

**Submission  
No 190**

## **ADEQUACY OF THE REGULATION OF SHORT-TERM HOLIDAY LETTING IN NEW SOUTH WALES**

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# The Regulation of Short-Term Holiday Letting in NSW

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NSW Government Submission to the NSW Legislative  
Assembly Committee on Planning and Environment

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## Table of Contents

<b>EXECUTIVE SUMMARY</b>	<b>3</b>
1.1	What is short-term holiday letting? 4
1.2	Economic importance 4
2.	Regulation of short term holiday letting 6
2.1	Industry self-regulation 6
2.2	Government regulation of short term holiday letting 6
3.	Land use planning, compliance and enforcement 7
3.1	NSW land use planning 7
3.2	Compliance and enforcement 8
3.3	Safety and amenity 8
4.	Property management 9
<b>APPENDIX 1</b>	<b>Summary of recent provisions in local environmental plans 10</b>
<b>APPENDIX 2</b>	<b>Regulatory systems in other jurisdictions 12</b>

## **NSW Government Submission to the Legislative Assembly Committee on Environment and Planning Inquiry into the Adequacy of the Regulation of Short-term Holiday Letting in NSW**

This submission outlines the current approach to regulating short-term holiday letting in NSW and the economic significance of the industry.

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### **EXECUTIVE SUMMARY**

Short-term holiday letting relates to the renting of the whole or part of a private dwelling by its owner to a visitor on a commercial basis. It has been commonly carried out in coastal and other popular tourist destinations in NSW for many years and provides significant economic benefits to local economies and the wider state economy.

Industry, with the support of Government, has responded to some community concerns by preparing and implementing a voluntary Code of Conduct (the Code) for operators and visitors to adopt. The Code was endorsed by the former Minister for Planning in 2012 and has been adopted by several major letting agencies including Stayz and Flipkey. Airbnb is a supporting organisation of the Code.

The emergence of innovative online booking services and the development of the sharing economy has seen short-term letting continue to expand significantly both in Australia and overseas. This has led to investigations currently taking place in Victoria, and in major international tourist destinations like Berlin, London, New York, Paris and San Francisco, to consider the need to improve the regulation of short-term holiday letting to enable the activity to continue to take place, without unduly impacting on local communities and the safety of visitors or introducing unnecessary red tape.

NSW councils can regulate the activity under the *Environmental Planning and Assessment Act 1979* but only a few councils have introduced local planning provisions to do so. The activity has the potential to impact on neighbourhood amenity through noise and disturbance. Councils can address such impacts under the *Protection of the Environment Operations Act 1997*.

Some councils have prepared local planning provisions to regulate the use by defining the activity and the circumstances in which it may be carried out with, or without, development consent.

## 1. Introduction

### 1.1 What is short-term holiday letting?

Short-term holiday letting relates to renting the whole or part of a private dwelling by its owner to a visitor on a commercial basis. This is common in many parts of NSW, particularly in coastal areas and other holiday destinations. In metropolitan areas, short-term letting is also provided for tourist and business stays. It may be provided in a single dwelling or a residential flat building or other dwelling type. In regional areas, short-term accommodation is popular on rural properties, with or without the owner's presence.

In the majority of cases, short-term letting occurs without incident. Traditionally, it has been, and continues to be, carried out by owners through local real estate agents or tourism agencies or by direct advertising but online services are increasingly being used.

In recent years, online booking services, through platforms such as Stayz, Owners Direct, HomeAway and Airbnb have facilitated growth in the industry, both in Australia and overseas. This booking format enables dwelling owners to register their properties allowing prospective short-term tenants to book via a portal at any time, and from anywhere in the world. Some serviced apartments, including those administered by an agent, may also use online booking services. Booking through an internet portal enables direct contact between a wide range of owners and potential visitors. A variety of accommodation types is available.

### 1.2 Economic importance

Short-term letting of a residence is a long established practice in NSW and in major world cities. It makes a significant contribution to the NSW economy through:

- local economic growth – a study of the Economic Impact of the Holiday Rental Industry (2014) by BIS Shrapnel estimates that the short-term accommodation industry supported \$31.3 billion in economic activity and 238,000 jobs nationally.
- income generation – short-term rentals can be a significant source of income for property owners.
- job creation – for example, new businesses are being established to provide a conduit between property owners and customers.

