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YSP Podcast Transcript: Episode 217. How The Horizon upheld its pet ban - with
David Edwards

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite sized information from an experienced and authoritative source. To access previous episodes and useful strata tips go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome to this week's episode of the podcast. I'm Amanda Farmer, your podcast host and I am here each week helping you to demystify the legal complexities of apartment living, wherever you are around Australia. This week I am bringing you David Edwards. David is a founding partner of DEA Lawyers, a specialist strata title and litigation legal practice in Sydney. David has been practicing law for over 21 years. He practices mainly in the areas of commercial and property litigation, with a particular emphasis on disputes arising in the context of strata and community title schemes. David has been involved in many of the leading cases in the New South Wales Court of Appeal and the Supreme Court, including 2 of the most important cases on by-laws decided by the New South Wales Court of Appeal and that is White versus Betalli as well as The Owners of Strata Plan No 3397 versus Tate.

David can now add to that list a leading case from the New South Wales Civil and Administrative Tribunal Appeals Panel, that is Strata Plan 58068 v Cooper. That is the case I invited David to share with us today on the podcast, as you may have heard it is a case about by-laws banning pets in New South Wales strata schemes and I will leave the rest for David to explain to you, as he does in this upcoming interview.

Before we head over there, I want to let you know that I will be running a webinar midday this Thursday the 11th of June. This webinar is brought to you by Blacktown City Council and it is fitting that I mention it to you today because it is a webinar all about by-laws. How can you use by-laws to combat bad behaviour in your building and restore peace to your strata community. Now I regularly run webinars about by-laws and many of you would have previously attended a by-law webinar of mine. Even if you have attended before, I do urge you to tune in this Thursday for what will be an update. I will be delving a little deeper into the issues that David is about to highlight for you in this upcoming chat, particularly around what it is that makes a by-law in New South Wales harsh, unconscionable or oppressive. We've received some really important guidance in the Cooper case, which is not only relevant to by-laws dealing with pets, but all by-laws in our New South Wales strata schemes. So join me on the webinar on Thursday.

You do need to register. Head over to yourstrataproperty.com.au/webinar. You'll be directed to Blacktown Council's registration page. Sign on up and you'll be sent your unique access link for the webinar. I hope to see you online on Thursday.

Now I will take you over to my chat with David Edwards.

David Edwards, welcome to the show.

David Edwards: Hi Amanda. Good to be with you.

Amanda Farmer: It is a pleasure to have you here with us on the show. I did give our listeners a bit of a heads up last week that we would be chatting and I have also mentioned your impending appearance over on our Facebook page, so I know we have listeners out there who are very keen to hear from you, all about the excitement that you've had over in the New South Wales Civil and Administrative Tribunal, particularly the Appeal Panel. A couple of wins for you coming out of that place last week David.

David Edwards: Yes, that's right Amanda. Decision in relation to the Horizon building in Sydney. It's been in the papers a fair bit since the earlier decision was made in November last year and so there's been a bit of press coverage in relation to it, and the decision's been eagerly anticipated and the Appeal Panel delivered the decision which provides much clarity for strata owners and Owners Corporations in New South Wales.

Amanda Farmer: Yes, you are talking about The Owners Strata Plan Number 58068 versus Cooper. I will put a link to the

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decision in the show notes for this episode. That was the case in which you David acted for the successful owners corporation on appeal. Let's kick this off David, by setting out if you don't mind, the facts of this case. What was it all about?

David Edwards: Well look, it was basically about an owner's right to keep a dog in their lot in the building. As I mentioned previously the building is the Horizon building in Darlinghurst, an iconic large building in central Sydney. When that Strata Scheme was registered back in 1998 there was a by-law that was in existence and registered with the strata plan that was in effect the old model by-law C that prohibited an owner or occupier of a lot from keeping an animal in the lot or keeping it on the common property. Now the Coopers purchased their lot and have resided in their lot since July 2015. Before they purchased the lot they were aware of the existence of the by-law that prevented the keeping of animals and initially the Coopers kept their dog away from the building and it lived with Mrs Cooper's sister for a period of time.

