All About the Land: The (Mis)application of Public Health Orders to Strata Schemes during the Delta Variant COVID-19 Outbreak in Sydney, Australia

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Abstract

Stay-at-home orders have been a key element in the management of the COVID-19 pandemic both in Australia and overseas, with profound consequences for freedom of movement, association, work, recreation and privacy. The rationale for orders is the minimisation of the spread of disease between unrelated households. However, for maximum intended effect, people need to live in residential premises that contain a single household, such as a freestanding house or terrace. In reality, well over two million Australians live in multi-household residential premises, typically strata title schemes. When confined to their homes, these people will of necessity have contact with other households through their use of collectively accessible, private common property. This article analyses the way in which NSW public health orders relied on categories of land to trigger their operation, but failed to properly account for physical and legal differences in land and buildings. The result was nonsensical, potentially ineffective and — eventually — draconian public health orders, offending the rule of law. Given the likelihood of future public health lockdowns, and the severity of their impact on ordinary freedoms, lessons must be learnt from the past to protect the health, social wellbeing and basic rights of millions of people who live in high-density housing.

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I Introduction

As a nation, Australia fared relatively well during the initial stages of the global pandemic of COVID-19. A combination of strict border controls and state-mandated lockdowns, followed by high vaccination rates limited our national death toll to 31 deaths per 100,000 until mid-2022.[1] In comparison to other nations, Australia's lockdowns were strict, and — in the case of Melbourne — extended.

The key element of lockdowns was stay-at-home orders. Their public health motivation was to increase social distancing and to minimise the spread of disease between unrelated households. Social distancing has been adopted worldwide to reduce the spread of COVID-19, as well as during previous viral pandemics, such as the Spanish flu and SARS pandemics.[2] While research on the efficacy as well as the social and political acceptability of lockdowns is ongoing, epidemiological studies have shown that 'the COVID-19 pandemic can be suppressed by a lockdown';[3] thus, it is accepted that lockdowns, including stay-at-home orders, have epidemiological benefits. At the same time, it is acknowledged that lockdowns impose extraordinary restrictions on ordinary freedom of movement, association, work, recreation and privacy — recognised human rights — with profound consequences for social and economic wellbeing. As a result, if lockdowns are used as a public health tool, they must be implemented through justifiable, intelligible and efficacious law.

The ability of stay-at-home orders to create social distancing, and to minimise the spread of disease, is dependent on the physical nature of the homes to which people are being confined. If those homes are freestanding houses or terraces, social distancing will be created between households. However, if those homes are in multi-household residential premises, typically strata schemes, people will of necessity have contact with other households through their use of collectively accessible, often poorly ventilated, private common property such as lifts and corridors. Well over two million Australians live in these kinds of homes. This article analyses public health orders declared during the 2021 outbreak of the Delta variant of COVID-19 in New South Wales ('NSW'), identifying the way in which these orders used land to trigger their operation, but failed to adequately account for physical and legal differences in residential land. For residents of high-density housing, the result was nonsensical, potentially ineffective and — eventually — draconian public health orders.

Research on the application of public health orders to high-density housing is significant both in Australia and overseas. First, although it is often locally contested, the construction of new high-density housing is inevitable in most cities worldwide. Using Australia as an example, our population is predicted to double by

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1 In contrast, the United States had a death rate of 300 per 100,000 and the United Kingdom had a death rate of 262 per 100,000: 'WHO (Coronavirus) Dashboard: Data Download', *World Health Organization* (online 23 May 2022) <https://covid19.who.int/data>.

2 Alexandra Medline, Lamar Hayes, Katia Valdez, Ami Hayashi, Farnoosh Vahedi, Will Capell, Jake Sonnenberg, Zoe Glick and Jeffrey D Klausner, 'Evaluating the Impact of Stay-at-Home Orders on the Time to Reach the Peak Burden of COVID-19 Cases and Deaths: Does Timing Matter?' (2020) 20(1) *BMC Public Health* 1750, 4.

3 Ibid.

2066, largely from inward migration, with most growth occurring in capital cities, specifically Sydney and Melbourne.[4] Sydney's outward expansion is limited by the Blue Mountains to the west and the Pacific Ocean to the east. While urban sprawl will continue in the northwest and southwest sectors, 'greenfields' development on the urban fringe is expensive owing to the lack of infrastructure. In the medium to long term, governments will continue to implement urban consolidation policies that encourage or mandate high- and medium-density development within Sydney's existing footprint. Millions of residents, either through positive choice or lack of alternatives, will live in and/or manage strata schemes. Second, at the time of writing, the COVID-19 pandemic is not over, and future lockdowns for new waves, including more-virulent and/or vaccine-evading variants,[5] are possible. Research suggests that Australians during 2020–21 were generally accepting of lockdowns, being willing to trade some freedom to avoid the negative consequences of disease.[6] Although they were more vigorously contested in other nations, lockdowns still occurred, and of course, lockdowns in all countries remain possible in the event of inevitable future pandemics. As a result, it is imperative that we learn from the mistakes of initial lockdowns, particularly mistakes in the application of public health orders to a significant segment of most cities' housing stock. Public health officials must have an accurate understanding of the legal status of space within high-density housing, as well as the powers and responsibilities of stakeholders in the sector. That understanding can only come from a fine-grained analysis of the legislation that regulates high-density housing, as well as foundational principles of land law. If we want to ensure that public health orders operate fairly and effectively on the ground, in people's lives and homes, we need to focus our analysis on the law that regulates those lives and spaces. To date, this analysis has not been done elsewhere.[7]

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4 'Population Projections, Australia', *Australian Bureau of Statistics* (Web Page, 22 November 2018) <https://www.abs.gov.au/statistics/people/population/population-projections-australia/latest-release#capital-cities>

5 Deborah Cromer, Megan Steain, Arnold Reynaldi, Timothy E Schlub, Adam K Wheatley, Jennifer A Juno, Stephen J Kent, James A Triccas, David S Khoury and Miles P Davenport, 'Neutralising Antibody Titres as Predictors of Protection against SARS-CoV-2 Variants and the Impact of Boosting: A Meta-Analysis' (2022) 3(1) *Lancet Microbe* e52-e61.

6 Kathleen Manipis, Deborah Street, Paula Cronin, Rosalie Viney and Stephen Goodall, 'Exploring the Trade-off between Economic and Health Outcomes during a Pandemic: A Discrete Choice Experiment of Lockdown Policies in Australia' (2021) 14(3) *The Patient: Patient-Centered Outcomes Research* 359.

7 Relatively high-level recommendations about Australian governments' responses to the pandemic were made in Peter Shergold, Jillian Broadbent, Isobel Marshall and Peter Varghese, *Faultlines: An Independent Review into Australia's Response to COVID-19* (Report, Paul Ramsay Foundation, October 2022). However, one general recommendation the panel made that was pertinent to the strata sector related to the need for all levels of government 'to invest in relationships with business and civil society to harness their expertise and networks in a crisis by committing to comply with the principles and core values for community engagement': at 12. In NSW, it was a source of frustration for the strata sector, strata lawyers and researchers that NSW Health was generally unwilling to consult with or benefit from sector-specific expertise.

II Public Health Orders in NSW

Australian state governments used public health orders to respond quickly and decisively to the COVID-19 global pandemic.[8] Orders are created with executive powers exercised through delegated legislation. The advantages of this approach are speed and flexibility; the disadvantages are a lack of parliamentary scrutiny, infringements of people's liberties and the potential misuse of powers.[9] In addition, when orders are drafted quickly and frequently, there are real risks of poor and incorrect drafting, creating confusion for citizens and their lawyers, as well as ineffective public health outcomes. O'Brien and Waters argue that along with front-end controls on power, back-end reviews are essential to determine whether powers were 'exercised in a manner which was lawful and meritorious in the sense that the resulting decisions were necessary and proportionate to the end to be achieved'.[10] Formal back-end reviews include judicial review and commissions of inquiry,[11] while informal reviews include academic analysis of the drafting, creation, dissemination and operation of orders. This article is one such analysis.

