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YSP Podcast Transcript: Episode 346. Where do our cost recovery by-laws stand now?
- Allison Benson guides us

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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, lovely strata people and welcome to this week's episode of Your Strata Property Podcast. I am your host strata lawyer, Amanda Farmer, and I'm here each week helping to demystify the legal complexities of apartment living. This week I am joined by fellow strata lawyer Allison Benson. Allison is a director of Kerin Benson Lawyers specialising in strata community titles and building defects law. Allison has been working in this area since 2008. She concentrates on advising and acting for owners corporations, community associations, and lot owners in the preparation, interpretation, enforcement of management statements and by-laws. She acts on strata renewal processes and in both strata and building construction disputes.

Allison is well experienced as an advocate in the New South Wales Civil and Administrative Tribunal and has represented parties in disputes all the way to the New South Wales Court of Appeal. She also writes a blog on strata law called *Thoughts from a strata lawyer*, a link to that one for you in the show notes, and she's a regular presenter to owners corporations, strata managers, and strata lawyers on the ins and outs and the hot topics that are facing us in our strata world.

This is not the first time I have had the pleasure of Allison's company here on the podcast. We also had a chat back in episode number 203. In that chat, Allison was talking us through the implications of what was then an NCAT appeal panel decision about owners applying to the Tribunal for compensation when they had a claim against their owners corporation. That case was the Pullicin case, which later became known as the Vickery case when it went up to the Court of Appeal.

In this week's chat, Allison and I are again talking about some Tribunal litigation, specifically litigation in which Allison acted for the owners corporation. I'll let Allison give you the background, but in short, we are talking about cost recovery by-laws, also known as enforcement costs by-laws. They're the by-laws that many buildings in New South Wales have in place to allow owners corporations to recover from recalcitrant lot owners the costs that they are causing owners corporations to incur as a result of their persistent by-law breaches.

This is a topic that I touched on briefly in one of our recent Friday Live chats over on the *Your Strata Property* Facebook page. We had a lot of interest in that discussion, so I thought it well worth bringing the woman with firsthand knowledge, Allison Benson to the show.

Allison has also been part of at least one, I think more of our Friday Live Facebook chats. She was one of three of my special guests when I broadcast live from what we called our girls weekend away. A few months ago, we booked an AirBnB in a popular wine region, had a very enjoyable wine tour on a Friday afternoon, and then Allison, along with two other well-known, I'm going to say female strata figures, join me for a Friday live chat. If you haven't caught that one, it's a whole lot of fun. There's a link to watch that one via our Facebook page in the show notes in case you haven't found them yet. When I'm referring to the show notes for our podcast episodes, they are over on our website at yourstrataproperty.com.au/podcasts. Just find this episode number 346. On the page there, click on through and you'll see all the links relevant to this chat. I'm going to take you right on over now to my most recent chat with Allison Benson of Kerin Benson Lawyers.

Allison Benson, welcome to the show.

Allison Benson: Hi, Amanda. Good to be back and I promise no death threats this time.

Amanda Farmer: Yes. We have had a lot of fun on live chats, on podcasts in the past. No, this is a very serious podcast episode. This week I know there are many owners, strata committees, and strata managers, very interested to hear your take on a couple of recent Tribunal cases dealing with cost recovery by owners corporations, what I call in the by-laws that I draft enforcement costs, the costs that may arise for an owners corporation when it is attempting to enforce its by-laws. And as I was reading these cases,

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as I was trying to educate myself on what sounds like a bit of a shift in our law, I thought to myself, "Why not get the expert firsthand to come and share with us exactly what's going on?" And this is her. She is here, Allison Benson.

Allison Benson: Thanks, Amanda, and nice to be called the expert. I know I ran these cases myself. So in far as that, I'll take the expert title for that, but I don't claim to be the strata expert. But it's been an interesting process and it is a really important issue for all owners corporations and lot owners because there are so many schemes with these type of by-laws in it.

