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YSP Podcast Transcript: Episode 184. The curious case of the disappearing by-law

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**Amanda Farmer:** Hello and welcome. I'm Amanda Farmer, and I have with me today Reena Van Aalst from Strata Central. Hi, Reena.

**Reena Van Aalst:** Hi, Amanda. How are you?

**Amanda Farmer:** I'm doing well. It is lovely to see you. As some of our listeners know, we do record these interviews over video, and we release little sneak peeks of our videos. So it's always good to see you online, Reena, as well as hear your lovely voice.

**Reena Van Aalst:** Thank you so much, Amanda.

**Amanda Farmer:** We are going to jump into our wins and challenges from our week in Strata. Why don't you kick us off, Reena, with your challenge for this week?

**Reena Van Aalst:** Thanks, Amanda. So a very common challenge, I think, for many strata schemes is completing their annual fire safety statement testing. As managers know and building managers know, there's always that three-month testing period that needs to occur before the submission. There's other testing that may occur throughout the year.

But we've also spoken about this, Amanda, previously, I think, on other episodes, where there are no clear guidelines, I think, for Strata committees to understand why, especially just a week or two before the AFSS is due, that they receive these quotes for huge amounts of money to be expended for repairs of fire doors and other fire safety equipment.

I thought to myself, "Well, let me just check," because one of the chairpersons said to me, "Reena, I think there is an issue as to which standard they're testing. We're not a new building. We don't have to be tested to the new building standard."

I said, "Of course, that is correct. Let me just go to the council document, which obviously stipulates the date and the EPA, and see what the schedule is and also what the standard of testing needs to be." When I had a look at this particular council, which is not one of the inner city ones, it actually had nothing Amanda, it was actually, just had the all the equipment but had no standard to which it was to be tested. So I think this is a very important era, I think, for strata schemes because now in a sense all these issues that have come up that have to be fixed should have been probably picked up in previous years and all of a sudden we are finding Amanda, I think, that many companies where you say to them, "Well you tested all these fire doors last year."

One example is that in this particular, another building that we manage, they're all asbestos fire doors, now that's been asbestos from day one and the same company has been testing these doors every year and now for the first time they said they won't issue the annual fire safety statement because there's asbestos in the doors and they have to be replaced. As many of us know these doors are around \$5,000 each and when you have to sort of spend that sort of money at the last minute, it is a bit disconcerting I think, and I think it causes a lack of confidence in the fire safety industry.

And I know Amanda, you had a recent guest, Rob Broadhead who actually spoke about this issue. But I'm not sure if perhaps if our listeners can add any more to our discussion, but there is a real problem out there in terms of every year contractors passing buildings and then now currently I think there seems to be an appetite for less risk by these companies to allow these buildings to go unrepaired or these items to remain and not a very happy building actually.



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**Amanda Farmer:** Yes, I think you've hit the nail on the head there, Reena, where you say the appetite for risk has reduced in recent times and that might be why we're seeing companies that previously said certain services or facilities were okay, are now saying that they don't pass the test. And indeed Rob Broadhead, back in episode 178 from 2020 Fire, spoke exactly on that topic and I asked him, "Do you see this happen where services have passed the test one year and they don't the next year?" And he said, "All the time." And he said he understood completely why buildings were frustrated and we have a real problem about being able to properly qualify competent fire safety professionals. And just go back to that episode 178 if you want to learn more about what the fire safety industry is doing to address that.

But something that you said there Reena, at the beginning. You mentioned a three month testing period. Can you tell me what that's about?

**Reena Van Aalst:** Yes. So normally what we've been advised, and again Amanda, we don't understand the EPA or any of the legislation, but we've been advised that the testing must occur three months prior to the submission of the annual fire safety statement. So you can't sort of test doors six months before the due date. They've got to be tested within three months of the date of submission of the annual fire safety statement.

**Amanda Farmer:** Makes sense.

**Reena Van Aalst:** So, but again, I haven't seen the legislation. I think it's like many things in strata that you seem to learn things because of what people tell you. Unless you understand strata legislation, that's what strata managers are suppose to know inside out. But anything else that's outside of that area of law, we are relying on contractors and these fire safety experts who are supposed to be competent, to let us know what the BCA says, what BCA applies to the building, what the testing criteria and standards must be. And a simple three month window that has to be fulfilled, again, it's something that I've been told, but I haven't actually read it anywhere. So I'm just assuming it's correct, but it may not be.

