

Publication Date: 17 December 2019
**YSP Podcast Transcript: Episode 192. Smoking nuisance | committee waives
interest on levies | defamation**

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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. Gearing up for Christmas. Are you taking a break, Reena?

Reena Van Aalst: Yes, definitely. Even though I've been on a race and holiday, our office is going to close for about 2 and a half weeks, so we always look forward to that summer break.

Amanda Farmer: Excellent. Yes, we close for about 3 weeks. I do like to see professionals in this sector taking a break, closing down. It's a quiet time of the year for us, say for any plumbing, electrical emergencies that strata managers may have. But important to have a break after a busy year full of wins and challenges and that is of course what we're here today to talk about. Let's kick off with your challenge for this week, Reena.

Reena Van Aalst: Well, I think I keep prefacing all my challenges with interest, Amanda. But this is probably a fairly common issue that occurs in buildings where people like to smoke, either in their courtyard or on the balcony. And a particular scheme: a tenant has just moved in onto the top floor of a, I think it's this 5 story building. And they're complaining that there is smoking from the courtyard. And at first I said, "Well, can you identify which courtyard it is? Which bottom floor apartment?" Because obviously you need to make sure that you write to the correct person if they are smoking. So she gave me an apartment number and then I wrote to that person who I know who's on the strata committee and she said, "Well I don't smoke". So I went back to her and said to her, Well I have gone to the person that you identified as the person that's smoking. And they've advised me that they don't smoke.

So then she must've taken some time and given me another apartment number. So before I made the same mistake again, by contacting that person, I went back to the strata committee and just said, "Do any of you know if this person smokes?" And they said, "Yes, this person has lived in the building for 15 years and has been smoking in their courtyard". Anyway, so okay I suggest, we try to write to that person, and they said to me, "Well, first of all, there's no bylaw that says people can't smoke". And I said, "Yes, there is now as tremendous would be aware of in the new model bylaws, there are new no smoking bylaws, which would have to be adopted if they were to be enforced.

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: But the other thing that they said was that the woman's actually that's complaining, it's on the other side of the building. So there's no way that smoke would be going over the roof and over on onto the other side. Anyway, so this woman, I actually wrote to her and said, "This is what we've been advised at the smoke now. It's highly unlikely it's coming from that particular apartment. It could be coming from the neighbouring development" and then she in manner produces a doctor's certificate to say that I think she's trying to get out of her lease as well, so I think she's just trying to use any excuse.

So when I was doing some research for a recent webinar that I did on the REI strata chapter committee, I was looking at bylaws and I found that even if you don't have the no smoking bylaw, there is a new section 153 in the act, which says owners, occupiers or other persons not to create nuisance.



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Reena Van Aalst: So it talks about no one affecting another person or the use of common property that you can't affect someone's use or enjoyment of a lot or permit the lot to be used or enjoyed in a manner or for a purpose that causes a nuisance or a hazard to the occupier of any other lot.

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: Down the bottom in that section it says "Note: depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot". So in your experience, Amanda, have you come across this section 153 and have you had to use it or, in our circumstance where this person is complaining about smoke, which is not coming from our property but it's coming from another property, have you sort of had any experience with someone trying to use a vehicle like smoking in a sense to be able to say, "Well I'm being affected by someone in the building".

Amanda Farmer: Mmm, yes, definitely. And this is becoming more and more common. We are seeing some cases come through our tribunal now that are directly on this point. The most recent one we did mention it, I think back in episode 182: the G.I.S.K.S case, G. I. S. K. S. This was a tribunal case from the New South Wales tribunal, and the tribunal referred directly to section 153, the nuisance provision, and said that smoke drift coming from 1 lot onto a neighbouring lot is indeed a nuisance because it is interfering with that other person's use and enjoyment of their lot. So that's a very recent case. I think it was about September coming out of our tribunal. This was a building that did not have a no smoking bylaw or a bylaw that dealt with the issue, but the lot owner was the applicant in that case and actually brought proceedings against the owners corporation, requiring them to do something about the nuisance.

