

Publication Date: 13 October 2021
YSP Podcast Transcript: Episode 283. Common property only for the vaxxed? Dr Cathy Sherry answers

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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, your podcast host. This week, I'm chatting with Dr. Cathy Sherry. Cathy and I were live over on the Your Strata Property Facebook page last Friday, the 8th of October, discussing the new public health order for New South Wales, which has now commenced. It started on Monday the 11th of October. Cathy and I answered your questions, including whether common property facilities can be restricted to vaccinated people only? What to do about in-person meetings over the next 8 weeks or so? What are the new rules about trades and construction work on occupied premises? How is short stay accommodation being regulated? And lots more.

This is an edited version of our chat. You can watch the video of our complete conversation over on the Facebook page. There is a link in the show notes for this episode where you can go and check that out. You will hear me say that if anything changes with the health order, I would be letting you know.

At the time I'm recording this intro, which is the morning of Tuesday, the 12th of October, there have been no changes specifically affecting apartment buildings, and as far as I'm aware, nothing that changes the views expressed by me and Cathy in Friday's chat.

We are just so incredibly lucky to have a professional of the calibre of Dr. Cathy Sherry advising us in our strata sector. I know you'll enjoy this chat. Here we go.

There are lots of you here today. I think you might be waiting to hear from our special guest. Let's jump right in. Dr. Cathy Sherry. Dr. Cathy Sherry is an associate professor at UNSW Law and a UNSW Scientia Education Academy Fellow. She is a leading Australian expert on strata and community title, providing advice to government and the private sector on the complexities of collectively owned property, both nationally and internationally. She is currently on the Technical Committee for the United Kingdom Law Commission reform of commonhold. Her book, *Strata Title Property Rights: Private governance of multi-owned properties*, is the first academic legal monograph on strata title in Australia, and it has been cited by the Privy Council.

Cathy's research focuses on the social implications of private communities as well as optimal planning for children. Cathy has a special interest in urban farming and the challenges of providing growing space in high density cities. She's team leader for UNSW Urban Growers, a cross-faculty group that creates food gardens on campus. Cathy is also an academic member of the Australian College of Strata Lawyers, a regular and popular presenter at our annual conferences.

If you like what Cathy has to say, you might want to check out some previous chats that we have had. Back in September 2020, Cathy was our special guest here on live, and you'll see the replay of that video here on the Facebook page in the videos library. Just scroll back to September 2020. And I've also interviewed Cathy on the podcast. Podcast episode number 29, that was a few years ago now, Cathy shared with us the immense power held by strata owners. She explained how strata owners have been given almost unlimited power to legislate for their neighbours through by-laws, and some of you might have some questions about just how far the power of bylaws extends right now as we jump into this chat. I'm welcoming in Dr. Cathy Sherry. Hi, Cathy.

Dr. Cathy Sherry: Hi, Amanda. How are you?

Amanda Farmer: I'm doing very well, and it is my pleasure and my privilege to have you here with us. And I'm not sure if you see the numbers on your end, but we have almost 100 people tuning in live to hear from you, so this is indeed a very popular topic. Lots of questions to be asked, and we are going to try our best, I hope, to give some answers.

Now, we are going to be talking about the new New South Wales public health order. We've got a link that Richelle will pop into the comments where you can go and access a copy of that order. It's the one that on the page is marked, general, and the first thing I want to say is please keep looking at that page and make sure that you access the up to date order, because we are hearing from

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our premier that there are some changes going to be made in certain respects and there will be updated orders. So, do keep checking that page. This order is part of the roadmap for easing restrictions when 70% of the population of New South Wales who are over 16 are fully vaccinated against COVID-19, and we have reached that threshold, the order is going to start on Monday.

Now, Cathy, I want to ask you a general question. What do you think of the order when it comes to our strata schemes? And I have some views, some short words on that, but I'll let you kick us off.

Dr. Cathy Sherry: Well, let me start by saying something positive, which is not to do with the order at all, and I'm going to do a shameless plug for you, Amanda, and just tell your guests how, in discussions with you, how just what a pleasure it is to talk to you and how good a lawyer you are, because I'm tired of talking to my cats. They're hopeless, they've got no opinion on the health order, and it's so good to have a conversation with another lawyer who's paying attention to the detail and go, "Yes, what about this? What about that?"

So, the orders, look, they're really problematic, they are really problematic. I don't have any problem with public health orders, I'm not part of the freedom bandwagon that it's outrageous, that we're regulated, I think it's really necessary that we're regulated for our health, and I think a lot of lives have been saved as a result of the public health orders, however, they're a mess. Part of me generously wants to think this must be incredibly hard for people who are drafting these orders. They've been changed frequently, they're squashed between public health experts, we're telling them one thing, but at the end of the day, politicians do have a say in these things. It's not that the chief health officer has the ultimate say, politicians do. And so the orders are a compromise.

There are some parts of them, though, I have to say as a lawyer, to whoever's in pursuant is the lawyer who's drafting them, some things that, to be honest, I think are pretty inexcusable, and the biggest problem that I've had, and I've talked to you about this is, I have a huge problem with the fact that they're starting to do this less because they're using the term household, but overwhelmingly, the public health orders use this general term of place of residence.

