

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

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 this week I am bringing you an edited version of my Friday live chat with fellow strata lawyer, Michael Kleinschmidt.

Michael was live with me over on our Facebook page last Friday afternoon, sharing his view of the law in relation to Strata Insurance Commissions. Now I invited Michael to have a chat with me after he appeared as a guest on two very popular webinars hosted over on the LookUpStrata website. Links to each of those in the show notes for this episode.

In those webinars, Michael explained that strata managers have very serious professional duties in their role acting for and advising owners corporations and body corporates. And the act of receiving insurance commissions and paying broker fees is very likely, in Michael's view, to be a breach of those very serious professional duties.

Now, as you might've picked up, this topic is hot in our space right now. Last week on the podcast, you heard from John Trowbridge as he shared his recommendations arising from his independent review of strata insurance practices. You'll hear Michael mention John's name. But I do want to point out that we here at Your Strata Property actually first started talking about this way back in 2018.

In podcast episode number 138, I interviewed Heather Lander of Strata Advise. Heather is an insurance broker and, in that chat, Heather shared with us the shocking truth about broker commissions and fees, including what brokers don't have to disclose to their clients. So if this is a topic that has you hot under the collar, that is also an episode worth returning to, episode number 138. If you want to get access to the full unedited discussion between me and Michael Kleinschmidt, you can do that over on our Facebook page. Head to facebook.com/strataproperty. You'll also get the video there too, and you'll be able to read all of the comments that were posted during the course of the discussion. Friday Live is a regular weekly session over on the Facebook page. If you haven't yet joined me for one of those, I do encourage you to pop in. I usually go live around 4pm Australian Eastern Standard Time on a Friday, sometimes answering one quick strata question, sometimes interviewing a guest as I did last week. I'd love to have your company at our next Friday Live. For now, I'll take you on over to my chat with Michael Kleinschmidt.

He has specialised in strata law for over 20 years. Across these years of practice, Michael has acted for pretty much all of the different stakeholder groups in strata. He's acted for occupiers, owners, bodies corporate, management right operators, the banks, the body corporate managers, the property developers, the utilities providers, and he's acted in pretty much every conceivable strata matter type, from structuring duplexes to 400 lot island resorts. He was litigating leaking roofs before departmental adjudicators through to appealing novel points of strata law to the Queensland Court of Appeal. He has done it all. Together we sit on the council of the Australian College of Strata Lawyers and Michael is never one to shy away from telling us exactly what he thinks and to that extent, he's a man after my own heart. I respect him. I appreciate the contribution that he makes here to our strata sector and for that reason, I'm thrilled to introduce him to you today. Michael Kleinschmidt, welcome to the show.

Michael Kleinschmidt: You're way too kind to me. You need to treat me mean to keep your cane. Slap me around a bit and I'll respond even better but no, you're way too kind. Thank you.

Amanda Farmer: Now I'm not sure if I covered it in my intro there, Michael, but you are a partner at Bugden Allen Graham Lawyers operating their Queensland office. We have spoken on the podcast before so some of my audience may have come across you at that time when you were running your practice Stratum Legal.

In that podcast episode, it was way back, I think it was episode 219 and we were actually talking about Queensland being at the forefront at that time, the forefront of some COVID-19 legislation. And I think you mentioned in that episode that body corporate managers should be allowed to issue notices by Twitter. That was the mic drop for you in that episode.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

Michael Kleinschmidt: Well, it's all about, I'm a believer in legislation being simple and direct and preferably not too difficult to interpret. And if you choose a legislative scheme that talks about effective communication, whether you're using Twitter or smoke signals at the end of the day, as long as someone gets the message, then that should be enough. And, you know, we have to get with the times and if Twitter is what people are using to communicate, then why not?

Amanda Farmer: I like it. Now, Michael, you were delivering a few mic drop moments last week in your chat with Nikki over on the Look Up Strata website. I'll just ask Richelle and Mina if we haven't got those links to those two webinars hosted by Nikki in our comments here. Let's pop them in here now for anyone to go over and check those out. You covered a lot of background there about the role of strata managers, their relationship with their bodies corporate, which is what you call them in Queensland. We call them owners corporations here in New South Wales. I'm not going to get into too much of that detail. So anyone interested in that for those foundation pieces, please do go and watch those webinars. Where I want to start is here. Is it your view that strata managers, body corporate managers who are taking insurance commissions are acting illegally?

