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YSP Podcast Transcript: Episode 280. Is it time to reopen the pool? | Retrieving refundable bottles from the bins

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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. Hey, Reena.

Reena Van Aalst: Hi, Amanda. How are you?

Amanda Farmer: I am great. I am looking forward to debating our challenges this week and sharing our wins. I always look forward to our chats, Reena.

Reena Van Aalst: Yes, me too Amanda. With COVID there's been quite a few challenges, so I'm happy that we're actually catching up this week.

Amanda Farmer: Yes, and I am looking at our spreadsheet we have here. We do dump, I'll say, dump our challenges and our wins in this joint spreadsheet that you and I share and refer to when we're recording our podcast together. And I see that your challenge for this week does relate to the dreaded virus. Jump in, what's going on?

Reena Van Aalst: Well, the new challenge I have, Amanda, is New South Wales as many of our listeners probably would know that next week there's some new freedoms and one of them is the reopening of public pools. This has now brought about a number of our buildings that do have pools to come along and say, well, we want to reopen our pools, and you can only be allowed to use the pool if you've been fully vaccinated. And the question was posed to me in terms of how does this strata committee or the owners corporation enforce that measure, which is easily undertaken in a public pool where you obviously would have to show your vaccination passport or evidence of being fully vaccinated.

But in an owners corporation where the pool may or may not be in a section where it can be cordoned off in terms of having fob access or whatever. Who's going to be standing there asking people for their vaccination status and how do we enforce it. And so I thought to myself, this is a really challenging proposition because you have to have the resources to be able to do it in the first instance, in terms of having either a concierge or a building manager or security or whoever **personnel available**.

And secondly, on what authority do we have to ask them this question? So one of my schemes sought the advice of the lawyer that acts for them. And he said that it would be very difficult to actually enforce that because you can't say in one area of common property, such as the lifts or any other part, that you can still use it as long as you wear a mask, which has been mandated by the government. Whereas in another part of common property, you have to be fully vaccinated. So that's the advice that we've received, Amanda, and I'm not really sure what your thoughts are on that particular piece of advice.

Amanda Farmer: Okay, let's start here. There has never been a health order in New South Wales to close residential apartment pools or gyms or recreational facilities. The health order in New South Wales has been that recreational facilities that are open to members of the public must be closed. Now, myself and other strata lawyers have said that this does not extend to residential strata communities because those pools, those gyms are not open to members of the public. They're open to residents and their guests. A member of the public can no more use a strata swimming pool than a member of the public can use a swimming pool in somebody's backyard. You either live there and you use it, or you're invited as a guest to use it. So, frustratingly from my point of view, and I know for many of my clients in your buildings as well, Reena, our apartment communities have been left to make their own decisions about closing their pools and gyms and deciding what's best for their communities.

And many have sensibly made that decision to close the gym and the pool in the height of the pandemic to reduce the risk of transmission of the virus. And so here we are, as we embark upon our roadmap to freedom and gradually getting more freedoms and our government is now within the last week telling us that public pools, and I believe it's outdoor public pools will once again be

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open. And that at the time we're recording this Reena, that's due to start the 27th of September. Now, Reena, I know both of you and I have gone looking for some government guidance on exactly what the reopening of public pools means and on what basis they are permitted to reopen and strangely there doesn't seem to be any information on the New South Wales Health website about this particular new freedom starting in just a few days, but there are plenty of news articles.

And what we've read in the news is that public outdoor pools will be allowed to reopen as long as they have a COVID safe plan in place, from what I can see, and I know this might be contrary to information that was circulating a few days ago. There is not going to be a requirement to show full vaccination status, to be able to use the public outdoor pool. Now that could change within the next few days, we might see this come up in amended public health orders, but I'd be saying to apartment buildings that are reopening their pools, to keep a very close eye on what the government regulation is in relation to public outdoor pools and to have rules that reflect what the government is doing in relation to those spaces.

So for example, I've said a few times now it's outdoor pools only, now buildings that have indoor pools, I think should be very cautious about making this decision to reopen. Certainly, public indoor pools are not reopening as far as we know at this point in time. And I have yet to see any legal requirement that people using these spaces be double dosed, as we say, so imposing a requirement that your residents or their guests be double dosed may not be consistent with what's happening in our public or commercial spaces.

