

## Friday LIVE: 28 March 2024

In today's "Ask Amanda Now" session, Amanda answered Peter's question: does the Owners Corporation have a 'duty of care' with regard to 'toxic behaviour' (e.g. bullying, harassment, intimidation, defamation)?



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Hello and welcome to Ask Amanda. Now I am Strata lawyer, Amanda Farmer. We're heading out live to the Your Strata Property Facebook page. We're going out to LinkedIn. We're going out to YouTube. It is not Friday afternoon, which is the usual day that we are here live, having our strata discussions. Today is Thursday. It is Easter, long weekend coming on up,

so it is a Thursday. That feels like a Friday, that is actually a Thursday, and perhaps your Thursday has been just as jam packed and frazzled as my Thursday has been, which is always the way before Easter, long weekend, couple of public holidays, needing to get everything done, wanting to have a relaxing weekend. I feel you. That has been my day too.

Client call this morning, then onto a training webinar for some of the pro members inside our membership community. Then onto a podcast interview, which you're gonna get all the juice from next week. I think we're gonna send that one out. And now I'm here with you live off to return phone calls and emails after that. So thank you. Those of you who have found the time to join us here live special,

hello to you. If you're catching the replay, hello to you too. I have announced this as an Ask Amanda. Now session today, what does that mean? For those of you, those many of you who are new to our page, lots of new people joining us over the last week or so. Welcome, welcome and ask Amanda. Now,

session is a short 10 or 15 minute session where I can answer one strata question chosen ahead of time after putting the call out on the page here, the Facebook page on LinkedIn, and also emailing those of you who are on our email list to let you know that I will be live, that I will be answering one question and if you have one for me to send it through,

inviting you to send it through and see if you will be the lucky one who will be chosen today. So we have chosen one question. We always get lots. There's never a case where I sit down at three 30 or quarter to four and say, Hmm, I wish I had some questions. Shock and surprise. There are always a lot of questions that come through for answering in our Ask Amanda now session.

I will let you know soon what the question is. Those of you who are here live are saying hello, which I love. Hey Shana, good to see you and happy Easter to you too, coming in from the Australian Computer Museum Society. That sounds like a cool place. I would like to check out where you are. Hello to you. Thank you for joining us.

Leoni is here, saying hi. Hey, Kristen. Happy Friday. Live on a Thursday. Yes, thanks for the double up. Yeah, I think Shana said happy Friday as well. It's a bit like that. That's the joy of this weekend. Sean is here saying he's not Australian Computer Museum Society. Oh, okay. Right. Tell me about that,

Sean. Interesting. But it is a great society. Very sweet. David's here from Neutral Bay, Vivian is here. Happy Easter to everyone. Excellent. Well, I won't take up too much of your time on this busy Thursday, so I can send you all out into your long weekend. We're gonna get stuck into our one question that we have chosen.

It was a question posted here on the Facebook page not too long ago. It is from Peter. It's a really juicy one, and I saw it and I went, oh, I wanna answer it. And I went, do I wanna answer it? And I went, this is a bit dangerous. I can't help myself. I want to at least start perhaps a discussion in attempting to answer Peter's question.

This is a short version that you have here on the screen. That's what we can fit into these banners. Peter has asked, does the owners corporation have a duty of care with regard to toxic behavior? For example, bullying, harassment, intimidation, defamation, the longer version of Peter's question, you can see on the page, he is broadening his question to community associations.

Do they have a duty of care when it comes to this toxic behavior, as Peter calls it, behavior that is committed by residents, by owners towards other residents, other owners, contractors, perhaps visitors, neighbors. If says, Peter, this duty of care is owed, then how should the Owners Corporation Community Association best fulfill this duty? So I am gonna start by acknowledging it's a

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big question and it is not one that I can completely answer here in this format and certainly in being here in providing guidance,

in attempting to answer your questions here live, I have to be really clear that this is not legal advice, this is information, this is education, which I hope you can take away, do some more reading, do some more research perhaps. If this is a problem that's really plaguing your community, definitely go and get some legal advice from a strata lawyer or other qualified professional in this space.

