

**Publication Date: 25 July 2018**  
**YSP Podcast Transcript: Episode 122. Two lots on the one proxy form?**

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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, thank you, how has your week in strata been?

**Reena Van Aalst:** Yes, it's been pretty busy. Got quite a few errands 'cause I'm going away at the end of August, I'm really getting down, trying to get everything done before I go, which I know will never happen, but I'm trying to keep focused and looking forward to my break.

**Amanda Farmer:** Yes, you've got a really exciting trip coming up, going overseas for a few weeks. I would say I'm jealous but I can't say that because I'm heading overseas a few weeks after you. So I know that feeling.

**Reena Van Aalst:** Yes, so where are you going, Amanda?

**Amanda Farmer:** I am heading over to London for a week and then we're ducking over to Ireland to see some family that will be there the same time. And then we are in the south of France for 4 weeks. Sorry, everyone. Sorry to make you jealous. Where are you off to, Reena?

**Reena Van Aalst:** We're off to the UK and Ireland. So we start off in London and then we do Scotland and then we finish in Ireland. And I realise, we're not actually going to be going to be the same way crossing.

**Amanda Farmer:** Yes. We could have planned that a little bit better, we could have recorded a 'Your Strata Property' podcast from Dublin, that would have been cool.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** All right. Well, enough talk about our holidays. Let's jump into our wins and challenges for the week. Reena, what has been your challenge this week?

**Reena Van Aalst:** The challenge I've got this week, Amanda, has been happening over the few last weeks, following the AGM that I held in April where owners have decided that we did not agree to a motion, even though it was put and carried at the time. It was carried unanimously. But people were fighting at the meeting, so perhaps they may not recall the events.

So in the particular example that I'm referring to, there was a motion that we put on every AGM agenda to obtain a work, health and safety report. So after the meeting had finished, obviously, we went and obtained quotations from various companies to obtain this quote. And then they said, "Well, no, we don't need this report. You have no right to obtain this report, we never agreed to it." And I sent the resolution from the AGM and they said, "Well, we've rerun Fair Trading and they've said we don't need this report and you have no right to do it." And I said, "Well, unfortunately, it is a resolution of the Owners Corporation and it was passed."

Then they tried to actually send an email around to get owners to try and rescind it and that didn't happen. I think only 2 owners, I don't know how many owners, that particular proponent and another member of the committee as well decided that they didn't want it, but this wasn't a formal meeting and all the owners didn't even respond.



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So I think, Amanda, I suppose the question is, for owners, once a resolution is passed, if every single resolution can be rescinded, then that would create chaos and I don't know how you can manage a scheme where a deed has been done, for example. I mean, in this case, they asked us to get quotes and the motion included the provision of quotes. But if there wasn't such a motion and it was to accept the quote, for example, and we'd already accepted it and then they decided that they don't want it or suddenly they wouldn't want it, for whatever reason, I find that these types of issues only occur when there's disharmony or conflict in the building. But the question here is, rescinding of resolutions at a general meeting. That to me, I think, is a key and whether owners can or can't do this. And I don't believe ... I think, there's a case law around this where once something has been done, it can't be undone, per se, because people have a change of mind. But I'm not sure what your thoughts are on that.

**Amanda Farmer:** Yes, well there is a provision in the Act, and I'm just putting my hands to it now, Section 21 of the Strata Schemes Management Act in New South Wales, and that's about amending or revoking a resolution, specifically, unanimous or a special resolution. And it says if you are going to amend or revoke a unanimous or a special resolution, then you must do so by way of a unanimous or a special resolution, so amend or revoke in the same way as you would pass.