Reena Van Aalst: So Amanda, in this case where we're talking about someone who's trying to allege that the smoke is coming from another lot, even though it is highly unlikely that it is affecting her because it's on the other side of the building, how should the owners corporation deal with that type of scenario?

Amanda Farmer: Well, in order to establish the nuisance, she does need to show that it is the smoke from that lot that she's complaining about that is affecting her peaceful enjoyment. It sounds like she may have some trouble doing that if she is indeed on the other side of the building.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: The owners corporation doesn't have to make an application against the owner that's been complained about, doesn't have to, even if it did have a bylaw in force, the bylaw against the owner. If the owners corporation feels that there's not enough evidence, there isn't a nuisance of the type complained about, then it's within the discretion of the strata committee of course acting at all times in good faith and in the best interests of the building as a whole to decide that it's not going to do anything and that doesn't stop this owner who is apparently being affected from commencing her own proceedings in the tribunal and that's not unusual in smoking cases that we see. It's 1 lot owner bringing an application against another lot owner and the owners corporation stepping aside and saying, "Look, we'll be bound by whatever orders the tribunal makes so far as they affect us but we don't, we don't have a dog in this fight if you like".

Reena Van Aalst: So Amanda, but in this scenario, the person who's complaining is a tenant, so could that tenant still make their own application? Would that be against the owners corporation? Because she's trying to sort of, I think, involve the owners cooperation and she's actually even directly writing to me and the agent's still being copied in but I'm trying to distance myself, non-direct communication with her. But as a tenant, what rights would she have in terms of taking any action because I think she's trying to perhaps get out of her lease?

Amanda Farmer: Yes, she has the same rights as an owner to commence proceedings in the tribunal. The Strata Schemes Management Act says that interested persons can commence proceedings and the definition of interested persons includes tenants, residents in lots. It is not just limited to owners.

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Amanda Farmer: The issue about the lease is very interesting because we have had a case in New South Wales where a landlord has been fined by the tenancy tribunal separate from our strata division-

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: ...by the tenancy tribunal for failing to provide a healthy living environment for their tenant because that tenant was suffering smoke drift from a neighbouring lot in a strata scheme, and that is the case of Bhandari and Laming. I won't spell that out for you, but I'll put a link to the case in the show notes for the episode. It's a 2015 tribunal case and that landlord was fined \$11,000 for failing to do anything about a chain-smoking neighbour.

Reena Van Aalst: Mm-hmm (affirmative) This is quite interesting, Amanda, because she's bringing the owners corporation into it rather than the lot owner. I know that tenants do have rights, but would her application, be against the owners corporation, her landlord or the other person that's actually smoking who's also a tenant apparently as well. So I think it's making it really complicated.

Amanda Farmer: No, well not really in my view, she could list all of those parties as respondents to her application. The owners corporation, the allegedly-smoking neighbour and her landlord. The difficulty with the landlord is that it's probably an action that should be heard in a different division-

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: ...of the tribunals. So there's some procedural issues there, but that would be quite common that you would see the owners corporation drawn into an application that also involves another lot owner.

Reena Van Aalst: Yes. Well thanks for that, Amanda. It's quite complex when there's so many different parties that could be involved in this scenario.

Amanda Farmer: Yes, and it might be that the owners corporation makes clear that they have considered the issue very carefully, they have investigated the complaint and they have decided that they're not going to take any action at this point in time. I think if that's the decision, it's important to communicate that to the tenant and perhaps even say it's a matter for you to seek your own advice if you wanted to take the matter further. And if she did go and do that, she might find that she could make an application to the tribunal involving the other owner may or may not involve the owners corporation and may or may not make an application that's relevant to her lease and her rights under her lease. But yes, there are a few avenues there for her and we are definitely seeing more cases come out of our tribunal where it is found that smoking is indeed a nuisance under section 153 of our act. So thank you for that one. It's always good to refresh on those regular issues that we know our committee members, our strata managers, and residents are facing.