So, I do say to people, I've been reading them closely, because the trigger for the public health orders is land, so it's all about where you are on land. That's how they work. It's not just because I'm obsessed with land that I say that. They don't apply to people of a certain age, they don't apply to people who have immunocompromised, they apply depending where you are physically. So, whether that's greater Sydney, outside Sydney, local government areas of concern in the preceding order, or residential, non-residential premises, publicly accessible, non publicly accessible premises. So, it's all about where you are physically present, not you as a human being.

And so as a result, it's incredibly important for the public health orders to get their categories of land and premises correct, and I don't think they have, because they're constantly using this general provision of place of residence. The new orders, I think, because they're simpler, there's less of a problem with them than the old orders, but as we'll probably talk about, it has a category of general areas and stay at home areas. The stay at home areas are presumably where they need to ratchet things up when we get outbreaks, which we will. So, those kind of problems with the previous order are going to come back into play for strata schemes if they're in areas that are declared stay at home areas again. Overall, though, I mean, for people who are listening, Amanda and I have been talking and struggling, and we're both pretty experienced lawyers, and these orders are a mess.

Amanda Farmer: And I just want to give a special mention to Jane Hearn from the Owners Corporation Network, who has also been discussing both with Cathy and myself very closely, the meaning and effect of those orders. And Jane has been a fabulous resource, particularly because she is a resident and a committee member in a large strata scheme.

I said earlier, I had a few words about the orders, and you've already said them. It's a mess. That's what I had to share, generally. But let's jump into really the biggest question that we're being asked, I'm being asked as a lawyer and that I'm seeing others ask and query in our public forums. Can we restrict access to the common property to vaccinated people only? Big question.

Dr. Cathy Sherry: Huge question. Huge question. Really hard.

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Amanda Farmer: And we can tackle it on the basis of... well, I think it's the same answer either way, but we have residents, people who live in the building, and then we have visitors, and we have trades. Can we say to residents, "You must be vaccinated in this building"?

Dr. Cathy Sherry: Look, I think the answer to that, I would say, is no, but I mean, I think the first big thing that people need to realise is that strata schemes are simply not captured by large amounts of the public health orders, so it's as simple as that. Really important thing for people to realise is that strata schemes are not publicly accessible, overwhelmingly, they're not. There are some schemes, so Breakfast Point, or Central Park, there are schemes that do have publicly accessible areas, and if they've got commercial premises, supermarkets, whatever, they are publicly accessible, but the baseline is, for the vast majority of strata schemes, they are not in any way, shape, or form, publicly accessible, and I think a lot of people, including they're, I suggest, the Department of Health is confused about this.

So, schemes are just not captured by the orders because a lot of what they're capturing is private property, but publicly accessible private property, and a strata scheme is not that. The fact that you might actually have 200 residents and all of their visitors and guests are able to access common property does not make it public property.

So, the common property of a strata scheme, even if it's a big open area, unless it is specifically under part of its planning consent, it was meant to be open to the public, it's no more publicly accessible than my driveway or front path in my non strata property is. People are only allowed to be on it by express or implied invitation. So, someone delivering something to the door is thereby implied invitation, they're not a trespasser, but you're not allowed to just walk onto it because you feel like it. And that covers most strata common property. And that's the trigger for the public health order. A lot of stuff only applies to publicly accessible property. It may be private property, but it is publicly accessible. So, strata schemes are simply not captured by vast amounts of it.

So sorry, going back to your question about vaccination, that thing about businesses being required to make sure that people are vaccinated. Strata schemes are just not captured by any of those kinds of provisions. They don't fall into the category of premises that must require people to be vaccinated, so they're not covered by the public health orders, which makes things much easier, if it is mandated by the public health orders. It does come down to just a question of schemes being able to regulate themselves. Can they apply a higher standard than the government is actually requiring of them under the public health orders? And the answer is, other than masks on common property, there is almost no imposition on strata schemes.

Can you mandate vaccines for residents to be present in the building? Absolutely not. I think it's really clear that you can't do that. My reasoning would be that owners corporations only have powers that are given to them by the legislation, that relates to the management of lots of common property and the finances of the scheme, and I think that vaccination of residents in the building does not fall within that category. There would possibly be an argument in relation to the Cooper Case, which is the pet case. And the Cooper Case was very clearly that an owners corporation cannot make a by-law that regulates an activity that has no meaningful effect on other people.

The flip side of that is they can write by-laws that regulate activity that has a meaningful effect on other people. And obviously, there's an argument to say that not being vaccinated has a meaningful effect on other people, because unvaccinated people are more likely to get COVID and they are thus more likely to spread it. The basic rule with vaccinations is if you don't have it, you can't spread it. There is breakthrough infections, you can get COVID if you are vaccinated, but you are still much more less likely to do so if you are vaccinated. So, there is a kind of Cooper argument, I just don't think it's going to fly in relation to excluding people from their homes, I just think that's not possible. You could not exclude someone from their home on the basis of a by-law, even if it follows the reasoning in Cooper.

