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## YSP Podcast Transcript: Episode 040. Explaining the Tribunal process, including penalties under the new NSW law (references to NSW legislation)

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**Amanda Farmer:** Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. I have a short solo episode for you today. By the time this goes to air we are all gearing up for the holiday break. I hope you're taking a break. I certainly am taking a few weeks off, as we do in the legal profession around this time of the year, and I think that it's something that should be taken up by the strata sector, generally. I see a lot of strata managers in particular who seem to close their offices on Christmas Eve and they're open again just after New Year.

You've all had an incredibly busy year, to the extent you can, please do take a break. It's important for us all to revitalise and gear up for another big year next year. Now the podcast episodes will keep coming over the break, I've got another one for you next week just before Christmas.

I think I'll have a short week off between Christmas and New Year and we will be right back into it the first week of January, I've got some really exciting guests lined up for you for 2017 and I am looking forward to it.

Now what I want to talk about today and I'm doing this because I'm getting a few questions about it now that the new strata law has started here in New South Wales, I want to talk about how the recent changes to the Act have affected the way that disputes are dealt with in the Tribunal.

Now I'm sure you've heard me and many others talk about how the adjudication system, the paper system, of dispute resolution has been scrapped under the new law, so where we used to send in pages and pages of written submissions to an Adjudicator and that Adjudicator would consider both our side and the other side of the dispute and make a decision and send us back some written reasons, that system no longer exists under the new law.

And I have to say I think that's a good thing. Things can be overlooked when there is a paper submission process and if you're not quick off the mark or you don't have legal representation or experienced lawyers, strata lawyers, assisting you, the result can be unexpected.

And even if you have done everything that you should have done and you have had experienced advice and representation the result can still be unexpected. No doubt you like me have had some very surprising decisions from strata schemes Adjudicators in the past.

And with all of that, I think that's the reason why the policymakers have decided that this system isn't working, it's not working as well as it should be, so let's cut it out and go straight to stage 2, stage 2 being having a matter heard before a member of the Tribunal. So that is what the new law now provides: disputes are to be heard in person before the Tribunal, no more written adjudication system.

Alright, so how is all this going to work in practice and this is the question that I'm being asked regularly at the moment. Well, the Tribunal website tells us that we lodge an application, once an application has been lodged all parties will receive a notice of directions hearing and that directions hearing is going to take place about 4 to 6 weeks from the filing of the application.

Now a directions hearing is a first appearance before the Tribunal, what usually happens in my experience is that the Tribunal member will set a timetable for each side to provide their evidence and their material that they want to rely on at the hearing of the matter, and the Tribunal is also going to deal with any preliminary or procedural matters, for example if you want a lawyer there to represent you then that lawyer is going to have to seek the leave of the Tribunal or the permission of the Tribunal to be there for



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you at the final hearing, and that's the kind of thing that the Tribunal would deal with at the directions hearing. The Tribunal might also ask you about dates that you're available for a final hearing, are you going to be overseas, are you going to be able to get there in person, do you want to bring some witnesses with you and are those witnesses going to put on some statements, how long will the hearing take, is it going to be 2 hours or is it going to be 2 days?

So the Tribunal is addressing all of those things at the first directions hearing. You might even get the opportunity at the first directions hearing to talk the other side and try and resolve your dispute. So whether it's a dispute between you as a lot owner and your owners corporation or a dispute between 2 lot owners or a dispute with your strata manager or your building manager, the Tribunal is likely to give you the opportunity, it usually wants to give you the opportunity on that first appearance to go outside of the Tribunal hearing room and have a chat, see if you can resolve the issues and dispute between you or if you can at least narrow them so that the work of the Tribunal is a little bit less onerous and perhaps you can cut down on some of that hearing time.

So that's your directions hearing. Shortly after that appearance, you are going to get a notice from the Tribunal telling you when the hearing is due to take place, and that will be a date that is after each party has served the other with all of their written material, evidence, witness statements, photographs, videos, whatever it is that you want to rely on in the hearing, you'll have time to exchange that with the other side and then there will be a date for your final hearing.

And in my experience, depending on how much time you need for a final hearing, that's usually I would say about 3 months from the time you filed your application, so you filed your application you've got 4 to 6 weeks before you've got a directions hearing, you're then going to exchange your material with the other side, maybe 2 to 3 weeks for you to provide your material, 2 to 3 weeks for the other side then to provide theirs', and then a few weeks after that you are probably going to have a date for your final hearing. So that's where I get to about 3 months this process is going to take and that's not too different to the timing that we were looking at for the adjudication system, it's probably a little bit shorter because when we were making submissions to an Adjudicator we were getting about 4 weeks to do that, often time's one party would ask for an extension so there might be a couple of extra weeks added on there and then we would be waiting possibly up to 4 months to get a decision, a written decision from an Adjudicator, so that was quite a lengthy process. So hopefully with this new system, we will see the process happening a little bit more efficiently.

I suppose the only risk there is that now that everything is going before the Tribunal, the Tribunal is going to have a lot on its plate. So I'm not sure what's happening in the background there, the bureaucracy of the Tribunal, whether they're getting some more members on board, I certainly hope so but as with anything we shall wait and see what we are faced with in the coming months.

