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YSP Podcast Transcript: Episode 074. In Conversation: why managers must keep emails and Fair Trading on AirBnB by-laws

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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](http://www.yourstrataproperty.com.au).

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

**Reena Van Aalst:** Hi, Amanda. How are you?

**Amanda Farmer:** I'm doing well. I have been enjoying this cold weather actually, I must say. The fresh, fresh, very fresh, mornings when I get up and take myself down to the gym, I've been rugging up, but we might see a warm change around the corner.

**Reena Van Aalst:** Yes, it hasn't been that cold this winter, I think it's just this is the first year I've actually experienced the cold, but I've actually got the flu as well which hasn't helped so... I'm just trying to recover from that. But apart from that, I've been good.

**Amanda Farmer:** Yes, you've probably been working yourself crazy, that's why you're unwell. You need a rest.

**Reena Van Aalst:** Yes, I need a holiday.

**Amanda Farmer:** Take a holiday. But, before you do, tell us about your challenge for the week, Reena?

**Reena Van Aalst:** This challenge has actually been on that I've been observing over time and it sort of came to the forefront this week when I had two members of a prospective owners corporation that want me to manage them. This person is actually a committee member, he doesn't get all copies of all the correspondence, but that's a separate issue. Basically, whenever they've done a strata search all the records aren't complete. There's no copies of emails printed, in the whole year there's probably about maybe half a dozen pieces of correspondence. And they feel that even knowing the law correctly, there has to be more information than this. I've been thinking also since I've taken to plans to various different companies, that only one company only provided me with a copy of their email export. Now that most people communicate by email I was quite surprised that I hadn't received it, nor had these copies been made in hard copy, printed format. Also, what's been happening, I've been getting the electronic files, which are whatever they keep on their hard drive.

Let's say you send an email as a lawyer with a cost disclosure, well that's just being filed on the email, that cost disclosure is not being saved in the appropriate directory if they had a legal directory or whatever. I'm just really wondering, the records of the owners corporations now that people are using email, I think that with it being transferred between managers, or even when people are not between managers but just at the one company.

**Amanda Farmer:** Yes.

**Reena Van Aalst:** When strata was having to do a search, one of them said to me Reena, where are all the emails?

You know, from the other company. And I said well I don't know where they are. I said I'll have to ask for a copy.

**Amanda Farmer:** Yes.

**Reena Van Aalst:** Another thing I've observed also is ...obviously there's sort of two main software that strata companies use. Strata Master and StrataMax; one has a document management system called File Smart to Strata Master. So you have to sort of open it and get into it.



**Publication Date: August 15, 2017**  
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They'll notice that this manager saved certain emails and there are others that to be electronic, you know, even though it saves paper and money in the long run. It is time-consuming scanning, saving, renaming. Unfortunately, people name documents with whatever the scanner gave you rather than an actual name and you're trying to open every document to see what it is but...

**Amanda Farmer:** Yes.

**Reena Van Aalst:** I'm just a bit concerned now that people are actually not transferring these records and aren't printing them. And then how do owners ...

**Amanda Farmer:** Yes.

**Reena Van Aalst:** And people are actually not transferring these records, they're not printing them, and then how do owners getting access to emails?

**Amanda Farmer:** Yes, it is an age old problem and it's something that I see when I go in looking at records for lot owners or trying to assist an owners corporation to locate things within their own records. A lot of stuff is missing and it does not surprise me that emails and otherwise electronic documents are a big category of things that just do not make it to the file. I know as you do Reena that yes, strata managers do use this software that supposedly helps them file things and file them in the right place. We can't forget to file emails. They absolutely are records of the owners corporation. They do need to be kept amongst the owners corporation records. And as you point out Reena there will be different types of email correspondence. There'll be correspondence with the committee, there'll be correspondence with lot owners. There'll be correspondence with lawyers. And that may go in a different file. Correspondence with engineers and that goes to the refurbishment project file. It's very difficult for owners and new strata managers who are taking on buildings as you are to have an understanding of what's been going on if they don't have these records.

**Reena Van Aalst:** Yes. The other thing also ... one of the strata certifiers when he came in, it was a new building I had acquired, so I didn't have much to give him from my management period of time. And I said to them all well, how do you know ... like, there's no email, so how do you know. He said to me, ah, Reena it doesn't matter to me. I wrote a disclaimer on my report and he said that, like, you know, most things would be in the minutes anyway.

And I'm thinking well, I know as a strata manager a lot of things don't get onto the minutes. Sometimes it's a deliberate thing because, you know, people are worried, committee members especially if there's any litigation or any issues that may adversely affect the sale of apartment or value or saying certain things that get on to the agenda. And I'm thinking ... this particular two owners that came to see me said, Reena if we'd told them the stuff in the records, we wouldn't have bought this apartment.