Then we get onto the harder question of, could you exclude people from facilities, and I'm not sure whether you want to get onto that now.

Amanda Farmer: What we might touch on first is visitors to the property. So, if we've said that we feel pretty confident that you can't exclude residents from their own home if they're not vaccinated. I agree with that. We are looking at, in New South Wales

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from next week, the current order says 5 visitors at a time to a premises, but we understand that's going to be increased to 10 when we see a revised order, and there is a requirement that those visitors be vaccinated or that the members of the household do not permit unvaccinated visitors into their household.

Now, I've been deliberate about using those words because we're getting the question, "Amanda, if I've got a building manager or I've got a concierge and there are visitors attending, we want the building manager to check the vaccine passport," as we're calling it here in New South Wales, "and check that these visitors are vaccinated because that's the law, isn't it? People have to be vaccinated." The way that I read the health order is that it is the responsibility of the household member, not the owners corporation, the household member, the person who is the occupier in the apartment, to be responsible for preventing unvaccinated people from coming into their household.

Now, you touched on this earlier, Cathy. We've introduced this term of household into these new orders, which I agree with you is a good term, but I think owners corporations wanting to restrict unvaccinated visitors need to be very careful about this because owners corporations certainly do not have the clear right under the public health order to do that.

Dr. Cathy Sherry: I would absolutely agree with you, and I think that was a really good thing that you spotted that actually I hadn't processed that when I was reading it. That, yes, absolutely, the legal obligation is on members of the household who are over the age of 18. And that's really important that actually, when you're reading the legislation, that you actually really pinpoint who is the legal obligation on? And you're right, it's the member of the household.

And I think generally, if we didn't have this provisions in the health order, the question of, can the owners corporation restrict visitors? Again, I think we're on very shaky ground here. So, in the same way as you clearly have a right to access your own home, and the general rule would be that you have a right to have whoever you want into your own home. So, outside of the COVID circumstances, you have a right to have whatever visitors you want to come into your own home and the owners corporation would not be able to actually regulate that. I think that's actually strangely inherent in the strata legislation in that the ban on by-laws that restrict transfer leasing, you'll notice that they never said anything about restricting licensing, which is asking people into your home as a visitor, they have a license, a legal permission to be there, that's never been covered. And I think the assumption is, well, you could never restrict licensees, you could never tell people who they can ask in to their own apartment.

So, I don't think a court would say it was okay for the owners corporation, in ordinary times, to regulate someone's visitors, and I think now the clear tenor of the public health order is it the responsibility is on members of the household themselves, not the owners corporation. And terrible as this is, to say your dobbing in your neighbours, but if you have concern... I mean, that's what public law is for, it is to avoid citizens policing each other.

Amanda Farmer: That's very good point.

Dr. Cathy Sherry: It's generally acceptable that we leave policing to the police. So, if you are genuinely concerned about that, don't speak to your strata manager or your building manager, and hard as this is to say dob your neighbours into the police, but it is a legal matter and it might be better dealt with that way. I don't know. Maybe that's a terrible suggestion in the strata scheme.

Amanda Farmer: No, it's certainly a suggestion that I've been giving when I've been asked, "Amanda, if we think someone's breaching the public health orders, what do we do?" And the public advice is Crime Stoppers. There's a website for Crime Stoppers, there's a phone number for Crime Stoppers. That's what you do. And I understand the police have been reasonably responsive.

Now, we're getting questions, lots of questions before this chat, and I can already see them in the comments now. What about our pools and our gyms? What about our recreational facilities? Can we have a rule that restricts use of those facilities to the vaccinated only?

I grappled with this one earlier today. As Cathy and Jane know, we were emailing about this because there are some very

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confusing terminology in the new orders, but I think I've landed on my view of this situation. Do you want to let us know yours, Cathy?

Dr. Cathy Sherry: Yes. Well, I think probably we have an agreement that at the end of the day, despite all the confusing definitions, I don't think that the order is meant to or does capture halls, or gyms, or any of those facilities. So, the original public health order I think was very clear that it only referred to publicly accessible premises, so it's publicly accessible gyms and pools, I know a lot of schemes sensibly closed them of their own volition, but they weren't required to, under the public health order, which is just an evidence of the huge mistake in the public health order, that they didn't consider strata schemes, because it can't be the case that it's not safe to go to an outdoor public pool but it's perfectly safe to go to an indoor pool and a strata scheme that's being shared by lots of different households.

But I think the answer is, it's not covered by the public health order. There is no obligation under the public health order to require people to be vaccinated, it's not being regulated.

Could strata schemes impose higher standards themselves through their own bylaws? This, I think, is certainly arguable. I mean, that's where I'd come back to Cooper to say, "Can you write a bylaw that requires people to be vaccinated to use the pool or to use the gym? And then you would say, "Well, that may well be a bylaw that is for the benefit of all lot owners, because being unvaccinated has a meaningful effect on other people." It does then raise that issue that we were talking about before of the spectre of people asking for medical evidence. Again, I actually don't know that there's any law against it because strata schemes are not captured by privacy legislation in relation to medical evidence, which has always been a huge problem. Being able to ask your neighbours about their assistance animal was always a huge problem, I mean, it's outrageous. In a sense, people have to produce medical evidence to prove that an animal is an assistance animal.

