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YSP Podcast Transcript: Episode 317. Disability Access and Discrimination in Strata

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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 to this week's podcast episode. I am your host, strata lawyer Amanda Farmer. And it's my job here each week to help you demystify the legal complexities of apartment living.

Solo episode from me this week. It has been a little while since I have delivered a solo for you. Most weeks here on the podcast, I have a special guest I chat to bringing you some insights, some ideas, some energy from our wider strata sector. But sometimes the mood strikes me, and perhaps because of what I've been working on during a particular week or who I've been talking to, what I've been seeing as a popular or important issue in our circles, I have a certain topic I think it's necessary or helpful to bring to the podcast, and this week is one of those weeks.

Now, some of you may have seen a TV news story recently about a strata resident in New South Wales. The story aired on A Current Affair a few weeks ago. This story was about Eric Bouvier, a 92-year-old war veteran confined to a wheelchair. In that story, I gave some comment in my capacity as a strata lawyer about the apparent refusal of Eric's owners corporation to install a chairlift in the common property stairwell so that Eric could access his third-floor apartment.

Now, I shared the link to the replay of this story, and also some comments about the issue on my various social channels, on our Your Strata Property Facebook page and also over on my LinkedIn profile. And on LinkedIn in particular, this story has generated some discussion, some interaction, some interesting points of view that I think, deserve to be aired, to be explored further, and to be discussed. And I'll just share with you some behind-the-scenes stats on this post on LinkedIn. It has had over 5,000 impressions, over 100 reactions, 8 comments, 2 shares. I will include in the show notes for this episode both the link to check out the A Current Affair story that I am talking about, and also the direct link to this post on LinkedIn.

Now, this story was about an owners corporation in New South Wales facilitating disability access for a resident. And the comment that I shared with the journalist and that was aired on your TV screens was that a strata resident has a fundamental right to safe access to their own property. On LinkedIn, I shared the comment that older buildings without lifts need to view these types of additions, installations as not negotiable. Now, that position is supported by the current law in New South Wales, as well as a couple of other states, which I'll share with you in today's chat. But the discussion that has been generated by this story raises some really interesting questions and highlights, I think, the challenges that our strata buildings, our owners corporations face when having to cater for residents of differing needs and differing abilities.

Now, the question of disability access and whether owners corporations are subject to discrimination laws has been discussed here on the podcast previously. If you're interested in exploring further, check out episode number 249, one of my chats with Reena Van Aalst, where we talk about why anti-discrimination legislation is increasingly relevant to our residential strata buildings. Also, episode 136, I interviewed Tim Graham, who was then a partner at HWL Ebsworth lawyers in Victoria, now a partner at Bugden Allen Graham lawyers. We talked about what was then a recent Victorian Supreme Court case which left buildings questioning whether they could be forced to upgrade their common property to cater for residents with a disability. Links to each of those episodes in today's show notes.

I also want to make sure you're aware of an excellent journal article available online written by Cathy Sherry. This was published in 2020 when Cathy was an associate professor at the Faculty of Law at the University of New South Wales. The article is titled Does Discrimination Law Apply to Residential Strata Schemes? Link to that one available for you. And my discussion today has certainly been guided by Cathy's research and the questions that she poses in that article.

Now, returning to that LinkedIn post. Couple of the comments under that post worth checking out and exploring a little further. Kareen Mackey posed this as a counterpoint, "While, yes, rights to access are fundamental, this raises the bigger issue of aging populations in bodies corporate and the increasing use of a body corporate as a means to replace or delay as long as possible a

shift to retirement village/hospital scenario. Bodies corporate are not designed with the facilities of retirement villages, so how far do they have to go to incorporate changes to accommodate elderly residents often at the expense of younger residents who prefer to spend funding on modernising, updating, aging infrastructure for future value?" "It's a difficult issue, says Kareen, "and one we're all facing in this industry as infrastructure funding only goes so far, and the competing interests of youth versus older members can be a contentious problem."

Dawn Tompkins has posted in support of Kareen's comment. "Great counterpoint, Kareen," says Dawn. "The issue of aging populations in strata properties and the use of body corporate schemes as defacto aged-care facilities is on the rise and becoming increasingly more complicated to manage and to navigate. I'd like to hear more discussion on this." Well, Dawn, here is that discussion, a full podcast episode dedicated to the topic.

