

Publication Date: 12 June 2018
YSP Podcast Transcript: Episode 116. Do strata committee vacancies need to be filled? And short term letting update

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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. How has your weekend strata been?

Reena Van Aalst: Very busy, as usual, always new challenges but it's going really well.

Amanda Farmer: We are slowly recovering from the deluge here in Sydney. I'm wondering if it's still going to be raining when this episode goes to air. I find that when it rains in Sydney, everyone goes a bit crazy.

Reena Van Aalst: Yes. I can-

Amanda Farmer: Why is it, raining in our beautiful city? This isn't Melbourne. What's going on?

Reena Van Aalst: Yes. It's been quite wet. I think we actually needed the rain. It's been dry for some time and the thing the poor people in the country need the rain more than we do, I think.

Amanda Farmer: Yes. For sure and you can't really complain when you sort of get in the car, get out of the car walking in to your office, get in the car, go back home, walk into your home.

Reena Van Aalst: Exactly.

Amanda Farmer: All right. Well, let's jump straight into it. What has been your challenge for this week, Reena?

Reena Van Aalst: I think this week I've had a few issues relating to a meeting that I held last week. And it was about proxy forms and their execution manner. So I think sometimes people, managers especially, when they are in the capacity of chairing the meeting or even before hand when they're assisting the chair person with all their preparation to let the chair person know, who is eligible to vote.

With proxy forms, people don't realize that they have to be completed properly, so you have to have the date, you have to have who the proxy is from and who it's going to. And if there's more than one owner, it's really important that the actual proxy form is signed by all owners. And if it's not signed by all owners, it's not valid.

Reena Van Aalst: Another thing also is if the proxy giver or the owner of the lot is actually a company, and there's more than one director, then you actually need to have all directors sign the form as well. Now I think a lot of owners might not be aware of that. And I think it might have been over ten years ago, I had a large AGM and I this sort of came to light at that meeting.

Reena Van Aalst: So, it was a large meeting, we'd spent over half an hour trying to do all the registrations and give out the people were appointed as proxy's, give them the voting forms. And this woman turns up and says to me, I said, "Oh yeah, so and so's got your proxy forms." She said, "No, I haven't given my proxy forms to that person, this proxy form is being forged." So anyway, we had to wrestle. I had to go and tell the chair person and therefore the meeting was then halted because then there was a aspersion cast on any of the proxy's that had been given to this particular person.

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Reena Van Aalst: Anyway, so the meeting had to then be adjourned. And in the mean time, there was obviously some trouble in the voting between certain factions, so, they contacted the office of fair trading. And the office of fair trading came out to our office. And actually went through every single proxy form to check the validity of the proxy form because of the complaint that had been made.

And it was fortuitous that this only one had been incorrectly completed for some reason. So the meeting was then held, it continued from the motion that we were up to. And then there was further trouble, so I had to be adjourned a second time. So this AGM article started in July and finished in October.

So, yes, but I think sometimes with companies, people don't know whether or not there's more than one director. So sometimes you may want to ask for company nominee form to make sure that all directors sign and if it is only one director, they should say sole director.

Amanda Farmer: Yes. Can I just stop you there, because there's something I just made a note to come back to you on. When you say, the company appointing the proxy has to fill in the proxy form correctly, has to have the form signed by all directors, is that where there is no company nominee listed on the strata roll?

Amanda Farmer: Because if there was company nominee, then that person could just turn up and vote.

Reena Van Aalst: Even if there is, Amanda, it doesn't matter, because I can still appoint, that is for if the person is turning up themselves. But if that company wants to ... Because the nominee can't give the proxy.

Amanda Farmer: Yes.

Reena Van Aalst: The company has to give the proxy to another person, apart from the nominee. If they might want to appoint-

Amanda Farmer: They might want to-

Reena Van Aalst: The chairperson.

Amanda Farmer: Yes.

Reena Van Aalst: Yes.

Amanda Farmer: They could do that.

Reena Van Aalst: That's when they'd use a proxy form, yes.

Amanda Farmer: If there is a company nominee named on the Strata roll then that person can just turn up and vote?

Reena Van Aalst: Yes, that's correct.

Amanda Farmer: In the absence of a proxy? Okay.

Reena Van Aalst: Yes.

Amanda Farmer: That was my understanding.