Michael Kleinschmidt: At the moment, unfortunately, I think probably a majority of them are. There is a widespread set of practices. It's just one individual thing that we're talking about. My preparation for the first Look Up Strata forum about this, I had done some work on fiduciary duties in relation to developers and the Arrow Asset Management case. I published a paper about it back in 2010, 2011. For a bit of fun, what I did was I took the principles of fiduciary duties and applied them to a whole heap of other stinky stuff that I knew that developers were doing. In fact, I asked my friends and colleagues to tell me if they knew that there was some sticky stuff. I collected up a whole heap of practices and compared them to the rules and worked out what the result would be. I'm pretty familiar with the fiduciary side of life. Subsequent to that, I'd spent a couple of terms on the SCIA Queensland Professional Standards Committee, having a look at conduct complaints and things like that. I was pretty live to it all. When I started to dig and then I came across John Trowbridge's material, and in particular how some of the models had been set up, a whole heap of disparate data in my brain started to connect. Everything started to come together and I said, ah, that is why people are doing particular things. That is why they have set themselves up in a particular way.

So to go back to your question, when we talk about illegality, from a Queensland point of view, the starting point is you must disclose the insurance commission if you're proposing to take it as a strata manager. And that's in our Body Court Community Management Act. So failure to do so is going to be illegal straight up and there's a penalty, you can be prosecuted for that. Bear in mind that there's no cop on the beat, by the way. The Office of the Commissioner for Body Court Community Management is not charged. It's not one of their three functions to go and prosecute. I have recommended to some of my clients over the years that they prosecute privately. And we have been doing that. I'm prosecuting a developer at the moment, are in the process of hearing an appeal on a novel point because there's no cop on the beat. You've got to go and do this for yourself, which is just bloody tragic as far as I'm concerned. But to come back to that disclosure point, so if you fail to disclose under the BCCM Act, there's an offence. Then you can move from there into things like obviously fiduciary duties and where there's a breach of the fiduciary duties.

Is it illegal? Well, it's illegal to hang onto the commission. It's in breach of your obligations to your client. That's what people are doing. But one of the things that the Trowbridge material opened my eyes to in combination with some of the other forums and stuff that I've been involved in since, is that there is a course of conduct around this. And if I was a consumer lawyer, I'd be running this tomorrow because it's not just at that AGM or in the notice materials in Queensland, because you get notice of the commission in Queensland that a commission is going to be taken. It's back when the strata manager's engagement is being negotiated and the lack of disclosure at that stage. I'm strata manager X. I have relationships with these three brokers. They will give me three-quarters of the 20% commission that they take on the insurance. Just knowing that as a committee on an OC and being able to say, well, I actually want you to get quotes from insurance from some other brokers who don't pay you that 15%.

Bodies Corporate are being deprived of that opportunity because they don't know. No one's telling them at the beginning of the relationship that that's what's happening. In fact, in some of these agreements, and I believe this is the case in New South Wales, the STA agreement, and I might be wrong here because Queensland is my jurisdiction, that there are clauses which basically provide that if the strata manager doesn't get that money, then they're entitled to charge it up to the Body Corporate to make up the shortfall of the income. I mean, for God's sake, what work is being done to justify that money?

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

The truly outrageous part of that is that the justification that's being given is, well, we're doing these 47 things that Dr Cole, a good friend of both of ours, has identified from her research work at Deakin, and I've now taken to challenging strata managers who tell me that to show me their records of how much time they've actually done doing this work.

Amanda Farmer: Let's dig into that, Michael, because I heard you talk about this in your webinar with Nikki and when Nikki was doing the panel session, which involved a handful of strata managers. This also came up a lot. Managers are saying, "We are entitled to be remunerated for the work that we do." One manager said, "I characterize an insurance commission as a form of remuneration. We do a lot of complex work when it comes to insurance claims. Owners don't necessarily understand or appreciate the very complex work that we do. And because we receive the commission, then the owners don't have to pay additional fees to be able to remunerate us."

Now that sent me off having a look at the Strata Community Association, New South Wales, standard agency agreement and having a close look at the agreed services and the additional services. And it does seem to be the case that where an insurance commission is disclosed on the front page of the contract or just disclosed that this manager takes insurance commissions, the service of processing routine insurance claims is listed as an agreed service. So there is no additional fee charged if the managers accepting insurance commissions. If there is a non-routine insurance claim, commission or no commission, the building gets charged an additional fee. That's in the contract. So how can strata managers sit back and say, "This is very complex work, we need the commission to be remunerated." when they're charging an additional service for complex insurance work anyway?

Michael Kleinschmidt: Well, if I did that, I'd be reported to the legal services commission. And I don't do it because I have professional standards. It's, I think, emblematic of some of the behaviour that's going on. Now, I just want to put a caveat in here. I am not the enemy of strata managers. I'm not the enemy of brokers, and I'm not the enemy of insurance companies. What I'm the enemy of, and you know, Amanda, because you know me well, is dodgy practices. And I will always call out bad behaviour when I see it. And I'm seeing bad behaviour before the first one of these presentations. Over a number of years, I can remember having a conversation with one of my colleagues in 2008 about his shock at being asked to sponsor a strata management firm in exchange for access to their clients, to their bodies corporate.