The challenge that I am going to jump in to today is one of terminology and Reena, we have spoken about this particular challenge off air. It's one that we were talking through together. It relates to an owners corporation's right to waive interest on overdue levies. And you and I were talking about a building where a lot owner had requested a payment plan and the committee had asked how does that work when it comes to interest? If we decided that we didn't want to charge interest, for example, for a short period of time, 6 months or so to give this owner a bit of a break, how do we go about doing that? And you and I had a look at section 85-

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: ...in our 2015 act in New South Wales and we read subsection 3 which says an owners corporation may by resolution determine either generally or in a particular case that a contribution is to bear no interest and we asked each other what does by resolution mean?

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Amanda Farmer: Does it mean the owners corporation has to have a general meeting and pass a resolution? Does it mean the strata committee can pass that resolution because we have another section in our act that says that a decision of the strata committee is a decision of the owners corporation?

Now I took the view that the strata committee could make that decision because the section did not specify that the resolution had to be a resolution at a general meeting and I took some guidance from the balance of section 85 which has different wording. If you look at subsection 4, it talks about an owners corporation by resolution at a general meeting.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: It says those words, determining that a person may pay 10% less of a contribution if they pay before the due date. So, in other parts of section 85 the terminology by resolution at a general meeting is used. But in subsection 3 when we're talking about waiving interest on contributions, the wording simply says by resolution, not by resolution at a general meeting. So I came to the conclusion that the strata committee could make that resolution. Reena, I know you had some experience with the previous-

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: ...1996 version of the act.

Reena Van Aalst: Yes, so previously Amanda, the legislation mentioned that could only be done by special resolution and general meeting to actually waive interest. So when you look at that section, I think that they really made a mistake because, well maybe perhaps they didn't mean to. If you're giving 10% off or letting someone not pay 10% more, it seems to me that they sort of different sides of the same coin.

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: And I think perhaps it might have been an omission, or even not an omission, but perhaps-

Amanda Farmer: A drafting error, we call it.

Reena Van Aalst: Yes, drafting error. But also too, I think it is a good idea to give these strata committee flexibility because sometimes there are cases where people are suffering hardship and they may not want everyone to know that, all the owners to know, that they're suffering hardship. So allowing the strata committee to have that discretion I think is a good idea and even if it was a drafting error.

Amanda Farmer: Yes.

Reena Van Aalst: So I think it's an important one. I think for a lot of us who are used to the old act, just assuming quickly that it does mean general meeting resolution, but when you look at the terminology, it is quite clear that the wording by general meeting is used in that section as opposed to by resolution for the interest waiving section.

Amanda Farmer: And it might be perhaps a recognition that people will be asking the strata committee after the levy has been struck after perhaps the notice has been issued and they've received it in their inbox and they've said, "Oh, okay, this is a large amount; I don't think I'm going to be able to pay this. I'm going to ask for some leniency when it comes to interest". And it might be section 85 recognising that we shouldn't have to send all owners back to a general meeting that have just come from a general meeting where the levies being struck. Why does everybody have to go back to a general meeting to make that decision?

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Amanda Farmer: It's different to a situation where you may be deciding as a community that people who pay before the due date should be given a reward and pay 10% less and that's a decision that's made before the levy has struck and before the notice is issued because of course, logically-

Reena Van Aalst: Yes.

Amanda Farmer: ...you're giving them the discount before the due date. That may be if it's not a drafting error, it might be a very carefully considered intentional piece of drafting and for that reason. So that's my view.

Do contact me as I know many of you do if you don't agree or if you do agree, I'd love to hear from you too. Let me know your thoughts.

Reena Van Aalst: Actually, one of the considerations that I was thinking about when the strata committee may give someone 10% interest saving if they're not paying on time, Amanda, is how does that affect the other people perhaps that may not have been able to pay their levies on time-

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: ...and have paid interest and usually reminder fees that have been sent by the strata managing agent? In a sense, sometimes I think that if it's not documented then other people perhaps don't know that that avenue is available to them. So, sometimes I can see that some people perhaps can afford it.

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: Well, okay. I will, I'll pay 10% cause it's cheaper than putting it on my credit card. While other people would come and say I can't pay the interest. I think there are issues of, I don't know how it would be best described, but it's not a publicised thing that people can come to the strata committee and ask for interest to be waived and I think perhaps maybe why talking about it today, more owners who are in financial hardship...

