

Publication Date: 29 June 2023

YSP Podcast Transcript: 368. Proxy power plays: getting proxies and powers of attorney RIGHT at your next meeting

Listen to this podcast episode [here](#).

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's my job here each week to help demystify the legal complexities of apartment living and that is certainly what I'm doing this week for you. A solo episode coming up. It's been a little while since we've had a solo.

Today I am having a close look at proxies. Who can be appointed as a proxy holder to vote on behalf of an owner at a general meeting? How do we properly complete a proxy form and what kinds of things might make a proxy form invalid? What are the limits and restrictions on proxies? And where do powers of attorney fit into this discussion?

This question about proxies and specifically powers of attorney came up during our pro-member webinar that I delivered last week. We were talking about effective strata committee meetings. And as always in our pro webinars, I had some clever cookies there online with me asking me questions about owners attending committee meetings, committee members who may have given their power of attorney to another person. Can that attorney then attend and vote at committee meetings in their place?

Really interesting questions that have sent me off doing a bit of research, reading some cases, and I thought I would bring my findings here to you on the podcast. Not a topic I think we've covered in this kind of detail before. So this will be an excellent reference for owners, for strata managers, for committee members wanting to understand how votes are properly cast at our general meetings and at our committee meetings especially in the context of proxy appointments.

The legislation I'm going to be referring to today is the New South Wales Strata Schemes Management Act specifically Schedule 1 to that Act. That's the schedule that has all of the detail about general meeting procedures for our owners corporations. Schedule 2 is where you'll find strata committee meeting procedures.

These are parts of our legislation that I look at on an almost daily basis. And I do recommend if you have a question about meeting procedures, what needs to go on an agenda, when it needs to go out, how votes are cast, how votes are calculated, your first stop should be a close look at Schedule 1 of our Strata Schemes Management Act for general meetings, and Schedule 2 for committee meetings. Links to these will be in our show notes for this episode. You'll find those over at yourstrataproperty.com.au/podcasts. Have a look for this episode 368 you'll be able to click through and get access to not just the legislation I'm talking about today, but also the cases that I'm going to refer to, as well as the transcript.

The starting point for a discussion about proxies. I think should start with recognition of who exactly has voting rights at general meetings of an owners corporation. You'll find this in schedule one. We're told that the voting rights of an owner may be exercised by the owner in person or by a proxy appointed by the owner. If the owner is a corporation rather than an individual, then voting rights are exercised by the company nominee named on the strata roll or the corporation can appoint a proxy.

Clause 26 in Schedule 1 has all the detail about how a proxy is appointed. It tells us that a proxy must be in the approved form. Now this is really important. This is one of the few references in our legislation two and approved form. It's approved by New South Wales Fair Trading, and it's a publicly accessible form. I'll have a link for you in the show notes. It will be familiar to many of you. And the form must be filled out correctly in order for the proxy to be valid. The form must include the name of the lot owner as well as the name of the person they are appointing as their proxy.

Now this is an area I find confuses some people. It is the case that any person can be a proxy holder. You don't have to appoint another owner. You don't have to appoint the chair of the meeting. You don't have to appoint your strata manager as your proxy holder. Any person, any human being can be a proxy holder.

That means if you can't make the meeting, you can send your son, you can send your auntie, you can send the person who makes

Publication Date: 29 June 2023

YSP Podcast Transcript: 368. Proxy power plays: getting proxies and powers of attorney RIGHT at your next meeting

you coffee in the morning, you can send your lawyer. I often attend meetings as a proxy holder. The person who attends as your proxy holder does not have to have anything to do with the building.

On the form, you need to state whether the person you are appointing as your proxy holder is able to vote on all matters that are on the agenda and if not all matters, then you specify on the form which matters the proxy can vote on. The approved form also asks you to specify the period or the number of meetings for which the appointment has effect. So you can appoint your proxy just for one meeting. You can appoint your proxy for a period of time, for example, one month or 12 months. Or you can appoint your proxy for up to two consecutive annual general meetings.

Now a proxy appointment done by way of this approved form cannot have effect for more than 12 months or more than two consecutive annual general meetings, whichever period is greater.

Now I think you'll find that two consecutive annual general meetings will probably occur over a period of about two years. So if you want to appoint your proxy for the longest period possible, that's the option that you would be selecting. Your proxy is appointed for two consecutive annual general meetings. That doesn't mean that you can't, as an owner, attend a general meeting and vote in place of your proxy. You absolutely can. But if you are attending a meeting, and the person you appointed as your proxy holder is also there, you can't both vote on behalf of your lot. Your vote will be relied on rather than your proxy's vote.

Now both the legislation and the approved form requires you to consideration to whether there is going to be a vote on the appointment of a strata managing agent. Now that might be the appointment of a brand new strata managing agent or the reappointment of your current managing agent under a fresh contract. If a vote is going to be taken on whether your strata manager should be reappointed or whether a new strata manager should be appointed, you must specify on the proxy form how you want your proxy to vote, or if your proxy is not authorised to vote on that particular issue then state that on the form.

