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YSP Podcast Transcript: 416. How to succeed at NCAT - self represented

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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 my guest this week is Cate Morrison. Cate is a strata owner and a committee member with what I'm going to say is a solid history of success in the New South Wales Civil and Administrative Tribunal. That's NCAT.

Representing herself and more recently, her owners corporation, Cate has succeeded in obtaining orders in her own applications and also defending applications. Cate's professional work supports the government by providing impartial policy recommendations, and she has influenced the direction of legislation across a range of public issues.

In her personal time, Cate keeps active with hiking, swimming, dancing and running, which she says helps her retain balance amidst the strata stress. Cate studied Psychology and is very focused on wellbeing. She is a longstanding member of the Your Strata Property online membership community and is regularly helping out fellow members in our forum and encouraging them to never allow strata issues to overtake their lives.

Now, I've invited Cate on the show to share with us her most recent Tribunal success, because I know so many of our listeners are in a similar situation, battling conflict and maybe even litigation in your building, and trying to do that alone without legal representation. You've heard me say before that it is possible to succeed in the Tribunal without a lawyer, and Cate is certainly proof of that.

I'll take you on over now to my chat with Cate Morrison. Cate Morrison, welcome to the show.

Cate Morrison: Thanks, Amanda. Lovely to be here.

Amanda Farmer: Lovely to have you here with me. Cate, you are fresh off yet another, I'm going to say, win in the Tribunal, self represented.

You are a member inside our online community. You've been sharing some tips and some strategies with our members in the forum. I've invited you here to the podcast to share those, if you're willing, with a broader audience. Thank you for so generously accepting that invitation.

Cate Morrison: Thank you for the opportunity, Amanda.

Amanda Farmer: Can you give us a brief outline of the dispute?

Cate Morrison: Yes. So I was recently required to represent the scheme in an application where an owner was seeking orders for compulsory management. The owner was claiming that the scheme was dysfunctional. And this was based on the fact that we had delayed one AGM and that there was a committee with only one person and that we had had quite a few strata managers over the years. So I have been the sole strata committee member for a few years, and that was due to no other owner having volunteered to participate.

Amanda Farmer: Right. And you're in a reasonably small building?

Cate Morrison: Yes, just four units.

Amanda Farmer: Fair enough. As I always say, the smallest buildings have the biggest problems. So this is an application that was brought by a neighbour wanting a compulsory manager because of these alleged failures to comply with the law. You are the

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sole committee member, therefore, responding to this on behalf of the owners corporation as a whole, did you think about engaging a lawyer on the owners corporation's behalf?

Cate Morrison: Yes, I absolutely did. And I reached out to our insurer to check our policy and they were open to accepting that application for legal defence insurance. However, as the owners corporation had already accessed this insurance in the past when they were actually defending an application that was brought by myself, our premiums had increased as a result of that. And as I did not feel that it was a difficult claim to defend, I decided not to go down that path because I didn't want to risk our premiums being increased.

Amanda Farmer: Fair enough. It is something I hear often, and I do want to acknowledge that this is an interesting situation where we talk a lot, or at least I do, and maybe you've heard it on the podcast and you see it inside the membership. I talk a lot about owners who want to bring applications for compulsory appointments because they feel that their community is not functioning satisfactorily. And this is a situation where you, wearing your owners corporation hat, or as the sole committee member representing the owners corporation, are defending an application for a compulsory appointment.

So we don't often hear that side of the story, which is interesting, but I do want to be focused today on the way in which you prepared for the case and what it is that you did, the steps you took, the challenges you overcame to successfully defend this application.

So if you think back to the stage where you were served with the application, what were some of the first steps that you took?

Cate Morrison: The first thing that I did was to read the application and to understand the claims being made and to analyse those claims in relation to the section of the act that was relevant, which is Section 237. I quickly identified that the claims made were that the scheme was dysfunctional. So I believe that was subsection one. I don't recall exactly, but there is like 4 subsections under which you can seek a compulsory manager, and this was one of them, that the management of the scheme was dysfunctional.

