



THE LAW SOCIETY
OF NEW SOUTH WALES

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3 November 2017

Director, Housing Policy
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: sth@planning.nsw.gov.au

Dear Sir/Madam,

Short-term Holiday Letting in NSW: Options Paper

The Law Society of NSW appreciates the opportunity to participate in the consultation on the options for regulation of short-term holiday letting ("STHL") discussed in the Options Paper: 'Short-Term Holiday Letting in NSW'. The Law Society's Environmental Planning and Development and Property Law Committees contributed to this submission.

We acknowledge that the rapid expansion of STHL in NSW due to innovative online platforms and the development of the share economy has led to the need to reconsider the role of regulation in this sector. It is important to "get the settings right", so that the significant economic benefits provided by the development of the share economy can be enjoyed, without unduly impacting on local communities and the environment.

Overview

The Law Society supports the following key recommendations from the final report of the Parliamentary Inquiry¹ into the regulation of STHL, subject to our comments below:

- Amend planning laws to regulate short-term rental accommodation;
- Allow home sharing, and letting principal places of residence, as exempt development;
- Strengthen owners' corporations powers to manage and respond to STHL issues in strata properties.

¹ New South Wales Legislative Assembly Committee on Environment and Planning, *Adequacy of the Regulation of Short-Term Holiday Letting in New South Wales 2016* vii.

The NSW Government has also indicated general support for these key recommendations.²

Options for regulation

The Options Paper discusses a number of regulatory options that could be considered either individually or in combination as having the potential to manage STHL impacts. These include:

- Greater industry self-regulation through a stronger code of conduct;
- Changes to strata laws to protect the amenity of residents within apartment buildings;
- Regulation through the planning system; and
- Registration or licensing of STHL operators with acceptable standards of operation.

We discuss each of these options below.

Self-regulation

We do not support self-regulation as a sole method of regulation.

We agree that while the evidence relating to the impacts associated with STHL, where most hosts operate without incident, supports the view that the vast majority of STHL does not require government regulatory intervention, this is not an effective or appropriate approach for all STHL. There would need to be a more effective, accountable and transparent approach to self-regulation by the industry, which is currently lacking, before this becomes a more viable option. Even in that event, for the reasons set out below, we consider that changes to planning regulation are a crucial part of any regulatory approach.

Changes to strata laws

We note that the NSW Government is committed to providing a balanced regulatory approach to the issue of STHL in strata schemes. This is centred on maintaining a resident's right to the use and enjoyment of their property, providing the right enforcement tools to address adverse behaviour affecting other residents, while supporting the positive economic benefits derived from STHL.

As previously noted, there are differing views on the best regulatory approach to managing STHL, which potentially has a greater impact in the strata context. The Law Society supports regulation through amendments to the relevant planning laws, as discussed further below, under the heading "Planning regulation".

Our comments on relevant issues in the strata context are set out below.

By-laws

We note that s 136 of the *Strata Schemes Management Act 2015* is cited in the Options Paper as authority for the proposition that by-laws that restrict the rights of owners to deal with their lots are prohibited (s 136(1)) and by-laws that purport to

² New South Wales Government, *Response to the Final Report of the Parliamentary Inquiry into the Adequacy of Regulation of Short-Term Holiday Letting 2*. The support in relation to items 1 and 3 was qualified.

restrict the use of a lot when that use is permitted under an applicable planning instrument have no effect (s 136(2)).³

If the strata legislation was to be amended to provide clarification about the validity of by-laws which purport to prohibit the use of lots as serviced apartments or for STHL, it would still be necessary to overcome the effect of s 28 of the *Environmental Planning and Assessment Act 1979*. This section provides that certain “regulatory instruments”, including by-laws, may be set aside to enable development to occur in accordance with a Local Environmental Plan (“LEP”) and a development consent. The decision whether or not to include a “s 28 clause” in a particular environmental planning instrument is a matter for the planning authority. We submit that this is appropriate, and that if the LEP allows STHL, with development consent, then the owners’ corporation should not be allowed to prohibit it.

The Options Paper notes that despite the current strata legislative provisions, some owners corporations have passed by-laws which purport to prohibit STHL in their buildings, allegedly as a result of legal advice that such by-laws are valid.⁴

We suggest that some legislative clarification would be useful in providing certainty on this point.

Managing STHL impacts

As noted earlier, the NSW Government supports Recommendation 10, one of the key recommendations from the Parliamentary Inquiry, which states:

The Committee recommends that the NSW Government considers amendments to strata regulations to give owners corporations more powers to manage and respond to adverse behaviour resulting from short-term letting in their buildings.

While we support this recommendation, we do question the effectiveness of by-laws in managing the adverse behaviour of short-term occupants who are likely to have vacated the premises before any enforcement action can be put into effect.

Planning regulation

The Law Society notes the NSW Government supports the key recommendation from the Parliamentary Inquiry to amend planning laws to regulate STHL. We consider this is the most effective and appropriate mode of regulation for STHL as discussed further below.

It is necessary, in discussing appropriate regulation, to distinguish between the different forms that STHL takes in NSW:

- Rental of one or more rooms (including room sharing) with the host present;
- Rental of a whole dwelling (principal residence) with the host away;
- Rental of a holiday dwelling (non-principal residence) with the host away;
- Rental of a dwelling solely reserved for short-term holiday letting.

As noted earlier, the NSW Government supports a key recommendation of the Parliamentary Inquiry to allow home sharing, and letting a principal place of residence, as exempt development.⁵ We support this recommendation, but consider that the definition of “STHL” is crucial. A limit on the number of days per year for the

³ But see also s 139(2).

⁴ See also: *Estens v Owners Corporation SP 11825 [2017] NSWCATCD 63*.