Look, I'm probably not being very helpful. I think it's possible, but I think it's problematic.

Amanda Farmer: I just want to jump in on the practicalities of instituting a by-law, and it may be something that buildings don't necessarily want or need to rush into. Two things. In New South Wales, from the 1st of December, we're hearing that there will be fewer restrictions on the unvaccinated, let's put it that way, and so it's quite possible that what we're talking about, very likely, what we're talking about now is not going to be an issue in less than 8 weeks time. We know how long it takes to draft by-laws, to put bylaws before meetings. I'm not sure there'll be too many buildings right now saying, "I want to deal with this particular issue and these particular restrictions by way of by-law."

But if you are considering a bylaw, and you've heard Cathy say we do have some law that would be supportive of that view that this by-law deals with lots of common property is for the benefit of occupiers, definitely get some specific legal advice on that. Everybody's communities are different, everybody's pools are different, everybody's gyms are different, what makes sense for one community might not make sense for another. And get your by-law drafted in general terms. We're not necessarily referring to this particular pandemic or COVID-19, but we might be referring to communicable diseases or something broader that's going to carry you through a few more years, bearing in mind what it costs and the time it takes to put forward a by-law.

Then secondly, I want to address the difficulties with enforcement. If you do have that kind of by-law in place, and as Cathy says, presumably, you'd want to enforce it. Do you have a building manager? Do you have a way of restricting access to your common facilities, maybe by way of fob? And then are you comfortable that your committee, your building manager, or your strata manager is going to ask a resident for their private medical information to be able to determine whether they meet the criteria of the by-law, whether for example, they are vaccinated or not? So, there's a few things to think through there.

Cathy said to us, the privacy legislation doesn't apply in strata schemes. I agree with that. A couple of questions came through earlier with reference to privacy law, so I'm glad we've covered that. But there are layers on layers with this issue. So, I am conscious that buildings, are thinking quickly about these issues and wanting to address them as comprehensively as possible, but please do take a breath and think it through. And certainly if you're planning to put in place particular by-laws, get specific legal advice unique to your building.

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Dr. Cathy Sherry: Could I just also add just the alternative view, because I don't want to suggest that I think Cooper definitely authorises those by-laws, because the alternative view is the reasoning for cases like [Lin 00:21:48], which is the case that relates to the very litigated ventilation system in the Hunter Arcade that's had like 3 cases on it. And certainly, some of the early decisions on that would say, "You are not allowed to permanently exclude people from common property." So, people own common property as tenants in common. As a tenant in common, you're entitled to occupy the whole, is the legal expression, which means you're allowed to use all of it.

So, while it is possible to regulate people's use of common property, a basic property argument would suggest that you cannot permanently exclude people from property that they actually own. So, that's an alternative view, that a by-law requiring people to be vaccinated is actually invalid, because presumably, people, if they're not vaccinated it's because they've chosen not to be, as opposed to people who haven't been able to get them, they're going to be permanently unvaccinated, so they're going to be permanently excluded from property they own. So, possibly, those by-laws may not be valid.

The second thing I would say is also I'd echo Amanda's caution about being too trigger-happy about this. I think with the exception of a few places, like Northern Rivers in New South Wales, which is really very, very challenging, I don't think there's very much genuine vaccine hesitancy in Australia at all. I think you only have to look at the vaccine rates in Western Sydney, which are astronomically high, like they're above 90%, Canberra is above 97%, it's extraordinary.

I really don't think there's a lot of genuine vaccine hesitancy in Australia. I think vaccination rates are a reflection of the fact that it's been very, very hard for a lot of people to get them. Children, my kids are in their 20s, and they have a very determined mother. It was really hard for them. My last child got her final vaccination yesterday. So, vaccination rates, I think, are much more an indication of availability of vaccine than genuine vaccine hesitancy, which means I think that, to be honest, in Australia, this may end up being really an academic issue. People just will be vaccinated.

Amanda Farmer: I hope so. Now, let's talk about trades and contractors. A couple of questions in the comments here about that. On my reading of the health orders, people who are carrying out work at a place of residence are exempt from the requirement to be vaccinated in order to attend that place of residence. And I want everybody to have a close look at that part of the public health order. We do have a link earlier on in the comments, if you're just joining us, to the place where you can access the public health order. And I am looking at Clause 2.6. This is the clause that tells us that a person is authorised to be at a place of residence even if they are unvaccinated. And it includes people who are carrying out work, it includes people who are assisting others to move, it includes those who are giving child care, who are caring for others, who are engaging in family contact arrangements because of an emergency or an illness.

Now, just reading through these, you start to think, "Wow, if we did think we wanted to introduce a rule about only allowing vaccinated visitors to our premises, we're going to have a few questions to be asking people who are walking through the front door because there are people who are exempt from that requirement." And that's why, as Cathy and I said earlier, it's important to be aware that it is the member of the household, not the owners corporation, who is responsible for checking that vaccination status.

