Publication Date: 5 April 2018

YSP Podcast Transcript: Episode 106. Resolving the confusion around electronic voting

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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 very well here is Strataville. I'm might swap between Strataland and Strataville. I would say Strataland. I like Strataville too. Strataville.com, go and check if that's been taken, any strata management companies that are looking to set up and need a new name. I like it. I like it. Yes, in a bit of a crazy mood, but I'm doing well. How are you, Reena?

Reena Van Aalst: Good, yes. I'm very busy, but all good.

Amanda Farmer: Yes, keeping up with the post-Easter deluge.

Reena Van Aalst: Yes, exactly. It's funny how just two days off, Amanda, can make such a difference in terms of people's minds. It's like the world's going to end before Easter.

Amanda Farmer: Exactly, and it hasn't, and we are still here and going strong.

Reena Van Aalst: Yes.

Amanda Farmer: Experiencing our wins and challenges, as always, let's jump into your challenge for this week, Reena.

Reena Van Aalst: Well, this is actually a question that we both received from one of our listeners, and it's basically dealing with the notion of electronic voting.

Amanda Farmer: Yes, I remember this question, Reena. This was from a manager listener who had sent to us a motion, a standard form motion that many of her buildings had adopted, and it was a motion that the owners corporation resolved to accept voting by electronic means such as email. It's a motion that I have seen lots of buildings adopting lately. Of course, once the building has adopted it, they're asking their manager and sometimes asking me, as a lawyer, *"Well, now we can vote by email. We don't even need to go to the meeting."* That's not necessarily the case.

The question that this listener was asking us was if a building has adopted electronic voting by means of email, or teleconference, or video conference, is it possible for someone to vote by email prior to the meeting, actually not attend the meeting, and have their vote counted? The way that this manager saw it was that, if somebody did that, it was actually going to fall into the category of pre-meeting electronic voting, and pre-meeting electronic voting actually has some rules, some complicated rules around it that need to be complied with, so it's not a simple matter of saying, *"Yes, we could now vote by email,"* sending in an email vote prior to the meeting, and you've had your say.

Reena Van Aalst: Yes, I think there is a lot of confusion out there in terms of what this section means. One of the buildings now is saying the same thing to me. It's, *"Now that we have the electronic voting, can we just not turn up?"* As you said, voting before the meeting is a totally different ball game than just attending a meeting by other means. I think that's got to be made very clear to your owners corporations and also that, in a sense, when you're adopting the various motions that you look at what you're adopting, because I think there's confusion out there with managers as to what these regulations mean. When they adopt this, whether ... In their minds, it may cover a whole range of things when it's actually quite specific to voting by other means as opposed to voting prior to the meeting.

Amanda Farmer: Yes, so there's a difference between the way you vote when you're at the meeting and pre-meeting electronic voting which, of course, is voting before the meeting. In my view, the regulation that says owners corporations can adopt electronic means of voting, which is Clause 14 in the Strata Schemes Management Regulation, I think that goes to the type of situation where you're actually having a video meeting or a Skype meeting. You're not actually in the same room together. If you're there, and you're present in the meeting by some electronic form such as video, then you can then vote by email, sending in your votes in real time, or you can vote via a specified voting platform like a StrataVote or other companies that are out there doing their voting platforms. That's what that Clause 14 is designed to permit, voting electronically during the meeting.

If you want to vote before the meeting, for example by email, that is pre-meeting electronic voting, and you then must comply with subclause 3 of regulation 14. This says that the notice of meeting must include a statement if you are allowing pre-meeting electronic voting, a statement that the motion could be amended at the meeting, and if the motion is amended, then your vote that you've given prior to the meeting by email may have no effect. The notice must include that statement if you are going to allow pre-meeting electronic voting.

Things get a little bit more complicated if a motion can be determined partly by pre-meeting electronic voting or wholly by pre-meeting electronic voting. If a motion is going to be determined wholly by pre-meeting electronic voting, then it can't be amended at the meeting. Clause 14 is something you really need to be on top of if you're going to have pre-meeting electronic voting, which is this kind of email vote that this particular manager listener was asking us about.

Reena Van Aalst: Amanda, I had another situation this week in a meeting where an owner who had given a proxy to her daughter said, *"Oh, well, can I now be on the telephone as well during the meeting due to the telephone conference allowance for attendance in that form?"* I said to her, *"No, but your daughter actually is the proxy holder, so if she's there, then you both can't be there, so it's either you by telephone conference or her through proxy."* I think that's causing a bit of confusion for people thinking that even though they've given their proxy to someone, that they can still be attended by telephone.