I think the other thing also is sometimes trying to not test the veracity of what people are saying, but there are people that perhaps may use it as a means to achieve again, that they would rather have their money somewhere else rather than paying it off and paying interest.

Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: So, I suppose it's one of those difficult things where you do have to assess it on a case by case basis and look at the history of their payment. Because if some people have been paying all the time on time and then they come across a time when they are aren't able to, that's probably one consideration. But there are some people that we have that have come to us that have always been in a arrears, never paid on time, always pay it before it gets referred to legal action. So I think it makes those decisions by the strata committee probably more important than just looking at the whole general interest charging component when people are suffering hardship.

Amanda Farmer: Yes, it is a very difficult decision to make. And as a committee member myself, I have been involved in making those decisions. Of course, it is always open to the committee to say, "Hey, we're not going to make this decision on our own; we are actually going to convene a general meeting" and ask the owners to decide what they would like to do and the majority carries the day. So that is always an option for a confused committee, a committee that either feels that he can't make the decision. Maybe you read the legislation differently to me or it's a difficult decision and there are arguments on both sides. Take it to a general meeting and can't really be criticised for doing that. If the majority of owners present and voting at that general meeting say, "No, we don't agree that interest should be waived", then that's the decision that the majority have made.

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Reena Van Aalst: Yes, that sounds good, Amanda.

Amanda Farmer: Okay, let's head over to your win for this week, Reena.

Reena Van Aalst: Yes, so I actually had a scheme approach me where the strata managing agent had resigned and they had no strata manager and obviously they were approaching me for a proposal and there was a bit of angst between the owners for various reasons, which is probably not an uncommon thing in strata. A couple of people wanted 1 manager put forward, another few owners want another manager put forward and the problem was is that the strata manager had resigned and I want to bring to the attention of our listeners this obviously section 50 that we have referred to, Amanda. So previously, managing agent contracts would come to an end at the end of their term but then keep rolling on for a month to month period until they were terminated or a new agreement was entered into.

But what's happened now with the legislation, there's quite a number of steps that we had discussed previously under section 50 where as you come 3 months before the term ends, your agent must give notice. They can extend it by 3 months of specific terms up to the next AGM, etc etc. Now in this case, I'm not really aware of why their agent resigned. I think now I know why but at the end of it they did decide to appoint our company, which was a good outcome. But I think for our listeners, I think people need to remember this whole thing of section 50 where, is their agent giving them 3 months notice before the term expires?

Because what's happening is that, I don't believe this was a case in this particular instance, Amanda, and now they've got I think a month now. They've got bills to pay that haven't been paid. They obviously need someone to help them draft an agenda and comply with, with a timetable. Because it's the first time they sent an agenda, it wasn't in the right time table. So I had to say "You know, 70 days, what that means now". Because the other owner didn't, so we haven't given a sufficient time. You sent the agenda on this date, the meetings on this date, this doesn't comply with the act, which I said that's correct. Yes. So there are a lot of legal areas that I think are affecting owners where there are owners that aren't happy with their agent or vice versa, but I think the section probably has caused a few problems because in a sense, who's going to go to the tribunal and say, "Well you know the agent, that we're not happy with, didn't give us 3 months notice that it was going to terminate".

Amanda Farmer: Yes. Yes. You can see they intent behind that requirement. It's in section 50 subsection 6 that a strata managing agent must give the owners corporation written notice of the end of a term of appointment at least 3 months before the end of the term.

You can see how that period has been carefully set to allow the committee to get other quotes if they'd like from strata managing agents, ask their current strata manager to forward their proposed new agreement to think about what they're going to do at the end of that term. But I have to say, Reena, I agree with you.

I think this is being overlooked. I don't think I've ever seen one of these notices and I do attend a number of general meetings for lot owner clients where strata managers are being reappointed, new strata managing agents are being proposed and it does often come as a surprise to the owners in the room: Oh, the agreement is up. Oh.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: If I had known that I would have gone and got some other quotes, we would've had a tender process. "Strata committee, why didn't you do that?" And the strata committee says, "Oh, well it's sort of crept up on us". And to me that means that the strata manager is not complying with this requirement of section 50.

