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YSP Podcast Transcript: Episode 037. BONUS - New Strata Laws: Preparing For The Future - Part 3 (Q&A) What strata owners need to know about the new NSW strata law

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. Today, I have a bonus for you. You have hopefully listened to part 1 and part 2 of my presentation delivered to strata owners on the new New South Wales strata law, that's Episodes 035 and 036.

Now there was a Q and A session held after that presentation where audience members had the opportunity to ask me questions about the new strata law, including on some aspects that I hadn't covered in the presentation and today I've put together this episode to give you access to that Q and A session.

Now, because the audience members weren't mic'd up the same way that I was, their questions aren't so easy to hear. So what I'm going to do is to let you know what the question was and then we will shoot over to the live answer that I gave on the night. Alright, so let's jump straight in.

The first question was about minor works and this particular owner recognised that replacing carpet with a floating timber floor would be considered minor works under the new legislation, so that needs to go to a general meeting to be approved by an ordinary resolution.

Now this lot owner asking the question is concerned about having to go to a general meeting for what, in his building, were quite regular applications to replace carpet with a floating floor. So, he asked me how do we deal with that? Is there a quick option? And here's my answer:

So, what's happening with the minor renovation works and you're right: that lifting carpet and exposing floorboards or installing floorboards is not cosmetic work, it is minor work, and minor work must go to a general meeting and be authorised by ordinary resolution.

However you can delegate that decision making to the strata committee so hopefully that would suit your circumstance where you want to do it more quickly, you don't want these kinds of things going to general meeting, yes, you have to have a general meeting first to approve the delegation of that power to the strata committee, and then the strata committee can make decisions about those kinds of works if you specify that.

Okay, next I was asked how to deal with a building or a committee that doesn't want to allocate sufficient funds to the sinking fund – soon to be the capital works fund – and here's what I had to say:

The new law, for the first time, says that you actually have to comply with your sinking fund plan. Currently, it's simply: get a sinking fund plan or forecast, and most of a lot of buildings I know get it and say "that's nice we've got it". There is a requirement in the legislation that says you now must comply. As for what happens if you don't, I'm not sure, but I would suggest that with a legislative requirement saying you must comply, if you don't, it's all the more reason why you are dysfunctional.

Next, I was asked by an owner who had just bought into what he called a 'poorly maintained building'. He said I've just bought in and I'm now basically up for $100,000 to contribute to repairs and maintenance, and from his point of view that should have been allocated in the sinking fund and he asked me what do I do about that? Here's what I have to say:

Unfortunately, it's probably I think it's too late for you if your developer hasn't struck appropriate levies when the strata plan was sold off and you're now behind, so the best thing that you can do is get yourself on the committee and make sure that sufficient funds are raised – as they should be – to make sure that the work gets done. And if for whatever reason your committee, or the rest of the owners, are not on board with that, then you can approach the tribunal for orders that the owners corporation properly maintain and repair the common property and in order to do that they need to raise X amount and therefore that's what they should be doing and they can be ordered by the tribunal to take those steps.

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The next question was about the new model by-law dealing with smoking. Does smoking and smoke drift cover barbeques? Here's my answer:

That's a really good question, as far I'm aware it doesn't specify what's smoking, it doesn't define smoking and I think that's a problem and I think that's why you need a bespoke smoking by-law drafted. The by-laws that I draft define what smoking is and we include things like, if we are instructed, e-cigarettes. A lot of buildings have problems with e-cigarettes because I think there's a smell or there's maybe a question about toxins. So they want to ban e-cigarettes so we make sure that's included in the definition of smoking in a by-law. So as much as the model by-law is it a great place to start, I do recommend the buildings get their own unique by-laws drawn out.

Next, I was asked about the process for approving minor works and particularly, this lot owner talked about magnesite in their building. They have magnesite in the concrete slab which causes concrete cancer, I'm sure a lot of our listeners would be familiar with this stuff and this particular committee had been inspecting and remediating wherever they have found magnesite and they were concerned with the new law that people could now lift their carpet and replace their carpet, that would be considered cosmetic work, that doesn't require any notification to the owners corporation and therefore, the owners corporation – the committee specifically – had no way to know whether or not magnesite existed and this sort of flew in the fact of their current procedure which was if you are doing any renovation works within your lot, if you're lifting your carpet then please let us know so that we can come in and inspect.