The Coopers then requisitioned a motion to be considered at an extraordinary general meeting to in effect repeal the existing by-law that prevented the keeping of animals and to make a new by-law that would permit animals to be kept with the written consent of the owners corporation. Now those motions were defeated by 75% of owners voting against those motions. Then about 6 months after the Coopers purchased and moved into their lot, after those motions were defeated, they then brought the dog into the building and kept it in their lot. The dog was initially concealed for about 2 and a half years in a bag when entering and leaving the building.

Fast forward a couple of years, Coopers then tried again to repeal the existing by-law and to make a new by-law in the same terms as previously and that again was defeated by 75% of owners voting against. Then in about August 2018 Mrs Cooper started walking the dog in and out of the building on a lead traveling across the common property because it was no longer possible to keep the dog in a back pack because it had suffered an injury.

Then in October 2018 Mrs Cooper's lawyers advised the owners corporation that they considered the by-law was harsh, unconscionable and oppressive and was invalid and if the owners corporation took any steps to enforce the by-law then they would make an application to seek to invalidate the by-law on those grounds.

There was then yet another attempt at the end of December 2018 to repeal the by-law and replace it with a new by-law. This time that was defeated by 89% of unit entitlements voting against that motion. Then the owners corporation essentially issued some notices to comply and when they weren't complied with, they commenced action in the Tribunal seeking an order for a pecuniary penalty, but also more importantly, for an order for removal of the dog from the building. The Coopers filed their own cross-application whereby they were seeking to invalidate the by-law under this new provision which means that a by-law can't be harsh, unconscionable and oppressive.

Amanda Farmer: Can I just stop you there David? I just want to get an idea of the timing. When was it that the owners corporation filed its application for a pecuniary penalty?

David Edwards: That was in April 2019.

Amanda Farmer: Okay, and at the same time, were they seeking an order for removal?

David Edwards: Yes, in the same application. Then, I think about 2 months thereafter the Coopers filed their cross-application and then the both applications were essentially joined and heard together by the Tribunal about 6 months thereafter, I think in about September last year.

Amanda Farmer: Okay, and what did the Tribunal decide at that time?

David Edwards: In the first instance decision the Tribunal spent much time criticising and critiquing an earlier decision in a well known case of *Yardy*. That was earlier in 2018. Essentially the Tribunal said that that *Yardy* decision it thought was wrong, but the Tribunal applied a different test to what had been applied in *Yardy* and essentially adopted the position that the legislature had a

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intended some movement towards a regime where pets could be kept in buildings and assessed on the merits of a particular pet or particular type of pet. That reasoning seemed to stem from the fact that the parliament changed the model by-laws so that there's now only two options which essentially contemplate animals being kept with approval or otherwise, instead of the third option which was previously that there be a prohibition or a blanket ban on pets.

So, at first instance, the Tribunal found that the Coopers had demonstrated that their dog was a suitable type of dog and had a suitable personality and behaviour that, in effect, made it unpleasant or harsh or unjust or excessive, unconscionable, oppressive for it not to be allowed to keep the animal in the building. Interestingly the Tribunal then said the evidential onus then shifted to the Owners Corporation whereby it needed to put forward evidence of the particular Strata Scheme to demonstrate that the blanket prohibition's not harsh, unconscionable and oppressive and the Tribunal said that the owners corporation hadn't led sufficient evidence to demonstrate that was the case, and therefore the Tribunal invalidated the by-law and the owners corporation's application was unsuccessful and orders were made that permitted the Coopers to keep the dog in the building. The owners corporation then appealed from that decision.

Amanda Farmer: The Appeal Panel found ultimately that the Tribunal got it wrong. Why?

David Edwards: Yes look, that's right. It's a very interesting decision because it's not just related to pets. It really is a decision by the Appeal Panel as to how it will look at by-laws generally and anyone that might challenge a by-law for being harsh, unconscionable and oppressive. It's given owners corporations, owners, lawyers that practice in the space, clear guidance as to what are the circumstances that might give rise to those things happening.