Amanda Farmer: Well, is it the case that if you are an owner, and you've given your proxy to someone to vote on your behalf, the proxy obviously attends, and setting aside electronic voting and attendance for now, the proxy attends as eligible and entitled to vote, and can't the owner still attend as an owner but simply can't speak to the meeting, can't vote?

Reena Van Aalst: Yes, that's right. They can still attend, but she wanted, Amanda, to actually talk. It's funny because she was actually ... Her daughter's on the committee, and then we had a committee meeting, and she was in the background, and I think she thinks, because she's the owner, she's still a member, whereas it's like, no, once you nominate somebody else to be on the committee, you give up your right as an owner because you've nominated a non-owner, but then you can't then still participate in the meeting.

Amanda Farmer: Oh, for sure, yes, for a committee meeting, yes.

Reena Van Aalst: Yes. People make allowances for that anyway because sometimes it's ... people want to be inclusive, and that's all fine, but it's like we're having an extra member on the committee because you've got someone else that's in the background talking, and the meeting talking, so yes.

Amanda Farmer: Yes, very difficult. This is certainly a deep topic, and it's something that I know both you and I, Reena, are being asked about regularly and coming across in meetings as well. I attended a meeting a couple of weeks ago where the building had invited people to put in their votes by email if they don't want to attend. When I saw that, I said, *"Look, guys, this is not legal. Your notice of meeting doesn't meet the requirements of Regulation 14. You cannot accept pre-meeting electronic voting in this circumstance."* They said, *"But Amanda, at the last general meeting, we resolved to adopt ... Pursuant to our right under the Strata Schemes Management Regulation, we resolved to adopt this type of voting. Can't we just go ahead and do it?"* I think a lot of buildings and some managers are under that misconception as well, or they don't realise until they scratch the surface and look a bit closer that this is more complicated.

That's one of the reasons why I have included as a topic that we're going to be covering at our live event, coming up on the 17th of April, this issue of electronic voting. We will have Gary Bugden there in attendance, and he addresses the issue in his book, his recent book about the Strata Schemes Management Act 2015. Those who are attending the event can certainly take the opportunity to ask us and ask Gary some questions about how we think this was designed to operate in practice and how managers and owners committee members can make sure that they are compliant. If you haven't yet registered for that event, jump in quick, spots are filling up fast, **www.yourstrataproperty.com.au/live**.

Okay. My challenge for this week, Reena, this is a short, sharp one. I've been approached a couple of times now, and this is what caused me to put it on our list for discussion on the podcast. I've heard of some strata managing agents banking the fee for a strata search, the statutory fee for a strata search, minimum $34.10 I think it is now, banking it to their own account and not the account of the owners corporation that's having their records searched. I wanted to make very clear to everybody listening and spread as far and wide as I can that fee is due to the owners corporation. It is not due to the strata managing agent. Have you heard of this, Reena?

Reena Van Aalst: Oh, yes. It happens all the time, actually, I want to say.

Amanda Farmer: Oh, does it? There we go.

Reena Van Aalst: Well, I mean ... No, sorry, not the notion of it happening all the time in terms of strata managers banking it into their own account, but every time I have a search that's conducted in our office, they always ask me all the time, *"Do you want this made out to the strata plan or to your company?"* I said, *"No. It's the strata plan's."* I said, *"But don't managers know?"* He said, *"Oh, well, they should know,"* but it's a question that, every single time, without fail, 100% is asked.

Amanda Farmer: Are these professional searchers who are asking you this?

Reena Van Aalst: Yes.

Amanda Farmer: Wow.

Reena Van Aalst: Basically, I think what managers, perhaps, don't understand is the relationship is between the owners corporation and the strata management company so, therefore, there is no direct relationship between any lot owner or any third party. Hence, when the money is banked into this trust account, it should be banked under certificate or search fees, whichever is relevant, and then the manager then basically pays themselves that fee for that service so, in a sense, it's banked into the owners corporation's funds as income and under the corresponding expense item in the financial accounts, and then, usually, when the accounts are finalised at the end of the financial year, those two income and expenses and that, and they're all equal each other, and there's no effect because it's just money coming in, money going out. Unfortunately, I have heard that some managers actually put it into their own trust account, so there's no transparency as to how to show that the owners corporation having searches that have been conducted, et cetera.

Amanda Farmer: Yes. Just to follow that trail through, it's the strata searcher or the person searching the books and records who is liable to pay the fee to the owners corporation. The owners corporation then pays the fee on to the strata manager, but that is pursuant to the agency agreement because the agency agreement says that if there is a search carried out, there's a fee paid, then that fee is paid by the owners corporation to us, but in the first instance, there is no obligation, as you say, Reena, no obligation for the strata searcher to pay anything to the strata manager.

