

Publication Date: 25 April 2016
YSP Podcast Transcript: Episode 008. The truth about by-laws in your strata property (and how to ensure you're not in breach)

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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 this is Your Strata Property. Today, I welcome to the show Savina Yang. Savina is a lawyer and part of my team at Lawyers Chambers. Savina has been practising law with us for over four years now, and regularly advises and represents strata buildings and lot owners on day-to-day issues such as by-law drafting, by-law breaches, and tribunal proceedings. I invited Savina to join us today to share her knowledge and experience when it comes to strata by-laws. Hi Savina, how are you?

Savina Yang: I'm very well Amanda. Thanks for having me on your podcast.

Amanda Farmer: Thank you so much for joining us. Now before we start, I just want to tell our listeners about the Strata Essentials eBook.

If you haven't been to the Your Strata Property website yet, head over after this episode because we've got a new free eBook available for download, and that eBook tells you the six things you absolutely must know about owning a strata property. Now, by-laws which we're going to talk about today is just one of those 6 things.

Savina Yang: Yes.

Amanda Farmer: So, head over to www.yourstrataproperty.com.au and download the Strata Essentials eBook and I'll remind you about that at the end of the episode too. So Savina, let's start with the basics. What are by-laws?

Savina Yang: Well, to answer that question, I think it's very important to understand that when you live in a strata complex, you're essentially sharing the building, including its facilities with other residents. So there might be say a gymnasium or a garden at your strata complex that you are required to share with your neighbours. So to ensure that the community you are living in is dispute free, by-laws are created as house rules to govern the use of common property as well as to regulate the behaviour of residents in the building.

Amanda Farmer: Indeed they are, and they're things that are created on the registration of a strata plan, so they're often things that the developer puts in place, aren't they Savina?

Savina Yang: Yes, exactly. So, generally they're by-laws created by the developer before the building is built, so that say if you move into a newly built development, there are already a set of by-laws that you need to be aware of before you start living in your strata complex.

Amanda Farmer: Indeed, and that's something we find as lawyers, and often lawyers who are advising owners who've just bought into strata, we find that they don't realise that by-laws exist and they might be hearing...

Savina Yang: Exactly.

Amanda Farmer: From us for the first time about what by-laws are, what they mean, where to find them and how they impact your day to day living.

Savina Yang: Yes, exactly. It's very easy to miss, especially if it looks like the terms and conditions of Apple iTunes and most people just don't want to read it...



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Amanda Farmer: Don't want to know about it...

Savina Yang: Exactly.

Amanda Farmer: Just want to buy their perfect home.

Savina Yang: Yes and live in it, and just do their own thing.

Amanda Farmer: So Savina, why is it so important for strata owners and residents to know about and understand their building's by-laws?

Savina Yang: Yes. So, as I just mentioned before, in a strata complex, residents live in very close proximity to one another...

Amanda Farmer: Yes.

Savina Yang: And they often have to share the same area or facility, so disputes can arise very easily. So by-laws are very essential to maintain the necessary order and harmony amongst residents. Without by-laws, I mean, anyone could essentially do whatever they please to other people's property, the owners corporation's common property and behave in any way they wanted. So, you know, imagine how chaotic it would be to live in a building that doesn't regulate how many pets a person can have, or who can park in the visitor parking spot or the amount of noise a resident can or cannot create.

Amanda Farmer: Yes and even on I suppose, I could say a superficial level or on aesthetic level, when you are talking about by-laws that might govern the way a building looks, so you've got by-laws in some buildings that say what kind of blinds you can have, what kind of curtains you can have, and just on the point about why it's important to understand the by-laws and understand that they exist and what they say, you could be putting up blinds and curtains, and you could have spent quite a bit on them, I know these kinds of things are expensive...

Savina Yang: Yes.

Amanda Farmer: And then you have the chairperson of your building knocking on your door and saying "No you can't have purple blinds. We only permit cream-coloured blinds in our building; didn't you see special by-law number forty three?"

Savina Yang: Yes, exactly.

Amanda Farmer: So that's a really practical reason I think, that strata owners and residents need to know about the by-laws and understand them.