So firstly, the Appeal Panel held that a by-law might be harsh, unconscionable and oppressive in 3 circumstances. One, by its terms. So in other words, by reading the by-law, if reading it, it shows that it's harsh, unconscionable and oppressive, then that will be the case, or alternatively that it imposes an obligation or removes an existing right from an owner. So that may well be harsh, unconscionable and oppressive, or otherwise upon consideration of all of the facts and circumstances of the particular lot owner and the way in which the by-law operates.

So the Appeal Panel then said that the relevant matters to take into account are the terms of the by-law, the history of the by-law, the circumstances in which the by-law came to operate on various owners, including the particular applicant, and having a look at those things, they're the relevant things to determine whether or not the by-law might be harsh, unconscionable and oppressive. Essentially the Tribunal said that the qualities of the dog, the breed of the dog, the benefits of pet ownership, the contention that mental health et cetera benefits by pet ownership, are not sufficient and not relevant matters to take into account. What the Appeal Panel said is the Tribunal failed to consider all of the facts properly. There was a particular focus on those things about the type of dog, the personality of the dog et cetera, which were factors, but they weren't necessarily determinative.

What the Appeal Panel focused on was, that the Coopers chose to purchase a lot in a strata scheme that didn't permit the keeping of animals. They commenced residing in the scheme, knowing that that was the case, and essentially with having notice of those things, and in their particular factual circumstances, then the by-law wasn't harsh, unconscionable and oppressive. There were probably some key takeaways from the decision, without getting too technical or legal, but essentially what the Cooper decision and the Roden decision that were handed down at the same time essentially mean is that a strata community is entitled to make its own rules by way of by-laws, including to prohibit animals, and just because there is a blanket prohibition, that does not in and of itself render a by-law harsh, unconscionable and oppressive.

It was interesting that, because there are arguments about community standards and so on that applied across the community, and what the Appeal Panel said is, if you're looking at community in this context, then the community is the community being the community within the particular strata scheme itself, not the wider or broader community, and it was those owners that make up that community Strata Scheme that are entitled to, in effect exercise democratic rights about how they wished to live in the building. So, I think what's important from the decision is that, essentially we know that when owners are considering buying a particular lot, then they consider factors such as location, size, views, aspect, natural light, storage, lifts, stairs, amenities, but they quite often ignore or pay little attention to the by-laws and what I would say as a consequence of this decision, and it's a follow-on from many

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decisions that the courts have made essentially that they won't really interfere with original by-laws and they'll be reluctant to interfere with other by-laws unless there's a good reason to do so.

But it's very important if you're an owner that are looking to purchase a lot in a strata scheme, that you do check the by-laws, particularly if you own a pet, or you would like to own a pet and keep it in the building. You need to consider the by-laws and consider whether the by-law prohibits that activity, or whether you're allowed to do it with written consent and so on, because it will be unlikely, if you purchase with notice of the by-law, which you always will because the by-laws must be attached to the contract for sale, then you'll have very limited right to have such by-law set aside and to keep your animal in the building.

Amanda Farmer: Am I right that it was quite relevant to the Appeal Panel that the vast majority of owners when this was put to the general meeting a couple of times by Mrs Cooper to change the by-law, the vast majority of owners opposed that change? Am I right that that really fed into establishing I suppose the community standard for the building? Is that how the Tribunal knew that this building had set a standard of no pets and took it into account that way?

David Edwards: Yes look, certainly that was one of the factors that was taken into account and I think that not much weight was placed upon that by the Tribunal at first instance and the Appeal Panel seemed to say that, well when you take into account all of the facts, including the fact that on the last attempt to repeal the by-law and to change the by-law, there were 89% of owners that had voted against changing the status quo. In other words they wanted to keep essentially the same blanket prohibition that had existed for the past 22 years, since 1998 when the building was registered. You can imagine that other owners had purchased into the building. People have all sorts of reasons for buying into buildings, but some of them might have regarded that it was important that the building was pet free and animal free, and they didn't want to live in a community that had pets as part of it. Others might have been apathetic about it, and some might want to keep animals, but it's always been the case in this particular community that no animals have been permitted to be kept in the building.

Amanda Farmer: I'm also interested David in the lapse of time I suppose between it clearly coming to the knowledge of the Owners Corporation that Mrs Cooper was keeping her dog in the apartment, was carrying him across common property. You said that she first brought the dog in, I think around 2015 concealed and then perhaps openly from towards the end of 2018, and then the owners corporation commenced its proceedings, when was that?