So, certainly, work that is being carried out at an occupied premises, there are actually no rules in this new public health order, unlike what we have to date about the two workers in a premises and you have to be in a different room or off the premises altogether, those rules will be gone from Monday, and there are no rules about work being carried out in an occupied premises. Do you agree with that, Cathy?

Dr. Cathy Sherry: Yes, and it's really weird. There are parts of the public health order that I've read that I think it has to be a mistake. And so this is really, really odd. It just does seem to be, you're allowed to have an unvaccinated visitor in your house, and unvaccinated people are not allowed to visit anyone else's house, they've really been confined to their houses, but somehow, if you're a worker, you can. Also, employers are not allowed to let people come into workplaces if they're not vaccinated if it is reasonably practical for them to work from home. So, if you work in an office, you're not allowed to go into work if you're not vaccinated. It does seem a really odd hole, and it's also, as you say, when you look to that section... sorry, I'm just scrolling.

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Amanda Farmer: 2.6 is the exemptions, yes.

Dr. Cathy Sherry: Yes, 2.6 is the exemptions, it's odd because all the other things are really important things and narrow things, like helping someone move, or child care, or helping a vulnerable person or family contact arrangements, or emergency to avoid illness, injury, or risk of harm, or inspecting a place of residence, but that's about people being able to find housing. So, it is very odd to see this blanket exception from a public health point of view, it's quite seriously nonsensical.

Amanda Farmer: Yes. And there is another nonsensical aspect to this, and that is that if the dwelling is unoccupied, then it becomes a construction site, and then there are rules about what needs to happen, including that there needs to be a COVID safe plan. So, we have different rules for renovations, alterations work, a contractor coming in to fix the hot water, whatever it is, that can go ahead, doesn't need to be vaccinated, there doesn't need to be a COVID safe plan, but a property immediately becomes a construction site if it is unoccupied, and then other rules come in about that particular site, including a COVID safe plan, which is very strange in a strata building where one apartment may be unoccupied but the rest of the building is certainly occupied and people are coming and going on the common property.

Dr. Cathy Sherry: Can I also ask you, Amanda, I don't know if you know the answer to this, but I'm now struggling to think, where are the requirements in the new public health order that construction workers have to be vaccinated? Have I missed them? Because you can't go to work if you're not vaccinated, but that only applies if you can't reasonably work from home. I'm struggling to find the provisions, and maybe I shouldn't ask this in a live podcast where neither of us will be able to find it, but I'm struggling to find the provisions that now require construction workers to be vaccinated, because clearly, that is work that cannot be done from home.

Amanda Farmer: Yes. I don't know that it's there, and that's why I was careful about saying the requirement, definitely, for a COVID safe plan, if you're on a construction site is there, but I can't see it here in this general order, but I can come back to that here and post a comment on this page.

That's the other thing I do want to be clear about. Cathy and I are speaking live on Friday afternoon, the 8th of October, and we are expecting changes to these orders. To the extent that those impact anything that we're saying today or indeed strata schemes in particular, then I will make sure I bring you updates here on that page, but we'll make a note to look into the vaccination of construction workers in particular.

I'm also seeing a question here in the comments from Elizabeth who is asking about an employed building manager, and Cathy, you pointed out and I agree, that in our new health order due to commence on Monday, employers must not allow employees to attend a place of work if they are unvaccinated unless it is not reasonably practicable for them to do their work at home. In my view, that would apply to an employed building manager and owners corporation would have to look very closely at the work that that building manager is doing and whether it can be done or part of it can be done off site. I know a lot of building managers, during hard lockdown, particularly in the heavily restricted LGAs in Sydney, were having to do a lot of work off site and only turning up to do... well, not turning up at all because they weren't authorised workers. So, there's certainly a lot of building managers out there who've learned to work from home, but I think that is a very interesting question, an owners corporation as an employer is going to have some different obligations as well to employees.

Dr. Cathy Sherry: Yes. And I wonder whether part of this is that they're just... I mean, there is a general thing that both the federal and state governments have been doing, and that is just offloading stuff onto the private sector. We don't want to decide it's too hard, and certainly, employers have now been left in a really invidious position, really incredibly difficult. So, vaccines are mandated for certain occupations like teaching anyone, being on a school site, or obviously, aged care facilities, but other employers have just been left... I mean, I've skimmed Kimber. I have not really across this law, but it's really very, very difficult than having to make a judgment call about whether they can require vaccines as a condition of the kind of employment they're engaged in.

I just don't think that it is really difficult for those employers who are in those kind of in between positions where it's a really complex

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legal question as to whether they can mandate vaccines. I mean, some employers like SPC went out on a limb, fruit canning, I'm not quite sure why, but they went out on a limb and they mandated it. Good on them, whatever. But it really is extraordinarily difficult. And I assume that owners corporations, in their capacity as employers, will be in the same position, and it's not just simply Fair Work, it's also the common law, their obligations. Clearly, there are duties of care that owners corporations owe to people when they're employing people. It's not really different to, you didn't fix a handrail and someone who was working for you fell and injured themselves.