Savina Yang: Yes, I totally agree. I mean just last week there was a client who called me and said: "Apparently I need a by-law to do renovation works and I said: "Yes you do." And he said "But it's my own property, I'm just doing things inside the building, it's not even going to affect the outside."

Amanda Farmer: Yes.

Savina Yang: And I said but at the end of the day, what you are buying is actually just air space, everything else could be considered common property... other people's lot property.

Amanda Farmer: Yes, that's a really good point and it's something that I touched on in episode one of the podcast: what's the difference between lot property and common property? And a lot of strata owners don't realise that they are indeed affecting common property when they're doing what they think are simple renovations, kitchen renovations, bathroom renovations. They are

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actually, most of the time, affecting common property and therefore they need approval, and that approval is ninety percent of the time, by way of by-law.

Savina Yang: Yes, exactly. I mean, I guess strata is still quite new and a lot of people don't understand what strata is like...But I think seeing all these new developments coming up, strata will be a very familiar creature to everybody.

Amanda Farmer: Yes, I hope so and I hope we can have a hand in familiarising it.

Savina Yang: Yes, I agree.

Amanda Farmer: Okay, so how are by-laws enforced?

Savina Yang: Well by-law breaches actually are very common in strata schemes because most of the time it arises from a lack of knowledge of the by-laws like we just said, so many by-law breakers don't even know there's a by-law in place and what they are doing is actually wrong. So in that case, the best thing to do is just to approach them, have a face to face chat with them, just let them know 'look you need a by-law or what you are doing are doing is wrong', and if that's not possible, get the owners corporation to write them a polite letter just to let them know what you've done is wrong and that you need to comply with the by-law, and usually that should be enough for them to realise: "Oh, what I've done is wrong and I need to get my act together."

Amanda Farmer: I think particularly when you're talking about breaches that relate to noise...

Savina Yang: Yes.

Amanda Farmer: And one of the standard by-laws that buildings are registered with is a by-law in relation to noise, and not disturbing the peaceful enjoyment of other owners, so I think that's a really good example for what you're talking about there Savina, where just knocking on the door and saying: "Hey, do you guys realize that last night you were particularly noisy, appreciate that it might have been a party, or it might be a one-off, but I just want to let you know that it really impacted me and I work early shifts and would you mind keeping it down..."

Savina Yang: Yes.

Amanda Farmer: And by the way, do you realize that there's a by-law in relation to noise, and technically you are in breach of that by-law. Here's a copy of it, maybe you can have a think about that next time you're thinking of holding a party."

Savina Yang: Yes, exactly. I mean, generally, people just want to live in strata complexes harmoniously without causing any issues to other residents, but having said that there are always some stubborn cases where the resident displays a complete disregard for the by-laws and thank God they're in the minority. This category of people that need a stronger form of persuasion to make them comply with the by-laws, and when that happens I guess owners corporation will then need to consider 'should we get the intervention of a strata lawyer to provide legal advice on what options are available to the owners corporation to enforce the by-law?'

Amanda Farmer: And what are some of those options?

Savina Yang: Say if you've written them a letter and it hasn't worked, the next thing to do would be to serve a notice to comply on the by-law breaker, so that would just set out the by-law number that the lot owner is in breach of, and what are the behaviours or actions that they are displaying that's in breach of the by-law.

After notice to comply is served and that is still ignored, the owners corporation can then seek a penalty of up to five hundred and fifty dollars against the offender... that penalty is actually paid to the Department of Fair Trading, it's not to the owners corporation.



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An alternative to seeking a penalty order is to seek an order from the adjudicator to require the offending owner or occupier to comply with the by-law.

But before doing this, the parties must try to resolve the dispute by way of mediation. Now if the order is made and the lot owner is still not complying with the order, the owners corporation can then apply to NCAT, which is what we call the New South Wales Civil and Administrative Tribunal, for a penalty order that can be up to five thousand and five hundred dollars.

