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YSP Podcast Transcript: 451 - Cowboy Owners | Capital Works Fund Benchmarks | NCAT Wins

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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. I'm Amanda Farmer, and I have with me today Reena Van Aalst from Strata Central. Welcome, Reena.

Reena Van Aalst: Hi, Amanda, how are you?

Amanda Farmer: I'm doing very well, thank you very much. Busy in strata, as always. We are here, as we like to do, to chat about our wins and challenges from recent weeks. Hit me up with your challenge this week, Reena.

Reena Van Aalst: Well, this is again, I keep saying to everyone on our podcast, a matter in relation to things that have never happened before, but this is the first as well. And sometimes it's hard to imagine in strata there'll be a first when you've been doing for as long as you and I have been. But we had this particular owner in a building that we took over, I think, last year, where when we attended initially to do the walk-around, he had actually installed a pipe.

He was on level one, in, in the building, the balcony on level one, and installed a pipe running all the way down the side of the balcony, all the way underneath, and then traversing across and down onto the facade of the building and attaching to a common property tap. So he's using the tap to water his plants and bits and pieces. Anyway, so committee have been concerned. This person used to be a building manager as well.

So, for the building and then now that they've got a separate independent building manager, not an owner. And so we sent him a couple of breach letters. Of course, he didn't respond. He basically refused to answer, and didn't remove the piping and his access to the tap. So the new building manager arranged for a lock to be put on a new tap to be put on that had a lock thing on it so that you couldn't actually use it anymore because obviously with someone like that, the committee thought it'd be better to try and stop his access as opposed to taking any further action.

Anyway, so then what this particular person did was, and that he's been filmed because obviously there's cameras everywhere. He got a power tool, and he actually cut that lock with it. Oh, yes, with the power they've got him on, doing it on, they've recorded it, and now, he's basically, obviously did that just last week. And the committee have come to us and said, "Well, what do we do now? Like, do we send him like a notice to comply?"

And I'm thinking, well, I don't think someone of that nature would actually respond to a notice to comply. And I'm not sure, really, and I wanted to ask you today about this. Whether or not if someone's damaging property that they don't own, I mean is that a criminal matter, or I mean, we could obviously go down the NCAT path, but what do you do?

And he's actually like his proxy farming, he's in, is bad-mouthing the strata committee. He's actually calling the manager, who is one of my colleagues, calling her a puppet of the strata committee. And you know, obviously we're just doing our job, and you know, he's obviously doing the wrong thing. I mean, apart from the fact that he's using water that doesn't belong to him. Yes, that you can see this whole piping, I mean it just looks shocking.

Amanda Farmer: Yes, wow. Okay, a few things there. Your question about is it is a criminal matter? The short answer is no. Because where an owner is interfering with the common property, they essentially have a legal interest in the common property, right? By nature of being an owner. And that's how our strata law works. Everyone's a member of the owners corporation, everybody has a legal interest in the common property.

Reena Van Aalst: Yes

Amanda Farmer: But there are rules to follow when it comes to interfering with adding to altering common property, and those rules are in our legislation. So if a building was to go to the police and say this person has damaged our property, the police are going to say, "Sorry, not a matter for me because technically, this is that person's property as well." And police often say things like, "Oh, it's a civil matter."

Reena Van Aalst: Yes

Amanda Farmer: So there is a legal regime here, but it's not the criminal law, it is the strata law, and that's the avenue that the owners corporation should be going down. And look, when I've had to advise when, I'll say that again, when I've been asked to advise in difficult cases where we have maybe difficult characters, people who have a mental illness, for example, people who are criminals themselves, who are known to police.

We've had bikies in the past, we've had gangs, we've had some serious damage to common property, ripping out cameras, smashing glass in lifts and things like that. You might have experienced some of that.

Reena Van Aalst: Yes, I remember that one. That particular matter. Yes, I remember that one.

