

Publication Date: 20 March, 2018
**YSP Podcast Transcript: Episode 104. How insurance commissions impact
management fees**

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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. Hi, Reena.

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

Amanda Farmer: I'm very well, thank you very much. How are you?

Reena Van Aalst: Good. Yes, very good for a Friday, which is fantastic. I love Fridays.

Amanda Farmer: Yes, yes, we do always record on a Friday, and we enjoy, I think I do, this change to the week, working hard in strata land and then being able to review and wrap up with you is always enjoyable for me.

Reena Van Aalst: Yes. Thank you.

Amanda Farmer: And it was lovely to see you last week, Reena, at the Women in Strata and SCA High Tea in Sydney's Park Hyatt Hotel. What a beautiful day.

Reena Van Aalst: Yes. That was a fantastic event, actually. It was so well attended, and it was just lovely to see so many more women getting involved, and of course, men getting involved as well.

Amanda Farmer: Yes.

Reena Van Aalst: So, yes, it was held on the International Women's Day, on the 8th of March, so that was a great event.

Amanda Farmer: It was. It was put on in partnership between SCA New South Wales and Women in Strata (WiS). It's the first event that we have done together, and when the call for registrations went out, we were so overwhelmed by the response that we ended up having to put on an event in the morning and another event in the afternoon, so all the speakers at that event, including myself, including Reena, agreed to attend the event both in the morning and in the afternoon, which was exhausting but fun, and lovely to see over 150 people in attendance over the day. So, a really successful event, and some good, juicy topics we got stuck into there, didn't we?

Reena Van Aalst: Yes. Very interesting questions from the floor, as well, that I found, Amanda. So, apart from the presentations that were given by yourself and Suzanne Mercier, which were fantastic, there was also a panel of people, including myself, but what I found, I think, the most interesting was the types of questions that women asked from the floor, so I think they were quite thought-provoking and sort of gave you a flavour of what people are experiencing out there in their professional lives.

Amanda Farmer: Yes, absolutely. And definitely having Reena and I there, live and in the flesh, it gave you a flavour of what our upcoming live event is going to be like: Your Strata Property Live. We are...

Reena Van Aalst: Yes. I was speaking to a few people last night that have already told me they've actually registered, Amanda, so everyone's looking forward to it.

Amanda Farmer: Yes. Yes, yes. We have lots of people already registered to attend, so don't miss out on securing your spot. It is Tuesday evening, the 17th of April, in Goulburn Street here in Sydney, and you can secure your spot by heading over to



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yourstrataproperty.com.au/live, and 6 CPD points up for grabs for strata managers, and I think that's why we've got so many managers signing up to that list, and of course to hear from Gary Bugden, Chris Duggan, Dr. Cathy Sherry, Natalie Fitzgerald, and of course, your beautiful self Reena. Thank you for joining us that evening.

Reena Van Aalst: Thank you. Yes. Looking forward to a great evening.

Amanda Farmer: Me, too. Now, let's jump straight into our wins and our challenges for this week, as we do, Reena. What has been your challenge this week?

Reena Van Aalst: The challenge that I've been encountering now for probably a few months is the fact that when the annual fire safety statement is due, most of the time, the repairs haven't yet been completed for one reason or another. Sometimes it's due to lack of access, sometimes it's multiple quotes being obtained, and so what I'm really struggling with is the fact that most of the companies that I'm dealing with will actually issue the annual fire safety statement before the actual work has been done. So, as long as you accept their quotation for the required repairs, they will actually issue the statement for you to sign, which I have refused to do because I just don't believe that you can submit that when you know the work hasn't been done. And unfortunately, because of the threat of the fines that looms from various councils, I think there's a big pressure for managers to actually do this.

City of Sydney Council actually has a very unique system where they actually will say that you can apply and pay a fee to stop the fine from occurring. I think the fee was about, I think it was about \$800, and I'm thinking, why would I ... *"If you've already had the inspections, and you're just now accepting the quotes, and the work won't be done by the time the annual fire safety statement is due, why don't you fill out this form and pay this fee, and we will defer any fines,"* and I'm thinking, wow.

Amanda Farmer: Wow, you can buy your way out of a fine. Interesting.