Reena Van Aalst: Yes, Amanda, you're absolutely right on that and I think that updated advice regarding outdoor pools doesn't seem to be the same as what had been issued last week because two of my buildings and the chair people there had the information I saw the link and now it's obviously been changed. The other thing I think we should mention too is that Kerry Chant did send a letter to all strata managing agents recommending that all facilities be closed. So, that's been a recommendation that strata managers have been aware of, however, Amanda, as you have rightly said, it has never been mandated through the public health orders that these facilities closed. However, it has been there to owners corporations and managing agents and committees to try and regulate that and so, yeah, it has been very difficult in this sort of minefield of changing advice and not having the tools to be able to really, at times in force the public health orders where they don't marry up with, what's been mentioned for strata schemes. It has been very, very difficult, Amanda.

Amanda Farmer: Yes, and this lack of regulation of our strata spaces has not been for want of us shouting, crying, demanding that these spaces be given attention in our public health orders. We do not know why our government insists on ignoring our community spaces. It may be that the view is taken, that these are private residential spaces and the private residents controlling those spaces can make decisions in their own best interests that shows a complete misunderstanding of how strata schemes operate, how the Strata schemes Management Act operates, we need to have meetings, we need to pass resolutions, we need to maybe make bylaws, all of that takes time. We need to convince the majority of a particular point of view perhaps, it has been incredibly hard for our communities, for our managers, our building managers, to protect the health and safety of their residents. Without the support of legislation.

Reena Van Aalst: I was going to add Amanda to what you're saying in terms of passing by-laws. Now, we all know those that live in strata and work in strata, know that enforcing by-laws is also problematic and is also arduous and also takes time. So when you have a public health order saying, you must wear a mask, that is so much easier than having a bottle of saying, you must wear a mask because the enforcement of both of those is entirely different.

Amanda Farmer: Yes, and coming back now to our swimming pools example, this is where we see the pain really become obvious. We are hearing that in our public spaces, in our commercial spaces, eventually when we reached 70% as we head towards 80% double dosed, we as citizens are going to be required to prove our vaccination status, to be able to use these public and commercial spaces, where do our strata scheme stand? Where does our common property stand? And where do our gyms and our pools stand? Is this law going to extend to those spaces? I think based on past experience, I can probably say, I don't think it will, I think we will continue to be ignored and these decisions about how we protect our common property will continue to be left up to residents and that is a very undesirable position. I think the only people who win and I put that in inverted commas win out of that are the lawyers who are sent in to draft rules, draft by-laws, draft motions, provide advice on what's legal and what's not.

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We're only scratching the surface of that now as lawyers and tossing these ideas around amongst ourselves, looking at what is happening in places like the United States, in Canada, in Singapore, where their apartment communities are facing these questions and these rules already. So I think there's going to be a very hard road ahead and it's hard to comment with any helpfulness at the moment in the absence of seeing what these laws for our public spaces are going to look like. But this first question about reopening of outdoor pools is I think the first in a long line of difficult questions facing us.

Reena Van Aalst: Definitely Amanda, I totally agree with that and I think it's just going to make our jobs as strata managing agents that much more difficult because of the diversion of opinions amongst owners, in terms of whether facilities need to be reopened or closed, and whether people need to have double vaccination or not. And so that's the next minefield that we're going to have to deal with coming up?

Amanda Farmer: Whack it on the challenge list for a couple of weeks, time Reena, we might have some more lore in front of us to talk about then maybe.

Reena Van Aalst: Probably not.

Amanda Farmer: All right, I am changing gears as I move into my challenge for this week. And I'm talking about the collection of recyclable bottles from common garbage bins. Now this is a question that a member inside our online community asked in the forum and I thought it was a great one. Not the first time I've heard this, but I took the time to research it a little bit for this member and I thought I'd bring it to the podcast. This owner likes to go down to the bin room on bin collection evening when the recycling bins are full and retrieve the recyclable cans and bottles for which in New South Wales, you can get a 10 cent refund. If you deposit them in the appropriate place of return and earn station, we call them here. And this resident accused by a couple of neighbours of breaking the law by doing this, going through bins, looking potentially at people's private information, documents that might be in recycling bins and they were told to stop this practice. Now it was asked of me, am I doing something wrong? Is this illegal?