Amanda Farmer: My advice has always been, don't assume that these people will just ignore notices that are sent out by the owners corporation. Yes, they might. But it is really important to follow what I call the usual enforcement procedures. And the reason that's important is because you never know when this person's going to sell. For example, if you're a tenant, getting the attention of the landlord through by-law, breach notices, notices to comply, ultimately Tribunal proceedings is going to be really, really important because the landlord really doesn't want to deal with all that crap.

They're looking at their bottom line. Get that tenant out, get somebody who's better behaved in. You don't know whether there's a family member who might be assisting someone who may be suffering from mental illness, and that's impacting their behaviour. That family member might see these notices and go, "Hang on, mate, we've got to sort this out. What's going on here?" So there's a lot of benefit to following those usual enforcement procedures.

Even if you find that if you assume that this person is just going to get that and rip it up, they may well do that. Then, for your situation in particular with this piping, is it the case that the owners corporation could just have a contractor come in and remove all of that from outside the lot? You don't need access to the lot enable to just rip it all out.

Reena Van Aalst: To an extent, that's correct, Amanda. They could remove it from their facade, and then the part that goes onto the balcony, they'd have to probably. Yes, that's another thing they could do is cut that part off.

Amanda Farmer: Because that's open to the owners corporation. That is part of its repair and maintenance duty. To remove illegally installed structures usually holds owners corporations back from that is that they can't physically do it. They can't.

Reena Van Aalst: Yes, access, yes.

Amanda Farmer: But something that is installed external to the lot or part of it.

Reena Van Aalst: Yes.

Amanda Farmer: To just come in one day and rip those things out. I mean, you know, he's probably going to jump up and down about that.

Reena Van Aalst: Well, I think what he'll do is reinstate it. I mean, I've come across lots of people that, you know, do things like that, but to actually get a power saw and like, that's next level, I think, because it's not just like getting bolts and trying to cut something, you actually, you know.

And so I think that perhaps the corporation should remove the piping and then start, if he reinstates it, then start the next set of which is not to issue a notice to comply, but to go to mediation and get an order. I think that it's a way that's going to.

Amanda Farmer: Yes. And the weird thing is, you might find I've had some buildings hit this roadblock previously where they look through their by-laws and they say, "Actually, I can't point to a by-law that says, you know, thou shalt not damage the common property. It's not there."

Reena Van Aalst: No.

Amanda Farmer: Something to that effect was in an older version of the model by-laws.

Reena Van Aalst: Yes.

Amanda Farmer: It's not in the model by-laws anymore. So I have had that question before, "Amanda, what if an owner or a tenant just goes and damages the common property?"

Reena Van Aalst: Yes.

Amanda Farmer: They're not necessarily doing work they're not adding to. They've just for whatever reason, smashed something, ruined something, ripped something out. What do we do? And your fallback there is, is the act; they have reached the act because they have technically altered the common property.

Reena Van Aalst: Yes.

Amanda Farmer: And Section 111 of our Strata Schemes Management Act in New South Wales says that if you are going to interfere with the commercial common property, you need some form of approval. Whether that's under the by-laws, whether that's minor works approval under the Act, whether it's cosmetic work under Section 109. There has to be some, you have to be able to point to some approval that you've got.

This guy obviously doesn't have a problem. What he did, certainly with the piping and with the tap. So you're right, it would be mediation and seeking an order that whatever common property has been damaged be reinstated.

Reena Van Aalst: Yes. And maybe, perhaps if the committee did go down that path, which they should, then maybe he might pull his head in, and sometimes some people need that next step before they.. It's like sort of being in the wild, wild west in the cowboy days, you know, I mean, you know, like, it's really interesting how you see people's behaviour and anyway, it's like, you know, you're saying no to me, so I'll fix that. It's really that type of mentality. Yes, interesting.

Amanda Farmer: And, you know, that's the nature of strata and strata management. You know, one day you're working with lawyers, negotiating a \$5 million construction contract, and everyone's being very commercial and very sensible and looking to improve the building.

