

Publication Date: 16 March 2022

YSP Podcast Transcript: Episode 304. The 3 Ways Strata Managers are Getting Notices to Comply Wrong

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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 am your podcast host and resident strata lawyer, Amanda Farmer, and it's my job here each week to help you demystify the legal complexities of apartment living. Now last week in my chat with Reena Van Aalst, Episode number 303, I shared a recent win that a client of mine had achieved and it related to a successful challenge to a notice to comply, which my client's owners corporation had issued.

This week, I'm going to go a little deeper on that topic and share with you three ways that strata managers are getting notices to comply wrong. I'm also going to share with you the details of an exclusive webinar that I'm delivering on this very topic this Thursday, the 17th of March, so stay tuned for that info towards the end of this episode.

Now, I've mentioned there are 3 ways strata managers are getting notices to comply wrong. In fairness, it is not just our strata managers that need a little more guidance on this often complex area of our strata law. Strata committees, committee secretaries, maybe even lawyers, those less experienced in strata could all benefit from a refresh on the technical requirements of a notice to comply under our New South Wales legislation.

Section 146 of our Strata Schemes Management Act 2015 is the section that allows an owners corporation to give a notice to an owner or an occupier of a lot requiring that owner or occupier to comply with a specified by-law. The owners corporation can give that notice if it is satisfied that the owner or occupier has breached that by-law.

Now, I'll share with you in just a little bit why an owners corporation might want to issue a notice to comply. I'm often asked what kinds of circumstances, what types of by-law breaches are best dealt with via a notice to comply? My answer to that is that we need to be thinking about situations where there is behaviour that is happening that you would prefer not to be happening in your community or the community you're serving as a strata manager.

For example, noise. Unacceptable levels of noise that is disturbing the peaceful enjoyment of other owners and occupiers, that would be a breach of the noise by-law that so many buildings will have in place. Anti-social behaviour. Behaviour that causes offense or embarrassment to others on the common property. Many communities have a behaviour by-law.

What about residents that are not properly disposing of their rubbish, making a mess of the bin room or the garbage shoot room, dumping on the common property? That's the kind of behaviour we want to stamp out in our strata buildings. The hanging of washing on balconies. Some communities have a by-law that prevents that, or storing items on balconies or in car spaces that may impact the external appearance of the building, items that can and should be easily removed and placed somewhere else on the lot.

In each of these situations, it's very likely that there is a by-law being breached and issuing a notice to comply is often an effective way of addressing that behaviour, bringing the existence of the by-law to the attention of the owner or occupier responsible for the behaviour and making sure that it stops promptly and doesn't reoccur.

Now, a notice to comply would not be suitable or recommended when the owners corporation wants a person to actually do something, to fix a problem that they've caused. For example, there's been some illegal work done on the common property, maybe a bathroom has been renovated without permission, and the faulty waterproof membrane is now causing a leak down to the apartment below.

A notice to comply pointing out a by-law breach is probably not the most efficient, effective way to deal with that particular situation. Rather, what you want in that situation is for the owner, the occupier to rectify the damage that they've caused to the common property, and you're going to have to be a bit more specific about what it is you want them to do. We don't have that kind of

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flexibility when we issue notices to comply, so in my experience they are best used when we are trying to correct poor behaviour and ensure the high standards that we might have within our communities are upheld.

If a notice to comply is issued by an owners corporation and the recipient of the notice continues to breach the relevant by-law, then it's open to the owners corporation to proceed to the Tribunal, the New South Wales Civil and Administrative Tribunal, NCAT, with an application for a penalty order. The Tribunal may order a penalty of up to \$1,100 be payable by an owner or occupier where they have failed to comply with a notice to comply. That amount is payable to the owners corporation.

This is the reason why I say notices to comply are not suitable where the outcome you really want is for an owner to do something, to fix something, to remedy a problem, because a penalty application will not give you that order, a penalty application, if successful, will only result in payment of a penalty.

Now with that background, onto the three ways I see strata managers getting notices to comply wrong. In summary, and then I'll give you the detail. Number one, the notice to comply refers to the wrong by-law. Number two, the owners corporation has no authority to issue the notice to comply. Number three, the notice to comply is issued, but there's no compliance and there is no prompt follow-through from the owners corporation.

Okay, now here is the detail. Number one, the notice to comply is quoting the wrong by-law. I saw this very recently in a case I was assisting a lot owner client with. Our legislation is very clear that a notice to comply must contain a copy of the specified by-law. That is the by-law that the owners corporation says the owner or occupier is in breach of. Our legislation uses that word, must. The notice must contain a copy of the by-law. The by-law can be attached to the notice, but it must be the right by-law.

