NEW SOUTH WALES GOVERNMENT

INDEPENDENT PLANNING COMMISSION

BYRON SHIRE SHORT-TERM RENTAL

The NSW Government's 2021 changes to the State Environmental Planning Policy represent circumvention of National Building Codes and Federal Disability Access legislation. Also set aside by this SEPP are residential zoning regulations and, as noted in a precedent ruling by Justice Pepper of the NSW Land and Environment Court, the short-term commercial rental of residential dwellings:

"…undermines the planning regime of the (LGA) and ultimately of the State."

"In 2014, there were an estimated 216,000 STHL premises in NSW/ACT."
(Planning NSW 'Options Paper' July 2017)

Neighbours Not Strangers, **28 February 2023**

Neighbours Not Strangers

28 February 2023

Independent Planning Committee
New South Wales Government

Dear Sir/Madam

REF: SHORT-TERM RENTAL ACCOMMODATION PLANNING PROPOSAL IN BYRON SHIRE

In 2013/2014 I assisted the City of Sydney Council with their application to the NSW Land and Environment Court (LEC). Council obtained LEC Orders with PENAL NOTICE[1], which resulted in the cessation of large-scale short-term rentals in our residential building. Whilst assisting Council I received 37 threats of legal action from members of the strata committee – including a claim of defamation made by Julie Bishop MP's brother, Roy Bishop, on behalf of ClaytonUtz Partner Gary Best. Indeed, Mr Best and State MPs notified me on 26 February 2014 that I would be "named and shamed, it would be put to every member of our strata community that I act recklessly, and I would be hunted down and sued". I also received three anonymous telephone calls asking if I had 'funeral insurance'.

In light of the "Illegal Use of Premises" in our residential strata scheme, I also made two submissions to the NCAT. State Government MPs and ClaytonUtz Partner had their Legal representative label me as a 'vexatious complainant'. The NCAT dismissed both my submissions.

In 2015 I lodged a submission to the State Government's Inquiry into the Adequacy of Regulation of Short-Term Holiday Letting in NSW. This submission - Submission No. 22 – was described to me personally by the Manager of the Inquiry, Mr David Hale, as "the most graphic" of the 212 Submissions received. It was marked 'Confidential' by Parliamentary Committee Members. I was subsequently advised that were I to provide a copy of my submission to a third party I would be officially "In Contempt of Parliament". I was also denied permission to address the Parliamentary Commitee Members during the course of their Inquiry. Of specific note:

- The Manager of the Parliamentary Inquiry went on to confirm that at no time did the MPs on the Inquiry Panel seek legal advice on this critical matter.
- Federal Disability Access Legislation (see pages 15-26) was not considered, and has now been circumvented under Rob Stokes MP's changes to the SEPP.
- A long line of NSW LEC judgments on this matter were not considered.
- No mention was made of State MPs' profiteering personally from STRs.
- There was no disclosure of DestinationNSW's official 'partnership' with Expedia/Stayz.
- There was no mention of DestinationNSW's platforming of hundreds of short-term holiday rentals, some of which acted as portals to thousands of listings. (National Parks NSW also engages in STRs.)
- Multiple State Coroners' reports and recommendations were ignored.
  And
- The NSW Government was well aware of a 2014 report which said that NSW/ACT, by the time of their Inquiry, had already lost 216,000 homes to STRs and…"the number of listings via online platforms is more than doubling each year between 2011-2015"[2]. This too was not disclosed during the Parliamentary Inquiry and no representative from any of our State's Homelessness Services were consulted or invited to address MPs during the parliamentary process.

On 30 May 2016, in the corridors of State Parliament House, I was privy to a conversation between Legal representatives from Expedia/Stayz, HRIA (Holiday Rental Industry Australia – now known as the Australian Short-Term Rental Association/ASTRA) and Gordon Clark, Strategic Planning Manager, Shoalhaven City Council. Mr Clark recommended to the STR representatives that they lobby State Government/our Planning Minister to alter the State Environmental Planning Policy (SEPP); if commercial short-term rentals were to be classified as 'exempt' and/or 'complying development' in residential dwellings, the STR Industry would have access to every home. Business cards were exchanged. Mr Clark volunteered to meet representatives of the STR industry at any time.

Shoalhaven City Council has lost 4,522 homes to commercial Airbnb/Stayz rentals[3]. Byron Shire has lost 2,673 homes to commercial Airbnb/Stayz rental[4]. Might someone please explain why this Independent Planning Commission is not inquiring into the situation in the Shoalhaven region as well?

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[1] https://www.neighboursnotstrangers.com/_files/ugd/5a8126_1e32ab553a7f4d1fb34c7f14b3fc9f40.pdf
[2] https://www.planning.nsw.gov.au/~/media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx
[3] https://www.airdna.co/vacation-rental-data/app/au/new-south-wales/shoalhaven-city-council/overview
[4] https://www.airdna.co/vacation-rental-data/app/au/new-south-wales/byron/overview

Given the NSW Government's response[5] to their Parliamentary Inquiry, and with the assistance of others, I launched a community group known as Neighbours Not Strangers. Approximately 1,200 residents signed an online petition[6] against the penetration of their residential buildings and communities; full details of which were provided to NSW Ministers and MPs.

In May 2017, Neighbours Not Strangers lodged a paper: – Give Us Your Homes: The Rise and Rise of Short-Term Letting in New South Wales. NSW Ministers and MPs never acknowledged this work nor addressed the contents.

In October 2017, Neighbour Not Strangers lodged a submission[7] in response to the State Government's so-called 'Options Paper' on short-term rentals. No acknowledgement of this submission was received and none of the issues raised were acknowledged or addressed.

In June 2018, Neighbours Not Strangers wrote to then NSW Premier Gladys Berejiklian, outlining the specific 'conflict of interest' of numerous MPs[8], who were to debate Minister Matt Kean's *Fair Trading Amendment (Short-Term Rental Accommodation) Bill* in the NSW Parliament. These State MPs went on to debate the matter and NSW Hansard records show where these same MPs voted on legislation – again, without declaring their 'conflict of interest' and/or Court Orders over their STRs - "Illegal Use of Premises".

In January 2019, Neighbours Not Strangers lodged another submission[9] with the NSW Parliament. The submission and its contents were not acknowledged nor addressed.

In September 2019, Neighbours Not Strangers lodged another submission[10] with the NSW Parliament. The submission and its contents were not acknowledged nor addressed.

In 2021, I personally was still receiving almost daily verbal abuse and was the subject of severe provocation within my strata building, due entirely to the City of Sydney's action in the NSW Land and Environment Court and my engagement with Council at its behest. In December of that year, I sold my home and moved to a neighbouring building. Records show that the financial costs associated with that move were well in excess of $80,000; this figure included payment to the NSW Government in the form of Stamp Duty on my current home. What cannot be calculated is the impact on me personally of these years of threats and harassment.

Since 2013, at no time has access to any Minister of the NSW State Parliament been granted.

Since the inception of the community organisation Neighbours Not Strangers, at no time have we been offered the opportunity to sit on any State Government consultation committee.

It is well noted that representatives from ASTRA appear to always be included when State Government Ministers form consultation committees. Indeed, Minister Victor Dominello has recently appointed former ASTRA Board Member/STR operator Joan Bird[11] to his NSW Property Services Expert Panel[12].

In 2017, Minister Dominello received advice from NSW Senior Counsel on the Government's contentious plans to alter the SEPP in favour of short-term rental operators. This advice was ignored.

The NSW State Environmental Planning Policy was altered in 2021.

A so-called 'Code of Conduct' - supposedly an attempt to mitigate the severe impacts of mixing commercial STR activity with permanent residents - has been passed by Parliament. This, despite Ministers being made very much aware of NSW Supreme Court case law[13] which renders this 'Code' completely ineffective.

Now, the New South Wales Government's 'Independent Planning Commission' is inviting residents to 'Make a Submission' – yet another submission - on short-term rentals in the Byron Local Government Area?

It was Minister Robert Stokes MP who, as Planning Minister, used ministerial discretion to single-handedly alter the SEPP in 2021. A critical issue ignored by said Minister in placing the financial goals of STR platforms and operators over the rights of residential Title Deed holders, is that **any exercise of discretion must avoid actual or apprehended bias** (NSW Ombudsman). The Minister's actions are judged by many as clear contempt for our proprietary rights on Title Deeds on our residential dwellings. **Your attention is again drawn to advice from Andrew Pickles SC to Minister Victor Dominello dated 09 January 2017 – see from page 27 onwards**.

Without doubt, the NSW Department of Planning's handling of this issue do not reflect the lawful use to which the land may be put under valid zoning restrictions and development consents. These restrictions and consents were clear to all at the time entering into legal contracts for the purchase of Title Deeds on residential property.

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[5] https://www.parliament.nsw.gov.au/ladocs/inquiries/1956/Government%20Response%20-%20Inquiry%20into%20the%20adequacy%20of%20short-term%20holiday%20letting%20in%20NSW.pdf
[6] https://me.getup.org.au/petitions/stop-short-term-lets-neighbours-not-strangers-2
[7] https://www.neighboursnotstrangers.com/_files/ugd/5a8126_d2d87d24845d44c68203544f0d171570.pdf
[8] https://www.neighboursnotstrangers.com/_files/ugd/5a8126_1df03c98ac554b59ba5afaaff67ef0fb.pdf
[9] https://www.neighboursnotstrangers.com/_files/ugd/5a8126_3f1c05e9f39c41b3a5d0d95966937ce7.pdf
[10] https://www.neighboursnotstrangers.com/_files/ugd/5a8126_a1c67f9d92c7419ab7f6759d28cd825b.pdf
[11] https://alpinecountryproperties.com.au/joan-bird/
[12] https://www.nsw.gov.au/nsw-government/projects-and-initiatives/property-services-expert-panel?fbclid=IwAR0utjgEYww3I6YhBFsCwEB4Z2wv4eKFXNgaml5R8ru4ASws0RCcf7KGNh4#toc-meet-the-panel
[13] http://www7.austlii.edu.au/cgi-bin/viewdoc/au/journals/PrivLawPRpr/1996/8.html

On 08 April 2008, the Minister for Fair Trading gave the following assurance in the NSW Parliament:

> *"The Office of Fair Trading would examine any improper or questionable actions undertaken by a(n)…agent, including actions that would be in breach of the consumer protection provisions of that Act…Penalties for breaching the legislation include a range of disciplinary actions from a reprimand to cancellation of a licence and disqualification from involvement in a real estate business[14]."*

On 14 October 2008, the Minister for Planning gave the following assurance in the NSW Parliament:

> *"…I have stated publicly I will review any…proposal which has checks and balances and which properly balances people's rights…with the need of the council to enforce safety standards[15]."*

Not only has NSW Fair Trading not followed through on this assurance given by the Minister, contacts in Fair Trading are well aware that all owners of short-term rental management businesses with 'booking engines' must have a Class 1 Real Estate Agent's Licence to operate legally. Many do not. One example only which has never been followed up is that of Byron's *A Perfect Stay*[16], which was sold to Newcastle-based Alloggio in December 2022. It is understood that *A Perfect Stay's* owner Colin Hussey and employee Sarah Workman met and lobbied Planning Minister Anthony Roberts on 02 November 2022, seeking his approval to instigate an inquiry into Byron Shire Council's proposed 90-day cap on short-term rentals. There were reportedly two other individuals at that meeting: Ben Kirkwood of Beach restaurant and Campbell Korpff of Byron Coast Realty[17] and Korpff Wealth.

Minister Matthew Kean asked us to provide details of Agents colluding with Online booking platforms. We have since provided details. Top of our list:

- Destination NSW (State Government) and National Parks NSW (State Government)
- Multiple Travel and Real Estate Agents plus what appear to be unlicensed large-scale operators
- Several NSW Unions
- There are also multiple Members of Federal/State Parliament profiting directly from STRs

No authority in NSW has control over Online Travel Agents or Online Booking Platforms in China, Russia, Singapore, Japan, New Zealand, the United States, Ireland, etc, etc, etc.

A representative from the NSW Department of Planning recently advised that there are currently some 42,000 licensed STRs in our State. A quick search of Agents in April 2022 showed that 136 Real Estate Agents (only) had at the time 259 homes available for residential tenancies, as well as 42,32 homes listed as STRs. It would seem NSW Planning's estimate of 42,000 grossly underestimates the number of homes lost to commercial operations.