How do you sponsor a business? You can sponsor a charity, but how do you sponsor a business? By handing them cash. That's graft, it's corruption. And in fact, in Queensland, if you're a solicitor and you do that, if you don't sit yourself inside the relevant Australian Solicitor's Conduct Rule, you're in breach of your professional obligations as well. The law society here has issued a guidance statement on it. So the reality is that you're not supposed to be doing that. And I would look at the sorts of terms in those contracts, including the New South Wales SCA contract. I'd have a look at it through the lens of unfair contract terms, consumer law practices. There's a whole bunch of stuff that needs to be had a look at.

But I just want to say this, I deal with starting managers pretty much every day of my working life. I put them into sort of three categories, right? There are the honest, hardworking ones that are in the trenches doing their best in a difficult situation. And they are the overwhelming majority. And they put up with a lot of crap if you will pardon that expression. And they do it gracefully and under pressure. And oftentimes, they're not huge businesses. They don't have a lot of time for compliance. They rely upon their professional organizations to keep them out of trouble. They've come through and been trained in a particular way or had particular cultural experiences. So it's not unusual for them to be innocently failing to comply with something. Innocent and not intentional.

Then the next group is what I call sociopaths, where they don't know and they don't care, even if they did know, because they're really driven by one thing and one thing only. And the third group of people are the truly bad ones who know exactly what they're doing. And they're doing it deliberately. And they really care. And there is a difference between the second and third categories. But yes, I mean, that's what you see.

So what I'm trying to do is to help that first group of people and say, guys, just wake up to this. It's out there. You need to be aware of it. It's not good enough so far. And the concrete message there is, the very least, if I was a strata manager, the very least that I would be doing right now, right now, is going to Trowbridge, you know, phase three, adopting without exception the recommendations that he provides, including the business modeling stuff that says, this is how I make my money out of this.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

I'd be doing that, but I was also going to my standard terms strata management agreement that I put out to everybody. And I would be looking at really hard at how much disclosure I was giving about my existing business relationships, who I had relationships with, what they were giving to me, what I was asking them for, and getting that information out there.

Coming back to this issue of, should you be paid for the work that you do? Absolutely. There's no doubt about it. But the other thing that I find really interesting, I must admit, I don't go back and watch my video all the time, but I was intrigued just to go back to that first presentation with all of the other panel members, because I kept hearing this phrase, "Be careful what you wish for". I heard that phrase, it's triggering me. I'm going, what do they mean, be careful what you wish for? And I put it together. And here's my theory. My theory is simply this. When you have a big building that has a big insurance policy, because it's to do with building replacement, so it's a large policy, so there's a large commission by nature. So you get this big chunk of money in, and then you're in a little building. It's a little insurance policy, and it's a little commission. And you get that little chunk of money in. But you know what? A claim's a claim most of the time. And the amount of work that's required for a claim for a leaky roof in one might be very similar to a leaky roof in another. And so you're probably disproportionately doing work for small schemes that are not really being paid for out of the fixed commission percentage that you're getting.

So what's happening is, one, the big buildings are subsidising the little buildings. Now, I put that theory to a couple of people who shall obviously remain nameless. And they pretty much admitted that that was the case. They could not make their money out of the insurance commission to do the all insurance work that they do for a small building. Now, what I call that is a wealth transfer. And unless you're a government, you shouldn't be doing a wealth transfer. You shouldn't be sitting there saying, I'm going to take this money from the rich and give it to the poor by subsidising their work. And the only way you can really fix that is to turn this into fee for service. And that will also mean that there is no longer any conflicted remuneration. Conflicted remuneration is you can be doing the best job in the world, but if you're doing that job for the insurer or for the broker, putting together claim information or the rest of it, you're working in their best interests, not the best interests of your own client. Your client should be paying you. Your client is the board of corporate. You can't have two masters at the same time. And if you do that, if you want to go biblical, you'll go to hell. That's the reality of it. You've just got to avoid that situation.

Amanda Farmer: Now, Strata Community Association has said quite clearly, quite loudly that they have heard what John Trowbridge has recommended and they are fiercely adopting phase one of his report, the recommendations in phase one, to the extent that they're producing a best practice guide for disclosure of the components that make up an insurance premium. And their view is, tell me if I'm wrong or misquoting the position, but it seems to be to me, their view is that disclosure is the cure for these concerns. And as long as we are clear with owners, what it is that they're paying, who it is that money is going to, then there is no conflict. Managers are acting in accordance with their fiduciary duties and it's all right, mate. What do you think about that?

Michael Kleinschmidt: Yes. It's like, you know, standing next to the Hindenburg and saying, nothing to see here, move on. Nothing to see. Look, it's just silly. That's silly. And if you have any understanding of fiduciary law, you understand that disclosure is the first part of the defence. So just rewind.