Reena Van Aalst: Yes. As long as you can show that you've got the quote, that you've accepted it, and that basically the works are in progress, but I just feel like this whole fire industry, even though they're trying to change it with this new requirement for the competent fire safety person, whatever that means in terms of how that's assessed, but ... Yes, it's one of those things, Amanda, that I think a lot of managers are faced with, and sometimes when you have larger buildings, it's the building manager who's involved, so you probably don't know what's going on, but now that I'm more down at the coalface, I can see that many managers would be susceptible to such pressure, and especially, perhaps, by the committee, if they want they want the manager to sign it even though the work hasn't been done.

Amanda Farmer: So, just to be absolutely clear, you're saying that fire safety professionals are issuing annual fire safety statements saying that everything is up to scratch, and they haven't actually conducted the inspection?

Reena Van Aalst: Oh, no. Not the inspection. They've given a quote for the remedial works, but the remedial works haven't been completed.

Amanda Farmer: Okay. So, everything is not up to scratch.

Reena Van Aalst: No and secondly, what if you don't get into every apartment, what if something happens, there was a delay, and then there's a fire in between you submitting that and then something happening, then I'm not sure how your insurance would cover you, how your PI would cover you.

Amanda Farmer: And the remedial works in question, are you seeing that these are kind of basic things, like...

Reena Van Aalst: Oh, sometimes they're basic, but sometimes they're significant. They're not always basic, Amanda. I mean, yes, if it was a door closer here or a little thing there, you'd probably think, okay, well that's no big deal, but no, they're quite significant works. We're talking about, sometimes, works in the order of \$50,000, so we're not talking about minor things.



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Amanda Farmer: Yes. It seems to me that the difficulty is this grey area as to what it is that makes a building compliant and fire safe, and at least from the professionals that I speak to, there is a wide variance of opinion. And it might be that, where one professional will sign off a fire safety statement, another won't, and that's how we're ending up in these positions where they say, *"Well, you do need this work done, but we can still, effectively, sign the certificate and say that you're compliant."* I think we're fast getting to the stage where we need one of these professionals on the podcast, Reena.

Reena Van Aalst: Yes, I think so. I think I have someone in mind, so leave it with me, Amanda.

Amanda Farmer: Oh, good to know. Yes, we'll get that one on the list. And anybody out there who's listening who wants to put their hand up and come and chat to us as a qualified expert in this area, please don't hesitate to reach out to myself or Reena.

Now, my challenge for this week, this is actually a listener question that I would like to share with you, Reena and everybody else, and the question was this: *"Thanks, Amanda and Reena. It was great to hear the clarification about agency agreements and that there is flexibility to amend terms, or to add terms,"* and that was in one of our previous episodes. One question that this listener has is that, when a plan's management fee is based on commissions received from insurances, and the strata manager is getting paid commissions, if the building decides to go to another insurance broker so that the commission doesn't go to the agent, does this entitle the agent to revise their management fee before the agreement comes up for renewal? So, are they then going to be charged more in management fees because the manager is not going to get that commission?

Reena Van Aalst: Well, Amanda, yes. So, with the new agency agreements that SCA have put out, there are actually 3 options, which is, option A, where you get a fee plus any commissions or fees that are listed in your schedule, option B, then, I think, is that you may get some commission, and then option C is, you get no commission. So, there are actually 3 different prices that you put on your agency agreement if you feel that you may not be getting an insurance commission. Now, most managers would have to enter into some arrangement with the insurance broker or insurance company. They can be an authorised representative or a distributor, and on that basis, they are able to, then, receive a commission.

So, perhaps another thing that this strata manager could do was, perhaps, to approach the other broker and say, *"Is it possible for our strata management company to become a distributor?"* upon which, it gives you certain things that you are able to do as a distributor, which we won't go into today 'cause it's another topic for another day. But then, once you become a distributor, you are, then, permitted to receive a commission. So, for example, in our business at the moment, we're taking on a lot of new plans, and some managers have used other brokers that I haven't used.

So, in the case that they want to retain that same broker, what I've been doing is ... And if they want us to receive a commission, 'cause sometimes, you know, schemes don't want us to receive a commission, so, on the basis that they do, then we may say, *"Okay, well, our fee is based on us receiving a commission. If you want us to receive a commission which subsidises your management fee, we may go to your alternative broker and see if we can become a distributor."* Which obviously means you're going to be covered under their PI and other sorts of things, so it's not just a form-filling exercise. Although, in practice it is, but there's a lot more behind it.

