



Submission to Economics and Industry Standing Committee

Inquiry into Short-Stay Accommodation in WA

24th January 2019

Strata Community Association WA Inc (“SCA”) wishes to make a submission to the Committee in relation to short-stay accommodation issues as they affect the strata sector in Western Australia.

We understand the Committee’s Terms of Reference to be to inquire into and report on matters relating to the regulation of short-stay accommodation in Western Australia, with particular reference 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.

SCA’s submission relates to Terms of Reference 1 and 3 only.

Introduction

SCA is the only Western Australian association supporting the strata sector, with a membership that includes 350 strata managers, 90 strata management businesses, 190 individuals and businesses involved in providing services to the strata sector, 26 strata companies and 190 strata lot owners. Our strata manager members have over 110,000 strata lots under their management.

We bring together people who manage strata schemes, live in strata communities and provide services for them. We also offer education, advice and advocacy to enable better understanding of strata rules, obligations and rights.

SCA was incorporated in 1989, shortly after the enactment of the *Strata Titles Act 1985* (WA). The association was previously known as the Strata Titles Institute of Western Australia.

SCA is governed by a Board of volunteers elected by members and appointed by the Board. The Board has in turn convened a Legal Affairs and Public Policy Committee to advise the Board on policy initiatives and make submissions to government on policy, legal and regulatory matters.

The Legal Affairs and Public Policy Committee have prepared this submission with the support of the Board. The Legal Affairs and Public Policy Committee comprises:

Rachel Cosentino (Chair), Barrister -Francis Burt Chambers

Scott Bellerby (SCA President), Managing Director- Bellcourt Strata Management

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Paul Keet, Certified Strata Community Manager, Managing Director – Strata Asset Services (WA) Pty Ltd

Mark Atkinson, Lawyer- Atkinson Legal

Taryn Linfoot, Head of Strata Management - Blackburne

Warren Kiddle, Accredited Strata Community Manager, Managing Director – Strata Administration Services

Alissa Hammond, Client Liaison Manager- Smithwick Strata Services

SCA has a [policy](#) on short-stay accommodation which is published on its [website](#). The purpose of the policy is to guide its members dealing with issues arising in short-stay. The policy acknowledges that allowing short stay use in a scheme that is well designed and adapted for short stay or non-residential use can be a desirable planning outcome in some contexts. It can also maximise the potential for owners in strata schemes to make a profit and maintain the property's value. In these schemes, with appropriate conditions on development approval in place, there are few conflicts between short stay guests and other owners.

However, in some schemes predominantly used as residences, short stay use may create conflict with and between owners and residents over noise, anti-social behaviour and compromised security.

SCA believes that negative impacts of short stay use in some schemes can best be resolved by a combination of:

1. better planning control by improved local planning schemes, improved conditions being placed on development approvals and greater enforcement of conditions of development approvals
2. appropriate legislative changes to introduce sensible restrictions on short stay use
3. short stay aggregators doing more to improve guest behaviour and relationships with residents in schemes
4. improved design of buildings

If these things do not occur and serious problems occur, strata companies may need to themselves exercise greater control over the use of the commonly owned property. This may include such by way of:

1. modifying the building
2. changing parking arrangements
3. introducing on-site management controls
4. developing and enforcing security protocols
5. clearly and regularly communicating the noise and nuisance prohibitions and security requirements
6. introducing incident reporting systems
7. applying to the State Administrative Tribunal for appropriate orders if necessary

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SCA has been provided with a draft Department of Planning, Lands and Heritage Options Paper for regulating sharing economy short-term accommodation in WA. In relation to the content of that draft Options Paper, it is SCA's position, consistent with the policy outlined above, that regulation of short-term accommodation should fundamentally be driven by a state-wide planning framework.

The majority of local authorities have definitions pertaining to *short-stay*, *short-term*, *holiday house etc*, in addition, a few have adopted varying policies pertaining to short-stay. Unfortunately, given the wide-ranging definitions and policies, there is significant confusion around what is required when it comes to the management of short-stay living. This is further compounded by the by-laws pertaining to each scheme.

Globally, most major cities, including San Francisco (where AirBnB originated), New York, Paris, Japan, Los Angeles and Berlin, for example, require a registration for short term letting.

It is New South Wales' recent State-wide planning rules that appear to have achieved a balanced form of governance pertaining to short-term letting that provides a good starting point for management of this 'use'. The NSW planning rules are state-wide and include the following:

- Single definition for short-term rental accommodation (STRA);
- Introduces minimum fire safety and evacuation requirements;
- Restricts the maximum number of days a STRA can be leased for in a calendar year;
- Enables strata companies to adopt a by-law restricting/preventing STRA in their scheme;
- Provides a mandatory code of conduct that includes a dispute resolution process.

