



BWL Update

There's something in the Airbnb...

15 March 2019

Summary

NSW Government has taken steps to regulate Airbnb and similar short-term letting arrangements within strata schemes, as more homeowners are using online platforms to participate in the rental market.

A reform package has been approved and the *Fair Trading Amendment (Short Term Rental Accommodation) Bill 2018* (NSW) (Bill) was assented to on 21 August 2018. A date has not yet been confirmed for its commencement.

Application

The Bill will apply to “short-term rental accommodation arrangements” defined in the Bill as “a commercial arrangement giving a person the right to occupy residential premises for a period of not more than three months at any one time”.

The Bill introduces two key changes:

1. Amendment to the *Fair Trading Act 1987* (NSW) (**Fair Trading Act**) to authorise a code of conduct applying to participants in the short-term rental accommodation industry; and
2. Amendment to the *Strata Schemes Management Act 2015* (NSW) (**Strata Schemes Act**) to allow the by-laws for a strata scheme to prohibit short-term rental accommodation where the premises are not the principal place of residence of the person giving the right of occupation

The intention of the Bill is to ensure that lot owners can rent out their homes when they are on holiday or when they are present and sharing their home. However, it will allow owners' corporations to prevent short-term letting of investment properties being carried on a year-round basis.



1. Introduction of Code of Conduct

Although the regulations are not yet available, the Bill provides that the regulations may declare that a code of conduct (**Code**) applies to short-term lettings which:

- sets out the rights and obligations of owners;
- provides for the registration of residential premises used for short-term lettings, including when the premises are used for those purposes;
- provides for warnings to be given to owners who contravene the Code;
- authorises the keeping of a register containing the details of those owners who have failed to comply with the Code (**Exclusion Register**); and
- prohibits or restricts persons on the Exclusion Register from entering into short-term lettings.

Failure to comply with the Code will constitute an offence and result in significant civil penalties of up to \$1.1 million for corporations and \$220,000 for individuals.

In addition, NSW Government has stated that the Code will establish a complaints system pursuant to which all complaints will be assessed by independent adjudicators approved by NSW Fair Trading.

The complaints system will be based on a 'two strikes and you're out policy' and will result in owners who have committed a serious breach of the Code more than once over a two year period being listed on the Exclusion Register. If listed on the Exclusion Register then online booking platforms and letting agents must remove them from their listings.

2. Amendment to Strata Scheme By-Laws

Current Position

Section 139 of the Strata Schemes Act currently restricts an owners' corporation's ability to adopt by-laws that would be unjust, hard, unconscionable or oppressive. Therefore any by-law seeking to restrict how an owner may deal with their lot, such as short-term lettings, is likely to be seen as a contravention of section 139.

The above position was affirmed in *Estens v Owners Corporation SP 11825 [2017]* NSWCATCD 52 in which it was held that a by-law prohibiting short-term lettings was invalid because the owners' corporation had no power to adopt it due to the existing limitation on by-laws under section 139(2) of the Strata Schemes Act.

Section 139(2) of the Strata Schemes Act 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".





Amended Position

On commencement of the Bill, section 137(A) of the Strata Schemes Act will confirm that a by-law 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.

The by-law will have no effect if the lot is the owner's principal place of residence.

Although owners who occupy lots as their principal place of residence will be unaffected by section 137(A), it is worth noting that they will still be required to comply with the Code and any other measures introduced by the owners' corporation to govern short-term rentals within their strata schemes.

Next Steps

It is uncertain at this stage whether any currently adopted by-laws restricting short-term lettings will stand under the reform package. In any event, owners' corporations will need to review their existing by-laws to ensure compliance with the new legislation.

We understand NSW Fair Trading will be developing a specific short-term letting information kit so that owners' corporations understand how existing provisions can be used to address problems that short-term letting creates. The reform package will also be reviewed in its entirety 12 months after commencement to evaluate its effect on the industry.

If you have any questions or would like to discuss this further, please feel free to contact a member of our team.

Blackstone Waterhouse Lawyers

Danny Arraj
Managing Partner
T: 02 9279 0288
E: darraj@bwl.com.au

Melanie Howard
Senior Associate
T: 02 9279 0288
E: mhoward@bwl.com.au

Milena Mijovic
Licenced Conveyancer
T: 02 9279 0288
E: mmijovic@bwl.com.au

Andrew Zeidan
Lawyer
T: 02 9279 0288
E: azeidan@bwl.com.au

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