

**Publication Date: 18 August 2021**  
**YSP Podcast Transcript: Episode 275. Electronic meeting ballots and agendas: a legal quandary**

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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. Welcome, Reena.

**Reena Van Aalst:** Hi Amanda. How are you?

**Amanda Farmer:** I'm doing well. I am looking forward to diving into our wins and challenges for this week as we like to do every few weeks here on the podcast. Reena, what has been challenging you this week?

**Reena Van Aalst:** Well, I'm sure many managers are being challenged by all the demands and the extra workload of COVID. And all our meetings are now being held electronically. One of the challenges that has come up recently, Amanda is AGMs, which we know can be held electronically under the new, statutory guidelines that were issued by the government recently following the repeal of that legislation back in May. But it says here that if there were to be a strata committee election that went to ballot, the Strata Schemes Management Regulation, Number 10 says that for a vote to be valid, a ballot paper must be signed by the voter and completed by the voters' writing on it.

And the completed ballot paper must be returned to the chairperson. So, one of our secretaries has rightly said to us, "So, Reena how can we have an AGM if we don't know if there'll be a ballot for an election for the strata committee, once the committee election is taking place?" And many other committees have said to me, "Well, Reena, why can't we do it electronically?" If we're using Zoom we can use the Zoom ballot function, which we have used for special resolutions in the past. But I haven't actually come across this particular scenario, Amanda and I was just wondering what your thoughts are on it. When the regulations clearly state that for a vote to be valid, it has to be signed by the voter and completed by the voters writing on it.

**Amanda Farmer:** So just explain to me, Reena, if you're having a meeting where all attendees are present on Zoom, for example, they are voting by Zoom, putting their hand up, you can see them or they're typing in the chatbox, yes or no. When it comes to having to conduct a ballot for the election of the committee, how would you do it? Forget what the regulation says about writing and signing. How would you do it setting that aside? And then we'll come back to Regulation 10.

**Reena Van Aalst:** Yes. So, if we've received nominations in writing prior to the AGM, we put those in our table for the Zoom poll. And then when there are nominations from those owners that are present at the meeting, we then add those people in and then we ask, "Are there any other nominations?" And then we close nominations. Then we put forward a motion for the number. And then once the number is less than the nominees then obviously we have to hold a ballot. And then we advise those owners that now we will have to get you to vote. And we issue the poll on Zoom. And then we get everyone to vote let's say there was 7 nominees but we say only vote for five people only. And then we get a record of everyone's vote and who they voted for and then it tallies it up as to the majority of people, whoever the person ends up being elected, whichever strata committee members that they tend to be.

**Amanda Farmer:** Okay. So, you're running the ballot by way of the poll feature in Zoom.

**Reena Van Aalst:** Yes. Correct.

**Amanda Farmer:** And the question is, are we complying with Regulation 10 in the Strata Schemes Management Regulation because that actually requires for a vote to be valid when you are conducting a ballot, the ballot must be signed by the voter and completed with the voter writing on it. The name of the candidate. The capacity in which the voter is exercising the vote. And if they're a proxy, who gave the proxy. Now, what I am wondering is if our Electronic Transactions Act in New South Wales covers this because Section 8 of that Act does say that if a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication. Now, I think voting by poll on Zoom

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could be an electronic communication. You can, as you said Reena, get the report from Zoom that tells you who voted which way.

**Reena Van Aalst:** Would you suggest Amanda in these types of issues perhaps that when the ballot is being undertaken or there is like the nominees are being put forward, that perhaps that section of the meeting is recorded with the consent of the owners present? Because at least then there could be some evidence that that person was there. Or would that be some way of trying to sort of add some certainty to a process that's not really, that is sort of certain to some extent in terms of we know who they are, but at least if we get everyone's consent and say, "*Can we please record this section of the meeting?*" Because the regulation does say writing and unfortunately it perhaps could be a bit ambiguous, even though there are other electronic transactions legislation that may cover it, but without having any certainty, this could be another way of making sure that if there's any issues in the future about an election that it has been recorded.