Reena Van Aalst: Well, we find it funny that at quite a lot, Amanda, from other agents that we're taking schemes from. But the other thing that I think perhaps, maybe I've looked also is that subsection 6 also says, at least 3 months before the end of the term of appointment and at least 1 month before the end of each extension of a term permitted. So even when you've got the 3 months, you've still got to then 1 month before the 3 month expires-

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Amanda Farmer: Mm-hmm (affirmative).

Reena Van Aalst: ...you've still got to then let them know.

Amanda Farmer: Yes. So what we're talking about there is the right of the strata committee to resolve, to extend the term for 3 month periods.

Reena Van Aalst: Up to the next AGM.

Amanda Farmer: Only up to the next AGM. That's right.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: Just to give you some extra time to convene that AGM and perhaps to get all the quotes if that's what you want to do. But yes, very good point. The managing agent still has to give that notice 1 month before the expiry of an extension term.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: Well, always good to hear what's going on on the ground there and how our legislation is being applied. It's been a few years now. 3 years, 3 years now.

Reena Van Aalst: Yes.

Amanda Farmer: Happy anniversary our 2015 act and still getting used to it. That's for sure.

Reena Van Aalst: Yes.

Amanda Farmer: Okay. I am bringing a case to the table for my win this week and as I often do talk about cases in the category of wins, it is not necessarily because I agree with the outcome or I support the reasoning in the case. It is because I think the more cases we have looking at our legislation and applying it to real life situations, the more helpful it is. So this case is particularly interesting because it is a court of appeal case and it relates to defamation.

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: Now, you may remember way back in episode 167 Reena and I spoke about the Raynor and Murray case in New South Wales. Came out of the district court and it got a lot of media publicity. At the time, a resident was ordered to pay \$130,000 in damages to a chairperson because of what were found to be defamatory emails.

Reena Van Aalst: Mm-hmm (affirmative). I remember that, Amanda.

Amanda Farmer: Yes. So go back and listen to 167 if you like, but here's the update. The resident appealed that decision to the New South Wales court of appeal and the court of appeal has overturned it.

Amanda Farmer: In a judgment with fairly detailed reasons. And I will post the link to that in our show notes. The court of appeal has found that the damages award was manifestly excessive. Damages should have been no more than \$25,000, nowhere near 130.

Reena Van Aalst: Mm-hmm (affirmative).

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Amanda Farmer: There was no malice in the emails the court found and the district court judge really got it wrong in assessing the damages. So that decision has been overturned and the resident has been awarded her legal costs.

Reena Van Aalst: Ah, that's amazing.

Amanda Farmer: Mm-hmm (affirmative). We don't get too many of these cases reported when it comes to defamation in strata. We don't have too many that go that far. So an interesting one to have on our books and when we spoke back in episode 167 Reena, we were talking about the need to be very careful-

Reena Van Aalst: Mm-hmm (affirmative).

Amanda Farmer: ...when you are communicating full stop. But communicating by email, communicating in writing, sometimes in the heat of the moment forgetting that these things might be copied to other residents, which these particular emails were copied to 16 other residents and that they will be on the books and records of the owners corporation.

You may not necessarily be protected by defenses like qualified privilege, which was discussed in this case and you may be exposed. So the fact that this case has been overturned essentially on the basis that the damages award was far too high, doesn't mean we should be any less alert to these issues, I think. So that is the case of Murray and Raynor. That decision came out on the 13th of November from our New South Wales court of appeal. I'll pop the link in the show notes to this episode, which you can always access over at yourstrataproperty.com.au/podcasts. Look for this episode up at the top of the list, and if you're listening to this prior to the end of the year, happy holidays, everyone.

Reena Van Aalst: Yes. Try and have a good rest as well.

Amanda Farmer: Indeed. See you in 2020.

Reena Van Aalst: Okay, bye Amanda.

Amanda Farmer: Bye.

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. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