Amanda Farmer: So then we start really seeing an impact when the penalties are getting up that high. I just want to go back Savina and address a couple of things that you've said there. A notice to comply – now something that I want to make sure our listeners are aware of... this is a notice that is issued under Section Forty Five of the Strata Schemes Management Act, and it's very important for that notice to comply with a number of the formalities that are set out in the legislation. As Savina says, it needs to list the by-law that has been breached and set out the terms of that by-law. A notice to comply can only deal with one by-law at a time, so we always advise our clients that if you are issuing notices in relation to breaches of numerous by-laws, you actually issue separate notices.

The notice needs to be issued on the instruction of the executive committee or, if your strata manager has been delegated authority under their strata management agency agreement to issue these notices, then the strata manager can issue it.

We generally recommend that the executive committee resolves to issue a notice to comply. It's not that difficult to convene an executive committee meeting, and it just gives you that extra layer of authority.

The reason why all of this is important is because if the notice to comply is not complied with by the by-law breacher, and you proceed to NCAT, as Savina said, seeking a penalty order, you must prove that the notice was properly issued and that you complied with all of the formalities. So we have unfortunately seen owners corporations and strata managers who have attempted to issue these notices, and perhaps without the right advice and guidance, they've issued them or they think they have issued them properly, and they've gone to NCAT to get their penalty order and NCAT said "well sorry you didn't have the executive committee resolution authorising the issue of this notice, your strata manager doesn't have delegated authority under their agency agreement and you haven't properly set out in the notice, the terms of the by-law." So even though I can see a by-law is being breached, I can't issue a penalty order because of those technical failings. So that's something that I just really wanted to flesh out there, make sure you get your notices to comply or Section Forty-Five notices right.

Okay and Savina's given you just an outline there of what happens next, in relation to by-laws being breached. If you want an order of the adjudicator, which isn't, in the first instance, a fine, it's an order actually requiring the by-law breacher to comply. So it might be somebody who has carried out work on the common property, they've renovated their kitchen and in the process, they've destroyed water proof membranes and damaged the surrounding common property, and you actually want an order that they reinstate, you have to get through that strata schemes adjudicator.

So you have to go through that process of mediation, as Savina said, and then submissions to the strata schemes adjudicator. The adjudicator can make an order requiring the lot owner to do all things necessary to reinstate the common property, bring it back to its original condition, and if the owner doesn't then comply with that order then they could be facing much higher penalties of up to five thousand five hundred dollars.

Now this is the law at the time that we are publishing this episode, it's April 2016, and the law as you may know, is looking at significant change in the latter half of this year, and this is one of the processes that's going to be subject to quite a bit of change, when it comes to penalties, the amount of the penalties and how the adjudication process works. So that's something we'll certainly get into in later episodes.

Alright so, Savina, what are some of the challenges that you've seen buildings or lot owners face when it comes to dealing with by-laws and what's worked in terms of overcoming them?



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Savina Yang: In my view, the decision to enforce a by-law is a big challenge for a lot of strata buildings because some by-law breaches, like what we just mentioned, emission of noise is actually quite subjective. So for some people they can be quite tolerant to noises from their neighbours because they accept that, you know, it's part of community living, there's bound to be some noises...

But some people may not be as accepting, so when complaints are made to the owners corporation about noise, the owners corporation will then need to consider 'is it our building's policy to enforce the by-laws regardless of the degree or nature of the breach?'

Because if so, that could be very costly and onerous and it may even lead to an increased attitude of enforcing ones rights, or alternatively, the owners corporation may only address those breaches that are deemed to be sufficiently serious by the executive committee.

But if they do that, the owners corporation may need to bear the risk of being perceived by the residents as being unfair. So I think to overcome this challenge, the by-law should set out some objective standards to minimise the subjectivity in the by-law, and we see this a lot in flooring by-laws that require the use of new floor boards, not to exceed sound pressure level of forty five decibels and another way to overcome this challenge is to seek legal advice on what's the process involved in enforcing the by-law? What's the timeframe that we're looking at in enforcing the by-law, and what are the costs associated with that? Because with all the information the owners corporation can then make an informed decision on when to enforce this by-law and how should we enforce the by-law?

Amanda Farmer: Yes, that's a really a good point that you make, and I think you've hit the nail on the head when you say that's a big challenge because it is certainly one that we see a lot... committees and even strata managers struggling with whether or not to take on a breach and to take it to the next level.