There is no contract between the strata manager and the searcher. There is no legislation that says that the money is paid to the manager. The legislation specifically says the money is paid to the owners corporation. I agree with you, Reena, as a matter of proper accounting and, well, compliance with the law, let's say, the fee needs to be paid to the owners corporation in the first instance, and then if it then goes on to the strata manager under a different authority, which is the authority of the agency agreement, then that's fine.

Reena Van Aalst: I think that a lot of the managers actually ask for it to be put in their name, which is why [crosstalk 00:12:33]-

Amanda Farmer: This is what I'm hearing, yes. I've heard that a couple of times now.

Reena Van Aalst: Yes, so as long as the searchers don't know what the act is, it's the other way around. Right?

Amanda Farmer: Yes, but any searchers out there listening or anyone who's paying fees to inspect records, and it could be a lot owner, could be lawyers ... I do it quite regularly. I think it's important for us to be telling managers, *"No, that's not the way it works. I have no contractual relationship with you. The relevant part of the legislation is Schedule 4 to the Strata Schemes Management Regulation, and that clearly states that the fee is payable to the owners corporation, and it's a fee of $31 plus GST,"* so I think that's where I came up with my 34.10. If you're a searcher, if you're paying this fee over, and you're being directed by a management company to pay it to the management company, I strongly suggest you draw their attention to the Schedule Four requirement and ask them to explain why it shouldn't be paid to the owners corporation pursuant to the legislation.

Reena Van Aalst: Yes.

Amanda Farmer: All right, Reena, your win for this week.

Reena Van Aalst: Well, this is actually an interesting one that comes up with many managers when it comes to their appointment, or their termination, or their reappointment, as the case may be. I had a question from a former colleague, and it related to the proxy form. In the old section, it was under Schedule 2, Section 11. In the current act, it's under Section 26, Appointment of Proxy. It talks about the form is prescribed by the regulations and is signed by the person appointing the proxy or executed in any other manner permitted by the regulations.

The form of the proxy is a prescribed form to make provision for the giving of instructions on, A, whether the person appointing the proxy intends the proxy to be able to vote on all matters and, if not, matters on which the proxy will be able to vote and, B, which is the pertinent point that my discussion today is about, how the person appointing the proxy wants the proxy's vote to be exercised on a motion for the appointment or continuation in office of a strata managing agent.

The question was does this section of the proxy have to be filled out when someone is giving their proxy to a person to vote, in this case, on the reappointment of the managing agent? My view was that, basically, the old act and the new act, the proxy form is mirrored in this way, this part of the proxy form, and therefore, the proxy bearer must be told how to vote, so you must fill out that section of the proxy form.

Amanda Farmer: When it comes to the appointment of a managing agent.

Reena Van Aalst: An agent, yes, but if it's not ... If that person hasn't put anything in that part of the proxy form, then that proxy cannot be used towards the vote and the counting of votes or the appointment of the managing agent.

Amanda Farmer: Yes, I think that's right, Reena. To my knowledge, I don't think there's any case law on this, and it would be good to have some because I think the point is arguable, but I think there's a good argument in favor of your view, and it's one that I agree with, that where there is provision in the legislation and in the standard form for an owner to direct their proxy how to vote on the appointment of a strata managing agent, then the intention, to me, is clear that there should be a direction provided and, in the absence of a direction, then the proxy doesn't have authority to vote on that issue because, if it was to be left open to the proxy to determine, then there wouldn't be that separate requirement and that separate section on the form. Yes, I follow your logic there.

Reena Van Aalst: That's exactly our thinking, Amanda. Why would they have a separate section on the act? Okay, so now it's very funny that you asked the question that there's no case law on this because, in my previous company, we were involved ... It was a large scheme and, actually, it was a former employee who, in a different capacity, was giving advice to an owners corporation on how to terminate the company. Basically, it was all through proxies. They had the meeting on a Friday night, which is highly

unusual, and there's hardly anyone there, and it's all by proxy. Of course, we got copies of all the proxies and the majority of them didn't have any indication in that section on how to vote, so we obviously challenged that and said, *"Well, we don't believe this is valid, we've been validly terminated, because these sections of the act of the proxy form have not been completed."*

I rang the Office of Fair Trading and spoke to a senior person that I deal with on a regular basis, and he said to me, *"Reena, well, the agent is not a party to the meeting so, therefore, you cannot put on an application to say that the chairperson had invalidly declared proxies to be compliant, because as an agent, you're not a party to the meeting or to this aspect,"* and I said, *"Well ..." "The only person,"* he said, *"that could do that would be another lot owner,"* so a lot owner could actually put on an application, say, *"I don't believe this meeting was validly held because of the fact that these proxies didn't contain the appropriate wording,"* et cetera. Yes, it's an interesting one, Amanda, that the proxy form, that part of it hasn't changed, and that many people use this to try and terminate managers but not really understanding that it has to be filled out.

