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YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

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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 I'm glad to be back with you here this week as we continue a conversation that we started last week. If you caught last episode number 453, you'll remember that I laid out five solid reasons not to rush off to the Tribunal.

Five reasons why you might not want to be litigating a strata dispute. Litigation is rarely simple or cheap, and I walked through the emotional, financial and relationship costs that come with it. But sometimes going to the Tribunal isn't just justified, it is necessary. So today we are flipping the script. I'm sharing five reasons why I say you must go to the Tribunal to resolve your strata dispute. And I'm sharing some real-life case examples from my own practice and beyond.

So if you haven't yet listen to episode number 453, I do suggest you head back, have a listen to that one first and then come on over here for today's episode. And speaking of taking action, if you're trying to figure out exactly what to do before heading to the Tribunal, or if you're already on the precipice of filing that application, trying to make head or tail of the forms, concerned about how much or how little to submit, maybe you're even already deep in the weeds.

You've already commenced litigation. You're wondering how this is all going to play out. Then I encourage you to join me for my upcoming live online training. It's called the Strategic Strata Litigator. How to navigate NCAT end to end without expensive legal fees. Even if you've lost faith in the system, it's all happening on Thursday, 19th of June. That's 2025. We kick off online at midday Sydney time. We're going to be live on Zoom webinar.

This is a free practical session where I'm going to walk you through the big mistakes that I see strata owners making when preparing for the Tribunal and how you can avoid them. How to structure your evidence so that it actually supports your case and helps you achieve the outcome that you want. I'll share the truth about legal costs, including how to position yourself best to recover them and what to expect on the hearing day, helping you to prepare like a pro.

Now, it is free training, but you do need to be registered to attend and get your unique access link. You can do that now over at yourstrataproperty.com.au/webinar. Link to that one in the show notes for this episode over on the website. I will remind you about that session at the end of today's chat, but for now, let's dive on in the five reasons or the five situations when you really can't avoid having to go to the Tribunal.

Reason number one: when you need a clear, binding decision. Now, not every issue can be solved with a friendly chat. A knock on the door, a coffee, a meeting resolution, a few letters, Especially when both sides are convinced that their version of the facts or their version of the law is correct. When clarity is essential, often the Tribunal is the place you need to go. Let me give you an example of this.

The case of Melani and strata plan number 22214, a 2017 New South Wales Tribunal case and Melani is M E L A N I, link to this decision in the show notes for you. That was a case in which I represented the owners corporation after a lot owner made some unauthorized alterations to their lot. Now this was a commercial lot, it was being operated as a restaurant and the owner had actually at some point removed a false ceiling from the lot.

It wasn't entirely clear when that had happened, but it had happened. The owners corporation found out about it. And, from the owners corporation's perspective, this false ceiling was common property and therefore the owner needed the approval of the owners corporation to be able to remove that false ceiling. That approval had to come in the form of a special resolution. And because the removal of the false ceiling opened up a much larger ceiling space, a ceiling cavity that the owner then had the benefit of, the owners corporation also required an exclusive use or common property rights by-law to allow the owner to have the benefit of that additional space.

Publication Date: 12 June 2025

YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

None of that had happened. Owners corporation complained about that and lot owner said, "That was my ceiling. That was not common property. That was lot property. It is not the structural ceiling, it's not the roof of the building. It is a false ceiling or a dropped ceiling and I could remove it at any time. I didn't need your permission." The parties were stuck on that point. Owners corporation wouldn't agree that this false ceiling was lot property.

Lot owner wouldn't agree that it was common property. The Tribunal needed to make a determination about that fact. Without that determination, the parties couldn't move forward. The owners corporation wasn't willing to let it go and have the lot owner enjoy the benefit of what it said was common property space. And, the lot owner wasn't prepared to seek retrospective approval or put forward a by-law for work and use that they said they didn't need approval for.

So the parties battled it out in the Tribunal. It actually went to back then an adjudicator, when that system was alive and well in New South Wales. Adjudicator's decision was appealed to the Tribunal and the Tribunal had to have a close look at the legislation, particularly the Strata Schemes Development Act, looking at how that legislation defines the boundaries of lots of. The Tribunal also looked at the strata plan, looked at a survey, looked at documents filed with the local council at the time the building was strata subdivided.

