

**Submission  
No 149**

**ADEQUACY OF THE REGULATION OF SHORT-TERM  
HOLIDAY LETTING IN NEW SOUTH WALES**

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# **Submission by Strata Plan [REDACTED] and Strata Plan [REDACTED]**

## **“Inquiry into the Adequacy of the Regulation of Short-Term Holiday Letting in New South Wales”**

### **1 INTRODUCTION**

#### **1.1 Why the Terms of Reference of this Inquiry need to be Extended**

We are pleased to make a submission to the inquiry in respect of the above. At the same time we draw the attention of the Environment & Planning Committee to the restricted nature of the terms of reference.

Short Term Letting poses challenges for regulation whether it is for holiday or other purposes. It is our view that the Committee should extend its terms of reference to

1. All forms of short term lettings, not just holiday lettings; this would include short term letting that targets corporate visitors, students and others requiring accommodation of less than 3 months
2. All forms of “multiple occupancy” letting irrespective of whether or not they are for periods of more or less than 3 months

It is appropriate to extend the terms of reference in this way since all the above letting arrangements impact to the detriment of the lives of permanent residents and their communities in a similar manner.

#### **1.2 The Essential Elements of Our Submission**

1. Our submission extends beyond the narrow definition of “Short Term Holiday Letting” and encompasses the following:
  - a) Short Term Letting for any purpose
  - b) Multiple Letting ( letting to multiple unrelated persons), irrespective of whether or not it is for terms of less or more than 3 months
2. Our submission is necessarily based upon experience within the strata sector. This is of particular relevance to the Inquiry because most Short Term & Multiple Letting arrangements involve apartments in strata schemes. Indeed the repercussions are felt more readily by those living in the close community environment of strata than amongst those living in free standing homes.
3. Overcrowding in the strata sector is an allied issue and contributes to the impact on strata buildings and their residents in ways similar to the impact of Short Term Letting. It is a manifestation of the larger Short Term Letting problem. Because of the close relationship that exists between the two we deal with overcrowding as a separate part of our submission.

### **1.3 The Incompatibility of Short Term Lettings and Residential Communities**

Successful residential communities provide a “home” environment for their residents. The success of these communities depends upon a high level of dialogue and cooperation amongst their members. In strata schemes this is fostered by the existence of accepted rules and codes of behaviour as well as other initiatives taken by owners to build the community eg. a regular newsletter, events, interest groups etc

Strata communities have their own democratic processes designed for owners to make decisions affecting their built environment and the behaviour of their residents. Strata schemes formalise their own rules and codes of behaviour into enforceable by laws. Strata schemes provide for an equitable sharing of the costs of maintaining their property through a process of “unit entitlements”.

Residential strata schemes can self govern but they can only do this effectively within a robust legal framework supported by state and local governments. Short term and multiple letting are incompatible with residential strata. We discuss below the various impacts that Short Term Letting has on amenity and safety together with the need for robust legislation to mitigate these impacts.

## **2 WHAT IS SHORT TERM LETTING ?**

### **2.1 The Many Faces of Short Term & Multiple Letting**

Short Term Letting in strata has now taken on many forms

- a) Letting of complete apartments either Serviced or Unserviced
- b) Letting of individual rooms within residential apartments to multiple occupants

The growth of online platforms such as airbnb, stayz, come2arentals etc. to promote and manage short term lettings has extended Short Term Letting to strata schemes in areas previously little impacted. Many of those offering apartments for short term letting are individual owners who manage access to the apartments themselves.

Short Term Letting has, however, now moved out of the realm of individual owners offering accommodation to include an industry where businesses operate to let residential accommodation they control as either owner, or more usually, as the lessee.

The impact upon the lives and amenity of permanent residents stems from the conflict between the interests of those who stay in a building for a few days and the interests of those who make the building their home.

## 2.2 Multiple letting Businesses

There has been a growth in the number of businesses specialising in offering short term rentals. A study of the New York short term rental market using Airbnb data concluded that “commercial users” comprised just 6% of hosts but were responsible for 36% of all lettings.

These businesses own or conventionally lease apartments and then sublet to multiple tenants. An analysis of the New York Airbnb figures showed that bookings for some apartments exceeded one a day sometimes by a factor 4, confirming the extent of multiple lettings.

The business model for these multiple letting businesses may involve either long or short term letting, but with the common characteristic that apartments are simultaneously let to multiple unrelated persons.

Multiple letting in a Class 2 building is Illegal Letting.

1. To the extent that the letting is for *periods longer than 3 months*, it constitutes operating a “boarding house”. Boarding houses require a Class 3 building classification and are therefore incompatible with a Class 2 residential strata building.
2. Where the multiple letting is for *short periods of less than 3 months*, then it would constitute the illegal operation of a “hostel” and would need to comply with the visitor accommodation provisions of local planning controls. Compliance would require both that the building was of a Class 3 type and that the zoning for the building was such as to permit Short Term Letting.