New South Wales:

136 PROPERTY AGENTS – 259 HOMES AVAILABLE FOR RESIDENTIAL TENANCIES

42,532 HOMES LISTED AS HOLIDAY RENTALS

A NSW Government Report said in 2014 there were an estimated 216,000 short-term holiday letting premises…

The 2021 Short-Term Rental Accommodation (Affordable Housing) SEPP legalises the use of homes as unstaffed hotels

Holidu NSW	No available rentals	19,100 holiday rentals	LJ Hooker South West Rocks	3 available rentals	79 holiday rentals	Coffs Harbour Holiday Accom	No available rentals	36 holiday rentals
Aabode.com	No available rentals	10,333 holiday rentals	Elders Real Estate Yamba	4 available rentals	78 holiday rentals	Coffs Harbour – The Edge	No available rentals	36 holiday rentals
AURA	No available rentals	1,291 holiday rentals	LJ Hooker Batemans Bay	No available rentals	77 holiday rentals	Byron Bay Real Estate Agency	4 available rentals	35 holiday rentals
Winning Holidays (Alloggio)	No available rentals	575 holiday rentals	First National Gerringong	9 available rentals	75 holiday rentals	Byron Bay Accomm Rentals	No available rentals	35 holiday rentals
Madecomfy	No available rentals	524 holiday rentals	LJ Hooker Nelson Bay	5 available rentals	75 holiday rentals	Fraser-Gray Broulee	1 available rental	35 holiday rentals
Holidaypaws	No available rentals	407 holiday rentals	First National Kiama	11 available rentals	75 holiday rentals	Raine & Horne Merimbula	3 available rentals	34 holiday rentals
Holiday Rental Specialists	No available rentals	350 holiday rentals	Whale Coast Realty Narooma	No available rentals	74 holiday rentals	Tathra Beach Real Estate	No available rentals	33 holiday rentals
Winning Holidays Pt Stephens	No available rentals	347 holiday rentals	Ray White BendalongManyana	No available rentals	74 holiday rentals	Crescent Head Real Estate	No available rentals	33 holiday rentals
Port Stephens Accommodation	No available rentals	347 holiday rentals	Marshall & Tacheci Bermagui	1 available rental	73 holiday rentals	Furnished Properties	No available rentals	32 holiday rentals
Absolute Alpine Holidays	No available rentals	278 holiday rentals	LJ Hooker Palm Beach	3 available rentals	73 holiday rentals	Beach Stays Blueys Beach	No available rentals	30 holiday rentals
Accom Holiday Rentals	No available rentals	274 holiday rentals	Vervevr Vacation Rentals	No available rentals	72 holiday rentals	Blue Mountain Escapes	No available rentals	30 holiday rentals
Alexandro Dream Homes	No available rentals	274 holiday rentals	LJ Hooker Sussex Inlet	1 available rental	70 holiday rentals	Fisk & Nagel Bega	2 available rentals	29 holiday rentals
A Perfect Stay Byron Bay	No available rentals	252 holiday rentals	Bondi Beach Holiday Homes	No available rentals	69 holiday rentals	MidCoast Holiday Rentals	No available rentals	28 holiday rentals
Cheap Holiday Homes	No available rentals	234 holiday rentals	Hawks Nest Holidays	No available rentals	68 holiday rentals	Thredbo Accomm Specialists	No available rentals	25 holiday rentals
Holiday Collection S Highlands	No available rentals	232 holiday rentals	Lakeshores Lake Macquarie	No available rentals	68 holiday rentals	Real Estate Thredbo	No available rentals	25 holiday rentals
Forster Holiday Rentals	No available rentals	221 holiday rentals	Raine and Horne Jindabyne	4 available rentals	67 holiday rentals	Thredbodotcom	No available rentals	25 holiday rentals
Pacific Coast Property Forster	10 available rentals	221 holiday rentals	Di Jones Central Coast	15 available rentals	66 holiday rentals	Iris Property	1 available rental	24 holiday rentals
Sydney Short-Term Apartments	No available rentals	216 holiday rentals	Batemans Bay Accom	No available rentals	66 holiday rentals	MUM Real Estate Ulladulla	2 available rentals	24 holiday rentals
Belle Property Escapes	No available rentals	214 holiday rentals	First National Evans Head	1 available rental	64 holiday rentals	Ray White Port Macquarie	3 available rentals	23 holiday rentals
L'Abode	No available rentals	194 holiday rentals	First Hand Holidays	No available rentals	63 holiday rentals	MidNorth Coast Realty	No available rentals	23 holiday rentals
Weekenda	No available rentals	173 holiday rentals	Henley Holidays Snowy Mts	No available rentals	62 holiday rentals	RichardsonWrench Went Falls	3 available rentals	22 holiday rentals
Elders RE Pt Macquarie	29 available rentals	171 holiday rentals	Jervis Bay Rentals	No available rentals	61 holiday rentals	Elders Brunswick Heads	4 available rentals	21 holiday rentals
Elders RE Crescent Head	No available rentals	171 holiday rentals	Bella Coastal Ulladulla	2 available rentals	61 holiday rentals	Lyn Gatty RE Tuross Head	No available rentals	21 holiday rentals
Property Providers	19 available rentals	169 holiday rentals	Hawks Nest Beach Realty	No available rentals	59 holiday rentals	Guest Realty	No available rentals	20 holiday rentals
Byron Bay Holiday Rentals	No available rentals	168 holiday rentals	LJ Hooker Ulladulla	No available rentals	57 holiday rentals	Snow Escape Jindabyne	No available rentals	20 holiday rentals
Contemporary Hotels	No available rentals	157 holiday rentals	Pearl Beach Real Estate	1 available rental	56 holiday rentals	Roberts Nambucca Real Estate	3 available rentals	19 holiday rentals
O'meara Nelson Bay	No available rentals	147 holiday rentals	Conlon & Co	10 available rentals	54 holiday rentals	Real Property Sussex Inlet	1 available rental	19 holiday rentals
First National Tuncurry	2 available rentals	147 holiday rentals	Lois Bucket Ballina	5 available rentals	53 holiday rentals	LJ Hooker Lennox Head	1 available rental	19 holiday rentals
Oz Combined Huskisson	15 available rentals	134 holiday rentals	Merimbula Realty	4 available rentals	51 holiday rentals	LJ Hooker Tea Gardens	1 available rental	19 holiday rentals
Thredbo Ski Accommodation	No available rentals	132 holiday rentals	Blue Mountains Getaways	No available rentals	49 holiday rentals	Professionals Batemans Bay	1 available rental	18 holiday rentals
Mollymook Milton Holidays	No available rentals	131 holiday rentals	Hallmark RE Tuross Head	No available rentals	48 holiday rentals	MacMasters Beach Real Estate	No available rentals	18 holiday rentals
Pacific Palms Real Estate	No available rentals	129 holiday rentals	Clarence Holiday Coast RE	No available rentals	47 holiday rentals	Byron Beach Realty	No available rentals	16 holiday rentals
LJ Hooker Kingscliff	3 available rentals	121 holiday rentals	Julie Rutherford RE Bermagui	1 available rental	46 holiday rentals	Narooma Holidays	No available rentals	16 holiday rentals
Apartment Service	No available rentals	115 holiday rentals	JR Real Estate Bermagui	No available rentals	46 holiday rentals	Batemans Bay Real Estate	6 available rentals	15 holiday rentals
Forster Accommodation Centre	No available rentals	110 holiday rentals	Kangaroo Valley Getaways	No available rentals	45 holiday rentals	Ben Bate Real Estate Narooma	No available rentals	15 holiday rentals
Professional Holiday Homes	No available rentals	105 holiday rentals	Elders RE Lennox Head	10 available rentals	45 holiday rentals	Harcourts Ulladulla	3 available rentals	15 holiday rentals
Holiday Coffs Coast	No available rentals	100 holiday rentals	Kingscliff Accommodation	No available rentals	44 holiday rentals	Highlands Private Hideaways	11 long stays	13 holiday rentals
Ray White Tea Gardens	3 available rentals	99 holiday rentals	Betina King Property	8 available rentals	44 holiday rentals	Elders Real Estate Tathra	1 available rental	13 holiday rentals
Kosciusko First National	No available rentals	97 holiday rentals	Kingscliff Holiday Rentals	No available rentals	44 holiday rentals	South Coast Prop Specialists	No available rentals	13 holiday rentals
Central Coast Holiday Escapes	No available rentals	93 holiday rentals	North Coast Lifestyle	4 available rentals	43 holiday rentals	My Agent Batemans Bay	2 available rentals	13 holiday rentals
Ray White Central Coast	1 available rental	92 holiday rentals	Raine and Horne Thredbo	No available rentals	43 holiday rentals	LJ Hooker Hallidays Point	2 available rentals	12 holiday rentals
Professionals Forster Tuncurry	7 available rentals	86 holiday rentals	First National Tweed Heads	5 available rentals	42 holiday rentals	New Tweed Coast Real Estate	No available rentals	12 holiday rentals
Snow Holidays Jindabyne	No available rentals	80 holiday rentals	Destination Byron Bay	No available rentals	42 holiday rentals	South Coast Holiday Homes	No available rentals	10 holiday rentals
			Beach Retreats Central Coast	No available rentals	41 holiday rentals	Century 21 Blackheath	2 available rentals	8 holiday rentals
			LJ Hooker Forster/Tuncurry	1 available rental	39 holiday rentals	UHoliday Tweed Heads	No available rentals	8 holiday rentals
			Elders Real Estate Evans Head	1 available rental	38 holiday rentals	Century 21 Blackheath	2 available rentals	8 holiday rentals
			Home Hostess Palm Beach	No available rentals	37 holiday rentals			

Sample listings as at 17/04/22

THE NSW LAND & ENVIRONMENT COURT JUDGES SHORT-TERM TOURIST/VISITOR RENTALS:

"OFFEND AND UNDERMINE THE PLANNING REGIEME OF THE (LOCAL GOVERNMENT AREA) AND ULTIMATELY OF THE STATE"

#Right2Housing https://www.caselaw.nsw.gov.au/decision/54a6399b3004de94513da983 **#NeighboursNotStrangers**

[14] Answer received on 8 April 2008 and printed in Questions & Answers Paper No. 57.
[15] Answer received on 14 October 2008 and printed in Questions & Answers Paper No. 89.
[16] https://www.aperfectstay.com.au/?utm_source=google&utm_medium=organic&utm_campaign=Google%20My%20Business
[17] https://www.byronbayaccom.net/accommodation/results

There are instances of an Airbnb 'host'[18] obtaining one license number and using the one license number across 11 properties[19]. NSW Planning was asked to explain what they were doing in such instances. Nil response.

We now take this opportunity to remind the IPC of NSW Land and Environment Court case law judgments. That which follows are short extracts only:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Under the Environmental Planning and Assessment Act 1979 No 203, a person who a) aids, abets, counsels or procures another person to commit, or b) conspires to commit, an offence against this Act or the regulations arising under any other provision is guilty of an offence against this Act or the regulations arising under that provision and is liable, on conviction, to the same penalty applicable to an offence arising under that provision.

Since Destination NSW's August 2015 partnership with Expedia/Stayz, one can find no record of penalties applied for the offence of the "Illegal Use of Residential Premises" for STHLs.

Following is a small sample of extracts from NSW case law judgments:

> ***"For these reasons I find that there is a fundamental incompatibility between a mix of residential and serviced apartments that share the same floor and access points."***

[2013] NSWLEC 61 (2 May 2013)[20] Jurisdiction Class 4

ZONE NO. 2(a) RESIDENTIAL
Objectives of the zone
The objectives of Zone No. 2(a) are:
(a) to make provision for the orderly and economic development of suitable land for a variety of low density housing forms which are essentially domestic in scale and which have private gardens; and
(b) to provide for other uses, but only where they:
(i) are compatible with a low density residential environment and afford services to residents at a local level; and
(ii) are unlikely to adversely affect residential amenity or place demands on services beyond the level reasonably required for low scale housing.

The Use of the Property (Short-Term Holiday Rental Accommodation) is Prohibited Within the Zone Because it is Not for the Purpose of a "Dwelling-house".

(An occupancy)" granted to persons who are residing in a group situation for periods of a week or less for the purposes of bucks and hens nights, parties, or for the use of escorts or strippers, is, in my opinion, not consistent with a use or occupation by a family or household group in the ordinary way of life, and therefore, not consistent with the use of the property as that of a "dwelling house".

…regard must be had to the notion of "domicile" contained within it…and the critical element of permanence. Inherent within the term "domicile" is, as a long line of authority in this jurisdiction has established, the notion of a permanent home or, at the very least, a significant degree of permanence of habitation or occupancy.

(In Law) the place where one has his home or permanent residence, to which if absent, he has the intention of returning.

…the facts disclose an absence of any permanent habitation or occupation. (Occupancies) of no more than a week are antithetical to this concept.

The evidence discloses that the use to which the property is being put – STHL – in fact "adversely affect[s] residential amenity" and "places demands on services', on the police and the council in particular, by having to deal with complaints relating to its use, in a manner well "beyond the level reasonably required for low scale housing".

(The rental of the property) as holiday accommodation for periods of a week or less to persons using or occupying it other than in the ordinary family or household way, does not constitute a "domicile", does not constitute a "dwelling", and therefore, does not constitute a "dwelling-house" for the purpose of item 2 in the 2(a) Residential Zone. The use of the property not being otherwise permissible, it is prohibited within the Zone and it constitutes development in breach of s76B of the EPAA.

