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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.

**Amanda Farmer:** Hello and welcome. I'm Amanda Farmer, your podcast host. And I'm here each week helping you to demystify the legal complexities of apartment living. This week specifically, I'm demystifying the mediation process. As a strata lawyer, mediation is something that I regularly assist clients with, whether owners corporation clients or lot owner clients. It is something that many of us living in, investing in, working in strata will experience in some form or another. And today, I'm going to share with you the 4 steps to a successful strata mediation. I'll summarise those straight up for you.

Step number one, getting the mediation application right, right from the beginning, including asking and answering the question, do I need to make an application for mediation at all? Step number two, properly preparing for mediation, especially now that in New South Wales at least, our mediations are happening by phone and not face-to-face. Step number three, confidently conducting the mediation. And step number four, following up after the mediation. What are the next steps even if mediation has been successful? Now, my experience is indeed in New South Wales. And I'm going to reference some legislation that is specific to New South Wales. But I'll think you'll find that each of these steps is very relevant across our country, whatever jurisdiction you may be in. And if you're not in New South Wales, I'm sure you will get a lot of value from listening to these practical steps to a successful strata mediation. Let's dive into those 4 steps.

Number one, getting the mediation application right. Now when you have a problem, a concern, an issue in your strata building, whether you are an owner or a committee member acting on behalf of the owners corporation, you're thinking about filing an application for mediation. Sometimes this application is a mandatory prerequisite before you can commence tribunal proceedings and sometimes you can commence tribunal proceedings without first attempting mediation. How do you know whether your issue is exempt from mediation or not? You have to look at Section 227 in the Strata Schemes Management Act, New South Wales. That's the section that lists which applications are exempt from mediation. You can proceed directly to the tribunal without first attempting mediation. They include things such as the appointment of a compulsory strata managing agent. You don't need to mediate if your community is not functioning satisfactorily and you think that you may need a compulsory strata managing agent.

If you are seeking an order to reallocate unit entitlements, you do not need to first mediate. If you are an owners corporation seeking access to a lot to inspect or repair the common property, you don't first need to mediate before seeking that order. If you want an order about the inspection of records, or most importantly I find, an order imposing a monetary penalty, you do not need to mediate first. I'm often asked whether it is necessary to mediate before filing an application with the tribunal for a penalty order. The answer is no, you do not need to mediate before seeking a penalty order. So if for some reason you are in a hurry or you just don't think mediation is going to work for your particular situation, do have a look at Section 227 in the Strata Schemes Management Act, you may not have to mediate, before you file your application.

But for most issues, most disputes, most problems, we do need to first attempt mediation before we are heading off to the tribunal. It's very easy to make an application for mediation. You do that through Fair Trading, New South Wales website. I'll put the link to the mediation application page in the show notes for this episode. You can fill the form in completely online. There is no filing fee. And the online form leads you through a series of questions to add some. None of them are that difficult. The most important question being, what is your problem, your concern? What are you hoping to solve through mediation? And what would you like to get out of mediation? I recommend that you're really clear in those parts of the application form. Why it is you're seeking mediation and what it is you hope to get out of mediation? So that the other side, whether they are your owners corporation or whether they are a lot owner understands why this application is being made.

If you're an owners corporation, it is a good idea to have a strata committee resolution made at a strata committee meeting authorising the application for mediation. If only to let the other owners in the community know what's going on, they will read the minutes and understand that there is a particular dispute with a lot owner, whether it's about the hanging out of washing on the

## YSP Podcast Transcript: Episode 265. 4 steps to a successful strata mediation

balcony, or the illegal keeping of an animal, or renovation works that may not have been carried out in accordance with the terms of a common property rights by-law. The decision to proceed to mediation should be recorded in the minutes of a strata committee meeting. And if you haven't already communicated with the owner you're intending to list as the respondent to your mediation application, then they too will find out through the strata committee meeting minutes that this application is going to be made and they can look out for it. Probably not a good idea that's their first notice that there is a concern within the strata committee about something they are doing or not doing.