**Amanda Farmer:** I think that is an excellent idea. There's also a provision in our Electronic Transactions Act when it comes to electronic signatures. And it may be that that assists in this situation. Ultimately, these questions are going to arise of course, if somebody challenges the election of the committee down the track. Now you would hope that in 99% of cases where you're conducting elections this way, ballots for elections this way. There isn't going to be a challenge. If there is a challenge then certainly it's something that an owners corporation would be well-placed to go and get some legal advice about. But I think there are some clues there in our Electronic Transactions Act that is helpful. I'm not sure if this has been thought about by those who have been drafting our emergency COVID legislation for strata. We definitely have some emergency legislation there, Reena, as you said about conducting electronic meetings, affixing the common seal, but this question about writing and signing ballots for committee elections, I haven't come across that before. If there's anybody out there who has and can give Reena and I some more direction, feel free to reach out.

**Reena Van Aalst:** Yes. So, I think, in this case, Amanda, one of the committees is actually postponing their AGM because of this provision. So, we all know that committee ballots only occur in the minority of cases in most strata schemes. I think you're lucky to even get a quorum half the time. So in most cases, this is not an issue where there's more nominees than the number that's been set. However, this committee has decided that because of this provision, they can't really hold their AGM at this point in time, even though they're still within the legislative timeframe of within 12 months. But as we know in terms of levies that are being issued at the old rate, there's an increase that needs to take place in the capital fund for this particular scheme.

So, I think you've given me some food for thought in terms of perhaps giving some guidance or some comfort that if we use these other means and perhaps record that section of the meeting if that were to happen, then we've got something to be able to rely on if there were to be a challenge in terms of any future owner challenging the whole election process.

**Amanda Farmer:** Yes. And I do think that if a building is delaying their AGM for this reason they would be well-placed to get some advice on whether the Electronic Transactions Act in particular Sections 8 and 9 would cover them in the event of a ballot. I would hope that an experienced lawyer could spend a couple of hours on that and be able to deliver some reliable advice and give that committee the comfort that it needs to know it is holding a valid committee election.

**Reena Van Aalst:** Thank you, Amanda.

**Amanda Farmer:** Okay my challenge for this week also relates to meetings being held by Zoom, electronic meetings. This particular question that has been asked by a listener relates to a strata committee meeting that was convened. The notice was sent prior to the emergency legislation once again coming into effect, permitting electronic meetings without first opting in. So this strata committee issued a notice to have a meeting in person. They haven't opted in to have electronic meetings. The meeting was then due to take place after the emergency legislation came in and the committee could no longer safely meet in person and they wanted to have their meeting electronically by Zoom. And the question that has been asked is whether that is possible? If we have said on the committee meeting notice that the meeting is being held at a certain place face-to-face at this time, on this day. And then we wish to have the meeting electronically by Zoom, for example.

Is that legal? Can the validity of the meeting and the resolutions made at that meeting be challenged? And I found this a very

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interesting question because when I went digging in our legislation, I discovered that there is actually no requirement as far as I can see, someone will tell me if I'm wrong, to state on a meeting notice the time, the place, the day, the method of the meeting. Now, of course, we do all of these things because we want people to attend the meeting. We want them to turn up, we want them to vote. So of course we tell them where it's going to be held when and how it's going to be held. But that is not a legal requirement. The Act is quite specific about the types of things that must be included on a notice, including setting out voting rights and quorum provisions. And there are, as we've discussed previously Reena, statutory motions, motions that must go on agendas of general meetings in particular. But otherwise, nothing that says you have to set out the method of the meeting on the notice.

So if that method changed, I think you are still holding a valid, legal meeting. What do you think, Reena?

