

Publication Date: May 9, 2017
**YSP Podcast Transcript: Episode 060. In Conversation – New Rules for Engaging
Lawyers and Banning Smoking Building-Wide**

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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 Reena Van Aalst. How are you, Reena?

Reena Van Aalst: Good Amanda, how are you?

Amanda Farmer: Not too bad. You know what, it has suddenly gotten a bit cold here in Sydney and I am really enjoying the cold weather. How about you, do you like this cold weather?

Reena Van Aalst: I don't mind it but I think we went from this humid rain period, then to cold. There's nothing in between and because it was such a hot summer, I didn't go to the beach as often as I normally would have because it was just too hot to be there and now it's like ...

Amanda Farmer: You've missed out.

Reena Van Aalst: Yes, what happened to summer? It just came and went.

Amanda Farmer: I don't mind that. I really love autumn when you can go out early in the morning, go for a walk and you get that bit of sun but it's still crisp and cool and it doesn't last for long because then we're all freezing.

Reena Van Aalst: Yes.

Amanda Farmer: But I quite like the change. That's what I've been enjoying this week.

Now, let's jump straight into our challenges, Reena. What challenges have you had this week?

Reena Van Aalst: Well, a scheme that I just recently took carriage of, had some outstanding legal bills, which hadn't been paid. I sent them to the committee and I asked the lawyer as well, to send me the cost agreements and any correspondence because the files weren't really that adequate that I'd received. I forwarded these to the committee and they came back to me and they said ... And I asked them, "Have you seen these cost agreements? Were they sent to all owners as per sections 105 and 103 of the Act, where any disclosure has to be made to all owners?" The committee actually has been pursuing this matter, it's not just a one-off little thing. Basically, they said that "No, Reena we haven't seen this cost agreement." I mean I don't if that's the case, I'll have to go through some of the email records, but they also said that the owners hadn't seen it either, that it hadn't been sent to all owners.

I'm actually quite surprised and ... In a sense, I see this quite often. Even when I was working in my previous role, sometimes the managers weren't aware that there is that obligation, previously under Section 230A and now under section 105, to actually send a copy of any legal cost disclosure to all owners. I think this has obviously come about because sometimes committees have gone off on tangents, maybe, in terms of incurring high legal fees and entering into litigation when the owner's corporation wasn't even aware of what was going on, so ...

Amanda Farmer: Yes.

Reena Van Aalst: I think it's just a reminder to all strata managers to basically look at those sections of the act, so yes...

Amanda Farmer: Yes.



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Reena Van Aalst: Sections 105 and 103.

Amanda Farmer: The interesting thing I find about the new Section 105 ...

Reena Van Aalst: Yes.

Amanda Farmer: Where previously under the old Act, owners corporations were required to basically circulate any cost agreement that they received from a lawyer for legal services. Under this Section 105, the way I read it, you're only required to circulate it if it's actually a cost agreement that's going to go before the general meeting for approval. Section 105 says that "If disclosure of cost is made to an owner's corporation for legal services and they are legal services for which approval is required under Section 103."

Reena Van Aalst: That's right.

Amanda Farmer: If you go to Section 103, that's the section that says, if you're going to be commencing legal proceedings or engaging a lawyer, you must approve that engagement and those costs at a general meeting. There are exemptions there, some very limited exemptions.

Reena Van Aalst: Yes.

Amanda Farmer: Basically ...

Reena Van Aalst: It was very similar because there was obviously a statutory threshold. Previously, Amanda, if there were cost agreements for debt recovery they weren't required to be circulated, so I think that.

Amanda Farmer: Correct and that's still the case. That's still the case.

Reena Van Aalst: Yes, that's still the case.

Amanda Farmer: There is in this new Act, one of the exemptions for needing general meeting approval for legal services, is if the legal services are going to cost less than \$3,000.00. Now as a lawyer, I still need to issue a cost agreement if I'm doing work that, for example, is going to cost 2 and 1/2 thousand dollars. I have to issue it, but under this Section 103 and 105, it doesn't actually have to be circulated because it's not a cost agreement that is going to go before the general meeting for approval and it's not going before the general meeting for approval because it is less than \$3,000.00 and that falls within one of the exemptions. I'm not sure if that was the intention of the drafting here, but that is its effect in my view.

Reena Van Aalst: I agree with that Amanda. In this case, this was actually done in March 2016 where that requirement was not the case, it was still Section 230A and this matter would probably exceed \$15,000, I think ...