The power to deal with a public health emergency varies from state to state in Australia,[12] but in NSW, s 7 of the *Public Health Act 2010* (NSW) gives the Minister for Health extremely broad powers to make directions if they believe on reasonable grounds that a situation has arisen that is likely to be a risk to public health. Unlike in other states, it is not necessary for an emergency declaration to be made.[13] Under s 7(2) the Minister may take such action and by order give such directions they consider necessary to deal with the risk and its possible consequences. Although 'public health order' is defined in the Act as an order made under s 62 by an authorised medical practitioner (including the Chief Health Officer), directions of the Minister under s 7(2) can also be made by order, as was the case during the 2021 Delta outbreak. Consistent with this terminology, this article uses the term 'public health order' to refer to ministerial directions under s 7.

At daily press conferences throughout the Delta outbreak, the then NSW Premier Gladys Berejiklian emphasised that all decisions in relation to public health orders were informed by medical advice from the Chief Health Officer, Dr Kerry Chant. While there is little doubt that medical advice formed a significant part of the government's response to COVID-19, medical advice was balanced with concerns about the effect of lockdowns on the economy and people's mental health, and in

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8 Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 69, 76–89.

9 Ibid 69, 82–8; Janina Boughey, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168; Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Parliamentary Library and Information Service, Parliament of Victoria, August 2020) 4–5.

10 Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28(2) *Journal of Law and Medicine* 346, 347–8.

11 Ibid 348; Ian Freckelton, 'Government Inquiries, Investigations and Reports during the COVID-19 Pandemic' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 90.

12 O'Brien and Waters (n 10) 346–53; Stephenson, Freckelton and Bennett (n 8) 69–89.

13 *Public Health Act 2010* (NSW) s 7(1); Stephenson, Freckelton and Bennett (n 8) 69, 76.

NSW, unlike other states, the ultimate content of public health orders by ministerial direction is determined by politicians, not public health officials.[14] Further, medical advice must be implemented through the letter of the law. While public education and behavioural change were a central part of government strategy, ultimately, legal imperatives to take particular action or refrain from certain behaviour could only be found in the specific wording of the public health orders. If those orders were improperly drafted, public health aims could not be achieved.

III The COVID-19 Delta Variant Public Health Orders

Between June and September 2021 over 40 public health orders were declared with multiple amendments, culminating in stay-at-home orders in late June 2021. These required residents of Greater Sydney to remain in their homes unless they had a 'reasonable excuse' to leave.[15] Reasonable excuses included performing work not practicable to do from home, obtaining household goods and services, exercising, for childcare, providing assistance to vulnerable people and for compassionate reasons, including seeing a person with whom someone was in a relationship.[16] The orders were amended multiple times a week, and eventually implemented a five-kilometre radius in which people could shop or exercise, as well as a curfew for particular areas of Sydney.

The continual remaking and amendment of public health orders gradually increased restrictions on movement over the initial stages of the outbreak, and then gradually decreased restrictions as the outbreak subsided.[17] The government was presumably concerned to minimise extraordinary restrictions on movement and freedom of action. However, the result of gradual and continuous changes to orders was widespread confusion in the community, the legal profession and, most concerningly, the police force. Speaking in early 2022 about thousands of unpaid fines issued for alleged breach of public health orders, Redfern Legal Centre lawyer Sam Lee said:

> What we found with these COVID fines is a majority of them, in our experience, were not issued according to law, so it's a due process issue rather than a public health issue … I don't necessarily blame police because the orders kept changing so rapidly that no one was keeping up properly. It was inevitable that the outcome was going to be badly issued fines.[18]

Frequent changes were further complicated by multiple sources of information, including public pronouncements at press conferences by the Premier,

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[14] In other states, the power to make orders or directions in a public health emergency rests with the Chief Medical Officer: see O'Brien and Waters (n 10) app 1. In 2021 Victoria passed the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic), inserting s 165AI into the *Public Health and Wellbeing Act 2008* (Vic) which now vests power to make public health orders in the Minister.

[15] *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW).

[16] Ibid cls 20(1), (2), sch 1.

[17] NSW Government, 'Public Orders Relating to Delta Outbreak Restrictions', *NSW Legislation* (Web Page, March 2023) <https://legislation.nsw.gov.au/information/covid19-legislation/temporary-movement-gathering-restrictions>.

[18] Quoted in Caitlin Fitzsimmons, '"People are Struggling": $42 Million in Unpaid COVID Fines after Lockdown Blitz', *The Sydney Morning Herald* (online, 22 May 2022) <https://www.smh.com.au>.

the Minister for Health, the Chief Medical Officer, the Minister for Police, the Police Commissioner and Assistant Police Commissioners. One disturbing source of confusion was allegations by the Minister for Police and Police Commissioners about people exploiting 'loopholes' in the public health orders,[19] a concept that is deeply legally flawed. The starting point for public health orders is that all movement and contact with other people is legal unless prohibited by specific provisions of the orders. They do not operate on the grounds that 'Your Honour, it's the vibe'.[20] There were no 'loopholes'; actions were either lawful or unlawful according to the wording of the orders. Further confusion was created by attempts to provide lay explanations of orders on the NSW Health website and its social media sites. While lay explanations of law are laudable, those sources of information were sometimes contradictory or incorrect, making statements that were not substantiated by the content of the public health orders.[21] Ultimately, in late 2022, more than 33,000 fines — over half of those issued for alleged breaches of the public health orders — were cancelled by the government after it became clear that they were invalid for lack of specificity under the *Fines Act 1996* (NSW).[22]

Australian society, like all liberal democracies, is governed by the rule of law. The rule of law is a complex and much discussed concept that has spawned a vast literature over centuries, but it contains some basic elements that are relatively uncontested. One is that law should be known and knowable so that people and their legal advisers understand what is required of them to comply with the law. Laws must be publicly accessible, prospective, intelligible and consistent. They must be drafted so that it is 'possible for professionals at least to get a reliable picture of what the law at any given time requires'.[23] As the late Joseph Raz wrote, 'ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse' and law that is changed too frequently will leave people 'constantly in fear that it has changed since they last learned what it was'.[24] While there is some provision in the rule of law for less formal legal orders and emergencies, the plea that extraordinary times call for extraordinary measures must be kept in check. The use of public health orders during the COVID-19 pandemic has raised concerns about compliance with the rule of law. Questions have been asked about the publication of public health orders in accessible

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19 Hamish Goodall, 'NSW Police Minister David Elliott "Delighted" after Lockdown "Loopholes" Closed by State Government', *7news.com.au* (Web Page, 16 August 2021) <https://7news.com.au>; Samantha Maiden, 'Byron Bay COVID Case under Investigation by NSW Police', *News.com.au* (Web Page, 10 August 2021) <https://www.news.com.au>.

20 In the classic Australian film, *The Castle* (Miramax, 1997) 0:55:12–0:58:20, when asked to specify the section of the *Australian Constitution* on which he is relying, the protagonist's endearing, but less than competent, lawyer replies, 'There is no one section. It's just the vibe of the thing'.

21 For example, NSW Health tweeted on 8 August 2021: 'Masks need to be worn whenever outdoors': @NSWHealth (NSW Health) (Twitter, 8 August 2021, 11:03am AEST) <https://twitter.com/nswhealth/status/1424174432235376643>. In fact, masks were not mandated outdoors by a public health order until 23 August 2021: *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cls 3.15(2), 4.16(2).

22 Georgina Mitchell, 'More than 33,000 COVID Fines Withdrawn after Government Concedes They Are Invalid', *The Sydney Morning Herald* (online, 29 November 2022) <https://www.smh.com.au>.

23 Jeremy Waldron, 'The Rule of Law', *Stanford Encyclopedia of Philosophy* (Web Page, 22 June 2016) [5.1] <https://plato.stanford.edu/entries/rule-of-law>.

24 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 214. See also John Rawls, *A Theory of Justice* (Oxford University Press, rev ed, 1999) 209.

formats and the lack of obligation to maintain enduring, accurate records of orders.[25] This article identifies rule of law concerns in its discussion of the clarity, intelligibility, accuracy and rationality of public health orders.

Rather than analysing a moving target — the multiple versions of the public health orders that were in force during the Delta variant lockdown and multiple government descriptions of their content — this article predominantly focuses on a single order: the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) (the '*PHO*') which was in force between 13–14 September 2021, at the height of the NSW lockdown. The order is substantially similar to multiple orders in force in the preceding weeks.

