



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:EEIb1777709

11 September 2019

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

Dear Sir/Madam,

Short-term rental accommodation in NSW – A new regulatory framework

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper *Short-term Rental Accommodation – A new regulatory framework* and the draft planning instruments and Regulations to introduce the state-wide planning framework and mandatory Code of Conduct for short-term rental accommodation (“STRA”). The Law Society’s Environmental Planning and Development and Property Law Committees contributed to this submission.

The Law Society made an earlier submission in response to an Explanation of Intended Effect (“EIE”) released in October 2018¹ (“earlier submission”). We acknowledge that some of the matters we raised in that submission have been addressed in the proposed new regulatory framework, such as the proposal to establish a register and by the current exhibition of the whole of the proposed new regulatory framework, including the code of conduct.

We remain concerned about a number of matters, however, such as the enforceability of some of the proposed criteria in the exempt and complying pathways. These include: enforcing fire safety requirements; establishing whether STRA is hosted or non-hosted or whether a property is the host’s ‘principal place of residence’ to establish the relevant day cap; “policing” the relevant day caps and enforcing the code of conduct.

Our answers to the specific questions set out in the Discussion Paper are set out in the attached Table “A”.

Overview

As stated in our earlier submission, the Law Society supports the Government’s aim of introducing a state-wide planning framework for STRA that strikes a balance

¹ Law Society of NSW “Short-term rental accommodation in NSW- Explanation of Intended Effect”, 13 November 2018 accessed at: <https://www.lawsociety.com.au/sites/default/files/2019-01/Letter%20to%20DPE%20-%20Short-term%20rental%20accommodation%20in%20NSW%20-%20Explanation%20of%20Intended%20Effect%20-%202013%20November%202018.pdf> on 6 September 2019.

between supporting the economic value of the industry and managing impacts on the community.

We are concerned, however, that without additional measures being put in place it will not be possible to effectively enforce the limitations and requirements for STRA, as set out in the proposed approval pathways. We suggest that consideration be given to requiring a 'complying development' pathway in the place of the proposed 'exempt development' pathway, particularly in the case of strata accommodation. We consider that a complying development pathway would more effectively achieve the aims of the policy.

We support the establishment of a registration system but maintain that any register must be government-run, with access provided to councils, rather than industry-led as proposed. The register must be in place before the changes to the planning controls are implemented.

Proposed changes to the planning system

The Law Society supports a state-wide planning framework to provide state-wide consistency in the definition and permissibility of STRA. The proposed planning framework includes:

- A new definition for STRA.
- New 'exempt' and 'complying' approval pathways that enable STRA within day limits:
 - Where the host is present, STRA is 'exempt development' for 365 days per calendar year.
 - Where the host is not present, and the site is not on bushfire prone land or a flood control lot, STRA is 'exempt development' for:
 - 180 days in Greater Sydney
 - 365 days in regional areas; except where a council varies this to no lower than 180 days.
- Where the host is not present, and the booking is for 21 or more consecutive days, the booking will not count towards the above day thresholds.
- Minimum safety and evacuation requirements for dwellings used for STRA.

Changes since the EIE

The Discussion Paper sets out the key changes since the release of the EIE. The most critical is the proposal that non-hosted stays of 21 or more consecutive days will not be counted towards the applicable day caps. It is stated that "this is based on feedback that longer bookings tend to have fewer amenity impacts and are a key support to a mobile workforce".²

This overlooks the other fundamental strategic planning impacts of STRA, which in the case of the majority of non-hosted STRA involves the whole dwelling. These impacts include the loss of long-term rental dwellings and the "hollowing out" of the residential community. In the case of some residential flat buildings in the CBD and in places like Byron Bay, there are only a "rump" of permanent residents left, which has a major impact on the whole community.

We comment further on the impact of the number of days caps below.

² Discussion Paper, 7.

The State Environmental Planning Policy (Short-term Rental Accommodation) 2019 (“SEPP”)

Definitions

We suggest that including definitions of ‘principal place of residence’ and ‘permanent resident’ in the SEPP would be useful.

STRA as ‘exempt development’

We recognise that the Government aims to maximise the benefits to the economy and property owners that flow from STRA by making the majority of STRA ‘exempt development’.

However, even with the proposed establishment of a registration system, we have serious concerns about the effectiveness of a framework based on ‘exempt development’ to achieve the following aims set out in clause 3 of the SEPP:

3 Aims of Policy

The aims of this Policy are as follows-

- (a) to support short-term rental accommodation as a home sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,
- (b) to provide for the safety of users of short-term rental accommodation who may be less familiar with the dwelling,
- (c) to clarify the types of dwelling that may be used for the purposes of short-term rental accommodation.