Always good I say to communicate first face-to-face if you can, or through informal letters or emails what the problem is and see if you can resolve it without having to resort to these formal processes. But if you've tried that and the lot owner still hasn't fallen into line, then indeed resolving at a committee meeting to apply for mediation. And then, filling in that online application form is your next step and a fairly straightforward one. It is a good idea to act reasonably promptly in filing these applications if only because there is at the moment in New South Wales, quite a backlog, it is getting better these days. If we file an application for mediation online, we're getting mediation dates about 2 months after lodging that application. Things have sped up. It was 4 months around this time last year. And just because you filed an application for mediation doesn't mean that you can't keep trying to resolve the issue with the owner or with the owners corporation in the meantime.

It's very easy to withdraw an application for mediation if you find that the issue has been resolved prior to the mediation date. I'm often asked what documents, if any, should be attached to an application form. My general practice is actually not to provide too much at all. If anything, when filing that online application form, as I said, be clear about what you're seeking and the reasons why you're seeking it. But because the mediation is likely to take place a couple of months after the filing of the application form, I find it's a good idea to give the other party and the mediator the documents that you want to refer to in the mediation closer to the mediation date.

And I'm going to get into that when we talk about step two, properly preparing for mediation. Events can overtake themselves when we're waiting this long for a mediation date. And attaching many and voluminous documents to your application may not be the best idea when you are filing it. You can always attend the mediation with up-to-date documents or send them through just prior to the mediation date. There's certainly no requirement to attach documents to your application form. So that's step one to a successful mediation application, getting the application itself right.

Step two is proper preparation. How do we prepare for our mediation day? You've lodged your application. You will eventually receive notice of the mediation date. You'll receive that from Fair Trading. And Fair Trading will also send notice of the date and a copy of your application to the other party. If you are the respondent to a mediation application, you can decline to attend. You don't have to attend mediation. And you don't actually, in New South Wales, have to explain why you're declining to attend mediation. I do see this from time to time often with owners corporation strata committees, who may not see the value in participating in a mediation with a lot owner. If the respondent declines to attend mediation, Fair Trading accepts that, sends a notice confirming that mediation has been declined and the applicant is then free to proceed and seek their orders from the tribunal. I do think that it is always helpful to attempt mediation even if you know or you assume that a problem cannot be solved at mediation for whatever reason.

It's usually a helpful forum in which to sit back, listen to what the other side has to say, facilitated by a professional mediator. You may hear things that you haven't heard before. In that context, you may, as a strata committee or a strata manager representing an owners corporation, be able to learn more about the concerns of the lot owner, see things in a light that you haven't seen them in before, and come up with a creative idea to solve a problem. If you don't give yourself that opportunity and allow the case to go straight to the tribunal, then it may well be a missed opportunity to save some time, some money, and preserve some neighbourly relations. From a legal perspective, I often tell my clients that mediation is a very hopeful place to learn precisely what the other side's case is while we can't use the material that is prepared for the purposes of mediation in later tribunal proceedings. And I'll get into that in our next step.

We are certainly going to hear from the other side why they think they are entitled to orders from the tribunal. We may even hear some of the legal arguments that they are going to present to the tribunal. And these maybe arguments that we hadn't thought of before or realised were available to the applicant. And it may assist to change our minds or change the minds of our other

## YSP Podcast Transcript: Episode 265. 4 steps to a successful strata mediation

committee members or owners. And once again, avoid time-consuming and costly legal proceedings. So, there is little downside in my view to at least attempting and attending mediation even if you think it's not going to completely resolve a dispute in your community. If you are an owners corporation, then at the time you receive notice of the mediation and you know what the proposed mediation date is, it's important to start thinking about who is going to attend the mediation on behalf of the owners corporation. Is it going to be your strata manager? Is it going to be one or two members of your committee?

And in my view, you should be holding a committee meeting to expressly authorise those people to make decisions at the mediation and to enter into a settlement agreement with the applicant if that is in the best interest of the owners corporation. Too often I'm attending mediations on behalf of lot owners and I'm frustrated because representatives of the owners corporation, not usually a lawyer, but a strata manager or committee members are attending the mediation and refusing to enter into any kind of helpful discussion because they say they simply don't have the authority to make any decisions today or commit the owners corporation to any resolution. Now, that's pretty unhelpful. Even if you think the mediation is not going to be a forum to resolve the issue, as I said earlier, it could be a place that sparks some ideas that open up some avenues for resolution that you didn't think or didn't know existed earlier and you maybe able to come to some form of agreement that narrows the issues or progresses the matter if not resulted.

