Update on Short Term Holiday Letting
An (inter)national perspective

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Summary

This paper comprises an update to my more detailed paper of 2 March 2018: *Short Term Holiday Letting in Multi-Owned Properties: A Cross-Jurisdictional Summary.*

In this paper, I summarise the current status of legislative intervention across the various Australian jurisdictions when it comes to the practice of short term holiday letting (STHL) in multi-owned properties, and refer to some recent (albeit limited) case law - specifically from Victoria.

Over the past twelve months, the greatest activity in this area has been seen in New South Wales and Victoria. Those Australian jurisdictions are the focus of this update, with short reference also to recent developments Queensland, Western Australia and Tasmania.

The session in which this paper is presented also included a short oral update from New Zealand practitioner Liza Fry-Irvine in respect to the state of the law in New Zealand.

New South Wales

This time last year, NSW was still "considering its options" when it came to the regulation of STHL in the state.[1]

On 5 June 2018, the Minister announced a whole-of-government framework for STHL.[2] The framework involves:

1. Amendment to the *Fair Trading Act 1987* to include reference to a mandatory Code of Conduct;
2. Amendment to the *Strata Schemes Management Act 2015;* and
3. State-wide planning reform.

[1] See my 2 March 2018 paper: p 4
[2] Media release: https://www.planning.nsw.gov.au/News/2018/Short-term-holiday-letting-plan-a-win-win

The Code of Conduct

On 14 August 2018, the bill to enact the *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* ("Amendment Act") received assent. At the date of this paper, the Amendment Act is yet to commence.

The Amendment Act inserts sections 54A to 54E in to the *Fair Trading Act 1987*. In summary, these sections:

i. add a definition of "short term rental accommodation arrangement", namely: a commercial arrangement for giving a person the right to occupy residential premises for a period of not more than 3 months at any one time;
ii. add a definition of "short term rental accommodation industry participant", covering the online booking platform, agents, owners, occupiers, any other person prescribed by the regulations;
iii. provide for the regulations to declare a code of conduct applying to short term rental accommodation industry participants;
iv. provide that the code of conduct may cover a range of things, without limitation;
v. provide that the code may require the registration of residential premises used for the purposes of short term rental accommodation arrangements and for the registration system to include details about when residential premises are used for those purposes;
vi. provide that the code may require the keeping of an "exclusion register" containing the details of short term rental accommodation industry participants who have failed to comply with the code and prohibit those persons from participating in short term rental accommodation arrangements; and
vii. provide that contravention of the code is an offence carrying a maximum penalty of $110,000 in the case of a corporation and $22,000 in any other case.

The code of conduct is a critical aspect of this regime, but at the time of writing a draft code has yet to be seen. Fair Trading NSW reports the following on its website in respect of the code of conduct:

> *The Code will establish the '2 strikes and you're out' policy. Hosts or guests who commit 2 serious breaches of the Code within 2 years will be banned for 5 years. Platforms and letting agents will not be permitted to offer services to anyone, or any dwelling, that is listed on the exclusion register.*
>
> *A strike will include any behaviour which unreasonably interferes with a neighbour's quiet and peaceful enjoyment of their home.*
>
> *The Code will establish a complaints system, which will be available to neighbours of short-term holiday letting premises, strata committees and owners corporations.*

Complaints will be assessed by independent and impartial adjudicators, approved by the Commissioner for Fair Trading. Adjudicators will be required to make decisions on evidence and after giving both complainants and respondents a chance to put forward their case.

Strikes will be recorded on an online register to ensure that guests and/or hosts cannot 'platform shop'. Platforms and property agents will have to check the register before taking on new customers. Failure to do so may result in significant penalties of up to $1.1million for corporations and $220,000 for individuals.[3]

NSW Fair Trading will have powers to police online platforms and letting agents. The Code, its enforcement, the compliance system and the register will be funded by industry.[4]

Despite the passage of some 6 months since the Amendment Act received assent, little else has been publicised in respect of the draft code, including its status or expected completion date.

At this point in time, NSW Fair Trading's website reports that the "new framework" is "expected to start in 2019, with the code of conduct being developed in consultation with stakeholders during 2018."[5] With a state election scheduled for 23 March 2019, we do not expect to see a draft code of conduct any time soon.

