of the adjudicator, you could apply to the tribunal for a penalty of up to \$5000.

Reena Van Aalst: 5000? That's what I thought.

Amanda Farmer: Yes.

Reena Van Aalst: Now it's 11,000?

Amanda Farmer: Well, here's the thing. This hasn't been determined yet, but what I'm excited about is that it has been listed for hearing before the tribunal panel. It's been listed with another case that has a very similar problem, and the tribunal has decided to hear the two cases together, hear submissions from the lawyers as to what we think the law is, what it means, and the tribunal is apparently holding back other similar cases until this issue is decided.

Reena Van Aalst: Wow.

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Amanda Farmer: My client, as much as I tell them they're lucky, perhaps don't feel so lucky to be in this position, but they are essentially running a test case before the tribunal to try and work out what the answer to this issue is. Is the penalty to be made under the old law or is it to be made under the new law? That's something that's going to be heard in about a months' time, and I suspect a quick decision will be made by the tribunal panel so that other owners and buildings who are in similar situations trying to enforce old orders know what direction to go in.

Reena Van Aalst: But Amanda, I was just thinking about you know if you got a fine for speeding, for example?

Amanda Farmer: Yes.

Reena Van Aalst: And the amount then changed under the new law because it was a higher amount, so how would that work in that type of situation?

Amanda Farmer: Yes. You are exactly along the right track and without disclosing too much about our case theory, it is a legal principle that a wrongdoer shouldn't be punished more so under new legislation if that legislation is not expressly retrospective. The problem with the new strata act is this section doesn't expressly say that it's retrospective, so one of the principles that we're looking at is, well, the order was made under the old law, as a matter of procedural fairness it's quite possible that this lot owner who's breached the order should be punished under the old law.

Reena Van Aalst: The old.

Amanda Farmer: Yes, because that's where the breach was committed.

Reena Van Aalst: And are you acting for the owners corporation or for the [crosstalk 00:19:23]?

Amanda Farmer: Yes, we're acting for the owners corporation.

Reena Van Aalst: And does the lot owner have their own lawyer as well?

Amanda Farmer: At this point in time, the lot owner has not made an appearance in these proceedings.

Reena Van Aalst: Oh, yes. That's usually the case.

Amanda Farmer: Yes, so that makes our job perhaps a little bit easier, but the tribunal I think is a bit disappointed that it might have one rather than two lawyers on the case. It's interesting from our perspective that what we come up with in terms of our view and what we think the law should be. Hopefully, if that's accepted by the tribunal then that's going to assist other buildings who are in a similar situation.

Reena Van Aalst: So when's the hearing, Amanda? Do you know the date?

Amanda Farmer: It's in a few weeks' time. Who knows how long the tribunal will then take to release their decision and their reasons. As I said, I'm thinking it'll be quite quick because they do want this to be settled, and absolutely that will be a published decision. Assuming we don't settle beforehand, which is always a possibility if the owner decides to come out of the woodwork, then hopefully we'll have a decision and some guidance for our listeners, and others in that same situation.

Reena Van Aalst: Look forward to actually hearing about it, Amanda. I think it's a quite interesting thing when you've got these test cases happening, especially with relation to the new act, like getting things tested under the new legislation.

Amanda Farmer: Yes, there's a few things that perhaps aren't as clear as they could have been in the new act, but that's our teething problems to work through, and as we've said for some time now, it's going to be these decisions of the tribunal that help



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to navigate those gray areas, so good to see that some of them will be coming through.

Reena Van Aalst: Yes, it's wonderful.

Amanda Farmer: Okay. Lovely to chat to you as always, Reena. I shall catch you next time.

Reena Van Aalst: Thank you, Amanda. Bye.

Amanda Farmer: Bye.

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