Amanda Farmer: So many, it was only today that I had an email in my inbox attaching one of my own templates where I have drafted a by-law that deals with this issue enforcement cost a few years old now, that template by-law, and I was being asked by a manager, "Hey Amanda, can you change this up and make it applicable to community associations?" And I said, "Well, great timing, because I'm actually in the process of reviewing all of those by-law templates that have these kinds of clauses in them. And not only do we need to look closely at whether we can apply them to community associations, but whether we need to be reconsidering them for our owners corporations." So look, let's start with the *Cosquez* case. I hope I've pronounced that correctly and the history, I'll say, of that litigation, there were a few cases that I know you were involved in. Can you give us a brief summary if you don't mind?

Allison Benson: No, not a problem. And one thing I think we need to come back to that you've just reminded me of in your introduction is the differences between cost recovery by-laws and cost recovery provisions in things like work by-laws.

Amanda Farmer: Let's absolutely deal with that.

Allison Benson: Let's come back to that, but *Cosquez* not sure if that is pronounced correctly, even though I ran all three cases in that I will just say lot four, it was really factually complex. We started off in the Tribunal, there was a claim by the owners corporation that the lot four owner had done unauthorised work, that the lot four owner owed monies under an agreement for excess water charges, and that the owners corporation was owed monies by the lot owner under by-laws relating to cost recovery. I'll focus on that because that's really what the topic of today is. There was also a cross-claim by the lot owner.

Cross-claim being that the by-law had been unreasonably refused to approve the work and that the by-laws, the cost recovery by-laws were harsh, unconscionable, oppressive, and therefore invalid. So that was the original Tribunal. We ended up with a decision of the Tribunal that the by-laws were not harsh, unconscionable or oppressive, and that my submissions that the by-laws were in fact of benefit to lot owners as a whole because they protected the lot owners rights against people that incurred costs and allowed the owners corporation to recover its costs rather than potentially having to cover the cost of lot owners who, for instance, had damaged common property or who had run up costs in Tribunals or just failed to respond to inspection notices.

Therefore, the fire inspectors for the annual fire safety statement had to come out again and again and again. So that was my argument. The Tribunal accepted it at first instance.

Amanda Farmer: So if I can summarise that down to Allison, why should everyone have to pay for the sins of just one owner?

Allison Benson: That was exactly the argument I raised, and that's why I said it's actually for the benefit of all of the lot owners to have this type of by-law, even if it is just used in cases where its excessive costs. We all know the schemes where there have been problem lot owners that like nothing more than a good case and to cause costs to be incurred by the owners corporation. The decision was appealed. The appeal panel decided that there hadn't been adequate reasons given and remitted the proceedings back to the Tribunal. The remitted proceedings were actually heard by a different member and they took an entirely different view and they upheld the points for the lot owner.

Amanda Farmer: Yes, quite the rollercoaster there for that owners corporation, Allison. This isn't the first case where these kinds of by-laws or these types of cost recovery clauses in by-laws have been considered in New South Wales. Let's talk about the Liu case. That's L-I-U, and there will be links to each of these cases and the series of litigation in the *Cosquez* decision in the show

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YSP Podcast Transcript: Episode 346. Where do our cost recovery by-laws stand now?

- Allison Benson guides us

notes to this episode. What happened in the Liu case?

Allison Benson: Well, it was again in relation to by-laws. This one was a short-term rental accommodation by-laws. So it was regulating short-term rental accommodation. That wasn't the issue. The issue in the Liu case or Liu, and it was an appeal panel decision, was whether certain provisions in that short-term letting by-law were harsh, unconscionable, or oppressive. And there were two particular provisions in that case. So the by-law conferred authority on the owners corporation to deactivate access devices to the lot if there had been found to be a breach of the short-term rental accommodation by-law. That was one of the issues. The second issue was that it empowered the owners corporation to recover the cost and expenses of carrying out activities under the by-law. And that included, for instance, legal fees for chasing them up in the Tribunal. So they were the two provisions of the by-law that were under discussion by the Tribunal.

In that case, the two points were considered being access was found to be an inherent property right, and the deactivation of the access codes was found to have removed a really important fundamental right really that lot owners have to access their lot. And because there were no conditions or details of how the breaches would be found and no conditions as to how long access would be deactivated for that particular provision was found to be invalid. The cost recovery provision, which is what we are talking about, was also found to be invalid under the harsh, unconscionable and oppressive provisions. It was also found though, and this is where the Tribunal really went into a lot of detail. It was found to be invalid, not because it had an adverse effect against lot owners. It was found to be invalid because it was beyond power, which was the two limbs within the Cooper case.