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Reena Van Aalst: Yes.

Another thing also, I think that as you said, Amanda, the company nominee must be on the roll before we get to the meeting. So they can't just rock out with the form. And say, I'm the nominee.

Amanda Farmer: Yes.

Reena Van Aalst: Because it has to be on the Strata roll which means it has to have been received before the meeting had commenced. And usually it's got to be entered by the Strata managing agent into their software system.

Amanda Farmer: Yes. Excellent reminders, there. Some basics perhaps, for some long term experienced players, but always good to revisit those and remember what the requirements are for a valid proxy and it can get complicated when we're dealing with companies with multiple directors, company nominees and general meetings that take four months to resolve.

Reena Van Aalst: Yes. Most of the time, Amanda, unless something is contentious, you might have one person signing a proxy and it's accepted by the managing agent or the chair person and nothing ever happens.

Amanda Farmer: Yes.

Reena Van Aalst: But if something is going on and then every single thing that everyone's done has been scrutinized. I think it's good practice as it is managing agents, you do know that if there's more than one person that owns the lot, the both have to sign, otherwise that proxy form is not valid.

Amanda Farmer: Yes. Definitely.

Amanda Farmer: Okay. Well, my challenge for this week arises from a question that a member inside the YSP online community has asked, in the members only forum. And it was a fabulous question. We had a little bit of back and forth about it in the forum and I put it on our spreadsheet here, Reena to have a chat with you about it and bring it to the attention of our listeners.

It's about replacing Strata committee members when there is a vacancy on the Strata committee. And we have the relevant section of the legislation is, section 35 in the Strata schemes management act. Now section 35 says that the Strata committee may appoint a person eligible for election as a member, to fill a vacancy. If there is a vacancy arising.

And the question that the member inside the YSP community asked me, was this. Does the Strata committee have to fill vacancies or because of the operation of section 35, where it says, may, it uses the word may appoint a person, does that mean that positions can be left vacant on the Strata committee until the next annual general meeting when a new committee is elected?

And it is a very interesting question because we also have this requirement that you'll be familiar with, Reena, when it comes to quorums for Strata committee meetings. The quorum is determined based on the number of committee members originally elected.

Reena Van Aalst: Yes. Like the AGM.

Amanda Farmer: If you originally elected eight and you need four members to attend, then that is your quorum for Strata committee members for the whole year. Even if you might have two people resign. So you've actually only got six positions filled on the committee. Your quorum is still going to be 4.

Reena Van Aalst: That's correct.



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Amanda Farmer: So, that make it really difficult to achieve a quorum when you need the vast majority of committee members to be present. So the discussion that we had in the forum was around why the legislation is phrased as a may, a seemingly giving the discretion to fill vacancies yet upholding that rather onerous quorum requirement. And we couldn't find any where in the legislation that required the strata committee or the owners corporation to fill vacancies. It didn't seem to be mandatory. The only thing that we were able to point to and I have to give credit to the member who raised this, was in Section 30 of the Act, it says that the Strata committee is to consist of the number of persons determined by the owners corporation.

Amanda Farmer: So query whether that means, if there is a vacancy, the owners corporation is fill that vacancy at the next general meeting, because the Strata committee is to consist of the number of persons determined by the owners corporation. And the relevance of section 35 which gives discretion to the Strata committee, is to leave space for the Strata committee, to fill the vacancy, rather than the owners corporation? I appreciate that's a little bit convoluted.

Reena Van Aalst: Yes. I think what you're saying is correct. That even the previous, the strata committee had to replace that vacancy. It's schedule three, but I count 'em in the section now.

Amanda Farmer: Schedule 3 to the 1996 Act. I'm just putting my hand to that. And you're right, Reena, in Schedule 3, Clause 4, vacation of office of member of executive committee as we used to call it, that clause said that when a vacancy occurs in the office of a member of the executive committee, then the owners corporation must appoint a person eligible for election to fill the vacancy.

Amanda Farmer: Now Reena, is that just talking about office bearers? So the chair person, treasurer or secretary?

Reena Van Aalst: Yes. Because when you where it says, Strata committee to appoint officers. Officers is actually defined as, means a chair person, secretary, or treasurer of the owners corporation. So in that case, it is referring to the office bearers.

Amanda Farmer: Yes. And I think that remains the case in the new act as well.