Amanda Farmer: On that point about the common law and workplace health and safety obligations, I do want to acknowledge Jane Hearn, who has posted something very similar just here in the comments saying that the requirements of the public health order is not the end of the story. There is a duty of care that owners corporations have towards residents. And absolutely, that law is there, and it's not something I think we've ever had to grapple with in the strata context in the level of seriousness that we are now. So, definitely these questions about... forget the public health order, but if somebody contracts COVID on the common property, we as an owners corporation, liable to be sued, and what is our duty to protect our residents from that happening? And these are definitely questions that were being asked in the United States. In January, when I attended their conference online, these were happening. There weren't any cases that had been brought yet, but these questions were definitely circulated, and I did predict that we would be asking the same questions very soon.

And Cathy and I don't have the answers to those right now, and I think it would be remiss of us as lawyers to attempt to delve into those kinds of situations which will be absolutely limited to their facts. Every building is different, the steps that each owners corporation takes to protect their residents are going to be different.

One thing I do want to point out is that COVID safe plans are not mandatory for our residential strata schemes but they're a bloody good idea, let's say that, and particularly in this context of duty of care and doing as much as you can to protect your residents.

Dr. Cathy Sherry: Yes. Well, because the duty of care stuff, I mean, I always say torts law... I'm not a torts lawyer, but I always think of it as stating the bleeding obvious law, which is, I don't mean rudely to torts law, I mean, it's often very sensible. It's the obvious stuff. What was reasonably foreseeable? I notice Jane had referenced to *Ridis* in the chat before. *Ridis* is the case where someone put their hand, went to stop a door closing that had a non safety glass in it and cut themselves very badly, so there's case law on this. But often, it's actually pretty sensible law. It's the what was reasonably foreseeable, and I think things like I would certainly go as far as saying that if you don't have a mask sign up in a pandemic... it's required under the public health order now, but if it weren't required under the public health order, I'd be worried as an owners corporation, you haven't taken that basic precaution.

There are also, of course, much more complicated questions about ventilation, and I will say this is just if people are interested, I am a member of an organisation called OzSAGE, which is O-Z-S-A-G-E, it's lots of really amazing doctors, and engineers, and scientists, and they are putting advice up on their website, because that's also a real concern for owners corporations about ventilation. And a strange little tip that I have shared with Amanda and Jane, which surprised me, and that is one of the leading epidemiologists in the country told me that she carries Glen 20 in her handbag and she sprays it in lifts and corridors. And I was saying to Jane and Amanda that I thought that it was just some kind of gimmick from the 1970s. Who knew that this stuff works? But apparently, it does. So, I'm not recommending owners corporations do that, but that issue of getting into lifts and in corridors that are poorly ventilated, if people are concerned about their own safety, that's something. But certainly, owners corporations turning their attention to ventilation would be a good idea.

Amanda Farmer: I just want to come back and acknowledge some of the comments here. John is helpfully letting us know that Justice Beech-Jones said he will make a decision by Sunday. That's in the Fair Work cases brought by Kimber and others. And I think also to address comments or questions that are being asked by Elizabeth and also Jan about employers requesting proof of vaccination, that's really what those cases are about, and definitely, our state government at the moment, it takes the position that yes, employers can and should do that and shouldn't be allowing unvaccinated employees to work, but there is a challenge to whether our government's powers under the Public Health Act in fact extend that far, so we're all awaiting the outcome of that case.

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Dr. Cathy Sherry: Yes. Probably one thing that's worth saying, though, not wanting to preempt Justice Beech-Jones, but if anyone is on social media and seeing lots of discussion of this, there's a lot of really, really erroneous stuff going around about government has no rights, it's an infringement of our rights. The reality is in Australia, you have very few legal rights, to be honest, Our constitutions give government's power, that's what the state constitution does, and that's what the federal constitution does. So, any kind of discussion of that kind that you see on social media about an infringement of rights is usually actually simply legally wrong, and don't hang too much on it.

Amanda Farmer: A question here from Jeff, and it is one that I had earlier today, Jeff, so I went looking. Is there any clarity on holiday let properties in strata relating to vaccination of guests? And I'll have another look at it this evening, but when I searched the public health order, it only dealt with short term lets on Lord Howe Island, if I was reading that correctly, but otherwise, the health order was not interacting with holiday letting residential premises used for the purpose of holiday letting at all. Certainly, business premises, commercial premises, service departments, hotels, yes. Cathy.

Dr. Cathy Sherry: I think that there is... I've just done the search through... 2.5 places of residence max. I don't know whether it's going to cover strata, but maximum number of persons, holiday homes, or short term rentals, the occupier of premises in a general area must not allow the premises to be used for the purposes of a holiday home or short term rental by persons unless all persons staying on the premises are from the same household, or if the person staying on the premises are not from the same household, there are no more than 5, and none of the persons is an unvaccinated adult. And the obligation would not be on the owners corporation, of course, but to the owner of the apartment.

Amanda Farmer: That's it. Yes, that's it. I agree with that. And once again, it went back to the householder, the member of the household, the owner of the apartment to make sure that those conditions are complied with.