And then later on in the week, you're dealing with residents yelling and screaming and smashing up pipes. I mean, what other profession? One extreme to the other.

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Reena Van Aalst: Yes. And then also, I think, and this is another challenge I'll talk about in the future, is that plus your normal day-to-day duties so this is the thing I think, that people don't understand about strata is that in most like one of my colleagues now has got a different role in strata and he think he knows who I am.

So he says to me that now he can plan his day. Whereas in strata management, you really can't plan your day because these things happen out of the blue, and then you've got to drop everything else that you're doing and then because people are, you know, upset and emotional about things. So you've got to direct your attention.

Amanda Farmer: For sure. All right, well, keen to know how that one turns out, Reena. Keep a flag on that and come back to us. My challenge for this week comes from our members' Q and A forum. I was scrolling through the forum earlier today, and I saw a great question there that I thought I'd bring to the podcast. The question was this: "Amanda, what is a good balance for a capital works fund? Is \$25,000 in the fund good enough? Is \$50,000? Does it need to be \$100,000?"

And this question is coming from someone who, I think I can tell from some other posts, appears to be an agent, maybe a property manager. We do have lots of agents, property managers inside the membership, being able to tap into that strata knowledge and get their questions answered for their clients, maybe advising someone on the purchase of a property and looking at those financials and looking at the bottom line figure there, what's in the capital works fund?

What's a healthy balance? What should it be? Are there any benchmarks around this? And my answer, as you might be able to guess, Reena, was... I can't say without any other knowledge of what's going on in that building, first of all, how big it is, what projects they might have on, whether they have just replaced the lift or the roof membrane, or whether the roof indeed is leaking and needs to be replaced, whether they have a strata manager, a building manager, what facilities they might have that may need repair and maintenance.

Every building is different. And no, we don't have any benchmarks for what might be normal or necessary or healthy for our capital works funds. I'm not saying that's impossible. With the right data, I think that could be put together, and I'm hopeful that that's the direction that maybe our New South Wales strata hub is heading in, having to report capital works fund balances each year. But the other thing that I pointed out to this member, and a reason why I wanted to discuss this today, in case others aren't aware, the 10-year capital works fund plan is a really good place to start.

If you are asking this question of a particular building or about a particular building, what does that 10-year plan say should be in the fund at this particular point in time? Now, I said in my response to this member, while I suggest have a look at the ten-year plan, I acknowledge that's not always going to be perfect because some buildings they don't comply with their plan or do things in a different or do things in a different order.

So we were going to do the lift in 2030, but all of a sudden the lift has conked out. We need to do the lift now. We've been raising money for that since 2024. We've then paid for that lift to be replaced. And that's the reason why we don't necessarily have the money that the capital fund says we should have had at this point in time. So really hard.

And I think if you're asking this question, you've got to look really closely at a number of other things to be able to get the right answer as to whether that balance is healthy. Any thoughts on that, Reena?

Reena Van Aalst: Yes, well, I mean I always mentioned when we get to that motion on the AGM agenda, which is a statutory motion considering the capital fund forecast. So this is only a guideline.

Number one. I mean, for someone to give you an accurate report, and if you think about it, they would have to understand and examine and investigate the state of all your capital assets. So they would have to go and look at the lift go through, which is what we did. Someone's doing a lift audit report. They go through all the past records of the maintenance contractor and see how many breakdowns.

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You know, they look at the original installation date, they look at the parts. So someone to give you a really good analysis in terms of when that lift should be replaced. That's the sort of money you'd be spending. And some buildings, not many, will have like an asset register where someone will come in, look at every single piece of plant and equipment, capture it and then work out where it is in the life cycle, tell you, you know, but also what's happened.