One, a by-law had to be within power, and two, a by-law had to not adversely affect other lot owners without giving some sort of reward. So in this case, the cost recovery provisions were found to be without power. You can't recover the wording. I should say it was very, very dependent upon the wording in the Liu case. The wording was they would recover as the owners corporation, the debt as a levy debt, and there was no power for the owners corporation to recover costs and expenses as a levy debt under the Strata Schemes Management Act. So slightly different to the *Coscuez* case.

Amanda Farmer: Okay. So by-laws that empower an owners corporation to remove and occupy his access to their own lot are a no-no. We got to be careful of those. That's the Liu case and by-laws that seek to recover costs and expenses of the owners corporation as if they were levies are also a no-no. This is what the Tribunal appeal panel has told us. Going back to *Coscuez*, you've said the lot owner was ultimately successful when the matter went back to the Tribunal. What did the Tribunal in *Coscuez* say about that the owners corporation's cost recovery by-laws? Did they say the same things as the appeal panel said in Liu?

Allison Benson: No, slightly different. So we actually had three by-laws that were being challenged. Two of the by-laws and I should just say I did not draft them, but two of the by-laws had provisions in them that didn't quite accord, let's just say with the Strata Schemes Management Act. So one of them in particular didn't relate or didn't refer to the occupancy provisions under the Strata Schemes Management Act and the Strata Schemes Management Regulations. So that one was problematic.

Amanda Farmer: So that was a by-law and I did have a look at your summary in your blog Allison, which we will direct our listeners to because it's a good one. That was the by-law that restricted occupancy in each lot to a maximum of two persons over the age of 16, without any further exceptions, which unfortunately is not consistent with the occupancy limit provisions in our legislation in New South Wales, which is in Section 137 of our Act. So we have to be very careful when drafting occupancy limit by-laws that they don't overstep Section 137.

Allison Benson: And that was essentially it. It was an overstep and to be fair to the person that did draft the by-laws, the regulations I don't believe we're in at that point in time to save it, really all it needed was something along the lines of or as provided by the regulations from time to time or with any of the exceptions provided by the regulations from time to time. So it could have been saved.

Amanda Farmer: Another Tribunal member might have read the by-law down to mean that they. Do you think this one was black and white?

Publication Date: 25 January 2023

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Allison Benson: I think the right decision was made in that one. The by-law didn't make it obvious that it would be, any changes would carry through or flow through to the by-law itself. So that one I can accept quite frankly. So that sounds terrible. I'm accepting the Tribunal's decisions, but oh, I think that was probably a fair call. So we had other by-laws and one of the other by-laws effectively set out to say that, and I should say all of the cost recovery provisions in these by-laws were phrased as if it may be an action that the owners corporation would take. The owners corporation did not have to take the action, so it was discretionary that didn't save them. The fact that the owners corporation may have taken proceedings or may have added the costs to a ledger was discretionary that did not save the by-laws from being invalid.

Amanda Farmer: So two more by-laws that were ultimately declared to be invalid, what did they say?

Allison Benson: Okay. And so these were the cost indemnity provisions that the discretionary cost recovery provisions. The second by-law provided that the owner or occupier was responsible for indemnifying the owners corporation for any loss caused by damage to the common property. And that's a fairly typical by-law we see. But they were also responsible for paying any fines or penalties that were imposed by the failure to comply with the by-laws. Again, that's a pretty typical by-law that we see. The third by-law and because these kinds of ran together, these two required lot owners and occupants to comply with the by-laws and empowered the owners corporation to recover as a debt, not as a levy debt, but just as a debt. Its costs for taking action due to a breach of the by-laws. So just slightly different by-laws, but both of them were found to be harsh, unconscionable, and oppressive.