Amendment of strata legislation

The Amendment Act also amends the *Strata Schemes Management Act 2015*, inserting section 137A as follows:

137A Short-term rental accommodation

(1) A by-law made by special resolution of an owners corporation may prohibit a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is not the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.

(2) A by-law has no force or effect to the extent to which it purports to prevent a lot being use for the purposes of a short-term rental accommodation arrangement if the lot is the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.

[3] This reference to fines in the sum of $1.1m and $200,000 appears to be either a typographical error or a calculation error on the part of the author of the text appearing on the website. The Amendment Act is clear that fines are "1000 penalty units" and "200 penalty units" respectively. One penalty unit equates to $110, therefore maximum fines can only be up to $110,000 and $20,000 respectively.

[4] https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-short-term-holiday-letting-regulations

[5] https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-short-term-holiday-letting-regulations

(3) In this section, ***short term rental accommodation arrangement*** *has the same meaning as in section 54A of the Fair Trading Act 1987*

The expressed intent is to permit owners corporations to pass a by-law prohibiting investor-owners from using their investment property at all for STHL, whilst still permitting resident owners who genuinely wish to "share" their home, to do so.[6]

Adding a layer of complexity, this section must be read hand in hand with separate planning laws which are yet to be drafted. As set out further below, the effect of the proposed planning laws is expected to be that if the resident home owner is not present during their guest's stay, the residence can only be used for STHL:

- up to 180 days per year in greater Sydney;
- 365 days in all other areas of NSW.[7]

NSW Fair Trading has announced that it also intends to develop guidelines to advise owners corporations on how they can use other existing strata laws to help deal with the impacts of STHL.[8]

Planning laws

Proposed amendments to NSW planning laws in the context of STHL were on exhibition between 5 October 2018 and 16 November 2018.[9] The Department of Planning is now considering feedback received during the exhibition period.[10]

The Department of Planning website announces that the proposed amendments will:

i. introduce a single definition for "short term rental accommodation";

ii. introduce exempt and complying development pathways that enable STHL in greater Sydney local government areas as "exempt development" for up to 365 days per year when the host is present, and for no more than 180 days per year when the host is not present; and

iii. apply a blanket limit of 365 days per year to dwellings in council areas outside greater Sydney, though those Councils may decrease that limit to no less than 180 days per year; and

[6] https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-short-term-holiday-letting-regulations
[7] https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Short-term-holiday-letting
[8] https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-short-term-holiday-letting-regulations
[9] https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/Short-term-Rental-Accommodation-EIE5.ashx
[10] https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Short-term-holiday-letting

iv. introduce minimum fire safety and evacuation requirements for premises used for STHL.[11]

An example of the opportunities that may be available for local councils to avoid these state planning laws has recently been demonstrated in the Byron Bay area. On 11 February 2019, the Minister for Planning and Housing announced that he would issue a Ministerial Direction in relation to the Byron Bay area, inviting the Byron Shire Council to prepare a Planning Proposal that could introduce a 90 day limit in the most impacted towns of that local government area. This is apparently in recognition of the high concentration and unique impacts of STHL on some parts of Byron Shire.[12]

It will be interesting to see whether other local councils take up this opportunity to submit Planning Proposals, which effectively allows councils to bypass the state planning law.

Victoria

The *Owners Corporations Amendment (Short-stay Accommodation) Act 2018* commenced on 1 February 2019.[13]

The detail of these amendments were set out in my 2018 paper.[14] In short, the *Owners Corporations Act 2006* now:

i. defines the inappropriate conduct which characterises unruly short-stay parties, including excessive noise, interference with residents' enjoyment of their units and of the common property, creation of health and safety hazards, obstruction of the common property, and property damage
ii. empowers VCAT to:
- award loss of amenity compensation (up to $2,000) to residents affected by an unruly short-stay party
- make orders prohibiting the use of apartments for short-stay accommodation for a specified period if occupants have breached the Bill's conduct prescriptions at least three times within 24 months,
- impose civil penalties (up to $1,100) on short-stay occupants for breaches of the Act's conduct prescriptions
iii. makes short-stay accommodation providers jointly and severally liable with their guests for loss of amenity compensation and civil penalty awards, as well as any award for

[11] https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Short-term-holiday-letting
[12] https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Short-term-holiday-letting
[13] http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/8F6AAC963CC5128BCA2582E9000FA3E0/$FILE/18-034aa%20authorised.pdf
[14] See my 2 March 2018 paper: pp 7-8

damage to common property in the apartment building caused by their short-stay guests, and

iv. adapts the internal dispute resolution process under the Act and the conciliation powers of Consumer Affairs Victoria to include all those involved in short-stay disputes.