So the owner was claiming that the scheme was dysfunctional because there was one committee member and we had delayed an AGM. So it was very clear to me very quickly that based on this application alone, there was not sufficient grounds for an order to be made. I accept that the Tribunal sometimes does make orders where perhaps they shouldn't, and that's why there is an appeals process in place. However, I was very confident, based on the claims and the lack of evidence provided, that there was no way that an order could be made in this case.

However, I couldn't stop it, that I had to ensure that we had a fail safe defence. So in doing so, I referred to the online membership and I got advice from yourself as to what makes a scheme dysfunctional. And in that case, I was able to outline the ways that we were compliant with the legislation being the opposite of dysfunctional. So we had insurance in place, we had a legal committee in place, we were running meetings lawfully.

So in my written submissions, I laid out arguments that specified what would be required to prove a claim under Section 237 and outlined how these things were not relevant, I suppose, and how the claims being put forward did not provide legal justification.

Amanda Farmer: I love it. I want to point out that you're not a lawyer, but you sound like one to me and I want to acknowledge that this is not your first time in the Tribunal and not your first win. So there's a bit of experience that you bring to this task.

But one thing you said straight up is you got the application and you read the application. Might sound simple, but some respondents to Tribunal applications do fail to do that, or fail to do that thoroughly and miss things. Was there a lot of material? Are we talking pages and pages of material that was served on you?

Cate Morrison: There was. Most of the material was in the form of email correspondence and what the applicant had failed to do was to link any of their legal claims, which they hadn't really included, to any of that evidence as well. So I suppose that they were just hoping to show that the communication was dysfunctional.

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But again, they hadn't actually even articulated that. That was just something that I was guessing. And as you very well taught me, we can't assume what's going on in somebody else's head. We can only go off what is on the written application and the actual succinct words. We can't surmise what somebody's suggesting or intimating, even though that appeared to be the case.

Amanda Farmer: And when you say that it was pretty clear to you and you were pretty confident that they hadn't met the legal requirements of Section 237 to show that the community was dysfunctional, is that because you've been involved in one of these cases before or did you do some research or look at other cases? How did you gain that confidence?

Cate Morrison: I suppose years ago when I had issues myself with noncompliance with Section 106 in terms of failure to repair and maintain the common property. That was in my own lot at that time. A lot of things that I heard was, *"Oh, just get a compulsory manager. A compulsory manager will fix all of your problems."* And I've heard that so many times over the years and I think that's such a dangerous path for people to go down because it's just a misperception that that will solve all of your problems.

And so having had a friend as well who had been subject to a compulsory strata management application in order, and it was by consent, but then learning that in reality handing over full power, 100% authority without any limitations, just totally saw their scheme basically dissolve. And effectively, most of the owners have subsequently sold because they haven't been able to afford to live there anymore. So it's very dangerous path to go down.

So through that sort of anecdotal experience with those orders and seeing so many people in the forum wanting advice on how to achieve those orders, and I guess that's always my advice, is to avoid those orders wherever possible, because sure, it may solve the issue in some cases that you're just giving up all of your rights and democratic process are dangerous.

Amanda Farmer: Yes. So you've told us that you read the application, you have familiarised yourself with what Section 237 requires, and you've gone through in quite a forensic way, I'm going to say, and looked at whether the material that's filed by the applicant proves the points that need to be proven to have this Section 237 appointment.

And then I think I heard you say in your response, in the material that you file in reply, you were sort of pointing out all of the things that your building was doing correctly and how the applicant had not made out their case. Have I got that right?

Cate Morrison: Correct. Yes, that was my claim was that there was no legal justification being presented in their submission.

Amanda Farmer: Anything else that you did in this, let's say in the lead up to the hearing, that you felt best prepared you to defend this claim?

Cate Morrison: In terms of the preparation, the other thing I did was just ensure that I was using the actual standard template being a statement. So in my written submissions, I made sure that I followed the actual directions and the directions very clearly spelled out how I had to prepare the bundle and just to make sure that all my arguments use that bundle.

I personally like to use a contents page at the start because I feel that having that overall summary of all my high-level arguments upfront is very helpful so that people can see my logical arguments without reading through the whole 20 or 60 or 100 page document, however long it's going to be, you can see it all on page one straight away.

