

Publication Date: 30 June 2020
**YSP Podcast Transcript: Episode 220. The immense power held by strata owners –
with Cathy Sherry**

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Amanda Farmer: Hello and welcome to this week's episode of the podcast. I am Amanda Farmer, strata lawyer and your podcast host.

It is great to be here with you once again this week. Some of us are easing into or about to ease into some school holidays. That's definitely what I am preparing for by the time I'm recording this. Looking forward to enjoying a couple of weeks down time, taking some time off. Enjoying those parts of our city that we weren't able to enjoy the last school holidays. Restriction easing around our country at the moment which is really great news. And I hope that some of you too, perhaps, with young families will be enjoying your family time together.

This week on the podcast I am reacquainting you with a past episode, quite a past episode, actually. Way way back in episode number 29. I interviewed one of my most favourite people in strata, Cathy Sherry. Many of you I know have come across, will know Cathy, have had the privilege of hearing her speak on All Things Strata Law.

I first spoke to Cathy for the podcast in this episode number 29 back in September 2016. Wow! years ago now. That was my first year of podcasting.

And I have decided to bring this episode back to you today because even though almost 4 years has past, the issues that Cathy covers for us in this chat are still so very relevant. We are talking about the incredibly unusual and very significant power that our strata law gives to private citizens when it comes to regulating the activities of other private citizens.

Very rare the people who sit outside of our government should have the kind of powers that we see strata owners holding, strata committee members and Cathy has devoted much of her career to exploring this power in the context of property law.

You'll hear Cathy in the episode mention her book which was just a few months away from publication at the time we were chatting but since then has been cited by the Privy Council in a case called O'Connor and I will put the link to that case in the show notes so you can go and check it out.

A very interesting case about by-laws regulating short term letting in a community in the Turks and Caicos Islands, a Caribbean jurisdiction, that actually copied our New South Wales strata legislation. So, feel free to take a trip down that rabbit hole if you like.

Cathy's book is called "Strata Title Property Rights: Private Governance of Multi-owned Properties". I'll pop a link to that in the notes as well.

If you haven't come across Cathy before she is a leading Australian expert on strata and community title providing advice to government as well as the private sector on the complexities of the collectively owned property.

Her research focuses on the social implications of private communities as well as optimum planning for children and Cathy has a special interest in urban farming ending challenges of providing growing space in high density cities.

We heard from Cathy at our annual conference for the Australian College of Strata Lawyers earlier this year in 2020 when she was talking about the importance of green spaces in our urban areas.

Now when I was chatting to Cathy back in 2016, it was just about a month before our Strata Schemes Management Act of 2015, our New South Wales legislation, was due to commence.

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Amanda Farmer: So you will hear Cathy and I talk a little about that and the changes that we were expecting with the introduction of a section in our legislation restricting a little more the power to make by-laws and Cathy makes a few predictions about that that have turned out to be quite accurate unsurprisingly. And I do believe this discussion is so relevant right now when many of you are reaching out to me wanting to understand the impact of and the reasons for the recent pet decisions, the pet cases that have come out of New South Wales from our NCAT appeal panel.

Cathy definitely talks about pets in this episode and I do believe you're going to get an excellent insight into just how broad our by-law making power is particularly in New South Wales.

So, sit back and relax. Enjoy revisiting my chat with Cathy Sherry.

Welcome, Cathy.

Cathy Sherry: Thank you very much, Amanda.

Amanda Farmer: Now Cathy, I am very much looking forward to your book – as I know many of us in the sector are – and I know from chatting with you that a lot of the book focuses on strata by-laws, and I want to ask you today: why are strata by-laws such a hot topic for you as a researcher and an academic in this area?

Cathy Sherry: Well, strata by-laws for me are a hot topic because they're essentially a form of private legislation and they can be very, very intrusive into people's lives, they often aren't because people use them wisely, but the way our legislation is drafted they have the potential to be so.