Reena Van Aalst: Yes.

Amanda Farmer: If there is a vacation in the position of office bearers then they must be replaced.

Reena Van Aalst: Yes.

Amanda Farmer: But it's looking like there's always been discretion to replace Strata committee members who vacate their positions as opposed to office bearers.

Reena Van Aalst: Yes. Exactly. Yeah. So I think that's probably where the confusion has arisen in the past I would say.

Amanda Farmer: So, a practical difficulty that this member was experiencing and I'm sure many other committees experience, Reena, you probably see it too. That where strata committee members vacate their positions, they are not replaced, we still have the higher, if you like quorum requirement.

Amanda Farmer: We're having trouble achieving a quorum, and bear this in mind, too, sometimes if there is dysfunction, or there is disagreement between committee members, people who perhaps don't want to be involved anymore in that difficult process, in the disagreement, there's a falling out. They vacate the committee, and those who are left, are those who perhaps are pushing their own agenda. Those who perhaps don't get a long with others.

And that was something that this member inside my community was raising, effectively, we're left with the bullies. And there's no requirement to replace those people who may have been the voice of reason, which is disappointing.

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Reena Van Aalst: Well I think in that case, Amanda, those people can probably approach other like minded owners and ask them to nominate for the Strata committee now that there's a vacancy. I had a recent case where two members resigned at the same meeting. One person was having a baby and the other person just had a lot of work commitments and travel so, you know, they thought they weren't able to contribute sufficiently.

And in this case obviously it was two sort of thoughts in the building about certain matters, and therefore, we had four nominations for two positions. So it just depends I think on, what's happening in the building.

But hopefully if people are worried they should then make sure that the vacancies are replaced.

Amanda Farmer: And how does that work, Reena, because the way I read the act, it's for the strata to fill the vacancy. So it that the a decision of the strata committee?

Reena Van Aalst: Yes. Yes. But I mean, I think even though the actors that made replace the vacancy, or fill the vacancy, I think it would be, if there was an issue in a building and there was some people that are eligible to be nominated, and they are putting themselves forward in the community saying, oh we don't want to fill the vacancy. I think you go back to that section 30 and I think you mention well, the amount ... There are people that are willing to put their hand up, and are eligible then they should be allowed to. And I think it'd very unwise for any committee to try and use that 35 to whatever it was to try and stop people coming on.

Amanda Farmer: Yes. So, convene a general meeting and then under that section 30, subsection one, determine the number of persons to fill the strata committee.

Reena Van Aalst: Yes.

Amanda Farmer: At a general meeting by the owners corporation. The owners corporation decision prevailing over that of the Strata committee.

Reena Van Aalst: That's right.

Amanda Farmer: Gosh, a lot of effort isn't to have to achieve a fair say and have the democratic process properly exercised.

Reena Van Aalst: Yes. That's correct, Amanda.

Amanda Farmer: I wonder what the policy is though behind the discretion to fill a vacancy? Why don't they make it mandatory?

Reena Van Aalst: I think it may have been an oversight.

Then another here on section 38 and it says acts and proceedings of Strata committee valid despite vacancies or defects.

It says, section applies if, when any act or proceeding of a Strata committee was done, taken or commenced, there was a vacancy in the office of an officer. Okay. Of the owners corporation or any other member of the Strata committee or any defect in the appointment or any disqualification of any such officer or member.

Therefore it's taken to be done in good faith as valid, blah, blah, blah. So-

Amanda Farmer: Yes. As if the strata committee were fully and properly constituted. So there's an assumption there that the strata committee is not fully and properly constituted if there is a vacancy. I think you might be right, Reena. Everything else seems to point to an assumption that the Strata committee will be maintained at the same number of members as were elected at the AGM, and the only part that seems to be missing is a mandatory requirement to actually fill vacancies.

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Reena Van Aalst: Apart from an office bearer if that person-

Amanda Farmer: Apart from an office bearer. Yes. Indeed.

Fascinating stuff. And thank you that member who I know is avid listener for raising that question and giving us that brain strain today. It's always good to test-

Reena Van Aalst: Brain strain.

Amanda Farmer: Test Reena and I. All right let's move on to wins, Reena, what was been your win for this week?