In relation to tourism and visitor participation, internet platforms have generated new marketplaces for short-term letting, potentially benefiting consumers and providers by:

- lowering transaction and accommodation costs of engaging holiday rentals, and reducing information and search costs;
- providing opportunities to earn income from unused assets and a flexible way to supplement incomes; and
- potentially broadening the economic benefits of tourism.

In February 2015, the NSW Government released three Visitor Accommodation Demand and Supply Studies for Greater Sydney, the Hunter and the Northern Rivers. The findings of these studies indicate that the holiday rental market has recorded strong growth over

recent years and is anticipated to continue to increase its share of visitor night demand in the next ten years.<sup>1</sup>

Tourism Research Australia's International and National Visitor Surveys provide data on the different types of accommodation used by holiday visitors to NSW. This includes data on the number of visitors, number of visitor nights and expenditure per accommodation type, including non-traditional accommodation. The data for the year ended June 2015 shows that non-traditional accommodation (includes rented house/apartment/flat/unit or private accommodation):

- was used by 12 per cent of total visitors (1,564,000 visitors) to NSW and contributed 18 per cent of total visitor expenditure;
- accounted for 25 per cent of total visitor nights;
- was the most popular accommodation type used for in NSW by international visitors; and
- contributed 24 per cent of total international visitor overnight expenditure.

Industry research has also been conducted which provides an insight on specific segments of the short-term holiday rental sector and its economic impact. For example:

- A 2014 BIS Shrapnel study found that:
  - there are an estimated 623,000 holiday rental premises across Australia and 215,964 in NSW/ACT;
  - of the total holiday homes owned in NSW/ACT, an estimated 50 per cent, or 108,000 holiday homes, are made available for rent when not in use by their owner; and
  - 77 per cent of holiday home owners use their holiday home for personal use, on an average of 7.5 weeks a year.
- Airbnb has also commissioned BIS Shrapnel to look at the economic impact of Airbnb on Sydney and its suburbs in 2012-13. The study found that:
  - there were 2,205 Airbnb properties in Sydney and surrounding suburbs and 30,480 visitors;
  - Airbnb supported \$214 million in economic activity across Sydney over a 12 month period, including in many suburbs that have not historically benefited from tourism;
  - Airbnb guests spent an average \$1,822 per person during their time in Sydney compared to an average tourist expenditure of \$1,071;
  - 48 per cent of Airbnb guests were visiting Sydney for the first time;
  - 31 per cent of Airbnb visitors say they would not have come to Sydney or stayed as long in Sydney if not for Airbnb; and
  - 63 per cent of Airbnb guests say that Airbnb makes them more likely to return to Sydney.

There is currently limited quantitative data on how new technology platforms and the increase in short-term accommodation have impacted or may impact established "traditional" accommodation providers. The traditional accommodation industry is very

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<sup>1</sup> <http://www.industry.nsw.gov.au/invest-in-nsw/industry-opportunities/tourism/industry-action-plan-tourism>

significant for NSW, generating around \$850 million in revenue for the June quarter of 2015 (according to research by STR Global).

## **2. Regulation of short term holiday letting**

### **2.1 Industry self-regulation**

In 2011, in response to concerns regarding the behaviour of some occupants of short-term holiday accommodation, an industry stakeholder group comprising holiday letting organisations (the NSW Real Estate Institute, Stayz, Take-a-Break, Rent-a-Home, Byron Bay Holiday Letting Organisation, and HLO Central Coast) along with the Department of Planning and Environment and Destination NSW, developed a draft Holiday Rental Code of Conduct.

The Code sets out standards of conduct and behaviour for the use of owners, managers and occupants of properties let on a short-term basis as holiday rentals. The then Minister for Planning endorsed the Code which commenced operation in May 2012.

Following a review of the operation of the Code, the Holiday Rental Industry Association relaunched the redrafted Code as a national code in March 2015 in conjunction with leading advertising portals Stayz, HomeAway and Flipkey, with Airbnb as a supporting organisation of the Code.