Now there has been a case before our Tribunal. It's an unreported case, but thanks to the members inside our online community, I do have a copy of it. The case is Warren and the Owners of strata plan at number 61618, copy of that one linked for you in the show notes. In that case the Tribunal declared invalid many proxy forms that did not have this particular part of the form completed. There was a motion on the agenda of an AGM as to whether a strata manager's contract should be renewed. Many proxy forms were lodged ahead of the meeting, and most of them did not state how the proxy was to vote on that particular motion.

The tribunal found that because this part of the form wasn't complete, the entire form was invalid and could not be relied upon by the proxy holders to vote on any matter at the general meeting, not just the matter of the strata manager's appointment, but any other motion. A surprising result, perhaps, but the tribunal found that the legislation is strict about what it is that makes a proxy form valid. It needs to be completed in its entirety.

So if there is a motion on the agenda about the appointment of a strata managing agent and you're sending a proxy to that meeting, make sure your form specifies how you want your proxy holder to vote on that particular matter. It's essential that a proxy form is signed by the owners in order to be valid. It doesn't have to be signed by the proxy holder, but it does have to be signed by the owners of the lot. If you're a sole owner, you own your property in your sole name, then that's one signature on the form. If there are co-owners, jointly owned property, both owners need to sign the proxy form in order for it to be valid. If the property is owned by a company, then the company needs to sign the proxy form. How does a company sign a proxy form? Well, it does that in the same way that it signs any other document. It signs pursuant to the Corporations Act. And under the Corporations Act, Section 127 in particular, we're told that a company can sign forms by having two directors sign or a director and the secretary, or of course if there is only one person in the company who is both the sole director, sole secretary, then that one person can sign.

But that's a common question that comes up. When strata managers are looking at proxy forms signed by corporate owners, have they been filled in correctly? Have a look at section 127 of the Corporations Act, and you'll see those rules there about how companies sign documents.

When does your proxy have to be given to the Secretary of the Owners' Corporation? In a building that has more than 100 lots, the

Publication Date: 29 June 2023

YSP Podcast Transcript: 368. Proxy power plays: getting proxies and powers of attorney RIGHT at your next meeting

proxy must be sent in at least 24 hours before the meeting at which it is to operate. In any other building, 100 lots or less, the proxy can be handed over just before the meeting starts. So you can take it with you for a meeting in person, or you can email it through to the secretary, that's your strata manager usually if you have one, before the meeting starts, just be sure to confirm that they have received it.

It's another common misunderstanding that I see both among strata managers and committees, they assume that the proxy forms must be in 24 hours before the meeting starts. That is only the rule for large strata schemes, more than 100 lots.

In New South Wales, we do have a limit on the number of proxies that may be held by one person. If a building has 20 lots or less, one person can hold one proxy. If a building has more than 20 lots, one person can hold the number that is equal to 5% of the total number of lots. So if there's 100 lots in the building, then one person can hold five proxies. Important clarification on that which was only inserted into our legislation I think within the last couple of years a person who owns more than one lot in a building can appoint a single proxy holder for all of their lots so even if you're in a building that has 20 lots and you've heard me say the rule is one person one proxy in a building of 20 lots. If you own two lots in that building, you can appoint one person to vote on behalf of both of your lots. Don't fill in separate proxy forms, just list both of your lots on the one form. It's still one person, one proxy, but they have two votes for each of your lots.

And if a meeting is adjourned, the proxies that have been accepted for that meeting still stand when the meeting is reconvened at a later date. New proxy forms don't need to be submitted, they don't become invalid. The same proxies accepted at the earlier meeting are relied on at the adjourned meeting. Now all of that is set out in clause 26 of schedule one to our Strata Schemes Management Act.

What about powers of attorney? Where do they sit in this discussion? If an owner has appointed an attorney pursuant to the Powers of Attorney Act 2003 in New South Wales. Can their attorney turn up to a general meeting and vote on their behalf? Does that attorney still need to fill in a proxy form?

Now we do have a couple of cases relevant to this question in New South Wales. One of them is Unilodge Australia and the owners of Strata Plan 54026. 2020 Tribunal decision link for you in the show notes. In that case, the tribunal member found that powers of attorney that formed part of residential tenancy agreements entered into by lot owners permitted the tenant under that agreement to complete and lodge a proxy form enabling them to vote on behalf of the owner at general meetings, and those proxy forms were found to be valid in making that decision, the tribunal referred to a Supreme Court decision.

Quest Rose Hill and White. 2010 case. In that case, landlords had granted powers of attorney to Quest's apartments. Those documents being in substantially the same form as we saw in the Unilodge case, and the Supreme Court said it is open to a landlord, to appoint a proxy or an attorney to act on their behalf at meetings of an owners corporation and in doing so, they are not acting contrary to the strata legislation.

Importantly in my view, the court in the Quest decision does say that with the appointment of the power of attorney, also comes the implied obligation to do whatever is necessary to enable proxy rights to be validly exercised in accordance with the relevant procedural requirements under the legislation. What does that mean? Well, to the extent that it's necessary for a person holding a power of attorney to submit a proxy form on behalf of the owner in order to meet the requirements of the Act that votes must be cast in person or by proxy. Then that step should be taken. The attorney should fill in the proxy form and submit the proxy form before casting any valid vote.