So I first became interested in strata when I was working in a law firm in Newcastle and they were doing a lot of redevelopment around Newcastle Harbour – I'd taught property law for many years but never really had much to do with strata – and I was reading the by-laws for large developments and was rather perplexed by the idea that they could tell people what colour their blinds could be and how fat their pet could be! I remember saying to the partner "this is extraordinary, how can they tell you how fat your pet can be!?" to which she'd say "Cathy, could you just go and do the contracts and stop wringing your hands over the by-laws?"

So when I went back to academia I thought "well this seems like a really interesting area" and I'd always had a kind of fascination with master plan communities as well so I started to look at it, and essentially it's by-laws that I find most potentially troubling about strata because it is a mechanism by which the government has given private citizens the power to write laws for their neighbours, and that power can be used very well and it potentially can be used very badly. The simple fact is that private citizens, like government, can't always be trusted to do the right thing by other people. Not necessarily because people are being abusive but because it is very easy for people to convince themselves that exactly what is right for them is the right option for everyone, and we know that often isn't the case, and it seems to me that from my research I don't think any governments in Australia – with the possible exception of the Victorian government that created their 2006 Act, I don't think any state legislature in Australia actually understands the power that they have given to people via by-laws.

Amanda Farmer: Just for my own interest, indulge me, what is it about the Victorian 2006 Act that you think they did well when it comes to by-laws?

Cathy Sherry: The Victorian 2006 Act stands out as the only Act in Australia that makes a very clear distinction between the power to write by-laws for private lots and the power to write by-laws for common property, and that should be blindingly obvious: that you don't give people the same power to write laws for collectively-shared property as you do for private lot property. The only rationale for being able to regulate someone's private home is if what they're doing inside their home is disturbing other people.

Amanda Farmer: Yes.

Cathy Sherry: And yet that is completely absent from strata acts.

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Cathy Sherry: So for example in New South Wales we've always had a by-law making power that allows people to make by-laws with respect to the use or enjoyment of a lot or common property, and the example that I always give to people is a by-law banning people eating meat in their own apartment is irrefutably a valid by-law.

Amanda Farmer: Yes.

Cathy Sherry: Because it is a by-law that relates to the use or enjoyment of a lot or common property, and incidentally in India it's not actually uncommon to write by-laws banning people eating meat because it's a way of prescribing buildings to Hindu-only residents, but in the New South Wales Act we have a new provision that says by-laws can't be harsh, unconscionable or unjust, so that's an improvement, I think it doesn't go far enough because it's a very high bar, but we really haven't got our head around what I would say is an absolutely fundamental principle in all liberal democracies, and that is the concept of negative liberty, that if we're not actually harming other people, then we shouldn't be regulated by law.

It's the basis of all of our legislation. Ordinary legislation works on that basis, the government is not entitled to regulate what we do in the privacy of our own home if we're not hurting anyone else or disturbing anyone else, and there's absolutely no reason for a strata scheme to be any different. If anything, the restrictions on private citizens making law should be greater than the restrictions on government because there's all sorts of public law that guides the way which government makes legislation. In strata schemes, quite obviously, individual owners are entitled to act in their own interest – that's legitimate.

There's no requirement that you act in other people's interest when you vote as a member of an owners corporation so, strictly speaking, we should have much stricter controls on a body corporate's power to write by-laws but, with the exception of Victoria, all state Acts basically just give blanket powers to write by-laws in relation to private homes and also common property.

Amanda Farmer: And where are the courts in all of this, at least in New South Wales? Are they running with this? Are they interpreting the law this broadly?

Cathy Sherry: In New South Wales they are. So Balcombe, the recent Victorian decision on the Watergate apartment, is the only superior court decision where an Australian state court has really attempted to limit a body corporate's by-law making power.

So Balcombe really stands out as really been quite different, where Justice Riordan said that we really have to look at parliamentary intention, and it cannot be the case that parliament intended to empower owners corporations to have this much power over private lots. With all due respect to Justice Riordan, I think that it's entirely possible that parliament did intend that because developers drive a lot of strata legislation and developers want flexibility when it comes to development, and that means broad by-law making powers.

I think the Victorian parliament that enacted their new Act did intend to restrict owners corporation's powers because in Victoria they only have very limited powers in relation to private lots and they only have powers in relation to a list of matters in Schedule One, as opposed to all other state Acts that say it's just a very broad power that has to relate to a lot or common property, that's no limit at all really, like I said: a by-law banning someone eating meat is a by-law that relates to a lot.