Reena Van Aalst: Well I had a building where an owner who owns a majority of the lots has undertaken works to common property. They have taken a works to years and no ball has actually ever passed. And again, this is happening this time and I went down there and I had to look at all the work. I advised them that you need to a bottle for this works, where calm was probably affected. And of course, nothing happened. And then he sent me the DA application because he wants to change some of the external parts of the building. And I said to him I'm not gonna sign the actual DA in any event. Because obviously you need a by-law first, and that has to be passed in general meeting.

Reena Van Aalst: And it was lucky that the city of Sydney form, which I think is a new one, that refers to Amanda, the fact that you can't make the declaration and execute the development application if section 108 of the act hasn't been complied with.

And for our listeners, I just go quickly to section 108, and obviously it refers to tenants to common property, that section of the act. So basically, for a managing agents now, it has in section 108, you always need a general meeting at a by law, if it's not minor works and even, not covered by any other by-laws.

So, I think now this will give more assistance to managers when pressure is being put on them to sign DAs. At least from the city of Sydney, you have that notation on the form to say that when you're signing the form, you actually saying that section is being complied with. So, of course, then I told him that and we went back to his lawyer and ended up getting the by law drafted and now the meeting is being convened.

Amanda Farmer: Excellent.

Reena Van Aalst: Yes, so at least, the works had been done before that and had never been covered by a by law so that was a good thing at the meeting to have everything all wrapped up.

Amanda Farmer: Yes.

Reena Van Aalst: Now that the newer climate is coming to effect.

Amanda Farmer: Yes.

Reena Van Aalst: So yes it was a good outcome.

Amanda Farmer: Yes. Good reminder that where you are having to apply to counsel for the development consent to do work within a strata scheme, if you are going to be affecting the common property, then the owners corporation is one of the parties who needs to sign the DA as the owner of property that's going to be affected. And no doubt like you Reena, I've had the experience of some counsels being more on top of that others. And it's good to see that the city of Sydney is now actually citing the relevant part of the legislation which requires the by law and requires that to be in place first. Which makes sense.

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Amanda Farmer: A case that I'm involved in at the moment which I'm hopefully going to report as a win in a few weeks time, involves quite the opposite where a lot owner is doing some minor work inside their lot, it's actually cosmetic work they're putting up some partitions. They are actually not penetrating any of the common property. They are not moving any electrical, any cables, they are not drilling through any walls, they are essentially setting up their new commercial property as an office. And the owners corporation has demanded a common property rights by law. And is refusing to sign a DA.

And I have had a look at it, and I've said, "Well, you're actually not affecting any common property. I don't believe that you need a common property rights by law. At the most, you might need an ordinary resolution if some of it is minor work. But I'm not even convinced yet that that's the case. I think it's all cosmetic."

Reena Van Aalst: Yes, it doesn't sound like it.

Amanda Farmer: Yes. And the counsel should not be requiring the owners corporation to sign this DA. I don't think they understand how minor the work is. And at the moment, I'm in the process of setting up a meeting with counsel to be able to explain to them that the owners corporation doesn't need to sign this DA. And in fact, doesn't have anything to do with the decision to allow somebody to run an office.

Reena Van Aalst: Yes.

Amanda Farmer: So, I'm, yes, I'll hopefully have a good outcome there for these clients of mine. But interesting the different approaches that are taken by counsels and some not understanding the nuances, perhaps of strata law.

Reena Van Aalst: So, Amanda, in this particular case, that you're referring to, is this a commercial building, or a residential with the commercial component?

Amanda Farmer: It's a commercial building.

Reena Van Aalst: Oh.

Amanda Farmer: The building is, it's approved for business use, which includes offices but apparently a DA is required because the premises has been vacant for some time. And the planner who's involved has advised that because it hasn't been used for quite a long a periods, particular lot, then there needs to be consideration by counsel to re live the office use if you like.

Reena Van Aalst: Okay. That's interesting.

Amanda Farmer: Yes, whether that's the case or not, who knows, we'll soon find out.

Okay, well the win for this week that I want to have a chat about, I'm calling this a win, because we are looking like we are going to get in new South Wales finally, some guidance from our state government about short term letting in apartment buildings.

Now, I've actually bumped up this episode, so that this could be brought to air as quickly as possible. It was announcement made only last Tuesday, the fifth of June. And I will do my best to summarize what it is that's being proposed. We have very limited detail at the time that we're recording this.

