

Submissions

Legislative Assembly Committee on Environment and Planning

Adequacy of Regulation of Short Term Holiday Letting in NSW.

14 March, 2016

The *Conveyancing (Strata Titles) Act 1961* (**original Strata Act**) was landmark legislation of this Parliament to which assent was given on 27 March 1961.

The original Strata Act describes itself as “an act to facilitate the subdivision of land in strata and the disposition of titles thereto”.

The original Strata Act was a defining moment for land law, not only in this State but throughout the Commonwealth. Indeed this NSW mechanism to subdivide land vertically became an innovation replicated globally — in Asia, the Middle East, North America and Europe.

Community concern about short term letting is almost exclusively focused on the strata space. This is the case not just in NSW but also globally. Every jurisdiction in which strata living has been embraced is having issues with short term letting not unlike our own.

With this Parliament being the birthplace of strata living, it should not surprise this Committee that any response by this Parliament to the short term letting issue will receive considerable global interest.

Letting Pools

Any understanding of short term letting within the strata space first requires an understanding of the “letting pool” phenomenon grafted by some onto strata developments.

Creating land title by way of vertical subdivision resulted in the growth of a number of new business models for the use of the “new land created in the subdivision process.

One of the early new uses for strata subdivision in a new form of business model was the creation of hotel style accommodation on the Gold Coast using strata plans of subdivision as the basis for raising capital and spreading risk amongst the pool of owners. Intrinsic to this model is the creation of a letting pool into which individual owners place their lot. The pool is then managed by a single letting agent.

The single letting agent can be an entity as simple as the building caretaker or as complex as

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a corporate entity presenting itself to the market as a “private hotel”.

As strata schemes grew in size, developers realised:

1. there were benefits in having a permanent on site caretaker; and,
2. that management rights were a new asset to offer for sale.

With the advent of caretakers came the possibility of a further business model creating a new and different letting pool for not so much holiday lettings as ordinary residential accommodation.

All of the early letting pool business models involved a single corporate entity into which a multitude of owners could place their strata lot with a view to a collective marketing of accommodation by the manager of the letting pool.

The benefit of this approach for the owner involved was a higher rate of return over an ordinary residential lease. These early letting pool models also enabled the owner to “time share”.

Traditional letting pool business models with an “on site manager” are now under challenge from new digital platforms.

There are new players in the market providing a digital platform onto which strata lots can be aggregated for offer to the market for short term letting. Owners of strata lots anywhere can place their lot into the aggregated digital letting pool and take advantage of the tenant at will.

These digital platforms no longer assume an “on site manager” who is:

- (a) servicing the letting pool stock; and,
- (b) overseeing the impact of the short term tenancy on common property.

Airbnb is an example of the *new style* digital letting pool aggregator who merely offers an opportunity to rent a strata lot to a short term tenant. Any responsibility for what happens on the strata site contained to only what can be seen from the mouse pad.

Impact of Letting Pools

Short term letting has had a devastating impact on strata schemes.

Michael Heaney, Chairperson of Maestri Towers [REDACTED] is available today to give evidence as to the impact on common property subjected to a traditional letting pool operation.

You will have already heard evidence from other sectors of the Community that the use of a strata lot in a letting pool (old or new — analogue or digital) raises fundamental concerns concerning:

1. Use of a residential space for a commercial purpose without the benefit of development approval from the relevant consent authority;
2. Failure to comply with fire safety issues arising from the illegal conversion of residential space to a commercial use;

3. Compromise of owners corporation public risk insurance cover by failing to advise the owners corporation insurer of a new higher and more intensive commercial use of residential space – giving rise to the possibility of loss of cover for the scheme as a whole; and
4. Compromise of common property security systems implemented by the owners corporation to protect common property and preserve amenity.

These are all authentic concerns which have plagued any strata scheme in which a letting pool has ravaged common property for the short term gain of the participants but the cost of all.

The advent of the digital platform has now exponentially enlarged the number of schemes impacted. Why? The digital platform enables any owner in any building in any location to form part of the aggregated “*virtual letting pool*” operated by the digital provider.

Every one of these issues play out — large or small — wherever the new wave of short term letting is tolerated.

OCN Position

It is not the role of OCN to approve or disapprove of short term letting.

OCN exists within the strata space to facilitate conversation in the public interest which will assist in the delivery of good public policy for those who choose to live or invest in strata living.

Our primary focus is to facilitate good governance within strata schemes as measured by the:

- preservation of common property; and,
- growth of amenity for all occupiers.

In this context, OCN is concerned to ensure all lot owners within all schemes are given the democratic right to vote upon whether their building and the common property creating the lot spaces within that building, is or is not used as part of a short term holiday letting pool.

Legislative Reform

The short term letting phenomenon identifies a fatal flaw with The *Strata Schemes Management Act 1996 (SSMA)* — which has existed since the original Strata Act.

The legislative flaw is found within s.49(1) of the SSMA. Section 49(1) provides:

"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".

The above statutory provision has the effect of preventing owners in general meeting from adopting by-laws to regulate the purpose for which a lot may be leased out to a third party by an owner. This statutory provision is as old as the concept of vertical subdivision. The section:

- (a) is found within section 13(1) of the *Conveyancing (Strata Titles) 1961*; and,

- (b) continues through the current SSMA; and,
- (c) exists as section 139 (2) in new legislation adopted by the Parliament last year but not yet commenced.

It is the submission of OCN that it is time for s.49(1) to be amended.

Why?

Section 49(1) was initially intended to preserve property rights for the "land owner". By 2016, that quaint property right built on the assumption that owning a strata lot is just like owning land is now having unintended consequences for co-operative living.

