

# RESIDENTIAL SHORT-TERM LETTING: IS IT ABOVE BOARD?

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By Kye Tran-Tsai and David Sachs

The evolution of digital sharing has transformed the global economy and its proliferation has grown with enormous speed. With the ultimate demise of timeshare, short-term letting is the new fashion. However, short-term letting is problematic in residential strata schemes, as online platforms can be used by letting operators to advertise short-term accommodation available for booking by the public at large. Short-term lets can cause interference with full-time residents' enjoyment of their lot due to noise, security concerns, excess wear and tear on common property, and excess use of common property infrastructure, such as lifts and plumbing. Fire safety is a particular concern. Strata buildings whose lots are often frequented by holidaying guests pose risks as the fire safety requirements of a residential building are not the same as those imposed on hotels and the like. There are also other risks of short-term letting when listings are run by unscrupulous operators and guests who use the premises for unlawful or unsafe purposes.

## Does an Owners Corporation have the power to make by-laws regulating use?

Each resident of a strata scheme has the right to occupy their lot and to use and enjoy the common property, so far as the law allows. Common property, by definition, comprises all those parts of a parcel that do not form part of a lot. Common property usually includes the building's lifts, stairs, hallways, roof, foyers and garden. In New South Wales, each resident's right of occupation, use and enjoyment of common property is regulated by the *Strata Schemes Management Act 1996* (NSW) ('the Act') and the strata scheme's registered by-laws. One of the limitations of the legislation governing strata schemes is that it fails to deal expressly with the conflicting interests and uses of different lot owners. The power to restrict land use was instead placed within the *Environmental Planning and*

## Snapshot

- Short-term letting is booming across NSW thanks to the likes of Airbnb, but not everyone is happy. A recent parliamentary inquiry has broadly condoned the practice but recommends better regulation when it comes to strata schemes in particular.
- In the meantime, the state of play is still not entirely settled in NSW. The power to regulate land use is contained in the relevant planning instrument and a by-law purporting to contradict a planning instrument is invalid.
- Short-term letting can be construed as a 'bare licence', falling outside the prohibitive effect of s 49(1) of the *Strata Schemes Management Act 1996*.

*Assessment Act 1979* (NSW) ('EPA Act'). Councils are empowered by the EPA Act to prepare local environment plans that determine the zoning of land and separation of uses within the particular local government area, with the Minister of Planning having the ultimate authority. Where a local environmental plan states that the permissible use of land includes use as a dwelling, then short-term accommodation has been held to be inconsistent with that use (see *Dobrohotoff v Bennic* [2013] NSWLEC 61). Therefore, the lawfulness of short-term letting in a strata scheme will be determined by the planning instrument relevant to the land and, often, tourist and visitor accommodation will require consent. A by-law has no force or effect to the extent that it is inconsistent with any Act or law (s 43(4) of the Act).

## Owners Corporation PS 501391P v Balcombe [2016] VSC 384

On 22 July 2016, the Supreme Court of Victoria held that a rule that governed a strata scheme that sought to prohibit short-term letting was invalid. The Court found that the power to regulate use in a residential strata scheme is always vested in the planning legislation. The Court found that because there was no express power in the *Owners Corporations Act 2006* (Vic) to govern use, the Owners Corporation of the building was not entitled to claim such a power. Riordan J cited Lord Goff in *A-G (UK) v Guardian Newspapers Ltd [No. 2]* [1990] 1 AC 109 at 282 and restated the common law position that 'everybody is free to do anything, subject only to the provisions of the law' (at [192]). In other words, a by-law restricting a lot owner's use was a substantial interference with the lot owner's property rights and the rule prohibiting short-term letting was held to be invalid and of no effect.

## Lease or licence? The 'spanner in the works' for s 49(1) of the Act

Many strata schemes in New South Wales have adopted a by-law prohibiting or restricting short-term letting by reducing it to 'commercial use' of a residential strata lot.

However, section 49(1) of the Act complicates this somewhat, as it states that '[no] by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot' (emphasis added).

It could be argued that this provision prevents an Owners Corporation from adopting a by-law to restrict the practice of short-term letting, as the nature of the short-term let can be construed as a 'lease'. In such case, the prohibitive effect of section 49(1) may apply. However, there are arguably circumstances where a short-term let will not constitute a lease, but rather a bare licence for a permissive occupancy.

A lease is distinguishable from a bare licence because the licensor retains an

immediate right to eject the licensee and no legal or equitable interest vests by nature of the licence. There have been many decisions dealing with the issue of whether short-term occupancies could be constituted as licences rather than leases. In the English decision of *Marchant v Charters* [1977] 3 All ER 918, Lord Denning MR said the test 'depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?'

In light of Lord Denning's test, it is difficult to suggest that the 'host' of the short-term let intends to grant a legal or equitable interest to the 'guest' in a short term let. Equally, it would be difficult to reconcile a suggestion that a 'guest' intends to obtain something more than a personal interest in the premises during or after the booking period. It is also interesting to note that a scan of AirBnB's terms of service describe the booking as 'merely a licence' and specifically reserve the host's ability to eject a guest who overstays and to cancel a 'confirmed booking'. In this light, it is arguable that a short-term let

does not come within the realms of a 'lease' or 'other dealing relating to a lot' as used in section 49(1) of the Act.

Other commentary suggests the intent of section 49(1) is actually to prohibit the creation of a by-law restricting alienation of land and the right of assignment. Such principles remain inherent characteristics of freehold land ownership and this position has been consistently upheld by the courts since feudal times, and more recently in comments by White J in *White v Betalli* [2006] NSWSC 537 and the majority on appeal. Of course, a by-law that is consistent with the planning instrument does not circumvent the overarching power of the Council to regulate land use. This reasoning does, however, suggest the issue remains complicated and has not yet been adequately addressed in NSW. While the *Strata Schemes Management Act 2015* is soon to bring a number of reforms, section 49(1) has not been amended and will be carried forward into section 139(2) of the new Act.

## Inquiry into short-term holiday letting

A report on the Adequacy of Regulation of Short-Term Holiday Letting in New

South Wales' was tabled in Parliament on 19 October following an 18-month inquiry. The report concedes that 'current arrangements are fragmented and confusing' and says there is a need for a 'consistent definition of short-term letting within planning legislation'. It broadly recommends that short-term accommodation sharing be allowed across New South Wales, but recognises that 'short-term rental in strata properties is a special case'. Prohibition, however, is a 'last resort'. Rather, the report recommends that 'incremental steps should be taken to increase the powers of strata residents and owners corporations to influence the use within their buildings, including the right to recover costs from short-term rental landlords'. It will be interesting to see the Government's response in the coming months. In the authors' opinion, a convenient way to deal with the issues of short-term letting is to specifically empower each strata scheme to have the ability to adopt a by-law to restrict short-term letting in their building, provided it is with the overwhelming support of lot owners. **LSJ**

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