**Reena Van Aalst:** Yes, well based on what you've just said, Amanda, I actually wasn't aware until you said that you've researched the legislation, it's not required to even say how it's going to be held or the date and the time. That makes it a bit strange in terms of, if owners want to take away the power from the committee for any item that they're considering, if they don't know where it's going to be held, then how can they perhaps give notice or I suppose seeing the agenda is one thing and knowing where it's going to be held as another. But yes.

**Amanda Farmer:** Yes. Strangely, there is an express requirement for an adjourned meeting to fix the time and place at which the adjourned meeting is going to happen. That's in Clause 20 of Schedule 1 to our Strata Schemes Management Act that relates to general meetings. Bizarrely, there is no such requirement to display the time and place for a general meeting itself or a committee meeting. If you are conducting a pre-meeting electronic voting, partly by the meeting electronic voting, you do need to say that because you have to include a note that a motion may be amended at the meeting and therefore any votes cast by pre-meeting electronic voting may not be counted. So there is in our regulation an express requirement to identify if you are conducting a meeting, partly by pre-meeting electronic voting. But otherwise, there's no requirement to state how you are conducting the meeting. There is a remedy for owners that may have been denied a vote or feel that they haven't been given due notice of an item of business.

**Amanda Farmer:** That's in Section 25 of our legislation, they can go to the Tribunal and seek an order nullifying a resolution, if they can prove to the Tribunal that they were improperly denied a vote or not given due notice of an item of business. So, the practice perhaps is driven by the remedy. We want to make sure that we don't leave open to owners this avenue to challenge resolutions, so we do make clear that everybody has due notice and is aware of how they can vote. But on my reading of the Act there is no express requirement to set these things out in a notice of meeting. And I suppose it hasn't come up for consideration until now. Until we have these unique circumstances where meetings are being convened by one method and not able to take place by that method. The committee doesn't want to cancel the meeting or re-issue the notice, which could be an easy solution.

**Reena Van Aalst:** Yes. Which is what I was going to suggest, Amanda. That would probably have been the safer way to proceed if you're on shaky legal ground.

**Amanda Farmer:** Yes. We only need three days notice of a committee meeting, so there wouldn't be too much time lost in reissuing notice, but a committee that then proceeds by another method is not expressly breaching the Act as I read it.

**Reena Van Aalst:** Yes. I recall last year, Amanda during the previous lockdown that we had scheduled an AGM to be held physically at a building and it was a large scheme, and obviously we then had to cancel and we just basically gave the same notice again, the full notice period, and just send a letter out rather than the whole agenda and said to everyone that due to COVID regulations and restrictions and that the meeting will now be held electronically. Here are the details to access the link to the meeting. And your agenda as previously issued is the same, but this is the new date and time. So, I think that's probably more, a safer way to proceed. I mean, definitely for general meetings, which is required anyway, I think, but for the strata committee meetings, especially if there's items that are perhaps contentious.

And you know that there are people that would want to be saying something about it, or be involved or know about what's happening on a particular item, then it might be a good idea just to give those extra days of notice and then make sure that

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everyone has access to the meeting and is aware of how they can access the link and then given those details.

**Amanda Farmer:** I think we're seeing these questions come up more now as well because of the rapid lockdown of various parts of New South Wales. So, some regional areas that were not previously subject to lockdown are very quickly within a matter of hours becoming subject to lockdowns, and therefore general meetings, AGMs that have been scheduled and are about to happen suddenly cannot happen. And owners are rightly questioning, *"Well, how can we having done all this work, got the agenda out there. We need to raise levies, we need to sign contracts."* Whatever it is, *"How can we still legally have this meeting?"* So really interesting one.

**Reena Van Aalst:** Yes. Interesting times, Amanda, isn't it?

**Amanda Farmer:** Alrighty. Have you got a win for me this week, Reena?

**Reena Van Aalst:** Yes. This is an insurance win, which are usually far and few between, but in February of 2020, there was a huge storm in Sydney. For those that recall, I remember it was a Sunday night and there was a lot of wind and rain and many of our schemes suffered loss and damage, especially older buildings, roof issues. It was quite devastating even in my own home, our retaining wall collapsed. So, it was quite significant for us too. And there were many, many repairs that were outstanding and basically what the insurance assessor had reported and engaged a builder and an engineer to also report was that these are the defects that were inherent in the building beforehand, which have contributed and exacerbated the loss and damage that in this particular case, it was a company title with the building had suffered. And therefore until these items were remedied, we are not going to pay out the claim.