**Amanda Farmer:** Yes, it's not something I've heard of, but it does make sense that the testing should be done within the three months prior to the due date and not before. Where I see buildings get frustrated is where the testing is done, some one week or a few days before the annual fire safety statement is due and then the building gets a quote from the contractor saying, "Oh, you need to do all of these things in order for us to issue your certificate. It's going to cost thousands of dollars. Oh no, we're not going to be able to lodge the certificate on time." And you think, "Oh, well why did we do the testing days before the due date?"

**Reena Van Aalst:** Well, Amanda, as we've already spoken about in previous episodes, this happens quite a lot, where let's say there's a schedule of defects that's been given, which is what we did in this case, had a schedule of defects that was given and we've got another quote. Now, the other quote happened to be higher in this particular example, but nevertheless, you may get somebody else to then do the work at a cheaper cost, but then they've got to certify their work. The other company's certifying their work and it becomes a very muddled situation as to who's taking responsibility, the time also it takes for different contractors to be able to be brought on site and do all the work. Because a lot of these fire companies I've learned, Amanda, actually subcontract out. So you may think that you're dealing with fire company X, but they've got subcontractors of different specialties that do other things that they don't have the expertise to do.

So again, you're relying on third parties and as you said, most of the time they will submit it Amanda and then this happens all the time, I think we've, spoken again about this. The AFSS says it's submitted, but the work hasn't been done, but they will issue it on the condition that the quote is accepted. So that also happens quite a lot.

**Amanda Farmer:** Hold you to ransom.

**Reena Van Aalst:** Yes, exactly. So you're being held to ransom. And also with fire, I still think it's a very important area where it's still, I believe, highly unregulated, compared to other professionals, especially with people's lives, the complexity of what you're dealing with, especially with older buildings or even buildings built within the last 10 to 15 years, have many problems with fire safety compliance.

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**Reena Van Aalst:** And what we find as strata managers is that we're told different things by different contractors and we have fire safety engineers who again, are quite costly to try and give us advice on fire safety measures and other methods of compliance rather than trying to meet the standard that perhaps in an old building or very old or relatively old building, can't be matched.

**Amanda Farmer:** Well I think the lesson for strata managers is certainly to be across these issues, to make sure that you understand that they are challenges that you will be facing, to make sure that you're giving yourselves and your buildings enough time, so you're aware when these fire safety statements are due and some months out, you are doing your best to find a competent fire safety professional. And as we discussed with Rob on episode 178, we are hopeful that that's going to become a little bit easier to find the right person, from the beginning of the year when we will have a register of properly experienced, qualified, accredited people. And we shall see whether that changes this discussion, I hope it does.

**Reena Van Aalst:** Yes, I hope so too, Amanda, because as I said, it's been highly unregulated for a long time and the amount of money that buildings have had to spend to meet the day before they get fined by not submitting their AFSS on time, is one of the areas that has to be related, I think, sooner rather than later.

**Amanda Farmer:** Well, thank you for sharing that challenge Reena. I'm going to jump into my challenge for this week and I have a feeling this may be a challenge for a few others. It relates to the consolidation of by-laws and in particular registering the consolidated bundle, which as we know in New South Wales, since our new legislation started, each time we change the by-laws, we add a by-law, we repeal one, we amend and we're going to land registry services to register that change, we have to register the change in the form of a single bundle of by-laws so that on the common property title there's only ever one document that includes all of the current by-laws for this scheme.

In my view, makes a lot of sense, makes it easier for people who are looking at the title to understand what the by-laws are. However, what happens if that consolidation is wrong? What happens if the administrative task of putting the consolidation together has not been done correctly and a by-law that should have been included in the consolidation is not there, even though it was never repealed by special resolution at a general meeting. And then the consolidation is lodged, those are the by-laws. The legislation tells us that the register reflects the legal status of the by-laws for the building and they are what we rely on.

Now I have come across this problem about three times in the last 12 months. Buildings coming to me saying, "Oops, we've made a mistake. The wrong bundle has been registered. It is not correct. What do we do?" And my communications with land registry services so far have been to this effect, "You must go back to the meeting and re-resolve, especially resolve the by-law if you want it back in the consolidation or especially resolve whatever the amendment is that you want."

Now you can see how that would cause a problem. If somebody, for example, lost their exclusive use by-law because oops, it was left off of the consolidated bundle and some owners didn't want that exclusive use by-law to go back onto the title and be part of the bundle, they would just vote against it at the meeting that was convened for the purpose of correcting the register. If you can't get that special resolution through, what do you do? Have you come across this problem Reena?