And I think this has really thrown all our capital fund forecasts out that have been done, say prior to 2021, 22 would be the Design and Building Practitioners Act, because that didn't take into it all our forecasts that we've had for say buildings that have had to do waterproofing and not taking into account this legislation, which wasn't known at the time, and its impact.

I mean, even if the legislation was known, and I'm sure people would have known about crafts and whatever, but no one would have understood the impact in terms of the regime of people getting certified and getting their certificates, and the liability that's attached to the person now, which wasn't the case earlier.

The fact that you got to put on the portal, so that has increased the cost significantly. And it makes sense, Amanda, the day people have spent a lot of money in the past, and so I say good money after bad, because they've spent the money. But not in five years later, the same water leaks are emerging because these are these band-aid jobs and no responsibility taken, which is obviously why the government changed legislation. And it obviously is applying to new buildings and older ones as well.

So if a balcony now is costing, you know, 200,000 to fix and you've got 50 of them, well, your capital fund forecast is not going to reflect that. I just say it's a guideline, use it as a guideline. But I mean, sometimes when my buildings have no money or someone comes along and they want to run the capital fund down and I say, "Well, okay, there's 50,000 or 100,000 in the capital fund and there's 30 of you. Well, I mean, that means like you've got 3,000 in the bank."

Like in real life, would you be able just to have \$3,000 in the bank if something happened in your life? I mean, even if you have, you can't, you don't have a lot of funds. People may have access to cash. They can sell shares, they can liquidate things to pay, or they can or borrow on their, you know, equity on their home loan or whatever they, people can do.

So it's about having access to capital. And so I suppose, does the building have enough money in the bank per person? I try and use that. That analogy is easier for me to try and get people to think about when they are running their capital funds, and they don't want to raise enough money. So, okay, you've all got \$2,000 each in the bank.

So if the hot water system breaks down, we know we've had problems, and you know that we'll need a special levy and oh no, well, I mean, then we can't have that. So sometimes it's about trying to appeal to the singular rather than the collective to try and get the message across.

Amanda Farmer: Yes, I like it. Good strategy, very interesting. It's always good to hear from you, Reena, how this is playing out on the ground. And yes, great point about the Design and Building Practitioners Act and how that has skewed our capital works planning. And look, I think most buildings will be sitting on capital works plans that don't take that additional cost into account. As you said, there is a statutory motion.

So it is mandatory under the legislation to have this motion included on the agenda of every AGM that we review our capital works plans. And it's open to an owners corporation to say, "Oh well, the plan's only three years old, four years old, we're not going to renew it." Managers just remember this discussion, and that maybe encouraging your buildings for these reasons to review their plans is a good idea.

Making sure that they're aware of these changes to the legislation. Maybe there's some more around the corner with NCC 2025. All of that has flow-on effects for cost of capital work in our plans.

Reena Van Aalst: Yes, definitely. Amanda.

Amanda Farmer: Okay, moving on to your win for this week, Reena.

Reena Van Aalst: Yes. So we had a case of matter in one of our schemes where a lot owner wanted to lodge an insurance claim.

They suffered water ingress through a window. And, basically, the strata committee said, "No, it's your fault, you left the window open. We're not going to lodge the claim, it's going to impact our renewal and our excess, et cetera." And then the person ended up going to NCAT, and luckily enough, through both lawyers on each side, the matter has now settled, and the owners corporation has agreed to submit the insurance claim after all that.

Amanda Farmer: Hmm, interesting. So we've talked about this issue in the past, Reena, about whether owners corporations have to lodge insurance claims. And I think we both agreed that, no they don't. It's open to them. If they say, "Look, the excess is too high, or we don't think this is an insurable event," they're not going to lodge the claim.

But there is that section in the Strata Schemes Management Act which permits a loan owner to go to the Tribunal and seek an order forcing the owners corporation to lodge the claim. So it sounds like that's what this loan owner did that case. And I'm not sure how far things got in the Tribunal, but the owners corporation decided, perhaps no skin off their nose.