So, it's important to make sure that those attending for the owners corporation do have the authority to make those decisions on behalf of the owners corporation. In New South Wales, a party to mediation is not entitled to be represented by anyone else at a mediation session, unless all the other parties consent to that representation. That's in Section 220 of our New South Wales legislation that often comes up when strata lawyers are wanting to attend mediations on behalf of or with their clients. The other side may object to that lawyer being present. And if they don't consent to the lawyer being present, then the lawyer cannot be present. In my view, the same applies to a strata manager who is proposing to attend on behalf of an owners corporation. Of course, an owners corporation has to be represented by someone. They are a corporate entity. They're not an individual. But unless the other side, the lot owner consents to the strata manager, or the chairperson, or the two committee members, or the lawyer, whoever it is who may propose to attend on behalf of the owners corporation.

Unless the owner consents to that person being present, then the owners corporation is not entitled to be represented by that person. At the time I am recording this episode, mediations in New South Wales are happening by phone with Fair Trading. When you receive notice of your mediation date, you need to give Fair Trading the phone number on which to call you at the start of the mediation. This is also your opportunity. The few days prior to the mediation, I suggest to email through the documents that you would like the mediator to have to hand during the mediation, as well as the other side, send them a copy as well. Because the mediation is happening by phone, we can no longer turn up with our file in our hand and copies of documents to hand around the table like we might've done a couple of years ago.

Now, it's important to make sure that whatever document you'd like people to be looking at while you're having your phone mediation, you have emailed that through beforehand. I say at least 24 hours beforehand, if not more. And if you're sending things like Dropbox links and Google Drive links, do make sure that the person you're sending them to has and can access those files. You don't really want to be delayed by that at the opening of the mediation. You can prepare specific documents for mediation like submissions, or position papers, a statement, a chronology, a summary, anything that is prepared specifically for the purposes of the mediation cannot be used later in tribunal proceedings.

If there are things like expert reports, photographs that haven't been prepared specifically for the purpose of the mediation, but you are planning to use them in later tribunal proceedings, you might find it helpful to refer to them and distribute copies during the mediation. But do be clear that they are not documents solely for the purpose of mediation and you do intend to rely on them later in tribunal proceedings if the dispute is not resolved in the mediation. So mediation is a good opportunity to say or to offer compromises, resolutions, solutions that you may not be prepared to offer later or to commit to in the tribunal. You don't have to if you have taken a position in mediation. That position cannot be held against you in later tribunal proceedings. So that's our second step to a successful strata mediation, properly preparing for the mediation.

The third step, confidently conducting the mediation. Our mediation day has arrived. The mediator has telephoned us if we are in

## YSP Podcast Transcript: Episode 265. 4 steps to a successful strata mediation

New South Wales and telephoned in the other side. The mediator is a person who facilitates the discussion between the parties in a mediation. They cannot and do not make any decisions about the case, any determinations. They do not issue orders nor can they say anything that is binding on either of the parties. They help create the space to guide you to a solution that you're each most comfortable with or perhaps least uncomfortable with. If a mediator can do that, they have been successful. The mediations that I have been involved with, start with the mediator inviting the applicant to make an opening statement, give a summary of the reason why they're there, why they have made the mediation application, what the issue is that they want resolved today.

So if you are attending mediation, it's a good idea to start prepared with that opening statement. You maybe a little bit nervous. So, I do encourage clients who are making their own statement to write it down so they can read it out if they're feeling a bit nervous. Some people feel that in a mediation it's not the place to discuss legal principles and refer to sections of legislation and cases that may assist you in your later tribunal proceedings. I don't necessarily agree with that. I think absolutely we should be referring to the law that supports our position, the cases that we're going to rely upon if the mediation is not successful and we do have to proceed. You want to get a result out of mediation. You want to be clear with the other side that if that result is not achieved, then you are heading off to the tribunal from what you believe is a strong position.

So if you do have some legal principles that support you, cases, legislation to rely on, the failure perhaps of the owners corporation to comply with some legal requirements, mediation is an important place to be talking about that. This is the time in your opening statement that you might refer to documents that you sent through to the mediator and to the other side earlier. What do you want them to look at? What are these documents and what do they mean for your position? What do you want out of the mediation? What solution would you be happy with today? If there's 3 different possible solutions, set those out. When as an applicant, you've made your opening statement, the respondent will be given the opportunity to respond and say what they would like to say in reply, addressing your points and perhaps raising things that you haven't thought of or haven't heard before. Some mediators particularly through Fair Trading do like to give you the opportunity to have a bit of discussion back and forth, addressing each other's position for a little while and seeing if you can narrow the issues without too much intervention from the mediator.