…the property continued to be let to large groups of people who engaged in antisocial behaviour. This behaviour included shouting, screaming obscenities, strippers, escorts, who appeared topless in full view on the

[18] https://www.linkedin.com/in/zoja-miljevic-9a82b374/?originalSubdomain=au
[19] https://www.airbnb.com.au/users/237335836/listings
[20] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWLEC/2013/61.html?stem=0&synonyms=0&query=dobrohotoff

deck of the property, and the discovery of shards of a broken glass on his property…the antisocial behaviour often continued into the early hours of the morning, intruding upon the sleep of the family…the family have vacated their house in order to avoid the disruptive behaviour during weekends and school holiday periods…complaints to the police and the council…have not resulted in the diminution or cessation of either.

Before taking a booking for the property she emails prospective tenants a copy of the House Rules and the Stayz Holiday House Code of Conduct. It is only once the prospective tenant emails back confirming that they have read, understood and agreed to abide by these Rules and the Code of Conduct, that she confirms their booking. Moreover, prior to the booking commencing she meets with the tenants and ensures that they sign the House Rules. She also verbally advises them of the House Rules to ensure that they completely understand what is required of them with respect to their behaviour while they are occupying the property. In addition, she takes their licence details, confirms their identity, and takes a cash bond;

The local police have confirmed that no fines or convictions have been recorded with respect to the property.

She readily agreed that she could not guarantee compliance with the House Rules or the Code of Conduct. (She) stated, "I have no control over any other person do I really, in realist [sic], I can only control my own conduct I can't control other – other people's conduct."'

It appears that the council has been content for the Court to resolve the matter. On any view, this is unsatisfactory and amounts to an effective abrogation by the council of its fundamental duties and responsibilities. These duties include, amongst other things, to manage development and coordinate the orderly and economic use of land within the area under its control.

By leaving it to the Court to determine this important issue, the council, by its inaction, has, in my opinion, failed to fulfil its core functions and has failed its constituents.

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[1992] NSWLEC 43 (3 July 1992)[21] Jurisdiction Class 4

The decision of the Court of Appeal (as was the case of this Court's original decision) in terms, concerned, and only concerned, the question of the proper construction of the development consent granted by the Council on 19 January 1960 for the erection of a residential flat building and whether the Respondent's use fell within or beyond the ambit of that consent, property construed.

At first blush the Respondent's application appears to come into full head-on collision with long established principles which promote finality in litigation.

However upon more mature reflection I do not think in the present circumstances that the Respondent's attempt to re-open its case offends these long established and salutary principles. In my judgment the Respondent did not act unreasonably in submitting to the statement of agreed facts and more particularly to the agreed fact that the relevant development consent was that granted by the Council in January 1960 to the erection of a residential flat building. It is a notorious fact that the existence of development consents granted many years ago is often a most difficult matter to establish.

The definition of "residential building" requires nothing more than use of human habitation. However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency. Thus, a residential hotel may have a smaller degree of permanence than a residential club or a hostel. It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind of category of residential building which envisages a significant degree of permanency of habitation or occupancy."

It only remains to note more particularly the effect on the Respondent's use of the new governing planning instrument. When it originally came into force on 3 November 1989 (see the Government Gazette of that date) the North Sydney Local Environmental Plan expressly permitted, subject to the obtaining of development consent, the carrying out of development on land within Zone No 2(c) (which includes the land upon which the "Blues Point Tower" building is erected) for the purposes of "serviced apartments" which was (and remains) defined as follows:

"serviced apartment" means a building containing two or more dwellings which are cleaned and serviced by the owner or manager of the building or the owner's manager's agent, and which provides short-term accommodation for travellers or tourists but does not include:

a hostel or a building or place elsewhere specifically defined in this clause;…"

However only six weeks later North Sydney Local Environmental Plan 1989 (Amendment No 1) was made (see Government Gazette No 124 of 22 December 1989). One of its express aims was:

[21] https://docs.wixstatic.com/ugd/5a8126_d5be4877a647493fb66b7ceb6aafa86c.pdf

"(c) to prohibit serviced apartments on land in Zone No 2(c)…"

This aim was effected by suitable amendment to cl 9 by deleting reference in item 2 ("only with development consent") to "serviced apartments" with the result that that purpose became an absolutely "prohibited" purpose).

For all the foregoing reasons I conclude that the Respondent's use:

(i) is relevantly use for the purpose of "serviced apartments;
(ii) is prohibited by the terms of cl 9 of the North Sydney Local Environmental Plan 1989; and
(iii) constitutes a breach of the Environmental Planning and Assessment Act 1979.

Essentially the Court is being asked to pass over, this express prohibition and the Respondent's breach thereof, in the exercise of its statutory discretion, broad and salutary though that discretion be: cf Warringah Shire Council v. Sedevcic (1987) 10 NSWLR 335.

1. Findings supporting the grant of a remedy

i. the statutory prohibition on "serviced apartments" development within Zone No 2(c) can be supported by planning principles concerning urban consolidation, and promoting residential amenity;
ii. the breach of the Environmental Planning and Assessment Act 1979 by the Respondent's use is contrary to the planning principles referred to in (i) though the actual harm caused by that contrariety is not great;
iii. the Respondent's use, if unchecked, has the further potential planning detriment of creating a precedent for other serviced apartment uses of residential flat buildings within the Municipality of North Sydney; and…

I cannot regard, as the Respondent is inviting me to, the relevant breach of the Environmental Planning and Assessment Act 1979, as merely technical. The Respondent's use involves a clear breach of an absolute prohibition on a particular type of development effected as recently as December 1989.

In all the circumstances, I intend to grant the permanent injunction claimed by the Applicant to restrain the Respondent's unlawful use.

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[2001] NSWLEC 89 10086 of 2001 (06 July 2001)[22] Jurisdiction Class 4

The use of the premises for short-term accommodation is a non-residential use, and is prohibited within the Residential 2(c) zone; and

The unlawful use of the premises is causing loss of amenity to the immediate adjoining neighbours.

His Honour determined that the term 'residential building' envisages 'a significant degree of permanency of habitation or occupancy'.

"I have discussed your question regarding the requisite degree of permanency required for you to lawfully use your unit in the 2(c) Residential zone with a senior planner. The minimum length of time for a person(s) to occupy the unit should be six (6) months"

This time period should satisfy the degree of permanency for the use to be classified as residential."

Accordingly, adopting council's contention, any use of residential accommodation for a period of less than six months duration would constitute a prohibited use in the residential zone. Interpreted literally the order would prohibit the applicant from using the home unit for…'short-term accommodation' by tourists.

Council's determination that use of residential premises for periods of less than six months does not constitute a residential use (and) has no statutory basis.

…the use of the premises was prohibited because the home units were occupied by third parties as serviced apartments analogous to a hotel use, or a commercial use. Such use is quite different to 'short-term accommodation' by an owner of his or her home unit.

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[2003] NSWLEC 2, 40002 of 2002 (24 September 2002)[23] Jurisdiction Class 4

The Council has argued that, following the grant of Development Consent 19/60 in February 1960 pursuant to the County of Cumberland Planning Scheme Ordinance (the Ordinance), the building could be used as a residential flat building and continues to be able to be used only on that basis. By that submission, the Council means that the use of the flats in the building should be as a permanent domicile or home.

The Council argued the Respondents had been using (their unit) for holiday and short-term accommodation and that activity is not a permitted use of the flat in the building given the existing development consent.

[22] https://www.parliament.nsw.gov.au/ladocs/other/10065/Answer%20to%20question%20on%20notice%20Sutherland%20Shire%20Council.pdf
[23] https://www.parliament.nsw.gov.au/ladocs/other/10065/Answer%20to%20question%20on%20notice%20Sutherland%20Shire%20Council.pdf

Under the relevant local environmental planning instruments…the building is in a Zone 2(c), Residential zone. The planning tables in the LEPs for that zone shows that holiday and short-term accommodation is prohibited development.

It seems to me the 2000 LEP is clear on what is permitted and not permitted in this zone…

In the end, my conclusion is that the meaning of the consent, though not determined by, is to be read consistently with the use of language in the relevant definitions…The definition of "residential building" requires nothing more than use for human habitation. However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency… It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind of category of residential building which envisages a significant degree of permanency of habitation or occupancy.

The description of a flat as a "dwelling" or a "domicile" carries with it the notion of that degree of permanency.

The precise extent of the short-term use of (the Unit) is impossible to quantify in terms of the evidence presented to the Court, but it would appear that it has been considerable in terms of a large number of people using (the unit) for short-term accommodation.

If the evidence established that such use was being conducted as a commercial activity…[that is, the short-term accommodation use], it would prima facie constitute a prohibited use in a residential 2(c) zone.

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[2008] NSWLEC 88, 10576 of 2006[24] (02 March 2007) Jurisdiction Class 4

Condition 6 of the consent stated that the accommodation within the building on levels 1 to 8 must not be used for the purposes of a "hotel, motel, serviced apartments, private hotel, boarding house, tourist accommodation or the like…"

The applicant lodged Development Application…for the dual use of all apartments on levels 1 to 8 for residential and serviced apartments. The council refused the application.

***Mixed-use development** means a building or buildings in which two or more uses are carried out.*

***Residential accommodation** in Central Sydney means a building or part of a building that provides permanent or long-term accommodation, and includes residential flat buildings, dwellings, boarding houses, hostels, student accommodation and the like.*

***Serviced apartment** in Central Sydney is a form of tourist and visitor accommodation and means a building or part of a building that provides self-contained accommodation which is serviced or cleaned by the owner or manager of the apartments or the owners or managers agents.*

Chapter 2 of the LEP 2005 provides requirements for Central Sydney. Clause 33 states that before consenting to development, a consent authority must have regard to the objectives of the zone Clause 36 provides objectives for the City Centre zone. The relevant objectives are:

a. *to encourage Central Sydney's role and growth as one of the Asia-Pacific regions principal centres for finance, commerce, retailing, tourism, cultural activities, entertainment and government, and*
b. *to permit a diversity of uses which reinforce the multi-use character of Central Sydney, and*
c. *to facilitate the development of buildings and works that are scale and character consistent with achieving the other objectives of this zone, and*
d. *to provide for increased residential development with appropriate amenity and to ensure the maintenance of a range of housing choices, and*

Central Sydney Development Control Plan 1996 (DCP 1996) also applies. Clause 2.13.1 states:

> *The consent authority should not consent to a mixed-use development which includes two or more dwellings unless it is satisfied that separate lift access and a separate entrance will be provided for use exclusively for the dwellings.*

Clause 6.1 provides amenity requirements for residential buildings and serviced apartments. The objective is:

> *To enhance the amenity of residential buildings and serviced apartments in terms of daylight, solar access, ventilation, privacy, outlook, noise, safety, recreation facilities and storage.*

The council filed a Statement of Issues containing 3 issues. The issues relate to:

(1) the impact on the amenity of future residents, including shared lift access (Issues 1 and 2),
(2) the precedent for similar applications (Issue 3).

…raised a further issue… He submitted under the terms of an existing s 88E Instrument, the site cannot be used "for any purposes other than as a "residential building" as that term is defined in the Central Sydney Local

[24] https://docs.wixstatic.com/ugd/5a8126_3d8a03bfe9e742a2a1986b7e676f90a2.pdf

Environmental Plan 1996". As the proposed development is inconsistent with this requirement and as LEP 2005 does not contain any overriding provisions, the proposed development is prohibited.

Are the uses compatible?

The council officers report makes the following comments:

> *There is a difference in the living activity patterns and the behaviour of short and long-term residents, and the responsibility to resolve and control any conflict between the uses and occupants falls entirely upon the serviced apartment managing agency. Short-term residents have no long-term interest in the maintenance of the amenity within the building or the surrounding area….*

I accept the council's position on (in)compatibility between residential accommodation and serviced apartments. While both are residential in nature, the fact that they are separately defined in the LEP 2005 would suggest that they have different characteristics. I agree that there is likely to be a difference in behaviour, living and activity patterns between short-term and long-term occupants. A conclusion that short-term occupants are likely to have less concern about maintaining of the amenity of the building than long-term occupants is a finding that can be reasonably made, in my opinion. That is not to say that all short-term occupants are likely to have less concern about maintaining the amenity of the building than long-term occupants but only that there is likely to be a greater proportion who use the building differently through their behaviour and activities in and around the building.

The greater frequency of short-term occupants in and out of the building is potentially disruptive for long-term occupants, particularly at times such as early in the morning or late at night. These movements may not create excessive noise but may occur at a time when long-term occupants reasonably expect not to be disturbed. These disturbances could relate to matters such as doors closing, noise from adjoining apartments and general conversation in common areas. While there may be measures, such as door closers to minimise potential noise impact, it would be unlikely that all sources of noise could be removed.

In general terms, long-term occupants would generally have a greater expectation and promote a more quiet and peaceful amenity than short-term occupants, and they would regard their apartment as a home compared to a temporary place to reside for short-term occupants. Long-term occupants are also likely to be less tolerant of disturbances and likely to be more concerned with activities that may potentially cause damage to the building, as they would have a greater feeling of ownership and ultimately be responsible through the Owners Corporation for repairs. While Mr Crane states that there is no evidence to support such a finding, I am satisfied that by simply adopting a common sense approach, the council's conclusion of incompatibility between the two uses can be supported.