It was an older building that was turned into a strata plan when that plan was registered in about the mid-80s. And ultimately it was found that the false ceiling was in place at the time of the strata plan's registration. There was no indication on the strata plan that the false ceiling was part of the lot. And therefore the Tribunal found that the false ceiling and the space between it and the structural ceiling was part of the common property.

The implication then for the lot owner was that they could not remove or alter that false ceiling without the consent of the owners corporation. They did have to seek retrospective consent for the work that they had done and permission to exclusively use the common property air space that was between the false ceiling and the structural ceiling. So that was a dispute that needed the intervention of the Tribunal to make a clear and binding determination about where the boundaries of the common property lay.

That was not something that the parties could otherwise agree on and move forward with. This was a case where the facts weren't really in dispute. There weren't any witnesses cross-examined. The Tribunal was looking mainly at documents, some submissions in relation to the law, looking at earlier cases that applied and interpreted the relevant provisions of the Development Act. That is often how these types of cases go. When we're going to the Tribunal asking it to resolve what is in essence a purely legal question, what does the law mean?

How does it apply to these particular facts? That's how they play out. We see similar cases where we do have new laws taking effect or recent amendments to our strata laws and we're not quite sure what these amendments mean, perhaps how they are to operate in practice. There might be debate about that. We saw a lot of cases like this when our 2015 legislation started in New South Wales and, particularly the provision allowing lot owners to claim damages from an owners corporation that was new in our 2015 Act.

There was a real question around whether or not the Tribunal had jurisdiction to deal with those claims and if it did, whether it was limited in that jurisdiction, whether there was a cap on the amount of money that it could award. Quite a few cases ran through the Tribunal between lot owners and owners corporations trying to work that one out. It's really important to establish precedent cases that can be relied on by others in similar situations.

Those are the types of cases that do need to go before the Tribunal. And I think it's quite likely that we're going to see a few more cases in this category as we do enter another period of law reform here in New South Wales. New legislation commencing on the 1st of July. So when you need more than just an opinion, when you need a binding determination that can then be enforceable, the Tribunal is going to be the place to go.

Publication Date: 12 June 2025

YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

Second reason why you might be forced to head off to the Tribunal when time is running out. Legal deadlines do matter. Limitation periods are vital. Missed a deadline like that and your rights may vanish permanently. This is particularly relevant to building defects claims damages like I've just mentioned, where an owners corporation has failed to properly repair and maintain the common property, a lot owner in New South Wales has a limited time in which to bring their claim for damages, even unpaid levies or breaches of contract.

These all need to be pursued within a particular time frame. If you don't act within that limitation period, we call it, as lawyers, the Tribunal is not going to have the power to help you, even if your case is strong. A memorable example here, the case of Tezel and the owners of strata plan 16074. Not a case I was involved in, but quite a famous case now in our strata law circles.

In that case, the lot owner had waited too long, the window had closed to make her damages claim and the Tribunal couldn't make an award. This was an owner who had observed water ingress to her lot in 2013. Whenever there was heavy rain, the water was coming in. She stopped living in the lot. In 2016 she attempted to lease the unit but wasn't successful because it was in such poor condition and the place remained empty.

But it wasn't until 2020 that she commenced proceedings against her owners corporation in NCAT seeking orders for remediation and also compensation for loss of rent. Now at that time, there was a two-year limitation period on those types of claims seeking damages, loss of rent being a form of damages and Ms. Tezzel knew that. So she limited her claim to lost rent dating back to 2018, filed in 2020.

We know we can claim two years. I'll only claim back to 2018 even though I've been trying to lease this place since 2016. She didn't claim for losses incurred prior to that date, but the question was raised when does that two-year limitation period in the New South Wales legislation commence? Does it begin when the owner first becomes aware of her loss, which would have been back in 2016 when she first attempted to lease the unit and couldn't?

Or because the unit hasn't been fixed, does it reset with each day the failure to repair continues? Now ultimately the New South Wales Court of Appeal found that the limitation period commences when the owner first becomes aware of this particular type of loss. In Ms. Tezzel's case, that was in 2016 when she realised she couldn't lease her unit due to its condition. The court rejected the notion of a rolling or resetting limitation period that restarts itself with each day the owners corporation's failure to repair continues and therefore a 2020 claim for loss of rent was out of time.

