

SHORT TERM ACCOMMODATION

CAN IT BE STOPPED?

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Short Term Accommodation



Can it be Stopped?

Short Term Accommodation – An Introduction

- This short paper explains why most owners corporations in NSW are currently able to make by-laws that prohibit unlawful short term accommodation in their strata schemes.
- The paper does this by reviewing recent statements made by NSW Fair Trading and NCAT about this topic and considers some cases decided in other jurisdictions about short term letting by-laws which have gained recent media attention.

Short Term Accommodation – An Introduction

- This paper does not consider any changes to the laws regarding the regulation of short term accommodation in NSW.
- This is because, presently, the NSW Government has not made any changes to those laws and may not do so for several years.

Short Term Accommodation – The Basics

- A lot in a strata scheme is able to be used in many different ways.
- For example, a lot can be used as a home, office or shop.
- The use of a lot for short term accommodation is another example of the way in which a lot can be used.

Short Term Accommodation – The Basics

- An owners corporation is able to make a by-law prohibiting a lot being used in a certain way.
- This is because the strata legislation permits a by-law to be made which prohibits the use of a lot for a certain purpose and this power has been interpreted broadly by the courts.

Section 136 Strata Schemes Management Act 2015

136 Matters by-laws can provide for:

- (1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.

Hamlena's Case

In *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) 5 BPR 97,367, the NSW Court of Appeal said the following about by-laws:

“Parliament must have intended bodies corporate to have power to pass by-laws regulating “the use” of each lot in a strata plan, and it must have been apparent to Parliament when arming bodies corporate with this power that it extended to regulating what trades, avocations and activities could and could not be conducted on each lot.”

The Confusion – Restricting Leasing

- A by-law cannot prohibit or restrict a lease of a lot.

139 Restrictions on by-laws

...

- (2) By-law cannot prevent dealing relating to lot

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.

The Confusion – Restricting Leasing

Does a by-law that prohibits a lot being used for short term accommodation restrict the leasing of the lot?

NSW Fair Trading Has Its Say

- “No by-law is capable of restricting a dealing in a lot, including restricting short-term letting.”

NCAT Has Its Say

- In *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52, NCAT held that a by-law prohibiting short term letting (through Airbnb) was invalid.
- NCAT said use of a lot by a person through Airbnb involved a lease of the lot to that person.
- Therefore, a by-law that purported to prohibit use of a lot through Airbnb was an attempt to restrict the leasing of the lot and invalid.

NCAT Has Its Say

- Did NCAT get it wrong?
- Will the decision in the *Estens* case be followed in the future by NCAT?
- If not, why not?

Privy Council Has Its Say

- In *O'Connor (Appellants) v The Proprietors, Strata Plan No. 51 (Turks and Caicos Islands) [2017] UKPC 45* the Privy Council in England held that a by-law prohibiting a lot being rented for less than 1 month was valid.
- This case involved an analysis of strata legislation in the Turks and Caicos Islands.
- The legislation is based on the NSW strata legislation.

Privy Council Has Its Say

- Strata Titles Ordinance (CAP 9.04)

Section 20(1)

“... the control, management, administration, use and enjoyment of the strata lots ... shall be regulated by by-laws”.

Section 20(4)

“No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance.”

Privy Council Has Its Say

- The By-law said the following:

“7.1 Each Proprietor shall:

...

9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, *the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month ...*

Privy Council Has Its Say

- The Privy Council said the following:

“It is clear however that statutes prohibiting restrictions on dealing in strata lots do not prevent reasonable restrictions on the uses of the property, even though such restrictions may have the inevitable effect of restricting the potential market for the property.”

Privy Council Has Its Say

- By requiring rentals, and therefore occupation periods, to extend for at least one month, the by-law sought to ensure the degree of stability which is necessary to maintain the character of the residential use.
- This is properly regarded as part of a legitimate restriction on the use of the strata lot, to ensure that the residential purpose of the development is protected.
- It does not involve an impermissible restriction on leasing contrary to section 20(4).