They are now concerned with the new law that with cosmetic work they can just go ahead lifting and replacing carpet. How do we deal with that? And how do we keep in place our procedure for inspecting and remediating the concrete slab? Here's my answer:

Minor renovation works, which would include lifting carpet and installing hard flooring – this is where your magnesite is going to be involved – yes, it has to go to a general meeting on an ordinary resolution. There can be conditions attached to an approval and the legislation sets this out – this is actually in my paper if you go and download it, there' a bit more information about how these minor works are approved – you can impose conditions and they include things like the owner has to be responsible for any damage to the common property that occurs, you have to have the right trades people… what I'm thinking is whether you can impose conditions like notifying the owners corporation to inspect, so that they can come in and inspect so you can deal with your magnesite issue.

There's a real tension in the current law as to if you have an existing by-law – and I know the one that you have – an existing by-law that deals with hard flooring and it deals with magnesite issues, what the status of that by-law is when the new law comes in? Yes, it's still enforced but when the new law says something different which is 'you can install hard flooring on ordinary resolution' there's a conflict, so which prevails? And I've read this law inside out and back to front on that question and I can't work out the answer and I've said this to OCN members before if I was before the tribunal, I'd argue for the lot owner that the legislation prevails, we as lawyers learned that legislation takes precedent over instruments and rules, but I would also argue for the owners corporation that the legislation says you must comply with the by-laws and we have a specific by-law about flooring and it says this.

So, you know, I'd love for my colleagues or strata managers to give me their view and guide me on this but I haven't work that one yet, which one prevails, and it might be something that is worth the tribunal when we get some kind of direction there.

Now here I had a question about the owners corporation being responsible for consequential damage to lot property when the owners corporation is dealing with repairs and maintenance of common property, and what I specifically want to highlight here is that I did refer to a provision in the new legislation that does make owners corporations responsible for damages suffered by lot owners as a result of the failure to repair and maintain common property. Here's what I had to say about that new section:

Now, something interesting that's coming in with the new law is that the new law provides that if a lot owner suffers damage from a failure to repair or maintain common property, they can claim that damage from the owners corporation but they must do so within 2 years of first becoming aware of the loss.

Next, I was asked about air conditioning. This lot owner recognised that air conditioning is considered minor work under the new legislation, the installation of air conditioning, and this lot owner was concerned that air conditioning might constitute a structural alteration so is it still minor work?

The legislation specifically identifies air conditioning as a minor renovation work, so as far I'm concerned and I think it says split system air conditioners, so I appreciate what you are saying that it involves some alterations to the structure, but it's probably not going to affect the structural integrity of the building, so not like removing a structural wall… installing a split system air conditioner, I'd say any engineer would say that it's pretty safe so, yes, the legislation specifically says that it is minor renovation work. So that's an ordinary resolution at a general meeting, so a majority vote at a general meeting.

Next, I was asked how much does it cost to draft and register a by-law. Here's my answer:

Well, I can tell you what I'm charging. I charge just for a straightforward by-law, I charge $500 that's if you're getting it drafted by lawyers unique to your building. You can get them for free if you're a member of the YSP community – well, almost for free, $29 a month – there are a few by-law templates in there. So $500 for drafting and then I think registration fees at the moment are about $140, you have to register them with the LPI, and if you get lawyers to help you register then we charge a bit on top of that. So something like $900 by the time you've done the registration and paid your disbursements. A lot of strata managers register the by-laws themselves and they're much cheaper I'm told. They don't draft them themselves, they register it themselves.

The next question, great question: when it comes to occupancy limits by-laws or by-laws that prevent overcrowding, there is, of course, an exemption for people who are related, how do we prove that if there are 12 people living in a lot they are not related and they are in breach of the by-law? Here's my answer:

Very good question. Very good question. That's going to be a problem, and the legislation goes into some detail about what related means and it deals with things like recognising aboriginal kinship relations and things like that. So there's a bit in there about related and de facto, but as for proving that, if you take someone on for breach of that by-law you know what will happen is that you will end up in the tribunal, they will all be saying we're all related, you'll be saying no you're not and you will all be in the witness box and being cross-examined as whether the tribunal member believes you're not.

The section of the Act that says you can have an occupancy limits by-law simply says 'you can have an occupancy limits by-law' and it's no fewer than 2 adults per lot and it exempts these people. If you go off and get an occupancy limits by-law, your by-law should include all of these things: it should say what related means; it should say how you, if you say you are related, how you prove that it's the same way if you have a keeping of animals by-law, that by-law has a procedure in it for how to apply to keep an animal. I like this, you've given me an idea for when I'm drafting my occupancy limits by-laws.