### **2.2 Government regulation of short term holiday letting**

Currently in NSW, local councils can regulate short-term holiday accommodation through their local environmental plans (LEPs). A small number of councils have done this so far and more are seeking to do so. A summary of the councils which have recently included short-term holiday accommodation provisions in their LEPs is given in Appendix 1.

Short-term holiday accommodation, as a form of tourist and visitor accommodation, is subject to relevant standards where the accommodation is located in a mapped bushfire prone area. The regulatory provisions relating to bush fire protection are set out in Section 100B of the *Rural Fires Act and Planning for Bush Fire Protection* published by the NSW Rural Fire Service.<sup>2</sup>

Councils also have a role to ensure that the use of the land is consistent with the development approval for that land. Councils, together with the Environment Protection Authority (EPA) and NSW Police, have a compliance role in relation to noise and traffic. Waste left on footpaths is also a matter which councils address under delegation from the EPA.

NSW Fair Trading has published guidelines on letting residences for short periods and administers legislation dealing with tenancies of three months or more.

The NSW Government has an interest in ensuring that any necessary regulatory response should follow good regulatory design principles, including that it is:

- proportionate to the risks;
  - targets the issue;
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<sup>2</sup> ISBN 0 9751033 2 6

- simple, easy to comply with and consistent across the market, to avoid imposing market entry barriers; and
- such that administration and enforcement costs do not outweigh the benefits of the regulation.

### 3. Land use planning, compliance and enforcement

#### 3.1 NSW land use planning

Short-term letting has occurred across NSW for a long period of time without State-wide planning regulation. However, the recognition of community impacts associated with lettings in some areas has led to some significant court rulings. For example, in 2013, the NSW Land and Environment Court (the Court) found that the use of a house in a residential area in Terrigal for short-term letting did not meet the definition of a 'dwelling house' and that short-term letting was prohibited in the residential zone in the Gosford LEP.

The case involved the regular letting of this house in a low density residential zone to large groups of people. The Court found that the house was not occupied 'for the purpose' of a dwelling-house because it was not 'being occupied in the same way that a family or other household group in the ordinary way of life would occupy it.'<sup>3</sup>

After the ruling, Gosford Council amended the Gosford LEP to define short-term rental accommodation and to permit it in certain circumstances without requiring development consent.

Several other councils have included local provisions in their LEPs to provide greater certainty on the issue and some councils have made the use permissible without requiring consent in any circumstances (Appendix 1) to ensure that it can legally be provided without placing the burden of development approval on owners and operators. Some approaches taken by councils include:

- exempting short-term holiday accommodation from the need for consent for specified periods and numbers of bedrooms; or
- not requiring development consent; or
- specifying it as a temporary use with development consent required for longer period or larger dwellings.

The regulation of short-term letting is a local planning matter addressed by individual councils. However, for individual providers and online platforms operating across multiple council areas, the regulatory framework can be complex. Local guidance provided by councils can assist in clarifying the position, particularly where council LEPs contain local provisions to address short-term letting.

In determining an application for development, the determining authority considers "the likely impacts of the development including environmental impacts on both the natural and built environments, and social and economic impacts in the locality" through merit based

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<sup>3</sup> Dobrohotoff v Bennic [2013] NSWLEC 61



assessment of the proposed development (*Environmental Planning and Assessment Act 1979* (EP&A Act), section 79C(1)(b)).

### 3.2 Compliance and enforcement

Councils can take action under the EP&A Act to enforce compliance with development consent. This can include cases where a property is being used for a purpose which is not included in the development consent (including unlawful uses), to stop a use that is being undertaken without development consent or is prohibited, to ensure breaches of existing controls are remedied, or that the requirements of any development consent conditions or agreements are met.

Councils and/or NSW Police may also take action:

- against noise complaints and renters leaving surplus waste collection on council footpaths under powers conferred on them under the *Protection of the Environment Operations Act 1997* (POEO Act) and the *Protection of the Environment Operations (Noise Control) Regulation 2008*; and
- to deal with public nuisance caused by the consumption of alcohol in public places in accordance with the *Local Government Act 1993* (LG Act). Councils can also declare alcohol-free zones and alcohol prohibited areas in accordance with the LG Act.