But if I can address a few points that come to mind for me in first seeing this question, I will do so. And if you've got your own comments here on the page as you do share, so well your carers, the new sharers here, feel free to chime in and I'll visit those before we finish up this afternoon. So very, very good question.

Thank you, Peter. The short and my short answer to this and then I'm gonna track back a bit and give, give you a little bit more detail. The short answer is, in my view whether or not this behavior is happening on the common property. That's kind of the additional context. Is this behavior happening on the common property and who is carrying out this behavior towards whom?

We're gonna have to know what those answers are in order to go deeper on this question. So Peter, if you're here and if you wanna give any more information in a way that still protects your identity and that of your building, then feel free to post some more. But in short, I'm gonna end up with is this happening on the common property and who is involved in this behavior?

There's a couple of reasons why we need to go down that line. There have been bullying cases, I'm gonna call them in strata that have been litigated, but they almost always, to my knowledge, the ones that I'm aware of, involve a situation where there is bullying happening in a workplace. It is where the common property is somebody's workplace or somebody is providing services as an employee or a contractor of an owners corporation providing those services,

whether they're on the site or whether they are in the course of providing those services from an offsite place, maybe it's a strata manager, maybe a building manager where there is some bullying or harassment that is alleged. That workplace context is really important and that's where you're gonna see a couple of cases where there has been success where somebody has complained about behavior involving,

I'm gonna say a strata scheme and has been successful in getting an order to remedy the situation. It's because a workplace is involved. There is a case where a building manager was being bullied on the common property and the Fair Work commission made an order in favor of that building manager being bullied by chairperson. I think it was in that case. There also is a case where a resident was running her business from home in a strata scheme and was being bullied by another resident, she said during the course of her work day. Very interesting. The place where I'm getting these cases, so you can go and have a look at them for yourself and have a read through, is this really handy resource it's, it is a fair work commission bench book and the Fair Work Commission is a federal institution. It's not devoted to just one state.

So the Fair Work Commission bench book on bullying and bullying cases in particular and with some guidance on how workplace bullying might be avoided, might be prevented and might be dealt with. The team has a link for you as we like to do that. We're popping in here into the comments to this bench book. And the reason that I'm sharing it with you is because it details in a couple of pages,

these strata cases that I have just alluded to, and the cases in particular are the case of Ms A, which is a 2018 Fair Work Commission case. That's the case where the building manager was bullied by a chairperson via excessive emails and the commission found that the chairperson's behavior was unreasonable in sending these excessive emails. It was likely to be continued, it was negatively affecting the health of the building manager and the commission made an order dealing with the timing,

the subject matter, the content of future emails by the chair to the building manager. The orders also required the chair to prioritize telephone contact over email contact. So perhaps some of these emails are the in the decision, if you wanna click through and have a read of it. I was just reading the summary of the case, but you might see some of the content of those emails and understand why the commission in its order required email contact, sorry, required the chairperson to attempt email, phone contact

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rather it's a long day phone contact over email contact. So that's a chairperson bullying a building manager. The building manager is contractor of the owners corporation. The building manager is in the course of their work providing these services to owners and that's why the Fair Work Commission gets involved. Okay, workplace context, another workplace context. Surprisingly, I came across this one in the bench book application by Diane Loveday is the name of the case, 2021 Fair Work Commission case. And this is where Ms. Loveday, I think it was ran a business, I think it was a mediation services that she was running from her strata property and she was being bullied during the course of her day by some other residents who were on site at the time.

And she alleged that this was workplace bullying. The conduct was apparently rude, insulting, belittling conduct in committee meetings, also in email exchanges. But there was also behavior that actually happened in the, on the common property and in the common areas of the building when Ms. Loveday bumped into this other resident who she said was bullying her. So the commission found that the bullying conduct that occurred while Ms.

Loveday was carrying out her work in her capacity as a chair or as a member of the committee or as a, just as an owner, the owners corporation that was found not to fall within the jurisdiction of fair work because the owners corporation was said not to be covered by the Fair Work Act. In that Situation, it's not providing a workplace for these people,

it is not an employer itself. So in this context, in context where there is bullying happening on the common property between residents, fair Work Commission says that's the owners corporation does not have a dog in that fight. And we don't have any jurisdiction to tell the owners corporation to deal with that. However, the commission did find that the resident who was engaging in the bullying behavior did engage in that behavior while Ms.