For these reasons I find that there is a fundamental incompatibility between a mix of residential and serviced apartments that share the same floor and access points.

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[2007] NSWLEC 382, 10576 of 2006[25] (18 June 2007) Jurisdiction Class 4

The Council filed and served a statement of issue…as required by the Court's direction. The statement identified the first issue, in part, as follows:

> ***Issue 1 – Impact on Amenity of Residents***
> *1. The proposed use would have unacceptable impacts on the amenity of permanent residents, especially in relation to security, potential noise and servicing of the serviced apartments.*

The appeal commenced on the site, at which various residents gave evidence. The Council tendered notes of the residents' evidence. That evidence included submissions from: …Mr Staveley, the national manager of the Tourism Transport Forum who was concerned about the outcomes in terms of an "uncontrolled …pattern of usage".

> *All available evidence suggests that serviced apartments result in a loss of amenity for permanent residents….*
>
> *In fact allowing "dual use" would combine the worst features of Strata Plan 61897's operations as residential apartments and as serviced apartments. Both Strata Plan 61643 and Strata Plan 61897 residents would get an intensity of use comparable to a continuously occupied hotel, but without the high degree of management supervision and maintenance association with its former status as a hotel.*

The applicant has not identified any error of law in the Commissioner's decision. Accordingly, the appeal is dismissed.

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[25] https://www.caselaw.nsw.gov.au/decision/549f8bb83004262463ada6bc

[2008] NSWLEC97, 40389 of 2007[26] (04 December 2007) Jurisdiction Class 4

…The Council also seeks declarations that a development consent for use of the premises as "flats" does not permit or authorise the use of the premises for "serviced apartments", "hotel" or the like…

4 The Council relied on the affidavit of Mr Moore, Planning Manager of the Council, sworn on 10 August 2007, which identifies the relevant planning instruments applying to the premises now, being the City of Sydney Local Environmental Plan 2005 (CSLEP 2005). Serviced apartments are a permissible use in the City Centre zone subject to obtaining development consent. He refers to the planning issues related to mixed use buildings which have both residential accommodation and serviced apartment uses. There are different impacts due to the short term use of serviced apartments because of the different living and activity patterns and behaviour of guests, greater maintenance required due to guests in serviced apartments and potential impacts on residential amenity.

21 The 1980 development consent should be construed on the basis that "residential flat building" excludes use for serviced apartments. North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd & Anor (1990) 21 NSWLR 532 (the Blues Point Tower case) and KJD York Management Services Pty Ltd v City of Sydney Council (2006) 148 LGERA 117 support this approach. This case has similar parameters to the decision of the Court of Appeal in Blues Point Tower. The case also falls within the use of a "residential flat building" as "serviced apartments" considered by Lloyd J in KJD.

28 The question before the Court now is whether the use of the rooms is for the purposes of "residential" accommodation or for some other purpose, namely short-term accommodation.

I do not therefore consider that the 1980 development consent authorised the use of the premises for serviced apartments. Further support for this approach is found in Derring Lane Pty Ltd v Port Phillip City Council (1999) 104 LGERA 92 relied on by the Council, in which Balmford J in the Victorian Supreme Court upheld a determination of the Victorian Planning Tribunal that a motel did not come with the meaning of a residential building. Referring to Wilcox J in Hafza v Director-General of Social Security (1985) ASSC 92-052 at 90,607 and Latham CJ in Commissioner of Taxation v Miller (1946) 73 CLR 93 at 99, his Honour held at 98:

> *On that basis, the phrase "residential building" must be taken to refer to a building constructed for the purpose of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode.*

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[2008] NSWLEC 97, 40389 of 2007[27] (05 March 2008) Jurisdiction Class 4

The Council also seeks declarations that a development consent for use of the premises as "flats" does not permit or authorise the use of the premises for "serviced apartments", "hotel" or the like, and that the First Respondent, its servants or agents cease carrying out the use of the premises for "serviced apartments", "hotel" or the like until such time as it has obtained development consent.

Where the word "domicile" is employed in the definition of an occupancy use, however termed, the popular and legal meaning of domicile "embod[ies] the idea which is expressed in English by the word 'home' ie permanent home"

The situation before me in this case is not distinguishable in any material way from the principles in Blues Point Tower as applied in KJD and I consider I should adopt that reasoning to the effect that "capable of use as a separate domicile" when used as a definition for a "flat" in a "residential flat building" requires that the flat also be used for habitation for a duration suggesting permanency rather than short term use suggested by serviced apartment use. I do not therefore consider that the 1980 development consent authorised the use of the premises for serviced apartments. Further support for this approach is found in Derring Lane Pty Ltd v Port Phillip City Council (1999) 104 LGERA 92 relied on by the Council, in which Balmford J in the Victorian Supreme Court upheld a determination of the Victorian Planning Tribunal that a motel did not come with the meaning of a residential building. Referring to Wilcox J in Hafza v Director-General of Social Security (1985) ASSC 92-052 at 90,607 and Latham CJ in Commissioner of Taxation v Miller (1946) 73 CLR 93 at 99, his Honour held at 98:

> *On that basis, the phrase "residential building" must be taken to refer to a building constructed for the purpose of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode.*

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[2010] NSWLEC 181, 40515 of 2009[28] (30 September 2010) Jurisdiction Class 4

1. *A declaration that the Respondent is carrying out development at the premises situated at and known as 'Oaks Maestri Towers', 298-304 Sussex Street, Sydney, NSW ('the Premises') for the purposes of a*

[26] https://www.caselaw.nsw.gov.au/decision/549f8eb83004262463ae626e
[27] https://www.caselaw.nsw.gov.au/decision/549f8eb83004262463ae626e
[28] https://www.caselaw.nsw.gov.au/decision/549f8daf3004262463ae1f42

'serviced apartments' ('the said Purpose') in contravention of the conditions of Development Consents D/97/00499F and D/98/00318H and in breach of s.76A(1) of the Environmental Planning and Assessment Act 1979 ('the EPA Act').

The following orders are sought:

2. *An Order restraining the Respondent (by itself or through a related entity or agent) from using or permitting the use of the Premises for the said Purpose until development consent for such use is granted pursuant to the EPA Act and such consent is in force.*

3. *An order restraining the Respondent (by itself or through a related entity or agent):*
   (a) from advertising or holding out the Premises or any part of them as available for the said Purpose; and
   (b) (b) from leasing or licensing the Premises or any part of them for the said Purpose without first obtaining a development consent specifically authorising the said Purpose.

4. *An order that the Respondent pay the Applicant's costs of these proceedings; and*

5. *Such further or other orders as this Honourable court deems fit."*

30 LEP 2005 (Exhibit C3, tab 1, at pp47-48) includes the following definitions:

*" **Residential accommodation** in Central Sydney means a building or part of a building that provides permanent or long term accommodation, and includes residential flat buildings, dwellings, boarding houses, hostels, student accommodation and the like.*

***Serviced apartment** in Central Sydney is a form of tourist and visitor accommodation and means a building or part of a building that provides self-contained accommodation which is serviced or cleaned by the owner or manager of the apartments or the owner's or manager's agents."*

31 LEP 1996 includes the following definitions (Exhibit C3, tab 2, at p107-108):

*" **Residential building** means a building which contains one or more dwellings, and in which the residential component is owner-occupied or occupied by a tenant with a residential tenancy agreement within the meaning of the Residential Tenancies Act 1987.*

***Serviced apartments** means a building containing two or more self-contained dwellings:*
(a) which are used to provide short-term accommodation, but not subject to residential tenancy agreements within the meaning of the Residential Tenancies Act 1987, and
(b) which are serviced or cleaned by the owner or manager of the apartments or the owner's or manager's agents."

36 The 24 designated serviced apartments were not affected by the October 2001 approval. The most relevant condition of that amended approval is condition 47 (fol 177), in the following terms:

47 The following restrictions apply to that part of the building approved for residential use:

(a) The residential apartments on levels 1-27 must be used as a permanent residential building only and not for the purpose of a hotel, motel, serviced apartments, private hotel, boarding house, tourist accommodation or the like, other than in accordance with the Central Sydney Local Environmental Plan 1996. (Amended 5 September 2000)

(b) A restrictive covenant is to be created pursuant to Section 88E of the Conveyancing Act, 1919, restricting any change of use of the land from a 'residential building' as defined in the Central Sydney Local Environmental Plan 1996. The covenant is to be executed prior to building approval under section 68 of the Local Government Act 1993 for the construction of the development, to the satisfaction of Council. All costs of the preparation and registration of all associated documentation is to be borne by the applicant.

(c) All units approved in the residential building must be either owner occupied or occupied by a tenant with a residential lease under the Residential Tenancy (sic) Act 1987. A certificate signed by the owner or the body corporate (if the development is strata subdivided) or a solicitor (holding a current certificate to practice), must be forwarded to Council within 12 months of the completion of the development, and every 12 months thereafter, certifying that all units approved in the residential buildings are either owner occupied or are subject to residential leases under the Residential Tenancy (sic) Act 1987."

39 The Council has never granted any development consent for serviced apartments in the Kent Street tower, and relies on the conditions of the consent D/98/00318 H (Exhibit C3, tab 8, and Annexure 'C' to McNamara – approved on 11 April 2002, with the plans stamped on the same date).

*As the applicant for consent in the DA the subject of the class 1 appeal (see Exhibit R1), announced itself as **manager** of the serviced apartments…(in its Statement of Environmental Effects at cl 4.2). The way it deals with the units in its care (offering apartments for short term lettings, setting tariffs, taking bookings, maximising income, informing short-term occupants in detail, organising servicing, etc) is clearly to "use" them as serviced apartments, in many cases beyond the conditions of consent.*

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[2011] NSWLEC 235, 40515 of 2009[29] (07 December 2011) Jurisdiction Class 4

…Council challenged the respondent company in separate but similar proceedings over the alleged unauthorised use by the company of residential units it does not own as serviced apartments. The company essentially argues that the use is carried out by the owners and merely facilitated by (the company).

I concluded in both cases that the company was, in fact, using various units in the respective residential unit blocks as serviced apartments without relevant consent…

> *The Respondent (by itself or its agent) is restrained…from using the premises situated at and known as… ('the Premises') for the purposes of 'serviced apartments' ('the said Purpose') unless and until development consent for such use is granted pursuant to the EPA Act and such consent is in force.*

2. The Respondent (by itself or its agent) is restrained forthwith from:
a. advertising or holding out the Premises or any part of them as available for the said Purpose; and
b. leasing or licensing the Premises or any part of them for the said Purpose
unless and until development consent for such use is granted pursuant to the EPA Act and such consent is in force.

Byron Shire Mayor Michael Lyon plus multiple Members of Parliament have been asked if they would nominate residential strata buildings and/or neighbourhoods where residents of our State may be guaranteed to live in a residential setting, unaffected by commercial short-term rentals. None have replied.

In order to put together an accurate and relevant submission to this Independent Planning Commission we sought information from NSW Planning and NSW Fair Trading. Our request for data was sent on 03 February 2023. See pages 12-14. A follow up request was sent on 10 February 2023. We repeated our request on 17 February 2023. And again, on 24 February 2023 we followed up. No reply was received.

The NSW Government must respect the proprietary rights of owners of existing residential dwellings and our law-abiding accredited accommodation providers. The brutal reality is that Government does not.

Is one permitted to ask what, if anything, will be acknowledged, considered, or might likely trigger from the State Government's Independent Planning Committee respect for the fundamental right to safe, secure, affordable housing plus respect for the proprietary rights of Residential Title Deed holders in NSW?

Attached now is that which we forwarded to NSW Planning and NSW Fair Trading in our efforts to again address this issue and compile yet another submission. Nil response from either Department.

Australia is a signatory on the United Nations' charter on Human Rights, which includes the right to safe, secure, affordable housing. Our homes were zoned, conceived, designed, constructed, certified, advertised and sold, as residential housing - not hotels. Respect for the fundamental right to housing and respect for our proprietary rights on residential title deeds must be upheld. This is not happening. To put into words how many within our State feel on this issue would most probably cause offence to those on this Planning Committee. Residents have suffered years of abuse and are incredibly damaged by this process. And yet again, here we are, being asked for comment.

Yours

Trish Burt
Convener
Neighbours Not Strangers
Email: neighboursnotstrangers@gmail.com

[29] https://www.caselaw.nsw.gov.au/decision/54a6364e3004de94513d91cc

Ms Kimberley Beencke
Town Planner/Digital Transformation Policy Officer
NSW Government Housing Policy
NSW Government Housing & Economic Policy Division

(Noted: your Town Planner qualifications from UNSW.).