Amanda Farmer: Yes, great tip. And that reference to the directions that the Tribunal will give at that first directions hearing. Certainly our New South Wales Tribunal, there is a standard set of directions, and so, so important to be following those and preparing your material in line with those. And it will say things like, your evidence must be in the form of a witness statement or an affidavit needs to be filed by this date page, numbered, served on the other side and filed with the Tribunal.

So it really is a bit of a how to guide when you get those directions. And the mistake I see some self-represented litigants making is that they don't follow them.

Cate Morrison: That's right. I think if you just read them very carefully and check off that you've done every single thing word for

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word, you just cover yourself, because sometimes you can get away with doing things the wrong way. As I understand that the Tribunal aren't bound by procedural rules. However, you don't want to risk having your claim thrown out on those basis. So, yes.

Amanda Farmer: For sure. So by the time you got to the hearing day, I imagine you felt you'd filed everything that you needed to file, you were well prepared. Any tips for the hearing day itself that you want to share with our listeners?

Cate Morrison: Yes. I found from previous experience that you get the opportunity to give a closing statement from the advice that you gave in the forum, they're supposed to let you make an opening statement. However, when I've been an applicant, I wasn't necessarily allowed to do that. And when I was the respondent, I was subjected to that, but then not allowed to respond.

So my advice is be prepared for anything to happen on the day and have everything that you need to say written out in front of you so you can refer to it. But things would generally not go in the order that you would expect, so you've got to just be ready to have however the day goes, the actual laying out of the process, it changes every time and no member does things the same, I found. But definitely be prepared to have your most concise, shortest version of your key arguments ready to go so that you can provide that at the end.

Further, to be prepared with any cross-examination questions for any witnesses ready to go. And that's a whole big part of the preparation, too, I should say, is planning and trying to find any holes and just being able to ask questions to get an answer, yes or no. And I think you've taught me that you only ask questions that you know the answer to and that you know it's going to help your case. So if you're not sure about something, don't ask it. Don't risk helping the other side to prove or disprove their case.

Amanda Farmer: Great tips. Really great tips. And having just come out of the Tribunal at the time, we're recording this a couple of days before, you've hit the nail on the head. It really depends on the member, how they want to run the day. Sometimes, yes, you'll have the opportunity as an applicant to give an opening statement and as a respondent to respond to that. Sometimes. No, the other side might want to cross-examine you if you're a witness in your own case, or whoever your witnesses are. Sometimes they don't.

And my recent experience was that the day was broken up with some settlement discussions. So it might be at some point, if things are going particularly well for you, that your opponent might say, "I'd like to make an offer to settle." That often happens when lawyers are involved and they're taking the time to give updated advice to their clients in morning tea breaks and lunch breaks.

If that happens and you've got fixed in your head that you wanted things to go a certain way, it's important to be flexible, I think, in your mindset and flexible in your thinking and be open to the case or the day being resolved in a way that you might not have first expected. That's really important, too. Or if the settlement discussions are not successful and you come back into the room and you got to keep going, you have to take that in your stride as well.

Cate Morrison: Yes, I think it's important to understand that anything's possible once you get there and to have your bottom line of negotiation ready if that is the situation. Because if you can resolve it by agreement at any time, that is absolutely ideal. As opposed to having orders made on you, just having all the possible options that you'd be open to. Ready and open, and not necessarily telling the opponent that upfront.

But if you do get the opportunity to go out and have those conversations during the hearing, then, yes, be ready to present your ideal negotiation and then just work down from there until you met your bottom line.

Amanda Farmer: I love it. You mentioned cross-examination and some cross-examination questions you had prepared. Did you cross examine the applicant or the applicant's witnesses?

Cate Morrison: Yes, I did. I cross-examined the applicant, and when it came time for the cross-examination, I actually had to ask for the opportunity to do that. So at the start of the day, the applicant basically took over and was just talking, talking, talking, talking, and I wasn't getting an opportunity to respond and I effectively just sat back and let it happen. And of course, I hadn't had

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much sleep. I wasn't really listening to much, to be honest, because I was a bit, I suppose, too relaxed knowing that the case didn't have any legal legs.