Reena Van Aalst: Amanda can I ask you a question, is that when the bins are outside on the footpath or are they within the property?

Amanda Farmer: That is a very good question, Reena and that was the basis of my research. I found out after asking some more clarifying questions that the bins were indeed on the common property, they had not been put out onto the council strip or the council land to be collected the next day. And my conclusion was, that if the bins are on the common property, and if this person who is going through the bins and collecting the bottles is an owner or a tenant in the building, then they are free to go through them and collect them. This person is an owner, they are a part owner of the common property, they can deal with that common property within the boundaries of the relevant law. They're not causing a nuisance or a hazard or otherwise damaging the common property.

So I said, I can't see what law you're breaking, however, if the bins were on the council land, then they should not be interfered with. They are then within the custody and control of the council and going through bins on council land, or for that matter, somebody else's land your neighbour down the street or the building down the street is a no no.

Reena Van Aalst: Well, it's interesting, Amanda, it's funny, cause the other day when I went to visit my mum and in the garage, she had a whole bag of these empty plastic bottles and I'm thinking one of these for and she said, oh, it's from like the cleaner she actually collects and gets the 10 cents per bottle. I thought, oh, okay. I think it's a great initiative in terms of, recycling and, but I think it's a sad initiative at, you have to sort of go through bins to make some money, that's really the reason that she's doing it.

Amanda Farmer: Look, I know people who do it for a range of reasons, I have friends of mine who collect bottles for their kids and then their kids go and put the bottles through the return and earn, and get a bit of a thrill getting their 10 cents back. I hope that's not preparing our future generations for poker machines, but they seem to enjoy the process. Another interesting aspect of this was that this person had been accused of potentially seeing other residents private information that might be in the bins. And what I said in response to that is if people are concerned about their private information being in communal garbage bins, then they are

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best placed to shred their documents or to find another secure disposal method. I know that's something I'm always conscious about living in strata, putting my documents. I like to put my paper in the recycling bin, but I'm not going to put confidential banking statements or documents from my office about my clients in the communal bin.

I'm going to dispose of that securely or shred that so, I think that's probably the answer to that particular concern. Another potential solution, if the community is worried about this practice is I think to dedicate one bin or a couple of bins to the refundable cans and bottles, there's only certain types in New South Wales that are eligible for this 10 cent refund and to encourage residents, to sort their recycling that way, put your bottles and your cans in these 2 bins so that if someone wants to participate in the return and earn, they just go through those two bins, empty them out and voila we're done.

Reena Van Aalst: Yes and you're absolutely right about the concerns of the owners, Amanda, because really, if you're going to put anything that's sort of private in a bin, then even when it's on council property, someone could actually go in there and have a look at all your information. It doesn't have to be necessarily someone from the building that does it while it's on common property.

Amanda Farmer: Yes.

Reena Van Aalst: So that's a really good point that you mentioned that if you do have anything that's very confidential, that has any other information that you don't want anyone to see, then you should dispose of it in some other way.

Amanda Farmer: For sure. All right. Let's move over to your win for this week, Reena.

Reena Van Aalst: Yes, well my win actually it still is COVID related Amanda. Unfortunately that the theme of COVID is this pervasive in everything that we're doing at the moment in strata, I would say. So, in this particular scheme, there was an owner who owns two apartments and basically he doesn't believe in COVID, he thinks it's a hoax. It's basically a TV ratings, episode phenomena, not real or made up and he went down to see the building manager because he was complaining that the gym had been closed. And in this particular scheme that the gym had remained open even during COVID and took about 3 cases of COVID before it was agreed to close the gym. Anyway, the gentleman came down without wearing a mask, he started to abuse the building manager and called him all sorts of names, threats and the police eventually were called to the building because of his conduct.