We note that the majority of STRA cannot be classified as a ‘home sharing activity’ and question whether the proposed ‘exempt development’ pathway will appropriately manage “the social and environmental impacts from this use”. In the case of strata lots, the issue of the management of noise, waste and other amenity impacts is particularly acute as strata complexes have been recognised as generally more susceptible to the potential impacts of STRA due to, among other things, the proximity of neighbours and the reliance on shared facilities.

Most importantly, we consider that the current approval pathways do not adequately support “the safety of users of short-term rental accommodation who may be less familiar with the dwelling”.

We note that the ‘exempt’ and ‘complying’ pathways are differentiated according to whether, on bushfire prone land or a flood control lot, the STRA is hosted or non-hosted. We suggest that even with the best of intentions, a host will not always be available to assist guests to evacuate in the case of emergency during a particular timeframe. To properly ensure safety, particularly in the case of bushfire prone land, a flood control lot or any strata lot, we consider that a complying development pathway should be implemented. This will ensure that all fire safety or other safety requirements have been met before the property is used for STRA, whether the host is present or not.

We note in the case of strata lots that the Government has legislated to provide that owners corporations can pass a by-law by special resolution banning STRA in their schemes where the lot is not the principal place of residence of the ‘host’. The relevant

provision, s 137A of the *Strata Schemes Management Act 2015* has not yet commenced but we understand the intention is to commence it once the SEPP is gazetted.

We suggest that in the event that all STRA is not required to be complying development for safety reasons, there is a strong case for requiring a complying development pathway in the case of all strata lots. The fire safety requirements may necessitate work on the common property. Such a provision will also ensure that, in the case where the lot is not the principal place of residence of the host, there is a proper check to ensure that a by-law has not been passed prohibiting the lot being used for STRA.

Number of days cap

We consider that the day caps proposed do not strike the appropriate balance to achieve the relevant policy objectives. The proposal that non-hosted stays of 21 or more consecutive days will not be counted towards the applicable day caps will make the 180-day cap meaningless in some cases.

We also note that the Department's website states:

On 11 February 2019, the former Minister for Planning announced a new Ministerial Direction that invites Byron Shire Council to prepare a Planning Proposal that could introduce a 90-day threshold in the most impacted towns of the Local Government Area.

The Direction is in response to the high concentration and unique impacts of STRA on some parts of the Byron Shire. The Planning Proposal process will include impact assessment and consultation with communities.

This would appear to be recognition of the impact of STRA in high volume tourist areas, and to support a reduction in the number of days STRA should be available in areas such as Sydney-Darlinghurst, and the beach suburbs of Manly, Bondi, Tamarama, Bronte and Coogee, to 90 days.

Existing development consent conditions

Note 2 to clause 9 of the SEPP provides that "Specifying a type of development as exempt development does not authorise the contravention of any condition of development consent."

We support the preservation of existing development consent conditions prohibiting STRA. We suggest for clarity that this be explicitly incorporated in the SEPP as an additional paragraph following clauses 9 (2) (c) and 10 (2) (d).

Register

The Law Society supports the establishment of a register but considers that it should be a government-run, rather than an "industry-led" register. A register is integral to the management of the amenity impacts of STRA and as an enforcement mechanism for the framework. We remain concerned that, even with the establishment of a register, it is still not clear how the following limitations and requirements will be enforced:

- whether premises are in fact the principal place of residence of the STRA operator; operators can presumably use different entities to operate multiple properties for STRA.

- the limits on the number of days per year, depending on location, that STRA can take place in properties where the host is not present;
- how there can be monitoring of whether the host is present or not; and
- the minimum fire safety and evacuation requirements for individual premises used for STRA.

We suggest, however, that effective control of these limitations and requirements would be better managed by a government-run register to record and manage compliance.

A government-run register, allowing councils access, could also:

- allow councils to have access to real time data on the growth and supply of this market and any effects on local housing availability and affordability; and
- provide an additional revenue source for governments to be passed on to councils to fund the enforcement of the code of conduct.

Complaints about noise, property damage and other amenity impacts will inevitably be made to councils despite any breaches of the code of conduct specifying other enforcement options. These complaints will be extremely difficult to manage given the transient nature of some stays, difficulties in proving whether hosts are present, whether a property is the host's "principal place of residence" and whether day caps have been met. Without a revenue source, councils cannot be expected to assist to enforce the relevant planning laws, as they are required to do, to enable the council to meet community expectations and protect long-term residents from the impacts of STRA.

Commencement

The Discussion Paper states that potentially all elements of the new STRA framework could come into force at the same time, but that, given the time that industry may need to develop and establish the register, the regulatory framework cannot commence until 2020.³ The Discussion Paper goes on to say that staged implementation is an option-with the planning instruments, Code, Amendment Regulation and strata legislation amendments starting later in 2019 with the register commencing in 2020.