I understand that there are strata managers who are very concerned about particular buildings because there's a high proportion of short term letting. We're in holiday destinations, there's a lot of tourist accommodation, and you might have 60, 70% of your apartments are short term lets, but you don't fall into that category of being a commercial premises or a service department. And I understand that is scary when you then hear us say, "Well, it's not for the owners corporation to regulate that, it's for each of the hosts to be regulating that in accordance with the health order."

So, perhaps making sure that your owners know that and perhaps drawing to their attention their new obligations under the health order is going to be helpful. And down the track, everybody's required to comply with the law, but if you have particular short term letting by-laws and rules and regulations about short term letting, as I know a lot of you do, you might think about incorporating a clause into your by-law that it is the responsibility of the owner to ensure that public health orders and all laws are being complied with, just to remind people that this is the kind of scenario that needs special attention.

Dr. Cathy Sherry: I think, Amanda, I'd like to just say I just noticed Wendy has asked a question about limiting numbers of visitors, and I think that that's something I know schemes are addressing. I think maybe you would agree with this. There's no requirement. Again, the schemes are not captured by those limited numbers of people, so 1 person per 4 square metres or whatever it is, they're not publicly accessible premises, they're just not captured. And the only way they could be captured is by a large residential gathering, that provision-

Amanda Farmer: Which I think was over 100 people.

Dr. Cathy Sherry: 100 people. It's quite [crosstalk 00:41:00].

Amanda Farmer: [crosstalk 00:41:00] the apartment.

Dr. Cathy Sherry: Look, for a house, that's pretty extraordinary. So, you got 80 people in your house and you're not covered by any of this. I mean, you're not allowed to have 80 people in your house at the moment anyway, because I think a lot of schemes are looking at those things. It applies to publicly assessable premises, which most schemes are not, so you don't have to actually

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worry about it.

Amanda Farmer: Yes. Thank you for clarifying that, Cathy, because you and I both saw a fact sheet that was circulating earlier this week and there's some other advice coming out from strata management companies and other associations attempting to do their best to answer questions, but certainly, there is no requirement for a residential owners corporation that there be a 4 square metre rule, or in the future, a 2 square metre rule. It is quite clear in the public health order that that does not apply to residential premises. Okay, there is an exemption there.

And Wendy, I'm not sure when you tuned in, but we were saying that it is the responsibility of the occupier of the apartment, not the owners corporation, to regulate who is coming and going from their apartment. So, we are, as property occupiers responsible for making sure that we don't have unvaccinated visitors, but that's our responsibility, not the owners corporations. So, I would be very concerned about an owners corporation that's instructing its building manager to stop everybody at the door and check vaccination status. There is no clear legal obligation or right, in these public health orders, let me say, to be able to do that, and you do have to be very careful about the series of exemptions for people who are doing work, who are giving care, who are there for an emergency purpose, you have to be bearing all of that in mind, so do be careful on that point.

Just on that note as well, Deb is just asking about lift space specifications. Once again, no requirement to only have a certain number in a lift in a residential apartment building. A good idea. I've certainly seen some sensible signs up there about only getting in the lift with your family members, or perhaps two to a lift, depending on the size of the lift, but no legal requirement in relation to residential lifts.

Alrighty. Now, I'm just scrolling down through my list of notes, Cathy, to make sure that we've covered what we wanted to cover. I know there are quite a few more questions here in the comments that we haven't got to and I will do my best to come around and give some guidance on those later.

I think we did mention masks. Cathy, masks on indoor common property, that's a requirement that is continuing under these new public health orders?

Dr. Cathy Sherry: Yes, absolutely. So, masks. And the requirement for outdoor masks I think has been removed for everyone now. I mean, I was always concerned about the fact that they were required on the street but not on outdoor common property.

One thing I would certainly say to people just in terms of, wear the masks, make sure... I think I'm really concerned that schemes have signs up that say masks are a condition of entry. As Amanda has correctly pointed out to me before, they're not a condition of entry for residents. Residents are allowed in and out no matter what. Masks are mandated under the public health order and it would be much better to have a sign that just says that it's mandated under the public health order for everyone to wear a mask.

And I'd also really encourage people to look up how to wear masks safely, how if you're wearing medical masks, how to knot them so that you get a proper seal. People are often not wearing masks properly. Again, this mask advice is OzSAGE because if you're not wearing it properly, it doesn't work if it's under your nose, if there are big gaps, it defeats the purpose. I think we all need to get better at mask-wearing, and I'll also say that much as we are looking forward to Monday, what I hear from doctors in this space, and I spend a lot of time reading the chat of epidemiologists and doctors and doctors at the frontline, and I can tell you it is not nearly as happy as what the government is telling us. So, everyone still needs to be very careful and take precautions even if you are double vaccinated.

Amanda Farmer: One additional topic I do want to address, this was asked by a few members in our online community, I was just scrolling through quite a few questions about this last night... meetings, and what should strata managers be doing, committees be doing about meetings. Some of us are getting excited now, we're getting back out into the world soon, in-person meetings, AGMs that maybe have been delayed because we have residents where electronic meetings don't necessarily suit and we're really hanging out for that in-person meeting. What should we be doing?