Amanda Farmer: Yes.

Reena Van Aalst: And obviously the insurance broker or company has to feel comfortable that you are giving proper advice, and not giving advice where necessary, in terms of what you are entitled to say when providing advice about insurance policies.

Amanda Farmer: Yes. Thank you for that insight, Reena. I was really interested to hear, from your perspective, how you see this operating on the ground, and I wasn't aware that you could actually have that distributor relationship set up. From my point of view, from the legal perspective, the answer to this question really comes back to, and you touched on this, Reena, the terms of the agency agreement. So, I'd be looking at, what does the agency agreement say about the ability of the agent to receive a commission, and if a commission is not received, is there provision in the agency agreement for the management fee to be increased because the commission is not received?

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I have seen agreements that do incorporate that. It sounds like it might not be in the standard form SCA agreement, but I have seen agreements that say, *"We're entitled to these commissions. If we don't receive them, then we are going to be charging you an additional management fee."* So, always go back to the terms of your agency agreement to work out whether or not that applies to you. And if it's not in there — of course get legal advice specific to your situation — but if it's not in there, then it's unlikely that the agent is going to be able to legally charge you more in the absence of that term.

Reena Van Aalst: No. Or the agency agreement may state, Amanda, if a commission is not received, they won't be undertaking taking any of your insurance claims, nor will they be dealing and arranging in your insurance 'cause once they don't have that power to do such tasks, then they pretty much will have to charge, and hopefully their agency agreement does have a schedule of charges for insurance claims, and getting valuations, and organising insurance in the event that they don't receive a commission.

Amanda Farmer: That's a really good point because it sounds to me, from what you're saying there, Reena, that the commission subsidises that additional work that comes up through insurance claims, so if you're not getting the commission, your agency agreement's either got to be very clear that you won't do that work, or you have provision — and I think this is the better idea — that you have provision in your additional services, additional charges, that if you're asked to do that work, then there will be an additional fee so you're not out of pocket.

Reena Van Aalst: And normally, Amanda, you can't do that work because it's provisions under the insurance legislation to say that if you're not a distributor or an authorised, you cannot deal on arranged insurance, so you can't do anything, pretty much.

Amanda Farmer: Oh, okay.

Reena Van Aalst: Yes. So, in terms of insurance claims, that's probably debatable, but a lot of other things, an agent can't do.

Amanda Farmer: Ah, fascinating. And you're right, yes, a topic for another episode, I think. Get stuck into that one, perhaps with an insurance expert. Add that to the list. All right. Your win for this week, Reena?

Reena Van Aalst: I think about a month ago, Amanda, I might have spoken about a situation where one of my schemes had been charged in advance for the annual fire safety statement inspection of their equipment.

Amanda Farmer: Yes. I think that was episode 96.

Reena Van Aalst: Yes. And, sorry, more than a month ago, now. Time flies.

Amanda Farmer: It does.

Reena Van Aalst: So, after I sent them that section of the Australian Consumer Law, basically, the next email came was, *"Can you give us your bank account details so that we can refund the amounts?"* So, we received the amount in full as a refund.

Amanda Farmer: Wow! Congrats. Nice work.

Reena Van Aalst: Yes. Yes. So, now I've actually got another one where, it's one of these large pest control companies, and we wanted to cancel the contract, and again, they said, *"Oh, you've got to give X-amount months' notice, and it's on a rollover,"* and I said, *"Well, send me the contract 'cause we don't have it,"* and hopefully we'll be able to achieve the same outcome in that particular situation with the same advice about the Australian Consumer Law.

Amanda Farmer: Yes. See what can be achieved when you have a manager who pays attention to the fine print and recognizes your consumer rights? And ask the question, really. Asking the question, I find ... You know, *"Why am I being charged this? Where did this come from? Where is the document?"* And commercially-minded people, and businesses who want to do good business, and get repeat business from people like Reena and buildings like those that she manages, are generally going to come to the

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table when we're not talking tens of thousands of dollars here.

Reena Van Aalst: No.

Amanda Farmer: It's just good business to be able to resolve those kinds of issues quickly, so I'm glad to hear that company was able to do that.