Amanda Farmer: Anyway.

Reena Van Aalst: The way that it's going, so I think that basically, the part of the issue I think was that the lawyers, sometimes they split the matter into various sections and say, rather than having it all on the one cost agreement they'll say, if we do this it'll be, say 5,000, next month's 5, so it's a notice- ... People are trying to keep within that \$15,000.00 threshold or I think previously it was \$12,000.00 threshold.

Amanda Farmer: Yes.

Reena Van Aalst: The problem is that I think that people think okay, well it's only going to cost five but really, the minute you start the five, you have to go to the next stage because sometimes ...

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Amanda Farmer: That's right.

Reena Van Aalst: Once you've started the process, then you can't just stop it. You're the person that's actually the proponent of the legal action or the ... So you can't just say, oh no we're going to stop now halfway through part 2. I think it's best, I think, that people do know from the beginning that the cost is going to be estimated in this vicinity and that also, that there's enough funds earmarked for that purpose in your budget because a lot of the time when legal fees ... And this is the case that's happened with this building, that the legal fees have been so high that, basically, they've run out of money because they hadn't budgeted for anything anywhere near that.

Amanda Farmer: Yes.

Reena Van Aalst: Their funds were quite tight to start off with and then we've had to have a special levy now, to basically raise funds to keep the scheme functioning. I think that's where, I think, a lot of schemes might come unstuck, when you find that legal action is taken and then after you need ... And also now they need experts, reports in place so that all adds up. It's obviously necessary because it needs to be done, but I think the way that the owners are now reacting, thinking well hang on, why are we raising a special levy? We didn't know that this is the amount of money that was being spent. It's only until ... In this case, because the only way that owners had found out about it was just at the AGM and that's usually too late by that time.

Amanda Farmer: Yes, that's right. It's definitely too late by the time you're raising the special levies. There really is a duty here for lawyers to meet to accurately estimate legal costs, including disbursements. When I say disbursements, things like the fees of experts, the fees of barristers. They are all disbursements and under our legal profession requirements, the Uniform Legal Profession Law that we now have, we are supposed to be including estimates for disbursements in our total estimate of legal costs that we give to clients.

Time and again I see lawyers not doing that.

Reena Van Aalst: Is that a new requirement, Amanda? Is that something new or that's been around?

Amanda Farmer: No, no, that's been there for a long time. We've always been required to give a total estimate of legal costs and legal costs include disbursements.

Reena Van Aalst: Oh.

Amanda Farmer: It is difficult a lot of the time, difficult to know what an expert is going to charge you. You might know that we have the need for an expert or a barrister on the horizon, but we don't necessarily have a quote from them because they haven't been engaged yet. It's a difficult task but it's not one that for that reason should be ignored. A lot of us practising in this space are very experienced, we've been doing it for a long time. We know ...

Reena Van Aalst: Yes, roughly, I mean pretty much ...

Amanda Farmer: Roughly, we can give a general idea of what litigation is going to cost, you know.

Reena Van Aalst: Yes.

Amanda Farmer: I think some lawyers are nervous to be overly generous with their estimates, perhaps. They want to be a bit more conservative because they don't want to scare off the potential client who's going to say, "Wow, is it really going to cost that much?", but honestly, I don't see why we shouldn't be realistic. Surely it's bad for business anyway if you are giving an estimate that eventually ends up doubling or tripling. Well, that's not a good look, is it?

Reena Van Aalst: No, and I think also what happens is that people sort of ... Owners think, well in some cases it may have been

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better to remedy the situation and say it's defects, for example, I mean that's your classic one.

Amanda Farmer: Yes.

Reena Van Aalst: Sometimes you look at the amount of time and money that's going to be expended in the process, you might as well think, well you know, at least we'll get the work done the way that we want it done, more quickly, efficiently and therefore we'll put in extra for doing it ourselves but we'll save on legal fees and expert fees, which invariably, really don't add value to the building, which compared to actually undertaking works for the building.

Amanda Farmer: Yes, that's a really good example. I see that happen a lot, where owners think, gosh, if I knew it was going to cost this much, we would have just spent the money doing the work rather than litigating. That's something I'm really ... In those types of matters, I'm really conscious of accurately estimating and preparing.

Reena Van Aalst: Yes.

Amanda Farmer: Preparing for the future.

Reena Van Aalst: Yes. I think so too.