The problem is that Australian judges, with the exception of Justice Riordan, Australian courts have taken a very hands off approach. New South Wales is a classic example, where courts have repeatedly said there's nothing in the nature of a by-law that of itself limits the content of a by-law, and the real problem – and this is the argument in my book – is that courts have failed to recognise that by-laws are simply restrictive and positive covenants on free-hold land, they're actually property law.

Cathy Sherry: So the reason why we need strata legislation is because we can only have restrictive covenants on free-hold land. An obligation to pay for maintenance is a positive covenant: so if you're going to build a high rise building and sell people free-hold fee simple you have to somehow get around that prohibition on imposing positive obligations to pay money on free-hold titles, and that's what the legislation does in levies.

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Cathy Sherry: So that's why we needed the legislation, but courts have really not made that connection between by-laws and restrictive covenants. They are simply an obligation or a restriction that's imposed on a freehold title. Courts have adjudicated on those for centuries so easements and covenants – although the law is pretty obscure and most people wish they'd never been subjected to it at law school – what courts are doing when they adjudicate on easements and covenants, so the 4 criteria for a valid easement in *Re Ellenborough Park* – and I apologise to those listeners who are not lawyers, this may be completely incomprehensible...

Amanda Farmer: No, I'm sure they are very engaged.

Cathy Sherry: Courts don't let you create any easement you want. There are only certain kinds of things that can be a valid easement. So if I agreed with you that you will be able to grow veggies in my back garden in good rainfall years and you could hold corporate parties in bad rainfall years: we can agree that between ourselves as a matter of contract law, that's fine, that's valid.

We can't actually turn that into a property right that's going to bind people who might own our land in the future because it's not reasonable, it's not a valid lease, it's not a valid easement, it's not a valid restrictive covenant. But the reason why law does that is because what works between you and me, may not work for people in the future. But if we manage to turn it into a binding right in relation to property, people in the future are going to be stuck with it and so that potentially makes freehold land very uneconomic and it reduces the social utility of land. Because it's not just that you and I can do it, it's that everyone in the community can make those agreements, and there's no limit to the number of agreements that could affect freehold land.

Courts disallow those kinds of things, which means that when we come to buy freehold title, we buy a house in the suburbs, we don't really need to worry about what kind of agreements people who owned it in the past might have made, none of them are going to affect us, with the small exception of restrictive covenants, but they're fairly limited and they're limited because courts have intentionally limited them. Strata by-laws just blow away those limits.

Because by-laws can be positive as well as restrictive, and because courts have just taken a completely hands-off approach to them: if people voluntarily agree to them, they're valid. But we know that people voluntarily agree things that harm other people and even if well-intentioned originally, can turn out to be inefficient and problematic, and although there are voting mechanisms to get rid of them in strata schemes, as probably most people in strata land know, sometimes it is much easier to create a by-law than to get rid of one.

Amanda Farmer: Yes, indeed.

Cathy Sherry: So, getting people to agree to get rid of a by-law that they already had can sometimes be much harder than to create one in the first place.

Amanda Farmer: With all of that in mind Cathy, what do you suggest communities should be doing when they're making by-laws?

How do they adopt a good set of by-laws or rules?

Cathy Sherry: I think the most important thing is to use a kind of measure of reasonableness, and honestly I think that most communities are already doing that. So the astounding thing in Australia... I'll give you an example that's maybe more realistic than the meat eating example: smoking.

Amanda Farmer: Yes.

Cathy Sherry: It has always been irrefutably possible for owners corporations to ban smoking inside people's lots, anywhere inside someone's home, irrespective of whether there is any smoke drift. I can't make this clear enough: it is beyond the shadow of a doubt that you can ban people smoking in their own home and you don't have to prove that smoke is affecting other people.

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Amanda Farmer: Yes, I agree.

Cathy Sherry: It's a valid by-law. However, most communities actually hesitate to do that, even when there's smoke drift and they really would have good reason for banning smoking, and the reason why they do that is because, instinctively, irrespective of how badly the strata Acts are drafted in this regard, instinctively, people know "you know, it is kind of reasonable to be regulating what people do in their own home, that's intrusive and maybe we shouldn't be doing that."