Dear Kimberley Beencke

I take this opportunity to refer to a NSW Government Planning review on the commercial short-term tourist/visitor rental of residential dwellings in the Byron Bay Shire. In order to compile and lodge a submission, I would very much appreciate your providing the following current and correct details:

A 2017 State Government 'Options Paper'[30] stated that in 2014 NSW/ACT had lost 216,000 homes to short-term holiday rentals: "…The number of listings via online platforms is more than doubling each year between 2011-2015…"

Please confirm the number of homes currently lost to short-term holiday rentals in NSW/ACT.

On 09 January 2017, Senior Council, Martin Place Chambers, Andrew Pickles, wrote to the NSW Minister for Innovation and Better Regulation. (Andrew Pickles specialises in Planning, Environment and Local Government law, Building and Construction, negligence of statutory authorities etc.) Andrew Pickles referred on that date to all NSW Residential Title Deed holders "who acquired their properties fully aware of the development consent conditions intended to prevent all commercial activity, including short-term letting". Andrew Pickles went on to note that if changes to the State Environmental Planning Policy [SEPP] were enacted…"this would be akin to an acquisition of valuable proprietary rights without compensation". Indeed, Andrew Pickles SC's email correspondence covered many pertinent areas of governance on this issue.

Please provide a copy of the Minister's response to each and every area of an individual's proprietary rights and legislation raised listed in Andrew Pickles correspondence.

Please confirm what compensation is available to NSW residents who wish to sell/repurchase into a residential building/zone.

Please nominate and/or list all buildings/zones within NSW where residents can now purchase Residential Title Deeds and be guaranteed of living within a residential environment.

On 09 April 2021, Minister Rob Stokes used ministerial discretion to single-handedly alter the said SEPP[31]. This legislation provided the pathway for the use of residential housing in NSW for the purposes of commercial short-term holiday rentals as 'Exempt' development. "For a dwelling located in a prescribed area—the dwelling is not used for non-hosted short-term rental accommodation for more than 180 days in any 365 day period." In this clause… prescribed area means the following-

a) The Greater Sydney Region,
b) Ballina local government area,
c) Bega Valley local government area,
d) Byron local government area,
e) Dubbo Regional local government area,
f) City of Newcastle local government area,
g) Land in the Clarence Valley local government area shown edged heavy black on the Clarence Valley Short-term Rental Accommodation Area map,
h) Land in the Muswellbrook local government area shown edged heavy black on the Muswellbrook Short-term Rental Accommodation Area Map.

Given that State MPs in my former NSW Strata building had their short-term rentals listed on upwards of 150 online platforms before being capture by LEC Orders, and given this SEPP was enacted for 22 months ago, please confirm:

How is the NSW Department of Planning (DPE) collecting data on its prescribed limits to rentals?

How many short-term rental operators in the areas listed have, to date, exceeded the limits imposed?

What action has the DEP taken against those in breach of its legislation and what penalties have been imposed?

Minister Rob Stokes' SEPP also states – 51E (f)(i)(ii) "the dwelling must have a current fire safety certificate or fire safety statement, or no fire safety measures are currently implemented, required or proposed for the dwelling, and Note. Part 9 of the Environmental Planning and Assessment Regulation 200 includes fire safety requirements for certain existing buildings or parts of buildings". Some time ago, verbal advice from one of your colleagues was that this vital area of legislation was being left to those running commercial operations to comply in 'good faith' with the legislation.

Please confirm what system/s has/have been implemented by DPE to ensure compliance with Fire Safety regulations?

Please confirm how many STR operators have been penalised for failure to comply with this specific legislation; what specific penalties have been issued by the DEP since the implementation of this legislation?

Minister Rob Stokes' SEPP also states – 51E (g) "the use of the dwelling for the purposes of short-term rental accommodation must otherwise be lawful, and Note. In addition to the requirements set out in this Part, adjoining owners' property rights, the

[30] https://www.planning.nsw.gov.au/~/media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx
[31] https://legislation.nsw.gov.au/view/pdf/asmade/epi-2021-175

applicable common law and other legislative requirements for approvals, licences, permits and authorities still apply. For example—

a) Section 137A of the Strata Schemes Management Act 2015 provides that a by-law may prohibit a lot being used for the purposes of a short-term rental accommodation arrangements, and
b) Conditions of development consent, or a lease, may impose additional restrictions.

I now draw to your attention the following judgments in the NSW Land and Environment Court (LEC) that, amongst other serious issues, judge mixing commercial short-term rentals with permanent residents "fundamentally incompatible" and an "Illegal Use of Premises". The LEC also judges that a Local Government Authority's failure to enforce residential zoning "amounts to an effective abrogation by the council of its fundamental duties and responsibilities. (A) council, by its inactions, has…failed to fulfil its core functions and has failed its constituents":

[1992] NSWLEC 43 - Justice J Bignold - North Sydney Council v Sydney Serviced Apartments Pty Ltd
[2001] NSWLEC 10086 - Justice J Cowdroy - Foster v Sutherland Shire Council
[2007] NSWLEC 88 - Justice C Brown - 187 Kent Street v Council of the City of Sydney
[2007] NSWLEC 382 - Justice J Jagot - 187 Kent Street v Council of the City of Sydney - Appeal -
[2008] NSWLEC 97 - Justice J Pain - Council of the City of Sydney v Waldorf Apartments Hotel Sydney Pty Limited and Anor ('Additional issue, 76') and ('Finding on discretion, 79')
[2010] NSWLEC 182 - Justice J Sheahan - Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Ltd [2010] NSWLEC 182
[2011] NSWLEC 234 - Justice J Sheahan - Council of the City of Sydney v Oaks Harmony
[2011] NSWLEC 235 - Justice J Sheahan - Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri)
[2011] NSWLEC 1054 - Justice C Murrell - Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri)
[2012] NSWLEC 40466 - Byron Shire Council v Blaney – 21 Bay Vista Lane, Ewingsdale (pages 46-50 of document)
[2012] NSWLEC 143 - Justice AJ Lloyd - GraiCorp Operations Limited v Liverpool Plains Shire Council
[2013] NSWLEC 61 - Justice J Pepper - Dobrohotoff v Bennic
[2014] NSWLEC - Case No. 14/4923 - Council of the City of Sydney v Con Kotis / Australian Executive Apartments W
[2017] NSWLEC 188 - Sun v Randwick City Council
[2019] NSWLEC 45 - Tweed Shire Council v Taylor
[2022] NSWLED 1650 - Wookey v Byron Shire Council

Given that Rob Stokes' SEPP clearly states "the use of the dwelling for the purposes of short-term rental accommodation must otherwise be lawful":

Please set out clearly how NSWDEP has circumvented NSW case law precedence in order to facilitate the conversion of residential dwellings into commercial short-term rental operations.

Please - since the inception of the SEPP in April 2021 - provide full details of successful action against those in breach of the clause "must otherwise be legal".

On 09 April 2021, Minister Rob Stokes used ministerial discretion to single-handedly amend his SEPP[32]. Provisions under this amendment include: 51E (d) "the dwelling must be registered on the register established under clause 186Z of the Environment Planning and Assessment Regulation 2000."

Were one to consult sites such as InsideAirbnb[33] one immediately sees a market shortfall in compliance. For example:

NSW Northern Rivers – 6,657 Airbnb listings – 11.0% unlicensed[34]
Greater Sydney – 22,100 Airbnb listings – 51.4% unlicensed[35]

Also of note, as one small example only:

73 Windmill Street, Millers Point consists of 11 residential dwellings. All 11 dwellings[36] are currently listed across numerous websites by Zoja Milievic[37] from HomeHost[38]. Each dwelling shows the same license number: PID-STRA-20637. This equates to an annual renewal fee of $25 to list 11 residential dwellings as commercial STRs.

Please provide full details of all action taken to date against operators who fail to register their short-term rental listings on the NSW Government run register.

Please provide full details of all action taken to date against some 150+ booking platforms that continue to list unregistered short-term rental properties.

Please provide full details of all action taken to date against those listing what appear to be, for want of a term, 'fraudulent' license numbers (referring to HomeHost as one possible example).

In June 2018 the NSW Government announced that there would be a new regulatory framework to manage short-term rental accommodation. One key element of the framework was a Code of Conduct[39] "to apply to online accommodation platforms,

[32] https://legislation.nsw.gov.au/view/pdf/asmade/epi-2021-175
[33] http://insideairbnb.com
[34] http://insideairbnb.com/northern-rivers
[35] http://insideairbnb.com/sydney
[36] https://www.airbnb.com.au/users/237335836/listings
[37] https://www.linkedin.com/in/zoja-miljevic-9a82b374/?originalSubdomain=au
[38] https://homehost.com.au
[39] https://www.fairtrading.nsw.gov.au/resource-library/publications/code-of-conduct-for-the-short-term-rental-accommodation-industry#parta

letting agents, facilitators, hosts and guests" – aka, landlords and clients. This 'code' was implemented and legislated, despite Ministers and Senior Public Servants being clearly notified of NSW Supreme Court case law precedence[40] which leaves those lodging requests for action open to being labelled a 'vexatious complainant', or indeed open to a counter charge of 'nuisance'.

> ***Please kindly liaise with your fellow administrators at NSW Fair Trading* and provide full details of all successful disciplinary action to date since the implementation of this 'code'.***
>
> ***Please also provide full details of any/all counter complaints against those attempting to have implemented the State Government's 'exclusion register'.***

NSW Department of Fair Trading has a detailed complaints register[41]. Between January and April 2021, Airbnb and its main competitor, Stayz (Expedia) had regular complaints registered. Since then, the Department claims there have been zero complaints registered with Fair Trading.

> ***Please kindly liaise with your fellow administrators at NSW Fair Trading* and provide details as to why the Department is no longer acknowledging and/or publicising complaints against online short-term holiday rental platforms and their landlords/clients etc.***

Ms Beencke, thanking you in anticipation of your providing responses to each and every request put to you herein. This information is required in order to lodge a proper, considered submission to the review currently underway into the commercialisation of housing in the Byron Bay Shire.

Trish Burt
Email: [redacted]
03 February 2023

cc * Senior Customer Service Officer – Real Estate & Property, NSW Fair Trading – Email sc@finance.nsw.gov.au

[40] http://www7.austlii.edu.au/cgi-bin/viewdoc/au/journals/PrivLawPRpr/1996/8.html
[41] https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register

Disability (Access to Premises — Buildings) Standards 2010[1]

Disability Discrimination Act 1992

I, ROBERT McCLELLAND, Attorney-General, make these Standards under subsection 31 (1) of the Disability Discrimination Act 1992.

Dated 15 March 2010

1.4 Interpretation

(1) In these Standards:

specified Class 1b building means:

(a) a new building with 1 or more bedrooms used for rental accommodation; or

(b) an existing building with 4 or more bedrooms used for rental accommodation; or

(c) a building that comprises 4 or more single dwellings that are:

(i) on the same allotment; and

(ii) used for short-term holiday accommodation.

Part 2 Scope of Standards

2.1 Buildings to which Standards apply

(1) Subject to subsection (2), these Standards apply to the following:

(a) a new building, to the extent that the building is:

(i) a specified Class 1b building; or

(ii) a Class 2 building that has accommodation available for short-term rent; or

(iii) a Class 3, 5, 6, 7, 8, 9 or 10 building;

(b) a new part, and any affected part, of a building, to the extent that the part of the building is:

(i) a specified Class 1b building; or

(ii) a Class 2 building that:

(A) has been approved on or after 1 May 2011 for construction; and

(B) has accommodation available for short-term rent; or

(iii) a Class 3, 5, 6, 7, 8, 9 or 10 building;

(2) These Standards do not apply to the following:

(a) the internal parts of a sole-occupancy unit (within the meaning of the Access Code) in a Class 2 building;

(b) a new Class 10 building, a new part of a Class 10 building, or an affected part of a Class 10 building if it is associated with:

(i) a Class 1a building; or

(ii) a Class 4 part of a building.

(4) A part of a building is a ***new part*** of the building if it is an extension to the building or a modified part of the building about which:

(a) an application for approval for the building work is submitted, on or after 1 May 2011, to the competent authority in the State or Territory where the building is located; or

(b) all of the following apply:

(i) the building work is carried out for or on behalf of the Crown;

(ii) the building work commences on or after 1 May 2011;

(iii) no application for approval for the building work is submitted, before 1 May 2011, to the competent authority in the State or Territory where the building is located.

5) An affected part is:

(a) the principal pedestrian entrance of an existing building that contains a new part; and

(b) any part of an existing building, that contains a new part, that is necessary to provide a continuous accessible path of travel from the entrance to the new part.

2.2 Persons to whom Standards apply

(1) These Standards apply to the following persons to the extent that they are responsible for, or have control over, matters in the Access Code for a relevant building:

(a) a building certifier;

(b) a building developer;

(c) a building manager.

(2) A ***building certifier***, for a relevant building, is a person who has responsibility for, or control over, the building approval process for a building.

Example

The following persons could be building certifiers for these Standards:

(a) private certifiers;

(b) building surveyors;

(c) local councils.

(3) A ***building developer***, for a relevant building, is a person with responsibility for, or control over, its design or construction.