Even if you do try to limit that claim to only the last two years, if you've been aware of your loss for four years, you've missed the boat. Hard pill to swallow. And important to note that from the 1st of July, this two-year limitation period in New South Wales is being extended out to six years. So a little bit more time there coming for our lot owners.

But this is precisely the type of situation you may find yourself in where you are forced to commence Tribunal proceedings. I've seen owners have to do that often on very short notice, receiving advice that their time is about to be up, quickly putting together an application form, getting that filed with the Tribunal to preserve their right to claim their losses. And of course, as soon as you are aware of a loss like lost rent or temporary accommodation costs or damage to your lot property because of a failure in the common property, as soon as possible you should be alerting the owners corporation to that and attempting to resolve that claim without recourse to the Tribunal.

It is only those circumstances where perhaps the owner wasn't aware that they could make this type of claim until they got legal advice or a situation where there have been in negotiations back and forth trying to convince their owners corporation of their legal right. Those are the cases that end up on the eve of the expiry of a limitation period and the filing must happen urgently. If you can try to avoid being in that situation by opening up those discussions as early as possible.

Publication Date: 12 June 2025

YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

Third reason why you may find yourself with no choice but to head to the Tribunal or commence litigation when there's a power imbalance that you just can't overcome. In strata, some of you may know power isn't always shared equally and sometimes it is abused. Let's take the Barnes case, for example. Barnes and the owners of strata plan 61934. An example of why sometimes going to the Tribunal is not just the best option, it is the only option.

This was a case where I acted for a group of lot owners at a holiday resort on the Murray River. They found themselves on the losing end of decisions made by a powerful group of owners at an AGM. That group had pushed through a \$1.7 million special levy to fund works that would only benefit their lots, the lots that they owned. They also started enforcing a by-law that allowed them to impose extra fees on certain owners.

These weren't routine decisions. They were self-serving, targeted and ultimately oppressive. Now imagine that you're one of those affected owners. You've tried to object at meetings, you've put your own motions forward, you campaign to other owners to try to make them understand what is going on. You've raised your concerns with the committee, with the strata manager. Nothing changes because the very people making the decisions are the ones who are benefiting from them.

That's a situation where the Tribunal needs to step in. And in the Barnes case, the Tribunal found that the \$1.7 million special levy was a misuse of power. It struck it down. It also found that the by-law unfairly targeted certain owners and declared it invalid. Now, the owners who brought this case didn't do it lightly, but it was clear that the internal processes within the owners corporation were not going to deliver justice.

The imbalance of power was just too great. The decisions that were being made were fundamentally unfair. So the Tribunal became the circuit breaker, that neutral legal authority that could say, this isn't right and it needs to stop. So if you're in a situation where decisions are being made that benefit the few at the expense of the many, and your attempts to negotiate or raise concerns have gone nowhere, then the Barnes case is your reminder that you can challenge that, you can seek a fair outcome.

But to do it, you will need to go to the Tribunal. And that's not being litigious, that is being strategic. It is standing up for equity and fairness in your strata community. If you haven't yet come across the Barnes case or heard me speak about it previously, there's a copy of it for you in the show notes for today's episode.

Reason number four why we're heading off to the Tribunal when there's been a total breakdown of effective governance. I've got another real-world example here to share with you. The case of Dunstan and the owners of strata plan 79749. This time we're not just talking about a committee or a group of owners misusing their power like in the Barnes case. The Dunstan case was a little different. Again, a case that I was involved in. Here the issue wasn't the abuse of power, the abuse of authority. It was the complete dysfunction of the owners corporation.

A total breakdown of governance. In this case, the strata scheme had been through the ringer. First, the property had some drainage issues. Then there were devastating bushfires that partially destroyed the complex. Rebuilding required some coordinated decision-making, plenty of cooperation, strong leadership from the owners corporation. But instead, what followed were years of bitter disputes between lot owners. There was infighting, lack of progress, lack of leadership, lack of strong management, and serious concerns about the way those who were making the decisions were operating.

Compulsory strata manager was appointed by the Tribunal on one occasion. It didn't help. The dysfunction continued. Disagreements persisted and that led to further application by two separate groups of lot owners. One, advocating for the continuation of the current compulsory manager who'd been in place for a little while. And, then the other group seeking the appointment of a new and different compulsory manager, alleging that the existing compulsory manager just wasn't up to the task and was actually making the situation worse.

