

Publication Date: 14 July 2020
YSP Podcast Transcript: Episode 222. Your Guide to Compulsory Appointments

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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. I am your podcast host Amanda Farmer. And it is my job each week to help you demystify the legal complexities of apartment living. And that is why I am here this week to do with this solo episode.

It's been a little while since I have brought a solo to you, but I thought it was about time I recorded an episode all about the appointment of compulsory managing agents.

Strata managers, with all the powers of the owners corporation and the committee, sometimes referred to as administrators. I have to say, requests for advice about these kinds of appointments have been crossing my desk more and more often these days. I am wondering if it is a symptom of the unusual times that we are in at the moment. More people at home, perhaps more people wondering what is going wrong with the management of their strata building.

And it's not a topic that I have dived into in particular detail. Notwithstanding 4 years of podcast episodes. I know from time to time, it is indeed referred to when I am chatting to experts on the show.

So I'd like to put this episode together as a ready reference for you if you are thinking about making one of these applications. Or if you are an owners corporation, a committee, or a strata manager defending one of these applications, then there should be some useful information here for you in this episode.

Now it is not easy to obtain an order from the Tribunal for the appointment of a compulsory managing agent. It is known as a Draconian step, one that is not taken lightly. It removes the democratic process established under our strata legislation, which allows people to have some say in the management of their strata scheme. It is a serious step removing that process. And that is why the Tribunal is very careful when it comes to the exercise of this power.

Today, I am going to share with you in particular the New South Wales law, being my area of expertise. What is the relevant part of our legislation when it comes to these applications? Who has standing to bring them? What needs to be proven for an application to be successful?

As well as referring you to the relevant legislation, I want to let you know what it actually means. What principles have been established by our Tribunal and our Supreme Court in New South Wales when it comes to considering this particular part of our legislation. When it comes to deciding these applications, I will let you know the relevant cases that you can take a look at to learn more about what it takes to run a successful application and why some applications fail.

I'm going to get into the powers of the compulsory manager. Once they are appointed, can they really do everything including make by-laws? Do we still have to have meetings? Do we need to have special resolutions when we have a compulsory manager appointed?

And lastly, I want to share with you my practical tips for success. How do you prepare one of these applications and give it the best chance of success? And I'll also let you know why I think success doesn't always mean that the appointment is made. There are other ways that you as an owner pursuing one of these applications may feel that you have been successful, even without an order of the Tribunal.

Now I will be referring to legislation and a number of cases in this episode, all of which you can find links to in the show notes over at www.yourstrataproperty.com.au/podcasts.

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Now I will be referring to legislation and a number of cases in this episode, all of which you can find links to over at www.yourstrataproperty.com.au/podcasts. Just have a look on that page for this Episode number 222. And you will find there under the episode, links to click through and read these cases that I'm going to be referring to, and the relevant parts of our New South Wales legislation.

So first up, what is the New South Wales law when it comes to the appointment of compulsory managing agents? That is set out in Section 237 of our Strata Schemes Management Act of 2015. Under our previous legislation, our 1996 Act, it was Section 162. I say that because a couple of the relevant cases do refer to the old law. So if you see references to Section 162, you can safely extrapolate those and apply them to our current Section 237. Which is in all relevant respects, identical to our former Section 162.

This is where it says that the Tribunal may make an order appointing a strata managing agent to exercise all the functions of the owners corporation or to exercise specified functions of the owners corporation, including whether the strata managing agent is to exercise all the functions of the office bearers on the strata committee or specified functions of the office bearers. In my experience, the most common order here is an order that the strata managing agent exercise all the functions of the owners corporation and all the functions of the strata committee. But certainly it is possible to seek and obtain an order that the compulsorily appointed managing agent is only appointed for a specified purpose. For example, to get a particular item of repair or maintenance work done. The compulsory managing agent can be appointed for a period of up to 2 years. The usual orders I have to say are either a 12-month appointment or a 2-year appointment, depending on what they tribunal sees needs to be done in the building over the period of the appointment.