TOR 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.

In addressing this Term of Reference, SCA wishes to highlight issues in relation to the regulation of short-stay under Strata Titles legislation only, and not local government or other regulation.

It is essential that whatever the broader regulatory and planning context, that strata companies themselves are able to control and manage to some degree both whether short-stay accommodation can occur within a strata scheme, and if so, on what conditions, without interfering with the underlying principle that owners' proprietary interests in freehold land should not be unduly interfered with.

Currently, and under the amended Strata Titles Act once it commences operation, a strata plan can be prepared or amended to include a restricted use condition (section 32(2) of the amended Act). There are numerous existing schemes which contain a restriction to the

effect that the scheme can be used only as short-stay accommodation. Any such restriction is noted on the strata plan and any buyer or prospective buyer is able to readily discover the nature of the restriction.

Additionally, the strata company can make by-laws which regulate the governance of the strata company and the conduct of owners, occupants and others on the scheme land and the management, control, use or enjoyment of lots and common property in the scheme. Under section 45 of the amended Act, the by-laws apply to occupiers and lessees for the time being of a lot in scheme, as well as applying to the owners of the lots. By-laws cannot be made which prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing with a lot. Also, under the amended Act, a by-law is invalid if it is unfairly prejudicial to, or unfairly discriminatory against, 1 or more of the owners or is oppressive and unreasonable (Section 46).

Thoroughly considered and well drafted by-laws can go a long way to ensuring that problems that commonly arise with short-stay accommodation are minimised or avoided, either by prohibiting lots from being used in certain ways, or by imposing conditions on permitted uses.

The reality is that by-laws are often drafted and enacted in a manner so that they are invalid, or uncertain. An example is the by-law that was the subject of the Court of Appeal decision in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104. The strata company relied upon a by-law to prohibit owners from using their lots for short-stay accommodation. The relevant by-law was in the following terms:

“...a proprietor of a residential lot may only use his lot as a residence.”

The Court of Appeal ultimately held that a by-law could validly be made which limits the nature of occupancy or use of a lot, without amounting to a restriction on the ability to lease a lot. The Court of Appeal also held that a restriction to use as a “residence” precluded the lot being used as tourist or holiday accommodation. A lot in the scheme can only be used as a “settled or usual abode” (at [151]). However the decision does not go so far as to determine that the by-law in that case precludes the lot being let for short periods of time. For example, it does not preclude the possibility of a lot being let to a fly-in/fly-out worker as her usual place of abode over a 10 week period. Nor does it provide clarity where by-laws are in different terms to the by-law considered in that case.

We also note that the decision pre-dates the legislative amendments, which contain a different articulation of what by-laws can be made by a strata company, and which preclude unfairly prejudicial or oppressive by-laws. A similar by-law might in particular situations be found by SAT to be invalid.

While it is an essential feature of strata that strata companies should have the ability to make by-laws to regulate conduct and use of premises within a scheme, the reality is that by-laws may often be open to differing constructions, lack uniformity in drafting, contravene or be inconsistent with provisions of the *Strata Titles Act*, be poorly understood

or difficult to apply in different fact situations. For those reasons, it is important that regulation of short-stay be led and driven at a planning level.

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

SCA's members' experience of the types of issues that arise with short-stay accommodation relevant to strata include:

- Managing safety- particular in relation to fire and emergency evacuation
- Compliance with by-laws which require owners to provide the strata company with occupant details
- Occupant ignorance of by-laws applying to scheme (and consequential breaches)
- Occupant ignorance of car parking rights of residents, often parking anywhere within a car park in disregard for the fact that bays may be owned or allocated to particular lots
- Compromise to the security of a scheme by copying of keys and widespread distribution of access cards and not reporting lost keys
- Noise and nuisance
- Moving in and out of the scheme which can often result in calls from the short-stay occupier to the strata manager for assistance, generally afterhours
- Over-occupation of lots
- Over-use of shared/ common facilities resulting in an increase in maintenance costs and capital expenditure which all owners in the scheme are burdened by, not just those using their lots for short-stay

As reflected in SCA's policy, we consider short-stay aggregators can do more to educate users (both owners and occupants) and encourage behaviours which will reduce the incidence of the above issues.

The amendments to the *Strata Titles Act* which enable SAT to impose fines for breach of the by-laws for a scheme will go some way to assisting strata companies to manage these issues.

Summary

It is essential that a State-wide planning framework be adopted to simplify the management of short-stay for all parties.

SCA would support the planning rules adopted by NSW highlighted earlier and additionally would like to see a requirement for property owners/ landlords to register the use of their premises with local government.