**Amanda Farmer:** Yes. Well ...

**Reena Van Aalst:** Then the other says we need more than that 'cause you might have an action against your ... the manager. But I'm just thinking well, you know, I know that there is a case where I think that has happened where a lot owner sued a manager because all the records had not been provided and obviously...

**Amanda Farmer:** Yes.

**Reena Van Aalst:** With how much apartments cost these days, and also, it's a lot of fighting within the scheme, you know, that's also a red flag. You don't want to have perhaps like, I think Anne Maree from CHU mentioned on her podcast with you a few weeks ago, Amanda, when you look at the records you see what's happening in a scheme and if those things aren't available ...

**Amanda Farmer:** Yes.

**Reena Van Aalst:** To you, then how can you make a well-informed decision?

**Publication Date: August 15, 2017**

**YSP Podcast Transcript: Episode 074. In Conversation: why managers must keep emails and Fair Trading on AirBnB by-laws**

**Amanda Farmer:** Yes, and as you say, the minutes are not enough. It's important for owners to have access to that other correspondence which is often where the mess is.

And the interesting thing about strata searchers is that like a lot of things, unfortunately, on the strata sector, it becomes commoditized service, which means that they ... Strata searchers are not charging very much for that service. They get by on quantity, and it is quality that suffers and they don't have the time to spend doing very detailed searches and giving detailed reports to their owners so they have what I understand to be a template procedure. They tick the boxes and say this was here, this wasn't there and protect themselves, they think, by having a disclaimer at the end, you know, that says, may not have seen everything, can't rely on this, must rely on your own inquiries.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** Purchasers think that they've done their due diligence, but little do they know.

**Reena Van Aalst:** Exactly, so yes, I've been thinking about it for some time now and I suppose my experience with these two owners recently, just as they brought it to the forefront, that you know, there's so much in action in terms of record keeping and I think lack of compliance with the law to be honest because if you look at the Act it's quite specific on what must ... what the owners corporation must keep and suppose they aren't keeping it Amanda, but how are they showing it to the parties. Yes, so...

**Amanda Farmer:** Yes, making it accessible and available and well, moral to the story is, strata managers, make sure you are complying with ... first of all that you know what your statutory duties are as an agent and also under the Strata Schemes Management to keep these records and to make them available to owners who are coming to inspect. The records will send in their agent, which might be a strata searcher, to inspect the records 'cause you could land yourself in hot water if you're not compliant with those obligations.

Okay, well, my challenge this week, Reena and ... it was a challenge I think was shared by many Sydneysiders who read Jimmy Thompson's column in the City Morning Herald. By the time this goes to air, it will have been a few weeks ago. But, just last week, Mr. Thompson who I know and is a great supporter of mine, published an article that said strata by-laws invalid. And he was referring to by-laws that attempt to prohibit short term lets in Strata buildings. He had obtained a quote from a spokesperson at The New South Wales Department of Fair Trading. That quote was to the effect that any by-law that attempts to restrict the lease of a lot is going to be invalid under the Strata Schemes Management Act and that includes by-laws, which attempt to prohibit short term letting. Now that came out of an amendment, which Fair Trading had made to its Strata Living Handbook to refer to section 136 of the Strata Schemes Management Act, which says that an owners corporation cannot have a by-law that restricts the lease of lot. That Section has always been there, it was -

**Reena Van Aalst:** Yes, exactly what I thought it mean, it's always been there.

**Amanda Farmer:** Yes, it was Section 49 in the old Act and -

**Reena Van Aalst:** Yes, you couldn't say you didn't want children to live in an apartment and things like that.

**Amanda Farmer:** Yes, that's what it was designed for, and the history behind that is that it was designed to show that Strata title buildings are different to company title. And where company title has great range to determine who lives in the building, and direct board of directs can interview people and say we don't want children, we don't want elderly people, whatever it is that they decide they don't like. That's all perfectly legal in company title. So when Strata title came along and we had this legislative scheme, the policy makers were quite careful to include a clause that says hey, this is not like company title. You can't restrict the leasing of a lot.

Now, there is great debate in some circles about whether or not that means you can't have by-law that says no short term lets in our building. And I have always maintained the position as have many of my colleagues that a by-law that says you have to use

**Publication Date: August 15, 2017**

**YSP Podcast Transcript: Episode 074. In Conversation: why managers must keep emails and Fair Trading on AirBnB by-laws**

your lot in accordance with the council planning instruments, and the council zoning, it's not a by-law that restricts the lease of a lot. If the council planning instrument says no short term lets or no service departments or no bed and breakfast or whatever term it is that they use, then you can have a by-law that reflects that same standard. And it is not you, the building, then restricting the short term letting, it is you the building confirming what council's requirements are. And some lawyers will take that even further to say well a by-law that does say no short term letting is not a restriction on lease, it's a restriction on use, and it's unclear in our legislation and the case law that has come out from our higher level courts here in New South Wales that you can have restrictions on use.