The application can be made by a lot owner being a person who has an interest. The application can be made by a lot owner. The application can also be made by someone who has obtained an order that has imposed a duty on the owners corporation or the strata committee. And that order has not been complied with.

And very interestingly and sometimes overlooked, an application be made by a judgment creditor. So this is somebody to whom the owners corporation owes a judgment debt.

If that debt is not being paid, then the creditor can indeed approach to the Tribunal for an order that a compulsory manager be appointed with the intention that the compulsory manager out will then ensure the judgment creditor is paid ... Can ensure the judgment debt is paid out. And I have definitely in my time seen lawyers in particular exercise that right under Section 237 to have a compulsory manager appointed in order to satisfy a judgment for their legal fees.

So that's something to bear in mind if you're providing services to an owners corporation. Whether you're a lawyer, a builder, an engineer, some other service provider that hasn't been paid and has a right to be paid. This is an avenue for you to consider.

For circumstances in which an order may be made by the Tribunal for the appointment of a compulsory managing agent. Number 1, that the management of the strata scheme is not functioning or is not functioning satisfactorily. Number 2, that the owners corporation has failed to comply with an order made under the Act. Number 3, that the owners corporation has failed to perform one or more of its duties. Or number 4, that an owners corporation owes a judgment debt. So you need to prove one or more of those 4 things to satisfy the Tribunal that it should make an order appointing a managing agent with all or specified powers of the owners corporation or the strata committee. As part of the application, you do need to propose who the strata managing agent is to be. It has to be somebody who holds a license under the Property Stock Agents Act and somebody who has consented in writing to the appointment. So as part of the application, you should be lodging a letter of consent, including evidence of that person's license. And I will come back to considering some of the practical implications when you are as an applicant proposing a particular managing agent.

So everything that I have said there is set out in Section 237 of our New South Wales Act. There is a link to that in the show notes to this episode. That section is indeed your starting point.

Next, I want to share with you what all of this actually means in real life in practice. How does this play out in our Tribunal and in

our courts? I have said that an order can be made in circumstances where the Tribunal is satisfied. That the management of a strata scheme is not functioning or is not functioning satisfactorily. What does an applicant need to show to prove that the management of their scheme is not functioning or is not functioning satisfactorily?

Well, this is played out and a number of cases. Probably the most helpful of which is the case of Bischoff and Sahade. It's a 2015 case from our New South Wales Civil and Administrative Tribunal appeal panel. There's a link to this one in the show notes. Being a 2015, July, 2015 case. It was considering Section 162, the former version of current Section 237.

And in this decision, the Tribunal appeal panel identified that our Act does not specify the particular matters that are to be considered in deciding whether the management structure of a strata scheme is not functioning or not functioning satisfactorily.

Rather, it is for the Tribunal when considering a particular case to look at the evidence that is before it. And continue whether the conduct that is being complained about has an effect on the management structure of the strata scheme.

Now in this case, the Tribunal identified that the management structure of a strata scheme consists of 3 levels of management. We've got the owners corporation, which makes decisions and manages the affairs of the strata scheme through general meetings. As well as through giving instructions to people who may be employed by the owners corporation.

Secondly, we have the strata committee. Which also makes decisions in relation to those matters it has authority to make decisions about. And thirdly, we have the appointed strata managing agent, or perhaps a building manager. And thirdly, we have the appointed strata managing agent and/or a building manager or a caretaker who are making decisions about the matters they have authority to make decisions over. So that's a 3-tiered management structure. I bring that to your attention because if you are putting together an application for a compulsory appointment, particularly on the basis that the management of the scheme is not functioning or is not functioning satisfactorily, that you consider which level of management are you saying is not functioning satisfactorily. Is it the owners corporation? Is it the strata committee? Is it the strata manager and/or the building manager or a caretaker?