But what I quickly realised was that the member even was kept referring to a dysfunctional scheme. So one thing that I did keep pointing out was that Section 237 requires the management of the scheme to be dysfunctional. So that's where I think a lot of people in these cases get all excited all the scheme's dysfunctional and they think they have a case. And having read up about these other cases, so many of them get dismissed.

And I think too many people perhaps go excitedly thinking their scheme is dysfunctional, but it's got to be the management of the scheme is dysfunctional. So either the strata management or the committee has to be dysfunctional. That's what I was continually highlighting was that there was no evidence or even claim that the management was dysfunctional in this case.

Amanda Farmer: So you're saying a couple of instances of non compliance does not a dysfunctional management make.

Cate Morrison: Correct. That's right. The claim actually had a couple of other components. So the applicant was also seeking for two meetings to be nullified. So when it came time to do the cross-examination, which, as I mentioned, I asked for the opportunity to do and time to be allocated for, I did actually seek from the member clarification as to what issues he might need to be clarified further.

And I was very lucky that he was able to articulate immediately that the two meetings he had found to be valid. So that saved a lot of time. I didn't have to address those. So, yes, so I had all my cross-examination questions ready to go for each of the specific orders. So I was able to just focus on the questions related to the compulsory management.

In asking those questions, some of the questions that I posed were specifically about each of the aspects under Section 237. I think there's 4 subsections in terms of the dysfunction. I didn't at any time given a question that would allow them an open invitation to talk about how it was dysfunctional.

So very carefully used questions that only allowed a yes or no answer. And where the applicant did try and start talking and giving more information, I cut them off. And unless the member then interrupted me and said to let them keep talking, I was able to stop them talking and giving information that might have helped themselves further.

While I was doing the questioning, the member themselves then actually chimed in and had some questions for the applicant while they were in the witness stand. Having taken the oath, it's sometimes difficult when there's not a very formal structure in the day. Know when you can object to something. So when someone's saying something and you know it's untrue, it's not like you can just say, "*Oh, I object to that.*" You can't just interrupt them and, and that was the hardest part for me, was sitting there having to listen to people say things and make claims that I knew weren't true or were being presented out of context of what really happened.

So that was the hardest part. Being personally vested in the situation and having things said about me that defamed my character. That was the last part. Yes.

Amanda Farmer: I want to come back to that as one of your big challenges. And I think many other self-represented litigants will relate to that. Even those who engage lawyers and are hearing their lawyer advocate on their behalf and then hearing what the other side says. It's really hard to sit there and hear things that you know and you feel are untrue and are damaging to your reputation even. But first of all, I want to point out your tip there about listening to the member and what it is the member is focused on or maybe some hints that they're giving you along the way.

So you said the member was focused on dysfunctional management and was pointing out to the applicant, it's the management that needs to be dysfunctional. So you're immediately alert to the fact that the member might not feel the management is dysfunctional. And so you really honed in on those words and that part of your argument. So that's a really great tip there.

And something that good lawyers will do is be guided by what the member is saying and the instinct that you get for the direction

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they're leaning in and you think, oh, they really like that part of my argument. Okay, I'm really going to repeat that. Focus on that maybe arguments that they don't seem to like too much leave those alone. And that means you've got to be listening all the time, even when they're talking to the other side. So it sounds like you did a great job of that. And then also I love that strategy of asking that question before you started your cross-examination. Member, is there anything in particular that you want me to focus on?

And I think as a self represented litigant you have a lot of room to do that and the member is going to like you because you're moving more efficiently than someone who might just want to cover everything for the sake of it and you are able to gain that insight into the direction the member was leaning about those invalid resolutions and get that boost of confidence. Okay members not interested in those resolutions, let's focus on the dysfunction. So really great idea there to be asking that kind of question before you dive into cross-examination.

And I love the way that you've tackled that cross examination. All good strategies, but coming back to this challenge, having to sit there, having to listen to these lies from your point of view that are being told about you, how did you handle that?

Cate Morrison: Not as well as I could have. So I found myself getting extremely frustrated and that was causing me to speak out of turn and be told by the member that it's not my turn. But what was good was that eventually he actually said you needn't be so anxious.