## CASE STUDY

The owners corporation of a large residential strata scheme located at [REDACTED], was concerned that its residential strata building could be deemed a Class 3 Building in terms of the BCA 2014 and lose its residential Class 2 classification as a result of letting activities taking place within the building. This would have exposed the owners corporation to fines for breaches of the Environmental Planning and Assessment Act 1979.

Certain apartment owners in the building had entered into long term leases under the Residential Tenancies Act 2010 with an accommodation and letting business. This business was advertising and subletting individual rooms in the apartments it had leased. The nature of the subletting was that rooms in these apartments were let by separate agreement to unrelated persons. In some instances letting of rooms extended from bedrooms to rooms designed for purposes other than as a bedroom.

Building management arranged with City of Sydney Council to carry out inspections to confirm these letting arrangements. Advice was received from Council that the subletting of individual rooms to unrelated persons as a place of residence constituted the running of a "Boarding House" in terms of the Sydney Local Environment Plan "LEP". It was not a permitted use for a Class 2 building due to the absence of the necessary fire, health & safety controls and therefore potentially put the owners corporation in breach of the Environmental Planning and Assessment Act 1979.

The letting business was contacted by the owners corporation's lawyers and put on notice as to the consequences of its illegal letting. City of Sydney confirmed to the business that its operations constituted the operation of a "boarding house", a type of accommodation that was not permitted under the consent for the strata scheme's building. The letting business agreed to make changes and to enter into complying subtenancy agreements in respect of the apartments it controlled.

The multiple letting of rooms in breach of the development consent and the Sydney LEP in this case took place in the context of the illegal letting of individual rooms for the purpose of long term accommodation. Significantly, however, where a letting business sublets individual rooms to unrelated persons for short periods of time, such as for holiday letting, then illegal letting is still occurring.

Where the illegal letting is short term, it constitutes providing illegal tourist and visitor accommodation as defined by the LEP, in the form of a hostel, private hotel accommodation or similar. The consequences for the owners corporation would be that the illegal letting results in the residential strata building being classified as a Class 3 building and therefore in breach of the Environmental Planning and Assessment Act 1979.

Permanent residents of buildings where illegal letting is taking place face not only the challenge of evidence gathering and convincing a local authority to take action, but of having to deal with a business which may have the support of a number of owners in the strata scheme, who have a commercial interest in the promotion of short term letting.

Furthermore these commercial interests may have gained representation on the scheme's Executive (Strata) Committee sufficient to inhibit the owners corporation from taking the necessary action to terminate the illegal letting. Strata Owners in one notable Sydney building have not only been unable to get their Committee to act against Short Term and Multiple Letting but have been faced with the threat of legal action if they continued to pursue an initiative to terminate the illegal letting.

The challenges faced by reform minded residents may be even greater where the Short Term Letting business is operated by the same entity which manages the strata scheme's property. Under such circumstances the manager is in a unique position to control the administration of the short term letting and to service the needs of his clients. The manager may be considered to be both operating illegally and acting through conflict of interest against the interests of the permanent residential community in the strata scheme.

### **3 IMPACTS ON THE RESIDENTS OF A STRATA SCHEME**

Short Term Letting results in impacts that are incompatible with the expectations that strata owners have for residential living, in particular

#### **3.1 Increases in the size & number of parties**

Lettings may be made for the specific purpose of hosting parties or other events. Parties and their impact on neighbours are a challenge in any living environment and the use of a residential strata scheme as a location for parties by non residents impacts the quality of life of permanent residents

#### **3.2 Occupation by persons unfamiliar with the safety systems**

The safety of not only short term occupiers but of a whole building may be compromised where residents are unfamiliar with evacuation plans and the layout of the building. Fire Regulations for short term and hotel type accommodation differ from those applicable to residential strata buildings and are designed to address the problems posed by this unfamiliarity.

#### **3.3 Occupation by persons unfamiliar with the scheme's services**

A strata scheme is able to inform and educate its residents in relation to its building services. This is typically achieved through ongoing interaction between building management and residents and by letting agents providing an Introduction Pack or similar information to acquaint new tenants with the services and by laws of the building they are

moving into. This education process cannot be effective when occupiers change frequently and are resident only for abbreviated periods of time.