Now at the end of the day, this is not an issue that has been determined here in New South Wales by the courts or tribunals. I expect that it will be. At some point, someone's going to challenge one of these by-laws and we will have some more guidance. The frustration is that Fair Trading, apparently, made to Jimmy quite a clear statement of what they thought the law meant, and Jimmy's now published on his flat chat website the comments of six straddle lawyers, most of whom disagree with what Fair Trading has said and disagree that that's what the law means. And look, my point of view is if Fair Trading is there to say what the law says, it is the job of courts and tribunals to tell us what the law means, two different things. And as any lawyer will tell you, it is open to interpretation, and there will be lawyers ready and waiting to debate this particular issue. And until it's resolved by court or there is some clearer guidance in legislation, in my view it is not correct for Fair Trading to be coming out and giving a blanket statement that these by-laws are invalid, it's just not the case.

**Reena Van Aalst:** Yes, I agree with that, Amanda and a lot of the schemes I've managed and do manage now have included these in their by-laws because no one looks at the development consent when they're buying or, as you know, a by-law forms part of a tenancing lease and so in a sense what the council restriction is would not be available to lot owners, perhaps, or tenants when they're leasing or when they're buying. It's when you have by-laws, normally, those documents are quite really available and therefore, to me, as you just said, you're reinforcing what the council has already imposed as a restriction on the use of particular lots in a scheme. So I think that it's not to sort of ... you're just supporting what's already been noted in the development consent.

**Amanda Farmer:** Yes, that's it.

**Reena Van Aalst:** Yes, yes.

**Amanda Farmer:** And if any of our listeners want to check out the detail comments of the six straddle law experts that Jimmy has published on his website including my own detailed comment, you can head over to his flat chat website and I will put a link to that in the show notes for this episode.

**Reena Van Aalst:** It's wonderful, man. I've actually been looking forward to seeing if there's been - if there will be any cases moving forward in relation to this area because it's been quite contentious.

**Amanda Farmer:** Yes, there has been a case in Western Australia recently and I know we have a few listeners who are hanging out for me to talk about that case. But I do know the solicitor who was involved in acting for the owners corporation in that case and we're just waiting for some time to pass and I have high hopes that that solicitor will be a guest on the podcast to be able to talk in detail about that case and what it meant for Western Australia and how it might impact the law here in New South Wales.

**Reena Van Aalst:** Mm, yes, well stay tuned and see. Yes!

**Amanda Farmer:** Alright, now, wins for this week, Reena. What has been your win?

**Reena Van Aalst:** So basically I've taken on a scheme that had a mud slide back in December 2015 and finally the last lot that hadn't been occupied is being completed in terms of all the remedial works, so we're looking at July 2017, some 80 months later.

**Amanda Farmer:** Yes.



Publication Date: August 15, 2017

## YSP Podcast Transcript: Episode 074. In Conversation: why managers must keep emails and Fair Trading on AirBnB by-laws

**Reena Van Aalst:** That lot owner was actually renting the apartment out so they were receiving lots of rent during that period but, the majority of the owners that were affected were actually owner occupiers. So, yes, it's been a long, drawn out 80 months for them. I've just managed them for the last five months but, everyone's really happy now that it's all over. We're still negotiating with the insurer in terms of some legal costs to be paid because at the time the owners corporation had to take the insurer, get legal advice to enforce its rights. So that's still ongoing. But apart from that, you know, everyone's now moved back in or able to rent their townhouses again so that's a great win for that scheme and ...yes.

**Amanda Farmer:** Yes, sounds like it. I was going to ask you did the insurer come to the table quite promptly on that one because of mud slide?

**Reena Van Aalst:** Yes, it was before my time actually 'cause this happened back in December 2015 but from what I can see and the records that were provided no, they did not come to the party quickly and this is probably just something I might just touch on, Amanda, based on your question is that when lot owners are considering, you know, the owners corporation's insurance policy at every AGM and here's our insurances and here are 3 quotes. And usually, people want to choose the cheapest quote for committee members and lot owners sometimes tend to want to do that without actually looking at the policy wording. And it sounds like this when the policy wording is really important because that's when you know what sort of cover you're going to get and also I mean, some of my committee members have asked me, you know, which is the better one? I said I can't give you an advice on it and you could go to the broker and ask him for their advice and the broker will give his advice on either, which ... how insurers perform when claims arise because it's all fine, you know, and everything's ... nothing's happening and there's no significant claims being submitted.

