

**Publication Date: 15 June 2021**  
**YSP Podcast Transcript: Episode 267. Registered by-laws incomplete | ballot for committee | win for disability access**

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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. And I have with me today, Reena Van Aalst from Strata Central. How you doing there, Reena?

**Reena Van Aalst:** Good, Amanda, how are you going?

**Amanda Farmer:** I'm going well, I have had a fabulous couple of weeks in strata since I last chatted to you. How about you?

**Reena Van Aalst:** Yes, always busy, strata never stops.

**Amanda Farmer:** Got any holidays planned. I know you're not good at taking holidays Reena, but you need to.

**Reena Van Aalst:** I was good at taking all those before, but we're actually going to Adelaide for a couple of days at the end of July. My husband's got a conference or a seminar that he has to go to, so yes, I thought I'd just tag along.

**Amanda Farmer:** Excellent. Nice one. Going to do a Barossa trip.

**Reena Van Aalst:** Not sure yet. We're going to be there for 4 days, so we probably will, we've already hired a car, so probably will go out to Barossa for a day on the weekend, I think. Yes. What about you, any plans?

**Amanda Farmer:** No plans. I am still enjoying my new location that is Mudgee and exploring. Still feels like I'm on holidays here. Getting used to some new digs. Yes. If anybody hasn't heard the news, I am splitting my time between Sydney and Mudgee at the moment and very much enjoying it, I can say. Now, let's talk strata, our wins and challenges over the last week or so. Reena van Aalst, what has been challenging you this week?

**Reena Van Aalst:** Well, this is been an interesting one, because with by-laws that have been registered for a scheme that we took carriage of the end of last year, Amanda, when we went through all the by-laws and committee said to me, here are the by-laws, you've got to make sure that owners, when they're doing renovations, that they comply with the various conditions that are noted in the works by-law. I know that a number of owners had passed special by-laws for their own renovations and they had referred to plans, but none of the plans have been registered at all. So, all the plans are missing. So, what I'll have to do now, there's 2 more by-laws that have to be registered coming up for 2 more renovations. And what I'll be doing is just inserting all that. I'll have to locate the minutes of the meetings, where those by-laws were passed, get the plans, and then put those plans into the consolidation when it's completed, because otherwise those plans are referred to and not included.

So, I think it makes it difficult for people that are doing searches or if an owner was to buy that apartment, if they were selling it, there's no plans referred to at all in the by-laws that were passed for their renovation works. And I just don't know how that would happen. I mean, even, I know previously, Amanda, sometimes agents for doing their own consolidations, I don't know if that's still happening today, but I would assume that would be the only reason that, that would have happened. Because I don't think any lawyer would have looked at the by-law and seen that there were plans referred to. And I would have assumed they would ask the agent, well, where are the plans before we finalise the consolidation.

**Amanda Farmer:** Yes, it is something that I see happen often. And I don't know that we should let lawyers off the hook so lightly when we are putting consolidations together. And we're given what we're told are the by-laws for the building and a by-law refers to annexed plans. It's important always to ask for that plan, if it's not already in the bundle. But yes, I've definitely seen where plans, if not entire by-laws have gone missing in consolidations. We do have a podcast episode on that called the case of the missing by-law. If anyone wants to go back and check that out, I'll put a link to it in the show notes.

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**Amanda Farmer:** My question for you, Reena was going to be, do you know for sure that the plans actually were part of the motion when it was considered at the general meeting and where the by-law was made? Because if it wasn't then I query whether the plans have actually legally been adopted as part of the by-law.

**Reena Van Aalst:** Well, when I spoke to the 2 owners who was still living there and who submitted the by-laws at the time, but by the time they did submit plans. But that's a really good question, Amanda, did those plans actually become part of the agenda at the time or where they just sent? Yes, it's a very good question. I'll have to now investigate that. Because I haven't thought about that. It's always sometimes else. Sometimes, as we know in strata, there's always another sort of thing that you can never would've thought of. Like you've just mentioned now, like where those plans... Even though the owners told me the plans were submitted. Were they submitted with the agenda, when the by-laws were presented for owners to consider. It's a very good question.

**Amanda Farmer:** Because our by-laws do expire. If they are not registered within 6 months of the date they are resolved, especially resolved at a general meeting. And if they plans were never part of the agenda, then the by-law with plans has never actually been specially resolved. And it is not just, in my view, an administrative error that the plans have fallen off the consolidation. I think you probably can fix that administrative error by putting them back in when the next consolidation is getting registered. But if the plans were never on the agenda with the by-law at all, I'd be suggesting that you put the by-laws forward again.