David Edwards: In April 2019 after having issued 3 or 4 notices to comply.

Amanda Farmer: Okay. So was there evidence in this case of the dog causing some nuisance or a noise or having some impact on other residents? Was that relevant to the Tribunal, the particular behaviour of this dog?

David Edwards: Look, it wasn't. The Appeal Panel said that they're not relevant factors to take into account and in this case, if they were relevant factors then in effect the Coopers would have the benefit of having not complied with the by-law for a number of years to then rely on that conduct to suggest that the dog wasn't a nuisance and wasn't causing any other issues in the building. There was one incident in the evidence where the dog had urinated in the foyer of the building and I think Mrs Cooper had cleaned that up and the Owners Corporation's cleaners then had to come along and clean that. But essentially though, the type, the breed, the behaviour and so on, really aren't factors that are determinative of whether or not a by-law such as this is harsh, unconscionable and oppressive. Rather, the Tribunal is just looking at the terms of the by-law itself and then the circumstances that applied to the particular strata scheme and the particular lot owner that was making the application.

Amanda Farmer: So important the fact that the by-law was in place from the registration of the strata plan, that the vast majority of owners had decided they did not want to change it, and that the residents who were attempting to invalidate the by-law had been on notice of that definitely since they purchased.

David, we seem to have so much controversy around this issue in New South Wales in particular. From what I see in other states around the country, they don't have the same controversy. What is it about our legislation that is perhaps different from Queensland's, if we take that example, that makes this such a controversy.

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David Edwards: Look, these types of disputes are always emotional. People who have pets have great love for them. They want to be able to keep them and so on, and there are other people that, for whatever reason don't like pets and don't want to live amongst them. So, certainly there's always emotion charged these disputes. In Queensland the situation as I understand it is slightly different because the test up there not only refers to being oppressive, but also unreasonable, and the Appeal Panel in New South Wales said that unreasonableness is not the relevant test when looking at a by-law in New South Wales. It's really just harsh, unconscionable and oppressive. That's a higher burden, or a higher threshold than unreasonable. So, what we see in Queensland quite often is that blanket bans of pets are usually overturned or not upheld by adjudicators up there, and even if there are some behaviour restrictions in by-laws, then quite often they can be overturned as well, if they're held to be unreasonable.

I don't know what it is about New South Wales in particular. I guess the legislature at this stage has taken the position that strata schemes are free to act as a democracy and are entitled to determine their own rules and whether or not they want to allow pets, and all sorts of other use and behaviour et cetera within the buildings. That really has shone through in the legislation. There was some argument in the case about whether that had changed as a result of the new legislation and whether this type of by-law could still be made, but the Appeal Panel has quite clearly said that an owners corporation is still entitled to make these types of by-laws and they're entitled to either make them on registration of the strata plan or an owners corporation can continue to make them thereafter.

Amanda Farmer: Something I have been pondering since reading these decisions and hearing from many listeners and clients also who have been confused by this issue over the last 12 months or so, as we have had the Tribunal take one view, and now shift to another, this concept of unreasonableness. It does appear in our legislation. There is a way for owners who are unhappy with a decision made by their owners corporation at a general meeting, to apply to the Tribunal on the basis the owners corporation is being unreasonable. You'll know David, that arises in the context of renovations often and the failure to approve common property rights by-laws. People want the special privilege to do something to the common property, usually connected to a renovation. They put forward a by-law in a meeting, and the by-law doesn't get passed. Our legislation in New South Wales then says that an owner has the right to apply to the Tribunal for an order making their by-law, on the basis the owners corporation has unreasonably refused to make the by-law.

Now, that concept of unreasonableness as you've explained to us, doesn't apply in the context of by-laws about pets. So, if Mrs Cooper put forward a change to the by-law about pets, saying that pets should be allowed on application, and her fellow owners refused to approve that change, she could not go to the Tribunal and say, "Well, my fellow owners are being unreasonable, and I want the Tribunal to make this by-law." I've been pondering why this difference between alterations to lots, which in my experience as a lawyer can have far more impact, do have quite a lot of impact, that's quite a common complaint that I hear from owners around the building, that they impacted by renovations, noise, renovations not being done properly, common property being damaged. I'm sure you see a lot of the same disputes. I don't see so much complaints about the impact of pets in apartments, I have to say. Noise, nuisance, mess, damage.