Loveday was at work in her home office in running her mediation business. And when they came into contact with each other the while on the common property, the commission found that that conduct was covered under the Fair Work Act. It was conduct that had been repeated, it was conduct that was unreasonable and the commission made orders to prevent those opportunities for conflict between the two residents and to set out some parameters for how they interacted with each other while they were at work.

So that's a really, really interesting case because that's a case where there's bullying behavior alleged to be happening on the common property between two residents. And it turns out that because at least one of those residents was at work during the day because she ran her business from her home Fair Work Commission gets involved and says this is bullying in the workplace or can be bullying in the workplace.

Not sure that I have come across that one before. That decision was a bit of a surprise to me, but it goes to show that we need to be careful in saying owners, corporations strata schemes are not workplaces and this bullying doesn't count or Fair Work Commission is not gonna be able to intervene whether there is this bullying behavior because we're not at work.

You don't know whether a resident is at work or not. You don't know whether this is, they're on their break in between calls or they're having a call on the common property. This is part of their workplace. I think residents need to be for that reason, very careful. I appreciate that. None of this is really answering Peter's question and herein lies the conundrum.

We're talking about relationships between contractors of the owners corporation and residents. Fair Work Commission can get involved with this bullying behavior there. We're talking about residents and their interaction with other residents when they're at work, but when we remove this at work situation, it becomes very hard to find a cause of action. We would call it as lawyers on which someone can hang their hat and blame an owner's corporation or require an owner's corporation to act because at the end of the day,

the owner's corporation is responsible for the management of the common property. And unless it is doubling as a workplace, the common property is private property. It's no more public than somebody's driveway in their freestanding home or somebody's backyard. And what happens on your private property happens on your private property. If there's bullying behavior and going on in your private property subject to some criminal actions,

if there's assault or some awful behavior like that, then what happens on private property kind of stays on private property is the general approach. So what, that's why we come to this question of what is the common property being used? Is it a workplace that

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gives you access to those fair work commission remedies? If it is not a workplace, I think it becomes a bit harder to stretch or to find,

to locate or to place this duty of care on an owner's corporation. I suppose there may be an argument that an owner's corporation in its management of the common property is responsible for making sure it is safe. It is certainly responsible for making sure that it is properly maintained and repaired. Does that mean that an owners corporation is responsible for regulating, coordinating, governing the actions of individual residents on the common property?

I think to the extent that there is a bylaw in place, if there is a bylaw in place that is managing governing the behavior of residents while they're on the common property, I think the owners corporation does and should have something to say about that when a bylaw is being breached in New South Wales, which is where I assume Peter is because he is referred to owners corporations in New South Wales, most buildings will have what used to be, I'm not sure if it still is, model bylaw number six, which is about behavior on the common property. And that is something along the lines of residents must be adequately clothed when on the common property and must not use language or behave in a way which might offend bullying would fall into that category. I'd say offend or embarrass others using the common property.

So if this behavior is happening on the common property, then there may be a breach of model bylaw six. And then the question arises, is an onus corporation obliged? Are they required to enforce their bylaws? We have some case law more so in Queensland, I think less in New South Wales, to the effect that onus corporation should be enforcing their bylaws.

That's certainly not clear in our legislation that a known as corporation must enforce its own bylaws. If it is happening on the common property between new two residents, one resident can certainly take an action against another resident, whether that's for a breach of bylaw or for nuisance. There's a nuisance provision in our New South Wales legislation section 153 that would be relevant here.

But if it's not happening on the common property, if it's not happening in a workplace, it's something happening between two residents, I think it's gonna be quite difficult to pin this on the owner's corporation under some duty of care provision in terms of solutions. If this is happening, propose a motion at a general meeting that some action be taken to deal with the issue.

Publicizing the bad behavior, I always say is a good way of quietening down the bullies a motion requiring the owners corporation to issue a notice to comply if there is a bylaw that's being breached here. And as I think I've said, one resident in New South Wales can certainly pursue another resident for breaches of bylaws. The owners corporation doesn't have to be involved in that.