But in short, the New South Wales government is apparently going to allow owners corporations to limit short term lets in their buildings in certain circumstances. So, the high level detail is that there is going to be a 180 day cap on using your property for Airbnb style short term letting. And that is only for owner occupied apartments. So if you're an owner occupier, you can short term let your apartment for half of the year. If you are an investor, an owners corporation can pass a bylaw actually banning you from



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short term letting your lot.

Amanda Farmer: What's being proposed apparently, is that there can't be by laws that prevent owner occupier's from short term letting, for that 180 day, up to 180 day period. Apparently there's also going to be a industry code of conduct and an exclusion register for host or guests who commit to serious breaches of the code.

That's about the limit of the information that we've got as this goes to air, and of course Reena and I will keep you all up to date on what's happening in this area. We know it is such a hot topic. We really have no, as far as I'm aware, Reena, timing on when we might see drafts of this legislation, whether it's going to come in as amendments to the Strata scheme's management act or stand alone legislation.

Amanda Farmer: We don't know yet. And what the detail of how this will be enforced, who calculates the 180 days, who enforces the code of conduct. We have none of that as this goes to air. So, make sure you're on the list. The email list for Your Strata Property for our weekly newsletters. And you'll be the first to get updates on this and you do that by heading over to Your Strata Property dot com do a-u. And there's a pop up there were you can sign up to our list and make sure you get all of this up to date info.

So, look I'm reporting this as win Reena, it seems like a compromise solution. We are a little bit concerned that there might be nothing done about regulating this in apartment buildings, leaving it up to owners corporations to continue to deal with on an ad hoc basis.

How are you feeling about this?

Reena Van Aalst: I think there's a lot of questions that are still to be answered, Amanda. Because OCN sent out an update to all their members yesterday as well. And in that update, they referenced different cities and how they've been like New York, Paris, London, how they've been regulating for several number of days. Because you could say, will is 180 days means like every weekend? Could be so that means a whole year, really, could be-

Amanda Farmer: Yes.

Reena Van Aalst: People could rent out their rooms. I don't really know much about people renting out rooms Amanda. I don't think that's really been an issue. Because normally if the owner is around, then that's always going to assist with any short term rentals. Because they are there, and they can assist in, but it's more I think when the owner or sometimes even tenants are actually subletting the apartment that they've rented just to make more money.

Amanda Farmer: Yes.

Reena Van Aalst: I think those are the ones that we have been concerned about. But hopefully there's more information that will be coming out on how this is all going to work. And how it's going to be policed and enforced and where this register will be of offenders. Because there's more than just Airbnb, there's Stays, there's other platforms that people can use to rent out their apartments.

Amanda Farmer: Yes. Absolutely. And just on that topic Reena, of tenants subletting, for short term lets, I did see pop into my inbox this week, I think we've had a case in New Zealand, where a landlord has successfully sued a tenant, I thin for damages arising from-

Reena Van Aalst: Oh yes, I did see it actually. Yeah. They rented out their apartment. Sublet.



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Amanda Farmer: Yes, Subletting.

Reena Van Aalst: Yes. Yes.

Amanda Farmer: Yes. So we hadn't seen a case like that as far as I'm aware in New South Wales or even in Australia. So a New Zealand case, I will get the details of that and make sure that that's in the show notes for any one who is interested in that one.

Reena Van Aalst: Yeah. That's a great idea, actually, Amanda, to have a look at look at that case.

So, yes, we will continue to wait and see what further detail we get. I am impressed I think, was it two weeks before this there was supposed to be a press conference revealing these proposals and it was canceled. And I'm impressed that it only took another two weeks for the proposals to be put forward. I was a bit worried that we were going to go back to months and months of waiting. So at least we've got some direction now.

Reena Van Aalst: So I wonder Amanda, if what had been proposed two weeks ago was vastly different to what's been put out now due to pressure that's been put on some back ventures I hear as why this whole things been changed. But we'll see.

Amanda Farmer: Yes. We will definitely see. Exciting times ahead. As always in Strata. That's why we love it. That's why we love it.

All right, I think that's it from me this week, Reena, how about you?

Reena Van Aalst: Me too Amanda. Nothing to add to today.

Amanda Farmer: Back to work.

Reena Van Aalst: Okay.

Take care Amanda. Bye.

Amanda Farmer: Thanks, bye.

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