**Reena Van Aalst:** Yes, I have actually, not on a personal level, but actually, one of my colleagues rang me to tell me that that happened in his building. And in his particular case, I think where the error has occurred, and I'm not really sure this a common thing, Amanda, you might have more information about this. But it stems from strata companies at the time when the legislation was brought in and where they wanted to make some money by the strata managers companies themselves actually undertaking the consolidation. So in effect, really it's just a typing exercise. I shouldn't make it sound so simple because it's not, because so many things can be omitted and especially if there's many, many by-laws where it's so easy for someone to make a mistake. But I think where managers try and go into this area of trying to do it themselves, I think they're leaving themselves at a high, high risk.

So the remuneration of, at the time, especially in thinking of larger companies, seeing it as a way of, okay we can get a staff member sit down, type up and consolidate the by-laws, I think is an area where this can happen because normally we always use a lawyer to do that, one, for the purpose of the fact that we're transferring the risk away from us because obviously a lawyer has PI and everything like we do also, but at least it's not our own.

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**Reena Van Aalst:** But in the second instance, what I think Amanda also, is that when we received the by-laws back from the lawyer, we actually just have a cursory look. So we make sure that all the by-laws are still there, and every single clause has been added, especially the new ones or the order is still maintained. And I think when you have the same company basically consolidating and then the manager not having that sort of oversight, I think that's where you have the problem. You don't have the separation of duties so to speak, like you would say, in an audit process where the person that's doing the work is not the person that's paying the invoice for them all.

And I think that's where I think companies are falling down, especially where they're trying to do it themselves and then not ... you can't sometimes see your own work. You need someone else with a fresh pair of eyes to perhaps look at it. And it's an unfortunate thing, I think that you will find in time that no one's going to know that these things have happened until there's a reason to. That's how we've discovered this in this particular instance where my colleague was telling me. The only reason he knew is because something had happened and they had to refer right to that by-law in their consolidated set and it wasn't there. Had they not had the need to refer that by-law in this instance, they wouldn't have known that it was actually omitted from the consolidated set of by-laws.

**Amanda Farmer:** Yes, I do agree with you. It is a more complex task than it looks and I think it's very easy to slip into that trap of saying, "It's just a typing exercise and I'm just copy pasting or whatever it is." We do the consolidations within my office and we do it as a tracing exercise. We look at all the past dealings. We make sure we can track the repeals, the amendments, through the dealings and then put together the correct bundle and I love that concept Reena, of having a double check process, sending it off to the strata manager, the lawyer has looked at it, the strata manager has looked at it, the committee has looked at it. I think that is just so important and you're right, an excellent way to pick up any errors. And certainly having a professional third party do the job for you, you mentioned PI insurance, well indeed, you've got someone to blame. I always say, you hire a lawyer, you've got someone to blame. You don't want to be the one who has explained to your committee.

**Reena Van Aalst:** I like to say, someone to sue.

**Amanda Farmer:** Someone to sue. Great, thanks. I was being friendly.

**Reena Van Aalst:** I know.

**Amanda Farmer:** You do not want to be the strata manager that has to explain to your committee, "Oops, sorry. We lost lot 3 exclusive use by-law because my assistant didn't type up the document correctly."

As far as I'm aware, there is no other process within LRS to correct these mistakes. I have communicated with them a couple of times and the answer that I keep getting is, "No, we need a meeting. We need a special resolution." There's no slip rule as there would be in a court where there's some kind of mistake in a judgment or an order. There is no avenue for that. I think there should be, and we may see that down the track. I am sure we are not the only ones who are experiencing and our clients are not the only ones experiencing these frustrations.

**Reena Van Aalst:** Yes, well I think sometimes Amanda, when some by-laws are omitted, it's easier then to add another by-law or amend something and then reconsolidate and create the error. But I think, for example, such as exclusive use, I mean that would normally impact on the value of a lot.

**Amanda Farmer:** Indeed. Yes.

**Reena Van Aalst:** So I think that in your example, the consequences of such an omission are far more reaching in terms of financial impact than just a few words missing or a by-law about some behavioral aspect of the management of the strata scheme.

**Amanda Farmer:** For sure. Yes, we'd love to hear from you. If you've experienced this problem, a strata manager, committee member, do feel free to drop us a line.

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**Amanda Farmer:** We do have some avenues to communicate with our policymakers and the more stories that we can gather when we have these challenges, the more powerful those approaches can be. So don't hesitate to drop me an email. You know where to find me. Let's shift gears and move into your win for this week Reena.