We consider that any staged implementation is not appropriate and that all elements of the framework should commence at the same time. The policy is intended to operate as a cohesive and integrated system where each component of the regulatory framework works together. This obviously requires each component of the framework to become operational at the same time.

It is imperative that the register is operational at the commencement of the new regime. The Government has identified a number of outcomes that the register would need to deliver including:

- Enabling all properties used for STRA to be individually and uniquely identified
- Ensuring only registered properties are made available as STRA
- Providing an up-to-date , accurate and accessible source of data on STRA premises in NSW, including the number of stays (days) and compliance and enforcement action.⁴

³ Ibid 18.

⁴ Ibid 16.

The delivery of these outcomes is essential to fulfil the objectives of the policy.

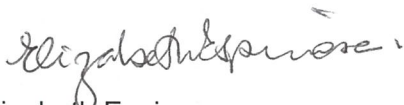
It is also extremely important that the information captured in the register is available to inform “the review of the STRA regulatory framework twelve months after it commences, which the Government has committed to completing.”⁵

Consultation and education

As noted in our earlier submission, these proposed changes will have a major impact on some communities where a high percentage of properties are used for STRA, such as for example, the Sydney CBD, Sydney harbourside and beachside suburbs and in ‘holiday areas’ such as the Byron Shire. Given the extent of the changes and their potential impact, we consider that public information sessions, particularly for strata owners, should be conducted by the Department prior to the commencement of the new legislation.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Elizabeth Espinosa
President

Encl.

⁵ Ibid 19.

Short-term Rental Accommodation: A new regulatory framework – Discussion paper

Submission by the Law Society of NSW – September 2019

Page	QUESTIONS	COMMENTS
Planning instruments		
p.8	1. What is your view on the form of and provisions in the STRA SEPP, Regulation and Safety Standard?	Please see our comments in the accompanying letter. Additionally, the limitation on number of persons in the SEPP seems to be dictated by the number of bedrooms. In rural areas, the size of the septic system can be a practical limit in relation to the number of residents at a dwelling. A third limb could be added to clauses 11(b), 12(1)(c) and 13(1)(c) of the SEPP: “(iii) the maximum number of persons permitted to reside on the property”.
p.8	2. Are there any elements of the draft instrument that are open to misinterpretation or require further clarification?	Please see our comments in the accompanying letter.
p.8	3. What are your views on new policy elements relating to days, flood control lots and bushfire prone land?	Please see our comments in the accompanying letter.
Code: Industry participants’ obligations		
p.10	4. Are the general obligations for industry participants adequate? If not, what other general obligations should be considered? Why?	We support a government-run register. On this basis they appear to strike the right balance.

Page	QUESTIONS	COMMENTS
p.10	5. What types of STRA information will be useful for the Secretary to collect to inform the further improvement of the Code and the STRA regulatory framework? Why?	Statistics should be collected about the complaints made to, and dealt with by, the Commissioner, and those complaints the Commissioner refers elsewhere, such as to local council or the Police, under clause 6.2 of the Code. Information regarding the type of the complaint and the outcome should be retained. Analysis over time of this data, provided it includes those complaints referred elsewhere, should assist in monitoring whether outcomes improve.
p.10	6. Are the specific obligations on booking platforms, letting agents, hosts, guests and facilitators in the Code adequate? If not, what other obligations should be considered for each of these industry participants? Why?	We support a government-run register. On this basis, yes.
Code: Complaints		
p.11	7. Is the complaints process detailed in part 6 of the Code sufficient? If not, what other matters should be considered or set out in the process? Why?	On the same basis as above, yes.
Code: Compliance and Enforcement		
p.11	8. Are the grounds for recording a strike fair and reasonable? What other matters (if any) should the Commissioner consider when deciding whether to record a strike? Why?	Yes.
p.12	9. What are potential ways to facilitate industry participants' access to the exclusion register while limiting potential privacy impacts? What factors should be considered?	Questions relating to privacy impacts will depend on the final form of the register.

Page	QUESTIONS	COMMENTS
p.12	10. Is the review process clear and sufficient? What other matters (if any) should be considered? Why?	Consideration could be given to whether there should be a further right of appeal after the Secretarial review process (for either a complainant or a host).
Code: Penalty notice offences and civil penalties		
p.13	11. Are the proposed penalty notice offence and civil penalty provisions appropriate? What provisions should or should not be identified as penalty notice offence and/or civil penalty provisions? Why?	Yes.
Amendment Regulation: Prescribed classes of STRA industry participant		
p.13	12. Does clause 22B(1) appropriately capture end to end property management services that specifically service STRA properties? Why or why not?	Yes. This definition is broad enough to capture all property management services.
p.13	13. What other organisations or persons should be prescribed classes of STRA industry participants (if any)? Why?	None.
Amendment Regulation: STRA industry participants excluded from Code of Conduct		
p.13	14. Is it appropriate to exclude the STRA industry participants set out in clause 22C? Why or why not?	Yes. In relation to clause 22C(a), residents living near tourist or visitor accommodation are aware of the intended use of those premises. In relation to clauses 22C(b) and (c), separate regulations already exist for these land uses.
p.13	15. What other STRA operators (if any) should be excluded from being covered by the Code? Why?	We have no additional suggestions.