IV The *PHO*: It's All About the Land

The starting point for analysing the Delta variant public health orders is a recognition that while public health orders can apply directly to individuals,[26] most of the Delta variant orders applied to land. That is, with the exception of the self-isolation orders that applied to people diagnosed with COVID-19 and their close contacts,[27] the public health orders did not apply directly to people (eg, specific individuals, people over 65, people with underlying health conditions). Rather, the orders captured people by their presence on land. While there were some categories of people who were singled out for particular rules (eg, 'authorised' workers), those categories were still connected to land — 'authorised workers' being people who lived in 'areas of concern' with high rates of COVID-19, but who were nonetheless allowed to leave their local area because they were performing essential services.[28] Because categories of land were the trigger for the *PHO*, careful attention needed to be paid to those categories. If categories did not logically correspond with risks of transmission or were legally incorrect, the effectiveness of orders could be compromised, infringing basic freedoms but providing limited, or no, public health gain.

The *PHO* divided NSW into three geographical categories with gradations of restrictions. The lowest level of restrictions applied to 'general areas', the next level to 'stay-at-home areas', and the highest level of restrictions to 'areas of concern' (colloquially known as 'hotspots'). At the height of the lockdown in August and September 2021, most of NSW was defined as a stay-at-home area, including Greater Sydney and multiple local government areas in regional NSW. The 'areas of concern' were a large swathe of local government areas and individual suburbs in Sydney's west and southwest, where rates of infection were higher than in other

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25 O'Brien and Waters (n 10) 354–5.

26 David J Carter, 'The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis' (2020) 43(1) *University of New South Wales Law Journal* 117.

27 In 2021 there were four orders titled *Public Health (COVID-19 Self-Isolation) Order* (No 1 to No 4), with multiple amendments: NSW Government, 'Public Health Orders Relating to Self-Isolation', *NSW Legislation* (Web Page, 14 October 2022) <https://legislation.nsw.gov.au/information/covid19-legislation/self-isolation>.

28 *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cl 4.3 ('*PHO*'). See NSW Government, 'Authorised Workers', *NSW Legislation* (Web Page, 15 September 2021) (no longer available at June 2023).

parts of the city or state.[29] These are also lower socio-economic areas of Sydney, which raised questions about the equitable application of the public health orders. There is not space here to address these complex issues, but suffice to say, it became clear that the impact of public health orders bore more harshly on communities where people were less able to work remotely, lived in multi-generational and/or crowded housing and were more intensively policed.[30]

Within geographical areas, further categories of land were used to implement restrictions. These related to categories of premises, primarily those 'open to the public' and 'residential premises' or 'places of residence'. Office and other work premises were not specifically closed, but they were effectively emptied of people by the prohibition on leaving a place of residence for work that could practicably be done from home,[31] as well as the requirement for employers to allow workers to work from home.[32] If non-residential premises had people inside them, they were limited to one person per four square metres.[33]

In stay-at-home areas and areas of concern, most premises normally open to the public were closed, including swimming pools, gyms, shops and hairdressers.[34] The exceptions included premises that sold food or drink to be consumed off the premises, supermarkets, chemists, and shops selling pet supplies or hardware, garden or office supplies.[35] The key public health motivation for the closure of publicly accessible premises was that those premises allow *multiple unrelated households* from a wide range of geographical areas to mix, increasing the likelihood that the virus would spread.

The combined effect of closing publicly accessible premises, requiring people to work from home, and the stay-at-home orders was to decant people out of public and non-residential space into residential premises. In residential premises that were freestanding or terrace homes, the public health orders achieved their objective: they largely prevented people from unrelated households mixing. In this sense, NSW suburbs carried out one of the primary functions for which they were constructed — preventing the spread of disease.

It is no accident that Australians overwhelmingly live in freestanding houses set in spacious gardens. It is the consequence of the Garden Suburb Movement, actively promoted by British and Australian planners in the late 19th and early 20th centuries.[36] Based on the writings of Ebenezer Howard,[37] the Garden Suburb Movement aimed to remedy the ills of British Industrial Revolution cities, which were unplanned, high density and above all else, dangerous to their inhabitants' health. In 1841, life expectancy in England and Wales generally was 41 years; in

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29 *PHO* (n 28) sch 1.
30 Kurt Iveson and Alistair Sisson, 'Transmission and Territory: Urban Borders during COVID-19' (2023) 104 *Political Geography* 102910.
31 *PHO* (n 28) sch 2(1).
32 Ibid cls 2.10(1), 3.18(1), 4.19.
33 Ibid cls 3.8, 4.9.
34 Ibid cls 3.3, 4.4.
35 Ibid cls 3.5, 4.6.
36 Robert Freestone, *Model Communities: The Garden City Movement in Australia* (Nelson, 1989); Graeme Davison, 'The Past and Future of the Australian Suburb' (1993) 31(2) *Australian Planner* 63.
37 Ebenezer Howard, *Garden Cities of To-Morrow* (Swan Sonnenshein, 1902).

Manchester and Liverpool it was 26.[38] In the 19th century, the development of germ theory and railways provided the incentive and means to get populations out of crowded, unsanitary city centres and into the quasi-rural suburbs, where families no longer lived in multi-family buildings, but in their own freestanding homes, separated from neighbours by green grass and trees.[39] The outbreak of bubonic plague in the unplanned, working class Rocks area of Sydney[40] provided an incentive to accelerate the construction of freestanding suburban housing, and by the 1920s, 81% of investment in all building work in Sydney went towards the development of low-density suburbs.[41]

Fast forward to the late 20th century and Australian cities faced problems with suburban sprawl. Peri-urban areas lacked infrastructure, incentivising governments to implement urban consolidation policies.[42] These aimed to fit new development within a city's existing footprint, and the only way to do that is to build up. Between 1996 and 2006, NSW built 10,000 attached dwellings a year, and by 2011, a quarter of Sydney's population lived in strata title apartments.[43] Some of those apartments are contained in community title developments, which are planned developments with multiple high-rise buildings, townhouses and/or freestanding homes, along with extensive, privately owned common property (eg, roads, parks, recreational facilities).[44]

In the context of a pandemic, strata title housing has two salient features: common property and a body corporate. Common property includes lifts, corridors, paths, car parks, recreational facilities and gardens (all of the spaces outside individual lots) and is accessible by all residents. The body corporate — called an 'owners corporation' in NSW strata schemes and an 'association' in community schemes — is the governing body with responsibility for the management of the scheme and its property. The body corporate is made up of all owners, not tenants, and while it might be assisted by a strata or building manager, the body corporate is the ultimate authority in a strata scheme. All aspects of strata schemes are private: that is, common property is private property, and a body corporate is a private legal entity.

If public health orders were going to confine an entire city's population to their homes, the orders needed to account for the vast physical and legal differences

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38 Kingsley Davis, 'The Urbanization of the Human Population' (1965) 213(3) *Scientific American* 40, 44.

39 Harold Platt, 'From Hygeia to the Garden City: Bodies, Houses, and the Rediscovery of the Slum in Manchester, 1875–1910' (2007) 33(5) *Journal of Urban History* 756.

40 Grace Karskens, 'Tourists and Pilgrims: (Re)visiting the Rocks' (2003) 27(79) *Journal of Australian Studies* 29, 33; Paul Ashton, '"This Villa Life": Town Planning, Suburbs and the "New Social Order" in Early Twentieth-Century Sydney' (2010) 25(4) *Planning Perspectives* 457, 457.

41 Ashton (n 40) 473.

42 Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017) 10.

43 Ibid.

44 The easiest way to understand community title developments under the *Community Land Development Act 2021* (NSW) ('*CLDA*') and the *Community Land Management Act 2021* (NSW) ('*CLMA*') is to explore the websites for large developments: see, eg, 'Home', *Jacksons Landing* (Web Page, March 2023) <https://jacksonslanding.net.au>; 'Home', *Breakfast Point* (Web Page, March 2023) <https://www.breakfastpoint.com>.

between the majority of homes in NSW — freestanding housing — and the significant minority of homes — 800,000 residential strata lots[45] and over 66,000 social and public housing apartments.[46] Unfortunately, the public health orders almost completely failed to do this. They used a single category of 'place of residence' or 'residential premises' and applied the same rules to all homes whether a freestanding house on a 500 m^2 lot or a strata scheme with 500 residents.

The *PHO* did not define 'place of residence' or 'residential premises'. Clause 1.4 stated:

> A reference to a type of premises in this Order has the same meaning as it has in the instrument (the *standard instrument*) set out in the *Standard Instrument (Local Environmental Plans) Order 2006* [(NSW)].