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Now, from my point of view, meetings being held on the common property at the moment are really difficult. That's because we do have these gray areas in our health orders about what constitutes a place of residence, how the owners corporation can control and manage its own common property, and how far our right to do that. If you think you are going to have people attending your meeting on the premises, who are not residents, that you may have proxy holders, that you may have a high number of visitors, you may have a strata manager who's attending, and unless everybody is very forthcoming about their vaccination status, I think you're going to be in a sticky situation attempting to prevent unvaccinated residents, proxy holders, professionals, from attending meetings on your common property, at least until the 1st of December when we have new laws that will be applying.

I've said it's less than eight weeks to the 1st of December. My suggestion is, if you can continue to hold your meetings online, that is best case, and if you do need to hold an AGM in-person, then having outside of the building at a venue, at a public venue, a business premises, where the rules about what they can and can't do are much, much clearer than what we can and can't do on our common property. So, going to the local club, the community centre, the function centre, where absolutely they have clear rules that bind them about COVID safe plans and about access by unvaccinated people. Of course, if you take that route, then you may be preventing unvaccinated people from attending the meeting because they simply can't get into the venue. Maybe that's a problem for your community, maybe it's not.

We do have the option to have in-person meeting attendance along with electronic access at the same time. So, can we have video access for people who can't actually come and sit in the room? Consider that. But if you could hold off your in-person meetings for a little bit longer or have them online, that's been the advice that I've been giving to my community. What do you think, Cathy?

Dr. Cathy Sherry: Oh, I think that's very wise. And like I said, again, I don't mean to be the voice of gloom, but I can hear the doctors I work with within my ear, "Absolutely, just do it online, if you can." Because again, I mean, all of the evidence is... and this is veering away from law and into public health, but all of the evidence says that vaccination is not a magic bullet.

We can see that very clearly from Singapore where they have extraordinarily high vaccination rates, and there's a lot of spread, people are still getting COVID, they're not getting particularly sick, but you probably want to avoid getting it all together. So, I'd be saying to schemes, just be cautious, if you can, do it online, do it, and also that's, I think, a very good suggestion to say if you do it in a public premise that is covered, you'll save yourself all of that complication of not being covered as a strata scheme.

Amanda Farmer: And you're not responsible then for managing the premises, you're not the strata manager who is... I'm getting the question from strata managers saying, "Amanda, are we responsible for checking vaccination status and making sure?" If you take that off the premises and you take that to a business premises, then your responsibility is shifted over to that premises' operator, and I think that's a much lighter load for strata managers.

I just want to share with you here, Cathy, I'm not sure if you saw Billen Ben's comment. I know Billen Ben is a particular fan of yours, and he said, "People are property of the state, just like the good old feudal days. The idea we have rights is so erroneous. You tell them, Cathy."

Dr. Cathy Sherry: I mean, I wish we did have more rights. It's just the reality of the Australian legal system that our constitution... I hope my public law colleagues can't hear me say this... the constitution is a pretty dull document. All it does is divvy up powers between the states and the Commonwealth, and it's about funding and stuff like that, and the state constitutions are really dull, and they most certainly don't talk about human rights or property. And there's no Human Rights Act in New South Wales. Really, government powers are very, very large, and in a democracy, normally, we don't probably have to worry about that that much.

I mean, I believe in the public health orders, but Amanda and I were talking about this before, I'm very concerned about the way in which the public health orders are so hard to read, how much information has been given to the public, not via the law, so websites, people being expected to read websites, listen to chatlines, all that kind of stuff, that, I think, is a real concern. But in terms of legal challenges to things, I don't think they're going to go very far because the reality is the government does have power to do this.

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Amanda Farmer: Our government, that's for sure. Well, thank you very much, Dr. Cathy Sherry, for agreeing to be our guest today at a time where so much is changing so quickly. I think I certainly sat down this afternoon to revise for this session, which is a great way to stay on top of the law, let me tell you, going live talking about the law for an hour, you have to get your head around it, and it's full on. There is a lot there and there is a lot that is difficult to understand, so anybody struggling to understand it, you are not alone, but we have wonderful experts like Cathy here to help us and we're very grateful to have you and your time. Lots of thank yous coming through in the comments here too.

Dr. Cathy Sherry: It's a pleasure. I'm grateful that people will talk to me about the public health orders, because like I said, my cats are not very responsive. My husband just wants me to shut up. Because I think they're actually really important and I'm really grateful to be able to have a conversation with you and with Jane Hearn and also with your community.

Amanda Farmer: Thank you so much, Cathy, and thank you to all of you who have been tuning in. As I mentioned earlier, we are expecting a few changes to these health orders before Monday, as we've heard from our premier, and to the extent that that changes anything that Cathy and I have spoken about, gives more clarity, tells us that we're wrong, I will be back here giving you an update here on the Facebook page. Thank you very much for all of your time today. Happy Freedom Day to our New South Wales dwellers on Monday, and I look forward to seeing you all, as many of you as I can, maybe in-person sometime soon, but always back here on Friday live. Thank you, everybody.

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