**Reena Van Aalst:** Well, this is a very interesting case, Amanda, because this is a dispute with a contractor that we had. So initially the contractor came to us with their own contract and he wanted 50% deposit. And the first thing I said was, "No." Like the home building act, this is a residential building and the home building act stipulates that it's only 10%. So he should invoice for 10%. And I recall our accounts person telling me even the ABN had one digit missing. Anyway, so I pay the 10% and of course the work doesn't commence on time. There's delays and all of the reasons that we didn't accept another quote, was because he said he could do it straight away and the other companies said they couldn't do it straight away.

So in a sense the committee went to this contractor on the basis that he was able to complete the work in a much more timely manner than another contractor that I had already recommended, whom I had used previously on my building, had been very happy with the standard of their work. Anyway, so not even two weeks after the work is completed, Amanda, he's been chasing the invoices every day or every second day. And a lot of companies now use software that generates automatic reminders for invoices, so it's actually not coming from an individual person, it's a system just generating a reminder.

And at that time, because the committee didn't have much confidence in the contractor because of the delays and other things that had happened and the fact that he had asked for 50% deposit, which of course was a red flag to them, that he didn't know that it could only be 10% I actually asked the company that I had initially recommended that couldn't do the work in a timely manner, to come and inspect the work that this contractor had done, before they paid him. And we're talking about quite a bit of money.

So they finally got the report from the second contractor and he said the work had been done properly. So I paid the invoice, basically I think two weeks after he said it was due and the day before he had already lodged a claim at NCAT and I just want to raise this with our listeners. It's actually with NCAT and it's the consumer and commercial division.

And the other issue that this person didn't understand was the law of agency, which I tried to explain to him. So basically it was our company on behalf of the strata plan. And when I said to him at the time when he was asking for his money on a daily basis, I said, "Unfortunately I don't have the authority to release the funds." Which I didn't. And then he said to me, "Well that's your problem?" "No, it's actually your problem." So when he went to NCAT he obviously put our company and basically saying, and the reason that he said the dispute details are, "Despite repeated attempts to be paid for completed works, the Strata company has refused to release the funds."

So he saw it as if we were refusing to pay him as opposed to the entity that had engaged him, not allowing us as agent to release the funds. So I think the problem is that a lot of companies, I think when we take over many buildings, the invoice is always sent to the strata company, not the strata scheme or the entity that's actually being built. This is something that we always have to correct because the law of agency is that we are acting on behalf of the strata scheme or the BMC or the community association, so that when you are being sued, in this case as we were, he still didn't get it right.

Then the site of the building work in his application was actually his address rather than the address of the actual building. So we kept on saying to him, "You've been paid, will you withdraw it?" And he just ignored me and sent me this quite rude email, which was ignored. And so I went to the committee, I said, "Well, I'll still have to turn up tomorrow because unfortunately if he doesn't withdraw it, it's still on the list. You have to turn up." So the afternoon before the next morning's hearing, he actually had withdrawn it and he said to the property manager, "You guys are such nice people. You're really nice, it's that strata manager that didn't want to release the money."

**Amanda Farmer:** It's all your fault.

**Reena Van Aalst:** Oh yes. I'm just like, "Yes, you guys threw me under the bus. You didn't tell him it was us that told not to release the money."

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**Amanda Farmer:** Yes, I would have liked to see him try to explain to the tribunal what his legal relationship was with you, Strata Central and what legal cause of action he had against you, Strata Central, because you do not have a contract with him. And from what I've just heard-

**Reena Van Aalst:** Oh but Amanda, he said to me, "I signed the contract."

**Amanda Farmer:** Oh because you signed it.

**Reena Van Aalst:** Because I signed it. That's what he said.

**Amanda Farmer:** Okay. Yes. See they come up with all sorts of things and we have to be prepared for that. And as strata managers be prepared for when this happens and I know Reena, probably in your career it's been a few times now that you've had to have that same conversation and it's important to have the right words to be able to explain, to educate others about the law of agency. I am an agent. I act on instructions only and I have no legal relationship with you, the contractor so you can go for your life. Good luck.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** Excellent. Good one to share. I am sharing a case this week in the category of my win, not my case, but certainly I think a case that takes us one more step towards understanding what the limits of our powers are when it comes to regulating smoking inside our strata buildings. So a good case to have a look at it is called gisks, G-I-S-K-S and the owners of a strata plan number 6743. As always, I will put a link to the case in the show notes.

It was an application brought by a lot owner against both an owners corporation and another lot owner in relation to smoke drift that was occurring from one lot to another. And the lot owner suffering said, "This is a nuisance under section 153 of our act." And ultimately the tribunal agreed and said, "Yes, this type of smoke drift does constitute a nuisance and orders were made for the occupant of the other lot to limit their smoking. It wasn't to stop completely, they were ordered not to smoke on the balcony or in the bedrooms because that was a bit too close to the other lot and to close all exterior doors, bedroom windows and the bathroom window when smoking inside the lot.