Now, that doesn't go specifically your question, Reena, about how we rescind or change decisions, but it does indicate to me that the Legislature intended for strata schemes to be able to reverse decisions, that have already been made. I think in my mind, it would come down to, in a situation such as yours, where the owners corporation has already taken steps to action, if you like, a decision that's been made, if there was then a motion put to reverse or to revoke that decision or change it in some way, surely the chair would be able to rule that motion out of order, because if the motion were passed, it would result in some potential illegality, a breach of a contract, for example.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** If the owners corporations already said, "We're going ahead with the work and signed a contract." Well, to then pass a motion saying we're no longer going to go ahead, that would put the owner's corporation in breach of the law, so, it would be the responsibility of the chair to then rule that motion out of order. And, as you say, Reena, we see this happening in buildings where there is disharmony and there are problems and disputes and we really do, it points to the need to have a good, strong chairperson.

I know that you often chair meetings for difficult buildings and to have the experienced strata manager who can nip these things in the butt, that would be, off the top of my head, that's my suggested solution for that kind of a problem.

**Reena Van Aalst:** Yes, I totally agree with you, Amanda and I think, yes, you need a strong chairperson or someone that actually understands that a chairperson can rule a motion out of order if it does conflict with, perhaps, a contract thing signed and you're right, once something has happened and it's been done, then it's going to be difficult. Then there are repercussions for undoing anything.

In this particular case, it was seen to be a waste of money, we're talking like maybe \$600 or something. It was seen not to be necessary and for reasons that actually that really made no, sort of, legal sense, so it wasn't as if they were saying that... I mean I can understand if there was going to be circumstances that had changed and therefore, this particular resolution, you know, would not be in the owner's corporations interest and they went about doing it the correct way, submitting proper motions, calling for a meeting, getting the right number of people to allow that to occur. But, I think sometimes, people don't understand there's a process and for undertaking, like I said, Amanda, in Section 21, where the resolution can be revoked or rescinded, but obviously you've got to look at the ramifications and consequences of such an action.

**Amanda Farmer:** Absolutely, and that's a really good example that you give, Reena, where the owner's corporation's already taken steps to action the motion that's been resolved, it can put buildings in a sticky situation to go backwards. It's important that chair-people are conscious of that.

Okay, well I'm going to jump into my challenge for this week and this relates to proxy forms. Something we've talked about a few

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times on the podcast, and it seems to be an area that is right for confusion, I guess. And this is an issue that has been raised by a member inside the 'Your Strata Property' online community inside our Q & A Forum, and it's a fantastic question.

I have already run this was one past you, Reena, and we both agreed that we would have a chat about this on the podcast. I've spoken to a couple of other experts in the field, in the meantime and nobody's really had a clear answer for me. So, let's put this out there and see what we can come up with.

So, the question relates to a situation where an owner may own more than one lot and this might not be unusual in a scheme where, for example, the car parking spaces are separate lots, so you might find everyone in the building has both a residential lot and a car space and because of the way the strata plan's been drawn, that means that they each own 2 lots. When it comes time to appoint a proxy to vote in their place, at a general meeting, if that's what they want to do, the question is, can they list both of those lots on the single proxy form?

So, at the section of the form where it says, "I am the owner of lot...", for example, I own lot 2 and lot 20. Do I put lot 2 and lot 20 on that form and appoint a single proxy holder? If I do that, the person who is holding the proxy, is only holding one proxy, of course, they've only got one form, but they've got 2 votes. Because they have been appointed by the owner of 2 lots.

If I was attending the meeting in person, and I'm the owner of 2 lots, I'm going to have 2 votes, of course. If I'm appointing a proxy, and I'm listing my two lots on the single form, then they're going to put their hand up and say, "I have two votes on behalf of Amanda, she owns 2 lots." This may not have been an issue in the past, but it has become an issue under our legislation now, where we have limits on proxies and the member inside our forum has come across a situation where owners in the building have been accused of breaching the proxy limit rules.

Might not have been an issue in the past, but now that we have limits on proxies, the issue to be considered here is whether we are getting around that proxy limit by listing more than 1 lot on a single proxy form and giving one person, who otherwise should only have one vote, arguably, we're actually giving them 2 votes.

