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## YSP Podcast Transcript: Episode 363. Knock, knock: access rights for OCs. How far do they extend?

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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'm your host, strata lawyer, Amanda Farmer, and it is my job here each week to help demystify the legal complexities of apartment living. Thank you so much for joining me. Solo episode from me this week. It's been a little while since it's just been me and you here riffing on the podcast. I'm looking forward to it.

Our topic for today is all about owners corporations getting access to apartments, access to do work on the common property, access to be able to investigate whether or not work needs to be done, access to protect other areas of the property from damage, or to investigate and to fix damage that may have been done by an owner or an occupier to the common property.

It may be a little bit surprising, maybe counterintuitive to hear that an owners corporation does have a legal right to access your apartment, your lot, your unit, whatever it is however it however you may want to describe it. Your home, your private secure space, yes, the owners corporation through its representatives whether that is its engaged contractors, employees, its building manager, maybe even its strata manager or committee members, your owners corporation can enter your home even in some situations without your consent. There is a legal framework regulating all of this and that's what I want to talk about today.

I get asked access questions regularly whether it is in my role as a lawyer advising owners. Whether I'm answering questions inside our online membership community. This does come up at a time when I'm seeing more buildings than ever before, needing sometimes urgent repair and maintenance work done on the common property, I'm seeing it come up more often.

And sometimes I am surprised to learn that owners, some strata managers sometimes are not aware of the legal framework and what steps should be taken to ensure access can be obtained, both in times of urgency and at times when we just ultimately need to get the work done, get something fixed, comply with a legal requirement, whatever it is that may need to happen to ensure a building can continue to run smoothly.

Today I'm gonna walk you through some of the relevant legislation, specific to New South Wales, that is where I am a qualified legal practitioner. I'm going to be referring to sections of the New South Wales Strata Schemes Management Act 2015, highlighting perhaps some traps for inexperienced players, some areas that I've come across in my practice in the tribunal and through being across some of the relevant tribunal cases that you might want to look out for if you are a strata manager advising owners corporations, strata committees on their options for accessing apartments or an owner who perhaps has received an access request. And maybe you think it's a little unfair or maybe you're surprised by that request. What are your rights and your obligations?

Now the starting point in our New South Wales legislation is Section 122 of our Strata Schemes Management Act. This is the section that sets out what I summarise as three circumstances in which an owners corporation may access a lot. That's what I'm going to refer to it as when I say lot, I'm referring to your apartment or your unit, your flat, your home.

Three circumstances for access. Firstly, and probably in my experience, the most common circumstance. An owners corporation can access a lot in order to carry out work that it is required to carry out pursuant to the law. That includes the repair and maintenance of common property, one of the most well-known, I think, most important legal obligations of an owners corporation, the duty to carry out repairs and maintenance to the common property if that needs to be done and in order to get that done access is required to a lot. Then Section 122 tells us that an owners corporation may enter the lot for that purpose may get access to the lot in order to carry out that work.

Now, interestingly, that includes access for the purpose of actually doing the work. Maybe there is a structural wall that needs to be shored up. Maybe there's some waterproofing that needs to be done on the balcony or in a bathroom to prevent a leak. That's going through to the lock downstairs. That is work that needs to be done.

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But it also includes access for the purpose of investigating whether any work needs to be done. So that's pretty broad. A situation where the strata committee might think, "Hmm, I think there's something going on up there in unit 20. There's a leak going down to unit 15 below. We're not quite sure if it's coming from unit 20, if it's coming from the bathroom, maybe there's a failure of a waterproof membrane. We need to get in there. Send our plumber in there, send our qualified contractor in there to have a look and investigate whether there might be a problem with the common property for which we are responsible. But we don't know exactly what the issue is or what needs to be done until we get in and take a look."

Section 122 says that an owners corporation by its agents, employees, or contractors may enter your lot for the purpose of investigating. The words in the section are determining whether any work is required to be carried out by the owners corporation in accordance with the Act.

So this can include inspections and investigations where a committee believes that an owner may have done unapproved work, or work that is suspected to have damaged the common property. I've seen applications made to the tribunal for access orders, and we're going to get to that process soon. Access orders where there is a suspicion that owner may have overstepped the bounds of a renovation approval done work that wasn't part of the by-law that granted them approval to do their work. They've gone a bit further, they've taken out a structural wall, they've renovated a bathroom. An owners corporation can use section 122 as a basis for seeking access to investigate whether or not that unapproved work has been done and whether or not there has been any damage to the common property.