However, the Standard Instrument does not contain any definition of 'place of residence' or 'residential premises'. The Standard Instrument's Dictionary defines 'residential accommodation' as 'a building or place used predominantly as a place of residence', so perhaps that is what the *PHO* meant by 'residential premises' or a 'place of residence'. 'Residential accommodation' then has a broad definition in the Standard Instrument, and includes boarding houses, dwelling houses, group homes, hostels, multi-dwelling housing, semi-detached dwellings, residential flat buildings, and seniors housing. Whether using a plain English interpretation of the phrase 'place of residence' or the Standard Instrument definition of 'residential accommodation', both categories capture a huge range of housing.

The key problem with the terms 'place of residence' and 'residential premises' is that these terms refer to *land* and its use, not to buildings. In land law, buildings are fixtures, which form part of the realty; they are not separate legal entities. As a result, the terms 'place of residence' and 'residential premises' capture *all parts* of a parcel of residential land. In relation to a freestanding house, the backyard and driveway are part of a place of residence just as much as the living room and kitchen. In a strata scheme, common property lifts, corridors, foyers, paths, car parks and gardens are all part of the place of residence. Crucially, 'place of residence' and 'residential premises' does not mean an individual apartment or house. This does not matter for freestanding housing because the surrounding garden, garage, paths and so on are only accessible by the same people as the house. It matters very much for a strata or community scheme, because the common property can be accessible by between two and 2,000 unrelated households.[47]

The failure to specifically define 'residential premises' or 'place of residence' for the purposes of the public health orders produced two serious flaws. The first was that the orders did not account for the fact that publicly accessible places are not the only spaces in which unrelated households can mix. The second was that the

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45 Hazel Easthope, Sian Thompson and Alistair Sisson, *Australasian Strata Insights 2020* (City Futures Research Centre, UNSW, 2020) 7 ('*Australasian Strata Insights 2020*').

46 'Social Housing Residential Dwellings Dashboard', *Department of Communities and Justice* (NSW) (Web Page, 28 March 2022) <https://www.facs.nsw.gov.au/resources/statistics/social-housing-residential-dwellings>.

47 For example, Breakfast Point, one of Sydney's largest community title schemes, has 1,737 dwellings, predominantly apartments: 'Breakfast Point: 2016 Census QuickStats', *Australian Bureau of Statistics* (Web Page) <https://www.abs.gov.au/census/find-census-data/quickstats/2016/SSC10557>.

orders created rules that made little or no sense for collectively owned and collectively accessible residential space.

A *'Open to the Public': Not the Only Places Unrelated Households Can Mix*

On 26 June 2021, a public health order closed multiple facilities that were open to the public, including gyms and swimming pools, indoors and outdoors.[48] However, gyms and pools inside strata and community schemes were not captured by these provisions as they were not open to the public. Although the public–private divide in strata schemes is often blurred in lay perception and even legal analysis, with the exception of a small number of large schemes that include retail premises, the common property of a strata scheme is not publicly accessible.[49] Just like the front path or driveway of a freestanding home, common property is accessible by residents and the people to whom they have given express (eg, visitors and delivery people) and implied (eg, doorknockers) invitations. That group does not include the public. Although the 26 June order did not oblige them to do so, many schemes voluntarily closed their recreational facilities on the assumption that as they allowed unrelated households to mix, they posed a risk to residents' health.

It is not clear why pools and gyms were legally allowed to remain open inside strata schemes. From late June to September 2021, NSW was in the grip of ever-tightening restrictions on movement, and at daily press conferences, the Premier, Minister for Health and Chief Medical Officer implored people not to leave their homes unless absolutely necessary. Families and friends were prohibited from seeing each other, children were excluded from school, businesses and their customers were excluded from their premises. It was an unprecedented suspension of freedom of movement, association, work, recreation and privacy, all justified by public health. In this context, it seemed contradictory to allow scores of unrelated households inside high-density apartment buildings to continue to mix freely in confined indoor spaces to use pools and gyms. On 21 August 2021, the author wrote directly to the Chief Medical Officer, raising questions about the discrepancy. Seven days later, on 28 August 2021, the Chief Medical Officer wrote to strata managers stating, 'Given the risk of COVID-19 transmission communal areas such as gyms, lounges and theatres should be closed at this time'.[50] The Chief Medical Officer would have been relying on legal advice provided to her about strata schemes, but that advice did not seem to have been informed by a clear understanding of the law relating to common property for the following reasons.

Strata managers are agents who may be employed by owners corporations.[51] There is no obligation to employ a strata manager, and many schemes, particularly

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48 *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) cl 24 (commencing 26 June 2021).

49 Cathy Sherry, 'Does Discrimination Law Apply to Residential Strata Schemes?' (2020) 43(1) *University of New South Wales Law Journal* 307, 311–14.

50 Copy of letter on file with author. See also Jimmy Thompson, 'Chant Calls for Roll Updates and Strata Gym Closures', *FlatChat* (Web Page, 1 September 2021) <https://www.flatchat.com.au/chant-letter>.

51 *Strata Schemes Management Act 2015* (NSW) s 52 ('*SSMA*').

older schemes in lower income areas of Sydney, do not employ professional strata management. That said, the kinds of schemes that have facilities such as gyms and pools would have professional management.

However, strata managers have no independent authority in relation to a scheme or its common property. Common property is owned by all lot owners as tenants in common in proportion to their unit entitlement,[52] and ultimate authority for the scheme and its property rests with those owners acting through the owners corporation.[53] Owners corporations may delegate some or all of their powers to a strata manager, but they may not delegate determinations of levies or decisions that according to legislation must be made by the owners corporation.[54] Although lay people frequently refer to 'the strata' as the source of authority in schemes, there is no such entity.

A strata manager could only have the power to close common property gyms or pools if an owners corporation had delegated that power to the manager. A specific delegation like this is unlikely to have been anticipated and expressed in a strata management agency agreement, but it could be captured in a general delegation, although only if the owners corporation has that power itself. So, does the owners corporation have the power to close a gym or a pool? On the one hand, the authority of *Lin v Owners — Strata Plan No 50276* would suggest that as owners are tenants in common of common property, like any tenant in common they cannot be excluded from their own land.[55] They have the right to 'occupy the whole', a right which passes to a tenant on the grant of a lease. On the other hand, owners corporations clearly have the power to regulate the use of common property and frequently do so with reference to facilities. For example, pools and gyms are regulated by access hours and rules on use, all of which are valid. A temporary closure of a pool or gym during a public health crisis could rightly be characterised as regulation of common property. This is bolstered by the wording of s 9 of the *Strata Schemes Management Act 2015* (NSW), which states that the owners corporation has the management and control of common property 'for the benefit of the owners of lots in the strata scheme', although noticeably not for the benefit of all residents, almost 50% of whom are tenants.[56]

This raises the difficult question of what is for the benefit of lot owners? The closure of public gyms and pools seemed to indicate that these facilities presented a real risk for transmission of COVID-19 and leaving them open inside a strata scheme could be dangerous or even fatal for residents. Alternatively, some lot owners and residents might have argued that as people were confined to their homes, access to privately owned recreational facilities was essential for people's physical and mental health. One of the key challenges of the pandemic has been balancing public health risks of activities that bring people together with the mental health and economic consequences of keeping people apart.

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52 *Strata Schemes Development Act 2015* (NSW) s 28 ('*SSDA*').
53 *SSMA* (n 51) s 9.
54 Ibid s 52.
55 *Lin v Owners — Strata Plan No 50276* (2004) 1 STR (NSW) 57 (Gzell J).
56 *Australasian Strata Insights 2020* (n 45) 8.