Reena Van Aalst: Yes, well, I think, I mean sometimes some people take a very intransitive sort of point of view based on principle, because a person spoke to me at the time, I remember a committee member said, "Oh, it's just a matter of the principle." But you know, as we know, principle comes at a cost. So sometimes it's better to like as you said Amanda, like without any proof that the person did it on purpose or whatever, it was in terms of the fact that that owner may have had some contributory actions that led to the water ingress as alleged.

But I mean in the day unless you can prove that and it was done willfully and I doubt it was but yes, unfortunately sometimes people need to be brought to the door of the Tribunal before they actually will realise that perhaps taking such a principled position is not really in the best interest of the owners corporation in the long run.

Amanda Farmer: Yes, it is unfortunate for everyone except the strata lawyers.

Reena Van Aalst: That's right. One man's meat's another man's poison, Amanda.

Amanda Farmer: But whenever we discuss this topic, I do hear from listeners who say, "You know, Amanda and Reena, don't forget that lot owners can lodge claims as well." And yes, I've seen that happen. I don't know your experience has been whether insurers accept those claim forms filled in by lot owners. Good one to remember.

Reena Van Aalst: Yes, I had one years ago, made in a community association where someone was doing voluntary work, and they fell over, and they wanted to lodge this \$40,000, like voluntary workers claim or something home.

It was a huge amount, and we said, "No, we, no one asked you to do it. You did it without our consent. No one asked you to do any gardening, whatever." And then he just went behind the community citizens' back and just lodged it and was successful.

Amanda Farmer: Yes, there you go. So worth a try if you don't want to go battling with your owners corporation, forcing them to lodge a claim. You need to have access to the policy details and know who you need to lodge the claim with. If you can get that information, then worth a try.

Reena Van Aalst: Information is usually readily available. Either on usually like a portal for a strata company or with your AGM agenda. Usually, you get a copy of the policy and the number of details.

Amanda Farmer: Good point. Awesome. Well, congrats to those parties for resolving that dispute. My win for this week. I am very pleased to be able to share that after I think it's now about 12 years of living in dealing with a leaking apartment. One of my clients is about to move back into their newly fixed-up, properly repaired home. This is a case that actually ended up in the Sydney Morning Herald about a year or so ago.

And because this is public information, I know this person doesn't mind me saying his name is Philip. And the headline in the Sydney Morning Herald article at the time was Philip's been waiting 10 years for strata to fix a leak in his apartment. And Philip is one of my clients. And yes, that was a fact. Philip came to me in 2020, and so at that time it was about seven or eight years that his apartment had been leaking.

Reasonably large building, unfortunately, a very troubled building, particularly when it came to building defects. I mean it was a building that just wasn't constructed properly from the start. And unfortunately, the owners, the committees over the years were left with the very difficult task of fixing all of these problems. Ultimately, with my assistance, Philip ended up in NCAT.

And once the owners corporation insurer, there you go again, got involved, that case was properly settled, and Philip's apartment, of course, by then was uninhabitable and he has been living in temporary accommodation for close to two years.

Reena Van Aalst: Jeez.

Amanda Farmer: Spent many years living in his leaky apartment and then ultimately moving out and receiving that temporary accommodation amount weekly paid by the insurer, ongoing until he is moving back in. But we are waiting for the sign-off soon to hear that everything has been completed and he is finally able to get back into his apartment. I mean, just think about that chunk out of a life.

Reena Van Aalst: So can I ask you, you said this building has troubled past because of its badly constructed history. But are you saying that the owners corporation didn't want to fix his apartment as part of a defects case, or is that this was an extension of just something else that went wrong in that building in addition to the defects that it's had in the past?

Amanda Farmer: I think it's one of these examples of there was so much going on around the building by the time I got involved, no one was suing the original builder or developer anymore. All those time periods had expired. But there was work that was being done on the roof. They were on about their second or third contractor, that in that respect, insurance had been involved there because the work hadn't been done properly the first time around.