Now I've said there's three circumstances in section 122, that's the first one. The second circumstance in which an owners corporation may access a lot is in order to carry out work that the owners corporation is required to carry out, pursuant to a notice that it has been given by a public authority.

When we say public authority we are thinking of authorities like our local councils, maybe there is a fire order that the council has issued to the building and there is work that needs to be done inside lots in order to comply with that fire order. Section 122 is specific that an owners corporation may access a lot for the purpose of carrying out that kind of work, work it has been ordered to do.

Thirdly, an owners corporation may enter a lot to carry out work that is required to carry out pursuant to a tribunal order. So it may be that an owner has taken its owner's corporation, taken their owner's corporation to the tribunal, seeking an order that certain work be done. In order to get that work done, access is required through one lot to be able to reach another or to reach the common property. The owners corporation has been ordered by the tribunal to do that work.

Then by section 122 it is also authorized to access any other lot it may need to access in order to comply with the terms of that order.

Now those are the three circumstances that I have pulled out of section 122. The question arises of course, "How and when does an owners corporation has access to a lot? Does it ask? Does it have to set a time? Is there a period that must be complied with? Does it have to go and seek an order from the tribunal before it can get access?"

Well, Section 122 tells us that an owners corporation can access lot for the purposes that I've outlined there in those three circumstances. At any time if there is an emergency. What's an emergency? It's not defined in our legislation, but I say it's a situation where you may have water gushing out of the front door of an apartment, you might have a ceiling that has collapsed in the apartment below because there's a flood upstairs quite different to a slow leak, maybe there's a fire.

The owners corporation, its contractors, those it has engaged, and those it has instructed need to get into a lot immediately. That means now, that means within hours, it doesn't mean within days or weeks, and we'll get to that kind of situation. It means immediate access is required. In that case, Section 122 says, an owners corporation can go into a lot at any time. No consent required, no notice required. It may enter at any time in an emergency for the purpose of attending to any of those three circumstances I outlined earlier.

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Doing work it needs to do under the Act, doing work it needs to do pursuant to a notice by a public authority, or doing work it needs to do pursuant to an order.

It's kind of hard to think of an emergency situation that would relate to work that needs to be done pursuant to a tribunal order or the notice of an authority. It's more likely to be work that needs to be done urgently in an emergency in order to repair a problem with the common property. That being the kind of work that an owners corporation is required to do under the Act.

But what if there's no emergency? What if there's a slow leak or there is a suspicion of illegal work, or there is an inspection that needs to be done by a contractor to scope some work that needs to be done on the common property pursuant to an order of the local council.

Well, section 122 tells us that unless there's an emergency, the consent of the occupier of the lot is needed before the owners corporation can get access. Now I want to be really clear here that is the consent of the occupier of the lot that's the tenant that's the person who is living in the lot. It is not necessarily the owner.

The owner may be the occupier, but may not. It may be a tenanted apartment, the owner's corporation needs the consent of the occupier.

I was once involved in a case where the owner objected to the owners corporation's contractors gaining access to the lot. The contractors had already been in there, had already done their investigations, done some work I believe on the common property, and the owner wrote an angry letter to the strata manager and said "You had no permission to go in there and do that work, how dare you?"

But what had happened is that, that owner's tenant had permitted the owners corporation's contractors to access the lot. And that tenant was perfectly entitled to do that. When you are the tenant in a strata apartment you are in occupation, you are in control of who comes and goes from your home and the Act recognizes that. Section 122 says that the owners corporation needs the consent of the occupier to access the lot unless there is a case of emergency.

"How do you get that consent?" Well, section 122 doesn't tell us that. Common sense I suggest should prevail. You ask for it. Depending on the circumstances, make a phone call, send an email. Set out what's required and why, who needs to access the lot and what the proposed date and time is. And as a matter of courtesy, it's a good idea to give as much notice as possible to the occupier so that they can make arrangements to be home or to leave their keys with their neighbour or with the building manager, and ensure that access happens as smoothly as possible for everybody involved.

I do know that there can be frustration among occupiers when they are told not 48 hours before a contractor is due to come in that a visit has been scheduled, and of course when people have to work, study, have other commitments that's going to be difficult to arrange at short notice. So as much notice as possible, a reasonable time depending on the circumstances of course. And recording that request in writing is important. It's important because if consent is not given, then there is a path for the owners' corporation to follow. Which I am going to talk about shortly, but recording that request for consent to access on reasonable terms with reasonable notice is essential.

Now before I leave section 122 I want to point out that it does say a person must not obstruct - or hinder is the word - an owners corporation in the exercise of its functions under this section. So don't get in the way of the owners corporation or its contractors accessing your lot if everything's being approached reasonably and you understand the purpose for the access, and it is related to one of those three circumstances I've highlighted earlier.