**Reena Van Aalst:** Yes, I think in this building, I mean the owners are very savvy and I think the plan wasn't included, because even now looking at 2 by-laws for other owners and asking for plans, more plans or changing of plans. So, I think hopefully that did occur, but you're right, Amanda, we need to check whether or not ... Because the committee and the owners might have seen the by-law, but they may not have seen it as part of the agenda pack. They're 2 different things.

**Amanda Farmer:** Yes. Thank you for sharing that challenge, Reena. My challenge for this week comes from a question from a member inside our members only Q&A forum. This question was about conducting a ballot for the election of strata committee members. Now, in New South Wales, the maximum number of committee members we can have is 9. I understand that in Victoria, it might be 12. I think this member was from Victoria asking a question about the procedure there, but I said, I'd bring this to the podcast after I'd answered it in the forum, because I think it was an excellent general question to make sure our strata managers and our committee members are well across.

How do you conduct a ballot for election of committee members when you have more nominations than there are positions. Now, in New South Wales, we decide on the number of positions there should be on our committee before we elect people to those positions. We might decide that we're going to have 3 committee members. We might decide that we're going to have 9, but if the nominations are more than the positions, then there must be a ballot to elect committee members and some are going to be elected and some are going to miss out. Reena, do you have a standard practice for when you're conducting a ballot? Do you hand out ballot papers? What's your process as a strata manager chairing meetings.

**Reena Van Aalst:** So, if we're in a physical meeting, Amanda, then we hand out voting papers and we basically advise the owners that they need to nominate the maximum number or less. So, you actually don't have to nominate... If the owners decided to have 9 members, for example, you can only complete 5 people's names, if that's the only 5 people that you actually want to see it. So, you don't have to actually put 9 names if there are 9 positions. Now, just to preface, go back one step. I think there's a fundamental flaw sometimes in this whole process, Amanda, where managing agents don't put the procedure on the agenda in the correct order. So, the first thing is to take nominations, close nominations, then set the number. Not the other way around. A lot of people that when we've taken over schemes, some other managers saying, "Oh no, but we have to set the number first."

It's like, no, nominations are taken first then the number is set after that. And that's why you then know whether you need to conduct a ballot or not, because the nominees could be greater than the number that's been decided. What we try and do also when there's such a case that arises, we ask all the nominees, is there anyone that's willing to withdraw the nomination? Because sometimes some people put their hand up, but really, maybe their heart's not in it or they say, okay, no, I'll withdraw.

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**Reena Van Aalst:**

So, if that happens and obviously we then are able not to proceed with a ballot, but if that doesn't occur, we then hand out voting papers to all our owners. If it's online, we had to do a poll online, which we've done a few times now. And then the way that the calculations are done is that we get each paper, we put the names and then we just obviously record the number of votes per owner.

**Reena Van Aalst:** And then if there was 5 members to be elected, the top 5 numbers by number of votes, are the ones that then become elected. So, then we basically read out those names. We've had a situation where we've had a tie. So, let's say there was 5 people. And then the last 2 had the same number of votes. And then we have to then basically put that again to the vote. So, we will say to the people, using the same voting paper or a different voting paper or show of hands, depending on how people are feeling comfortable, whether or not they want to sort of show their hand in terms of who they're voting for. We then put those 2 people. And again, it's a show of hands as to who will be elected out of the 2 people. So, it's quite an arduous process in terms of, if there's a lot of owners present, if it's a large scheme, it can take up to half an hour, even if not longer, sometimes to work out all the calculations.

**Amanda Farmer:** And there is helpfully, I think a relatively clear process for this set out in our New South Wales legislation. It's in Regulation 10 of our Strata Schemes Management Regulation. How do you conduct a ballot for strata committee election? I'm just reading through that now, Reena, and I am noticing that it does have a subsection in there that says if only one place remains to be filled, but there are 2 or more eligible candidates with an equal number of votes. The candidate to fill the place is decided by a show of hands of those present and entitled to vote.

**Reena Van Aalst:** Yes. So, yes, we normally do ask for a show of hands. Sometimes people may not want to show their hands.

**Amanda Farmer:** Yes. Now, the member who was asking this question and having this discussion with me in the member forum had said that their strata manager had told them they needed to conduct a preferential voting system where they listed their most preferred candidates at the top of the list. Then the vote for those candidates was given greater weight. Now I had to look at the legislation. I also had to look at the Victorian legislation. Admittedly, it doesn't have the detail that our New South Wales legislation does, but I couldn't find anything anywhere that said a ballot for committee election should be via a preferential voting system. Seems to be over complicating matters.