A lot of, actually, lawyers don't even obviously heard advice from other lawyers to say that you don't need to have this, and I totally disagree with that. As you said, why would that section be a separate section in the actual form if it had no bearing on its use and completion?

Amanda Farmer: The proper completion of proxy forms, oh, I'm sure we could do a whole episode on that, Reena, in terms of making sure they are dated and they are signed. It's very important for if an owner wants their vote to be valid, to make sure that they have properly completed a proxy form, and especially when there are contentious issues on the agenda such as the termination or appointment of a managing agent. It's something that chairpeople and those who are running meetings under delegated authority, such as strata managers and even where some lawyers are appointed to check proxies on the night, are very conscious of making sure now that proxy forms are correctly completed, so I think that's why we're seeing these questions crop up as people become more educated about these issues. Look, I don't like to say it, but are our buildings becoming more litigious or-

Reena Van Aalst: I think what's happening, Amanda, is sometimes there are people that have a certain agenda and, therefore, if other people don't agree with it, then that's when you start to look at the technicalities of meetings and making sure that people do the right thing. I actually will speak on another time on a very big skin that I had where proxies became the issue, and the Office of Fair Trading intervened, so I talk to you about that on another occasion.

Amanda Farmer: I shall look forward to it. Thank you. All right. Well, my win for this week is a win that we had in the tribunal, before the appeal panel of the tribunal, and it is a reported case. I will give you the link to that one in the show notes. It involved a building in Newcastle, the strata plan number 80412. It was an appeal from a costs order. This owners corporation, who I acted for, had been unsuccessful before the tribunal, and they had a cost order made against them. When we looked into the reasons for that cost order and the circumstances in which it was made, we said to the owners corporation, *"We actually don't think this cost order should have been made. We don't think that the tribunal had the power to make the cost order,"* and so we appealed it to the appeal panel, and we were successful in having that cost order set aside.

Now, the backstory to this is that it originally ... the application originally started under the old law in New South Wales as an application to the adjudicator. We used to have our adjudicators, which many of you will be familiar with, who made decisions on the papers only. There was no appearance before the tribunal. The adjudicator who originally received this application, which was an application from a lot owner for the owners corporation to do some remedial work to the common property, the adjudicator thought that the application was a bit complicated, so the adjudicator referred the application up to the tribunal.

Now, the old legislation provided that where an adjudicator referred an application to the tribunal, the tribunal only ever had the same powers as the adjudicator. Now, under the old law, an adjudicator could not make orders for costs, and there was a single decision some years old from a tribunal member that said where there is a referred application, a cost order cannot be made. Now, in our case, the tribunal member considering our case departed from that decision and said, *"I think that decision is wrong, and I think I can make that cost order. I think I am vested with the powers of the tribunal, and I don't accept that I'm limited in that cost making power."* We thought that was wrong. The appeal panel of the tribunal agreed with us and also thought that was wrong, and it provided good clarification of what had been a bit of an unsettled issue when it came to referred applications from the adjudicator

up to the tribunal.

You might think, oh, well, none of this is relevant because we've now got the new law and those kinds of applications that are left over from the old law are probably wrapping themselves up now, but the decision does go into quite a bit of detail about powers under Section 60 of the Civil and Administrative Tribunal Act relating to costs. Reena, we spoke about that in our last episode, so it's worth having a read of this long decision, in that respect, and also some of the regulations around the cost making power. For example, where there is a dispute where the value of which is more than $30,000, then the tribunal has greater powers to award costs, and where it's less than $30,000, that power is not so clear. This decision gets into the depths of those parts of the regulation and the Tribunal Act, which is now very relevant to cost making under our new legislation.

Reena Van Aalst: Oh, that's great, Amanda, with the ... Well done.

Amanda Farmer: Yes, a happy building, in that respect, not having to face that cost order. I'll link to that one in the show notes for you.

Reena Van Aalst: That's great.

Amanda Farmer: Well, I think that's about it this week, Reena. That feels like a jam-packed episode. There was a lot in there.

Reena Van Aalst: Yes. I think there was, actually, quite a lot of different diversions as well, Amanda, apart from the topic that we had originally decided to talk about.

Amanda Farmer: Yes, yes, a few more things on our list, on our spreadsheet. Those who listened to our Episode 100, which was our behind-the-scenes look at how we record this podcast, will know all about the spreadsheet, and the spreadsheet is filling up.

Reena Van Aalst: Exactly.

Amanda Farmer: I shall catch you next time, Reena.

Reena Van Aalst: Okay. Bye, Amanda.

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