### 3.3 Safety and amenity

The NSW planning system regulates building standards and building safety through the EP&A Act. Building work, whether exempt from or requiring development consent must be carried out in accordance with the Building Code of Australia (BCA).

The BCA is a performance-based building code which sets technical standards for the design and construction of buildings. Under the BCA buildings are classified based on their use in order to determine what standards must be met by the building work. The BCA sets different standards for each classification. Other factors such as number of storeys and size will also influence what BCA standards must be met. The BCA does not generally set standards for existing buildings although it may be used as a benchmark, or aspects may apply when a change of use is proposed.

The use of a building and hence its BCA classification reflect, among other things, the level of fire safety risk associated with that building. For example, the fire safety measures and/or level of fire-resistance required will differ for a Class 1a building (a dwelling) compared to a Class 1b building (for example, bed and breakfast accommodation), or a Class 2 building (for example, an apartment building).

If a dwelling or a part of a dwelling is used for short-term holiday accommodation development consent for a change of use may be required. In some circumstances, such as a change from a dwelling to tourist and visitor accommodation, this may result in a change of BCA classification of the building and there may be a need for the affected building to satisfy higher fire safety requirements than those that applied to the originally approved use of the premises.

Some concerns have been raised by the tourism industry that short-term holiday accommodation providers may not always comply with the relevant regulations (such as fire safety requirements and disability access), potentially providing a competitive advantage over traditional providers.

Issues such as fire safety, building security and noise associated with short-term letting are long-standing and predate the emergence of online platforms. However, the emergence of innovative online booking services and the development of the sharing economy has led to a significant expansion in short-term letting.

Ensuring that visitors to NSW enjoy high quality accommodation is key to NSW maintaining a competitive position in the global marketplace as well as its position as the most visited state in Australia.

#### 4. Property management

While there is no specific NSW legislation that relates to the short-term letting of residences, the NSW Department of Fair Trading has published guidance for owners who rent out their properties for holiday accommodation and for visitors to those properties.

If an owner rents out a property for less than three months, the agreement does not form a tenancy under the *Residential Tenancies Act 2010*. An owner may manage the property themselves or commission an agent to do so. If the letting is carried out through a real estate agent, including letting for a holiday rental, that person must be licenced in NSW as a real estate agent and is responsible for ensuring the property is well maintained and rents are collected.<sup>4</sup>In relation to strata schemes, the provision of short-term holiday letting can impact residents. Short-term letting can have an effect on the availability of facilities paid for by residents, which could lead to their over-use or damage. Building security may be compromised when access doors are propped open or security keys go astray. Noise and visitors' vehicles being parked illegally on the common property can also be an issue. However, these issues are not exclusive to short-term letting and may also be caused by longer-term residents.

Owners' corporations can pass by-laws in relation to the conduct of owners and occupiers of lots in a scheme. However, the *Strata Schemes Management Act 1996* provides that no by-law is capable of operating to prohibit or restrict a dealing with a lot (section 49). This means that an owners' corporation cannot seek to restrict a lot owner from offering short-term accommodation in the owner's lot.

Owners' corporations can only seek to control short-term accommodation through the use of "conduct" by-laws, or development approvals that have been issued by the local council in respect of the scheme. In a case before the Victorian Civil and Administrative Tribunal it was found that an owners' corporation rule prohibiting short-term letting was not validly made.<sup>5</sup>

In 2015, in the "Bridgeport" case, the NSW Land & Environment Court considered a situation in which apartments within a building were being used for short-term holiday letting. The Court relied on the development approval for the apartment being subject to a condition prohibiting tourist and visitor accommodation, including short-term letting, to prevent the use from occurring. The Court ruled that the tourist and visitor use must cease and specified a date for this to occur.

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<sup>4</sup> NSW Fair Trading

<sup>5</sup> *Dobrohotoff v Bennic* [2013] NSWLEC 61

## **APPENDIX 1 Summary of recent provisions in local environmental plans**

Description of councils that have or are addressing short term holiday accommodation in the relevant local environmental plan (LEP).