I don't just mean, for example, the by-law that says no washing allowed on the balcony, if the problem is just that, washing on the balcony, I mean the correct registered version of the by-law. I see too often strata managers, committee members quoting by-laws in terms that simply are not registered. By that I mean registered as part of the consolidated bundle of by-laws that is on the title to the owners corporation's common property registered with Land Registry Services.

A by-law has no force or effect unless it is registered, and I think there are a few communities out there that have copies of their by-laws saved within their books and records that are out of date, they are not actually the current registered bundle of by-laws. They may be a copy of the by-laws from a few years ago before that annual general meeting where the by-laws were updated pursuant to the advice from a strata lawyer. Maybe the strata manager has inherited books and records from a former strata manager and hasn't checked that the version of the by-laws that are in the electronic file is in fact the version of the by-laws that is registered on the title.

Really, really important to be checking this, especially if you are a strata manager taking over a building from another manager. What I'm seeing are older versions of by-laws being quoted in notices to comply, and when I go and do the legwork of accessing a copy of the current registered version, I can see that the by-law has been updated. Even if it's just some changes to the wording, changes to legislation references.

If the by-law attached to the notice to comply is not in the form that is registered on the title, then your notice to comply is open to challenge and you may not be able to enforce it down the track with a penalty application. So make sure the notice to comply contains a copy of the specified by-law, the by-law that you are attempting to enforce. That should be clear, but also that the by-law is in exactly the same form that is registered on the common property title. Don't skip that step of checking.

Mistake number two that I see being made with the issue of notices to comply, managers and committees are forgetting to get specific authority to issue the notice to comply. Now, our legislation tells us that a notice must not be issued unless there has been a resolution approving the issue of the notice passed by the owners corporation at a general meeting or the strata committee at a strata committee meeting.

So, you do need a specific resolution approving the issue of that particular notice to that particular owner in relation to that specific

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by-law and its breach. Make sure there's a formal meeting convened, a motion resolved and minuted. For most communities, it's going to be efficient to do this by way of a strata committee meeting.

Only 3 days' notice required for strata committee meetings in New South Wales, and I understand that many communities when you're in the situation of enforcing by-laws, you are moving quickly. The only time a resolution may not be required is if your strata manager is issuing your notice to comply, and your strata manager has been delegated that function under their agency agreement.

So strata managers, if you think you have this authority to issue a notice to comply and you don't think you need the strata committee resolution or general meeting resolution, check your agency agreement. See if that function is ticked in the list functions in respect of which you have delegated authority to carry out. In my experience, it's not all that common for strata managers to have this delegated authority. Even if you do have it, I know the cautious strata managers that I often work with are going ahead and seeking that committee resolution anyway.

If you are off to get a resolution to authorise the issue of a notice to comply, it might also be a good time to authorise the engagement of a lawyer if that's something the owners corporation wants to do, especially bearing in mind any future penalty application that may need to be made if the notice is not complied with. Section 103 of our New South Wales legislation does require that legal services for which any payment may be required be approved by the owners corporation at a general meeting.

There are some exemptions from that requirement, but if you are ultimately thinking you'll need to proceed to the Tribunal, you're convening a meeting anyway to approve the issue of a notice to comply, it may be efficient to include a motion for the future engagement of a lawyer to assist the owners corporation through that process to the conclusion of a penalty application.

Mistake number three or the third way I see strata managers getting notices to comply wrong, there is no follow-through or at least no prompt follow-through if the notice to comply is ignored by the owner or occupier or it's not complied with. I often see managers and committees get a little frozen at this stage, because they're not quite sure when they should expect compliance with their notice. What's the deadline? What's the timeframe? Is it 14 days? Is it 30 days?

When should a notice to comply be complied with? Well, our legislation doesn't actually tell us, so in my view it is open to you to set your own timeframe for compliance, and it's important to do that in the notice itself. Now, the form of a notice to comply is set out in a template that's available from Fair Trading. I'll include a link to it in the notes for this episode, and you'll see on the form where there is space to set out the by-law that has been breached, the terms of the by-law. If there's not enough space, attach a copy of the by-law to the notice, and what it is that you say the owner or occupier needs to do to ensure their compliance with the by-law.