Amanda Farmer: Okay, well my challenge that I want to talk about today is this, I was contacted by a strata manager who said, "Amanda, my building has asked ... One of my buildings has asked if we can have a by-law that bans smoking in the entire complex, so both on common property and within lots."

Now, we're doing a lot of these smoking, or non-smoking I guess, by-laws lately while owners are going through their by-law reviews and it's something quite popular to institute a by-law that says, lot owners are responsible for ensuring that smoke does not drift from their lot or their balcony, generally, onto the common property or into another person's lot, and certainly that smoking on common property, is not permitted.

Now, this building wants to go one step further and say, we actually want to stop people who are living here from smoking inside their homes. I said, "You know what, I think you can do it. I think if you did it and it was challenged, there is a very good argument that this kind of a by-law these days, is in the best interest of everybody in the building. It is in line with current social expectations and standards and there is just a mountain of evidence now that smoking and passive smoking, in particular, is downright bad for you. It is very difficult to prevent smoke drift from lots onto common property when you're allowing owners, residents, to smoke within their lots.

Our buildings, unfortunately, at least here in Sydney, are constructed in such a way that all sorts of smells and sounds drift between lots and through vents and air conditioning and things like that. It might be that a by-law which bans smoking in the building entirely, is the only way to solve that problem.

What do you think about this, Reena?

Reena Van Aalst: Yes, that's a common thing that come across my desk at times, where there's been smoking issues within schemes, especially when it goes on and on for some time. I think people don't mind if it's an occasional smoke drift, but I think if someone is a persistent smoker and it's happening all the time, I think that you'll find that some people, and rightly so I think, I mean, are very disturbed by it and don't want it to happen.

I'm actually aware of a case, Amanda, where there was ... I think this was a few years ago, there was a case where there was success by lawyers at the time who put forward a by-law to ban it within the apartment and they succeeded. This is maybe 5 or 6 years ago. I think there is a precedent there.



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Amanda Farmer: I'd love to have a look at that if that's a reported case. You can let me know, Reena, and ...

Reena Van Aalst: Yes I will actually have a look and see if I can find it, but ...

Amanda Farmer: If I've got some public information on that I'll make sure there's a link to that in the show notes.

Reena Van Aalst: Yes, I think it was a scheme in Ashfield, from memory. That was my recollection, but I could be wrong.

Amanda Farmer: Okay, because there's certainly cases on, and by-laws that prevent smoking on the common property and smoke drift and to say that that's fair, but this is taking it to the next step. I know this building is conscious of this new part of our legislation that says you can't have a by-law that is harsh, unconscionable or oppressive and query whether the bylaw would be challenged on those grounds. I said, "Look, absolutely it would certainly be open to challenge, but I would be prepared to draft it and I think there's an arguable defence of it."

Reena Van Aalst: Yes, well as I said, Amanda there is a case I think, where that has already transpired and I think that now, in terms of how buildings are constructed now, with a common cooling towers and vents and things, but sometimes it's really hard to stop smoke going between lots. In a sense, as we just said in our last podcast, about the prices of property in Sydney, I mean you buy an apartment and next minute you've got your neighbours smoke coming through into your lounge room. I just think ... The other thing that I find happens a lot, that I used to get complaints about, is the smoke drift from people who are out on balconies.

Amanda Farmer: Yes.

Reena Van Aalst: It goes up to the apartment above and that's an issue, I think when, if it happens quite often. They're not actually doing it within their apartment, they are outside but then the apartments above that also are receiving that smoke drift when they're trying to sit outside and enjoy their balcony.

It's quite a tough one. I think that's one of the things that, the challenges of apartment living and the close proximity of people leads to such inevitable things that will ... And we have to try and find ways that, obviously, ensure people's health and well being as a priority. I think, as you said Amanda, smoking is definitely documented to be a killer and causes of cancer, et cetera. There's enough evidence to that effect, so I think that people should be entitled to have a smoke-free apartment.

Amanda Farmer: Yes, well this is absolutely why I love practising in this space because you always have these interesting questions that crop up, that the legislation is trailing behind and we solve them as we go along, which I think is really exciting and why I love being a strata lawyer.

Reena Van Aalst: Yes, that's something I like ... Well, I also enjoy being a strata manager as well because every day you get a different issue or a different challenge. It doesn't really matter how long you've been practising, there's always something new so it keeps you on your toes.

Amanda Farmer: Yes, definitely.