A third and final comment I'll share with you right now is that from Julie McLean, who raised a separate but equally important issue. "Has Veterans Affairs or NDIS approved the upgrade to common property?" asks Julie. "I know in other applications," says Julie, "they have refused to fund improvements to the common property and only fund the private property component, even though the applicant is a part-owner of the common property. By refusing the upgrade to common property, people who live in standalone homes benefit more from a public scheme than strata owners. Perhaps the lens should be on the government policy when it comes to these types of Veterans Affairs and NDIS applications and the inequity for strata owners." Excellent point there from Julie. I did reply to Julie confirming that the Department of Veterans Affairs had paid in full for the chairlift required by Eric. But indeed with our aging population, as Kareen and Dawn have pointed out, this is likely to become an increasingly important issue for our owners corporations, our bodies corporate, and those who live in our strata buildings.

Now with that background, what I'd like to share with you today is some of the law across a few of our states relevant to discrimination and disability access to help clarify for our owners corporations, our committees, our strata managers precisely what their current obligations are when it comes to ensuring all residents can safely access their homes. I will be looking at the law in Queensland, as I understand it, New South Wales, and also Victoria, always, of course, with an open invitation to anyone tuning in who may have an update or is aware of something I've missed to reach out to me with a comment under this podcast episode over on our website and let me know where those gaps in my knowledge may be.

Now, first up, I do want to point out that the issue of disability access is not just an issue relevant to elderly people or an issue centred around aged care. Any person in our communities, young or old, may have a need either permanently or from time to time for a different means of access to their home. They may not have purchased their apartment or chosen to live in their apartment with this need. It could have arisen after they moved in. And for those of us who are currently living in strata apartments, perhaps we at some stage in the future could find ourselves in the position of needing facilitated access to our homes.

This is a challenging issue. It's an issue that evokes some emotion, differing points of view. And it's unfortunate, I think, that our law has been a little unclear in the past on this issue. And you'll hear me come to the conclusion at the end of this chat that we do need some legislative intervention, I think, to assist those guiding and those making the decisions in our strata communities.

Now, any discussion about disability access in this context is inevitably intertwined with a discussion about discrimination law. Discrimination law, generally, applies to public spaces and publicly accessible property. It doesn't apply to private property. So a resident in a freestanding home, not strata title, doesn't have to provide disability access, doesn't have to provide a ramp if they have a visitor in a wheelchair or a tenant in a wheelchair. I can prevent assistance animals from entering my freestanding home if I wish. I don't have to comply with the provisions of the anti-discrimination legislation when I am in my own home on my private property.

But the interesting, or perhaps challenging aspect of our strata law is that residential strata schemes are private property. But our courts in various different ways have said that discrimination law does apply to our residential strata properties. Why is that? Cathy Sherry addresses this question in her article I mentioned earlier. Cathy says, and I agree, that our strata buildings are different to private freestanding homes. They are homes to sometimes many hundreds of people with common areas that all of those people have to access to get to their own home. Entry doors into a common foyer, stairs, lifts, car parks, swimming pools, gymnasiums, all of those areas are accessible by each resident, they're visitors, and sometimes by contractors engaged by residents or engaged by

the owners corporation.

If I'm in a freestanding home, I don't need to worry about my neighbour next door coming through my front door unless I invite them to be there. Not the case in a residential strata building. In addition, incredibly unusual in our legal landscape, private citizens in strata buildings can make rules about property belonging to other private citizens. We can regulate what people can and can't do in their own homes. Again, not something I have the power to do when we're talking about the relationship between me and my neighbour in a freestanding home.

Now, for those reasons, I think that's why our courts have stretched perhaps to ensure that anti-discrimination law applies to our residential strata buildings. They are unique forms of property. And it's important, I believe, that in these unique forms of property residents are protected from discrimination.

The number of people living in strata is increasing exponentially. We're now in the middle of a housing affordability crisis. We can expect to see more people choosing apartment living as the cost of housing increases. Generally speaking, apartments are still a more affordable option. We need to make sure we are catering for and we are protecting with clear and understandable laws the people who live in these communities.