Why do we have then, this ability to more easily overrule if you like, the majority when it comes to renovations, but not so when it comes to pets? What are your thoughts on that?

David Edwards: Yes look, its an interesting question and I don't know, as you've identified, there are 2 different tests that apply and in respect of the common property rights by-laws and unreasonableness, there's actually an obligation on the Tribunal to take into account the rights and reasonable expectations of the owner that's seeking the special privilege or the rights and balance that against all other interests of owners in the use and enjoyment of their lots and the common property. So, there's a more heavily prescribed test that gives some guidance as to how those matters might be determined. At the moment I guess the legislature's just decided that it doesn't want to intrude too much into what I'll call management type by-laws as opposed to common property rights by-laws. You can prohibit all sorts of things in strata schemes. You can prohibit smoking and prohibit it from hanging certain blinds and window coverings and there are all sorts of examples of prohibitions where people are allowed or not allowed to do certain things and must behave in a certain way. So that's the state of the legislation at the moment and that's what we've got to work with.

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Amanda Farmer: Yes, it's curious. Do you agree with my view, or is your experience a little bit different as a strata lawyer practicing in New South Wales? Do you see many complaints come across your desk arising from the behaviour of animals in Strata Schemes, the outcomes I like to say, of keeping an animal?

David Edwards: Look I do. I can't say whether it's more or less than other types of complaints, but we certainly act for owners who own pets, and are met with those sort of notice to comply issues and complaints about their pets. We also act for many owners corporations who are having problems with pets in their buildings and trying to work out how to deal with them. I wouldn't say it's more prevalent than other by-law type disputes and enforcement actions, but certainly they are around and there are issues that do cause concern within these communities.

Amanda Farmer: Well anyone new to the podcast will have worked out by now, I imagine, that I do come personally from a pro-pets position, and I say new to the podcast, because if you've been listening for a while you'll know absolutely from what I have broadcast previously, both on this podcast and over on our Facebook page, that I am an animal lover and a pet owner in strata. We do have a dog here in our apartment. So, I try to approach this issue accepting that I may not always succeed, with 2 separate hats. One from the legal point of view and one from the personal point of view. My pondering I suppose about this difference in our legislation, where the Tribunal can take the position of overruling an owners corporation decision because it was unreasonable, and in other situations it cannot, I agree completely that that is a legislative constraint and with my personal pro-pet hat on, I do look forward to some reform in that area.

Is this the final word on this issue from the case law perspective David? What is happening next, if anything in this case for you?

David Edwards: Look, the Coopers may or may not appeal. There is an avenue of appeal to the Supreme Court, but you need leave to appeal on a question of law, so whether or not they avail themselves of that, that remains to be seen. But hopefully otherwise, this is the final word on the issue. We have seen some previous Appeal Panel decisions about other topics where Appeal Panels have decided different things in conflict with earlier Appeal Panel decisions. I suspect that they have had one eye on that here and that's very much why they held back the Roden decision, knowing that this Cooper appeal was pending, and then they've delivered both decisions simultaneously, I think to avoid a conflict situation, so now essentially what you have is 2 decisions decided by the Appeal Panel, by the president and the deputy president, so it's a very strong Appeal Panel, and so I think this has very much clarified the law in this area and owners corporations now need to really have a look at their by-laws and how they're going to deal with this going forward.

As I said before, it's important for owners to understand their rights now, and how they might proceed in terms of animals in their apartment, or purchasing apartments and so on.

Amanda Farmer: Yes, and an excellent point you raised earlier, these are not just cases about pets and pet by-laws. These are very helpful cases about giving us some indication of what it is that makes a by-law harsh, unconscionable or oppressive. New words put into our legislation and as yet only a few cases telling us exactly what those words mean. So, having this guidance from, as you said, a strong Appeal Panel is helpful in many different respects.