Example

The following persons could be building developers for these Standards:

(a) property developers;

(b) property owners;

(c) building designers;

(d) builders;

(e) project managers;

(f) property lessees.

(4) A ***building manager***, for a relevant building, is a person who has responsibility for, or control over, any of the matters in the Access Code that apply to the building other than matters about the design or construction of the building.

Example

The following persons could be building managers for these Standards:

(a) property owners;

(b) property lessees;

(c) property managers;

(d) operational staff.

2.3 Actions to which Standards apply

These Standards apply to an action concerning the provision of access to relevant buildings (and facilities and services within them) to the extent that the provision of access is:

(a) a matter in relation to which, under Part 2 of the Act, it is unlawful to discriminate; and

(b) a matter covered by the Access Code.

Note These Standards are subject to section 12 of the Act. That is, the provisions of these Standards are limited application provisions within the meaning of that section.

2.4 Construction of Standards

These Standards are intended to be within the power conferred by the Act, and are to be construed accordingly.

Note A provision that, despite this section, cannot be construed as being entirely within the power conferred by the Act has effect to the extent that the provision is within that power — see subsection 13 (2) of the *Legislative Instruments Act 2003*.

Part 3 Requirements of Standards

3.1 Building certifiers, developers and managers to ensure buildings comply with the Access Code

(1) A building certifier, building developer or building manager of a relevant building (other than an existing public transport building) must ensure that the building complies with the Access Code.

3.2 Compliance with Access Code

(1) For section 3.1, a building certifier or building developer of a relevant building is taken to have ensured that the building complies with the Access Code if the building complies with:

(a) the following clauses of the Access Code:

(i) clauses D3.1 to D3.12;

(ii) clause E3.6;

(iii) clauses F2.2 and F2.4;

Note The provisions mentioned in paragraphs (a) .. are described as deemed-to-satisfy provisions. They are limited to matters relating to the design and construction of a building so this subsection applies only to building certifiers and building developers.

(2) Subsection (1) is not intended to limit the way in which a relevant building may otherwise satisfy the applicable performance requirements.

(3) Without limiting subsection (2), a relevant building is taken to comply with the Access Code if the building provides a level of access that is not less than the level that the building would have provided if it had complied with the provisions mentioned in subsection (1).

Part 4 Exceptions and concessions

4.1 Unjustifiable hardship

(1) It is not unlawful for a person to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the person.

(2) However, compliance is required to the maximum extent not involving unjustifiable hardship.

Example

While enlarging a lift may impose unjustifiable hardship, upgrading the lift controls panel to provide braille and tactile buttons may not.

(3) In determining whether compliance with a requirement of these Standards would involve unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account, including the following:

(a) any additional capital, operating or other costs, or loss of revenue, that would be directly incurred by, or reasonably likely to result from, compliance with the requirement;

(b) any reductions in capital, operating or other costs, or increases in revenue, that would be directly achieved by, or reasonably likely to result from, compliance with the requirement;

(c) the extent to which the construction of the building has or will be financed by government funding;

(d) the extent to which the building:

(i) is used for public purposes; and

(ii) has a community function;

(e) the financial position of a person required to comply with these Standards;

(f) any effect that compliance with the requirement is reasonably likely to have on the financial viability of a person required to comply;

(g) any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building) or geographic factors (such as gradient or topography), affecting a person's ability to comply with the requirement;

(h) financial, staffing, technical, information and other resources reasonably available to a person required to comply with these Standards, including any grants, tax concessions, subsidies or other external assistance provided or available;

(i) whether the cost of alterations to make a premises accessible is disproportionate to the value of the building, taking into consideration the improved value that would result from the alterations;

(j) benefits reasonably likely to accrue from compliance with these Standards, including benefits to people with a disability, to building users or to other affected persons, or detriment likely to result from non-compliance;

(k) detriment reasonably likely to be suffered by the building developer, building certifier or building manager, or people with a disability or other building users, including in relation to means of access, comfort and convenience, if compliance with these Standards is required;

(l) if detriment under paragraph (k) involves loss of heritage significance — the extent to which the heritage features of the building are essential, or merely incidental, to the heritage significance of the building;

(m) any evidence regarding efforts made in good faith by a person to comply with these Standards, including consulting access consultants or building certifiers;

(n) if a person has given an action plan to the Commission under section 64 of the Act — the terms of the action plan and any evidence about its implementation;

(o) the nature and results of any processes of consultation, including at local, regional, State, national, international, industry or other level, involving, or on behalf of, a building developer, building manager or building certifier and people with a disability, about means of achieving compliance with the requirement, including in relation to the factors listed in this subsection;

(p) any decisions of a State or Territory body established to make recommendations to building authorities about building access matters.

(4) If a substantial issue of unjustifiable hardship is raised having regard to the factors mentioned in subsection (3), the following additional factors are to be considered:

(a) the extent to which substantially equal access to public premises is or may be provided otherwise than by compliance with these Standards;

(b) any measures undertaken, or to be undertaken, by, on behalf of, or in association with, a person or organisation to ensure substantially equal access.

(5) For these Standards, ***unjustifiable hardship*** is to be interpreted and applied having due regard to the scope and objects of the Act (in particular the object of removing discrimination as far as possible) and the rights and interests of all relevant parties.

4.2 Acts done under statutory authority etc

These Standards do not render unlawful anything done in a circumstance mentioned in section 47 of the Act.

4.3 Lessees

(1) If the lessee of a new part of a building submits an application for approval for the building work, the following people do not have to ensure that the affected part of the building complies with these Standards:

(a) the building certifier;

(b) the building developer;

(c) the building manager.

(2) Subsection (1) does not apply if a building with a new part is leased to only 1 person.

4.5 Toilet concession

(1) Paragraphs F2.4 (c) and (e) of the Access Code, to the extent that they require compliance with AS 1428.1—2009, *Design for access and mobility,* Part 1: *General requirements for access—New building work*, do not apply to the following:

(a) existing accessible sanitary compartments;

(b) existing sanitary compartments suitable for use by people with a disability.

(2) For subsection (1) to apply, a sanitary compartment mentioned in paragraph (a) or (b) must:

(a) comply with AS 1428.1—2001, *Design for access and mobility,* Part 1*: General requirements for access—New building work*; and

(b) be located in either a new part, or an affected part, of a building.

Part 5 Commission exemptions

Note This Part is about exemptions from compliance with Part H2 of the Access Code. Part H2 sets out requirements for public transport buildings.

5.1 Commission may grant exemptions

(1) The following persons may apply to the Commission for an exemption:

(a) a person:

(i) on the person's own behalf; or

(ii) on behalf of the person and another person or other persons; or

(iii) on behalf of another person or other persons;

(b) 2 or more persons:

(i) on their own behalf; or

(ii) on behalf of themselves and another person or other persons; or

(iii) on behalf of another person or other persons.

(2) After receiving an application under subsection (1), the Commission may grant the person or persons to whom the application relates an exemption from compliance with some or all of Part H2 of the Access Code.

(3) The Commission may grant a further exemption from compliance with the same requirements to which an exemption under subsection (2) (the ***first exemption***) applied, if:

(a) a person makes an application for a further exemption; and

(b) the person who makes the application is a person to whom the first exemption relates; and

(c) the application is made in the period granted for the exemption granted last.

(4) Before granting an exemption under subsection (2) or (3), the Commission:

(a) must consult with the Accessible Public Transport Jurisdictional Committee; and

(b) may consult with any other body or person that the Commission considers appropriate to consult.

(5) An exemption granted by the Commission under subsection (2) or (3) must not be granted for a period greater than 5 years.

5.2 Content of exemptions

An exemption granted under subsection 5.1 (2) or (3) must:

(a) be in writing; and

(b) state if it is an exemption from compliance with some or all of the requirements of Part H2 of the Access Code; and

(c) if it only applies to some of the requirements of Part H2 of the Access Code — state the requirements to which it only applies; and

(d) state the period for which it is granted; and

(e) state the following matters if they apply to the exemption:

(i) any terms and conditions subject to which the exemption is granted;

(ii) any circumstances or activities to which the exemption only applies;

(iii) if it is a further exemption.

5.3 Effect of exemption

The following persons do not contravene these Standards if the person's failure to comply with the Standards is in accordance with an exemption granted under section 5.1:

(a) a person granted the exemption;

(b) a person in the employment of, or under the direction or control of, a person granted the exemption.

Note Section 32 of the Act provides that it is unlawful for a person to contravene a disability standard.

5.4 Review of exemptions by Administrative Appeals Tribunal

A person may apply to the Administrative Appeals Tribunal for review of decisions made by the Commission under section 5.1.

5.5 Publication of notice of decision

(1) Within 1 month after it makes a decision under section 5.1 the Commission must organise for a notice of the making of the decision to be published in the *Gazette*:

(a) stating its findings on material questions of facts; and

(b) stating the evidence on which those findings were based; and

(c) stating the reasons for the making of the decision; and

(d) containing a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of the decision to which the notice relates by or on behalf of any person or persons whose interests are affected by the decision.

(2) A failure to comply with any part of subsection (1) for a decision does not affect the validity of the decision.

Part 6 Review

6.1 Timetable for review

(1) The Minister for Innovation, Industry, Science and Research, in consultation with the Attorney-General, is to:

(a) review the effectiveness of these Standards in achieving their objects; and

(b) carry out a subsequent review every 5 years after the previous review is finished.

(2) The review must start within 4 years after these Standards commence and be finished within 5 years after that date.

(3) All reviews must identify any necessary amendments to these Standards.

Schedule 1 Access Code for Buildings

(section 1.4)

Note The Access Code is prepared by the Office of the Australian Building Codes Board in consultation with the Attorney-General's Department.

Part A1 Interpretation

A1.1 Definitions

accessible means having features to enable use by people with a disability.

accessway means a continuous *accessible* path of travel (as defined in AS 1428.1) to, into or within a building.

aged care building means a Class 9c building for residential accommodation of aged persons who, due to varying degrees of incapacity associated with the ageing process, are provided with personal care services and 24-hour staff assistance to evacuate the building during an emergency.

assembly building means a building where people may assemble for —

(a) civic, theatrical, social, political or religious purposes, including a library, theatre, public hall or place of worship; or

(b) educational purposes in a *school*, *early childhood centre,* preschool, or the like; or

(c) entertainment, recreational or sporting purposes, including —

(i) a discotheque, nightclub or a bar area of a hotel or motel providing live entertainment or containing a dance floor; or

(ii) a cinema; or

(iii) a sports stadium, sporting or other club; or

(d) transit purposes, including a bus station, railway station, airport or ferry terminal.

atrium has the same meaning as in the *BCA*.

BCA means the Building Code of Australia 2009.

carpark means a building that is used for the parking of motor vehicles but is neither a *private garage* nor used for the servicing of vehicles, other than washing, cleaning or polishing.

early childhood centre means a preschool, kindergarten or child-minding centre.

exit has the same meaning as in the *BCA*.

fire-isolated ramp means a ramp within a fire-resisting enclosure which provides egress from a *storey*.

fire-isolated stairway means a stairway within a fire-resisting shaft and includes the floor and roof or top enclosing structure.

floor area means:

(a) in relation to a building — the total area of all *storeys*; and

(b) in relation to a *storey* — the area of all floors of that *storey* measured over the enclosing walls, and includes:

(i) the area of a *mezzanine* within the *storey*, measured within the finished surfaces of any external walls; and

(ii) the area occupied by any internal walls or partitions, any cupboard, or other built-in furniture, fixture or fitting; and

(iii) if there is no enclosing wall, an area which has a use that:

(A) contributes to the fire load; or

(B) impacts on the safety, health or amenity of the occupants in relation to the provisions of the *BCA*; and

(c) in relation to a room — the area of the room measured within the finished surfaces of the walls, and includes the area occupied by any cupboard or other built-in furniture, fixture or fitting; and

(d) in relation to a fire compartment — the total area of all floors within the fire compartment measured within the finished surfaces of the bounding construction, and if there is no bounding construction, includes an area which has a use which contributes to the fire load; and

(e) in relation to an *atrium* — the total area of all floors within the *atrium* measured within the finished surfaces of the bounding construction and if no bounding construction, within the external walls.

health-care building means a building whose occupants or patients undergoing medical treatment generally need physical assistance to evacuate the building during an emergency and includes:

(a) a public or private hospital; or

(b) a nursing home or similar facility for sick or disabled persons needing full-time nursing care; or

(c) a clinic, day surgery or procedure unit where the effects of the predominant treatment administered involve patients becoming non-ambulatory and requiring supervised medical care on the premises for some time after the treatment.

luminance contrast means the light reflected from one surface or component, compared to the light reflected from another surface or component.

mezzanine means an intermediate floor within a room.

private garage means:

(a) any garage associated with a Class 1 building; or

(b) any single *storey* of a building of another Class capable of accommodating not more than 3 vehicles, if there is only one such *storey* in the building; or

(c) any separate single *storey* garage associated with another building where such garage is capable of accommodating not more than 3 vehicles.

required means *required* to satisfy a Performance Requirement or a Deemed-to-Satisfy Provision of the Access Code as appropriate.

residential aged care building means a building whose residents, due to their incapacity associated with the ageing process, are provided with physical assistance in conducting their daily activities and to evacuate the building during an emergency.

sanitary compartment means a room or space containing a closet pan or urinal.

school includes a primary or secondary *school*, college, university or similar educational establishment.

sole-occupancy unit (SOU) means a room or other part of a building for occupation by one or joint owner, lessee tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes:

(a) a dwelling; or

(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or

(c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or

(d) a room or suite of associated rooms in a Class 9c *aged care building*, which includes sleeping facilities and any area for the exclusive use of a resident.

storey has the same meaning as in the *BCA*.

swimming pool means any excavation or structure containing water and used primarily for swimming, wading, paddling or the like, including a bathing or wading pool, or spa.