Why? Well, really good question. Because essentially they predetermined the responsibility for costs. So I believe that the Tribunal may have looked at it as usurping its jurisdiction. Obviously, the Tribunal has a jurisdiction to award costs, so potentially that was an underlying factor that certainly didn't appear in the reasons, but potentially that was one of the underlying issues there that was on the mind of the Tribunal member. So the issue as to whether the owners corporation had the power to put in the cost recovery provisions wasn't actually in question. Why? Because they were just found to be harsh, unconscionable and oppressive because of the predetermination of the responsibility for costs and forcing that back onto the lot owners without the lot owner having to have recourse to the Tribunal. So that was where the harsh, unconscionable and oppressive came in.

Amanda Farmer: Okay. Now, where did this leave your owners corporation client? What kind of costs have they had to... Let's set aside for the time being your costs, but what kind of costs have they incurred in the dealing with these by-law breaches on the part of the lot owner that now they just have to wear?

Allison Benson: Significant, significant legal costs because of course, we came through the original decision, which we were successful in the appeal and then the remitted proceedings. Bear in mind, there were other issues, as I talked about before that we were also arguing but we are talking about with regards to the by-laws. There had been a claim for insurance premiums to be compensated that did fall away at the original proceedings, but there were claims for meeting fees, claims for inspections, and works to make the lot fire safe after work had been done by the lot owner.

So there were quite a few claims in terms of the water charges. We had argued that it was under an agreement and alternatively that it could be recovered under the by-laws. So we're talking in terms of the fees themselves not being legal fees that the owners corporation sought to recover, probably talking about 20, 25,000. And then the third by-law was that it allowed the recovery of costs, legal costs to pursue breaches of by-laws. So obviously there were significant fees there. So it was a very disappointing decision for the owners corporation just to come to the conclusion that it had absolutely no power to do any of this.

Amanda Farmer: So those by-laws are now invalid for that owners corporation. They can no longer rely on those by-laws to attempt to recover these types of costs. Are you madly redrafting by-laws for various owners corporation clients? What do you say, Allison, that owners corporations should now do, if anything, about their cost recovery by-laws and indemnity clauses in their existing by-laws?

Allison Benson: Yes, so this brings us back to the question I was referring to before about the different types of cost recovery provisions. So one of the arguments that I was using in the proceedings was that, "Look, we have a by-law where the lot owner

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YSP Podcast Transcript: Episode 346. Where do our cost recovery by-laws stand now?

- Allison Benson guides us

had agreed to be responsible for costs and indemnify the owners corporation for any costs for breach of that by-law."

Amanda Farmer: And just to clarify, this was a by-law that granted the owner permission to carry out work.

Allison Benson: Yes.

Amanda Farmer: So it was a common property rights by-law. We always advise our owners corporations to put into those by-laws and indemnity provisions should any common property be damaged, should there be any loss suffered by the owners corporation. The owner with the benefit of the approval should have to reimburse the owners corporation those losses.

Allison Benson: Yes, that's exactly what it was all about. And the lot owner had put forward such a by-law and had agreed to those terms. That was distinguished from just a more general cost recovery by-law. The Tribunal felt that that needed to be distinguished because firstly, the lot owner had agreed to indemnify the owners corporation. Secondly, the lot owner gained a benefit from doing so because it was permitted to conduct the work. So I think for all the indemnity provisions for our work finals, our common property work finals, they're probably going to be okay, although they need to be checked to see if those traitorous words as a levy debt are in those provisions. So I'd be checking for those provisions.

Amanda Farmer: And that's been the case since the Liu decision, hasn't it? That we've been careful to check for those words as a levy debt. From memory, I haven't gone back to read that decision recently, but perhaps the words as if they were a levy might have been okay, but certainly not as a levy.

Allison Benson: Yes, I'm not sure that as if it were a levy would be okay. I think we just want to avoid any reference and any reference to any of the levy recovery provisions under the Act as well because the *Cosquez* decision, or however you may pronounce that, also said that the owners corporation had no power and it affirmed loop effectively to say the owners corporation has no power. One of the by-laws in the *Cosquez* decision did refer to recovering as if it were, didn't say levy debt, but referred to the section, which I believe is about Section 82-ish of the Strata Schemes Management Act for the levying of contributions in the recovery of contributions. So I think we just need to avoid it at all costs for our general by-laws, and general cost recovery by-laws. Oh, I would be extraordinarily careful. I would personally like to run another case in the Tribunal with regard to this.