If you're a professional, you are trying to ensure that you act ethically and that you also don't breach your fiduciary duties if the professional relationship gives rise to fiduciary duties. Not all of them do, but let's just say that strata managers are fiduciaries and I advance that case very strongly. I'm happy to debate it with anyone who chooses to debate me on it. So, let's just say then that being a fiduciary, you then also want to be a professional. So as far as fiduciary law is concerned, disclosure only arises or is only really necessary in a circumstance where you put yourself in a position of breach. So the rest of us professionals try and avoid being in breach in the first place.

So, if I have to, you know, if there's a, the example I gave in an earlier presentation was if I'm acting for two bodies corporate and then over some years and both of them come to me and say, oh, there's a retaining wall problem between our two buildings. And you know, they're both blaming each other. Well, I've got to stop acting for both of them. Right. I can't pick one over the other. I can't turn around and put up a Chinese wall inside my firm and say, well, these associates going to act for you guys. And that associate's going to act for the other one. I mean, it's just impossible to try and fix that. So you avoid that stuff at all costs because it puts you in a difficult position and also looks stinky. It's a perception issue.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

So, then you get to disclosure and you say, well, what does disclosure actually do? Disclosure is one half of what you did, right? You need two wings to fly. That's one half, one wing. The other wing is you need informed consent and informed consent. If you're the strata manager and you have the information that is necessary for informed consent, and you hold that back, you can never get informed consent. So you might say, I've disclosed, I'm okay. And if you look at the BCCM Act in Queensland, so I just have to disclose the commission that I'm all right. No, you're not. You've got to get informed consent. Now, strata managers will say themselves, "This is a complicated financial product. You need advice on it, blah, blah, blah. That's why you should pay me a bunch of money." Well, sometimes informed consent means having quotes from other sources, having legal advice, having financial advice, having all those things. Now, if you're a strata manager, under option A, get 15% of 20%, whereas under option B, you get nothing. Are you going to sit there and set up your body corporate to get the information that it needs to be able to provide informed consent? Of course, you're not. And this is the problem because strata managers are being placed in that position every day. Some of them understand it, some of them don't.

Amanda Farmer: And do we also need to bear in mind that we're dealing with, as well as a unique financial product, we're dealing with a unique entity in an owners corporation or a body corporate, and that is the legal construct that has been developed to be the representative for a whole group of owners, the actual human beings at the end of the day that are paying the levies that are then funding these premiums? And I wonder how far that thinking of informed consent then needs to go. Do we need to ensure that each lot owner is going off and getting their own separate and independent advice that's unique to their circumstances? There's just a whole can of worms I think that opens up if we're really going to do informed consent properly, which in my view is even more reason why the fee-for-service model rather than the commissions and broker fees model is the better way to go.

Michael Kleinschmidt: Yes, look, I actually see, I mean, I want to talk about some other in-prima payments that are being sought and paid that I know about, but I really do see this insurance thing, this insurance commission question is the heart, it's like the first cancer cell that spreads out all the way through the body politic and the relationship between the strata manager and their owners corporation. Because what it does is it just puts the relationship completely on the wrong foot from day one. You cannot, one of the fiduciary obligations is that you can't put yourself in a position where you are breaching obligations between two bodies corporate that you have to act in the best interest.

So, I've been in Queensland, you do have to do that. The first code of conduct item, I think, is to act in the best interest of your body corporate. That is part of your contract with the body corporate. So, subsidizing one to the other is a breach of your contract straight up. Then you can't put yourself in a position of conflict between your own interests and the interests of your client. Now, the insurance commission thing, based on its very nature, is always going to be, "I'm getting some money from a third party." So, you're always going to be influenced by the terms of that arrangement with the third party. And John Trowbridge actually put this very well. I mean, the way he describes it is, the usual paradigm is that a broker will get a call from a strata manager who says, "I'm thinking of placing some business with you, but my terms are that of the 20% that you get from the insurer, you give me 15%." And so, that's how it's starting.

The real issue is why? In my view, strata managers, like everybody else, are feeling the pinch. Their profit margins diminish. So, you get the management guru types come in, and the business gurus come in and say, well, you should do some horizontal integration, and you should get more dollars per client, blah, blah, blah. And it's good, sensible business advice, but you also then have to run it through the filter and make sure that it's not going to put you in breach of your legislative or other obligations to your client. So, you put it through that filter, and a lot of this stuff just filters away. Like in Queensland, I know of joint venture vehicles that are owned by strata managers that are used to provide associated services or essential services to bodies corporate, like utility services or maintenance services or brokerage services or whatever. And there's this thinking that, oh, we don't have to disclose any of that because it's not actually us, right?