Victorian owners, residents and practitioners now wait for the efficacy of these provisions to be tested.

Case: *Lim v Owners Corporation PS714612M*

On 19 December 2018, the decision in *Lim v Owners Corporation PS714612M* (Owners Corporations) [2018] VCAT 1995 was published.[15]

The case illustrates the creative steps that are already being taken by some buildings to limit the impacts of STHL on their properties. The findings in this case - in respect of seemingly onerous rules governing 'tenant inductions' - may well encourage a raft of 'copy cat' rules (in the Victorian jurisdiction) or by-laws (in other jurisdictions).

In this case, a lot owner complained to VCAT that the Owners Corporation was making it as difficult as possible for him to let his apartment to short-stay tenants. The Owners Corporation had published a set of "tenant directives", pursuant to one of their rules (no. 14.2 - which related to moving in and out of the building). The 'tenant directives' included, in summary:

1. The tenant was required to go through an induction process which included the following:

    a. The tenant was required to give the building manager at least 72 hours' notice of an intended move-in.
    b. The move-in had to be on a week day and between the hours of 9.00am and 5.00pm and supervised by the building manager.
    c. On that day the building manager would take the tenant on a tour of the building for the purpose, amongst others, of pointing out safety requirements.
    d. If the tenant wished to move in during a weekend or after hours, the owner had to pay a fee of $300.00.

2. The owner was required to pay a fee to the owners corporation of $100.00, plus GST, for each induction.

The Owners Corporation also had a rule in place (no. 18.1.1) prohibiting a lot owner or occupier from granting a lease, licence or occupancy right for a period of less than 3 months.

[15] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/1995.html

The Owners Corporation had also deactivated the security fob given by the owner to a short stay tenant, preventing access to the building during the tenant's stay.

The owner, Mr Lim, applied to VCAT for:

(a) a declaration that rule 18.1.1 purporting to ban short term tenants was invalid;
(b) an order preventing the Owners Corporation from de-activating the security key fobs of any existing tenant or occupier;
(c) a declaration that he was not legally required to follow the induction process; and
(d) a declaration that he was not obliged to pay a fee for each induction.

The dispute about the validity of rule 18.1.1 (ie: no stays for less than 3 months) disappeared prior to hearing - the Owners Corporation seeming to accept the authority of the Supreme Court's 2016 decision in *Balcombe*.[16]

In relation to the de-activation of security fobs, the Tribunal found [at par 21]:

> *An owners corporation has no right to prevent a subsisting tenant from access to the tenanted premises merely because the owner or the tenant has been in breach of a rule. There may be exceptional and urgent circumstances of emergency when the behaviour of an owner or occupier of a lot is so extreme that it threatens the health or safety of other occupiers and the owners corporation has no choice other than to exclude the owner or occupier from the building. There has been nothing like that in the present case.*

A declaration was made that, except in the case of an emergency, the Owners Corporation is not entitled to de-activate the security fob or key of any subsisting lot owner or any subsisting occupier of a lot.

In relation to the induction process, Mr Lim did not challenge the Owners Corporation's power to make such rules, but rather, argued that the rule was being used for an improper collateral purpose: to discourage lot owners from accepting short-stay tenants.

The Tribunal rejected that argument, finding [at par 25]: there was *"no evidence of any connection between the 'tenant's directive' and the rules on the one hand and the dispute about access for Mr Lim's tenant on the other hand".*

Mr Lim also argued that the directive and the rules that imposed the mandatory induction-process requirement were discriminatory because they effectively prohibited any move-in outside of week days and business hours.