**Reena Van Aalst:** Yes, I think you're right, Amanda. I think sometimes there are owners that perhaps they want to vote for certain people. And you, you always know in a building when there's a committee ballot. There's obviously other friction or there's disharmony or there's genders or there's people that want to sort of propagate people that perhaps don't adopt their own views. So, the thing is that you may not want to vote for everyone that's nominated. So, that's why we say to people if you don't want to nominate for everyone, then you nominate for the people that you want. So, as long as it's less than the number that's been nominated or decided to be the number of community members, then that's fine. So, if the positions, there's 9 members decided you can just put 8 or 5 or 3 or whatever you want. But yes, there's preferential thing doesn't really make any sense to me.

**Amanda Farmer:** No, nor to me. Have you ever had a poll called on a ballot for election of a committee?

**Reena Van Aalst:** Yes.

**Amanda Farmer:** I imagine that becomes a little tricky.

**Reena Van Aalst:** Just in April actually. The poll was not called on the committee members. It was actually called on the number. So, originally the number was set and there were 9 nominations and there were 7 that was decided. And so we did it, we didn't do a show of hands. We had to, there was a large scheme, we had to basically do ballot papers. And we did all the calculations. And when we read out the result, someone said, no, I'm calling for a poll. So, then we have to redo everything again through poll, which didn't change anything. I even sent to the person it won't change anything, but I just knew the numbers in terms of the number of proxies. And I just knew how it was all going to pan out.

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**Reena Van Aalst:** But yes, so we then spent another, nearly half an hour going through that process.

**Amanda Farmer:** Yes, and therein lies the benefit, I suppose, of having electronic voting platforms where you can click a button, as I understand it, and immediately convert in show of hands voting or standard form ballot voting into a poll simply by recognising each owner's unit entitlement and get an instant result.

**Reena Van Aalst:** That's only possible if you're doing it by Zoom, but if you're doing a physical meeting, Amanda, it's a lot of people also don't like in this particular demographic with a lot of older people that even found it hard to fill out a piece of paper. Sort of showing them how to circle and to a sign.

**Amanda Farmer:** Yes. I do know that some managers are using the electronic platform in the background of an in-person meeting. So, they're actually inputting the votes into a system like a strata vote and then declaring the results quite straightforward, of course, if we're on a show of hands, but when a poll is called, then you've already got the data put into the system, you're on your laptop. You can hit a button and then convert those same votes to a poll results. So, I can see more and more managers taking up that kind of software, which I think is great.

Excellent. Reena, your win for this week please.

**Reena Van Aalst:** Well, this is a really interesting win. I mean, I must say, I know I keep saying things like challenges are interesting, but this would have to be the most interesting win that I would say I've come across, Amanda, since you and I've been doing our podcasts. And what happened was about a year ago, a scheme, I knew some owners from another building and they'd gone to another development and they said, "I'd like a new strata manager, we're not happy with our manager." They came and saw me and get a proposal. Had a meeting, et cetera. And then I said to them, "Well, then you have to be at your agency agreement, because it was a new scheme. And therefore I knew that would only be a 12 month agreement. And they said to me, "No, our agreement's 2 years. And I said, "Well, that can't be right." I said, "You can't have 2 years."

**Amanda Farmer:** Because at the first AGM, they can only appoint a manager for maximum 12 months in New South Wales.

**Reena Van Aalst:** Yes. That's correct. Anyway, and so what happened was unfortunately they went to the strata managing agent and said, basically we want to leave. And they said he said, "No, you've got a 2 year agreement." And they said, no. As I read the section of the act, Section 50, and I said, no term at the first end AGM can't exceed 12 months. And therefore the maximum term for an agent is 3 years after that. And of course he wouldn't agree. And then they ended up going to NCAT. And then the agent wouldn't turn up. And it was, the agent said, oh he didn't turn up or he needed an extra time, et cetera. And that, as you know, Amanda, that tribunal is very accommodating in people giving more time, even though they've been given plenty of time. And so what happened was basically the agent did not turn up again and sent an email saying I can be there like next week at some silly time.

**Reena Van Aalst:** And he understood that basically that if an order was made today that he would have to abide by it. But what had happened was that at the first AGM in Section 15 of the Act, it states that a motion needs to be included whether or not a managing agent is to be appointed. And if they do want to appoint a managing agent, what will be the delegation they will give to their strata managing agent. Now that motion was not included on the agenda of the first AGM. And what had happened was an EGM, which should have been a general meeting, but he convened a general meeting straight after and was appointed for 2 years.