But then when there's a large one like this one and I was involved as you know back in March 2009, Acecare Horbury Junction, I mean, that was fantastic and they came to the party and, you know, it was in this case, that wasn't the case. I mean, people weren't even really ok that they had to pay out of their own pockets initially to find accommodation. So, yes, it's important I think to look at your policy wording and get advice on it from someone who can give you advice.

**Amanda Farmer:** Yes, and we've had a couple of guests on the podcast from strata insurers who have advised exactly that. Back in [Episode 023](#), if you want to go back and have a listen, with Leonie Milonas from Strata Community Insurance. She was telling us what to look for in a strata insurance policy and more recently on [Episode 067](#) with Anne-Maree Paull where we talked about the legal liability of strata committee members and I do remember both Leoni and Anne-Maree recommended exactly that, Reena, that buildings have a close look at their policies, that they don't think about the cheapest first and that they understand what they are and aren't covered for. And it is quite a competitive market so get out there and have a look at different policies and see if you can get some bang for your buck.

**Reena Van Aalst:** Yes, exactly.

**Amanda Farmer:** Okay, thanks for sharing that story, Reena. My win is a little bit similar in that we have been involved in some litigation in the tribunal for a relatively new building that discovered some significant building defects. And they logged their claim against the developer in the tribunal having not had any luck through Fair Trading and through building inspector rectification orders. We ended up in the tribunal. Both parties legally represented and with the assistance of some good expert reports, some sensible legal advice, the matter was able to settle before it went to a hearing. And I bring this up as a win because this is how a lot of building defects claims get resolved, through a settlement with the developer or the original builder will make a payment to the owners corporation and essentially each party releases the other from any future liability. The owners corporation walks away with some cash and is able to go ahead with its rectification works. And it's something that except in the most unusual cases is usually a path that we recommend as lawyers, that there's a settlement without having to go down the uncertain and expensive path of litigation and potentially get a result from the tribunal that you're not happy with and not in control of.

So, this building, I did compromise on a couple of issues, and they did that by way of looking at what it would cost them from legal costs, from expert costs, to have a fight about it in the tribunal and they said look, it's going to cost us the same amount to fight about it. Let's just drop that. We'll raise a special levy or we've got funds in the sinking fund to cover that particular part of the work

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let's settle and get some money released to us for the rest. So, that building was really happy with that result.

**Reena Van Aalst:** That's a great result, Amanda. I was going to ask you in terms of the quantum of the defects.

**Amanda Farmer:** Yes.

**Reena Van Aalst:** Now obviously there must have been a reason why you were in the tribunal and not in a higher jurisdiction?

**Amanda Farmer:** Yes, so, to be in the tribunal your costs, your estimated costs to repair the defects must be 500,000 or less. So you can't be over 500,000. The minute you do that, you're off to the district court. And this was actually an interesting case in that the first report we got from the quantity surveyor and it's quantity surveyors who assist with what the costs are.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** From a court perspective, the quantity surveyor had assist the cost at some 700,000 and we were already in the tribunal and this came through in an updated report and those costs ended up getting revised down. Partly because they were ... it was difficult to prove the particular action that was in dispute. And also because the cost of having to transfer out of the tribunal jurisdiction into a court were going to be quite high. And when you spring that kind of thing on the other side as well, usually they want their costs paid also. So, again, this building made quite a sensible commercial decision to say look, do we really need to claim that item?

**Reena Van Aalst:** Yes, if it's under \$1,000 difference, you're going to spend at least half of it in courts and district court as opposed to the tribunal, which is probably a bit more easier in terms of costs.

**Amanda Farmer:** Yes, absolutely. So yes, this building did well to settle. We ended up with ... often how these things settle is that you're sitting in a conference with experts on both sides, with lawyers on both sides, with representatives of the developer, representatives of the committee, the strata manager, and you spend a day knocking it out. The experts telling you, you know, why this is something you can't compromise, why something else you probably should compromise and figures go across the table and you agree on something that you can each live with.

**Reena Van Aalst:** Yes, it's obviously give and take. And I think also for most people they actually want to get on and actually repair the defect and not live in a building where water's coming in and it obviously affects the value of their lots when the defect is still prevalent. So at least people can get it fixed and fixed the way they want to get it fixed and move on which I think is a very sensible approach.

**Amanda Farmer:** Yes, absolutely.

Alright, well that's a lovely way to celebrate our wins for the week, Reena. Don't forget to grab the transcript of this episode from [yourstrataproperty.com.au/074](http://yourstrataproperty.com.au/074). Thanks for the chat as always, Reena.

**Reena Van Aalst:** Thank you, Amanda, take care, bye-bye!

**Amanda Farmer:** See you, bye!

**Outro:** Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners reliable and accurate information about their Strata Property. You can access all the information below this episode by the show notes at [www.yourstrataproperty.com.au](http://www.yourstrataproperty.com.au). You can also ask questions in the comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