Well, in Queensland, we have this little test of association. And if you have an associated relationship with these things, the legislation will say that you have to disclose whether your associate is going to get a benefit from this. Already, people are caught in Queensland, and the only reason nothing's happened with this is that it's reasonably difficult to go and get the evidence to go and put it forward and say, this is what's going on.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

Amanda Farmer: It's certainly happening in New South Wales as well. A comment posted earlier by Natalie Fitzgerald, I'll just bring it up on the screen. She's pre-empted you here, Michael. The next question is about strata managers who own shares in broking companies claiming to return commissions to the owners corporation because they're still making money as the broker. It's happening.

Michael Kleinschmidt: Absolutely.

Amanda Farmer: And on some level, I mentioned this to you earlier before we came on air, Michael, I said, on some level, I have some discomfort as a lawyer, not a strata manager, as a lawyer discussing these issues. And now you've got two of us discussing these issues. Who are we? I asked myself, who are we to be calling out these practices, to be criticizing, to be publicizing? We're not strata managers. We're not necessarily members of the industry association. I'm not.

I mean, when these practices are happening and others aren't calling them out, or we have clients, as I know you've said you do, I certainly do clients and those who are tuning in here right now who are telling us these things are happening. And it's becoming apparent that Trowbridge's report has been released. He said on my podcast this week that part of his recommendations have been taken up. Other parts have not. I mean, what do you think? What do we do with that? And do you think we do as strata lawyers, lawyers practising in this sector, have some role to play in talking about this, if not doing something about it?

Michael Kleinschmidt: Amanda, there's a number of different ways to answer the question. I mean, my go-to there is that I'll die in a ditch to help a friend. And, you know, I deal with these guys and girls every day. And as I said, the mass majority of them, if they're caught up in this little whirlwind, it's not because they've deliberately chosen to do so. I can imagine that there's plenty of people out there that have built their little businesses and big businesses too, on the back of a business model that they think is appropriate and is okay. And I really think that the legislators in Queensland, Parliament in Queensland has not done strata managers a favour. By turning around and putting a clause into, a section into our act that says, you know, you must disclose if you're going to take an insurance commission or another benefit. More recently, it's another benefit. You know, it gives this false sense of security and a false sense of compliance, let alone the ethical dimension to it.

I mean, I want to welcome my friends and colleagues in the strata management sector into the halls of the professionals. I want them to be professionals like me, like you, but they can't until they give up conflicted remuneration. They just can't do it.

Amanda Farmer: And I think that's where I sit when I resolve that question of who am I to be talking about this. The answer within myself is, well, I am a professional. I am part of a profession that for centuries has had very, very high standards when it comes to conflicts of interest in particular. And if there is any experience, knowledge, education that I'm able to share from that position, as we see this relatively new profession grow into what it wants to be, what it hopes to be and what it should be, then I'm going to share that. And I'm going to invite people like you to come and share that as well. And I think that's what we have to offer as strata lawyers talking about this issue that impacts strata managers and strata owners.

Having said that, let's talk a little bit about the relationship between strata lawyers and strata managers. I think you alluded earlier, Michael, to a situation where lawyers are perhaps not acting so professionally in this space and how it can perhaps be easier in strata relationships than other relationships for lawyers to fall into conflicted positions when dealing with body corporate managers. Can you share some examples of that?

Michael Kleinschmidt: Yes, I mean, look, there's so many dimensions to this. I mean, one thing that's really troubled me about my colleagues in the legal profession over the last 10, 15 years is the rise of over-servicing where the bill is being paid by someone other than the body corporate.

So in Queensland, there's two classic examples of that. First one is when you're asking for consent to the transfer of management rights, the outgoing management rights operator will pay the body corporate's reasonable legal costs. That's one. The other one is in debt recovery where the debtor who unpaid levies, right? So you do levy recovery, the debtor has to pay the body corporate's reasonable expenses, which is almost indemnity costs.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

Now those two areas, I mean, assignment and management rights, I had been charging for probably 10 years between \$1,800 to \$3,500. And I saw one not that long ago that was \$15,000. Now we charge a bit more than that now. I mean, on a simple one, you'd be looking at sort of three to four grand, but you regularly now see charges of over 10. Okay. So then I look at who's charging and who's providing that work. And I say, well, hang on a minute, how's this happening? And then you start to put two and two together. I know of arrangements personally where some firms, some law firms will hand over their development clients. They'll push their development clients over to a body corporate manager in exchange for doing that body corporate manager's debt recovery work, for example.

Now I'm not going to speak to illegality or otherwise of any of that. And I'm not singling out any particular person or organisation. But what I'm saying is that you know, that's the sort of stuff, when I say that cancer starts back at the insurance commission and it works its way out into the periphery in terms of relationships like that. But let's do some even worse stuff. So I know instances where, you know, a friend or colleague has received a call. I've got a great new matter coming out. You know, it's a big matter. There's likely to be sort of \$50 to \$100,000 in fees in it. I'm happy to send it your way as long as you pay me 15%.