So let's have a look at those cases in the jurisdictions I referred to earlier, a Queensland case, couple of New South Wales cases, and a Victorian case.

The leading Queensland authority is a case called C&A, a 2005 case. In this case, the resident had a condition that caused her to have blurred vision. And she was reliant on an assistance dog. She used a motorised wheelchair and a portable respirator. Her building was a large resort-style building at Southbank in Brisbane, and she couldn't enter the building, the pool, or any of the other recreational areas without assistance because of the way the building's key system worked. If she had a device, a proximity device, she could open all the doors on her own. And her claim against her body corporate was that it had failed to alter the doors so that they would be responsive to a proximity device and therefore her body corporate was engaged in indirect discrimination against her.

Now, the question for the Tribunal was whether the body corporate was providing services within the meaning of that term as it appears in the Anti-Discrimination Act 1991 in Queensland. And ultimately, it was determined that because the case was about access to recreational facilities and the body corporate was found to be providing these facilities as a service to residents, then the body corporate was indeed subject to the Anti-Discrimination Act and it was required to facilitate entry by the applicant to the recreational areas of the building from the street or from her apartment.

The body corporate argued that it wasn't providing a service. It was simply looking after its own property. The Tribunal rejected that argument. And you'll see that's a common argument made in these cases and has been consistently rejected. The body corporate also claimed that if it had to supply these special services to the applicant, it would suffer an unjustifiable hardship. And there is an exception in the Queensland Anti-Discrimination Act where a person can be excused from their obligation if to comply would cause them to suffer an unjustifiable hardship. In this case, the Tribunal found that the cost of the device that was needed was a few thousand dollars and the disruption from its installation would only last a day and would not cause unjustifiable hardship to the body corporate, especially taking into account that this was a large inner city apartment block with average unit prices exceeding $750,000. That's the case of C&A.

A more recent case in Queensland is that of Knox, K-N-O-X, 2020 QCAT case. I actually talked about this case in podcast episode 250. This was a case about the installation of a pool hoist to ensure a resident's access to the pool. And that resident was awarded $5,000 in compensation because of the body corporates delay in having that hoist installed. And the body corporate was ordered to make a private apology to the resident. So it seems some fairly clear direction there in Queensland in relation to the applicability of anti-discrimination law to Queensland body corporates.

Turning to New South Wales, the leading New South Wales case is Hulena, H-U-L-E-N-A. This is a decision of the Administrative

Decisions Tribunal confirmed on appeal. This building in which Ms. Hulena lived was relatively large. It didn't have extensive facilities and wasn't that Queensland resort style we saw earlier. Ms. Hulena had multiple sclerosis and couldn't access her apartment via the usual routes. She argued that this was a breach of Section 49M of the Anti-Discrimination Act in New South Wales. That section makes it unlawful for a person who provides goods or services to discriminate against a person on the ground of disability.

Once again, we have this term services coming up in our legislation, and the Tribunal needed to consider whether an owners corporation provides services. To work that out, the Tribunal looked at Section 4 of the New South Wales Anti-Discrimination Act, which defines the word services. And services includes access to and the use of any facilities in any place or vehicle that the public or a section of the public is entitled or allowed to enter or use. The Tribunal interpreted this definition broadly and found that it was open to Ms. Hulena to argue that her owners corporation provided services, namely facilitating access through common property to a resident's apartment.

The owners corporation, in this case, was found to be imposing a requirement on Ms. Hulena that she use a particular method, route of access and she couldn't do so as a result of her disability. The requirement was found to be unreasonable because the option to modify three doors would only cost about $16,000 with some additional costs for power supply and ongoing maintenance. The Tribunal found that the finances of the owners corporation were healthy and the costs wouldn't be an unjustifiable hardship on the owners corporation.

Now, importantly, the Tribunal at appeal level found that the construction of a building that met the design specifications at the time of its construction doesn't remove from the owners corporation the ongoing responsibility to maintain and repair the common areas in accordance with current anti-discrimination legislation. If we say that an owners corporation provides a service when it provides accessible entrances and exits to the complex, it has to do so in accordance with the relevant legislation enforce from time to time. And that includes the Anti-Discrimination Act.

So in this case, Ms. Hulena was able to substantiate her claim of indirect discrimination. And this is often the case that is relied upon by lawyers, by myself acting for owners attempting to ensure their safe and equitable access to their homes.