**Amanda Farmer:** I've heard that before.

**Reena Van Aalst:** Yes. So then the board of the company wanted to get their own consultant to give advice and report. So we issued the report that had been given by the assessor and their builders and engineers and got a pre-proposal from another engineer to also consider the report. Then March 2021 happens and there's another storm again. And so again, the same apartments that were affected initially and some that were still had floors that hadn't been repaired and ceilings that hadn't been repaired suffered further damage. And as we know in schemes in companies, sometimes things don't move as quickly. And we had a preliminary quote from their engineer and builder. It was like \$200,000. So, we weren't talking about a small amount of money that had to be raised. And therefore this made the board more anxious to get a second opinion.

Anyway, so then we had to then resubmit the claim again, saying there was further damage. And this time the insurance company decided to say, *"Well, in that case, we're just going to pay you out, get the work done whenever you get it done. We're not going to use that as a condition of not paying you out."* Basically-

**Amanda Farmer:** The same insurer?

**Reena Van Aalst:** The same insurer. *"Here's the money. Give us your bank account."* Oh, it's like [crosstalk 00:18:47]-

**Amanda Farmer:** You didn't ask questions. You just said, *"Thank you."*

**Reena Van Aalst:** Yes, exactly. So, and it was an unusual case in that there had been the same damage that had occurred less than a year apart in the same apartments causing the same water ingress issues and damage. But yes, I mean, they were so adamant that they weren't going to pay us out until... Which makes sense because obviously if there's an inherent risk to the insurer and that risk has not been remedied, then they're going to be prone to again, having to pay out the same damages again if a similar event occurs. So, it was really unusual and it didn't come with like any advice like, *"Here you go."* I didn't get any warning or they just let you know that there's been a change in that position. It was like, *"Oh, well here's the money, take it or leave it."* It's like, *"Oh okay."*

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**Amanda Farmer:** Yes, we will take that what a lucky-

**Reena Van Aalst:** Yes, we'll take that. Thank you. It's about having money in our pockets and their pockets. That's for sure.

**Amanda Farmer:** Good win. And I suppose that teaches us to never assume the insurer's position or tell our clients that it's not worth making a claim. Good on you Reena for going back and letting them know. Of course, we have disclosure obligations anyway, under our insurance policy, if there's damage to property. So you never know what you're going to get. You don't ask you don't get.

**Reena Van Aalst:** Exactly what I was cringing having to go back again, like back in March, 2020, where I'm saying, "*Oh my God, I've got the same damage again that's occurred in all those apartments.*" And knowing that the causes had not been remedied. So I thought here, they're going to say, "*Well, we told you a year ago to get this done. And now you haven't. So now you've made it worse for us.*" But no, they said the opposite, "*Here's the money go away.*"

**Amanda Farmer:** Very interesting. I know there are some insurance professionals who listen to the podcast and sometimes you send me some notes in my inbox. I'd love to hear from you. If there is a reason why this might have happened, whether there was a change of position from insurers recently, or maybe this goes to further protecting the insurer's position for this particular building where things are only going to get worse. If there's anyone out there who wants to shed some light on this one, that would be great. As long as you've got the money in the bank, Reena. There's no [crosstalk 00:20:55] going back on this one.

**Reena Van Aalst:** No, I haven't got it yet because the board still hasn't met because again, we were supposed to meet just before lockdown and then we were locked down and then some of the board members don't really like meeting via Zoom. So we haven't, I mean, I'm sure that they were just waiting for us to sign off and again, we need to look at what the sign off involves because when you're taking money, you're setting certain conditions. So there may be certain conditions in there that may or may not be palatable depending on how onerous they are.