I do quite like the argument that these type of by-laws, I mean, they're there for a reason that they developed for a reason because we have had, unfortunately in our strata schemes, a number of lot owners over the years just cause the owners corporation to run up costs. Whether it's because they just keep on depositing items on common property that then have to be cleaned up, whether it's because they damage the common property, whether it's the fire, the smoke alarm, callout fees. I mean I've drafted those many of them over the years and in fact, I've lived in a scheme where we had the fellow next door to me. I don't know what he was doing, but he certainly couldn't cook or he liked it. So that scheme had had a cost recovery by-law because it was about every second week and the *fireries* but it is what it is.

We just need to be very, very careful about those by-laws, know that they could be challenged and if the *Cosquez* case is followed, they will be held to be invalid. However, it is a single-member decision.

Amanda Farmer: Yes.

Allison Benson: So in fact, it doesn't necessarily have to be followed. In fact, I've had members not follow their own decisions.

So it's not an outright black-and-white situation. It is a very, very careful if you are drafting these provisions or as an owners corporation looking at these by-laws, you need to take them with a grain of salt to say 50/50 as to whether they're going to hold up and really carefully check the provisions, make them discretionary, potentially even say don't presume or predetermined costs that are to be recovered.

Publication Date: 25 January 2023

YSP Podcast Transcript: Episode 346. Where do our cost recovery by-laws stand now?

- Allison Benson guides us

So potentially say whatever the owners corporation is charged, if we're talking about a fire alarm callout fee, don't predetermine that amount. Don't try and take away the Tribunal's power to award costs. So don't predetermine those costs, but maybe just talk about the charges incurred by the owners corporation outside of legal fees. There'd be all sorts of charges. It'd be access fee charges to recode access cards. It would be, I'm just trying to think of some more access fee cards, the main one, or lost keys would be the main one, fire callout fees, that sort of thing.

Amanda Farmer: Additional fees charged by building managers for after-hours service, additional fees charged by strata managers for additional services.

Allison Benson: Absolutely. So there are tons of things that I think it's legitimate for the owners corporation to be able to charge a lot owner for. It's the user pays sort of concept. If a lot owner wants to do that or does cause that, is it fair for the rest of the owners corporation to have to support that cost? In my section, no, it's not particularly where that can be excessive, but we just have to be aware that we have this decision now. It says, "*Oh no, you can't do that on that particular by-law,*" and how it was worded and was invalid.

Amanda Farmer: Definitely worth heading over and having a read of the relevant cases. I think they're fairly easy to digest let's say, and you'll be able to have a look at the by-law clauses that were challenged and that were found to be invalid. Something that I think it's important we make clear Allison, only because I've had a couple of people reach out to me and express a bit of confusion about the types of costs and expenses that can be recovered from owners where an owners corporation is suing for a failure to pay levies. So a lot owner has not paid their levies at all or on time interest has been charged. Our legislation does say clearly that an owners corporation is entitled to not just recover the unpaid levy but recover the interest and any costs and expenses that it has incurred in seeking to recover those unpaid levies. So that is clear, that is in our legislation. So these cases don't affect an owners corporation's ability to do that. That remains the case.

Allison Benson: That remains off to the side that's a different kettle of fish.

Amanda Farmer: Yes. So look, I'm inclined to agree with you Allison, that if it is going to be the case down the track, maybe there will be a decision coming from a higher level of the Tribunal to the same effect. If it's going to be the case that owners corporations don't have the power to make these by-laws, then we can add up in a pretty unfair situation. I know many owners corporations rely on these clauses to ensure compliance with their by-laws when we have a system where it is harder than it should be I think to successfully enforce by-laws and to obtain penalty orders from the Tribunal, the process is a long one. It is drawn out. It is technical. Do you think there's room for some legislative intervention here to amend our Strata Schemes Management Act to make it clear that owners corporations do have this power?