So I think, instinctively, most schemes actually adopt pretty good by-laws. They have an innate sense of what property law should be and they actually act in accordance with that. So I think most communities are actually relatively reluctant to enact too many bylaws, particularly by-laws that are very intrusive into people's private lives.

Overall in Australia most buildings are doing really well. The simple fact is that we have way less litigation in relation to strata than statistically should be the case.

Amanda Farmer: Yes.

Cathy Sherry: When you look at the tribunals, the vast work of tribunals is actually in relation to residential tenancies so, when you look at the number of disputes in tribunals relative to the number of strata schemes, it's actually relatively low. So I think most buildings are doing pretty well. The one thing that I personally think we've made a mistake in relation to is pets, that is and in accordance with what I was saying before about negative liberty, I don't think anyone should be able to ban their neighbour in keeping a pet unless it's actually affecting people in some meaningful way, and I think some pet by-laws actually create problems.

Amanda Farmer: Yes.

Cathy Sherry: If I give an example – a lot of them are just irrational – so banning pets based on weight is just ludicrous and it's going to cause dispute.

Amanda Farmer: Yes, I see that a lot.

Cathy Sherry: Because anyone with a modicum... look, I don't own a dog and I'm not interested in owning a dog, so none of these arguments are based on because I'm a dog person and I love dogs and I don't think everyone should have a dog, it's got nothing to do with that.

Cathy Sherry: You only have to have a modicum of familiarity with dogs to know that a Labrador is likely to bark a lot less than a Fox Terrier.

So if you write by-laws based on pet weight, you're basically saying people can keep small, yappy dogs but they can't keep large, quiet dogs. The question of whether someone should keep a large dog in their apartment is none of the neighbour's business.

Amanda Farmer: Yes.

Cathy Sherry: So one of the things that I think people get very confused about – they get everything kind of a bit mixed up and they get agitated about stuff that really is none of their business – the question of whether your neighbours are keeping a dog cruelly or in inappropriate circumstances is a question for the RSPCA.

So I live in high density, but I don't live in strata. My neighbours have dogs; they keep their dogs in relatively small courtyards, it's none of my business that they do so. It's not my job to police how my neighbours keep their animals, unless how they're keeping an animal is bordering on cruelty that I should report to the RSPCA or the police.

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Cathy Sherry: Strata schemes are exactly the same. It's none of your business if a neighbour keeps a Labrador in their apartment and you shouldn't be worrying about it. It seems to me that the only basis on which people should be banning pets is if a particular pet is actually causing a problem. So, if a pet is barking then up-and-out.

I don't have any hesitation in saying that the tribunal should be making orders for dogs to be removed if they're barking and they are disturbing people. But if a dog isn't barking and if all you have to do is to occasionally share a lift with a dog well, that's what co-owning common property means.

It's not going to kill you, you have to walk past dogs on the footpath, you've got to get a lift with a dog: deal with it.

And the irony with strata by-laws, and I give this example, is when it comes to cats. Strata schemes can ban cats that never leave somebody's apartment and has no effect on anyone else. But there's not a thing that they can do about every feline in the neighbourhood, lounging around the external common property, sunning themselves in the garden, doing other less picturesque things that cats do because, under the Companion Animals Act, you are required to just tolerate that. It's a pretty high bar before you can start complaining about someone else's cat. You have to tolerate cats walking across your garden; you have to tolerate cats using your garden although it's not the owner of the cat's garden, you simply can't complain because that's part of living in a community.

You don't have to tolerate dogs barking at 3AM or dogs coming into your yard, but there are certain things that when you live in a community you are required to tolerate. So I think it's absolutely ironic that a strata scheme can ban someone keeping a cat that never leaves their apartment but they can have cats all over their garden and there's nothing they can do about it.

Amanda Farmer: And is that because... what's in the Companion Animals Act that permits that to happen with cats and not dogs?

Cathy Sherry: There's a definition of nuisance cats and nuisance dogs. So dogs are only a nuisance if they habitually defecate or habitually jump up on people, so it's a high bar.