**Amanda Farmer:** Yes. Very true. Thank you for sharing that win. My win is about a noise dispute that has been happily resolved, fancy that.

**Reena Van Aalst:** Music to my ears, happily resolved from noise, I've never heard that before.

**Amanda Farmer:** Never heard such a thing, Reena. The resolution is a creative one and that's why I wanted to share it with you. I'll give you some of the background first. The noise in this particular complex had been emanating for some time from a small utility lot. So, not a residential lot, but a utility lot owned by one of the owners who own another apartment in the building. And the utility lot has a restriction on use from the council that it can only be used as an office space. It doesn't have a kitchen. It doesn't have windows. It's a small space. Can't be used as a residence, but can be used as an office space Monday to Friday 9 to 5. Now the owner was unfortunately for other residents, using the space outside of those hours, creating noise at night, having different tenants coming and going on the weekends, playing music and causing a disturbance to the resident owner next door immediately next door, as well as some others in the complex, I was called in to give some advice to the owners corporation about what it could do.

Of course, I spoke about enforcing by-laws. We ultimately filed for mediation, but I was contacted recently to cancel the mediation because the utility lot was being sold. And it was being sold to the next door neighbour who had been experiencing the brunt of the noise problem. So, happy result all around the neighbour has a new property in their portfolio and is now going to be the one with the control of what goes on in that utility lot. And I presume I could be wrong, but I presume, able and willing to comply with the by-laws and to live peacefully and ensure their neighbours can live peacefully. So, I love that happy outcome and a happy vendor able to sell promptly without too much fuss and without the trouble of looming Tribunal proceedings.

**Reena Van Aalst:** Well, it's funny you should say that Amanda, at the moment I've got a noise complaint that's been going on for quite some time. We've only been managing the strata scheme for one year now, but it's been happening I think for 4 or 5 years

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where it was alleged that that person had actually changed the flooring. And we realised that wasn't the case. The new owner said it's carpeted. We have had the building manager go up there and they've seen that it's been carpeted. So it's been going on for quite some time. And the person underneath is saying, "Well, it's not due to the behaviour. It's due to the building." And I'm thinking of saying, "Well, you know what? Why don't you just buy the apartment? And you won't have to worry." That could be our new dispute resolution, forget about by-laws [crosstalk 00:24:25] you can buy the apartment yourself and then.

**Amanda Farmer:** And I have even heard of and indeed suggested to some buildings with really big problems is getting a consortium together of owners who will buy out a troublesome owner, especially if there is some special benefit they're attached to a lot, a rooftop access, for example, or an attic space or a particular area that's causing problem, make an offer, make an offer. That's the world we live in.

**Reena Van Aalst:** Yes, exactly. I mean, it's such a great outcome in your case, Amanda, because obviously there were strict times that the utility lot could be used and that was probably much easier to probably show that there was a lack of compliance in that respect. But I think for the general noise thing where there's no such parameters apart from the subjective ones, it sort of makes it a bit harder I think when it comes to enforcement.

**Amanda Farmer:** Yes. Noise cases are particularly difficult. I was just chatting to a new client yesterday about that. They are often so hard to prosecute and easy to defend and you just don't know what the Tribunal is going to come up with. It's a really, it's one of the top 5, if not top 3 three issues that we have in strata noise for sure.

**Reena Van Aalst:** Yes. Definitely.

**Amanda Farmer:** All right. Well, Reena, that is all I have for this week. Anything you want to add?

**Reena Van Aalst:** No, just let's keep going and trying to keep maintaining our composure during lockdown. I think it's getting a bit trying, I think for some strata managers out there, I think.

**Amanda Farmer:** Yes. Look after yourselves, everybody. We are all in this together.

**Reena Van Aalst:** Definitely.

**Amanda Farmer:** I'll catch you next time Reena.

**Reena Van Aalst:** Bye 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 via 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?