Allison Benson: Absolutely. I think it's absolutely necessary. I know there's a reform process going on at the moment, and I am hoping we will get, as a part of that reform process, at least a definitive guide of the types of fees that an owners corporation is empowered to on charge to lot owners. If not, then something along the lines of reasonable fees reasonably incurred, which goes along with the general fees with regards to legal services. They have to be reasonable fees and they have to be reasonably incurred, which I think is actually quite a good test because not just does it look at did you really need to charge these fees or to incur these fees, as in was the work required?

So in this case it would be, "Was the fee reasonably charged?" Well, if you've taking a false fire alarm callout if the owners corporation had a fine 10 times because of one lot owner who just can't seem to learn what the setting for burnt toast is or is not. That would be to my mind, reasonable to pass on. Perhaps not one, but certainly the second, the third time you'd have to be considering it. So I believe that type of thing would be reasonable to pass on. And then the fee would have to be reasonable. So you can't add a 20% markup to the fee, just uncharge the fee itself. So that sort of thing would be very, very handy to have in the legislation. So hopefully we will get that, but I don't know when that will be coming on through.

Amanda Farmer: I think you might have touched on this Allison meeting fees. So very often an owner who wants to get their

Publication Date: 25 January 2023

YSP Podcast Transcript: Episode 346. Where do our cost recovery by-laws stand now?

- Allison Benson guides us

renovation approved, doesn't want to wait for the next AGM to put their common property rights by-law forward. They'll say to a strata manager, "*Can you please convene a meeting just for the purpose of approving my by-law?*" That can be done reasonably easily these days with electronic meetings, but it is the practice I know of strata managers on instructions from their owners corporations to charge that owner the cost of that out of the ordinary meeting that wasn't otherwise going to happen. Those would be the kind of fees. Another example of the kind of fees that fairly, I think should be born by owners who are getting the benefit of that meeting.

Allison Benson: Oh absolutely. That may also be covered with the provisions in the works by-law or common property rights by-law. So you know-

Amanda Farmer: Yes, I like that.

Allison Benson: ... the provisions in the cost recovery by-law that says the cost of preparing, making, registering and enforcing the by-law, and they were the different kettle of fish. They weren't found to be invalid or the Tribunal actually probably going a little bit too far to say endorsed them, but definitely distinguished from the general cost recovery by-laws.

So you might be able to get it in that way, and that's the approach take to that. But definitely meeting fees should be able to be recovered, particularly where maybe not a fee for meetings that have been requisitioned, because that's generally by more than one lot owner, and that's a statutory process to call that meeting. There's a formal process for it, but that requires a meeting to be held. What we're asking for here with the types of meetings you are calling for, meetings that are held that are not required to be held, but are being brought forward by a particular lot owner.

Amanda Farmer: Yes, it does make sense. Well Allison, you and I could talk for another hour or two about this, especially if it was over a glass of wine, maybe another time. We do have to wrap up, unfortunately, but I would love for you to let our listeners know where they can go to find out more about you, about your practice and connect with you.

Allison Benson: Oh, that'd be great. Thanks, Amanda. So I write a book and have started doing a vlog. There's nothing so much as flattering as somebody who is taking from and learning from Amanda, so I'm challenging the video population. So please head on over to my vlog podcast, which is *Thoughts from a strata lawyer*, which is allisonbensonau.com, and that's Allison with two Ls. That would be great.

Amanda Farmer: I do encourage everyone to head over and make sure that you are in the loop on what's happening over there. *Thoughts from a strata lawyer*, and if only to read the very good summary of these recent decisions and Allison's review of their impact. A great one to be sharing with your strata manager, strata managers to share with your strata committees. And I have, since I started talking about this, having read these cases, Allison, I've certainly heard from many owners out there who are sitting on both sides of the fence let's say. Owners where the committee has sent them letters attempting to recover these costs, and then owners who sit on a committee saying, "*Oh, are our letters still valid and are we able to send them out?*" So a fair bit of confusion out there. I thank you for coming on the show to clarify some of that for us and look forward to chatting with you the next time you have an interesting decision, let's say this time around interesting decision to share with us.

Allison Benson: My pleasure, and thank you as always for the opportunity to come on.

Amanda Farmer: Thanks, Allison. Catch you next time.

Allison Benson: Okay, bye.

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 comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