Publication Date: 12 June 2025

YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

So the Tribunal had to look at whether the owners corporation was functioning satisfactorily. That's the test when it's considering whether or not to appoint a compulsory manager with all powers of the owners corporation, if it wasn't functioning satisfactorily, whether it was appropriate to appoint that manager, and if one was to be appointed or continued, which manager would be most suitable. Ultimately, the Tribunal found that no, this owners corporation was not functioning satisfactorily.

There were persistent disputes among owners, a lack of progress in the rebuild efforts, and most significantly, some pretty serious concerns over the current compulsory manager's handling of funds and communications. So the Tribunal decided compulsory appointment was necessary. It needed to continue, but appointed a different manager as the compulsory manager for a period of two years, granting them all functions of the owners corporation. Now, anytime the Tribunal steps in to appoint a compulsory manager to take over the functions of an owners corporation is because the owners just simply can't do it themselves.

So this is not about fighting any specific abuse of power. It is about restoring basic functionality to a community. So once again, we see the Tribunal acting as the circuit breaker, where a strata scheme has become paralyzed by conflict, incapable of fulfilling its legal obligations. The Tribunal is the only forum that can step in, dissolve deadlocks, appoint a neutral party, hopefully supposedly should be neutral party to steer the ship forward.

Another example of a situation where the Tribunal is likely to be the only way to get things moving again. And finally, reason number five, why we might find ourselves in the Tribunal. Well, all other options may have failed. As I said clearly in our last episode, litigation should always be a last resort. No one wants to spend time, money, energy on Tribunal proceedings if there is another way to fix the problem.

But here's the truth. Sometimes, despite your best efforts, everything else fails. You've had the informal conversations, you've knocked on the door. You've had the coffee chats, you've written the emails, you've sent the letters. You've tried mediation. Maybe you've attended meetings, put forward motions, raised your concerns respectfully, tried to get on the committee. But still, nothing has changed. You are stuck. The same issues, whatever they may be, keep recurring, or they get worse.

Now, at that point, the Tribunal becomes more than just a legal process. It is your safety net. It is the formal body that exists specifically for this purpose, to resolve disputes when there is no other path forward. I have worked with owners who have come to me exhausted. They're not litigious by nature. They want to try and preserve friendships. They want to keep a sense of community. They are very risk-averse.

They're not looking for a fight. They've tried to be reasonable. But when they've laid out the facts to me, when they've laid out the history, when they've set out what they've been putting up with and what they've tried, I've said to them, "I have no idea why you haven't yet commenced Tribunal proceedings. It's time. You really have no choice. You've been incredibly patient. But I can see you've tried every angle. It's time to take that next step. As anxiety-inducing as that might be, the only way forward is a legally binding decision."

And, in those cases, the Tribunal brings clarity, brings structure, and ultimately some closure. It can put an end to circular conversations, useless solutions, and finally start moving things toward a real solution. So if you're listening today and you're nodding along, if you tried everything else and it's led nowhere, this might be the point where you say, "Yes, that's me, it's time I hear you, Amanda." And if it is you, then I'm here to support you.

I'll remind you in just a moment of a really easy way to start getting that support. But first, let's wrap up. Let's recap the five situations where going to the Tribunal is not just justified, it is essential. Number one, you need a clear, binding decision. Number two, time is running out and you risk losing your rights. Number three, there is a serious power imbalance that you can't overcome. Number four, there's been a total breakdown of effective governance. And number five, you've just tried everything else and nothing has worked.

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YSP Podcast Transcript: 454 - When the Tribunal is the Only Way Forward

This truly is your last resort. So the Tribunal is not a cure-all, but in the right cases, it can be very powerful. I've referred to it as a circuit breaker, a vital pathway to fairness and accountability in your building. And if you're grappling with any of these situations, if you're trying to figure out what your next move should be, the place to go to get more support is to register for my upcoming live online training, the Strategic Strata Litigator, how to navigate NCAT end to end without expensive legal fees.

Even if you've lost faith in the system, I'm going to be walking you through the Tribunal process on Thursday, 19th of June, kicking off at midday Sydney time. Reserve your spot now at yourstrataproperty.com.au/webinar. I'd love to see you there and help you to take that next step the smart way. Thanks for joining me today. Enjoy your week in strata and I look forward to catching you next time.

Bye for now.

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