The continued existence of s.49(1) within strata legislation has the effect of preventing owners in general meeting from choosing whether or not their building and the common property which constitutes that building shall be used for short term letting. Worse still, the continued existence of legislation such as section 49 (1) disenfranchises owners from having the right to adopt by-laws as to how common property will be used.

It is the OCN view that s.49(1) needs to be amended by the addition of words not unlike:

"PROVIDED THAT this section shall not apply to any by-law adopted to regulate the impact of short term letting of a lot on common property or the amenity of the scheme".

Again, the purpose of the above amendment is to enable owners in general meeting to exercise the democratic right to choose:

1. Whether their building will be used as a venue for short term letting; and if it is,
2. By what circumstances short term letting will be permitted within the scheme.

Enacting such an amendment enables the Parliament to "put the horse in front of the cart".

Concerns about maintenance, fire safety, security and insurance are all matters which impact upon common property for which an Owners Corporation has a statutory duty to preserve and maintain.

Once owners resolve in general meeting that they are agreeable to the impact of short term letting on their common property, it is then available for the owners corporation to:

- (a) Advise its insurer of the intended permitted uses;
- (b) Review existing common property fire safety to ensure it complies with a commercial use; and,
- (c) Ensure security systems are consistent with a hotel style environment.

An absence of that "agreement" leaves these matters collectively and chaotically unaddressed.

An agreement within the scheme that short term letting is permitted also enables an owner to address the issue of development consent with the relevant consent authority.

You are doubtless aware the registered proprietor of a strata lot receives title to cubic air space all six external boundaries of which are co-owned with every other registered proprietor in the scheme in the proportion that their unit entitlement represents in relation to the whole. In other words, a strata owner, with title to only lot space has a duty of care to all other owners within the scheme for the use and preservation of common property.

Short term letting of lot space by an owner in isolation has an extraordinary impact upon adjoining lots and the common property utilised to establish the lot space in question. An absence of consultation or agreement to the short term letting within a scheme is guaranteed to deliver the conflict now well documented globally.

It is the OCN submission that enabling owners to exercise their democratic right to choose how a building will be used a whole is to give respect to the duty of care all parties owe each other within the scheme and enable an orderly administration of the proposed business model contemplated by joining the new digital letting pool.

Fatal Flaw

It is a fatal flaw for the Parliament to believe it can address the adequacy of the regulation of short term holiday letting in NSW without first empowering strata owners in general meeting to resolve whether or not they agree with their building being used for short term holiday letting. The OC is cannot be “the elephant in the room”.

To consider regulatory reform addressing:

- (a) Development or planning consent issues;
- (b) Fire safety issues;
- (c) Public risk insurance issues; and,
- (d) Security issues

without first considering the wishes and aspirations of the collective owners of the building impacted by the proposed use of a single lot for short stay accommodation is to “place the cart before the horse”.

Please help us ***put the horse in front of the cart*** by giving owners their democratic right to consider whether by special resolution they can adopt by-laws regulating short term stays in their building.

10 March 2016

The Hon Victor Dominello MP
Minister for Innovation and Better Regulation
52 Martin Place
SYDNEY NSW 2000

By Email: [REDACTED]

Dear Minister,

**Re: Legislative Assembly Committee on Environment and Planning
Adequacy of Regulation of Short Term Holiday Letting in NSW**

OCN has been invited to appear before the Committee at a public hearing on 14 March, 2016 (at 2.40pm). The hearing will be held in Room 814/815 Parliament House.

I attach a copy of the Submission to which I will be speaking during the course of giving evidence to the Committee.

Michael Heaney, Chair of Maestri Towers [REDACTED] will be speaking to the:

- (a) conflict introduced into Maestri Towers by short term letting;
- (b) the by-laws owners adopted in general meeting to deal with short term letting; and,
- (c) how the Maestri Towers By-laws are rendered illegal by current legislation (see Submission attached).

I provide you with a copy of the OCN Submission because it speaks to needed amendment to legislation for which you are the Minister responsible — namely s.49(1) of *The Strata Schemes Management Act 1996 (SSMA)*. To make submissions of this nature without your knowledge would be inappropriate.

Section 49(1) transmogrifies into s.139 in the *Strata Schemes Management Act 2015 (new Act)*.

Short term letting is a phenomenon within the strata space with which Owners Corporations have been struggling for decades. Initially it was the corporate style letting pool which converted residential space into a commercial use for a select few — to the cost of all.

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The digital economy has exploded the problem. It is now possible to employ a digital platform to aggregate diverse strata lots into a "virtual letting pool" with devastating results for harmony within strata schemes "everywhere and anywhere".

Many stakeholders will give evidence to the Committee regarding short term letting effecting:

- (a) a breach of development consent by converting a residential use to a commercial enterprise;
- (b) failure to comply with fire safety regulations because common property in a residential space is now being used commercially;
- (c) public risk insurance issues arising from a commercial activity occurring in residential space about which the Owners Corporation insurer has not been notified; and,
- (d) break down of common property security systems.

Rather than amplify these obvious problems for strata schemes which will be well documented anyway, OCN has resolved to speak to an issue about which no other witness is qualified to speak.

Without making reference to whether short term letting is "good or bad", the OCN evidence will focus upon the fact that the SSMA prevents owners from having the democratic right to consider and choose whether short term letting can or should occur within their building.

OCN seeks amendment to s.49 of the SSMA (s139 of the new Act), to enable owners in general meeting to exercise their democratic right to make by-laws relating to short term letting within their building.

Surely once a building resolves its common property may be used as part of the short term letting enterprise, all the other practical questions dogging this issue take a giant step towards resolution.

Minister, I provide the above observations and Submission for your assistance. Please let me know if we can assist further.

Yours faithfully,



Stephen Goddard
Chairperson