You mention there David, the Roden case, the decision that was delivered by the Appeal Panel simultaneous with the Cooper decision. I will put a link to that one in the show notes for this episode as well and the Cooper decision does cross-refer to that one.

Amanda Farmer: There's mention David of penalty proceedings in the Cooper case. Can you just give us a quick explanation of where they now fit in?

David Edwards: Yes look, the Appeal Panel has indicated that it will give the owners corporation the right to seek a remittal of that application to be determined by the Tribunal. So in effect, I mentioned earlier that the owners corporation sought 2 orders when it filed its application. One for a penalty for failure to comply with the notice to comply, and 2 for an order for removal of the animal. Now, in effect the Tribunal at first instance didn't decide the penalty application because it decided that the by-law was harsh, unconscionable and oppressive, so therefore the notices to comply weren't valid. Now, the Appeal Panel's held that the by-law is

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valid, and therefore it has suggested that the Owners Corporation, if it likes, can seek remittal of the application back to the Tribunal and the Tribunal can then decide whether or not to impose a penalty against the Coopers and if so the extent of that penalty.

David Edwards: So, at the moment I'm just waiting on instructions and a final decision to be made as to whether or not the owners corporation will seek to do that. So it may be that there's a next step in that, or it may not go any further.

Amanda Farmer: That would be a penalty of up to \$1,000 for breach of the by-law, is that right?

David Edwards: Yes, up to \$1,100 for breach of the by-law based on one of the particular notices to comply.

Amanda Farmer: Okay. Something to be clear on I think for our listeners who may be in the position of having a pet, or wanting a pet, is that the specific circumstances of the pet owner are still relevant aren't they, to the extent that the Tribunal is going to look at when this person bought in, what the by-laws were at that stage, if a by-law was not in place when a pet owner bought in, and then the by-laws were changed down the track, that could produce a different result before the Tribunal. Is that right?

David Edwards: Absolutely it could. I mentioned one of the grounds that the Appeal Panel said that a by-law might be harsh, unconscionable and oppressive is if it affects existing rights. So, if there's a situation for instance, where pets are permitted in a building, either with or without written consent and an owner has an animal, and the owners corporation then seeks to change the by-law to in effect prohibit pets and then proceeds to, I guess issue notices to comply requiring anyone that owns one to remove those pets from the building, then you would think that in those circumstances, that would seem to be harsh, unconscionable and oppressive and is very likely to be set aside by the Tribunal. So, it's really just looking at the relevant facts and circumstances that apply in that particular strata scheme, and the factors that you just mentioned Amanda are important. When did the owner buy in? Did they have notice? What was the status of the by-law at that particular time? What's happened since? What's the current position, and so on?

All of those things are relevant and it could produce a different outcome, but essentially, this case was more about whether or not an owners corporation had a right to have a blanket ban, and there was an earlier decision in *Yardy* that suggested that there was no right to have a blanket prohibition against pets, and that if you did that that was harsh, unconscionable and oppressive, and this decision says that's not the case at all. Then, when the Appeal Panel then analysed the facts in this particular case, it decided that in fact the by-law wasn't harsh, unconscionable and oppressive for many of those factors that you just mentioned, that are relevant to this particular building.

Amanda Farmer: Yes, thank you for that David. It's important to have that clarity for owners who may be in a different situation to that which the Coopers found themselves in. It will be very interesting to watch what happens from here, and if there is an appeal to follow that and follow the outcome, but for now it sounds like we have a reasonable level of certainty when it comes to harsh, unconscionable or oppressive by-laws and indeed blanket pet bans.

If there's anything else you want to add David, before we wrap up, do let me know, but otherwise, let our listeners know how they can find out more about you.

David Edwards: Yes, thanks Amanda. I guess just my website, dealawyers.com.au and my profile's on there with all my contact details.

Amanda Farmer: Excellent and you can buy me a drink next time we catch up, to apologise for your hard work in changing the law in this area, and breaking the hearts of strata pet owners around the state.

David Edwards: Will do, agreed.

Amanda Farmer: Thanks so much David.

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David Edwards: All right, thanks a lot Amanda.

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?