As a consequence building by laws and rules may be unwittingly breached. Instances of this which occur frequently include:

- a) Garbage may be left in passages under the mistaken belief that a service provider will pick it up
- b) Washing may be hung over balconies without regard to by laws
- c) Pets may be kept in buildings where pets are either not permitted or permitted only after certain conditions have been met

### **3.4 Occupation by persons who are not registered as tenants on the strata roll or identifiable**

- a) Details of Residential Tenancies are required to be advised to the owners corporation and to be recorded. The nature of Short Term Letting is that it is impossible to provide information on tenancies in a timely fashion. Where subletting is taking place, then the tenancy shown (if any) may be that of a letting organisation without any identity of the occupiers
- b) Management of a strata building and the maintenance of community values within a scheme requires that the owners corporations and its key providers, like strata managers and building managers, are able to effectively identify occupants. The absence of this information means that compliance regimes cannot be upheld and matters such as parking, noise and the custody of pets effectively policed.

### **3.5 An increased volume of traffic and pedestrian movements throughout the common areas**

Residential strata buildings are designed to accommodate the day to day needs of residents. This would include residents moving in and out from time to time due to the normal turnover in leases and ownership. Short Term Letting changes this dynamic.

- a) When there is a change in occupancy of lots every day, every week or indeed every couple of weeks, the use of common area facilities is increased. This leads to additional wear and tear on facilities such as lifts, doors, door closers etc. It also leads to greater use of the time of building managers, concierges and security personnel in resolving issues.
- b) In a similar way the increase in move ins and move outs associated with Short Term Lettings heightens the risk of damage to common property. Paintwork can be scratched and high cost items like lift doors & interiors damaged. This can lead to increased insurance premiums or result in costs of repairing damage for which no one can be identified as responsible.

- c) The residential ambience of the building where it is “home” to both owners and bona fide long term tenants is sacrificed in favour of a more transient hotel environment.
- d) The costs of this increased usage are borne by the general body of residential owners, not only by the owners of the lots subject to Short Term Letting arrangements. One of the fundamental principles underlying strata living is that the costs of administering and maintaining the shared “common property” are shared equitably by apartment owners in proportion to the values of their apartments - their unit entitlements. – This equitable basis of sharing costs is upset when certain apartments or lots make a significantly greater call on the common property services provided.

### **3.6 Short Term Letting raises Legal Issues for the Owners Corporation**

- a) The classification of the scheme’s buildings under the BCA 2014 may change from Class 2 to Class 3 resulting in non compliance for Fire Safety purposes
- b) The use of parts of the scheme for purposes of short term letting may be a matter to be considered by a scheme’s insurer and may impact upon insurance premiums payable
- c) Since typically Short Term Letting is permitted in a limited number of zones, the operation of Short Term Letting in a residential strata apartment building would potentially be in breach of the development consent and the zoning requirements for its location. This exposes the owners corporation to penalties.
- d) The duty of care required of an owners corporation may be higher in a scheme where Short Term Letting is known to be taking place. Failure to observe the required higher level of care may expose the owners corporation to legal challenge.

### **3.7 Increasing Impact on Strata Scheme Residents**

The advent of online agents such as airbnb, stayz and come2arentals has fuelled the growth in short term lettings with online agents being the driver in this sector. Whether it is owners letting through online agents or entering into leases with organisations whose business it is to provide short term accommodation, short term lettings, the majority of which are in the strata sector, have multiplied.

Technology has enabled short term letting arrangements to be made frequently, at short notice and out of hours. It has also enabled not only the letting of entire residential apartments but the letting of apartments to multiple occupants for periods as little as one night.

Permanent residents of a strata scheme are impacted in the ways described above by daily or weekly changes of occupants. The impact on their lives is further multiplied when a changeover of multiple occupiers within a single apartment occurs on a daily basis.



## **4 OVERCROWDING**

### **4.1 The relationship between Short Term Letting & Overcrowding**

Whilst the terms of the inquiry do not extend to overcrowding, overcrowding impacts on residents in strata in a similar way to Short Term Letting.

Overcrowding typically involves numerous unrelated persons being accommodated in an apartment at a higher density than is allowed under the relevant development consent. Typically there may be 4 or more persons sleeping in each bedroom.

### **4.2 The Impact of Overcrowding in Strata Schemes**

The impact on the other residents of a strata scheme that has apartments with overcrowding issues mirrors the impact experienced by strata schemes with illegal Short Term Letting issues,

- a) There is an overuse of common property with excessive wear and tear and the risk of damage to lifts, doors and other services.
- b) Overcrowded apartments make disproportionate use of utilities provided by the owners corporation and paid for communally by owners eg. water usage
- c) There is a heightened risk to safety since fire protection systems both within the apartment and in common areas are not designed to ensure safety in multiple occupancy situations. This is applicable to both warning systems and emergency egress; the dangers were most recently highlighted in the Inquest into the fatalities in the Bankstown fire.
- d) With entry access cards being shared across residents eg. left in letterboxes, the risk to security are great
- e) The illegal nature of overcrowding means that building defects or service failures eg. leaking taps, go unreported for fear of the overcrowding being identified through building management or tradesmen's visits.