Now, if we look to our legislation, we do have in the Schedule to the Regulation a standard form, for the way a proxy form should be filled out, and it does have a space to put the lot owner's name and the lot number that you own and it does refer to a single lot. It says, I, for example, "Amanda Farmer the owner of lot number 2." And there is one view that says, "well that's only a space to list 1 lot number and if you want to appoint a proxy for your other lot for your car space, then you have to fill out a new form and you have to, in a small building, have 2 different proxy holders, so that you're not in breach of the proxy limit rule." And our Act does say, in Clause 26 of Schedule one to the Act that the format of the proxy form is to be as prescribed by the regulations.

On the other hand, if we look at the definition of what a proxy holder is, if we look at the meaning of the term 'proxy' or 'proxy holder' and it's not defined in the Act, but if we look at the everyday meaning of the word 'proxy', well it's somebody who stands in the shoes of another and in my view, if I'm entitled as an owner to attend a meeting and have 2 votes for my car parking lot and my residential lot, then why shouldn't I be able to appoint one single person, by one form, to stand in my shoes and have exactly that same right to vote on behalf on my 2 lots. Why should I have to be forced in a small building to appoint 2 different people because in a small building I can only have 1 person holding 1 proxy.

I appreciate that this is not a straight-forward issue and it might take a couple of listens to get our heads around that one, but, Reena, I'm not sure if you've had a chance to have a think about this and find any way forward. The research I've done hasn't shed too much more light.

**Reena Van Aalst:** No. Yes, since the moment we first discussed this, I haven't really had any more information about it, but, my recollection with the previous proxy form was that people used to put all their lots on the 1 voting paper, and obviously because there was no restriction on the number of proxies someone could hold, it wasn't really an issue but I do take your point and I do agree that we need to be a bit more careful now, in terms of one person, obviously, if you have 2 lots, two or more lots on one, voting on one proxy form, then obviously, that person then has the 2 votes now. So, therefore, any others, depending on the size of the scheme, would be governed by the balance they could still hold or I'm not sure if it really matters how many lots are on the actual

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proxy form, as long as the proxy bearer is not exceeding the threshold that they're allowed to hold, Amanda. That's my view.  
Amanda Farmer: Yes, well what I had taken the same view, initially. But when you apply it to a specific example, in the case of a large building, where there might be some 300-odd lots, and for the sake of argument, I'm not sure if the Maths is right, let's say in a building of 3 lots, 1 person can hold 3 proxies. If everyone in the building owns 2 lots because of car spaces and one person can hold three proxies, there in effect, going to have 6 votes, because each proxy that they hold has 2 lots listed on it, and gives them 2 votes.

If that's not correct, and we can only have 1 lot listed on one proxy form, then that person is only going to have 3 votes because they can only have one lot one proxy form, so that in effect, cuts their power in half, and in a large building that adds up and can be quite significant when it comes to swaying the vote.

That was the kind of example that was given by the member who was asking this question and this member had actually run the question past Fair Trading, and Fair Trading had responded in writing and advised quite adamantly, that you could only list 1 lot on a proxy form. You couldn't list more than 1 lot and that member helpfully sent that information on to me and I found that quite surprising knowing, as you say Reena, it is quite common, or has been at least, for owners, for strata managers, for those who are assisting with the filling out of proxy forms, to list more than 1 lot on a proxy form.

And I had actually looked at proxy forms recently and given advice that the proxy was correctly filled out, even though it listed more than 1 lot and I cannot find anywhere in the legislation that says that you cannot do that and if we look at the everyday, general definition, the meaning of what a 'proxy' is, it sits with my logical understanding that someone should be able to appoint a single person to stand in their place and vote on their behalf, regardless of the number of lots that they hold.

There is a view that that is against the policy of the legislation when it comes to proxy limits and trying to prevent proxy farming, but I think that's a very different, proxy farming a very different issue to simply being able to have one person attend on your behalf and have your vote. Just because your vote, and it might be more than 1 lot, because you own more than 1 lot, so what? You'd have that same right if you're attending the meeting in person, why should it be any different when you're sending a proxy? But of course, that person is still limited to holding the number of proxies that are defined by the legislation, whether that's 1 in a building of less than 20 lots, or whether that's more in a larger building.