A1.2 Language

A reference to a building in the Access Code is a reference to an entire building or part of a building, as the case requires.

A2.1 Adoption of Standards and other references

Where a Deemed-to-Satisfy Provision references a document, rule, specification or provision, that adoption does not include a provision:

(a) specifying or defining the respective rights, responsibilities or obligations as between themselves of any manufacturer, supplier or purchaser; or

(b) specifying the responsibilities of any trades person or other building operative, architect, engineer, authority, or other person or body; or

(c) requiring the submission for approval of any material, building component, form or method of construction, to any person, authority or body other than a person or body empowered under State or Territory legislation to give that approval; or

(d) specifying that a material, building component, form or method of construction must be submitted to any person, authority or body for expression of opinion; or

(e) permitting a departure from the code, rule, specification or provision at the sole discretion of the manufacturer or purchaser, or by arrangement or agreement between the manufacturer and purchaser.

A2.2 Referenced Standards etc

(1) A reference in a Deemed-to-Satisfy Provision to a document under clause A2.1 refers to the edition or issue, together with any amendment, listed in clause A3.1 and only so much as is relevant in the context in which the document is quoted.

(2) Any:

(a) reference in a document listed in clause A3.1 (primary document) to another document (secondary document); and

(b) subsequent references to other documents in secondary documents and those other documents;

is a reference to the secondary and other documents as they existed at the time of publication of the primary document listed in clause A3.1.

(3) The provisions of subclause (2) do not apply if the secondary referenced document is also a primary referenced document.

A2.3 Differences between referenced documents and the Access Code

The Access Code overrules in any difference arising between it and any Standard, rule, specification or provision in a document listed in clause A3.1.

A3.1 Documents adopted by reference

The Standards and other documents listed in column 1 of Table 1 are referred to in the clauses of the Access Code listed in column 4 of the table.

Table 1 Schedule of referenced documents

No.	Date	Title	Provision(s) of Access Code
AS 1428		**Design for access and mobility**	
Part 1	2009	General requirements for access — New building work	A1.1, D3.1, Table D3.1, D3.3, D3.6, D3.8, D3.11, Spec D3.10, F2.4

No.	Date	Title	Provision(s) of Access Code
Part 1	2001	General requirements for access — New building work	H2.7, H2.8, H2.10, H2.15
Part 1 (Supplement 1)	1993	General requirements for access — Buildings — Commentary	H2.2
Part 2	1992	Enhanced and additional requirements — Buildings and facilities	H2.2, H2.3, H2.4, H2.5, H2.7, H2.10, H2.11, H2.12, H2.13, H2.14
Part 4	1992	Tactile ground surface indicators for the orientation of people with vision impairment	H2.11
AS/NZS 1428		**Design for access and mobility**	
Part 4.1	2009	Means to assist the orientation of people with vision impairment — Tactile ground surface indicators	D3.8

Part A4 Building classifications

A4.1 Classifications

Class 1 — one or more buildings which in association constitute:

(a) ***Class 1a*** — a single dwelling being:

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit; or

(b) ***Class 1b***:

(i) a boarding house, guest house, hostel or the like:

(A) with a total area of all floors not exceeding 300 m^2 measured over the enclosing wall of the Class 1b; and

(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation;

which are not located above or below another dwelling or another Class of building other than a *private garage*.

Class 2 — a building containing 2 or more *sole-occupancy units*, each being a separate dwelling.

Class 3 — a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including:

(a) a boarding-house, guest house, hostel, lodging-house or backpackers accommodation; or

(b) a residential part of an hotel or motel; or

(c) a residential part of a *school*; or

(d) accommodation for the aged, children or people with a disability; or

(e) a residential part of a *health-care building* which accommodates members of staff; or

(f) a residential part of a detention centre.

Class 4 — a dwelling in a building that is Class 5, 6, 7, 8 or 9 if it is the only dwelling in the building.

Class 5 — an office building used for professional or commercial purposes, excluding buildings of Class 6, 7, 8 or 9.

Class 6 — a shop or other building for the sale of goods by retail or the supply of services direct to the public, including:

(a) an eating room, cafe, restaurant, milk or soft-drink bar; or

(b) a dining room, bar area that is not an *assembly building*, shop or kiosk part of a hotel or motel; or

(c) a hairdresser's or barber's shop, public laundry, or undertaker's establishment; or

(d) market or sale room, showroom, or service station.

Class 7 — a building which is:

(a) ***Class 7a*** — a *carpark*; or

(b) ***Class 7b*** — for storage, or display of goods or produce for sale by wholesale.

Class 8 — a laboratory, or a building in which a handicraft or process for the production, assembling, altering, repairing, packing, finishing, or cleaning of goods or produce is carried on for trade, sale, or gain.

Class 9 — a building of a public nature:

(a) ***Class 9a*** — a *health-care building*; including those parts of the building set aside as a laboratory; or

(b) ***Class 9b*** — an *assembly building*, including a trade workshop, laboratory or the like in a primary or secondary *school*, but excluding any other parts of the building that are of another Class; or

(c) ***Class 9c*** — an *aged care building*.

Class 10 — a non-habitable building or structure:

(a) ***Class 10a*** — a non-habitable building being a *private garage*, carport, shed, or the like; or

(b) ***Class 10b*** — a structure being a fence, mast, antenna, retaining or free-standing wall, *swimming pool*, or the like.

Part D Access and egress

DP1 Performance requirement

Access must be provided, to the degree necessary, to enable:

(a) people to:

(i) approach the building from the road boundary and from any *accessible* carparking spaces associated with the building; and

(ii) approach the building from any *accessible* associated building; and

(iii) access work and public spaces, accommodation and facilities for personal hygiene; and

(b) identification of *accessways* at appropriate locations which are easy to find.

DP4 Performance requirement

Exits must be provided from a building to allow occupants to evacuate safely, with their number, location and dimensions being appropriate to:

(a) the travel distance; and

(b) the number, mobility and other characteristics of occupants; and

(c) the function or use of the building; and

(d) the height of the building; and

(e) whether the *exit* is from above or below ground level.

DP6 Performance requirement

So that occupants can safely evacuate the building, *accessways* to *exits* must have dimensions appropriate to:

(a) the number, mobility and other characteristics of occupants; and

(b) the function or use of the building.

Limitation Clause DP6 does not apply to Class 1b or Class 10 building, or the internal parts of a *sole-occupancy unit* in a Class 3 building.

DP8 Performance requirement

Carparking spaces for use by people with a disability must be:

(a) provided, to the degree necessary, to give equitable access for carparking; and

(b) designated and easy to find.

Limitation Clause DP8 does not apply to a building where:

(a) a parking service is provided; and

(b) direct access to any carparking spaces by the general public or occupants is not available.

DP9 Performance requirement

An inbuilt communication system for entry, information, entertainment, or for the provision of a service, must be suitable for occupants who are deaf or hearing impaired.

Limitation Clause DP9 does not apply to an inbuilt communication system used only for emergency warning purposes.

Part D3 Access for people with a disability

D3.0 Deemed-to-satisfy provisions

The Performance Requirements of clauses DP1, DP4, DP6, DP8 and DP9 are satisfied by complying with:

(a) clauses D3.1 to D3.12; and

(b) for public transport buildings, Part H2.

D3.1 General building access requirements

Buildings and parts of buildings must be *accessible* as *required* by Table D3.1, unless exempted by clause D3.4.

Table D3.1: Requirements for access for people with a disability

Class of building	Access requirements
Class 1b [1]	
(a) Dwellings located on one allotment [2] and used for short-term holiday accommodation consisting of:	To and within:
(i) 4 to 10 dwellings	1 dwelling
(ii) 11 to 40 dwellings	2 dwellings
(iii) 41 to 60 dwellings	3 dwellings
(iv) 61 to 80 dwellings	4 dwellings
(v) 81 to 100 dwellings	5 dwellings
(iv) more than 100 dwellings	5 dwellings plus one additional dwelling for each additional 30 dwellings or part thereof
(b) A boarding house, bed and breakfast, guest house, hostel or the like, other than those described in (a)	To and within: 1 bedroom and associated sanitary facilities; and not less than 1 of each type of room or space for use in common by the residents or guests, including a cooking facility, sauna, gymnasium, *swimming pool*, laundry, games room, eating area, or the like; and rooms or spaces for use in common by all residents on a floor to which access by way of a ramp complying with AS 1428.1 or a passenger lift is provided
[1] Refer to the definition of "specified Class 1b building" in subsection 1.4 (1) for information on Class 1b buildings to which the Standards apply.	
[2] A community or strata-type subdivision or development is considered to be on a single allotment.	
Class 2	
Common areas in buildings where one or more *sole-occupancy units*are made available for short-term rent	From a pedestrian entrance *required* to be accessible to at least one floor containing *sole-occupancy units*and to the entrance doorway of each *sole-occupancy unit* located on that level.

Class of building	Access requirements
	To and within not less than one of each type of room or space for use in common by the residents, including a cooking facility, sauna, gymnasium, *swimming pool*, common laundry, games room, individual shop, eating area, or the like. Where a ramp complying with AS 1428.1 or a passenger lift is installed- (a) to the entrance doorway of each sole-occupancy unit; and (b) to and within rooms or spaces for use in common by the residents, located on the levels served by the lift or ramp.
Class 3	
Common areas	From a pedestrian entrance *required* to be *accessible* to at least one floor containing *sole-occupancy units* and to the entrance doorway of each *sole-occupancy unit*located on that level To and within not less than one of each type of room or space for use in common by the residents, including a cooking facility, sauna, gymnasium, *swimming pool*, common laundry, games room, TV room, individual shop, dining room, public viewing area, ticket purchasing service, lunchroom, lounge room, or the like Where a ramp complying with AS 1428.1 or a passenger lift is installed: (a) to the entrance doorway of each *sole-occupancy unit*; and (b) to and within rooms or spaces for use in common by the residents, located on the levels served by the lift or ramp

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9 January 2017

The Hon. Victor Dominello MP
Minister for Innovation and Better Regulation

By Email

Dear Minister

Re: Short-Term Letting of strata apartments

I refer to the Legislative Assembly Report on the Adequacy of Regulation of Short-Term Letting in NSW (the Report). I understand that the NSW Government is proposing to formulate its position in response to that report by April this year. I wish to comment on aspects of the report as far as they concern short-term letting of apartments in strata buildings, particularly whole apartment letting.

1. First, this is a matter of interest to me as an owner of an apartment in a strata building in Pyrmont, which has since its inception, been subject to both a development consent condition imposed by the Council and an original by-law that prohibits short-term letting.

2. Second, as a lawyer, having read the submission made by the Department of Premier and Cabinet Government, on which much of the Report is founded, I am puzzled and troubled by the bald assertion that such by-laws are not legally valid or enforceable.

Strata apartments are a special case

3. The Report recognises that "strata is a special case"[1], yet is dismissive of the concerns raised by many strata owners essentially on the basis that the issues of concern "are not exclusive to STRA and may also be caused by longer-term residents." [2]

4. It is absurd to suggest that the solution to these concerns is to give owners corporations more powers to manage and respond to adverse impacts arising from adverse behaviour. While it may readily be accepted that many of the concerns relating to breaches of by-laws, unruly behaviour and damage to common property can also be caused by longer term residents, it is self-evident that longer term residents can be more readily identified by other occupiers and, thus, by owners corporations for the purposes of enforcement. When short-term lets may be as short as a few days, such powers are less likely to be readily enforceable against short-term occupants or their owners.

[1] Report at 1.51 and at 3.97
[2] Report at 3.99

5. Without a full time eye on every floor of every building, the identification of individuals responsible for every item of damage to common property is virtually impossible to prove, especially where the short-term occupants, who have long since left the building, are unknown or even unseen by others while on common property.

6. Enforcement action against absent owners letting their apartments is also problematic. They may rightly say they have limited control over the behaviour of their short-term tenants and have done everything in their power to try to inform short-term tenants of their responsibilities.

7. In any event, it is already difficult and expensive for owners corporations to issue breach notices and bring proceedings to enforce by-laws in respect of longer-term tenants and owners. The burden of proof and the costs are laid at the feet of the other owners while the landlords run away with the profits. These problems will simply be magnified if short-term letting is allowed to proliferate in residential apartments.