### **4.3 The Regulatory Response to Overcrowding**

The regulatory response to dealing with overcrowding has in many ways been more satisfactory than the regulatory response to Short Term Letting.

Strata Schemes may create their own by laws that limit the number of persons permitted to occupy a lot / apartment to no more than 2 per bedroom. S 137 of the recently enacted Strata Schemes Management Act 2015 now explicitly provides the power to do this.

Consent authorities may as part of the development consent process determine a maximum number of persons who may occupy a lot / apartment. The City Of Sydney has taken this position, but it is not universal amongst councils.

The City of Sydney has also recently established a task force to police overcrowding in its local government area. Councils have to date been slow to deal with instances of overcrowding because of the practical problems of gaining entry for the purpose of

gathering the necessary evidence. Similar practical problems of access have hindered the enforcement process where Short Term Letting has been identified.

## **5 REGULATORY FAILURE**

### **5.1 The Failure of Strata regulation as a means to control Short Term Letting**

The issues associated with Short Term Letting continue to be seen by government as issues for local zoning & planning controls. Strata Law, be it the Strata Schemes Management Act 1996 or a scheme's by laws created under the Act, has not been able to offer solutions to the problems associated with Short Term Letting.

Throughout the consultative process for the recently enacted Strata Schemes Management Act 2015 the government took the position that it was inappropriate for strata legislation to deal with issues of short term letting.

Indeed the new Act continues to restrict an owners corporation from enacting by laws that could affect the manner in which an individual owner deals with their lot. Owners therefore cannot, even with a 75% majority vote, enact a by law that prohibits short term letting in their scheme.

Where a by law is required to control short term letting, it must be framed in terms of requiring any letting of a lot by an owner to be in accordance with the relevant law, development consent or other planning instrument. The by law's effectiveness is therefore only as good as the interpretation given to the relevant planning instrument.

This legislative environment has failed to deliver to strata scheme permanent residents the quiet enjoyment to which they are entitled and continues to deny them the tools they need to maintain their residential communities.

### **5.2 The Limitations of Planning Instruments & Development Consent Conditions**

A Class 2 residential strata building being used for Short Term Letting may be in breach of its development consent conditions and of local planning instruments, but these planning instruments have not delivered to owners in strata schemes the remedies they need to combat the impacts of either Short Term or Multiple letting. Some of the reasons for this lie in the following:

1. The nature of the planning controls
  - a) Planning controls vary from one Council area to another
  - b) Planning controls may not specifically prohibit Short Term Letting
  - c) Planning controls may refer to "Residential Use" but it may be unclear as to whether "residential use" excludes Short Term Letting. The case of *The Sutherland Shire v Foster* is seen as authority for residential development consent excluding Short Term Letting, but the matter is not settled beyond doubt.

2. The ability or willingness of local authorities to enforce the terms of planning instruments and development consents due to
  - a) The resources needed to accumulate evidence of Short Term Letting
  - b) The powers available to Councils under the Environmental Planning and Assessment Act 1979 to gain entry to strata lots without the consent of the owner & occupier

## **6 THE LEGISLATIVE RESPONSE REQUIRED**

### **6.1 The Legislative & Regulatory Responses required to Control Short Term Letting**

The current regulatory response is inadequate and the inadequacies will be further highlighted with the growth of the Short Term Letting sector driven by online operators such as airbnb, stayz and come2aurentals unless a new regulatory environment is developed.

In the context of strata schemes this should take the following form with a requirement

1. That development consents for strata schemes state expressly whether or not Short Term Letting is permitted
2. That the definition of Short Term Letting be clarified so that it encompasses
  - a) all lettings for periods of, say, less than 3 months, together with
  - b) all lettings which do not have a dominant residential purpose
3. That the Strata Schemes Management Act 2015 be amended to permit the making of by laws specifically to control the manner in which lots in a residential strata scheme are let or sublet.
4. That the Strata Schemes Management Act 2015 be amended to provide for an owners corporation to have the right of access to lots for the purpose of ascertaining that their use is compliant with any relevant planning instrument or the scheme's by laws, in a manner similar to the way access can be obtained to maintain common property.
5. That s 258 of the recently enacted Strata Schemes Management Act 2015 extend the obligation to provide details of lessees and sublessees to owners' agents and that the address for service provided for the tenant be a permanent residential address rather than that of the owner's agent. The accuracy of such information is essential to the effective control of Short Term Letting.
6. That the Strata Schemes Management Act 2015 be amended to state that the use of a lot in a strata scheme for purposes other than as permitted by the relevant planning instruments is an offence rendering both the owner and any tenant liable at law, together with any agent acting with knowledge.