[16] Owners Corporation v Balcombe [2016] VSC 384

The Tribunal found: they did no such thing. The directive provided for a lot owner or occupier to achieve a move-in outside those days and hours if a fee of $300.00 was paid. The Tribunal saw nothing unfair, unreasonable or discriminatory about that [at par 26]:

> *It is reasonable for there to be a requirement that the building manager supervise a move-in and make the person moving in familiar with safety and behavioral requirements. If that occurs outside normal working hours the OC would have to pay the manager for that extra time. It is reasonable for the OC to seek reimbursement from the lot owner involved.*

The Tribunal accepted the Owners Corporation's submission that the requirement for payment of an additional induction fee in those circumstances was not discriminatory because it applied to all lot owners and occupiers. Sure, it affected Mr Lim more than any other lot owners, but that was because Mr Lim chose to have numerous short stay tenants.

Aside from a declaration that the Owners Corporation is not entitled to de-activate the security fob of any subsisting lot owner or occupier, the proceedings were otherwise dismissed.

Queensland

The 'sunshine state' has, to date, taken a relatively laissez-faire approach to STHL. As such, the 9 July 2018 media release from Queensland's Minister for Innovation and Tourism Industry Development, which called for a code of conduct to be "the key in the state's response to short term letting", may have come as a surprise to some.[17]

At that time, the Hon. Kate Jones said: "*a code of conduct for hosts and guests along with a limited number of "strikes and you're out" policy will be central to Queensland's response to short-term letting."*[18]

An industry reference group is currently working on the proposed code of conduct, with the intent to submit formal recommendations to government before the end of 2018. As far as I am aware, to date this has not occurred.

[17] http://statements.qld.gov.au/Statement/2018/7/9/code-of-conduct-the-key-in-states-response-to-shortterm-letting

[18] http://statements.qld.gov.au/Statement/2018/7/9/code-of-conduct-the-key-in-states-response-to-shortterm-letting

Western Australia

On 1 November 2018, the Economics and Industry Standing Committee commenced an Inquiry into Short Stay Accommodation, with an expressed mandate to refer particularly to:

1. The forms and regulatory status of short-stay accommodation providers in regional and metropolitan Western Australia, including existing powers available to local government authorities.

2. The changing market and social dynamics in the short-stay accommodation sector.

3. Issues in the short-stay accommodation sector, particularly associated with emerging business models utilising online booking platforms.

4. Approaches within Australian and international jurisdictions to ensure the appropriate regulation of short-stay accommodation.[19]

The Committee intends to report to the government by 27 June 2019.

Tasmania

On 7 August 2018, the Minister for Planning announced that the Tasmanian government would seek to introduce new legislation to address compliance concerns relating to short stay accommodation to ensure compliance with existing regulations.[20]

The Draft Short Stay Accommodation Bill 2018 was first read on 29 November 2018.[21] The intent of the proposed legislation is to require anyone listing their investment property on an online booking platform to show details of their planning permit, when it is required under the Land Use Planning and Approvals Act 1993.[22] The draft bill proposes to achieve the intent of the government by:

- introducing measures to encourage compliance with short stay accommodation planning permit requirements;
- supporting improved enforcement by planning authorities and
- collecting data that will lead to a better understanding of the impact of short stay accommodation on the broader housing market.[23]

[19] http://www.parliament.wa.gov.au/parliament/commit.nsf/(InqByName)/Inquiry+into+Short-Stay+Accommodation?opendocument
[20] https://www.justice.tas.gov.au/__data/assets/pdf_file/0007/446695/Fact-Sheet-Short-Stay-Accommodation-Bill-2018.pdf
[21] http://www.parliament.tas.gov.au/bills/Bills2018/66_of_2018.htm
[22] http://www.parliament.tas.gov.au/bills/Bills2018/pdf/notes/66_of_2018-Fact%20Sheet.pdf
[23] http://www.parliament.tas.gov.au/bills/Bills2018/pdf/notes/66_of_2018-Fact%20Sheet.pdf

There does not appear to be any proposal to amend section 91(2) of the *Strata Titles Act 1998*, which specifically authorises a by law to impose a minimum term, not exceeding six (6) months, for the letting of lots. Tasmania remains the only Australian jurisdiction in which there is a clear, legislated position on the way in which strata titled properties may use by-laws to regulate STHL.

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