

Publication Date: 14 July 2021

YSP Podcast Transcript: Episode 271. Avoid this mask-wearing mistake

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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, strata lawyer, and your podcast host. I'm recording this episode at a time when residents in the greater Sydney area and surrounds are in lockdown, as our state government attempts to control the latest COVID outbreak. This is certainly not the first lockdown our country has experienced, and I'm very conscious that we have many Victorian listeners to the podcast who have recently been released from a long lockdown period. But as a New South Wales resident and a New South Wales strata lawyer, the Sydney situation is particularly close to home for me. And I have been hearing within the last week from many clients, colleagues, friends about their on the ground experiences in and with our strata buildings.

Just today, New South Wales media has reported that of the latest COVID cases, 8 were from 5 separate apartments in a 29 unit apartment block in Sydney's Eastern suburbs. This news comes just days after the New South Wales public health order was amended to make the wearing of masks mandatory for people who are on strata common property. That also includes community association property, and company title common property. I will put a link to the most recent version of the public health order in the show notes to this episode so that you can check it out. This amendment took effect on Tuesday, the 13th of July. By the time you are listening to this, it will be in force.

This mandatory mask-wearing requirement is limited to people who are on indoor common property in residential buildings. This is not a step that has been taken in New South Wales previously, even though we have had other lockdowns. But it is something that owner advocacy groups like the Owner's Corporation Network have been calling for some time. It's something that I personally do support. The attitude of the government to date has been that our strata communities I'm perfectly capable of looking after themselves, making their own decisions to best protect their residents, their staff, and visitors during the pandemic. And I have to say, we have all done marvellously well so far. Albeit, often in a state of uncertainty and confusion about precisely what the law is and whether it applies to us.

But these new highly transmissible, as we're hearing, variants of the virus have spurred our New South Wales government into action, and we have seen this very unusual, if I may use the word unprecedented intervention into our residential spaces, our private spaces, as I define them. So we have mandatory mask-wearing on indoor common property in the greater Sydney area.

What happens if people don't comply if they don't wear a mask when they're on indoor common property? Well, those people will be in breach of the public health order and they are liable to penalty. That penalty notice is issued by the police. It is not issued by the owners corporation, the building manager, the strata manager, or the strata committee.

Already the question is being asked. Can we refuse entry to people who are not wearing a mask? Now just this past weekend, I saw an email from a strata management company, clearly sent to all of their clients, encouraging them to put up the New South Wales health poster in their building's common areas. The particular poster was one that I'm sure many of us have now seen outside supermarkets, office buildings, pharmacies. It's the poster that says, "Wear a mask. It's a condition of entry." Now, part of the reason I'm recording this podcast right now is to share with as many people as possible my very firm view that this amended public health order mandating masks on common property does not allow building managers, strata managers, committees members, or anyone for that matter, to prevent a person from entering their home if they're not wearing a mask. This amended public health order does not make mask wearing a condition of entry to residential strata buildings.

Building managers are no more entitled to turn someone away from their home if they're not wearing a mask than they are to chase a non-mask wearing person out of their local Coles. They have no such entitlement. That action is a matter for the police. Or in the case of a business, the premises owner. Businesses are different to owners corporations. Businesses can make mask wearing a condition of entry. That's why we see those signs. Businesses are private enterprises. They make their own rules about their own premises. But owners corporations are different beasts.

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Every owner has a share in the common property and should therefore have a say in how it's managed, and that includes whether or not mask-wearing should be made a condition of entry. That is quite a different concept to making mask-wearing mandatory on the common property.

In my view, if a community did want to make mask-wearing a condition of entry and enforce that condition, even with this amended public health order, I think they'd need to create a by-law. The validity of such a by-law would be open to challenge a New South Wales on the grounds it is harsh, unconscionable, or oppressive. That's in Section 139 of our Strata schemes management Act. A community defending such a challenge to their new by-law may seek to rely on the amended public health order as justifying their position. But I think they'd have trouble with that argument because the public health order doesn't actually say that mask-wearing is a condition of entry. And as broad as our by-law making power is, I don't believe that it stretches as far as denying people entry into their own homes.

Now, if you are going to put up posters in your common areas in New South Wales buildings, and I recommend that you do, the correct posters to use are linked in the show notes to this episode. You can access those over at yourstrataproperty.com.au/podcasts, and you'll see at the top of the list there, this podcast episode number 271. I've also included a link there to posters in languages other than English, which I know will be useful to many building managers and strata managers who are listening. There is also a link to a poster for buildings in regional and rural New South Wales, where mask-wearing on common property is not mandatory, but it is recommended. And that's what those posters say.

Now, if we accept that it is probably not a good idea to make mask wearing a condition of entry to a residential strata scheme, and if we accept that by-law that does attempt to impose such a rule may be open to successful challenge, the question arises, can we make a by-law that makes mask-wearing mandatory on common property? A by-law in terms that are exactly the same as the public health order, so that if someone is not complying with the public health order, is not wearing a mask on the common property, we can actually do something about that as an owners corporation, rather than wait or hope for police intervention.

Now, my view is that such a by-law would be fine as long as it is reflective of the New South Wales law. And that means that you probably want your by-law to expressly refer to the New South Wales law. I do bear in mind that the nature and process of by-law making is drawn out. It can be complicated. We need to convene a general meeting. We need to give adequate notice. There needs to be a special resolution. The by-law must be registered. Not to mention the prior time spent drafting the by-law, getting the terms right. It is going to take you some time to get that by-law in place. So if you are thinking about going down that path, do make sure your by-law is drafted broadly enough that it can carry your community through various iterations of the public health orders.

These are changing almost daily at the moment, and you can be assured that they all look quite different in a few weeks time to what they look like today. Now I've mentioned enforcing your by-law. If a resident is in breach of your new mandatory mask-wearing by-law, you do need to follow the usual enforcement procedures available to you under our legislation. In New South Wales, that means issuing a notice to comply with a by-law and then making an application to the tribunal for a penalty order. Please don't draft terms into your by-laws that allow you to issue fines or penalties direct to non-complying residents. Those terms are not enforceable, and certainly don't refuse people entry into their own homes.

Now, I'll be talking about this further this Friday on my regular Friday Live segment over on the Facebook page. 4:00 PM Australian Eastern Standard Time, that's where I'll be answering the many questions that are coming in this week about the amended public health order, its enforcement, the practicalities involved in all of this, and no doubt this concept of restricting entry that I'm talking about here today.

If you're not already following us on Facebook, you want to head over to Facebook now on your phone or your desktop, type, "[Your Strata Property](https://www.facebook.com/yourstrataproperty)," into the search bar and choose to like or follow the page so that you'll know whenever I have a live broadcast scheduled. The next one is up this Friday, the 16th of July, and I'd love to have you there with me live. 4:00 PM. Until then, stay safe wherever you are. Stay socially distanced, but emotionally supported and supportive, put up the right posters, and please apply common sense. I'll catch you next time.



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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 comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?