Here I was asked about pets and whether you can limit the number of apartments that can have pets. So for example, can you impose a percentage at any one time, "only 30% of the lots in our building can keep an animal", and the lot owner who asked this question was intent to ensure that the building wasn't overrun with animals because they didn't want to set a precedent. Here's what I have to say:

There's nothing stopping you expressly doing that but you might run into trouble if someone wants to say that's harsh, unconscionable or oppressive and what you're saying there that setting a precedent or we call it in law 'the floodgates argument', which is if we do this then we open the floodgates, it doesn't go down too well with the Courts… you know what the thing is about pets, it's not so much about allowing people to keep a pet or not, it's about how that animal then behaves and that's why your by-law then has to deal with the outcomes of keeping that pet.

So a building could have 50 animals in the building and you don't know that they are there, it's about, to the extent that you can, controlling the result of having those pets: the noise, the mess, the impact on other people, and you have all those clauses in your

by-law that says this is how, regardless of how many you have or what breeds they are or how big they are, this is how they should behave.

Next, I was asked about the sale of common property and I was asked what legislation deals with the sale of part of the common property and can lot owners or owners corporations generally be bullied into selling off part of their common property.

Okay, so it's in the Strata Schemes Development Act, and the Development Act says that an owners corporation can subdivide and sell parts of its common property, so what happens in practice is that part of the common property is subdivided and it's created into a new lot and that lot is then transferred to the neighbour or whoever it is who wants to buy it.

That needs a special resolution. It's not unanimous, special resolution only 75% calculated on a unit entitlement basis. As for anyone forcing the majority to do that when you can't get the vote, I can't see at law how that's possible, they might be huffing and puffing and threatening you…

If it's a pure sale then it needs a special resolution. If they're talking about an exclusive use right, which is a by-law, then there is an avenue to appeal a rejection of an exclusive use – or now going to be common rights by-law – on the grounds of unreasonableness, but as far I'm aware if you can't get that special resolution to subdivide and sell common property, it's not going to happen.

Here I was asked how do we change an unfair schedule of unit entitlement? Here's my answer:

So it's an application to the tribunal to reallocate unit entitlements, you've got to apply to the tribunal for an order and you have to show that the allocation of unit entitlements was unreasonable at the time the strata plan was registered. So you have to get valuation evidence going back to the time the strata plan was registered and somehow say that the valuer who set that schedule got it wrong. So you're getting market value evidence from way back then.

I've seen and run some of these that have been successful, and I've seen some that haven't, it really depends on the circumstances and they are expensive because you have to pay for a valuation report. Yours might be a bit cheaper than most because it's a small building, but I know big buildings in that situation and they just say the cost of getting a valuation report for the entire building is prohibitive.

Next, I was asked are there any changes to the requirement to install window safety devices? Here's what I had to say:

You are talking about the window locks requirement which is coming in March 2018, am I right? Yes. No changes in the new law when it comes to window locks, so that requirement will still take effect in March 2018: you have to have window safety devices installed to all of your exterior common windows that lead out to a drop that is more than 1.7 meters, I think it is, and window safety devices means that it is capable of restricting the opening of the window to 125 mills.

And the point here is it's not that your window can only ever be open to that, it's that there is a safety device installed that can be activated and prevent the window from opening. So if you ain't got no kids in there, you're probably not going to be activating it but it's there because the owners corporation is required to have it up there.

Next question, I was asked by a committee member: what are the duties of strata committee members? Are there any changes in that regard and in particular has the requirement to act in good faith been removed from the new law?

It certainly doesn't lift a requirement for you to act in good faith, what it actually does is that it enshrines that requirement, a requirement that has always existed at law so it's generally not something that I cover too much when I do these workshops.

But the new law does have a section that says something along the lines of 'executive committees must act in good faith', and to the extent that they do act in good faith, then if anything goes wrong the liability is said to be that of the owners corporation rather than the individual committee members.

I say that's what the law is, that's what the law's always been, that's what the common law is as we say as lawyers. I think what the new legislation is doing is just making that more accessible and putting it in there for you so that they can read it.