⁵ *Ibid*.

use (e.g. somewhere between 30 and 90 days) could be used to ensure the primary use remains residential. Consideration also needs to be given as to whether there is differentiation, even for this class of letting, for strata buildings, where the potential social and environmental impacts are greater.

Current regulation

In the absence of specific provisions dealing with STHL in the relevant LEP, this appears to be a prohibited use in a residential zone. At present in most residential zones, “bed and breakfast accommodation” is a permissible use with development consent, but serviced apartments are prohibited.

In the *Standard Instrument – Principal Local Environmental Plan* (“Standard Instrument LEP”), both “bed and breakfast accommodation”⁶ and “serviced apartments” are included in the Dictionary as types of “tourist and visitor accommodation” and defined respectively as follows:

bed and breakfast accommodation means an existing dwelling in which temporary or short-term accommodation is provided on a commercial basis by the permanent residents of the dwelling and where:

- (a) meals are provided for guests only, and
- (b) cooking facilities for the preparation of meals are not provided within guests’ rooms, and
- (c) dormitory-style accommodation is not provided.

serviced apartment means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner’s or manager’s agents.

The Options Paper notes that few LEPs in NSW refer specifically to STHL and those that do use different definitions of STHL and have different thresholds for when STHL requires development consent.⁷

As an example, *Gosford Local Environmental Plan 2014* allows “Short-term rental accommodation”, as exempt development, provided it is located in a zone where dwellings are permitted with consent. It is defined by reference to the number of bedrooms, with prescribed waste management facilities and requires that there must not have been more than two written complaints to the Council concerning the activities taking place on the property from the occupiers of separate dwellings located within 40m of the subject dwelling within the preceding twelve months. There are also prerequisites for the property to meet stipulated building standards and satisfy fire safety requirements and other safeguards.⁸ This approach appears suitable for that particular area. A limit on the number of days may not be necessary in areas where STHL is mainly restricted to holiday periods, as is likely to be the case in many coastal areas of NSW, but not in the Sydney metropolitan area.

However, we agree that there is value in a standardised approach.⁹

Changes to planning regulation

We suggest that homeowners who have purchased residences in a residential zone, including strata units in an apartment block, should not have a change of permissible

⁶ We suggest that the term “Airb’n'b” is a misnomer as the “B & B” description only applies, if at all, to a subset of accommodation provided through Airb’n'b as STHL.

⁷ New South Wales Government, *Short-Term Holiday Letting in NSW Options Paper 2017* 9.

⁸ *Gosford Local Environmental Plan 2014* cl 3.1, sch 2.

⁹ See above n 7.

use allowed in that residential zone, without a proper process of public consultation. We suggest that such a change of proposed use should also be the subject of development consent. To effect the necessary changes, there would need to be changes to the relevant LEP and the Standard Instrument LEP. There would normally be public consultation as part of this process, allowing those residents to have the opportunity to comment and then the Minister would have to make the final decision. It is submitted that if the current controls are to be changed, it should be through this process. We do not consider that it is desirable to change what is currently a prohibited use to a permissible use, without undergoing a process of public consultation.

We suggest that consideration could be given to making an exception for a principal place of residence¹⁰ as exempt development – although there may need to be strict parameters around the number of days per year that the accommodation was used. There is general agreement that it is extremely difficult to enforce these requirements.

If it is proposed to allow STHL to be a permissible use for all other properties (i.e. other than properties where STHL is allowed as exempt development) which are currently approved for residential use only, it is submitted that the following controls would assist to limit the adverse impacts:

1. Amend the Standard Instrument LEP to allow STHL, subject to consent, and other appropriate controls;
2. Limit the maximum number of days per year for the use (e.g. somewhere between 30 and 90 days) to ensure the primary use remains residential;
3. Consider limiting the number of properties in which a single operator holds an interest, that can be used for STHL¹¹ (this would prevent the situation which we understand anecdotally is quite prevalent within the City of Sydney where investors are buying up a number of units in a block and renting them out as serviced apartments).

Registration or licensing of STHL operators with acceptable standards of operation

We support registration of STHL operators, but suggest that it could be limited to premises where council approval is required for the operation of STHL. Registers could be maintained by the local council (rather than, say, NSW Fair Trading), as it will not then be necessary to duplicate well-established systems at council level for detailing consents, uses etc. This would also be responsive to the needs of the local community e.g. what is appropriate for the Sydney CBD may not be suitable for Dubbo or the far north coast. However, there is also merit in the option of State-wide registration to monitor that other regulatory approaches are being met. This may be preferable where councils do not have the resources to enforce the number of days per year controls suggested. A State-wide approach would also facilitate checking whether an operator is operating more than one property for STHL and would assist in collating data on STHL in NSW.

¹⁰ Any definition of the term 'principal place of residence' would need to take account of the large volume of litigation generated by the use of this term in land tax and other revenue contexts.

¹¹ Given the risk of non-compliance with such a restriction and the limit on the number of days referred to at point 2, there may be a need for on-going reporting requirements.

Conclusion

We support a combination of three regulatory options, namely regulation through the planning system, changes to strata law and registration or licensing of STHL operators. However, it is planning regulation that should be the key determinant of whether STHL is permitted in the particular circumstances. This is a core requirement for an integrated and effective regulatory regime. The other regulatory options provide support and enforcement mechanisms. Regulation of STHL through standardised planning regulation is key to ensuring that any regulatory regime is effective and transparent. We acknowledge the need for any new regime to not be unduly restrictive, so as to avoid unnecessary "red tape", and to facilitate the significant economic benefits of the share economy through STHL, while managing its social and environmental impacts.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President