Amanda Farmer: Right. That's something that you're aware of in reality.

Michael Kleinschmidt: Yes. I've got an email that says it. So what do you do? I mean, the dreadful thing about this, and you know, young lawyers have always talked about old lawyers being old and cruffy and they just don't get it. And old lawyers will say to young lawyers, well, dude, you're a member of a profession. You need to learn its rules and respect its traditions. I'm looking at the guidance statement for Australia's list of conduct rules 12.1.4 on my screen. If you are a lawyer that is paying that 15%, you must be overtly disclosing it to your client so that they know, "Hey, body corporate, thanks for giving me that job. By the way, I'm paying 15% of what you pay me to your strategy manager. Surprise." Unless you're a complete idiot and you're on that committee, you're going to say, does that mean that we're paying 15% too much? Because the body corporate lawyer still needs to get paid.

The other one that I love, another live example is, and there's heaps, you have to pay to be on our panel. If you want to be given the opportunity to do work for the bodies corporate that we manage, you must pay us. That's another beauty. There's another one out there and it starts to get more and more tenuous. There's another one out there, which is we're holding a training day at the Versace on the Gold Coast. I've made that up. It is a live example, but it's not that hotel. We're going to do a training day at the Versace on the Gold Coast. You're the lawyer that we've chosen to sponsor our training day. It's only going to cost you a mere \$75,000. Are you interested in sponsoring for the day? And if you do so, you'll be the exclusive provider on the day and you'll get exclusive access to our body group managers, blah, blah, blah.

Amanda Farmer: Mmm...

Michael Kleinschmidt: The stories just in the last two or three weeks, I've had incipient whistleblowers, people who are making up their mind as to whether or not they should go and blow the whistle. And I've tried to provide them with a bit of human counselling, not legal advice, but have a think about what you're doing. But they're telling me stories, confidentially telling me stories about stuff. And let me say, in New South Wales, the building commissioner has a big job cut out for him. If I was him, I'd really be looking at the relationship between developers and strata management companies and looking to see who does the majority of the off-the-plan work. And then I'd be looking at how often defect reports are being prepared and when they're being prepared and what's going into the process of that. And that's all I'll say about that. But if you think the Queensland is the wild west, holy crap. I mean, I might be a little bit less sophisticated, there's some sophisticated stuff going on in New South Wales. Absolutely.

But I want to hit one thing in particular. This is one of these situations where I think it's like the flipping of a switch. In Queensland, and I'll speak to Queensland particularly, the predominant business model for a strata manager is, I'm going to advertise and pitch on the basis of a per lot per annum price, which contains certain agreed services. Then there's an hourly rate for everything else, and I'll charge you the appropriate hourly rate for whoever does the work. They're the things that you see, right? And you might see another line that says, and by the way, I'll take some insurance commission, et cetera. You never see, and I'll take 15% from every maintenance contract, or 5% from every maintenance contract that you sign. And I know of a leader in this sector who's piped up at a meeting of other leaders in this sector and said, that's one of the ways that we can grow our business is to take 5% on every

Publication Date: 20 July 2023
YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

maintenance contracts that have a lot of corporate issues, right?

So that's the stuff that you sometimes see, and then there's the stuff that you don't see. And then there's all this other stuff that you don't see, which these businesses need to survive, okay? Or to grow as the case may be. And that's imperative when your costs are going up and all the rest of it. So how do you change all of that? Well, the reason is the way that is, is there's a race to the bottom on the per lot per annum fee.

For many, many years in Queensland, it was \$110 per lot per annum. It was like that for a decade, right? And the other thing is that because of this concept that if you do lip service disclosure to secret commissions or insurance commissions, you're okay. So there's this cultural thing that arises. So what you got to do is you got to flip the switch, turn off the insurance commissions because that's the cancer vector. That's the heart of the cancer. Turn it off and get rid of it.

And then the other thing that you've got to do is you've got to have transparency around the pricing, real transparency around the pricing so that people can compare apples with apples. Because then just like off-the-plan conveyancing in Queensland and what people get charged for conveyancing, once you get a bit of reality into the charging, it's not going to be \$200 to a lot per annum or \$300 to a lot per annum. It might be five or six or \$700 per lot per annum, but at least you can compare apples with apples. Now, I would call upon STA all over the country to change their standard form agreements so that consumers were able to compare apples with apples so that you could tick and flick.

These are how many you get one annual general meeting, you might get one extraordinary general meeting, you might get four committee meetings per annum. They're the included services and then this is how much we're going to charge for each other one, at least to be able to compare. Because that then would enable comparison between firms, which would then promote competition in a healthy way that it would, I think, it would then free them from the paradigm of having to race to the bottom because owners would get a realistic expectation of what the services actually cost. The reason that there's a race to the bottom is that lawyers don't understand what it costs to provide these services.