So I guess what I came to understand possibly too late in the day was don't be concerned if the member is listening to these things. You will get your chance and your opportunity even if you have to request them to then defend these matters.

What was hard was that so many things were being flung around and I wasn't getting the opportunity to respond to them directly. And at the time so in my head, I'm thinking, okay, he's listening to all of these things, his believing these, why shouldn't he?

So I suppose the way that I did respond at one point was just to say, look, I'm actually really struggling with this. But anyway I was. That was basically ignored and we just continued on. So that's fine. And I just had to sit there kind of hyperventilating and trying to stay calm and trying to focus on the key points of the case and trying to steer the direction of the day because as I say, so much of it was just the applicant talking at the member and the member was basically sitting back and reviewing and looking at the evidence that they had presented.

And all the members are so different. And this particular member, he was listening and I suppose he was giving the applicant every opportunity to present their case but then he was asking them challenging questions as well as they went along. So for example, in relation to one of the meetings and it was an AGM and I had prepared a budget, the best to my ability and I had done that with the support of a friend who was very kindly giving up their time to help me do that and had done that themselves before.

But I suppose the member actually then challenged and asked specific questions themselves here and there of the applicant. So what is it about this budget that is unreasonable? And the applicant kept saying things like, "I don't like this, I don't like this, I don't want to work with this person" and just that they don't like. So whenever they would say things like that I would seek clarification. What's the legal basis?

How does this relate to the orders? So I was trying to steer the member's mind even though I initially stayed quite quiet. I then came to realise that if I didn't speak up this person was going to have the whole day just to defame me, basically say these things that weren't true or were out of context.

So once I decided to start speaking up the member did seem to start giving us each time to talk. So yes, it was just so unpredictable and messy on how the actual structure of the day can go.

Amanda Farmer: And when the applicant was speaking I imagine you were or you realised you should take notes about each point they're making, especially each point you disagree with. And then when it is your turn to speak that's when you can respond to each of those points and always be responding to the points with reference to the evidence.

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So the applicant says this happened at a meeting. You know that's not what happened at the meeting and you've jotted that down and then when it's your turn to respond you're saying to the member, the applicant said, that this happened at a meeting. If I take you to page 425 of the bundle those are the minutes of that meeting. And as you can see in those minutes that is not what happened or that is not how they voted or that is not who was there. So it takes all the opinion and personal anxiety and gripe out of it and instead takes it back to the evidence. What the applicant's saying is simply not in the evidence.

And having to sit there and wait for your chance to do that I understand can be difficult but I think if you're focused on listening and taking down each of those notes in a very methodical way when it's your turn to respond then just going back to the top of that list and responding to each one of those points is a good way to do it.

Cate Morrison: Yes absolutely. It's just I don't think the member would have actually done that or given me that opportunity had I not kept speaking up. So to that extent I had to be told to be quiet quite a few times until he did actually finally give me that opportunity. But. So I guess that's the tip, is that it will be quite uncomfortable at first when you try and speak up. If you're not given the opportunity. And the structure of the day doesn't allow that, you'll feel quite uncomfortable and you'll feel that you're in trouble. But you have. You have to push past that and assert your right to be heard. And, of course, if you've got to judge it, each member as well. Some are more strict than others. And, yes, I mean, in this case, I was lucky that I could keep pushing it. And eventually, he seemed to come around. He was a bit more of a softer teddy bear than others that I'd seen him.

Amanda Farmer: Right. And you're also coming from this perspective as a respondent as well. So that's an important thing for me to point out. When you are the applicant, you often do get more airtime. And it is your case to prove. And you should be afforded. I mean, both parties should be afforded procedural fairness. But the applicant, first and foremost, is the one there to make their case. And the respondent is there to respond to the applicant's case. Not to talk about a whole range of other things.

So it does make sense that the applicant is going to have that first opportunity, is going to have perhaps what seems like more of an opportunity than the respondent, but important not to feel sidetracked by that or that you're not getting a fair opportunity. And indeed, if you do feel you're not getting a fair opportunity as you did, Cate, put your hand up and say, do I get to respond to some of this at some point and make sure that you do have that chance.