More recently in New South Wales, the Administrative Decisions Division of the New South Wales Civil and Administrative Tribunal confirmed that an owners corporation does indeed provide services. That's the case of Araya, A-R-A-Y-A, 2021 decision. A link for that one in the notes for you.

Turning to Victoria, the most significant decision that I'm aware of is the Supreme Court decision in a case called Black. I discussed this decision in some detail with Tim Graham, Victorian strata lawyer, also the current President of the Australian College of Strata Lawyers, back in podcast episode number 136.

In that case, the resident had a motorised scooter. The owners corporation was responsible for managing the main entry to the building, as are owners corporations, body corporates generally are, as well as the doors to a car park. The resident, Ms. Black, requested that the owners corporation make some modifications to the common property, and the owners corporation refused to do so.

The relevant legislation in Victoria is the Equal Opportunity Act of 2010. And it was found by the Supreme Court that Section 44 of that act applies to owners corporations. The owners corporation argued that they didn't provide goods and services, but the court didn't agree, finding that parts of the building, such as the main entry door, may well be in areas that the public are permitted to enter and therefore access to and the use of those areas falls within the definition of services in the Equal Opportunity Act.

As you'll hear Tim Graham and I discuss in podcast episode 136, we lawyers find that conclusion a little difficult to grapple with, bearing in mind, as I said right at the top of this episode, that our strata buildings are private spaces. They are private property. Although members of the public may be entering those spaces, they are doing so with the express or implied invitation of the residents or the managers, the controllers of those buildings.

It would be far clearer if either our strata legislation or our anti-discrimination legislation across our states directly addressed the situation of our residential strata schemes, owners corporations, body corporates, and was clear about the status of those unique buildings and whether and, if so, how the obligations in that legislation apply to us.

So that's my overview of the legislation in three of our East Coast states here in Australia on the topic of disability access and anti-discrimination. I appreciate completely that these issues are of concern to those living in strata buildings. Uncomfortable questions about whether we might need to do expensive retrofits, renovations, upgrades to ensure disability access, especially in the context of an aging population. Our relevant legislation, as you've heard me refer to, does have what it calls unjustifiable hardship provisions. These are somewhat of a safety net where the specific situation of buildings can be taken into account and the question of whether a proposed installation will simply be too much of a burden for an owners corporation can be taken into account. I do know in a number of the cases I've been involved in recently, the resident has been more than willing and indeed has paid for the installation and hasn't expected the owners corporation to fund that installation.

There's also the question of exclusive use of these kinds of facilities, ongoing repair and maintenance, and whether installations like chairlifts could or should be removed when the resident in question is no longer living in the building or doesn't have a need for the facility.

So I encourage communities faced with these issues to do three things. Number one, to ensure that they're armed with knowledge. Knowledge of what the relevant law is in their jurisdiction. Knowledge they can obtain from a qualified, experienced strata lawyer. Strata managers be alive to these issues, alert to the complexity of the situation, and do be recommending specific legal advice to your owners corporations should they be faced with these questions and these proposals.

Number two, keep the lines of communication open. Meet with the resident who requires the installation, the upgrade, the specific equipment. Understand what it is they're asking for, understand what it is they are committed to doing. Will they pay for the installation? Will they commit to its repair and maintenance? In my experience, it's often where these lines of communication have broken down that we find communities in turmoil unnecessarily so.

And number three, approach the situation with compassion. It may be hard for us as young people, as agile people, as fit and healthy people to understand the burdens of those who are not in that same position. I'm not sure I'd find too many people arguing with me if I was to say that we should all be committed to ensuring that all people, all types of people can fully participate in society notwithstanding their gender, their age, their race, or a disability.

As Cathy Sherry says at the conclusion of her excellent article, which I do encourage you to go and read, "All people should be able to make free choices about their housing rather than be restricted to particular kinds of housing, for example freestanding homes or retirement villages or low-rise residential buildings. Strata living is here. It is here to stay. It is beautifully complex. And it should, in my view, encourage and facilitate the participation of all."

That's what I have for you today. I hope you've enjoyed this discussion. I'm looking forward to hearing your comments, your questions, and your further ideas. 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 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?