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LIKE A THIEF IN THE NIGHT: WHY NEW STRATA LAWS MAY HAVE THWARTED YOUR ANTI-AIRBNB BY-LAW

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LIKE A THIEF IN THE NIGHT:

WHY NEW STRATA LAWS MAY HAVE THWARTED YOUR ANTI-AIRBNB BY-LAW

On 10 April 2020, new strata laws commenced. These laws clarify that an owners corporation is able to make a by-law that can prohibit a lot being used for a short-term rental accommodation arrangement in certain circumstances. However, the new laws may have unintended consequences that invalidate or limit the reach of existing by-laws that prohibit short-term rental accommodation arrangements. In this article we take a closer look at the new laws and their unintended consequences that seem to have been overlooked.

Introduction

Section 137A of the *Strata Schemes Management Act 2015* (**Strata Act**) commenced on 10 April 2020. This section says that an owners corporation is able to make a by-law that prohibits a lot being used for the purpose of a short-term rental accommodation arrangement where the lot is not the principal place of residence of the person who is providing the short-term accommodation arrangement. Section 137A is part of a state-wide framework of new laws that are intended to be introduced to regulate short-term rental accommodation arrangements in NSW. The purpose of section 137A is to clarify that an owners corporation can make a by-law prohibiting a lot being used for a short-term rental accommodation arrangement in certain circumstances. This clarity was thought to be necessary to overcome decisions made by NCAT in which it had been held that an owners corporation did not have power to make a by-law prohibiting short-term rental accommodation arrangements: see *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63.

The Widespread Industry Practice Concerning Anti-Airbnb By-laws

The introduction of section 137A raises an obvious question: did an owners corporation have power to make a by-law prohibiting short-term rental accommodation arrangements including through Airbnb before section 137A commenced on 10 April 2020? The long-held view, prior to the commencement of section 137A, was that an owners corporation did have that power and could make a by-law banning short-term rental accommodation including through platforms such as Airbnb.

This long-held view was supported by a number of cases. In 1991, the NSW Court of Appeal held that an owners corporation had power to make a by-law that restricted the use to which a lot could be put and the business activities that could be carried on from a lot: see *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) 5 BPR 11,432. More recently, the West Australian Court of Appeal and the Privy Council in England held that strata legislation drawn in very similar terms to the NSW legislation did permit an owners corporation to make a by-law banning short-term rental accommodation

arrangements: *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104; *O'Connor (Senior) and others v The Proprietors, Strata Plan No. 51* [2017] UKPC 45.

These court decisions gave stakeholders in the strata industry confidence that an owners corporation could ban short-term rental accommodation arrangements through an appropriately worded by-law. For that reason, over the last decade, many owners corporations have introduced those types of by-laws and in some cases those by-laws have been enforced to prevent short-term rental accommodation arrangements being provided in strata buildings.

An Unintended Consequence?

However, the introduction of section 137A has made it more difficult to argue that, before 10 April 2020, an owners corporation did have power to make a by-law to prohibit short-term rental accommodation arrangements. This is because, if that power already existed, what was the point of introducing section 137A?

In our view, the enactment of section 137A creates the distinct possibility that NCAT will rule that any by-law made before 10 April 2020 that prohibits short-term rental accommodation arrangements is ultra vires and invalid. This outcome would be consistent with the narrow approach NCAT has taken in a number of cases towards the by-law making powers of an owners corporation. This means that section 137A may well have thwarted all existing by-laws that prohibit short-term rental accommodation arrangements.

Of course, there is an argument that section 137A does not have that effect. Indeed, it is certainly arguable that the state of the law, prior to section 137A, supported by the cases cited above, was that an owners corporation could prohibit short-term rental accommodation arrangements through an appropriately worded by-law and that the purpose of section 137A was to confirm that power. But, in our view, the introduction of section 137A has made it more difficult to successfully argue that point.

A Further Unintended Consequence?

Section 137A says that a by-law has no force or effect to the extent that it prohibits a lot that is the principal place of residence of a person being used for a short-term rental accommodation arrangement where that person is providing the arrangement. This restriction applies to all by-laws. This includes by-laws that were made before section 137A was introduced. Therefore, since 10 April 2020, no by-law (no matter when that by-law was made) will be able to stop a lot being used for the purpose of a short-term rental accommodation arrangement where the lot is the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot. In other words, section 137A had limited the reach of all short-term letting by-laws (new and old).

Oh no – not another unintended consequence!

There is a further problem with section 137A which also appears to have been overlooked. Section 137A was intended to make clear that short-term rental accommodation arrangements where the "host" is present in the lot cannot be prohibited by a by-law. But that is not what section 137A says. The section does not require the host to be present in the lot in order for the lot to be the host's principal place of residence. Instead, the section simply requires the lot to be the principal place of residence of the person who is giving another person the right to occupy the lot pursuant to a short-term rental accommodation arrangement. A lot will be the principal place of residence of a person if the person's occupation of the lot has a degree of permanence to it and is not temporary or of a passing nature. But this means that a by-law will not be able to stop a person whose lot is his or her principal place of residence from permitting the lot to be used for a short-term rental accommodation arrangement whilst the person goes on a three-month holiday. That is problematic and not consistent with the Government's stated objective of relaxing rules to allow short-term rental accommodation arrangements to occur whilst the host is present in the lot.

The Wash Up

What does this all mean? Well, to start with, it means that any existing by-laws that prohibit short-term rental accommodation arrangements should be checked for their validity. Indeed, any owners corporation that has made a by-law prohibiting short-term rental accommodation arrangements should obtain advice about the impact of section 137A on the by-law and recommendations for what, if any, changes should be made to the by-law to deal with the unintended consequences created by section 137A.

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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 and levy collection.

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