I often use the analogy, and it's an analogy that I think was coined by my senior colleague, Robert Van Aalst, and I say strata by-laws are like no standing signs. We see the no standing sign, or the no parking, or no stopping, or whatever it is on the street, and we say: "Alright, well we're not going to park there, we're not going to stop there" or maybe its two hour parking and we think "alright, well we'll only park for two hours".

But every now and then, some of us think "well we'll give it a go, we might park here and maybe we won't get caught", and we push the boundaries a bit. But for ninety-five percent of us, that sign works, we obey it and we don't break the law.

Now by-laws are the same: they're there, they're in place, everybody knows that they exist, you can read them, they are accessible and we understand them, and it means that ninety five percent of us comply with them. But then there's the five percent that push the boundaries and some get caught, some don't.

For some, it's worthwhile going after them, for others it isn't. And it really is a decision that only a committee can make in the circumstances, and I think you give some really good advice there Savina, where you say to the extent the by-law, the wording of the by-law, the terms of the by-law, can help a committee to make that decision by setting out some objective standards, and perhaps a benchmark for compliance that they can tick some boxes, then that's really going to help them be seen to be fair and reasonable in the circumstances, because no committee wants to be running a concentration camp or have owners think that they are, and so if they can point to a by-law and as you say, a flooring by-law, that says "these are the requirements of the by-law, this is the decibel level and we've done some acoustic testing, and on the face of the documents you are in breach of the by-law and we are going to take that further", then that really helps them to come to what seems to be a fair and reasonable decision, and to be upholding what's in the best interest of their owners.

Savina, can you share a story with us about how you've helped a building or a lot owner using a by-law?

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Savina Yang: I think you'll remember this case too Amanda. So in early 2015, we acted in a matter where the owners corporation successfully undertook enforcement action against a lot owner who installed hard flooring without the owners corporation's approval, and that approval is actually one of the requirements in their flooring by-law. Now this lot owner falls under the stubborn category that I referred to earlier, because we wrote letters to her requesting her compliance, but there was no response.

So we served her with a notice to comply, and it wasn't to our surprise that the notice was also ignored. So the next step was that the owners corporation lodged an application for a penalty order with the tribunal, seeking a maximum penalty of five hundred and fifty.

Now because the rules of evidence apply in this situation, it means we had to assist the owners corporation's witnesses to present their evidence in a form of an affidavit, or statutory declaration, and the witnesses had to be prepared to have the evidence to be cross-examined on the day of the hearing.

So this means there was a lot of preparation that went into this civil penalty application, and it was also quite costly for the owners corporation because legal advice is inevitable, if you want to make sure that your application complies with the rules of evidence... it's very complex!

Now, returning to the matter that we were involved in, at the penalty hearing, the tribunal member accepted the owners corporation's evidence and was satisfied that the lot owner had breached the notice to comply. So as a result, the tribunal ordered the lot owner a penalty of two hundred and twenty dollars to the Department of Fair Trading.

Now, with respect to the owners corporation's costs, we sought a cost order against the lot owner for the owners corporation's legal costs in preparing and arguing the application. The tribunal member acknowledged the length that we had gone into on behalf of the owners corporation to prepare that evidence, so a costs order of four thousand dollars was made against that lot owner in favour of the owners corporation.

So on the day of the hearing when it concluded, the owners corporation was very happy with the result, because although the penalty was only two hundred and twenty, the cost order was far more than that and after the order was made, we served it on the lot owner and, surprise-surprise, the lot owner contacted us, and let me just tell you, it was not the penalty order of two hundred and twenty that grabbed the lot owner's attention...

Amanda Farmer: Yes, that's a good story [laughing]... I do remember that one. Just for our listeners, I just want to make clear that point about the rules of evidence applying in penalty applications. The way the tribunal works in New South Wales is that lawyers aren't permitted to appear unless they're given leave from the tribunal, and in our experience, when we are dealing with penalty application, because it is a quasi-criminal matter, because a monetary penalty, can be made against the by-law breacher, the tribunal takes these matters very seriously, and perhaps more seriously than other matters where the tribunal is simply making a decision based on the facts and the law and then requiring someone to do something, because the tribunal has the power to penalize and issue a monetary fine, they want to make sure that they're making the decision based on some very clear evidence.