Section 122 also makes clear that an owners corporation is liable for any damage to a lot or any of its contents that may be caused by the carrying out of work, or the access generally. Unless that damage arose because the owners corporation was being obstructed or was being hindered in its activities by the occupant.

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So a powerful section to be aware of and to understand, section 122.

Now what happens if there isn't an emergency, access is still required, but the occupier will not consent? You've tried to have a discussion by phone, you've sent your letter, you've proposed some reasonable access terms, sufficient notice, you've described who's going to be there, what they're planning to do, and still the occupier will not consent to access? Then the owners corporation may seek an order of the Tribunal requiring that occupant to provide access to the owners corporation.

The relevant section when you are thinking about seeking an access order from the Tribunal is Section 124 in our Stratus Schemes Management Act. The owner's corporation is the applicant, it's not possible for an owner to seek an access order under Section 124, if it wants to, if you want to get into your neighbour's lot and have a poke around, have a look at what's going on there, Section 124 is not for you.

It is for the owners corporation to make the application. Importantly, mediation is not required before you lodge one of these applications. Unusually, most applications do require mediation to be attempted before you file them with the tribunal. This is one of the few areas that is exempt from the requirement for mediation. So as long as it is a request for access in order to inspect or repair common property, then mediation is not required before you make that application under section 124.

Remember what I said earlier, the respondent to this application is the occupier of the lot. That is the person required to give access, that is the respondent to your application, it is not the owner of the lot. I've seen a couple of reported cases in the tribunal where owners corporations have come a cropper there with directing their applications to the owner when the owner is not the occupier so make sure you're listing the correct respondent on that application.

Now section 124 is a pretty short section in our legislation I'm going to make sure we have links to all of these sections in the show notes for this podcast episode so you can go over and have a read of them yourself. Section 124 doesn't set out what needs to be shown, what needs to be proven by an owners corporation in order to obtain an access order.

It simply says that the tribunal may, on application by an owners corporation, make an order requiring the occupier of a lot to allow access to the lot for the following purposes. And the section goes on to list the situations in which the owners corporation is permitted to access the lot. I've already outlined most of those for you. There are a couple of extra situations where an owners corporation may access a lot. And that includes in order to ensure that there are complying window safety devices on all relevant windows, that's section 118 where that requirement is set out.

And also a specific right of entry and inspection under section 123, which is relevant only to fire safety inspections. So you'll see some other sections there which may fit your particular scenario if you are an owners corporation, a committee who needs to get that needs to get access to a lot. But that's it, that's all that section 124 tells us.

It's not necessary and there is a tribunal case where this has been said. It's not necessary for an owners corporation to prove that there is a danger to anyone, or that there is a certain type of work that needs to be done, or a certain seriousness when it comes to the level of damage that might be happening or ongoing at the property. An owners corporation simply has to establish its right to access the lot pursuant to one of the sections that's listed there in section 124. And obviously, it's not set out in the section but I think it's obvious. You need to show that you don't have consent that the occupier has been asked and has not consented to access. Of course if you have consent, then there is no need to seek a tribunal order.

Now I do just want to stop there, because I have been very recently involved in representing an owner who is responding to an application for an access order under Section 124 filed by an owner's corporation. And this application came as a complete surprise to my client. In the application, it was alleged by the owners corporation that my client had failed on a number of occasions to provide access to a contractor who was coming in to have a look at part of the common property adjacent to my client's lot that needed repairing.

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And when I had a chat to my client about this, my client was very clear that the owners corporations contractors had been to the lot, had inspected the common property, and at no time had access been denied.

Once I got the full story, it seemed that what had happened is the contractors had been to the lot, they had inspected, they were in the process of putting together their quotes to send back to the strata committee, but none of that had been communicated to the strata manager or to the strata committee and they didn't know that access had been granted.

They made an assumption that it hadn't been and instructed their lawyer, paid for their lawyer, to prepare the application and to file it.

Now that's not a situation that you as an owners corporation want to be in getting your facts wrong because the left hand is not speaking to the right hand. If you are going to file an application for an access order, be absolutely clear on the day that you're filing that application that access is still refused. As clear as you can be that if you've engaged contractors, and you believe they haven't had access double-check that. Make sure that there hasn't been communication between the owner and the contractor in the meantime and access hasn't been permitted. That's often the way it works. I know contractors communicating directly with owners makes sense, that's the most efficient way to do things. But if that contractor is not reporting back to the strata manager or to the strata committee where they've got to, then expensive, embarrassing assumptions can be made. No one wants to be put in that position.