Cate Morrison: Yes. And knowing that the proceedings were recorded and knowing if the outcome was not fair and just, and I wish to appeal that, then wanting to make sure that I put it on record that I had raised the issue of procedural fairness. Regardless if they're bound by procedural rules or not. I did want to put that in the voice recording that I feel that the way it's running is not fair.

Amanda Farmer: Very brave. Good job. Any other challenges that you face that you want to draw to our listeners attention in case they're facing them too?

Cate Morrison: I think it is worth noting that pretty much every time I've been to the Tribunal, the other party seems to have something up their sleeve ready to surprise you with on the day. So definitely the admission of new evidence that they haven't served you with before the actual hearing. And then they seek to have that admitted on the day.

In my case, there was a whole folder worth of evidence and that was something that I had to be prepared and ready to challenge and effectively say because I wasn't represented, it's not fair because I don't have the opportunity to consult with my legal advice. Just because I wasn't represented isn't to say that I wasn't getting legal advice. Yes and it didn't stand. He let it run anyway. But at least, again, just being strategic and always thinking ahead, particularly if you're not happy with the outcome and you do decide that you want to appeal. Just having all of these things recorded and just remembering that everything's voice recorded and having that in the recording that you have disputed that and giving the reasons why.

Amanda Farmer: Good point. You were ultimately successful in defending this application. You haven't had a compulsory manager appointed to your owners corporation. We've talked about a lot of things that you did right. Even from my, I want to say, objective position of not being involved at all in this case or seeing the way that it was run. But it sounds like you did a lot of things right. You faced a few challenges. Is there anything else in particular that you attribute your success to? A few things that you really want our listeners to walk away with and apply in their own Tribunal proceedings?

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Cate Morrison: Sure. Look, I've been a member of this community, the Your Strata Property community, for years, and the lessons that I've learned through that time are invaluable, priceless and genuinely a godsend. So I did not have to get any formal legal advice.

I didn't even have my annual Amanda Farmer phone call in relation to this case. And just through the support that I received through the online forum, through yourself and I, other key members who had been involved in similar cases was. Yes, definitely. I mean, because I could ask very specific questions about very specific aspects of my submissions in preparation. That was extremely useful. So. And the only other thing that I'd say is you just got to be ready if you're a self-represented person and you are up against a legal service. Sometimes I find the Tribunal does favour. Having been the applicant and up against a legal service.

When I was representing the owners corporation, again, I still didn't get much airtime. They gave the air time and the lawyers were the respondent in that case and they seemed to always be listening to the lawyer and I had to fight for any opportunity to speak. So, yes, just not take things personally and just be really objective and impartial and no matter what your position is in it, try and treat it like it's a job and that you've got this objective and you've just got to do everything you can.

And yes, be thinking ahead all the time of all the risks and everything that could go wrong and what the possible outcomes are. And yes, avoid litigation at all costs.

Amanda Farmer: Nice point to end on. And I, even though I am a lawyer, I agree with that. It is not the first time I have heard people say that the Tribunal seems to favour those who are represented by lawyers. That is unfortunate. In a jurisdiction that tells us it should be lawyer-free.

We start from a place that lawyers need permission if they're going to represent parties. But it may simply be that the Tribunal falls into that comfortable position of being able to understand more clearly what the lawyer is saying, being able to communicate more efficiently what it means to a lawyer. I think that is probably something that the Tribunal may be generally, may be some tribunal members in particular need to be a bit mindful of, because I'm hearing that a lot the more I work with self-represented owners.

I'm so pleased to hear that you have benefited from the support that's available inside our online community, and thank you for all of the help you provide to others in similar situations. With all the experience that you now have with these Tribunal wins, Cate.

And thanks for sharing all of this with our listeners today. I'm sure a few of them will have some questions that will pop up and help both of us to better prepare our owners for their day in the Tribunal.

Cate Morrison: My pleasure and I just encourage everybody to just keep the balance and not let strata problems ever take over your life. And you're not alone if you're in the community.

Amanda Farmer: Thank you so much, Cate.

Cate Morrison: Thank 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.