**Reena Van Aalst:** I think you're right, Amanda. I think it's probably best to probably err on the side of caution and just have the 1 lot per proxy form. Unless then, it just means there can be no perhaps, challenge to that proxy form in the future, even though there's no logical reason, as you've described, that would account for such an action. But I think sometimes it's better to be, to err on the side of caution just to make sure that, especially if it's a contentious meeting, that you've really crossed your I's and dotted your t's.

**Amanda Farmer:** Yes, I suppose going down that path there's no risk of challenge, because you've gone above and beyond, probably because you've send 2 people to each have a vote on behalf of your car space lot and your residential lot, there's no real challenge to that. On the other hand, if you're finding it difficult to find someone else to attend for you, well, you could potentially lose the vote. Lose your right to vote because you can only send one person. So that's a concern, as well.

**Reena Van Aalst:** Yes, basically you're going to be disenfranchised if you don't have someone else to go on your behalf. I don't think that sounds right, because to me, you know, someone, what if they had 2 apartments? Forget about car space lots, if they have 2 apartments, they should have every right to send the same person to vote for them on the 2 apartments.

Amanda Farmer: And I don't see that being a breach of the proxy limit rule.

**Reena Van Aalst:** No, no I think the intention is for people to not proxy farm, but if someone owns 2 lots, but I suppose they could say, Amanda, that if you go around getting the people that have the most lots. Yes...

**Amanda Farmer:** Well, yes. That's where this member is coming from, who's in a very large building, who says when she does the maths, if that is the law, that multiple lots can be put on the same proxy form, [crosstalk 00:17:23] the owner of all of

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those lots, of course, then that's going to be a significant increase in the votes that a proxy holder could have and I appreciate that. What is concerning is that Fair Trading has come out in black and white and said to this member, "No, absolutely. You can only put 1 lot, list 1 lot on 1 proxy form, regardless of how many you own." And I just don't see that that's the law. If the law was intended to have that effect, it should say that, and it doesn't. And it's not the first time that Fair Trading has given definitive opinions or a definitive answer on a topic that I don't think is very black and white.

**Reena Van Aalst:** No, but my stance has been, in the past, that sometimes you can ring Fair Trading and ask the same question from 2 different people and you'll get 2 different answers. And I think in this case, when I had Amanda, where they didn't want to obtain a safety report to say that they didn't need it, that they didn't have any employees and they weren't carrying out any commercial business in the building. The thing is, I try to explain that Fair Trading is a regulatory body, a consumer body. It's actually not a legal authority, so... it may give opinions on things, and advice but at the end of the day, NCAT I think, in courts are where the interpretation of the law is really the ultimate place where any definitive rulings can really be, sort of looked at and followed. Is that your, sort of, view on that too, Amanda?

**Amanda Farmer:** Yes, absolutely. And I have said that a few times on a few different topics now where Fair Trading has given an opinion and I say it is not binding, it is not a finding as to what the law means. We need a decision of the Tribunal from a member or the appeal panel, or the decision of a judge sitting in a courtroom. When it comes to those kinds of statements about the interpretation of our law. So, who knows? We might see this one before the Tribunal or really I'd really love to hear from any others who are having this confusion. Whether you're a strata manager, committee member, lot owner, maybe this has had an impact on the meetings you've been having in your buildings. Or maybe you're a manager who just thinks, "oh look, this is black and white, this is exactly how we should fill out proxy forms." Do reach out to us and let us know your view.

You can always reach me at [amanda@yourstrataproperty.com.au](mailto:amanda@yourstrataproperty.com.au).

**Reena Van Aalst:** Yes, I think Amanda, you're right. The majority of strata plans in New South Wales that are registered as small plans, so, less than 20 lots. So it'd be interesting to see how this plays out where people may own more than one lot due to car space or that they may just own 2 lots in a building. It happens.

**Amanda Farmer:** Yes, so if we hear any updates on that one we will definitely fill you in, our listeners. Let's move over to wins, Reena. What is your win to share this week?