The community were quite concerned because we have a duty of care to contractors and those that worked for the owners corporation, they asked me to write a letter and pretty much, so I responded to the letter and the next minute, a more explosive response was received from the owner, which I knew it was going to happen because if you observe his conduct to date, it wasn't going to be unsurprising that he would not respond in a very helpful way and would become quite defensive and make further attacks and allegations, which then were directed at me, which again, didn't surprise me. Anyway, so the end of the story is that the chairperson who's a very hands-on chairperson decided to ring the gentlemen and obviously spoke to him and eased his concerns about the gym and said that we would open it as soon as we could, that owner also said that he won't pay levies because he can't actually use the gym.

And therefore again we had to sort of advise him that the use of facilities are for all residents and levies don't just go towards paying for the gym. So, the great outcome of the story is that the chairperson who was willing and able and quite a hands-on person took the initiative to actually ring this owner and basically defuse the situation. So we were very, very grateful for that because I could see it was going to escalate and the thing is that when you're a strata managing agent, you've got to do the right thing in terms of being able to have on record the owners corporation's response to such an attack on our building manager, however, a chairperson, who's also a fellow resident owner who's on a similar level in terms of being an owner there and living there was able to speak to the owner to be able to defuse the situation, to make sure that things didn't get out of hand and also to look after us as managing agents and fight for us as well as fighting for the building manager as well, but still being able to calm the whole situation down.

So, I was really happy and we were all quite sort of chuffed that this outcome was achieved. I don't believe it'll be the end of this

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particular person, I think that there'll be an outburst when the next thing happens, but at least for the time being, it's all calm on the Western front at the moment.

Amanda Farmer: Yes. Well, an incredibly difficult situation to have to deal with and hats off to that chairperson who was able to calm the storm, at least for now, that's definitely something that I see strong communities doing when legal proceedings are on foot or there is a legal dispute, there's lawyers at 20 paces and sometimes it can be just so helpful to have a member of the owners corporation, whether they're a committee member or an interested owner, sit down and do a face-to-face, off the record, chat to another owner or resident with whom the owners corporation is in dispute. And just get to the heart of the issue in terms that feel less confrontational, more comfortable for both sides, because you haven't got these lawyers hovering around, everybody's not concerned that what they might say will be used against them.

And I'm actually seeing that play out quite helpfully in a building at the moment where there is significant construction work going on and there is one particular owner who is very impacted by that construction work. There are lawyers involved on both sides for the owners corporation and the owner, but where we find we get the most traction and the most satisfaction for both sides is when the actual project manager who was a contractor, not a lawyer, not a representative of the owners corporation officially, but the project manager sits down with the owner and talk through what's happening, why it's taking so long, what's happening next, what we can do to make that owner more comfortable instead of having lawyers, fire off letters and cause expense for everybody. So I think that's a really good reminder that that method of communication can be helpful.

Reena Van Aalst: Yes, definitely, Amanda, I think in your example, that you just mentioned that's also a probably good way to try and alleviate costs and stress for all parties in the building. Cause again, you've got the community trying to do their bit, you'll get the lot owner and then you've got lawyers in between. So, having someone that's sort of a third party, not even an owner or a resident, but a third party be involved is also very helpful.

Amanda Farmer: Yes. Now we'll wrap up with the sharing of my win for this week. I have been working with a building for a couple of years now in relation to a by-law breach on the part of a particular lot owner, there was some work done at their lot that affected the external appearance of the lot and was a breach of a particular by-law. We went through the Tribunal process and ultimately we came to a set of consent orders, orders that were agreed by both sides, that the owner would propose a motion to the next general meeting, seeking retrospective approval for these changes to their property. And if the motion went through, great, the owner would not have to remove these particular items from their balcony that are causing the problem. And on the other hand, if the motion did not go through, then the owner had 14 days to remove these items.