But ultimately, it's likely the mediator will suggest that separate sessions are convened. If you're by phone, that means the mediator will hang up the phone and then ring back one of the parties in the absence of the other and have a separate discussion with them. Perhaps attempting to gain some deeper understanding of their position and suggest some solutions that they maybe comfortable putting to the other side. And then the mediator will call you and engage in the same exercise, trying to narrow the issues and see where there might be some common ground or middle ground to come to a solution. Ultimately, the mediator will bring you all back together on the same call. And if there can be some agreement, then those agreement terms will be, or I should say, should be reduced to writing. You can document your agreement reached in mediation. And I say, it's really important to document that agreement, write it down.

When we are mediating in-person, we sign these agreements. Perhaps there's an agreement to convene a meeting within a certain number of days to put a particular motion to the owners for their consideration. Perhaps there's an agreement to install carpet over hard flooring. Be as clear as possible in that agreement, what it is that each side has agreed to do. And make sure there are timeframes incorporated into the agreement. Without timeframes, it's too easy for these agreements to be derailed. This is why it's important for the owners corporations representative to have authority to settle matters, to enter into mediation agreements.

A successful mediation will most likely end with a requirement to enter into a written agreement. These written agreements can be enforced later if they are not complied with. A party to a mediation agreement can approach the tribunal and seek orders that the mediation agreement be enforced. So that's why it's really important that they are as clear as possible, as well understood as possible. And if you're not sure, particularly now, these mediations are happening by phone, don't hesitate to ask the mediator to slow down, be clearer, read those words out again, understand what it is that's being written and what you are committing to. The mediation agreement will be circulated to everyone so that they have a copy of it and can make sure that it is complied with.

Now that takes me to our fourth and final step to a successful strata mediation, following up or following through after the mediation. If an agreement has been reached, is it being adhered to? Have those timeframes being met, the timeframes we agreed to in the mediation? If the agreement has been breached, is there the opportunity? Is it a good idea to approach the tribunal and

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## **YSP Podcast Transcript: Episode 265. 4 steps to a successful strata mediation**

seek the enforcement of the mediation agreement? If no agreement was reached in mediation, the applicant will be free to proceed with the tribunal application. And they will get a letter from Fair Trading, letting them know that they are free to do that. If you are an applicant who wants to proceed to the tribunal after an attempted mediation, don't leave it too late, strike while the iron's hot, keep on progressing your case. I know there is a general rule of thumb that a tribunal application needs to be filed within 12 months of an attempted mediation.

I say it's a rule of thumb because I've been asked this a few times and I've never been able to find any section of our legislation, any regulation, or any practice direction from the tribunal that says this. But it has been my experience when attempting to file applications for tribunal orders outside of 12 months since mediation, that the registry will not accept them and will send you back to attempt mediation again. So that timeframe, while it seems long can pass quickly, so do pop it in your diary. If you've attempted mediation and you intend to apply to the tribunal, make sure you do that within 12 months.

It is best to get on with it. The tribunal doesn't look unfavourably at a failed mediation nor does it look unfavourably at a party that has declined to attend mediation. The tribunal doesn't really know what went on in mediation. All they need to know is that the application was filed, that it was attempted. By the time the tribunal proceedings are on, then as an applicant or a respondent, you simply put your best foot forward. And the tribunal member considers the case from that point onwards.

So, those are the four steps to a successful strata mediation. My four steps that I hope are helpful for you. Number one, getting the mediation application right, including knowing whether you need to make an application at all. Number two, properly preparing for mediation, especially now when our mediation is maybe happening by phone or by video. Number three, confidently conducting the mediation. And number four, following up after the mediation even if you've been successful and you are making sure that a mediated agreement is being followed. Thanks for tuning in to this week's podcast episode. I will be seeing you again soon. Hopefully not on the other side of a mediation, but if I do, I know you will all be very well prepared. Have a great week. I'll catch you next time.

**Outro:** Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode by the show notes at [www.yourstrataproperty.com.au](http://www.yourstrataproperty.com.au). You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?