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YSP Podcast Transcript: Episode 076. Amanda Explains: Consent is Needed to Change Common Property Rights 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.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. Solo episode from me today. It's been a little while but I do like to throw in a solo every now and then. Today I want to talk about a topic that I was contacted by a listener about recently. It's a topic that I promised then to discuss on the podcast because it fascinated me and it may be something that is tripping up some of you New South Wales listeners out there who are grappling with part of the new strata law.

The part I'm referring to deals with what used to be exclusive use by-laws and we're now calling them Common Property Rights By-laws. Now, Section 142 of the Strata Schemes Management Act of 2015 refers to a Common Property Rights By-law as a by-law that is conferring on the owner of a specified lot the right of exclusive use and enjoyment of the whole or a particular part of the common property or special privileges in respect to using part of the common property. For example, a license to use a common property area for parking your car or storing your camping gear or whatever it is. If the Owners Corporation wants to grant you that right they do it by way of a Common Property Rights By-law and the regime for how that's done is set out in Part 7, Division 3 of the Strata Schemes Management Act.

That's where that Section 142 comes from, I'll make sure there is a link in the show notes to this episode to all of the sections I'm about to talk about. Now, an Owners Corporation can only make a common property rights by-law with the written consent of the owner on whom the by-law is conferring the right or the privilege. Now, this was a little bit uncertain in our previous law and there were some Supreme Court cases on this, whose written consent do you need. The new law clarifies the written consent of the owner who's getting the right or the privilege.

You also need of course a special resolution because we need special resolutions in general meetings to make by-laws. Your common property rights by-law can have conditions in the by-law. For example, a common condition is that the owner who is getting the right or the privilege to use part of the common property has to pay some money to the Owners Corporation. That can be a one off payment, perhaps when the by-law is especially resolved and registered or it can be a recurring payment, for example, an annual license fee. That should be set out in the terms of the by-law.

Now, you can make one of these by-laws even though the owner has been enjoying the right or the privilege for some time in the absence of a by-law so you can make the by-law retrospective if you need to. Now, the particular question that I was contacted about and that I found quite fascinating was how do you amend or repeal one of these by-laws? Now, the old law was quite clear about the fact that if you wanted to amend or repeal what was then called an exclusive use by-law you needed the consent of the owner of the lot concerned. That's what the old law used to say, the owner of the lot concerned which the court had interpreted as the owner of the lot who's getting the benefit under the by-law.

Now, I think many in the sector including lawyers, including myself, assumed that that simply carried over into the new law quite clearly, quite expressly. The fact is that it did carry over to the new law, that is still a requirement that amending or repealing the common property rights by-law requires the consent of the owner who's enjoying the right but it's tucked away in the legislation. It took me a little while to find it when I was assisting this listener who'd contacted me. You find this requirement in seven little words that appear at the end of Section 142. Remember, this is the section that tells us what a common property rights by-law is.

It says that a common property rights by-law is a by-law that grants exclusive use or enjoyment, special privileges or a by-law that changes such a by-law. What the policymakers have done here is defined the changing, which I'd call amending, of common property rights by-laws as by-laws themselves. Therefore, that requirement that there be consent applies by default. Now, it's a bit of a tricky concept to get your head around but in practice what would happen if you wanted to amend or repeal a common



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property rights by-law? You'd have to have a special resolution and you'd have to set out the terms of the amendment or the repeal and you'd have to register that with land and property information.

It's essentially the same actions that you would be taking if you were creating a common property rights by-law from scratch. You've got a special resolution, you've got the terms, you've got registration. The legislation I think maybe has tried to be a little bit smart here and say that whether you're creating a by-law, whether you're amending it, whether you're repealing it, you're essentially changing the by-laws of the strata scheme. When you're dealing with common property rights you need consent and that's why I say the requirement for lot owner consent when you're amending or repealing a common property rights by-law still applies in the new law.

Now, the very interesting thing about this discussion, and it's why I wanted to raise it on the podcast, is that the listener who contacted me had contacted the Fair Trading. Fair Trading had said the requirement that there be consent when dealing with common property rights by-laws is no more and there is no requirement for consent of the owner affected if you are changing one of these by-laws. Well, that's not how I read Section 142 and there's further evidence for my interpretation, I say, in a later section, Section 149.

This section deals with applications for orders in relation to common property rights by-laws so that's orders from the Tribunal. This section says that the Tribunal can make an order prescribing a change so ordering that there be a change to a by-law if the Tribunal finds that an owner of a lot has unreasonably refused to consent to the proposed amendment or repeal of a common property rights by-law. Those are actually the words used in Section 149, Subsection One, Paragraph B.

Here the legislation is confirming, I say, that the consent of the lot owner is required where there is a proposed amendment or repeal of a common property rights by-law. If that consent is unreasonably refused then this is how you apply for an order of the Tribunal. Now granted, this is nowhere near as clear as the old law used to be. The old law was in Section 52 of the Strata Schemes Management Act 96. That made quite clear that an owners corporation can make, amend or repeal a by-law conferring these types of rights or privileges only with the written consent of the owner of the lot concerned. It actually had those words in there. Those words have not come across to Section 142 in the new act, save for those seven little words at the end of Section 142 or that changes such a by-law. I say that operates to require consent for amendments and repeals of common property rights by-laws.

Hey, that's just me. Happy to hear from anyone out there who has a different view, let's have a chat about it. If there's another section of the legislation that I haven't come across that makes this much clearer I'd love to hear about that as well. Now, these types of questions and a whole lot more are the kinds of things that I work one-on-one with members inside the Your Strata Property online membership community. If you haven't heard about that, if you haven't checked it out, head over to yourstrataproperty.com.au/membership. For as little as \$29 you can have access to the member's area where we have templates, we have e-books, we have a forum where you can ask these types of questions and get guidance directly from me and my team of lawyers. You can even come on the podcast as a guest.

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