Now, this was set out in an order of the Tribunal, okay. So, that's important to remember. When I tell you that the motion did not go through, it did not get the support of owners and therefore the order from the Tribunal automatically kicked in that this owner had to remove these items within 14 days. Now, that didn't happen, not for want of the owners corporation, following up, checking in, wondering if it was going to happen. Are you going to comply with the order? And the owners corporation came back to me and said, Amanda, well what can we do? Now, if it was a few months ago, I would have said to the owners corporation, there's not much you can do because we had a problem with our strata legislation, in that there was a bit of a loophole when it came to the enforcement of Tribunal orders, it was actually near impossible to enforce tribunal orders because you needed the consent of the minister to be able to file an application for enforcement.

There was a missing piece in our 2015 legislation when it came into effect. That was identified some years ago in a case called Anderson, which I was involved in, but it has taken until now, only last month, new legislation amendments to our Strata Schemes Management Act commenced, which finally introduced a new section. And it is section 247A which makes it very clear that the Tribunal can require somebody to pay a penalty of up to \$5,000, if they breach an order of the Tribunal. Now, going back to my particular example, I alerted the owners corporation to this option. If they did want to enforce the order of the Tribunal, then this is the step that they take, make an application under section 247A, that was relayed to the owner who was in breach of these orders and it was made clear that this was the path the owners corporation was going to take potentially exposing that owner to a penalty of up to \$5,000. And lo and behold, the offending items from the balcony have now been removed from that lot in order to comply with the original order.

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Reena Van Aalst: That's a great outcome, Amanda, so just a letter saying that that was going to happen if they didn't proceed.

Amanda Farmer: Just the existence now of that legislation, making very clear that there is a consequence. If you breach tribunal orders has solved a problem and prevented further litigation and that's all we need. Somehow, we just need that option available to whichever side it is. Sometimes it's the owners corporation that hasn't complied with an order, and that has been missing for some years and already, without even filing the application, we're seeing the benefit of that new legislation, which I think is great. And I do just want to make sure everybody knows that it is now there.

Reena Van Aalst: Oh, Amanda, this is so timely because I had an agreement that was an order as actually would have been about six months ago and it actually expired last month, where the resident, who's not an owner as a tenant, had agreed to remove all their items from the car space within 6 months of the agreement. And that he said that he was going to also move out of the apartment because his lease was coming up. And when that happened, of course, I realized that enforcement would be costly knowing that that section of the act had not been remedied. But now that you mentioned it today, I can now perhaps just use the enforcement of the fine as a means of trying to see if they will comply before the owners corporation then engages the lawyer to then start the enforcement proceedings. So, yep, that's wonderful news actually. I just can't believe it's taken so long, Amanda. Do you know why that's happened? Is it just been one of those procedural things that sort of, no one ever got around to actually address it?

Amanda Farmer: It came in as part of the amendments, along with our sustainability infrastructure amendments, where we can now approve that kind of infrastructure with a lower threshold of approval at our general meetings, that was delayed somewhat by the pets debate because the new pet laws came in with that legislation as well. So it was all bundled up in this amendment act, a whole series of problems with our legislation were amended as part of that package. And so there was some delay, it doesn't really explain the Anderson case was back in 2018. If my memory serves me correctly, it was an appeal panel decision.

I'll put the link to it here in the show notes for anyone who wants to check it out and I'll also link to Section 247A of the Strata Schemes Management Act. These days when I'm asked about delays to legislation, my default answer is also, COVID. Some other things that last 18 months that have distracted our lawmakers and we'll probably see that for some time to come. We also look forward of course, to the results of the wholesale review of our strata schemes management act. We made some submissions on that a few months ago, and I understand a discussion paper is on the way, which is exciting, but nothing moves particularly fast, especially not these days in our parliament.

Reena Van Aalst: No, especially that, as you said, Amanda, with COVID, that's added an extra layer of delays to many things, both in life and in our legislations.

Amanda Farmer: Yes, for sure.

Reena Van Aalst: So we'll look forward to seeing that discussion paper being released, I can't wait to see that actually.

Amanda Farmer: Yes, definitely and we will keep everybody up to date as we like to do. I think that's it for this week, Reena. Thank you very much for that engaging conversation. I am already looking forward to the next one.

Reena Van Aalst: See you next time, Amanda.

Amanda Farmer: 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 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?