Perhaps in buildings with particularly large problems, it is all 3. But bearing in mind that our legislation directs us to think about the management of the strata scheme, either or all of those levels of management are a good place to focus your thinking about the problem.

Now in the Bischoff case, the Tribunal did say that the manner in which owners, occupiers, or other people have dealings with each other, or the way that these people are conducting themselves when they're on the common property. Or when they're within their own lots in the scheme, these are not generally matters that are relevant to determining the question of whether the management structure is functioning or is functioning properly. So we need to consider these issues on a higher level than just looking at what individual owners or occupiers are doing.

To give you some examples from the Bischoff case, the Tribunal set out for specific circumstances in which a management structure of an owners corporation may not be functioning at all or satisfactorily. Number 1, there is a failure to properly maintain the common property. Number 2, a power is being exercised or a decision is being made for an improper purpose. For example, conferring a benefit on a particular owner or group of owners in a manner that is not authorised under the Act.

Number 3, there is a failure to exercise a power or make a decision to prevent a contravention of the Act, including when it comes to an owner or occupier's obligation to comply with by-laws. And number 4, levies are being raised. Legal action is being taken or defended on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners corporation, or lot owners as a whole. So in the Bischoff case, each of those 4 things was happening, and the Tribunal found a valid basis upon which to determine that the management structure of the strata scheme was not functioning or not functioning satisfactorily, and a compulsory managing agent should be appointed. And that decision was upheld on appeal.

It's an excellent case to go and have a read of. I haven't gone into the facts of that case, exactly what was going on in that small

building and what the evidence of each failing was. But it is definitely a case referred to by the Tribunal and by the Supreme Court in later cases, considering identical applications. So worth going and having a detailed read of.

I am going to mention a few more cases as I cover off a few more points here for you. A question that I get quite regularly is what does a compulsory manager actually have the power to do? Can they really do everything that an owners corporation and a strata committee can do? Assuming that is the specific order that has been made. Can they make by-laws? Do they need to convene meetings and take into account the opinions of owners?

Well, the short answer to that question is yes. A compulsory manager can do everything that an owners corporation and strata committee can otherwise do. Assuming that is the order that has been made by the Tribunal, and there's no limitation on that order.

There is no need for a compulsory managing agent to convene meetings. However, I do see experienced, professional managing agents who take on a lot of these compulsory appointments actually convening meetings, simply for the purpose of informing owners what it is they intend to do. Keeping accurate records, making sure that owners are in the loop about what's happening in their community, and why the compulsory managing agent is making the decisions that they are making. It's important to bear in mind that the maximum period of appointment for a compulsory manager is 2 years. So if a manager is appointed, even for that maximum period. At some stage, management is going to revert back to the owners. It's going to be important for them to understand what has been happening over that 2-year period of compulsory appointment. So good, professional managing agents. Although they recognise that the power lies in their hands, will still convene meetings to keep owners inform, and ensure that they are still making decisions in the best interest of the owners corporation as a whole.

Now the question of whether compulsory managing agents can make by-laws has come up a couple of times in our New South Wales case law. It came up in the case of Strata Plan 5709 and Andrews, a New South Wales court of appeal case. So a decision from a superior court here in New South Wales. A link to that one in the show notes. And later in the Supreme Court, in the case of James and The Owners of Strata Plan 11478.

In each of those cases, the court made clear that our legislation allows the Tribunal to give a strata manager, the power to exercise all functions of an owners corporation, with only those restrictions that the Tribunal may determine.

So if a strata managing agent is given all the functions of an owners corporation, well, one of those functions is to make by-laws. And the strata managing agent can make those by-laws without convening a meeting, without obtaining a special resolution. One important caveat on that, which arose in the James case is that where there is a by-law made that is granting an owner exclusive use rights over the common property. What we used to call an exclusive use by-law in New South Wales, now called a common property rights by-law. Our legislation does require that the written consent of the owner who is being granted that use be obtained. Now in the James case, Ms. James said that the compulsory manager had made the by-law, had registered the by-law, and had actually himself signed the consent form, consenting to the grant of exclusive use.