Now if you're making an application for an access order, make sure that you clearly set out the terms of the order that you want. It's important that you're very clear on the purpose for the access, what work is going to be carried out when the contractors get there, who are the contractors, what are their names, what company are they from. If they can't make it, who are the alternate representatives, who will be allowed to have access to the lot?

If there isn't work being done, it's just an investigation, make that clear in the order. The tribunal will want to know exactly what it is. You need this occupier to do and why. And the reason it's so important that orders are clear is because if there is no compliance with the order, if the occupier says "Well I'll allow Stuart to do it, but I won't allow Sam to come into my apartment."

We're going to be going back and looking at the terms of the order. What is it that the occupier needs to comply with? So make those terms really clear, think hard about them. Sometimes you might want a provision in the order that the occupier is not to communicate with the contractors who are accessing the lot. I know sometimes that is an issue in some communities where occupiers are seen to be interfering with the process of contractors coming in and quoting, scoping work and an owners corporation sees it as important that those contractors are objective, are not influenced by the opinion of the occupier. They predict that there's going to be some difficulties in that department. So they incorporate cleverly into the terms of the order that the occupier not communicate with the contractors and that they be able to come and go and then provide their opinion directly to the owners corporation.

Having done this before, in a reasonably drawn out difficult case before the tribunal where orders were ultimately made in favour of my client's owners Corporation, I have a template. Sample orders for access available for free to the members inside our online community. I know a number of members have relied on this one to achieve success in the Tribunal seeking access orders. A link to our members-only copy of that template in the show notes for this episode. If you are not a member then that template is there for you to purchase. If you like, even better, become a member and you'll get that one for free.

Links to both the member copy and the non-member copy of that template as well as access to our online membership community. There for you in the show notes to this episode. If you're not sure where the show notes are they're over on our website [yourstrataproperty.com.au/podcasts](https://yourstrataproperty.com.au/podcasts) you'll see this podcast episode on the page there. Click through to get all the links, all the sections of the legislation that I'm talking about today, as well as the transcript of this episode. Where I do talk in some detail about legislation, tips for tribunal proceedings, I know that this is the kind of information that committee members often want to share with their strata managers, strata managers want to share with their clients.

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Go ahead and download the transcript for this episode and that can be a great way to share this information as well.

So to summarize this legal framework for owners corporations that need to obtain access to lots, you want to be really clear on the purpose for your access. Make sure that that is a purpose that is permitted by the Act. A good summary of the various bases on which an owners corporation may access a lot is set out in section 124 of our legislation.

Start with a request, ask for consent. If it's not an emergency and emergencies are rare, I can tell you that. Start with a request, the courtesy of a phone call perhaps, followed up by a request in writing, seek the consent of the occupier for the access. Be clear about the purpose for which you are seeking access provide a reasonable time frame for that access, plenty of notice if you can. And be conscious that it is the owners corporation's responsibility to make sure that no lot property or lot contents are damaged during the course of the attendance at the lot.

If consent is refused or it's not promptly forthcoming, sometimes I find it is helpful to make clear to the occupier that the owners corporation does have a legal right to access, quote section 122, point out that the owners corporation may go to the tribunal and may seek an order under section 124. And if that happens, there may be legal costs that are incurred by the owners corporation and that may end up being payable by the occupier. So it's a good idea. You might want to point out to this occupier to consent to access rather than to drag it out at risk of increased costs and of course disharmony and conflict within the community.

Some occupiers are not aware that the owners corporation has this legal right, so making that really clear can be helpful to get an access request across the line. And finally, if there is no consent forthcoming access is certainly required. An order can be sought from the Tribunal.

Pursuant to Section 124, file your application, be very clear about the orders you are seeking, get some inspiration from the template that I have for you. No mediation is required, it is one of the rare situations that is exempt from mediation. You can proceed to the Tribunal. That doesn't mean that things happen quickly, I have to say. Applications for access can travel through the Tribunal at the same snail's pace, speed that other applications travel at.

I know Reena and I spoke about this on the podcast last week, I heard from a number of you agreeing with my summary of just how protracted Tribunal proceedings can be. So of course, the ideal scenario is for there to be consent to access and the tribunal should be a last resort.

So there's your legal framework for access to lots. A handy ready reference there for you.

Don't forget to access all of the resources mentioned in this episode over at [yourstrataproperty.com.au/podcasts](https://yourstrataproperty.com.au/podcasts) and I look forward to catching you next time. Bye for now.

**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 [yourstrataproperty.com.au](https://yourstrataproperty.com.au).