<b>Council area</b>	<b>Progress of planning proposal to amend LEP</b>
<b>Hunter Region</b>	
Gosford (H)	Local provision that enables use of a dwelling with up to 4 bedrooms as exempt development in Schedule 2 of the LEP. Requires a bush fire evacuation plan displayed prominently.  Development consent is required where a 5-6 bedroom dwelling is to be used.
Great Lakes (H)	A local provision was on exhibition until 19 June 2015. The proposal does not require consent if the use is for up to 60 consecutive days p.a.
Lake Macquarie (H)	The exhibition period for planning proposal ended recently. Planning proposal proposes short term holiday accommodation as exempt development for fewer than 5 bedrooms and as development permitted with consent for 5 bedrooms or more.
Port Stephens (H)	A local provision does not limit the number of bedrooms for a period of up to 60 consecutive days a year, identifies it as a temporary use, subject to amenity considerations. Probably included in 2013.
Wyong (H)	Short-term rental accommodation is exempt from development consent up to a maximum of 4 bedrooms under certain circumstances; otherwise, development consent may be granted for the temporary use of a dwelling for up to 6 bedrooms.
<b>Northern Region</b>	
Byron (N)	In April 2015, Byron Council endorsed an amendment to its LEP for a local provision to enable short-term holiday accommodation as exempt development in dwellings of 3 or fewer bedrooms (maximum of 2 adults per bedroom). Larger dwellings would require a development application. "Party houses" would not be permitted and council is proposing a register for dwellings used as short-term holiday accommodation.
Tweed (N)	Tweed Council was issued a gateway determination on 1 October 2015 regarding short-term holiday accommodation. The next step would be council's public exhibition of the proposal.
<b>Southern region</b>	
Bega Valley (S)	A local provision which does not limit the number of bedrooms for a period of any time up to 52 days a year and identifies it as a temporary use which does not require development consent for these circumstances.
Eurobodalla (S)	A local provision which does not limit the number of bedrooms for a period of up to 45 consecutive days a year and identifies it as a temporary use not requiring development consent for these circumstances.

Council area	Progress of planning proposal to amend LEP
Kiama (S)	A local provision which does not limit the number of bedrooms for a period of up to 60 consecutive days a year, identifies it as a temporary use, subject to amenity considerations.
Palerang (S)	A local provision which does not limit the number of bedrooms for a period of up to 45 consecutive days a year, identifies it as a temporary use, subject to amenity considerations.
Shoalhaven (S)	A local provision which does not limit the number of bedrooms for a period of up to 45 consecutive days a year, identifies it as a temporary use, subject to amenity considerations.
Wingecarribee (S)	A local provision which does not limit the number of bedrooms for a period of up to 45 consecutive days a year, identifies it as a temporary use, subject to amenity considerations.
<b>Sydney Regions</b>	
City of Sydney (Syd Central)	City of Sydney regulates the use in residential flat buildings through conditions of consent.
Pittwater (Syd N)	As Schedule 2 exempt development (for less than 3 months by an individual or group).

## **APPENDIX 2                      Regulatory systems in other jurisdictions**

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In summary, the use of online booking formats has seen an increase in the short-term accommodation industry in many jurisdictions, leading to concerns very similar to those being raised in NSW. Depending on the overarching legislation, the approach to regulation varies from:

- an 'opt in' process, as used in Queensland, where the local council amends its planning scheme or local temporary planning instrument to identify the land use in certain areas;
- the Greater London Council's move to enable temporary sleeping accommodation subject to amenity issues being addressed;
- the limitation of short-term rental to the primary residence in France to assist in making more accommodation available for long term rent;
- Berlin's move to require owners to apply for a permit and for the properties in question needing to be available for both short and long term rental;
- allowing eligible owners (and tenants) to rent out accommodation for up to 90 nights per year where they have registered with the city in San Francisco; and
- a hotel tax on short-term holiday accommodation in New York City with other taxes such as sales and business tax possibly also applying.