That means in my view that those holding a power of attorney shouldn't simply be turning up to meetings providing a copy of the power of attorney or not simply stating that they're there as that they're there on behalf of the owner pursuant to a power of attorney. What they should be doing is following the procedure in the Act to fill in a proxy form on behalf of the owner. They can sign that proxy form as the holder of the power of attorney vote as a proxy in line with the requirements in schedule one.

Publication Date: 29 June 2023

YSP Podcast Transcript: 368. Proxy power plays: getting proxies and powers of attorney RIGHT at your next meeting

That's my view. I appreciate there may be other interpretations of our legislation, particularly because there is another clause in schedule one, clause 25, that restricts the exercise of proxies.

And it says this, an original owner, that is a developer or a person connected with the original owner cannot cast a vote by means of a proxy or a power of attorney. If the proxy or power of attorney was given pursuant to the terms of a sale contract for the lot.

Now the fact that this clause says proxy or power of attorney, I know some lawyers believe that this implies that powers of attorney alone exercised without proxy forms are valid and can be relied on to permit an attorney to cast a vote at a meeting.

That may well be a correct interpretation. I'm not aware of that. Having been tested before our tribunal in New South Wales or our courts, I do think if you are as a chairperson, taking attendance at the beginning of a general meeting, if you are going to rely solely on a pair of attorneys rather than an assigned proxy that power of attorney document should be very clear as to what rights are granted to the attorney to exercise votes at meetings of an owners corporation.

I am aware of a Queensland decision, 2016 decision coming out of the Queensland Body Corporate Commissioners Office. Willara Tower is the name of the case, the link for you in the show notes. And special thanks to Charles, who may be tuning in, a member of our online community who brought this one to my attention. In that case, it was found that stack and they were a stack of powers of attorney relied on to exercise votes at a meeting of a body corporate were valid, and the relevant limit on proxies in Queensland did not apply to powers of attorney. So while there was a limit on proxies, the power of attorney holder did not fill in proxy forms. That person simply turned up and voted for many lots in their capacity as attorney, and that way was able to get around that proxy limit. Now I understand the legislation in Queensland has since been amended to prevent that kind of behaviour.

New legislation which came into effect in I think March 2021 addressed that issue in most communities. I suppose in NSW the door remains open for those holding powers of attorney to attempt to exercise votes without first filling in proxy forms and in that way get around the NSW limit on proxies. I have to say in my time serving strata communities, that's not a strategy I have seen adopted and perhaps that's because and perhaps that's because of the authority that we have in the Unilodge decisions and the Quest Rose Hill Supreme Court case, which on my interpretation seemed to tell us that those holding a power of attorney still should be completing proxy forms and complying with that procedure that's set out in schedule one of our Act.

Finally, a word about Strata committee meetings. There is no provision in our New South Wales legislation for committee members to appoint proxies to attend and vote at committee meetings on their behalf. What they can do, however, if they can't make a committee meeting, is appoint an acting member. That's in section 34 of our Strata Schemes Management Act.

Members of a strata committee may with the consent of the strata committee appoint an owner or a company nominee who is otherwise eligible to be a member of the committee to act in their place at meetings of the strata committee so you need the consent of your fellow committee members the person you're appointing as an acting member must otherwise be eligible to be a member of the strata committee and you can certainly appoint another existing member of the Strata Committee to be an acting member at meetings where you can't be present.

Would it be possible for a person holding a power of attorney to act in the place of a Strata committee member at meetings of the Strata Committee? My answer to that is, I don't think so. The law is quite well settled in the context of corporations that the office of a director is personal to that of the director. And a company director therefore can't delegate to another person the exercise of their vote unless there is express provision for that in relevant legislation or in the company's constitution. We do have that express provision in section 34 of our Strata Schemes Management Act, what we don't have is permission to vote by proxy or by power of attorney.

There is a quick mention of the ability of attorneys to vote at committee meetings in the quest Rosehill decision, but the judge, in that case, does say that there would need to be a rule permitting that to take place. I interpret that as a by-law. If you want to allow your committee members to attend and vote at meetings by way of a properly appointed power of attorney, then you would need at

Publication Date: 29 June 2023
YSP Podcast Transcript: 368. Proxy power plays: getting proxies and powers of attorney RIGHT at your next meeting

least, I think, a by-law to that effect. If you don't have that, then stick to the Section 34 provisions for acting members.

So that's your tour of the proxy provisions in our New South Wales legislation and some relevant cases on point.

I hope that helps you as strata managers, and committee members, answer questions that come up in your communities about voting rights and the validity of proxy forms.

If you have a different view on anything that I've opened up for discussion here today, please do post a comment under this episode over on the website, yourstrataproperty.com.au/podcasts. This is episode number 368. If you're aware of any other cases that might be of interest about proxies, I'd love to know about them. It's through you that I learn, keep my knowledge up to date and make sure that I am always bringing to you the most helpful, accurate strata knowledge to improve the experience of strata living for everyone.

Thanks for tuning in 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 yourstrataproperty.com.au.