Now orders were also sought against the owners corporation. However, when you read the decision, the member found that there was no by-law dealing with smoking and as a result the member thought the owners corporation didn't actually have an obligation to do anything about the smoking. It was more a matter between the two lot owners. And specifically the member said that the owners corporation did not have a duty to make its own application under section 153 of the act in relation to this nuisance. So that's interesting. Interesting for owners corporations who are in a situation where lot owners might be saying, "Hey you have to act." But the lot owner themselves has the right to approach the tribunal.

**Amanda Farmer:** So no orders made against the owners corporation in that case. But definitely a clear recognition on the part of our tribunal that smoking constitutes a nuisance under that section of the act. And there were some earlier tribunal cases cited as well where similar orders had been made about smoking being a nuisance. So we're developing a bit of a body of case law here, Reena, which I think is helpful.

**Reena Van Aalst:** Yes, I think so too, Amanda. It's funny, I actually had last week an agent write to me because the tenant had written to the agent saying that it was smoking, from the person on the ground floor apartments. And she said, "Can you do something about this?" And I said, "Yes, but which ground floor apartment? You need to be a bit more specific. Because it's very hard to take any action or even consider any action if you don't know who the actual lot that is offending." Anyway. So then she wrote back to the tenant, the tenant wrote back, "It's the woman in unit, whatever." Which I know quite well. I know she doesn't smoke.

**Reena Van Aalst:** But anyway, I thought, "Okay, so I'll forward it to her." And she said, "I don't smoke." Which is what I knew.

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**Reena Van Aalst:** Anyway and then the tenant said, "Oh, if this continues, I'm going to terminate my lease." So I think she was using that as a way and I'm not sure Amanda, if this has been tested. But yes, the smoke drifting was basically becoming an issue in terms of leases and whether or not a tenant is able to enforce their rights.

But even though there was no by-law, they don't have a no smoking by-law in this particular building either, Amanda, so I wonder how that would work.

**Amanda Farmer:** We definitely do have a case where a tenant has sued a landlord for failure to provide a safe, healthy environment because of a neighbor that was smoking and the smoke drift was entering and this was an apartment building and the landlord failed to do anything. And that's a case where the tribunal said there were a few things the landlord could have done, including approaching the owners corporation and requesting the intervention of the owners corporation, either on the grounds of nuisance or by developing a by-law. So indeed that tenant may well have a claim against their landlord.

**Reena Van Aalst:** Well through the agent who is acting on behalf of the landlord, they have come to us, Amanda, but I mean the information that we've been given is incorrect. So we'd love to help them, but we need to know exactly. And it's very easy not to know with smoke drift. I mean, you may think it's the apartment way below you, but it could be one on the side that's drifting. I mean, who knows. So sometimes smoke drift is not as apparent as people might think it is.

**Amanda Farmer:** Yes. Well, certainly in this gisks case, the tribunal member was quite clear that the strata committee was not responsible for enforcing the nuisance provisions of the legislation, section 153. However, the member did say that having read the reasons in the decision, the owners corporation would be well placed to change its views about smoke drift and penetration because this owners corporation had a view that it wasn't that bad and it wasn't really causing a problem and they had said that to the lot owner, but the member said, "Having read this decision, the owners corporation should have a look at that, change its views about smoke drift being a hazard or a nuisance." Didn't go that further step to say, "And introduce a by-law to deal with it." But I think that's what the member was hinting at there. Being able to regulate this issue for the benefit of the building and the occupants as a whole. I think that's going to become more often the conservative approach for buildings where, this is raised as a problem by occupants.

**Reena Van Aalst:** Yes, I agree with you Amanda. Totally. Because people may also have asthma or other respiratory conditions, so what, someone like me who doesn't have that issue may think that amount of smoke is not so bad, but someone who has asthma or any respiratory condition, will find a very smaller, the lower threshold of acceptability of smoke drifts.

**Amanda Farmer:** Absolutely, and it's a principle of our law that we take people as we find them. So yes, those kinds of conditions do need to be taken into account. So a link to that one in the show notes, it's a relatively short, go and have a little look at that case. Wow. We've had a jam packed episode today, haven't we Reena? It's like that some weeks.

**Reena Van Aalst:** Sure have, Amanda.

**Amanda Farmer:** I'll look forward to chatting to you again soon.

**Reena Van Aalst:** See you next time.

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