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Are by-laws prohibiting short term lettings including Airbnb valid? NCAT has just weighed into the debate.

Introduction

In *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52, the NSW Civil & Administrative Tribunal (**NCAT**) held that an owners corporation's by-law prohibiting short term letting (like Airbnb) was invalid.

At first glance, we expect many people will cite this case in support of the proposition that a by-law prohibiting short term letting like Airbnb is invalid. However a read of NCAT's decision reveals the reasoning in it is so seriously flawed that an appeal against the decision should be inevitable and if there is no appeal, the decision is unlikely to be followed by NCAT in other cases.

Background facts

Strata plan 11825 is a 5 lot residential strata scheme in Woollahra, a leafy suburb of Sydney's eastern suburbs. One owner occupier in the scheme, the applicant Ms Estens, liked travelling interstate and overseas and when she did so, she let her unit out on Airbnb. Another owner occupier, Ms Tesoriero, complained of people (presumably Ms Estens' Airbnb guests) using the common laundry in a manner causing disruption to her peace and enjoyment and also complained of men relaxing on Ms Estens' deck (once again presumably Ms Estens' Airbnb guests), drinking beer and watching her. These strangers made Ms Tesoriero feel uncomfortable.

The owners corporation passed a by-law prohibiting short term letting and it was registered on the common property title at NSW Land & Property Information. Ms Estens successfully challenged the by-law in NCAT. Ms Estens represented herself and the owners corporation was represented by its strata manager. No side was legally represented.

Ms Estens based her challenge on section 139(1) and (2) of the *Strata Schemes Management Act 2015* (**SSMA**) which provides:

- (1) A by-law must not be harsh, unconscionable or oppressive.
- (2) No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.



NCAT's reasons

NCAT found that:

- An Airbnb tenancy is sufficient to constitute a tenancy or lease with specific commencement and end dates that gives the tenant exclusive use of the property.
- Therefore, the by-law prohibiting short-term letting infringed SSMA section 139(2).

In support of these findings, NCAT relied on:

- A publication of NSW Fair Trading in November 2016 that indicated no by-law could restrict short term letting.
- The recommendations of the NSW Legislative Committee Environmental Planning Report dated October 2016, first that an owners corporation should not have the power to ban short term letting, and second that short term letting should not trigger a change of use of a property because it is of the same character as long term or traditional letting.

Why NCAT may be wrong?

Rather surprisingly, nowhere in NCAT's reasons for decision is the by-law in question reproduced. Therefore, it is difficult to understand the decision.

NCAT's reasons are brief. They indicate that NCAT deferred to both the NSW Fair Trading publication and the NSW Legislative Committee Environmental Planning Report without any analysis of those reports or whether the legal views expressed in them are correct. Neither publisher of those documents is a court or tribunal and NCAT was not bound to defer to them, like it is bound to follow an NCAT Appeal Panel or Court decision.

NCAT did not refer to a recent WA Court of Appeal decision in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104, which, when considering the WA equivalent of section 139(2) of the SSMA, upheld a by-law prohibiting short term letting.

Further, NCAT did not refer to planning law which is often picked up by strata by-laws. For example, model by-law 18 "*Compliance with planning and other requirements*" in schedule 3 of the *Strata Schemes Management Regulation 2016* prohibits lots being used for a purpose that is prohibited by law. Many environmental planning instruments of NSW local councils prohibit short term tourist and visitor accommodation and the like without development consent.



Short term letting without a development consent, where such a consent is required under the local environmental planning instrument, is unlawful. Therefore, model by-law 18 would apply to ban it in a strata scheme.

If the Parliament can prescribe a model by-law like model by-law 18, then there should be no reason why an owners corporation cannot make the same by-law or a by-law that has the same effect.

What next?

It remains to be seen whether there will be an appeal. However, given the brevity of NCAT's decision and its failure to deal with the issues in any depth, this decision is unlikely to be the end of the dispute about whether an owners corporation can pass a by-law that bans short term letting.

About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for OVER 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law, building defects and levy collection.

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