So they require witnesses to present their evidence in such a form that it complies with the kinds of rules that are applicable in courts, even though this is just a tribunal and is supposedly a consumer friendly tribunal.

So it likes to see evidence in the form of affidavits, or statutory declarations, and these are documents that have been sworn in front of solicitors or justices of the peace, and then it allows each side to cross-examine witnesses so to test their evidence, and it makes sure that it fully hears the case of each side, so that it can make the most informed decision available to it.

So that's why owners corporations and strata managers often get lawyers involved in penalty applications so that they can be assisted in preparing the evidence to that level of detail, and it's certainly what we had to go through in that particular case, and of course that's expensive for owners corporations, and this was a case where the committee in question had decided "enough is

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enough, we're going to pursue this person for installing these hard floors without consent, and we appreciate that it's an expensive exercise, but we want our community to understand that we take these things seriously."

So they engaged us and they ended up spending a considerable amount of money, but as Savina has just explained, they also got a considerable cost order, and not only was that a cost order a benefit to them, to be refunded for part of their legal fees, but also a significant deterrent to the by-law breacher and anyone else who might have been thinking of breaching the by-laws, either by installing hard flooring without approval, or otherwise altering the common property, or doing something that simply wasn't permitted in that community.

So that was a case where the owners corporation was very happy with that result and, as Savina said, that four thousand dollar cost order certainly got the lot owner's attention, where as perhaps the two hundred twenty dollar fine might have been filed away.

Okay so Savina, can you tell us about any books that you've read that had impact on you and why? And they don't have to be strata or law books.

Savina Yang: Okay, because I was thinking of saying Corporations Act 2001.

Amanda Farmer: I'm sure you were!

Savina Yang: So, when I was a university student, I picked up this book written by Richard Branson and it's called "Screw It, Let's Do It."

Amanda Farmer: Yes.

Savina Yang: It's a very short book and in that book he shares his ideas and secrets to his success with his readers. There is one quote in his book that has always been my favourite and he says: "I never went into business to make money, but I have found that if I have fun, the money will come." That quote stuck with me because it made so much sense to me. I mean if you don't love what you do, it's going to be very difficult to go through the tough times when they come. So, since then, I focus my life on my family, not taking life too seriously, having fun and being challenged. Making money has never been my top priority, and I think that's important, as a university student, to make sure that I knew what my priorities were.

Amanda Farmer: Fabulous. How wonderful that you were able to get your hands on that when you were still a student.

Savina Yang: Yes! I mean, I was always very intrigued with Richard Branson because he just seems larger than life.

Amanda Farmer: Yes.

Savina Yang: And he seems to be having a lot of fun...

Amanda Farmer: Yes.

Savina Yang: So I just wanted to know his secrets.

Amanda Farmer: Sure is, and let me just say to our listeners, Savina certainly brings the fun to our office. Alright Savina, how can our listeners find out more about you and is there anything else you'd like to add before we say goodbye?

Savina Yang: So to find out more about me, the listeners can go to www.lawyerschambers.com.au. There's a little quirky bio about me under "Our People" but I won't spoil it by telling you what it is.

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Amanda Farmer: I was thinking about using that for your introduction but I thought the same thing [laughing]... let's not tell all of your secrets!

Savina Yang: So if any of you have any questions about by-laws or strata in general, just send me an email. My email address is savina@lawyerschambers.com.au.

Amanda Farmer: Fantastic! Thank you so much for spending time with us today Savina, I think we've had a great chat about by-laws. To learn more about by-laws and the five other things that I think you absolutely must know about owning a strata property, don't forget to head over to www.yourstrataproperty.com.au and grab the free Strata Essentials eBook. Thanks for joining us. Thank you very much Savina.

Savina Yang: Thank you Amanda, thanks for having me, and yes, grab the free eBook, it's free! What are you waiting for?

Amanda Farmer: Love it. Bye.

Savina Yang: Bye.

Outro: Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners reliable and accurate information about the strata property. You can access all the information below this episode by the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comment section which Amanda will answer in her upcoming episodes. How can Amanda help you today?