So that's my attempt in under 20 minutes to answer. Peter's really great. Tough, I'm gonna say tough question. It depends is the loyal answer and kind of the place where I started, but there are some good resources there in that Fair Work Commission bench book, accepting that that is only going to apply where we're talking about owners corporation, strata schemes being workplaces in one form or another,

but a couple of surprising decisions there. I'm going to head over to those comments and just see if anyone has anything to add there. Bill and Ben wants to add assault to this list. Sean is saying, I personally feel that all participants in Strata should consider their communications within Strata to be of a business nature and of an appropriate standard accordingly. Yeah,

I like that Sean. And I think that's a safe sphere within which to operate. And talking about standards of behavior, I read this recently, I'm not sure if I mentioned it on a podcast. When you are committee members, the way that you conduct yourselves in committee meetings, in performing your duties as committee members and fulfilling those very clear functions of committee members,

that should also be the way that you conduct yourself when on the common property you are an elected representative of the owners. I think if you have that policy, especially as a committee member, I, I think as a human being, it's a good policy to have it conduct yourself with while respecting others and to be polite, but especially as a committee member, we're talking about setting standards of behavior here as elected representatives. I think that's a good rule of thumb for a committee member. There's a long response there from Bill and Ben. Here's Honors corporation is paying a firm \$2,000 to answer this. Interesting. Well, if you wanna

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come back to us, bill and Ben and let us know the outline of that advice,

that would be very interesting. I will come back and read that long question. Sean is saying, that's a weird interpretation, but I guess if members of the public are bullying people who are working on or off site. Yeah, I think, Sean, you're talking about the interpretation of that case with the two residents. Someone has a home business, so suddenly the strata scheme is a workplace and we can access Fair Work commission remedies.

Yeah. Worth clicking through that bench book and having a read of that case. Sean says there's been a New South Wales case recently indicating owners corporations are expected to enforce their bylaws, hasn't they? Yeah, I don't think it was the actual decision in the case. It wasn't so much a finding. It was perhaps a passing comment, which as lawyers,

the Latin term would be dicta. Not the actual decision in the case that an owners corporation must enforce bylaws. But there was something said, whether it was a tribunal member or a judge, we might try and dig that one up to be a little bit clearer on that one. Bill. And Ben's agreeing with me. Tough indeed. And thanks for the bench book.

And how good is Michael Klem on fiduciary duty, Judy? Yes. Well, bill and Ben, hopefully you've caught our, it was a Facebook Live last year with Michael Kleinschmidt on fiduciary duty, which also became a podcast. You will share, share that advice. Sounds good to me. Alright, I am gonna wrap up there. I told you,

ask Amanda, now is 10 minutes today it's 20. That was a really great question and hopefully Peter, I'm not sure if you're here, but if you're catching the replay, hopefully there is some if not helpful guidance, some interesting, interesting nuggets of information there in for you. Thank you for sharing that question. When we choose questions for our Ask Amanda now session,

I do pick out of all the questions that I get, I do pick out those questions that I think all lots of people are going to have this question. Lots of people will be interested in the answer and it might be helpful for more than just that individual person who has that very specific situation and specific question. So if you're gonna put a question out there,

have a think about. If you want me to choose it, have a think about framing it in a way that is going to be of benefit to most people. Those are the ones that get my attention. If you've put a question in for Ask Amanda now, it hasn't been answered. The place where I am every day answering questions for strata owners,

for Strata MA Managers is inside the Your Strata Property online membership community and a special hello and thank you to those members who just within the last few days, we've welcomed lots of new members into our online membership community. And I know you've already hit the forum and are asking questions in there, and I was in there this morning answering those. That's where you'll get my answers in writing.

You'll get links to additional resources. I'll link you over to video chats with other owners that I've had that are inside our member library that help to put some flesh on those answers, give you some real life experience and connect you to others who are going through exactly the same difficulties in strata as you are. Strata membership.com is the place to go to find out more about membership and to join us on the inside and start asking you questions over there in our Q and a forum.

Kristen saying fantastic question. Thanks for the asking and answering. My pleasure. Thank you very much, Peter, for asking that question. Happy long weekend to all of you, however you are celebrating it. I'll look forward to being here with you again next Friday. Why not? Let's do it. Bye for now.