Now, I told him at the time, that is definitely not on, because the intention of the Act is to enforce that 12 month appointment at the beginning of the term of the owners corporation, when they've had their first AGM.

Anyway, what had happened was the actual evidence that he submitted was a different set of minutes to what was actually issued at the time of the first AGM. So, the managing agent's produced a different set of minutes to show that this had not occurred. And basically the member obviously was quite sort of not happy. I mean, I wasn't at the hearing, but I got the feedback from the owners

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who obviously have been going through this whole process for a whole year. Anyway, the managing agent's agreement was then terminated by the tribunal. And that's under Section 72. The tribunal has the power to terminate an agreement. And that's what happened.

**Amanda Farmer:** Goodness. So, it was a fabricated set of minutes, seemingly.

**Reena Van Aalst:** Yes, yes.

**Amanda Farmer:** No one had ever seen them before.

**Reena Van Aalst:** Yes. And even that the owners had 5 witness statements as well, that they had submitted as part of their applications as well. So, the thing is, which I find really disheartening as a fellow agent, is that it's one thing to try and circumvent the law by you using a loophole, which of course is not really a loophole, but then when you go to NCAT, you went and fabricated the minutes. I mean, that's just really, I'm just shocked.

**Amanda Farmer:** That's scary.

**Reena Van Aalst:** It is very scary. And really that is like perverting the course of justice, really, when you think about it, Amanda.

**Amanda Farmer:** I'm interested, Reena. I had made a note when you were speaking earlier to ask you what orders were sought by the owners corporation. And you've now said they were orders under Section 72 to terminate the agreement. I'm interested in the member's reasoning when coming to that decision to terminate. Because if we have a look, as you've pointed us to Section 50, which tells us when agency agreements expire, it does say that the term of the appointment expires at the end of a period of 12 months following the appointment, if the managing agent is appointed at the first annual general meeting. So, from a legal perspective, that agreement had actually already expired. And I'm curious about whether the tribunal gave an order to terminate or made a finding or a declaration that the agreement actually had expired previously. Was this building waiting to engage you?

**Reena Van Aalst:** Yes. Yes. So, then it comes, yes, it was a year ago. It was a year. This is how long it has taken, it's taken a year for this to happen, because the original manager's agreement was actually dated October 2019. And so when I saw them in May, they knew they just had like, it's in October this year you'll be able to terminate. I said, "3 months before that termination, the managing agent should let you know that it's coming to an end. And then that's when you have the time period to actually let them know that you're seeking other proposals or whatever." Yes, and that's just how it all happened. So, the orders are under Section 72-2 that the respondent returned to the applicant on or before a certain date, any documents or other records related to the scheme. So, basically on the day of the actual hearing, the agreement was terminated with immediate effect. So, it was terminated as of that day, but the agent has till the, nearly 2 weeks, to return the documents. Because obviously-

**Amanda Farmer:** And what about fees? Is he entitled to any fees for that extra period?

**Reena Van Aalst:** Well, that was not part of the order. So, I don't know if that was actually part of the application or not. So, that's a good question, Amanda, because-

**Amanda Farmer:** And the owners weren't legally represented in any of this application.

**Reena Van Aalst:** No, they did it themselves.

So, the other thing also that occurred was that they were getting charged like BAS fees when they didn't even have a BAS.

They weren't raising levies. So, there were so many things that were happening in terms of fees and charges as well. So, it's actually a good point that you raise, Amanda. I don't think the... I'm sure the applicants didn't know they probably couldn't ask for that as well.

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**Amanda Farmer:** Yes. Because if the agreement had expired as of October 2020, for example, then anything that's happened since then, the agent has had no authority to draw down fees or deliver any services. And in my view, the owners corporation shouldn't be paying for that. But if the tribunal has made a finding that the agreement is only terminated as of the date of the hearing, then unfortunately they may have lost that opportunity. I don't see many of these orders. That's why I'm particularly interested in these orders under Section 72.

**Reena Van Aalst:** Yes. I mean, this is the first time that I've seen this happen. And for the listeners out there, I mean, we all know that the reason that the act had changed back in November 16 was that many buildings were bound by long agency agreements when developers had the majority voting rights at the beginning of the scheme, therefore that was done now to give people a chance to have 12 months with the current agent. And then if they want to continue on after that. And so for someone to try and circumvent that by holding a general meeting straight after and not including that motion on the agenda is really, to me, a blatant sort of disregard for the intentions of the legislation and not just the intentions. I mean, the legislation is quite black and white in that respect, Amanda. I was thinking also, I don't know how many other buildings this strata manager manages where that's been done before and that I didn't even know that they, unless I go somewhere else and seek some advice, they probably don't know that they can't have been appointed for 2 years at the beginning.