Reena Van Aalst: Yes. Well, even a lot of people don't know that there is this Australian Consumer Law and that you can't have the rolling contracts. A lot of people, actually, normally would just give in and say, *"Okay, we didn't give the required notice. We need to pay,"* so, to the managers out there, yes, look up the Australian Consumer Law.

Amanda Farmer: Absolutely. Okay. My win for this week, I'd like to share with you a reported decision that I was involved in in the Tribunal, and this is a case that I have spoken about on the podcast before. It's the case of Strata Plan 82306 and Anderson, and this is the case where we applied for a penalty for breach of an adjudicator's order under the old law.

Reena Van Aalst: Oh, yes.

Amanda Farmer: And the Tribunal was a little bit confused about how that application should operate under the new law, and we ended up before a panel and had quite a considered decision. And, I've spoken about the results in that case in episode 90, if you want to go back and have a listen to that one. We now have an additional decision in that case, and that is the costs decision. So, the case was determined in favour of my client, the owners corporation, and we then had a timetable to make submissions about costs, who should pay the costs of the proceedings, and of course from the owners corporation's perspective, as the successful party, it submitted that the lot owner should pay the costs, and we received quite a detailed decision again from the Tribunal Panel agreeing with us that, yes, the lot owner, the respondent, should pay the owners corporation's costs. And that is reported, so I'll put a link to the reasons for that decision in the show notes.

Reena Van Aalst: So, Amanda, how ... In terms of the costs decision, was it based on party/party costs, or ... I mean, how does a Tribunal look at these types of ...

Amanda Farmer: Yes. So, what the Tribunal said is that because it determined the application under the old law, which was part of the dispute in that earlier case, it also determined the costs decision under the old law. And if you remember, the old law actually had a provision for costs, and that was Section 204 in the 1996 Act. That provided for the Tribunal to make an order about the payment of costs whenever it made an order requiring a penalty to be paid. So, we used to have that provision in our old law. We don't have it anymore, so the position on costs is a little bit harder to make out now. You have to prove special circumstances, and that's under the Tribunal Act as opposed to the Strata Act, but in this case ...

Reena Van Aalst: Oh, okay. It's a different Act now, is it?

Amanda Farmer: Yes, yes. We don't have a cost provision in our 2015 act. If you want to claim costs in the Tribunal, you have to look to Section 60 of the Civil and Administrative Tribunal Act, and you have to prove special circumstances. So, even when you are making an application for a penalty order, or attempting to make application for a penalty order, which is also difficult under the new law, you're going to look to Section 60 of the Civil and Administrative Tribunal Act when it comes to costs. In our case, because it was determined under the old law, the Tribunal found they could also make the cost order under the old law, and that was Section 204, which was that discreet cost-making power. So, a little bit frustrating now, I suppose, for lot owners and owners corporations going to the Tribunal that they don't have a lot of certainty about costs, which we used to have a bit more certainty under the old law because of Section 204, but now we're going to have to look at how the cases play out, and how often the Tribunal, and on what circumstances, the Tribunal is finding that costs are payable under Section 60, under this special circumstance heading.

Reena Van Aalst: Yes, 'cause that sort of provision, Amanda, sounds very broad. I mean, it sounds like it's very discretionary.

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Amanda Farmer: Yes. So, special circumstances, it is set out in section 60 that the Tribunal can consider whether a party has conducted proceedings in a way that has unnecessarily disadvantaged another party, whether one of the parties is responsible for unreasonably prolonging the proceedings, the relative strengths of the claim, the nature and the complexity of the proceedings, whether the proceedings were frivolous or vexatious, and any other matter the Tribunal considers relevant. So, quite a long list and you're right, Reena, a broad discretion with only that, kind of, guidance provided in Section 60. So, the couple of cases that I've been involved in, we've had some success under Section 60, and that body of case law is just building up now as the Tribunal considers more and more applications under our 2015 Act. So, a link to that case will be in the show notes, if you want to check it out.

I think that's about it from me this week, Reena. How about you?

Reena Van Aalst: Yes. All good, Amanda.

Amanda Farmer: Looking forward to another fabulous week next week.

Reena Van Aalst: Yes. Have a great weekend!

Amanda Farmer: I will. You, too.

Reena Van Aalst: Bye!

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