The Supreme Court said that was a no no. It is not a function of the owners corporation to provide written consent to an exclusive use of common property rights by-law. It is a function of an owner, a lot owner. So the compulsory managing agent could not sign that form on behalf of a lot owner. He had no right to do so. And although the special resolution had been passed, the by-law had been made. The requirement for written consent of the lot owner had not been met, unless the lot owner themselves signed that consent form. So that's an important one to remember there, particularly for managing agents who may be under a compulsory appointment, understanding that they do have the power to make by-laws. If we're looking at a common property rights by-law or some other approval. For example, under Section 108 in our Strata Schemes Management Act to improve the common property. A by-law made under that section requiring written consent of the lot owner, the written consent must indeed still be provided by the lot owner.

What else can a compulsory managing agent do? Well the Andrews case I referred to earlier made clear that the agent can initiate legal action without calling a general meeting, even though our New South Wales legislation requires an owners corporation to pass a resolution at a general meeting, approving the taking of legal action.

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Once again, passing that resolution is a function of the owners corporation. And if they compulsory managing agent has all functions of the owners corporation, then there is no need for that meeting to be called. The compulsory managing agent can go ahead and initiate that legal action.

So as you're hearing, the powers of a compulsorily appointed strata managing agent are quite broad, and can have serious ramifications for a building into the future. Particularly when we're talking about the commencement of legal action, the making and registration of by-laws. And that is why you heard me say earlier that the Tribunal considers such an appointment a draconian method of solving problems in a scheme. And these orders are only made in the most serious of circumstances.

Another question that I am often asked is whether there are any particular professional obligations or rules, requirements that compulsorily appointed strata managers must adhere to. Well, our case law recognises that strata managers in this position must exercise their power for a proper purpose. And considering what that proper purpose is, well, why was the strata manager appointed? They were appointed to attend to the proper administration of the strata scheme. That is always what the compulsorily appointed strata manager should be bearing in mind when they are making day to day decisions about the management of the scheme.

So for example, a compulsorily appointed strata manager who determines that they are going to double their fees with no basis whatsoever for that increase in fees. In my view, would not be exercising their power for a proper purpose. They must always be considering whether they are acting for the benefit of the owners corporation as a whole. And building under a compulsory appointment that believes their strata manager is not exercising their power for a proper purpose would have grounds to apply to the Tribunal for a revocation of the appointment and a replacement of the strata manager. A couple more examples of situations where the Tribunal may find that the management structure of a strata scheme is not functioning satisfactorily or at all. Quite a recent case coming out of our New South Wales Tribunal is that of the UniLodge Australia Pty Ltd and The Owners of Strata Plan Number 54026 . A decision handed down at the end of April this year 2020.

In that case, the Tribunal was satisfied that the refusal by the owners corporation to accept certain proxies and company nominee forms as valid at 3 separate general meetings amounted to an unwarranted denial of voting rights for lot owners. And the tribunal was satisfied that because general meetings were not being conducted properly, then the strata scheme was not functioning satisfactorily.

In that case, the tribunal also found that there was a failure to repair common property. And that this failure was serious and prolonged, being further evidence that the scheme was not functioning satisfactorily.

As far as I'm aware, that UniLodge case is not a reported case, but I do have a copy of that which I have uploaded to Your Strata Property website, and the unique link to that one is in the show notes for this episode, if you want to check it out.

Finally, I want to wrap up with a few practical tips for you. Things that I am advising clients when they come to me wanting to prosecute these applications or owners corporations and managers who are defending these applications. 9 times out of 10, I find that would-be applicants are not ready, not at all ready to lodge these kinds of applications. They think they have all the evidence that they need to proceed with a successful application for a compulsory appointment. And my immediate advice is stop right there. We have some more work to do. These cases are won and lost on the evidence. Anyone who has ever been served with one of these applications or filed one themselves will know that it often comes with pages and pages, if not binders and binders of material evidencing the dysfunction of the owners corporation.