Page	QUESTIONS	COMMENTS
Amendment Regulation: Appeals against listing on exclusion register		
p.14	16. Is the appeals process clear and sufficient? What other matters (if any) should be considered? Why?	We suggest that there should be a non-exhaustive list of the types of considerations/matters that might warrant removal from the register, consistent with common legislative approaches, so as to provide guidance to the Secretary.
Amendment Regulation: Fees and cost recovery		
p.14	17. Which industry participants should contribute to the cost of administering and enforcing the Code? Why?	All participants should contribute. The most equitable approach in our view is an annual fee based on income received.
p.14	18. How should costs be apportioned across different STRA industry participants? Why?	It will not be possible to know what the costs of administration will be, nor how many contributors there will be. A conservative estimate should be made in relation to the fee, expressly noting that the fee can be varied over time.
Amendment Regulation: Penalties		
p.14	19. Is the proposed penalty notice offence amount appropriate? Why or why not?	In our view the proposed penalty notice amount of \$550 is too low and will not serve as a sufficient deterrent for breaches of the Code of Conduct.
Proposed industry-led property register		
p.15	20. How can industry be organised to develop and manage the registration system?	In our view the development and management of the registration system is a matter for government. Please see our further comments in the accompanying letter.
p.16	21. What would be the costs to industry in establishing and maintaining the register? How would industry propose to meet these costs?	We are unable to comment.
p.16	22. What role should the Government play in developing or overseeing the register, if any?	The development and overseeing of the register should be carried out entirely by government.

Page	QUESTIONS	COMMENTS
p.16	23. Are there other outcomes a register should deliver?	We agree with the outcomes from a register listed on page 16 of the Discussion Paper.
p.16	24. How can the approach ensure registration applies to all STRA operators, regardless of how the property is advertised for rent?	Use of the online booking agencies will be key, in addition to letting agents.
p.16	25. What audit and verification processes would be needed to ensure accuracy of data?	We support the inclusion of audit and verification processes. We note such processes would likely be included as a matter of course if the register was government-run, but would be more difficult to establish in an industry-based register.
p.16	26. Should there be separate or additional penalties for failure to register? If so, which industry participants should they be imposed on?	Yes, there should be penalties for failing to register imposed upon all industry participants.
p.16	27. What information should the register collect? Why?	In addition to the items set out on page 16, the register should also record the maximum number of people allowed in the particular property, and which on line booking agencies list the property. This could facilitate the checking of appropriate advertising to ensure that it is consistent with the lawful use of the property – for example, approved for 8 people but advertised for “up to 15”.
p.16	28. What role should different industry participants (e.g. hosts and booking platforms) play in the registration process?	This is difficult as many of the platforms are internationally based so enforcement will be difficult.
p.16	29. What role should Government play in the registration process or providing information for the register?	As stated earlier, in our view the register should be run by government.

Page	QUESTIONS	COMMENTS
p.17	30. Should any information on the register be made publicly available? If so, what information could be made available and why?	There should be limited information only that is made publicly available. Information regarding any strikes should be publicly available as this is one of the more important pieces of information recorded and the fact that it would be publicly available is an extra incentive for compliance with the Code of Conduct.
p.17	31. Should industry be required to report registration information, including number of stays (days), to Government and/or local councils? If so, how frequently? Why?	Yes, to the extent that this is necessary for the operation of a government-run register.
p.17	32. Should any information on the register be made publicly available? Why?	See our response to question 30.
Commencement of regulatory framework		
p.18	33. How much lead time would industry need to develop and establish the proposed STRA property register? Please provide reasons.	The STRA register should be government-run and we suggest a lead time of at least six months, given many industry participants are international and participants may need to obtain planning approvals.
p.18	34. When should the STRA regulatory framework start? Please provide reasons.	Depending upon the final form of the framework, six to twelve months lead time may be required.
12-month review of regulatory framework		
p.19	35. Do you support the proposed scope of the review? What additional considerations might be necessary?	Yes.
p.19	36. What data sources could the NSW Government use to inform the review? How can industry and councils assist with data collection for the review?	Sources of data would include: online booking agencies data, reviews by users of STRA and the enforcement/penalty data collected by the Secretary. As suggested in the Discussion Paper, surveys may also be a useful tool, particularly to obtain feedback from councils and industry generally.