**Amanda Farmer:** Yes. That is true. Thank you so much for sharing that Reena. I'm sure that's going to be helpful to a number of other listeners to at least be aware of this kind of issue. I'm going to wrap up with my win for this week. I have recently started working with a new client. This is a matter that I have inherited from another lawyer. And it is a case where my client is in a wheelchair and requires access to the common facilities, the gym and the pool, as well as access to her own level where her apartment is and does not at the moment have that access without her husband facilitating it for her, because the building is not set up for use by persons with a disability. She has commenced action in the tribunal, claiming that the owners corporation has a responsibility to install automatic doors among other things so that she can get in and out of the building and access the common property facilities.

That application has been going for a little while. And it has not yet got to the stage of a hearing, but that is coming up. The reason I'm bringing it to the table today as a win is because very recently, the owners corporation circulated a notice of general meeting with a motion on the agenda to raise money and do work that we'll see these automatic doors installed. Unfortunate that this has come after my client has had to commence tribunal proceedings. And to put a little bit of pressure on the owners corporation, I can tell you those proceedings weren't commenced lightly, and there has been a lot of back and forth over the last couple of years about this issue, but perhaps there will be a solution on the horizon if the majority of owners vote to approve this expenditure and these installations, which is a great win for my client.

We have discussed previously on the podcast the range of cases in New South Wales. Also in Queensland, we have a case in Victoria where our tribunal and our courts have been finding that owners corporations are responsible to alter, to upgrade, to change the common property to ensure that those needing disability access do have that in place so that if they are in wheelchairs or they require automatic doors, ramps, things like that, then owners corporations are responsible for putting those in place. We have the Knox decision, K-N-O-X in Queensland. We have a Black decision in Victoria. We have the Hulena Decision some years ago in New South Wales. So, I make no assessment as to whether those decisions may be or right or helpful, but it is interesting to see that owners corporations are cognisant of those and taking steps to facilitate that access for persons with a disability.

**Reena Van Aalst:** That's a great win, Amanda.

I think it's so important that people that aren't able to use the common facilities to be able to just have the doors opening. I mean, I remember when I broke my leg back in August 2018, and it was really funny cause even just being at the lights where I had a scooter thing that I was given, so I can put one leg on and I could use the other leg to walk on. And just being at the lights. And when there was, you're trying to cross the road and you have to like lift up the walker and put it over the curb, if there was no sort of ramp at lights. Even at home, and I mean, I live in a 3 storey walk up and I'm trying to get up the stairs and I had to use my crutches. But then my husband would have to bring up the walker.

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And just all those things until you actually, you go shopping and you try and go to the bathroom and then you can't even open the door and you're trying to open the door and get your walker through. And just things like that. I remember also years ago, I think you and I have had this discussion before, one of the owners who's on a wheelchair. The lift doors were closing very quickly. And so he was trying to explain it to me and to the building manager. And I said, "Okay, well, let's try and have a look and see if we can change the time until the doors would close a bit more slowly." And so he said to me, "Well, I've got a spare wheelchair. You get into the wheelchair and you try and do it."

I thought, "Oh my God!" So, I actually did that. And for the first time it really made me feel like, when the doors are closing on you and you're trying to get into a lift. It's really not comfortable and not right that everything takes so much longer. It's just so much harder for people. Until I think you're in that situation yourself, Amanda, I think owners don't really understand, they just think about the expense. They don't really think about the humanity and that one day that could be them. And with owners downsizing from larger homes and buying into strata schemes, that's going to be more of an issue moving forward. If buildings don't start thinking properly and making some provisions in their budgets for future upgrades where needed.

**Amanda Farmer:** Yes. So much so. Yes, I agree. And I do expect that we will see more of these cases in favor of those who are making these claims under both Disability Discrimination Legislation and depending on what state you're in, under your relevant strata legislation as well in some states. The ACT is one. There is particular wording used in the legislation, which in my view puts more pressure on owners corporations to actually ensure residents have access to common areas and to be able to get in and out of their own home. So, I will continue to update you on that one as I can. And if we end up with a reported decision, I will let you know about it. I think that's it for this week, Reena. Anything else to add?

**Reena Van Aalst:** No, all good, Amanda. Thank you.

**Amanda Farmer:** All Good. Enjoy your week in strata. I'll catch you next time.

**Reena Van Aalst:** See 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 via the show notes at [www.yourstrataproperty.com.au](http://www.yourstrataproperty.com.au). You can also ask questions in the comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?