Now Reena, what's been going well for you this week? What is your win that you'd like to share?

Reena Van Aalst: In the recent committee meeting that I had, we had to ... I included a motion about reviewing the by-laws for the November deadline for consolidation and it's been a really interesting exercise because this particular building, they weren't even aware of all their by-laws to start off with, which I thought was quite strange as a committee, but anyway I suppose their previous manager wasn't keeping them abreast of them. They've actually now realised, Amanda, and this is why I think this process is quite a good thing, that their by-laws are quite inadequate and there's hardly ... There's the model there ... The model by-laws from 1996 Act and they have a few special by-laws that have been added for people's, you know, extensions and renovations, but I think

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that instead of... I do recall, when I was managing larger schemes, sometimes there was a problem and then you'd try and address it through a new by-law. Rather than doing this on a piecemeal or ad hoc reactive way, this is a really good way now for schemes ... And they've got hopefully enough time, unless someone wants to try and add another special by-law within that time frame, to really sit down and look at their by-laws and review them and say, "Okay, well what are the issues that we've had? What are the complaints that we receive? What things do we want our building to focus on?" Then they've been able to look at by-laws in a holistic manner rather than in a piecemeal, ad hoc way and reactive way, where you try and just address an issue by passing a by-law about this or that.

I think it's been quite a good process to actually go through that and I think that buildings that do this ... And some buildings have actually formed subcommittees as well to go through this process.

Amanda Farmer: Yes, good idea.

Reena Van Aalst: That's also a very, very good handy way because you get a bit of a broader perspective if you've got other people involved in addition to the committee members, so it's been quite a good thing.

Amanda Farmer: Yes, look, I agree and for any listeners who aren't aware, what we're talking about here is the requirement in the new New South Wales law for owners corporations to review their by-laws within 12 months of the new legislation coming in. That's why we say you've got until the 30th of November this year, 2017, to conduct your by-law reviews.

I'm seeing the same thing, Reena, I'm seeing some committees really band together, have forum information nights with owners to get their feedback on, hey, what do you think is working? What's not working? What are you concerned about? What should we be dealing with in our by-laws and taking all of those different views into account and yes, establishing subcommittees and really spending the time to engage in that process and make sure they've got a good solid set of by-laws at the end of the day.

Reena Van Aalst: Yes, it's a very good, positive exercise and I think that one of the reforms that has been a great one, has been this particular clause, which I think people would have thought initially, oh no there's more work to do and deadline, but really it's actually ... It's like having a constitution for a company. I mean, you normally start off with a good constitution and you make amendments, whereas some buildings have a very basic, you know ... Basic by-laws that really, in this current day and age, they're over 20 years old, I mean they just don't anymore.

Amanda Farmer: Yes, they don't cut it.

Yes, excellent. I agree.

Okay, well the good news that I want to share this week is that we have two new books out on the new strata law in New South Wales and these books are by Gary Bugden and Alex Ilkin.

Now, these names will be familiar to a lot of our listeners and I think I've actually had a couple of guests on the podcast who have found a lot of valuable information in Alex Ilkin's strata management books, in particular, where he gives commentary on the act and step by step guides to how to navigate your way through the Act. I think one of those guests said, "When is the 2015 version coming out for the 2015 Act?"

Well here it is, it's out and there's also another book by Gary Bugden, another very well respected strata lawyer and I will put links to where you can purchase those books in the show notes. I know there's lots of managers out there who have been eagerly awaiting them, as well as very engaged committee members.

I'll certainly be getting my copies and make sure you get yours.



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Reena Van Aalst: Yes. Yes, I saw Gary last year and he mentioned that he was finalising his new strata sort of ... Is it through CCH the new one as well? It used to be IDA.

Amanda Farmer: Gary's is through CCH and I'm pretty sure that Alex's is through Thomson Reuters.

Reena Van Aalst: Yes.

Amanda Farmer: Yes.

Reena Van Aalst: I remember all the tags that I had on all their books actually. I knew them all by heart, but anyway.

Amanda Farmer: They do a great job and we're very lucky, very lucky to have them, so we'll support them by purchasing those books.

Reena Van Aalst: Yes, definitely.

Amanda Farmer: Excellent.

Well, I think that's it for me this week, Reena. Anything else from you?

Reena Van Aalst: No, all good Amanda. We'll see you next time.

Amanda Farmer: Catch you next time.

Reena Van Aalst: Bye.

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