Amanda Farmer: And having SCA amended standard template agency agreement, which so many strata managers use, would remove this first mover disadvantage, which John Trowbridge spoke about on the show, and I think it was spoken about in your webinars as well, that those who change their model first are punished in the market because it looks like they are more expensive. So having SCA move with a new standard agency agreement, I think is a great solution to that problem.

Michael Kleinschmidt: You know what happens with pioneers, don't you? They get lost or they get shot by the Indians, is the old chestnut, and that's a bugger of a thing. So if the SCA stood up and acted like leaders, then they could do their sector a really good thing. Now I'll just issue this little warning. I have indicated that I'm happy to go to ACSL.

Amanda Farmer: That would be the Australian College of Strata Lawyers?

Michael Kleinschmidt: Yes, with the suggestion that we consider drafting those agreements. Now that's me speaking in my personal capacity. I'm not wearing any other hat because we have done that in Queensland for developer off-the-plane contracts. We've done it for key agreements and letting agreements. And we've done that so that there is an industry-standard which is even-handed. Those things are even-handed. I drafted the caretaking and letting agreements with lots of input from my colleagues and we tried to make them as even-handed as possible.

Now, do you think that if I'm drafting a strata managers contract in Queensland that I'm going to hide all the secret commissions? I'm going to sit there and say, Michael Kleinschmidt, body corporate management has referral relationships with the following suppliers. Stratum Legal provides free training days once per annum and gets that out there so that people can understand that this is what's going on. Because if I'm going to have a relationship of trust and confidence with my body corporate, that can only start by telling the truth and telling the whole truth about what's going on and not trying to hide all of that.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

Amanda Farmer: We've been through years of law school, Michael, we've been through some of us 20 plus years of legal practice. We've had these principles drummed into us about disclosure, about conflicts of interest, and we live and breathe them every day. Not the case for strata managers. These for many, many managers, good managers working in the sector, this is the first time they're hearing about these kinds of issues. And I think you got a great example on Nikki's webinar where you said, imagine you're in the witness box. Do you want to share that one? I thought that was really good.

Michael Kleinschmidt: Yes. This is a technique that one of my early supervising partners impressed upon me. He said, look, if you're ever worried about how you're practising or what you're doing, imagine for one moment you're in the witness box in the Supreme Court in front of a Supreme Court judge or the full bench, be cross-examined by a King's counsel about the way that you practised or something that you did. Are you going to be proud or are you going to be scared? Which one do you want to be? I know, and I've tried, I'm only human, to conduct myself in a manner where I would be proud to be cross-examined by that King's counsel and say, this is what I did and this is why I did it.

And I think it's a great principle for people to apply in their own circumstances. It's okay to be a successful business person. That's perfectly okay. It's hard to be a successful business person and, for example, an ethical lawyer. Lots of us do it. Lots of us can do it. But that's why lawyers get so much ethical training so that they can, it's built into their DNA before they hang up their shingles and start practising and making money. Because we're in such a position of trust and confidence and people rely on what we say and they'll often rely on us to help them make decisions. Sound familiar? Strata managers, does that sound familiar to you? Does that sound like something that you do every day? If it does sound familiar to you and you want to be able to sleep at night, if you're part of that big group, then listen to your conscience. If you're a sociopath or an evildoer, then I'm coming for you.

Amanda Farmer: Can I add to that? It's also okay to place a real value on yourself and on the service that you're providing. I find that some strata managers, some lawyers do this as well. I work a lot with other women in business and I find that women are particularly good at doing this, failing to recognize that what you are offering is worth money and that it's okay to ask to be paid for the work that you are doing and to be very upfront about the basis for that payment.

As a lawyer, often it's an hourly rate or it's a fixed fee for a very clear service that we're providing. I do a lot of education in this space for strata managers and in addition to the free stuff we do here, the education I do one-on-one with strata managers, I don't do it because I get work from those managers or I want work from those managers, I do it because I give them a quote, I send them an invoice and they pay the invoice. And that is what helps me sleep at night.

Michael Kleinschmidt: And that's the thing too, as I said, I'll die in a ditch for a mate and strata managers fit into that category. I've been doing work for SEA Queensland in one form or another for most of my professional life and it really troubles me, the developments over the last, I don't want to put a fixed time period on it, but over recent times, because I don't want people to identify as being one problem or another. But yeah, it really worries me that there's a lack of attention paid to this. And again, I happily volunteer my time for that organisation.

I'm happy to turn up at a conference and give a presentation on ethical conduct and how to avoid these issues, but that's not really going to help until it's necessary, don't get me wrong, but it's not going to solve the problem until the pressure in relation to the business model is off and doing it at an annual conference is great, but you know what's better? Is doing it as part of the initial training in Queensland. Now, you have to go through a training course before SCA Queensland will allow you to be admitted as a member, etc.