You've always have a duty to do things properly, acting in good faith essentially means that when you need to get advice on something that you get that advice, you don't act like lawyers, you don't act like strata managers, you know what you don't know and if there are hard decisions to be made, you get some guidance, and if you've done all of that and oops you're still wrong, then you are going to be a long way from personal liability. The owners corporation might be liable for something and there might be someone else to sue, whether that's the person who gave you the bad advice. But you as committee members personally have to do something pretty bad and know that you are doing something pretty bad to get yourselves into trouble.

Next, I was asked about the calculation of the maximum number of proxies. So for a building that has more than 20 lots, 1 person can only hold 5% of the proxies. That's 5% of the total number of lots in the building. So where the 5% doesn't equate to a whole number, what do you do?

I suggest you go down because – I actually thought about this – so if you've got 50 lots so your 5% is 2.5 you are only going to be able to take 2 because you can't sort of invent the other half, it's like having 1.8 kids, I think you've got one [laughter].

Here I was asked about the exclusive use of common property where a lot owner has exclusive use under an exclusive use by-law, does their unit entitlement automatically increase and do their levies therefore increase? Now the short answer to that is no, but here I'm going to jump in with some commentary of a recent High Court case that only came out the week before and I thought was of relevance to this particular lot owner's experience of their exclusive use by-law. So, here it is:

So just to add in case you're interested, the High Court had a decision last week on this point coming from a Queensland case – so looking at the Queensland law – but it's about someone who had sought exclusive use over an area of a terrace, and they had fought through the years as to whether this application for exclusive use which was denied was unreasonable or not, whether the owners corporation had been unreasonable in refusing the exclusive use and the whole discussion of the case – it's a good one and I think it has some relevance here in New South Wales because our legislation uses some similar language – it's a question of what constitutes unreasonable refusal, so if somebody comes to you and says 'I want to use this part of common property' and the majority of the owners say 'no, I don't want you too', what's a good reason for refusing that? And the threshold is quite low for refusing this kind of thing, basically if you have any sort of logical rational reason to refuse it, so in this case they had architect's report saying this isn't what the area was designed for and this person hasn't offered any money for it, that was a good enough reason to refuse consent to an exclusive use by-law. Queensland legislation but a High Court case, it will be quite persuasive here in New South Wales, last week.

Next, I was asked a question about the collective sale or renewal of a building, so the sale of the whole building to a developer and I was asked the question: how is the 75% approval threshold calculated?

Now this has been a really popular question. It's something that has been asked by members of the YSP online community in the forum, and the question generally goes like this: is the 75% calculated on the basis of unit entitlements or is it a simple head count on the number of lots? Here's my answer:

It's based on the number of apartments. So the 75% requirement on a collective sale of a building is based on the number of lots, it is not a unit entitlement count, so it's not a special resolution, it's that 75% of the lots have to be in favour of the collective sale or renewal of a building.

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Now finally I was asked by a lot owner who is currently in litigation before the New South Wales Civil and Administrative Tribunal. She had recognised that there was a change to the tribunal procedure in the new law. She's currently in the middle of litigation and she wanted to understand how that change in procedure might affect her current proceedings. Here's my answer:

The process you are in now, I think you said the adjudicator has made a decision and this person has appealed the decision to the tribunal? Okay, so you're in the tribunal, so you'll just continue along that same track. What's happening with the new legislation is the adjudication system is being scrapped so there will no longer be adjudicators, you won't apply and have that paper fight that we have now where you put in written submissions and the other side puts in some written submissions, then you wait 4 months and then you get a decision and you go "how the hell did they make that decision?", that's being scrapped and now the application is just made straight to the tribunal so it's not to the Court, the application goes straight to the tribunal. How that's going to work, we don't really know. We will wait and see when we get there, but I suspect you're going to turn up day 1 in the tribunal and they're going to say you, 6 weeks for submissions and you, 6 weeks for submissions and we're all still doing submissions and then we're turning out for hearing day. So the only process is being scrapped is that adjudication paper process because the outcomes are so uncertain and straight to the tribunal. So you're already in that tribunal system now.

Okay. Now that concludes these 3 special episodes on the new New South Wales strata law. I hope you have found those episodes really valuable, I know those who attended the presentation on the night certainly got a lot of it and took a lot back to their buildings and to their committees. Now as we go to air with this episode I think there's only about a week until the new law starts here in New South Wales and I am excited. I hope that you are too. Now the video of this presentation is available to members of the YSP online community if you are not a member but you'd love to check that out head over to www.yourstrataproperty.com.au/membership. We would love to have you as a member of our community. Thanks for joining me, catch you next time.

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