Whatever the correct answer to this dilemma, one thing is certain: it is not the proper role of private citizens, whether owners corporations, the managers performing their tasks or the lawyers advising them, to determine these risks. By failing to close recreational facilities in strata schemes, the government was asking lay members of owners corporations to make a public health judgement about the risks of these facilities not only to themselves, but to third parties (other resident owners and tenants). That is a judgement lay people are not qualified to make. The fact that these facilities were situated on private property is no reason to default to private owners. Publicly accessible gyms, pools and retail premises are also private property, and the government did not expect their owners to make a public health judgement about the risks that their premises posed; the government simply closed them. Nor was the fact that strata owners were paying for the use of facilities a reason to leave them open. Commercial tenants were paying rent for premises they were not legally permitted to use. Finally, the residential nature of facilities was not a relevant reason to leave them unregulated. The prohibition on visitors to residential premises in force at the time was a serious suspension of one of the most basic rights associated with private residential land, the right to invite guests into your own home.[57]

Even if some members of an owners corporation, the strata committee or strata manager had come to the conclusion that gyms and pools presented an unacceptable risk, the decision to close facilities could have been met by resistance and/or anger from other owners and residents. As Easthope, Randolph and Judd state, strata schemes have a system of 'negotiated governance',[58] which can be fraught at the best of times. Problems with governance include lack of participation by many lot owners, aggression at meetings, allegations of mismanagement and self-interest, poorly trained strata and building managers, and a real or perceived lack of understanding of the law.[59] While there are owners corporations, strata committees and strata professionals that work well, the research of Easthope, Randolph and Judd demonstrates that there are significant numbers of schemes with moderate to severe governance problems. The NSW government is aware of these problems, as they are confirmed by its own research.[60] Difficulties in strata management identified by both academic and government research relate to governance outside of a global pandemic, and in relation to relatively straightforward matters such as parking and noise. If many schemes struggle to govern themselves in this context, it is unrealistic to expect those same schemes and people to manage the health risks of a pandemic.

Easthope, Randolph and Judd's research highlighted the genesis of the problem — the shift in urban governance from the public sector (local and state government) to private individuals pursuant to neoliberalism.[61] Urban consolidation has facilitated the creation of thousands of small private governments — owners corporations — responsible for individual buildings, which now make up a

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57 *PHO* (n 28) cls 3.10, 4.11.

58 Hazel Easthope, Bill Randolph and Sarah Judd, *Governing the Compact City: The Role and Effectiveness of Strata Management* (Final Report, May 2012) 41 ('*Governing the Compact City*').

59 Ibid 46–64.

60 NSW Fair Trading, 'Making NSW No 1 Again: Shaping Future Communities' (Strata and Community Title Law Reform Discussion Paper, 15 September 2012).

61 *Governing the Compact City* (n 58) 43.

significant proportion of our cities. Questions about the capacity and willingness of private citizens to perform functions imposed upon them by private governance structures, created with property law, have been the subject of decades of debate in the United States,[62] and to a lesser extent Australia.[63] These debates are a subset of broader political debates about the responsibility imposed on, and autonomy granted to, small groups in liberal democracies and/or welfare states.[64] Academic debate aside, on the ground in strata schemes

> [m]any owners and executive committee members [have] expressed frustration at the devolution of responsibility for representation and service delivery from government to owners corporations without sufficient accompanying governmental support.[65]

The failure to close pools and gyms inside strata schemes, at the same time as publicly accessible pools and gyms were closed, is a perfect illustration of this phenomenon.

B *Mandating Masks on Private Residential Land*

On 22 June 2021, public health orders mandated masks in indoor settings in which unrelated households could mix — retail premises, places of worship and other publicly accessible places.[66] The mask mandate did not apply to residential premises with the result that masks were not required to be worn on the common property in strata schemes. This was despite the fact that the corridors and lifts of schemes are areas in which unrelated households mix, and are often poorly ventilated. It is widely accepted that poor indoor ventilation is a significant risk for the transmission of COVID-19.[67] As the entire population of Sydney was subject to stay-at-home orders, with the ability to leave their homes for exercise and essential items multiple times a day, the use of common property was likely to be significantly higher than in ordinary periods, and higher than at publicly accessible premises.

After agitation from the strata sector, in particular the Owners Corporation Network,[68] a mandate to wear masks on indoor common property was introduced on

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62 Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994); Evan McKenzie, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, 2011); Robert Nelson, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press, 2005).

63 Sherry, *Strata Title Property Rights* (n 42); Cathy Sherry, 'Judicially Identified Limits on the Body Corporate By-Law Making Power: *Cooper v The Owners — Strata Plan No 58068*' (2021) 96 *Australian Law Journal* 125, 131–9.

64 Gregory S Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75(1) *Cornell Law Review* 1; David T Beito, Peter Gordon and Alexander Tabarrok (eds), *The Voluntary City: Choice, Community and Civil Society* (University of Michigan Press, 2002); Nomi Maya Stolzenberg, 'Return of the Repressed: Illiberal Groups in a Liberal State' (2001) 12(2) *Journal of Contemporary Legal Issues* 897.

65 *Governing the Compact City* (n 58) 2.

66 *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* (NSW) cl 5(1)(d).

67 Yuguo Li, William W Nazaroff, William Bahnfleth, Pawel Wargocki, Yinping Zhang, 'The COVID-19 Pandemic Is a Global Indoor Air Crisis That Should Lead to Change: A Message Commemorating 30 Years of Indoor Air' (2021) 31(6) *Indoor Air* 1683.

68 Jimmy Thompson, 'NSW Health Finally Gets the Strata Mask Message', *FlatChat* (Web Page, 4 July 2021) <https://www.flatchat.com.au/nsw-health-strata-mask-message>.

13 July 2021,[69] three weeks after the mandate came into force for other indoor spaces. The public health order defined 'common property' as

> (a) common property within the meaning of the *Strata Schemes Development Act 2015*,
>
> (b) association property within … the Community Land Development Act 1989, and
>
> (c) [for company title premises] a part of the premises used as common property … or that no person has the exclusive right to occupy.[70]

While this demonstrates some attempt to capture diverse forms of housing, the definition did not capture public and social housing apartments, boarding houses or apartment buildings with a single owner, all of which contain spaces in which multiple unrelated households can gather.[71] Subsequent serious outbreaks in public housing towers and social housing buildings demonstrated the risk of COVID-19 transmission within these premises.[72]

The drafting of the mask mandate highlights the fundamental confusion within the *PHO* about the phrases 'residential premises' and 'place of residence'. By 13 September 2021, cl 3.15(2) stated:

> A person in a stay-at-home area who is over the age of 12 years of age must wear a fitted face covering while the person is —
>
> (a) in an indoor area or outdoor area other than a place of residence, or
>
> (b) in an indoor area on common property for residential premises …[73]

The clause uses both 'place of residence' and 'residential premises'. While it might be tempting to assume that the term 'place of residence' in sub-cl (a) means an individual home (eg, an apartment), if that were the case, then sub-cl (b) would be otiose. Having required everyone to wear a mask outside their individual home, there would be no need to mandate masks on common property. In any event, 'place of residence' does not mean individual home; it refers to a parcel of residential land, which is why sub-cl (b) was necessary. Left on its own, sub-cl (a) would only require people to don a mask as they stepped off common property onto a public street. What drafters were attempting to achieve with the use of the different phrases 'place of residence' and 'residential premises' within the clause remains unclear.

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69 *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) (as amended by the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 4) Order 2021*) cl 17(1)(a1).

70 Ibid cl 17(6).

71 The government did produce management guidelines: Sydney Metropolitan Emergency Management Region, *Multi-Agency Emergency Management Guidelines to Support a COVID-19 Outbreak in a Public Housing Setting* (Report, March 2021) ('*Multi-Agency Emergency Management Guidelines*'). However, they had no force of law, and were only intended to ensure that masks were available to public housing tenants and that their use was 'promoted'. Unlike in private strata title apartment buildings, masks were not legally mandated in public housing.

72 Megan Gorrey, '"Scared as Hell": COVID-19 Cluster Emerges in Sydney's Public Housing Towers', *The Sydney Morning Herald* (online, 16 September 2021) <https://www.smh.com.au>; Zena Chamas, 'Police Enforcing Strict Lock-In a "Worst Nightmare" for Vulnerable Sydney Social Housing Residents', *The Guardian* (online, 15 September 2021) <https://www.theguardian.com/australia-news>.

73 *PHO* (n 28) (as amended by *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment (No 7) Order 2021* (NSW) sch 1 [20], [34]).

Although the mandate to wear masks was extended to outdoor areas in Greater Sydney on 23 August 2021, it was not extended to outdoor common property.[74] While some outdoor common property is only accessible by a single household (eg, balconies in some schemes), most outdoor common property is accessible by multiple households, and can include relatively small courtyards, gardens and restricted paths. Outdoor association property in community title schemes can be more expansive, including parks, tennis courts and pavements, but residents of large associations can number in their thousands. For example, Jackson's Landing in Pyrmont has over 2,500 residents,[75] and Breakfast Point, in the inner west of Sydney, has over 4,000 residents.[76] As a result, it was incongruous that people were required to wear masks in a large public park, but not on the paths, courtyards or open space of a strata or community scheme.