And most often, when you are thinking about commencing one of these applications, the paper trail as I call it is not yet there. You may have a feeling, or be aware, or have experienced some failures in your management structure. Perhaps some of the things I've been talking about, the failure to repair common property. The favouring of certain lot owners over others, the failure to comply with meeting procedures. You may be well aware that all of these things are happening, but there's not yet a clear, detailed record of these things. You need to be able to tell the Tribunal in as easy to understand terms as possible what has been going on in your building. And usually the best way to do that is to point to minutes of meetings and clear, written correspondence that records the

problems.

So often my job as a lawyer assisting owners attempting to prove dysfunction is to start sending letters clearly itemising what the problems are, requesting that these problems be addressed either by way of proposing motions for general meetings, or making specific demands in written correspondence. Those demands will either be met, resolved, agreed to, which is excellent, problem solved. Or they will be ignored or responded to in some way that is inadequate and demonstrates the exact dysfunction that is being complained about. So that process, while it can be frustrating because it takes a little bit more time, in my experience helps to shore up an application for compulsory appointment.

Do bear in mind that if the problem that you are complaining about can be solved by another method. For example, if you are complaining about the failure to repair and maintain common property, can that problem be solved by seeking a specific order from the Tribunal for the repair and maintenance of common property? Do you really need an order appointing a managing agent with all powers of the owners corporation? In my experience, unless you are complaining about a series of failures and some endemic dysfunction within your building, the Tribunal is going to ask you why it is not appropriate for another less draconian, less serious measure to be taken such as a specific order to repair and maintain a specified part of the common property.

And it is a much easier task in my experience to get such an order. Our law in New South Wales being very clear of course, that an owners corporation must repair and maintain the common property. And then if the owners corporation does not comply with that order to do specific work, then there you have your clear grounds supporting a future application for the appointment of a compulsory manager.

You'll remember I said back at the beginning of this episode when I was referring to Section 237, one of the circumstances in which an order may be made by the Tribunal appointing a compulsory managing agent is if the owners corporation has failed to comply with an order made under the Act.

So in some situations, it may be more appropriate. It may be more appropriate. And indeed you may have more if you first seek the specific order requiring the owners corporation to do something. And then when the owners corporation fails to comply with that order, to then seek the order appointing the compulsory managing agent. So in my view, that all falls under the heading of preparation, ensuring that you are indeed ready and armed for a successful application.

The next practical tip that I have for you is that timing is everything. I am regularly telling clients that the Tribunal is not all that interested in events that occurred years ago. Especially if those events may have already been aired and argued in earlier proceedings. And if there were no adverse findings made against the owners corporation. Well you can consider those issues done and dusted. There is no point raising them again in fresh proceedings for the appointment of a compulsory managing agent. The Tribunal is going to be very concerned with what it is that is happening within the scheme at the time your application is heard. Is the management structure functioning or functioning satisfactorily at the time your application is heard? The more recent your evidence is, the more weight it is going to be given by the Tribunal. So don't waste too much time, spend too much energy going back to what was happening in the building 10 years ago. If that is a problem that is still continuing today, then focus on what is happening today.

Now when it comes to nominating the strata manager that you want the Tribunal to appoint as your compulsory manager, I have said that this person needs to be licensed and this person needs to provide their written consent to the appointment. Be very careful about who you choose. If you are the applicant for one of these orders, then it is up to you to propose this person. Make sure it is someone that you know has extensive experience with compulsory managements. Someone who understands the very serious job that they have before them. Someone who understands what it is that needs to be done in your building during the period of compulsory management.