Privy Council Has Its Say

- Therefore, the Privy Council agreed with the decision of the NSW Court of Appeal in the *Hamlena* case that a by-law can restrict the use of a lot.

WA Court of Appeal Has Its Say

- *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104 considered the following by-law:

16. Use of Premises

16.1 ... a proprietor of a residential lot may only use his lot as a residence

16.2 Notwithstanding bylaw 16.1 a proprietor of a residential lot may:

16.2.1 grant occupancy rights in respect of his lot to residential tenants ...

WA Court of Appeal Has Its Say

The WA Court of Appeal held that:

- By-laws 16.1 and 16.2 provided that lot 14 could only be occupied by persons who used it “as their settled or usual abode”.
- This was derived from the words “residence” in by-law 16.1 and “residential” in 16.2.1.
- The by-law operated as a restriction on use rather than on leasing, and was therefore valid.

WA Strata legislation is based on NSW strata legislation.
Therefore, this case is relevant to NSW.

The Wash Up

- A by-law prohibiting an owner leasing a lot for less than three months is probably invalid.
- A by-law prohibiting an owner or occupier from using a lot, or allowing a lot to be used, for short term accommodation for less than three months is valid.

The Wash Up

- There is a neat but important distinction between a by-law restricting short term *leasing* and a by-law restricting short term *accommodation*.

Planning Law Has Its Say

- Planning laws generally override private covenants and by-laws.
- Therefore, whilst a by-law is able to prohibit short term accommodation, usually that by-law will not be enforceable if:
 - Short term accommodation is a permitted use of a lot under local planning laws; or
 - A Local Council grants planning approval to permit a lot to be used for short term accommodation.

Planning Law Has Its Say

- **Environmental Planning and Assessment Act 1979**
- **Section 3.16 Suspension of laws etc by environmental planning instruments (cf previous s 28)**
- (1) In this section, regulatory instrument means any Act (other than this Act), rule, regulation, **by-law**, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.
- (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

Planning Law Has Its Say

- Most local environmental plans made by Local Councils contain a clause suspending the operation of by-laws to permit development to be carried out.
 - **E.g. Randwick Local Environmental Plan 2012**
 - **1.9A Suspension of covenants, agreements and instruments**
- (1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

Planning Law Has Its Say

- Short term accommodation of a lot using Airbnb is normally “tourist and visitor accommodation” under a local environmental plan.
- Tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:
 - (a) backpackers’ accommodation,
 - (b) bed and breakfast accommodation,
 - ...
 - (d) hotel or motel accommodation,
 - (e) serviced apartments.

Planning Law Has Its Say

- Under most local environmental plans, the use of a lot for tourist and visitor accommodation requires the approval of the Local Council or (less often) is prohibited.
- Therefore, in most cases an owner or occupier of a lot must obtain development consent from the Local Council in order to use their lot for tourist and visitor accommodation.
- Owners and occupiers rarely obtain Local Council approval to use their lot for tourist and visitor accommodation.

Strata Law vs Planning Law

- If an owner or occupier of a lot is:
 - (a) able to use the lot for tourist and visitor accommodation under the local environmental plan; or
 - (b) obtains Council approval to use the lot for tourist and visitor accommodation;

normally, a by-law cannot operate to prohibit the owner or occupier using the lot for that type of short term accommodation.

- In other words, typically, a by-law can only prohibit short term accommodation that is unlawful under planning law.

Conclusion

- Short term accommodation requires Council approval or is prohibited in most local government areas in NSW.
- Therefore a by-law is still an effective way to prohibit short term accommodation in a strata scheme.

Thank You

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ABOUT JS MUELLER & CO

JS Mueller & Co are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection across metropolitan and regional NSW.

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Thank You!



*"I Airbnb'd my apartment to a ringmaster,
and now his whole circus is here and they won't leave."*

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