The initial failure to mandate masks on common property produced the same invidious default position as the failure to close pools and gyms. That is, lay members of strata committees, strata managers and also their lawyers, were required to make a public health judgement that they were not qualified to make. Research on face masks has evolved over the course of the pandemic,[77] making an assessment of the necessity for masks on common property extremely difficult for lay people. However, knowing that masks were mandated in other indoor areas and that owners corporations owe a duty of care to residents for injuries sustained on common property,[78] many strata committees felt compelled to consider the issue.[79] Thirty-six per cent of residents of NSW strata schemes are over the age of 40,[80] and an indeterminate number of residents are immunocompromised or have underlying health problems.

Strata schemes could have passed by-laws requiring all residents, their visitors and tradespeople to wear masks on common property. By-laws can be made 'in relation to the management, administration, control, use or enjoyment of the lots or the common property',[81] and are valid if they regulate activities that have a meaningful effect on others,[82] as mask wearing does. However, like all decisions of

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74 *PHO* (n 28) (as amended by *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment Order 2021* (NSW) sch 1 [1]–[9], [11], [12], [14]–[29]) cls 3.15(2), 4.16(2).

75 'About Us', *Jacksons Landing* (Web Page, March 2023) <https://jacksonslanding.net.au/about-jacksons-landing>.

76 'Breakfast Point: 2016 Census QuickStats' (n 47).

77 Fiona McDonald and Claire J Horwell, 'Facemasks for Public Use during the COVID-19 Pandemic: An Examination of Responses in England and Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 150, 151–2.

78 *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; *Morgan v Owners of Strata Plan 13937* [2006] NSWSC 1019; *Trevallyn-Jones v Owners Strata Plan No 50358* (2009) 14 BPR 27,113.

79 Jimmy Thompson, 'Strata Experts Split over Using "Mask-Up" By-Laws', *FlatChat* (Web Page, 15 July 2021) <https://www.flatchat.com.au/by-laws-for-masks>.

80 *Australasian Strata Insights 2020* (n 45) 8.

81 *SSMA* (n 51) s 136.

82 In *Cooper v Owners of Strata Plan No 58068* (2020) 103 NSWLR 160, Basten JA held (at 174–5 [61]) that there was no legislative basis to make a by-law that regulates activity that has no effect on others because such a by-law 'lacks a rational connection with the enjoyment of other lots and the common property'. Conversely, a by-law that regulates activity that has a meaningful effect on others is prima facie valid: Sherry, 'Judicially Identified Limits on the Body Corporate By-Law Making Power' (n 63).

owners corporations, the creation of by-laws occurs through a process of 'negotiated governance' with all of the challenges noted above. Further, new by-laws rightly require time and formality; trigger-happy regulation of other people and their property is deeply undesirable in strata schemes, potentially violating the sanctity and security of people's homes. As a result, by-laws must be voted on at a properly convened meeting of the owners corporation, garner special majority agreement, and then be recorded on the Torrens title register.[83] Like ordinary legislation, by-laws are not designed to meet the time pressures of a public health crisis.

This problematic state of affairs could have been avoided if the public health orders had been drafted with a proper definition of 'place of residence': that is, by defining 'place of residence' as *an individual household*, the relevant category for the prevention of disease transmission. For example, the Singaporean regulations defined 'place of residence' as

> (a) in relation to a subdivided building, an apartment or unit or a flat or lot in that building that is used as a complete and separate unit for the purpose of habitation or business;
>
> (b) in relation to a boarding premises in Singapore, a room comprised in the boarding premises for the accommodation of one or more boarders or lodgers at those premises, but not a room with shared facilities such as a communal living room, bathroom, laundry or kitchen; and
>
> (c) in relation to a building in Singapore used as specified accommodation or a specified hostel, a room in the building for the accommodation of one or more guests or residents of the specified accommodation or the specified hostel.[84]

The Singaporean regulation mandated mask wearing from the moment people stepped outside the front door of their own household, achieving the primary purpose of COVID-19 restrictions, namely, to minimise the spread of the disease between unrelated households.

It should be noted that the lack of definition of 'place of residence' or 'residential premises' in the NSW public health orders did not stem from a lack of detail. The orders were sufficiently fine-grained to address Lord Howe Island, tanning salons, waxing salons, gaming lounges, group dance classes, vessels for snorkelling, scuba diving and marine animal watching, and a range of other premises and activities. In this context, it was reasonable to expect that sufficient specificity would be given to the single most important category of land in stay-at-home orders: people's homes.

Ultimately, the failure to close gyms and pools inside strata schemes, and to initially mandate masks on common property, highlights a lacuna in public health thinking. Public health policy focuses on publicly accessible places as though they are the only areas in which unrelated households can mix. To the extent that people live in freestanding or terraced housing, this is true; for the significant segment of the population who live in strata or community title schemes, it is not. This housing contains privately owned, non-publicly-accessible space that is used by multiple

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83 *SSMA* (n 51) s 141.

84 *COVID-19 (Temporary Measures) (Control Order) Regulations 2020* (Singapore) reg 2.

unrelated households. It is essential that public health understanding of land that presents risks for the spread of viral diseases is expanded to include common property within strata and community title schemes — not so that residents can be subjected to draconian public health orders, such as those discussed below, but so that protective measures can be appropriately applied to strata schemes, and owners and occupiers can be given effective support and guidance. Further, public health officials must be provided with accurate advice about who owns that land, and how the powers and responsibilities that usually flow from land ownership are modified by strata and community title legislation.

C *Nonsensical and Unworkable Provisions: Workers in a Place of Residence*

In addition to problems with mask mandates, the inadequately defined category 'place of residence' made significant sections of the *PHO* nonsensical for strata schemes. This created acute problems for strata committees, strata managers and — most importantly — the lawyers advising them. Lawyers cannot advise clients on the basis of the 'vibe' of legislation or what they thought the government was trying to achieve. They have professional obligations to advise on the basis of what the law actually says. Law that is so unclear that even professionals cannot ascertain its meaning offends the rule of law.

One particular area of confusion related to the authorisation of workers to enter residential premises. Before discussing the specific problems for strata schemes, it must be noted that these provisions repeatedly contained what could only be described as a serious mistake.

Clauses 3.11(1) and 4.12(1) stated: 'A worker is authorised to visit a place of residence … to carry out work other than prescribed work.' The Dictionary defined 'prescribed' work as:

> (a) cleaning,
> (b) repairs and maintenance,
> (c) alterations and additions to buildings,
> (d) work carried out as part of a trade, including electrical work or plumbing.

'Work' was defined to include work done as a volunteer or for a charitable organisation and 'prescribed work' was permitted in circumstances defined in cls 3.11(2) and 4.12(2).

The upshot of cls 3.11(1) and 4.12(1) was to authorise *any work at all* in other households, other than 'prescribed work'. The *PHO* required residents of stay-at-home areas to work from home unless it was not reasonably practicable to do so,[85] and residents of areas of concern to stay at home unless they worked in essential services.[86] This prohibited workers such as academic tutors entering someone else's home, because tutoring could be done remotely. However, other work, such as mobile massage or hairdressing services could not be done remotely, and workers

[85] *PHO* (n 28) sch 2(2).
[86] Ibid.

were thus authorised to leave their own homes. Clauses 3.11(1) and 4.12(1) then authorised these workers to enter other people's residences in stay-at-home areas and areas of concern. Lest these examples seem fanciful, the inability to get a haircut during lockdown was a pressing concern for many, with long queues forming at salons as soon as restrictions were eased.[87] The blanket authorisation of all workers to enter homes, if they could not do their work from their own home, was an extraordinary provision in the context of prohibitions on a single visitor — including close family members — to a home.[88] It is hard not to conclude that the provision was a mistake, and yet it repeatedly appeared in orders throughout the lockdown.