Okay, I just want to make clear here it's important to understand that if you have lodged an application for Adjudicators' orders before the 30th of November 2016, so you've lodged that under the old Act, that application is going to continue through the adjudication system.

So there will still be Adjudicators who are considering those applications, calling for written submissions and providing that written decision and written reasons. So they will just continue through this transitional period... if you have filed your application on or after the 30th of November 2016 then that one is going straight to the Tribunal.

Okay, something that I've been looking at recently is what happens when it comes to breaches of orders. So under the old Act if there was an order made by an Adjudicator so, for example, an Adjudicator says this lot owner must comply with the owners corporation's by-law in relation to hanging of washing.

If the lot owner did not comply with that by-law, that was a breach of an Adjudicator's order and it entitled the owners corporation to then apply to the Tribunal for a penalty. A monetary penalty and that penalty could be up to \$5,000. So a breach of an Adjudicators' order entitled an owners corporation to go to the Tribunal and seek a penalty of up to \$5,000, that amount to be paid by the recalcitrant lot owner to the office of Fair Trading.

Now, because we no longer have an adjudication system, of course, that process no longer exists. So what happens when the

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Tribunal makes an order that a lot owner should comply with a by-law in relation to the hanging of washing and that lot owner does not comply with that order and continues to breach the washing by-law.

Well what you do now under the current law is that you go back to the Tribunal and you say there has been a breach of the Tribunal's order, and the relevant section of the legislation here – it's not in the Strata Schemes Management Act, where it is under Section 72 subsection 3 of the Civil and Administrative Tribunal Act and this section says that where there has been a breach of an order of a Tribunal, a monetary penalty of up to \$11,000 for an individual and \$22,000 for a corporation may be imposed – okay, so an individual lot owner is exposing themselves up to an \$11,000 fine if there has been an order made by the Tribunal requiring them to do something and they have not done that, they have breached an order of the Tribunal.

If your lot owner happens to be a corporation, so you've got a corporate lot owner, a company that owns the lot, then they are exposing themselves to a fine of up to \$22,000 should they breach an order of the Tribunal. So that's the process if you want to pursue breaches of Tribunal orders now that the new Act has commenced.

And of course, the question you are all going to be asking me is "wow where does all of this money go? This \$11,000 or \$22,000, that's a significant increase to the \$5,000 we were previously looking at. How do we get our hands on that?" Well, you've probably heard about this new provision in the law where owners corporations can have penalties paid to them and, on my reading of the law, a penalty for breach of the Tribunal order is not one of those situations where the owners corporation will have the penalty paid to them.

The situation where an owners corporation can have a penalty paid to them is specific to a situation where the owners corporation has first issued the lot owner with a notice for breach of by-laws. So this is what we call under the old Act – and I think I'll still call it this under the new Act – a Notice to Comply.

So an owner has breached the hanging of washing by-law, the strata manager has been authorised to issue a Notice to Comply, that notice is not complied with, what we used to do is go to the Tribunal and seek a penalty of up to \$550 for breach of that Notice to Comply, and that \$550 if you were able to get it was paid to the Office of Fair Trading.

The same process applies under the current law and that is set out in Section 147 of the Strata Schemes Management Act, and that says that where an owners corporation has issued one of these notices to comply with a by-law and the lot owner has not complied, they have breached that notice, and the owners corporation can go to the Tribunal and they can seek a penalty of up to \$1,000, so we're doubling the penalty that was previously available under the old law, and if the owners corporation is successful in getting that penalty order of up to \$1,000 then that money is payable to the owners corporation and that's specifically set out in Section 147 subsection 6.

Now the other helpful part of this section is that it says if the lot owner breaches the by-law again within 12 months of already having received a penalty then the owners corporation can go back to the Tribunal for a second time and seek a penalty of up to \$2,000.

So, for a second offence within 12 months, the lot owner is exposing themselves to a penalty of up to \$2,000 and certainly that, if it is obtained, is payable to the owners corporation. So that is the specific circumstance where you're going to get penalty orders paid to the owners corporation.

I want to be really clear that, on my reading of this legislation, it doesn't apply to that process I was describing earlier where there has been a breach of a Tribunal order and you're looking at a penalty of up to \$11,000 for an individual or \$22,000 for a corporation, that money is going to the government so that's not the kind of situation where the owners corporation is banking that one.

But hey, under the old law, owners corporations weren't getting any of this money so at least now where they are pursuing the Notice to Comply for breach of a by-law and going down that avenue where a Notice to Comply is not complied with, they do have

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the potential to recover perhaps their expense in having to deal with the fallout from this person's breach of the by-laws or the cost of having to get some legal advice on how do we best deal with this. So we're seeing some money come back to owners corporations which I think is good.

Alright, so I hope that helps demystify that particular aspect of the new New South Wales strata law for you. Please, as always, send me through your questions and comments, I'm really excited to hear what you are all going through on the ground here in New South Wales with this new law, what's exciting you, what's confusing you and I'm more than happy to help ease this transition process for you. Thanks for listening, catch you next time.

**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 comment section which Amanda will answer in her upcoming episodes. How can Amanda help you today?



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