Philip's complaints really had been deprioritised. I'm going to say. And for whatever reason, you know, we know Reena dealing with these situations, often there's often personalities involved. There are claims that aren't taken seriously. There are claims that perhaps when a committee knows this is all going to be a headache, it's going to be expensive, let's just make him wait. Make him wait, make him wait. And you know, it doesn't take long if somebody's patient enough for 10 years to pass.

And sometimes people who are suffering don't realise that there is another way that they are entitled to if their apartment is uninhabitable, to be moving out to some somewhere dry and healthy and safe and to have those costs met by the owners corporation or by its insurer, if its insurer will respond to that event until they go and seek some advice.

And not everyone can afford that advice. You know, you heard me say I first got involved in 2020. It's 2025. I've been Philip's lawyer for the last five years. You know, you can only imagine the expense that that has been. And he's been lucky that he's in a position to afford that. Not everybody is. So yes, a whole host of reasons I think Reena and I, I want to acknowledge that I'm not in the minds of the committee or the building.

But the good news is that for everybody involved, lawyers, the insurer, the committee and indeed Philip, it's all finally coming to a happy conclusion.

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Reena Van Aalst: And I can ask you also, you said that the insurer was involved in the, I assume, the damages aspect of the claim, so they came to the party because of the fact that the apartment was uninhabitable or like sometimes with these claims, I obviously don't know the details of this particular one, but sometimes the insurer will come in for damages when something has happened, but sometimes they don't.

Like I've got one at the moment where there's concrete cancer between two floors and I'll talk about this in another podcast, but the insurer is considering whether or not it is going to respond to the loss of rent aspect, as in the person's had to move out because the bathroom can't be used and therefore it's only one bathroom that the person has. But yes. So in this case, you're saying that the damages claim as was responded to by the insurer of the building.

Amanda Farmer: It was. And again, that is not something that I have insight into, what policy that was, what the term was, why the insurer covered that. I always say to my clients, you don't take the gift and don't ask questions. When insurers do get involved, these cases are often resolved more quickly and on more commercial terms.

Reena Van Aalst: Yes.

Amanda Farmer: Owners corporations don't have a say. The insurer's lawyer is instructed by the insurer. So they are doing what they see to be commercially sensible. But my experience has been the same as yours, Reena, that, you know, sometimes when the problem is lack of repair and maintenance, then an insurer is going to say, "Sorry, whatever your losses have been, if it's owners claiming damages, you know, we might pay for your legal fees under a legal defence policy if you're being sued in NCAT, but we're not going to pay the ultimate award of damages or pay for the work to be done."

Reena Van Aalst: The work. Yes, the work. No, but usually, yes, it's very I should look more into that, how this damages aspect works for each policy.

Amanda Farmer: Yes. And some policies will have, as I understand it, lost rent protection for investor owners. That's a little bit different to temporary accommodation expenses for owner occupiers. Some policies might offer that as well. But, you know, all the more reason to be thinking carefully about your policy and what it is talking to a broker, asking these questions.

No doubt I will receive emails, comments under the episode, if you like, from brokers, from insurers, answering some of these questions for us. But yes, different policies will provide different protection.

Reena Van Aalst: Yes. I mean, also, rent just means that whether you're an occupier or you're an investor, then the equivalent amount that you would have to fork out if you were living there or renting it out would be the same. And that's usually covered. But yes, it's just interesting, Amanda, what you're talking about in terms of defects, not in the insurer coming in with temporary accommodation, as under the damages aspect, I think of the policy. Yes.

Amanda Farmer: Yes. All right, that's all I've got for you this week. Reena Van Aalst.

Reena Van Aalst: Thank you, Amanda.

Amanda Farmer: Enjoy the rest of your week in strata, and I will look forward to catching up with you next time.

Reena Van Aalst: Thanks, Amanda. Bye.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at yourstrataproperty.com.au.