Habitually jumping up on someone makes a dog a nuisance dog, but if you have to walk past it on a footpath or it jumps up on you once in a park, it doesn't make a dog a nuisance dog. If cats are in your yard they're not a nuisance cat. If they were continually yowling at night or coming into your house, I mean you can certainly exclude a cat from your house, but the bar is relatively high. Off the top of my head it's Section 31 of the Companion Animals Act in New South Wales, but most states say the same thing and the basis of the legislation is simply negative liberty that is, if you're not harming someone else in any meaningful way, then you cannot be regulated and, if we live in a community, we just have to tolerate that people affect us, and I think that one of the risks in strata schemes is that because we have given people the capacity to regulate others, they then start to worry about stuff that if they didn't live in a strata property they just wouldn't worry about.

Amanda Farmer: So true.

Cathy Sherry: As I said, I live in high density; I can hear my neighbour's kids; I can hear their pets; I can hear people on the street; I can hear kids bouncing balls. I just don't worry about it because I don't have any power to regulate it. I just accept that's part of living in a very high density area of Sydney.

Amanda Farmer: Yes. It's fascinating and you do see – at least from my perspective as a lawyer dealing with all different types of communities' in different situations – how differently they operate and how differently they apply those powers and, as you said, some do so quite reasonably and flexibly and others seem to take to their positions wholeheartedly and attempt to regulate wherever and whenever they can, which can lead to some sticky situations.

Cathy Sherry: Regulation can actually cause more disputes, and I'm not denying that strata schemes need by-laws: if you live in high density, it makes sense to have strata by-laws, no problem with that.

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Amanda Farmer: Yes.

Cathy Sherry: But by-laws should be used sensibly and with a certain level of reservation and an acceptance that people will do things that affect you and you should be very, very cautious about regulating somebody else's private home.

Amanda Farmer: Indeed. Well, I can't wait to get stuck into your book, Cathy when that comes out. It's always fascinating talking to you and we traverse all areas of strata law, and I'm sure our listeners are enjoying that treat as well.

Now, talking about books, what books have had the greatest impact on you and why?

Cathy Sherry: Without a doubt, Evan McKenzie's book Privatopia.

Amanda Farmer: Yes.

Cathy Sherry: So Evan is a professor of political science at the University of Chicago at Illinois and he is also a lawyer, and he wrote a really influential book called Privatopia back in the 1990s and he's also written more recently a book called Beyond Privatopia.

And the reason why it's so interesting is because we copied a lot of our developments from Americans.

So there's a misunderstanding that Australia invented strata, we didn't. Germany had a strata Act at least 10 years before us. The American Condominium legislation came into force around the same time as ours, but America has actually had private community.

So, what we would call community title in New South Wales, what's been called cluster title law or just body corporate communities in Queensland for example... your flattened-out master plan community which might have apartments in it as well, it's exactly the same legal structure as an apartment building, that is that you have individually owned lots and you have collectively owned common property, and you have a governing body made up of owners.

In community title, it could be the parks, the roads, the sewerage, the infrastructure – so they're the kind of communities I'm talking about. America's had those communities since the 19th century because of difference in their property law, positive covenants can run with freehold land so they have been able to impose obligations on freehold owners to pay for maintenance which meant it was worthwhile for developers to provide private facilities. So the kind of private communities that have a club house, a pool, private roads and surfaces, and a governing body: they've existed in America since the 19th century, so America has had over a century of experience with these communities, of regulating them.

America of course is kind of fascinating in a way that Australia isn't, that desire to secede from the rest of society... I mean it goes back to the Pilgrim Fathers, I mean when they left England it was to create their own community free of the oppressive powers of England to live in accordance with their own religious laws.

So America has always had this very strong tradition of private communities wanting to break away from main stream society, so it's fascinating. But Evan's book looks at the rise of private communities, and in particular the way in which they were not driven by the desire of people to necessarily live in private communities, but driven by developers who wanted rising land prices, developers wanting to still make as much money can't afford to provide people with as large private lots as they could in the past, so how do we provide people with those kinds of suburban facilities with smaller blocks of land? We'll do it through a homeowner's association, so we'll give people smaller individual titles and we will have collectively owned common property.