8. In any event, it is not just unruly behaviour and damage to common property that is in issue. There is an unquantifiable value to exclusive use for residential purposes to the exclusion of short-term letting. The fact that I know all of the occupants of the floor of my building at any one time provides not only a sense of community that is missing from hotels and serviced apartments, but is a significant element of reassurance and security, which cannot be underestimated.

9. In recognising that strata is a special case, the only practical response is to allow strata schemes to make by-laws prohibiting or restricting the use of their buildings for short-term letting.

By-laws restricting short-term letting

10. The foundation of much of the Committee's findings and recommendations was a submission from NSW Premier and Cabinet that by-laws, which manage or prohibit short term letting in their buildings, have no legal authority.[3] While the NSW Premier and Cabinet Submission refers to s 49 of the *Strata Schemes Management Act 1996* (1996 SSM Act) in support of the proposition, there is no judicial decision referred to that would support the broader interpretation of s 49 advanced. In fact, the leading judicial decisions suggest a narrow interpretation of s 49 has been consistently applied.

11. Section 49 of the 1996 SSM Act, now replicated in s 139(2) of the *Strata Schemes Management Act 2015* (2015 SSM Act) prevents a by-law from "*operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot*".

12. However, section 47 of the 1996 SSM Act, now effectively replicated by s 136 of the 2015 SSM Act, allows the regulation of uses and provides that:

> *(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.*

[3] Report at 1.56 and 3.101-3.103

13. Not only does the NSW Premier and Cabinet submission fail to record any legal authority relating to the interpretation of s 49, but the relationship between s 49 and s 47 is also ignored. Critically, s 49 has been read down in the context of s 47.

14. In *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) 5 BPR 11,432, the NSW Court of Appeal upheld the validity of a by-law which prohibited a proprietor of a lot from engaging in any enterprise other than the practice of medicine, but excluding the practice of pathology. Although the decision preceded the 1996 SSM Act, and related to the limits of the powers of owners corporations under s 58(2) of the *Strata Titles Act 1973*, this was the predecessor to Division 3 of Part 5 of the 1996 SSM Act.

15. In *Pro-Tek Pty Ltd, trading as Panozzo Property Unit Trust v The Owners SP54408* [1999] NSWSSB 38 the appellant sought an order that they be "permitted to lease or rent their strata apartment for any legal and legitimate purpose". Consent to lease the premises to a church group had been rejected by the owners corporation. In dismissing the appeal the Strata Schemes Board noted that while s 49(1) operated to prohibit by-laws having the general effect of restricting dealings with a lot, the freedom to deal with a lot is qualified by the restrictions on the permissible use of lots.

16. In *White v Betalli & anor* [2006] NSWSC 537; 66 NSWLR 690, White J cited the decision in *Sydney Diagnostic Services* at [44] and noted, at [54], that s 49(1) has been construed narrowly and further said:

> *"In one sense, a by-law which restricts the user of the lot, restricts the right of the lot owner to deal with the lot. Most by-laws, including the by-laws in schedule 1 of the Strata Schemes Management Act, include restrictions on the use of a lot...The cases show that a mere restriction on use of a lot which might limit the number of potential transferees or lessees of a lot does not amount to a restriction on dealing so as to contravene s 49(1)..."* (Emphasis added)

17. While the by-law in question in *White v Betalli* was not one restricting the use of the land for short-term letting, it was nevertheless analogous in that it created a right in favour of the owners of one lot to use a portion of the land owned by the plaintiffs for storage of watercraft. It was argued by the plaintiffs that such a restriction interfered with their power to grant an easement or otherwise dispose of the affected land. This argument was expressly rejected.

18. The decision in *White v Betalli* was the subject of an appeal to the Court of Appeal which, by majority, dismissed the appeal and upheld the original decision.[4] On appeal, Santow JA specifically referred to the second reading speech of the NSW Minister for Fair Trading on the introduction of the 1996 SSM Act where the Minister said:

> *"one of the major initiatives in this Bill is to allow more flexibility in the use of by-laws, and to encourage the adoption of by-laws more appropriate to the nature of individual strata*

[4] *White v Betalli* (2007) 71 NSWLR 381

schemes. Too often in the past, bodies corporate simply accepted the by-laws included in the legislation without giving any thought to how well they fitted their scheme..."

And so it ought to continue. Just as some apartments may be more suited by reason of their layout, size, location and amenity for short-term letting, others may not be so suited and the residents of such schemes should be entitled to protect their residential amenity by preventing whole apartment letting for short-term lets.

19. The decision in *White v Betalli* was followed in the NSW CTTT in *The Owners SP57237 v Fowley, Burgess* [2012] NSWCTTT 425, which concerned the validity of a by-law that required owners to obtain the consent of the Council if they intended to use their apartments for short-term letting. The validity of the by-law was upheld with Senior Member Bordon saying at [33]: "I agree with the submission that section 49(1) is to be construed narrowly".

20. The NSW Premier and Cabinet submission also referred, though incorrectly cited[5], a decision of the Victorian Civil and Administrative Tribunal finding that an owners corporation rule prohibiting short-term letting was not validly made. I assume the decision intended to be cited was *Owners Corporation PS 501391P v Balcombe & Anor* [2015] VCAT 956. That decision has since been on appeal to the Supreme Court of Victoria. While the appeal was dismissed, the judge (Riordan J) did make some important observations concerning differences between the NSW and Victorian statutory schemes, which are relevant to the question of the powers of owners corporations to make by-laws:

    (a) First, Riordan J observed[6] that in contrast to Victoria, in NSW, proposed by-laws must accompany the registration of a strata plan. This is important because of the special position which original by-laws have in NSW.[7]

    (b) Secondly, it was observed that, subject to two restraints, the power to make by-laws in relation to matters under s 43 and for the purposes specified in s 47 was otherwise wider in NSW than in Victoria.[8]

    It follows from these two important differences that the decision in *Balcombe* is distinguishable from the position in NSW quite apart from the fact that the decision is not binding in NSW.

21. It is evident from the leading cases on the question in NSW that it is incorrect to baldly assert, as the NSW Premier and Cabinet submission asserts, that by-laws that prohibit short-term letting are invalid or unenforceable. What is certain from the decided cases is that, where a by-law reflects the lawful uses to which the land may be put under zoning restrictions and development consents, they are valid.

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[5] Incorrectly cited at p9 as *Dobrohotoff v Bennic* [2013] NSWLEC 61

[6] [2016] VSC 384 at [79]

[7] Section 157 of the 1996 SSM Act and s 148 of the 2015 SSM Act allow the Tribunal to revoke or amend an amending or new by-law, but not an original by-law

[8] At [83]

22. Once it is understood that the legal basis for the proposition advanced by the submission of the Department of Premier and Cabinet is legally mistaken, the ready acceptance of this advice by the Committee is also flawed. The recommendations have been made in the context of this mistaken advice and should not be accepted.

Original by-laws

23. Even if the Government is not minded to give full power to strata schemes to make by-laws restricting short-term letting, greater consideration should be given to the position of apartment buildings where there are original by-laws that have prevented such activity. As Riordan J noted in *Balcombe*, the position in NSW is different to that in Victoria. The SSM Act has always recognised a distinction between original and amending by-laws. The Report fails to recognise this important distinction.

24. Section 157 of the 1996 SSM Act and s 148 of the 2015 SSM Act are in similar terms. The provision permits the Tribunal to revoke an amendment to a by-law, repeal a new by-law or reinstate an earlier by-law. The fact that the Tribunal has no such power in respect of an original by-law demonstrates the special significance of original by-laws.

25. In *Casuarina Rec Club Pty Limited v The Owners SP 77971* [2011] NSWCA 159 Young JA, (Macfarlan JA and Handley AJA agreeing) said at [50]:

> *"Some very different considerations arise when one is considering whether an original by-law is valid as opposed to an amended by-law. In the case of an original by-law, people have vested rights which are not lightly to be diminished by an amendment at the behest of the majority."* (Emphasis added)

26. For the same reason as recognised by the Court of Appeal, the Government should recognise the important distinction between original by-laws, which restrict short-term letting, and those, which were introduced by later amendment.

Local Government and the role of existing development consents

27. The Report also unjustifiably downplays the views expressed by a number of inner city Councils where there is a preponderance of residential strata accommodation. The Report cites Woollahra and Leichhardt Councils as supporting the power of owners corporations to choose whether to allow or restrict short-term letting[9].

28. A reader of the Report would perhaps glean from this and from other references to submissions by the City of Sydney, that the City did not support the same position as Woollahra and Leichhardt Councils. However, a reading of the City of Sydney submission makes it clear that if the Committee were inclined to recommend that short term letting should be exempt development under the SEPP (Exempt and Complying Development) Codes 2008 (the SEPP), the City recommended that owners corporations should not be prevented from establishing by-laws to

[9] Report at 3.106

further manage the activity.[10] Yet, the Committee have glossed over this aspect of the recommendation from one of the major stakeholders.

29. It also must be borne in mind that for many years now the City of Sydney has been imposing development consent conditions limiting the use of residential apartment buildings for residential purposes only. The development consent condition for my own building, Sugar Dock, is typical:

> *"(a) The development shall be used for residential purposes only as defined in Sydney Regional Environmental Plan 26 – City West, for permanent residential accommodation and shall not be used for the purposes of a hotel, apartment hotel, motel, serviced apartments, tourist accommodation or the like.*
> *(b) All units shall be either owner occupied or occupied with a tenant with a residential lease under the Residential Tenancies Act 1987..."*

This condition is matched by an original by-law in the same terms.

30. Critically, for me and my fellow owners, as well as countless owners of apartments in the residential areas of the City of Sydney, who acquired their properties fully aware of the development consent conditions intended to prevent short-term letting, if enacted, the Committee's recommendations would be akin to an acquisition of valuable proprietary rights without compensation.

31. If I had wished to live in a quasi-serviced apartment building I would have bought into such a scheme. In fact, when looking to acquire my apartment I rejected a penthouse in the City near to Hyde Park notorious for short term letting and overcrowding for the very reason that I did not wish to live in a building with the costs, amenity consequences and atmosphere of a building with a transitory population. So why should I be faced with that prospect now when I have taken care to acquire property in a building protected by consent conditions and by-laws that prevent short-term letting and all its attendant consequences? This would be grossly unfair.

32. It is also apparent that the Committee fails to understand the significance of earlier decisions of the Land and Environment Court concerning short term letting, such as "Bridgeport" and "Maestri Towers". The Report states:

> *"in relying on development consents to rule STRA should cease in these two buildings, it is unclear whether the Court decision would be applicable to consideration of STRA in other strata buildings where a similarly worded development consent has not been issued".*[11]

It ought to be obvious that the enforcement of development consent conditions in the Land and Environment Court is a very different exercise of statutory enforcement power to the enforcement of by-laws in NCAT. The two actions are sourced in different legislative schemes. Even assuming, as the Premier and Cabinet submission does, that by-laws are ineffective to prevent short term letting, development consent conditions remain in force and enforceable.

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[10] Submission 158 at p5
[11] At paragraph [3.110]

33. The recommendations in the Report do not resolve how to deal with apartment buildings where there are such conditions in place. Making short-term letting exempt development under the SEPP will not invalidate development consent conditions, which expressly prohibit short-term letting. An immediate tension will arise between the exempt development provisions of the SEPP and the existing development consents, which prohibit short-term letting.

34. It needs to be borne in mind that a development consent may be regarded as a right or privilege acquired under a statute or statutory rule that would be preserved under s 30(1)(c) of the *Interpretation Act 1987 (NSW)* even if the Act under which the right was accrued is amended.[12] Accordingly, the Government cannot lightly assume that the amendment of the exempt development provisions in the SEPP would invalidate conditions of development consent that are in force and restrict or prohibit short-term letting.

35. If the Government does accept Recommendation 4 in the Report, then one of the prescribed circumstances for short-term letting to be exempt must be that it does not breach any development consent conditions in force for the building.

Conclusion

36. The Report makes an incorrect assumption that by-laws, which seek to restrict or prohibit short-term letting, are invalid or unenforceable. Such by-laws are almost certainly valid where they are supported by development consent conditions or planning restrictions.

37. If the Government is inclined to make short-term letting of apartments exempt development under the SEPP, the Government should not remove the legal rights of owners corporations to manage or restrict such activities by making by-laws.

38. If the Government is inclined to do so, it should not do so in residential zones where tourist accommodation is not currently permitted and/or where development consents already prohibit such activity.

39. The Government must respect the proprietary rights of owners of existing residential apartments that have <u>original by-laws</u> that prohibit short-term letting.

I would ask that the Minister take advice on the matters raised by this letter and consider these issues carefully before formulating the Government response to the Report.

Yours faithfully

Andrew Pickles SC

[12] *Harris v Hawkesbury City Council* (1989) 68 LGRA 183 and *Lederer v South Sydney City Council* (2001) 119 LGERA 350 at 373