Moving to specific problems for strata schemes, the basic rule in stay-at-home areas was that 'prescribed work' (cleaning, repairs, maintenance, alterations, additions and trade work) could be done in an indoor area if:

- there were no more than two workers in the 'room' and no other person was in the room; or
- the work was necessary.[89]

The common property of many strata and community schemes is extensive and it is not possible for residents to clean this area themselves. In the context of a pandemic of a disease transmissible via surfaces,[90] cleaning of high-touch areas such as lift buttons and balustrades was essential. Despite these facts, the *PHO* made the *legal* cleaning of common property in stay-at-home areas impossible for two reasons. First, common property is not a 'room'; it is all of the space that falls outside individual lots on a strata plan of subdivision,[91] or lot 1 community property on a community plan of subdivision.[92] As people need to access common property at all times to enter and exit their homes, it is impossible to ensure that no one, other than the workers, is in that 'room'. Second, cleaning work did not qualify as permissible on the ground that it was 'necessary'. This is because, although 'necessary' was defined in cl 3.11(3)(a) to include work that was 'urgently' needed to be done 'to ensure the health, safety or security of the place of residence or persons residing at the place of residence',[93] 'cleaning' was given a narrower, specific definition. Under cl 3.11(3)(c), cleaning was only 'necessary', if it was carried out in a place of residence that was unoccupied and the cleaning was necessary for the sale or lease of the premises. Those criteria could only ever apply to an individual apartment or house, not the common property of a strata or community scheme. Rules of statutory interpretation require specific provisions of legislation to qualify more general provisions, thus sub-cl (c) overrode sub-cl (a) with the result that cleaning of common property was prima facie illegal in stay-at-home areas.[94]

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87 Samantha Lock, Mostafa Rachwani and Rafqa Touma, 'With Queues at the Pubs and Beauty Salons, Sydney Reopens after More Than 100 Days in Lockdown', *The Guardian* (online, 11 October 2021) <https://www.theguardian.com/australia-news>.

88 *PHO* (n 28) sch 2.

89 Ibid cl 3.11(2).

90 Li et al (n 67) 1683.

91 *SSDA* (n 52) s 4.

92 *CLDA* (n 44) ss 8–10.

93 *PHO* (n 28) cl 3.11(3)(a)(ii).

94 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 370 (Brennan CJ).

In 'areas of concern' or so-called 'hotspots' the provisions on workers in residences were stricter still. Workers were only allowed to enter a place of residence to do prescribed work that was 'necessary', but again, necessary cleaning was limited to work done on an unoccupied premise being offered for lease or sale.[95] It is hard not to conclude that the government was more receptive to the concerns of the real estate industry, which profits from the sale and leasing of homes, than the concerns of people actually living in those homes.

Despite the prohibition on cleaning, the drafting of the public health orders was sufficiently confusing for owners corporations and strata managers that most schemes continued to employ cleaners. However, there was considerable concern about whether strata cleaners, many of whom lived in the lower socio-economic 'hot spots' of Sydney, were performing 'essential' work, and thus were, or should be, permitted to leave their local government area.

In addition to their nonsensical application to common property, the provisions authorising workers in a place of residence created risks for strata residents that the government did not seem to have considered. In stay-at-home areas, the provisions allowed homeowners to have any work done to their properties, so long as there were only two workers and no one else in a room. That provision allowed owners of non-strata properties to make a judgement about their own appetite for risk and to minimise that risk by leaving their homes when workers were present. However, for strata residents, it meant that every apartment in a building could have two workers in their residence, creating the potential for large numbers of workers accessing common property corridors and lifts. Residents who invited workers into their apartments were in effect making decisions about the level of risk to which other residents, including vulnerable residents, were exposed. In addition to the health concerns, the noise of renovations in adjacent apartments is more disruptive than renovations in a neighbouring freestanding home. This noise was occurring at a time when everyone was confined to their apartments, including workers and school children. Again, questions must be asked about the government's preparedness to place the needs of those who profit from homes — in this instance, the building sector — over the needs of residents of those homes.

V Targeting Low-Income Residents of High-Density Housing: 'High COVID-19 Risk Premises'

Throughout the Delta variant outbreak there was a *Public Health (COVID-19 Self-Isolation) Order 2021* (NSW) which required anyone who had tested positive to COVID-19 to isolate in their 'residence'.[96] It also required 'close contacts' to do the same.[97] A close contact was defined as a person identified by an authorised contract tracer to have likely come into contact with a positive person, and who was at risk of developing COVID-19.[98]

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95 *PHO* (n 28) cl 4.12(2)–(3).
96 *Public Health (COVID-19 Self-Isolation) Order 2021* (NSW) cl 5.
97 Ibid cl 6.
98 Ibid cl l.3.

With one notable exception, the self-isolation orders also paid no heed to the physical nature of strata schemes and the risks they presented. Somewhat incongruously, the self-isolation orders used a third term 'residence', rather than 'place of residence' or 'residential premises', but the term suffers from the same definitional problem — for a person who lives in a strata scheme, their lot and the entire common property is their 'residence'. As a result, the orders completely failed to address the obvious risk that COVID-positive residents and their close contacts presented if they moved through common property to access laundries, garbage rooms or recreational facilities. This point needs to be made clear — despite the extraordinary restrictions on movement during the Delta outbreak for all people, including those who were COVID-negative, with one minor exception (discussed below) at no point was it illegal for a COVID-*positive* resident of a strata scheme to leave their apartment and mix with unrelated households on common property.

NSW Health eventually addressed these risks on its website, recommending that COVID-positive residents avoid using common property, but law is not made by website. As a result, private citizens — strata committees, strata managers, lawyers and residents — were left to address the risk on their own, with the same lack of medical expertise and ambiguous legal authority discussed above in relation to facilities and masks. The government provided no assistance or even guidance on how COVID-positive residents were meant to take out their garbage, do washing or pick up food deliveries left at the front door of buildings. While many schemes developed a newfound sense of community and co-operation during lockdown, that could not guarantee assistance to all COVID-positive residents of all buildings in Sydney.

In early September 2021, COVID-19 began to spread in a social housing building in inner Sydney.[99] In response, the government made *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* (NSW). This extended self-isolation orders from individuals to entire apartment buildings. It allowed the Minister to make a declaration that premises with more than two dwellings were 'high COVID-19 risk premises' if a single resident tested positive or was simply a close contact, and a public health officer believed there was a risk of transmission between residents.[100] All residents of the building, as well as any non-residents present at the time of the declaration, became 'affected persons', *even if they were COVID-negative and not a close contact*. Pursuant to the Minister's direction, affected persons were not permitted to leave their 'residence' for any reason, other than an emergency or if authorised by a medical officer or the Commissioner of Police.[101] They were not permitted to leave for food or exercise. Non-residents, which included visitors and workers, could be ordered to go to a quarantine facility or hospital or to 'reside in a dwelling in the high COVID-19 risk premises until medically cleared'.[102]

There were strict provisions imposing obligations on affected persons to provide information to the police.[103] A person residing or simply present at a

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99 Chamas (n 72).
100 *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* (NSW) cl 9 ('*September PHO*').
101 Ibid cl 12.
102 Ibid cl 13.
103 Ibid cl 18.

declared premise had to respond to any request made by police about who was residing at or present on the premises. If police knocked at the door, affected persons were legally obliged to open the door. In addition to affected persons, at the direction of the Commissioner of Police 'a person involved in the management of high COVID-19 risk premises' had to provide information that assisted in identifying affected persons.[104] This section captured strata and building managers, as well as real estate agents and arguably lawyers. There was an obligation to 'ensure' (as opposed to make reasonable efforts) that any information provided was true and accurate.[105] The potential consequences of failing to comply with these ministerial directions were fines of up to $11,000 (100 penalty units) and imprisonment for up to six months.[106]

In contrast to the main public health orders (the *PHO*), the government seemed to have finally turned its attention to strata schemes in the high COVID-19 risk premises order. The order was clearly aimed at apartment buildings, and it contained provisions specific to strata. For example, included in the narrow category of people permitted to enter the premises were people 'entering for the purposes of undertaking functions or providing services necessary for the ordinary operation of the premises'.[107] Unlike the drafting of the main public health order, when this order was drafted the government seemed to be aware that cleaning is essential in apartment buildings, particularly to prevent the spread of disease.

However, the fundamental confusion about private lot property and common property remained. Clause 12(1) of the order required an 'affected person' to remain in their 'residence', which, as noted, includes the common property — the very space in which the virus could be transmitted between households, intensifying the building outbreak. It took a full three weeks for the order to be amended with the insertion of cl 12(5) which mandated that 'affected persons' could not use any part of common property unless authorised by a public health officer.[108] However, as noted, 'affected persons' was a blanket category, capturing all residents, including those who were neither COVID-positive nor a close contact. For most of the period in which it was in force, all the order did was:

- lock all residents of a building away from the rest of the community, regardless of the lack of risk that COVID-negative people presented; and
- increase the risk that the virus would spread within the building by failing to require COVID-positive residents and their close contacts to remain in their apartments.