Governments loved it and we're seeing this in Australia, particularly in Queensland and northern New South Wales, because it allows government to pass of infrastructure costs, not just initial costs, but costs in perpetuity onto private citizens.

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Cathy Sherry: So local governments don't have to pay for sewerage, don't have to pay for roads, and don't have to pay for other facilities, because it's being provided by the developer and it's going to be owned by the private community, by the body corporate, and they will be paying for it forever. So there are a lot of pressures for governments to prefer these communities, but what Evan's books are about is that no one anticipated what it really meant to expect private citizens to run these communities and to give private citizens those powers over their neighbours.

So it's sometimes referred to it as the fourth government in Australia after Federal, State, and Local government: these are form of mini government and America has been grappling with this for years. So what does it mean for private citizens basically to be operating as governors and when you're talking about a 6-lot strata scheme, we never really needed to worry about it. But we're now seeing private communities that have 3,000 residents.

Amanda Farmer: Yes.

Cathy Sherry: So, Jackson's Landing down in Pyrmont has 22 strata schemes and 3,000 residents.

Amanda Farmer: Yes.

Cathy Sherry: There are master plan communities all over the Gold Coast in Melbourne that have hundreds of thousands of people. So when you give private citizens the power to run those communities, it's essentially the power of a small local government, and that's an enormous expectation of private citizens, we're relying on volunteers.

Amanda Farmer: Yes.

Cathy Sherry: Some of who are fantastic, some of whom may not be up to the task running a high rise, that's why we end up having to rely on strata managers and building managers, because running a large high-rise building is like running a small or medium sized business, to be honest.

Amanda Farmer: And as you say, these people are volunteers and they're also people completely lacking in experience and possibly education in this sector.

Cathy Sherry: Yes, absolutely! Evan's argument is basically the government is asking people to do the government's job for us.

Amanda Farmer: Yes.

Cathy Sherry: So off-loading things on private citizens which they probably shouldn't be asked to do and I think that's certainly true in master plan communities where you've got privatised parks and roads, and in a lot of master plan communities very unfairly the private communities are paying entirely for that land.

Amanda Farmer: Oh, yes.

Cathy Sherry: They're paying insurance... that isn't right. So we need to think really critically about that, particularly with master plan communities because they are optional. Strata title is not optional in high-rise buildings, we have to have it and it's a very good thing. Master planned estates are optional, they could be done as ordinary residential subdivisions with public parks and no governing body at all.

Amanda Farmer: Yes.

Cathy Sherry: We need to think very critically about whether we keep rolling them out.

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Amanda Farmer: Fascinating. Well, I will make sure that the details of Evan's book are in the show notes under this episode on the website so that our listeners can get stuck into that if they like to.

Now Cathy, before we wrap up, is there anything else that you want to add and how do our listeners find out more about you?

Cathy Sherry: The other thing I would quickly add is the other book that is fabulous is a book called High Life by Matthew Lasner, which if you have more interest in apartments then that's a fascinating book so I can give you the details of that one as well.

Amanda Farmer: Great.

Cathy Sherry: You can find out about me on the UNSW Law website. I have a webpage; it's got the details of my publications there.

Amanda Farmer: I'll put that in the show notes as well.

Cathy Sherry: Yes, so people can find out and UNSW is a site with a lot of strata research so in the law faculty and also in the faculty of built environment, it's something that academics are very interested in.

Amanda Farmer: Yes. Fabulous! Thank you so much for giving us your time today, Cathy. I think that's been a fabulous chat that I know I've got a lot of, and I'm sure many of our listeners will too and we'd love to have you back some time, as I said, I'm looking forward to that book and I think everybody should keep their eye out for it. I might do a bit of promo in the website for you when it comes out so that everyone knows where they can get it.

Cathy Sherry: Thank you, that will be great.

Amanda Farmer: Wonderful. Thanks, Cathy.

Cathy Sherry: Thank you, Amanda.

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 by the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comment section which Amanda will answer in her upcoming episodes. How can Amanda help you today?