Are there extensive works to be carried out? Are there levies to be raised? Is there legal action to be commenced or continued with? Does this person have experience with those things? You as the applicant proposing this person has an excellent opportunity to put in place a managing agent who is going to best serve the owners corporation, and solve these problems that you are

appearing before the Tribunal and complaining about, seeking a resolution to.

Too often, I hear buildings come out of a compulsory appointment worse for wear, incredibly disillusioned by the process, and absolutely stunned and shocked with what it is that the strata manager has done or not done during their period of appointment.

So it is incredibly important to be going in with your eyes open to be understanding the extent of the powers that the strata managing agent is going to have to be ensuring that this is the only option available to you to fix the problems in your scheme and to make sure that you are asking the Tribunal to appoint someone who you know is professional, who is competent, and who is experienced.

And finally, the last practical tip that I'd like to leave you with is an understanding that an order of the Tribunal appointing a strata managing agent with all powers of the owners corporation may not be the only happy outcome from one of these applications. Very often, I have assisted clients to put together these applications. And some of them do run to the binders and binders I was referring to earlier. And simply by serving the application on the owners corporation via the strata manager, having that application circulated to other owners. Brings concerns, important issues, problems to the attention of other owners, to the attention of committee members. Having everything collated into an easy to read, easy to reference bundle of documents can be an excellent way to explain to your neighbours what has been going on in your building, why you and perhaps other owners have been suffering. Why that is not right, what the breaches of the legislation have been, and why change is needed.

And a number of times, I have seen that change happen without an order of the Tribunal. I have seen committees that were thought to be recalcitrant and set in their ways, determined to make my clients' lives difficult. Actually turn around and say, "We didn't realise this was happening. We didn't realise that we needed to have meetings to decide these issues. We didn't realise that you felt there was no transparency. We didn't realise that your proxy was valid. We didn't realise that we had to raise levies in order to meet these expenses." And it is then, that change can occur. Either by a committee falling into line, complying with its legal obligations, or by other owners stepping in and supporting you to achieve change within your management structure.

I have seen strata managers resign when they receive such applications, accepting that they are not the ones best placed to service the owners corporation. Accepting always without any legal admissions of course, that perhaps they haven't been doing things the right way. And therefore leaving space for you to appoint, for you to recommend a new strata managing agent who can breathe some new life into your building, start doing things the right way, start properly guiding the committee and the owners as to what a properly functioning strata scheme looks like.

In a self-managed scheme, the commencement of one of these applications can lead to the other owners accepting that they actually need a strata manager. Accepting that if they don't get together and apply the democratic process to choose the managing agent that they want, then the tribunal is going to appoint a managing agent and divest the owners of their powers to make decisions on their own behalf. So I've seen self-managed schemes voluntarily appoint a strata manager when faced with these kinds of applications.

So a Tribunal order, appointing a managing agent with all powers of the owners corporation is not necessarily the cure all, the ultimate success. When you put in the effort to put together one of these applications. And I do invite you to keep an open mind about that. I know many of you who have been through the Tribunal process will agree it is an uncertain process, and nobody wants to go through the expense, the energy, the drawn out defended litigation. Only to be at the mercy of often one Tribunal member's point of view. So wherever there is the possibility for an alternate resolution, it is certainly something that I encourage.

Now I hope that has given you some insight into this process of appointing a compulsory strata managing agent, particularly in New South Wales. Though I know many of those principles will be very relevant across all jurisdictions in our country. I would love to hear your questions arising from this episode. I have tried to keep it as high level as possible, but I know that some of you will want me to dig deeper, and I'm happy to do that in future episodes with a solo or chatting with Reena Van Aalst, our resident strata manager expert about these issues. All of the cases that I have mentioned and the links to the legislation are set out in the show notes over at yourstrataproperty.com.au/podcasts. I'm looking forward to being back here with you next week. Until then, enjoy your weekend strata. Catch you next time.

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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 via 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?