So you really should be doing it then, okay, at the very beginning and then continuously just like we do with our continuing professional development and you need to be able to spot conflict at 100 paces. If you can't, it will get you. It will charge you down and trample you. So you've got to spot it before it spots you.

Amanda Farmer: Now it is over time for us to wrap up here, Michael, but before I do, I want to acknowledge in the comments, I think what we might be seeing is a bit of a mandate for ACSL, the Australian College of Strata Lawyers, to start producing perhaps a template agency agreement.

Publication Date: 20 July 2023

YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

So Sean is saying "It's great if SCA produces a template agreement for SCA managers, but there are non-SCA managers who will undercut and not use the SCA contract, which won't be clear, which the owners will flock to as they appear cheaper."

There's also a comment here from the Owners Corporation Network. I'm not sure if that's you there, Karen. Hello. "Hence why Owners Corporation Network has called on the government to develop a standard agreement, just as they've done for the residential tenancies agreement."

So we have a strong position at the Australian College of Strata Lawyers that our position is there for the common good. It's there under our logo, and I think it's something that Michael, you and I should give further consideration to at our council level, whether we are the ones to produce this template agreement.

Michael Kleinschmidt: Yes, look, I'd love to see it. I'd love to do that. And I'll just add this little bit to it.

When we currently have a culture that it's not real unless it's in the Body Corp Community Management Act in Queensland, or the Strata Schemes Management Act or whatever, it's not real unless it's in an act, okay? Oh, it's not real law unless I can see it in the act. If we have that culture and we have that mindset, and we do, then it's going to take some legislative change as well.

But there's plenty of stuff that can be done here without legislative change. I'd love to see SCA tomorrow all out of the place, come out tomorrow and say, we adopt Trudder Bridge Phase 3 in its entirety without deburring, and it's happening, we're putting it out to our members, issue a circular. That's what we want them to do straight up. No amendments, no filibustering, no trying to hide, and just get it out there. Well, that would be a great start.

And then from there, the next part of it would be, "Let's really engage with this consumer experience." So, this is not just about point of sale in terms of insurance, it's about engagement. So, let's go back and revisit that as well.

And get out there and sell the value of strata managers. You can't sell the value of strata managers when you're hiding stuff. Why not do some benchmarking? Why not sit there and say, we've done some time in motion studies for strata managers? And based on the average level of competence to do the job, this is what lot owners in Queensland should be expecting to pay per hour for these tasks. Start exploding some of the myths.

I'm the same as everybody else. I've had the committee members sit at my table and say, charging us \$5,000 to do this. And I said, geez, you're lucky. If I did that for you, I'd be charging you \$15,000. And they'll look at me and go, what? I said, "Well, my hourly charge out rates like \$600 an hour plus GST. So you're getting a pretty good deal. And this is a good strata manager who's doing a good job for you." So I wouldn't complain. And when I see that, I blow it up whenever I can.

Amanda Farmer: Well, thank you for exploding some myths, for challenging some assumptions here today. Michael Kleinschmidt, partner at Bugden, Allum Graham Lawyers. We have had many comments here thanking us for a fabulous session. Some eyes have certainly been opened from what I can see here in the comments. I'll swing back around and have a closer look at those later on, probably over the weekend.

If you have been here live with us, thank you so much for tuning in. We run a little bit longer than we usually do. And if you're catching the replay, thank you. I hope those of you who have been here tuning in have recognized whatever side of the fence, insurers commission fence you might sit on, this is an incredibly important topic to be addressing openly, clearly, having a discussion, having a debate.

To that end, if you could please share this recording, this is public, this is on our Facebook page, this is on LinkedIn, on YouTube, you are welcome to share this with those who you think need to hear this information, whether that's your strata manager, whether that's your fellow committee members, other owners in your building, you are free to share this, hit that like button, give us a love heart, that gets all of that, those Facebook algorithms going to make sure that this gets in front of as many eyeballs as possible.

Michael, together with Nikki Jovicic at Look Up Strata have done a fabulous job at bringing this topic to the forefront the last few

Publication Date: 20 July 2023
YSP Podcast Transcript: 371. Insurance commissions need to stop: your professionalism depends on it.

weeks, so let's keep this discussion going.

Thank you so much, Michael Kleinschmidt.

Michael Kleinschmidt: Thanks, Amanda, and what is it, hashtag Strata Royal Commission?

Amanda Farmer: Hashtag Strata Royal Commission. Be careful what you wish for.

Michael Kleinschmidt: I'll be the first witness. I happen to be the commissioner, actually. Bring it on.

Amanda Farmer: Bring it on. You've heard it here first, Michael Kleinschmidt, Commissioner for the next, the inaugural Strata Royal Commission.

Have a lovely weekend, everybody. Thank you for joining us here on Friday Live, and we will catch you all next time. Bye for now.
Michael Kleinschmidt: Right, see you.

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.