That's the place where I recommend you put in a timeframe. Whether it's 14 days, 28 days, 30 days, 2 months, whatever it is that you as an owners corporation determine is a reasonable timeframe for compliance. Then strata managers, committee secretaries, diarise that date as your deadline. Is the by-law breach continuing past that date? Do we have evidence of the continuing by-law breach? And if so, is it time to consider making an application to the Tribunal for a penalty order?

If you don't set that timeframe, things can be left hanging. I do see communities with persistent problems in one area or with one particular resident, simply because notices are issued, but there is no follow-through. We're all busy, especially our strata managers, so it's important to set ourselves up for success right from the beginning and make sure we have a timeframe in place, agreed to, notified to the owner that we can all follow.

So, those are just 3 ways I see strata managers getting notices to comply wrong. They're not the only 3 ways. It's certainly a technical area of our strata law, and those technicalities are the focus of the Tribunal in any future penalty application. If a notice is not issued strictly in accordance with the legal requirements, then it is very likely to be set aside by the Tribunal. In that circumstance, a penalty application will fail. No one wants to be in that position as an applicant before the Tribunal, least of all a professional strata manager who has been paid by their client to get this process right.

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Now if you want to learn more about this important area of strata law, including how to run a successful penalty application, or if you're a lot owner on the other side of one of these applications, how you might cleverly defend it, then I have a webinar for you.

Now full disclosure, straight up, this is not one of my usual free webinars, there is a cost to attend, but here's why. This is a Pro Webinar. What's a Pro Webinar? These are designed exclusively for the Pro Members of the Your Strata Property online community. Our Pro Members are strata managers and highly engaged committee members wanting to serve their communities as well as they possibly can. On Pro Webinars, we don't just scratch the surface of complex strata issues, we go deep.

I've just put the finishing touches on the content for this upcoming webinar. It's called The Nuances of Notices to Comply, and I can tell you that I will be taking attendees right inside my client work, showing you some of the successful submissions that I've made to the Tribunal in the past on penalty applications, both for owners and for owners corporations sharing with you advice that I have received from specialist strata law barristers that has helped me get clients great outcomes before the Tribunal, thousands of dollars' worth of advice.

This will be our second Pro Webinar for 2022. Our first was Bulletproof Books and Records, very popular topic. The Nuances of Notices to Comply is coming up very soon. I will be delivering it live on Thursday, the 17th of March at midday. That's Eastern Daylight Time. I'll give you the link to register in just a moment.

On the webinar, I'll be sharing my step-by-step guide to properly completing a notice to comply with a bylaw, including how to ensure effective service on a lot owner. I'll identify common legal challenges to the validity of notices to comply, how to make these challenges and how to defend them, and I'll explain how to craft a winning penalty application. I'll also leave time to answer your questions about the notice to comply process and penalty applications generally.

Now, this webinar is free to our Pro Members as part of their annual membership. You would've heard from me, our Pro Members, about this webinar in your inbox last week. Do reach out if you haven't seen that email. CPD points are claimable for this webinar, which is good timing as we're near the end of the CPD year for our strata managers.

I do like to make sure that our other members in our online community have the opportunity to access the gold that is in a Pro Webinar, and that is why I also make them available for a fee to our members also. So if you are a member of the Your Strata Property online community, but not a Pro Member, you can still access this webinar for \$97.

The link to secure your spot is yourstrataproperty.com.au/prowebinar. That's for our members. If you are a Pro Member, no need to head over to that link, reach out to me if you haven't seen my email of last week and I'll get you registered straightaway. The link for our members to secure their spot for \$97 is yourstrataproperty.com.au/prowebinar.

Thursday, 17 March, midday. Even if you can't make that time slot, I do urge you to register. The recording will be available, but only to those who have secured their spot. It doesn't otherwise go in our member library, so you do need to be registered to catch the recording, even if you are a member. Because I know this podcast episode is being published only a day or so before the webinar is going to be delivered, I will keep that opportunity open for members to purchase the replay until midnight this Sunday, the 20th of March, 2022. Again, that's Eastern Daylight Time. Details and registration for our members over at yourstrataproperty.com.au/prowebinar. That's P-R-O webinar.

If you are not a member of our online community, then I'd love for you to become one, so you can access these member benefits. Find out more about our online community over at yourstrataproperty.com.au/membership. Being able to access these exclusive webinars is just one of the many benefits of joining our online community.

So, I hope I'll have you spending some time with me very soon learning the nuances of notices to comply, digging deeper on this important topic that has the potential to ensure more peaceful, more enjoyable strata communities for us all. That's it for me this week, I will 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 comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?