The order was so poorly drafted and irrational that it must be considered a violation of the rule of law.

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104 Ibid cl 15.
105 Ibid cls 15(2), 18(2).
106 *Public Health Act* (n 13) s 10.
107 *September PHO* (n 100) cl 9(f)
108 *Public Health (COVID-19 Self-Isolation) Order (No 3) Amendment (No 3) Order 2021* (NSW) sch 1 [2] (commenced 28 September 2021).

Only a small number of buildings were declared to be high COVID-19 risk premises. One was a church-run aged care facility for men in inner Sydney, while the others were private strata schemes in low-income areas. The numbers of COVID-positive cases in some buildings were relatively low. For example, in an 83-dwelling premise in Wollongong, there were only four dwellings with COVID-positive residents, and a further 61 with close contacts.[109] While there was a serious outbreak in the public housing towers in Waterloo in inner Sydney, declarations were never made in relation to these buildings,[110] possibly as a result of failures during the lockdown of 3,000 public housing residents in Melbourne in 2020, and the subsequent damning report by the Victorian Ombudsman.[111] Another possible explanation for the limited number of lockdowns of buildings in Sydney is the logistical challenge of feeding residents that lockdowns create. Delivery of food to public housing tower residents in Victoria was described as 'chaotic',[112] and in NSW, contingency plans for the delivery of food hampers to public housing tenants who 'could not meet their own needs' was grim, with hampers containing ready meals, noodles and pasta, but no fresh fruit or vegetables.[113] The early 2022 Shanghai lockdown produced distressing footage of thousands of residents screaming from their apartments at night as food supplies dwindled.[114]

Having initially claimed that strata schemes did not merit being a special case,[115] when the government finally turned its attention to high-density housing, the response was positively draconian, subjecting all residents and managers of some strata schemes to exceptionally intrusive orders. Only low-income or social housing schemes were subject to high COVID-19 risk declarations, although there were cases in multiple schemes across Sydney, including high-income schemes. As Silva states,

> evidence exists (and is often overlooked) to strongly suggest that it is persons who are socially and politically marginalised who are often subject to coercive measures in the name of public health. … The expediency of coercive public measures might be unconsciously too tempting not to use against marginalised populations, especially when public health workers are stretched to — or beyond — capacity, such as during a pandemic.[116]

To the author's knowledge, only two countries have locked in entire apartment buildings: Australia and China.[117] In early 2022 in Shanghai, 28 million people were

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109 Letter, 'Notice Declaration of High COVID-19 Risk Premises, 75–79 Keira St Wollongong 2500', 16 September 2021 (copy on file with author).

110 Gorrey (n 72).

111 Victorian Ombudsman, Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020 (Report, December 2020).

112 Ibid 4.

113 *Multi-Agency Emergency Management Guidelines* (n 71) 20–2.

114 Eryk Bagshaw, 'Why People Are Screaming from Their Apartments in Shanghai', *The Sydney Morning Herald* (online, 11 April 2022) <https://www.smh.com.au>.

115 Sue Williams, 'Lockdown on Elan, One of Sydney's Biggest Apartment Towers, Eased after No More Positive COVID Cases', *Domain* (Web Page, 27 June 2021) <https://www.domain.com.au>.

116 Diego S Silva, 'COVID-19 in the Public Housing Towers of Melbourne: Upholding Social Justice when Invoking Precaution' (2020) 44(5) *Australian and New Zealand Journal of Public Health* 430, 430.

117 Huizhong Wu, 'Sealed In: Chinese Trapped at Home by Coronavirus Feel the Strain', *Reuters* (online, 22 February 2020) <https://www.reuters.com/article/us-china-health-quarantine-idUSKCN20G0AY>.

confined to their individual apartments, with little or no outdoor access, for over two months. While rare, whole building lockdowns highlight a fundamental vulnerability of residents of high-density housing: with a single exit, it is possible to confine hundreds of people to their homes in a way that would not be possible if people lived in freestanding housing. This vulnerability may require considerably more attention in future COVID-19 outbreaks or other pandemics.

VI Conclusion

Public health orders and the restrictions they imposed were arguably a necessary and effective response to the COVID-19 Delta variant. NSW had considerably fewer cases, serious illnesses and fatalities as a result.[118] However, that does not mean that the government's response should not be subject to scrutiny, particularly given the extraordinary effect that orders had on fundamental freedoms, including movement, association, work, recreation and privacy. The COVID-19 pandemic is not over, and future pandemics are likely. Having limited experience in managing pandemics in the past century,[119] we have a lot to learn about legal and other responses. That is particularly the case in relation to strata title, a form of housing with collectively owned common property, that did not exist during the last global pandemic, the Spanish flu.[120]

One of the key failures of the NSW government during the Delta variant outbreak was a failure to consider physical and legal differences in housing. If the key response to a pandemic is to confine millions of people to their homes, attention to those homes is imperative. For the majority of the population who live in freestanding or terraced housing, stay-at-home orders achieved their aim of preventing unrelated households mixing, performing the precise public health function that their initial development intended: that is, to minimise the spread of disease. However, for the significant minority of people who live in strata title apartments — over one million NSW residents — stay-at-home orders needed to be more accurately drafted, and underpinned by a proper understanding of land law. Unless legislation otherwise specifies, references to 'residence', 'residential premises' and 'place of residence' are references to land and its use; they are not references to buildings or individual apartments. Those phrases, used repeatedly in the public health orders, needed to be specifically defined as *the area occupied by a single household*, the relevant category in the context of a viral pandemic. The absence of definition produced nonsensical and unworkable results, offending the rule of law and potentially compromising public health.

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118 See, eg, the data tables at 'WHO Coronavirus (COVID-19) Dashboard', *World Health Organization* (Web Page) <https://covid19.who.int/data> and compare the case numbers detailed in NSW Government, 'COVID-19 Weekly Surveillance Reports: Archive', *NSW Health* (Web Page) <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/weekly-reports-archive.aspx>.

119 Gabrielle Wolf, 'COVID-19 in Historical Context: Australian Legal and Regulatory Responses to Past Influenza Pandemics' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 34–50.

120 The Spanish flu affected Australia during 1918–19: ibid 37–44. The first strata title Act in Australia was the *Conveyancing (Strata Titles) Act 1961* (NSW), and strata or condominium legislation in most other nations dates from the same period or later.

By failing to account for strata schemes in the public health orders, the government-imposed obligations on private citizens (strata committees, their lawyers and strata and building managers) to make public health judgements that they were not qualified to make. This stood in contrast to the absence of expectation placed on private citizens in retail and commercial sectors. However, it was not clear that the government actually understood who they were imposing these obligations on in the residential sector. Repeated communication by NSW Health with strata managers indicates that the government erroneously believed that all strata schemes have professional management, and that authority in schemes rests with managers. It does not. The authority in all strata schemes rests with the owners. After decades of government facilitation of strata development, and a recent wholesale review of strata and community title legislation leading to new Acts,[121] it is inexcusable that any government department does not have a clear understanding of the legal and physical structure of strata schemes which house a significant minority of the population.

Finally, when the government turned its attention to strata schemes and the obvious risks that they present for the transmission of COVID-19 between residents, its response was extreme and punitive. The provisions on 'high COVID-19 risk premises' offended the rule of law with their lack of rationality and efficacy and their differential application.

Multiple challenges remain in the management of high-density housing in the event of future COVID-19 variants or another pandemic. Can strata schemes require vaccination as a condition of entry for visitors and tradespeople or for the use of common facilities by residents? In the event of a more deadly strain, can schemes exclude all visitors from the building? Do schemes need to improve their ventilation, and what should they do if the majority of lot owners — almost 50% of whom are investors who do not live in schemes and are not at risk — refuse to agree or pay? If another lockdown occurs and COVID-positive people are confined to their apartments, who is responsible for assisting them with food, laundry and rubbish removal? Answers to these questions cannot be left to private citizens with no public health expertise or legitimate authority to determine civil liberties. Answers must come from government. This will only occur once governments recognise the physical and legal diversity of housing when providing advice to citizens and, most importantly, when drafting the terms of public health orders.

[121] *SSMA* (n 51); *SSDA* (n 52); *CLMA* (n 44); *CLDA* (n 44).