**Reena Van Aalst:** The win that I want to talk about is one, perhaps, that some managers may not be aware of. But most strata insurance policies, actually will have a policy relating to legal defence expenses and if you look at the product disclosure statement for that policy, that will sort of particularise what's covered and what's not covered. But, basically, in essence, if a third-party, or a lot owner, sues the owners corporation, then there may be an avenue to claim legal defence costs to defend the claim from your insurer. Now, obviously, there's an excess, as exclusions, as special conditions, and, obviously, things that will apply. But, in this case, when we realised the lot owner was claiming against the owners cooperation, for damage that was not rectified in their lot and they suffered loss of rent and other financial losses, we then submitted that to the insurer and at the time, once the lawyer was appointed and, obviously, we knew that we didn't sort of take it too much further, we got the legal advice, sent it to the insurer and therefore, we put the insurer on notice.

I think the important thing to note in these examples, Amanda, is that you can't, sort of, start and close the whole thing and then go to the insurer and submit your claim to the insurer or to the broker. You've got to make sure that you put the insurer on notice, as you would do in any normal insurance claim.

So, sometimes, if it's a small claim, I think most insurers have a threshold where you don't have to actually get consent to proceed with paying invoices that have resulted from an insurance claim, but I think most of us know there's a threshold that would apply to different policies and different insurers and, therefore, legal defence costs are going to be in that bracket.

So, in this case we were able to successfully have the insurer retain the lawyer we had actually appointed, which is really



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important, I think for the owners corporation, because sometimes when you get the lawyers that the insurers appoint, sometimes, I think I just feel their interests are not necessarily being managed or covered because I suppose the insurer wants to minimise the costs. And I'm sure, and as a corporations' lawyer you should do the same, but I think people's perceptions of a lawyer appointed by the insurer as opposed to them using their own lawyer to defend the client is always different.

So yes, in this case it was a good outcome. Obviously, we got most of the legal costs back, but we didn't get all of them. Because obviously there's always a threshold and always exclusions and you got to look at the policy wording. This is another example, Amanda, I think you and I have spoken about this in another podcast episode, where if you're looking at insurance you don't just look at the premium and the cheapest cost when you're comparing quotes. It sounds like this when you're comparing the policy and it includes and excludes is where the value and where the fine print is really important.

**Amanda Farmer:** Yes, the key to remember there, Reena, as you point out is to move quickly and to understand that most buildings, at least in my experience most buildings, do have this policy in place. If they're lucky, they really need to claim on it, but some forget that they have it and not until, perhaps proceedings have concluded and they think, "Oh! Hang on, we could've claimed some of those costs back" but particularly if they are significant. We're not talking about 3 or 4 grand, we're often talking about 50, 60, \$100,000 that will make a big difference to a budget.

Insurers want to be, need to be, under the terms of the policy, notified quickly as soon as there is proceedings, or the threat of proceedings from a lot owner, where there might be a claim on that defence policy getting fast. And it's something that a manager's I see often forget to advise and paperwork comes to me and it's not until I remind managers to have a look at those policies, or committees have a look at their policy and see if they, in fact, have that coverage and they say, "Oh great! Wonderful! Didn't otherwise think to check that."

**Reena Van Aalst:** You're right, Amanda. It's an interesting point that you're right because I find that our manager aren't even aware of it. They didn't even know that policy exists so half the time it's too late to actually make a claim because the proceedings have concluded and the claim's been made. And I'm not sure if that really goes into the whole training because when you're a distributor or an authorised representative, of an insurer or a broker, there's a training that they put you through. And I'm not sure, perhaps, sometimes if that training is really that thorough because really, a lot of managers, and I've heard other schemes companies, where I didn't even know they should've done this.

**Amanda Farmer:** So when you say, "a distributor or authorised representative", does the strata manager sit in that position, as someone whose-

**Reena Van Aalst:** Yes, the strata company and every single person that deals with insurance in that company has to be trained, Amanda. So, it's part of the Financial Services Reform Act revisions, so if you're dealing and arranging in insurance, in any capacity, you have to have certain training. Now, some brokers, there's one particular broker, will actually come into our office and will sit there and try and explain as if we're being taught as if we're in a classroom. Other people just give you these online tools to do. And I think, sometimes, as we know, it happens in universities too, people sit there and do it together. No one really pays attention.

**Amanda Farmer:** Everyone's on Facebook.

**Reena Van Aalst:** Multiple choice and everyone's just making sure they put the same answer in, someone's already completed it or whatever. I'm not having a go at insurers or brokers per se, but, what I'm saying is part of it, really, is a lack of understanding and education, perhaps with the strata management side of things with the company, itself. And also with the brokers and insurers providing the required training for managers and property assistants. And even those that are involved in the back end of it, I think people really need to understand and that's an I think people don't know that much about.

**Amanda Farmer:** And it can be a very, very beneficial one or has been in our experience.



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Well thank you for sharing that, Reena. That will certainly go some way to reminding managers and committees to have a look at those policies when they are in a position of having to defend a claim from a lot owner.

I'm going to jump into my win now, if that's okay. I'm going to share a paper that has come out of a conference which I attended a few months ago now in Perth. And it was a conference put together by Curtin University. I'm pretty sure that I shared some snippet from that in an earlier episode, but we now have the paper that's come out of that conference and in short summary, it is a whirlwind tour of the law around the world when it comes to, what we call, multi-owned properties. Whether they known as apartments or condos or strata titled properties, whatever they might be called in their various jurisdictions. And anybody who is interested in learning about community titles law around the world, it's a nice, it's not long, a relatively short paper that has a look at England and Wales, Scotland, Hong Kong, and the positions of strata managers in those jurisdictions. Some interesting information there which, Cathy Sherry, who assisted together with Professor Sarah Blandy, who have both been guests on the podcast, have put that paper together and allowed us to share that through our website.

So I'll make sure that there is a link to that paper on the website. It's called "Sharing Property: the Results of the Multi-owned Property Workshop from the Curtin University Conference."

**Reena Van Aalst:** That's fabulous, Amanda! That's great! So, what were the main things that were covered in that particular paper?

**Amanda Farmer:** So, it looks at the major differences between the jurisdictions when it comes to how our body corporates are formed, dispute resolution and how that's dealt with in different ways around the world. I think I mentioned the strata managers and their roles, the concept of strata manager is not actually, a well-known one around the world, which I find interesting. Not everyone has that position of strata manager, as we would know it. How by-laws and rules are made and the different places that power can rest within our communities, so looking at developers, looking at the role of purchasers in markets that might be falling, the role of anchor tenants, for example, in large, mixed-used schemes. So, all that might sound a little bit complex, but it is a reasonably short paper, and just touches on each of those issues, and I know from the feedback I've had from episodes that I've done with experts in other jurisdictions around the world, that there's a number of listeners out there who are quite interested in the way that our communities operate in different jurisdictions.

So, if that's you, jump into that one.

**Reena Van Aalst:** That's great, Amanda!

**Amanda Farmer:** There will be a link to that one in the show notes over at [yourstrataproperty.com.au](http://yourstrataproperty.com.au)

Head over to the Podcast page. You'll see either mine or Reena's smiling face for this episode and click in there and you'll see the link to this paper.

Another jam-packed episode Reena, geez! I'm exhausted.

**Reena Van Aalst:** Me too!

**Amanda Farmer:** Wonder if our listeners feel the same.

**Reena Van Aalst:** Hopefully not.

**Amanda Farmer:** Anything to add?

**Reena Van Aalst:** Nope. All good for me, Amanda.



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**Amanda Farmer:** Well, good. I shall catch you next time. Thank you.

**Reena Van Aalst:** See you then. Bye, Amanda.

**Outro:** Thank you for listening to Your Strata Property. The Podcast which consistently delivers to property owners reliable and accurate information about their Strata property. You can access all the information below this episode, by the show notes at [www.yourstrataproperty.com.au](http://www.yourstrataproperty.com.au). You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

