

**Submission
No 205**

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

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HOLIDAY LETTING
ORGANISATION
BYRON
RELAX • ENJOY • RESPECT

**LEGISLATIVE ASSEMBLY COMMITTEE ON
ENVIRONMENT AND PLANNING**

**Inquiry into the adequacy of the
regulation of short-term holiday letting
in NSW**

Submission by HLO Byron Incorporated

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HLO BYRON

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1 EXECUTIVE SUMMARY

HLO Byron is an organisation made up of property owners and their managing agents. A central tenet of HLO Byron is that owners have a right to let their properties whenever they want to, short term or long term, providing that their properties are managed responsibly.

Short term rental provides a significant overnight visitor bed capacity throughout NSW. It is very important to the success and growth of the dispersal and increase in visitor spend targeted by local tourism organisations, Local Government Authorities and the NSW State Government. Destination NSW has a 2020 target to double the revenue generated by overnight visitors.

The debate around short term holiday letting has been primarily caused by incidences of unacceptable behaviour that affected the amenity of neighbours. Opponents have polarised this debate by calling for planning regulation as a solution. These opponents have disregarded the obvious benefits of providing residential holidays in private dwellings and resulting overall economic contribution.

Expert planners, legal advisers and the Department of Planning have stated that regulation through planning is an inappropriate strategy to deal with short term holiday rental.

The polarisation is obvious when looking at how some LGAs amended their LEPs. Some, such as Shoalhaven and Eurobodalla, realised that they needed to protect this important activity by clarifying in their LEPs that short term holiday accommodation was a permitted use. Others such as Gosford opted for regulation with restrictions through development consent.

The Department of Planning and Environment took a positive step to address the issues through the correct mechanism of behavioural management by convening a committee in 2011 to produce the Code of Conduct for self-regulation. Minister Hazzard maintained that this was an adequate solution and urged all LGAs to participate and support the Code.

HLO Byron urges the NSW State Government to end the doubt and uncertainty caused by the lack of clarity in current planning instruments and the exacerbation of that doubt and uncertainty caused by permitting individual LGA's LEP amendments. This means clearly stating that short term rental and long term rental of residential dwellings are aspects of the primary residential use.

The number of complaints and issues is very small overall. In Byron Bay the complaints generated reflect a fraction of a percent of all occupancies. Rather than create a complex and expensive regulatory strategy, problems should and can be addressed by exception.

If any further regulation is deemed necessary, HLO Byron recommends that the NSW State Government considers giving statutory power to the Code of Conduct, rather than fostering regulation through planning. The Code deals effectively with management and behavioural issues and is continuing to build widespread participation.

One way of achieving this is making an instrument (most likely a State Environmental Planning Policy – SEPP) to prescribe short term letting of any dwelling as “complying development”.(unclear sentence)

There are sufficient ancillary instruments in the EPA Act, such as noise abatement orders, to deal with extreme behavioural issues in any dwelling. These existing controls can be used very effectively when harmonised with the Code of Conduct.

2 HLO BYRON INCORPORATED

The HLO (Holiday Letting Organisation) Byron Incorporated was established in 2005 at a meeting of property owners to represent them at the local and state government level.

The membership of HLO Byron Inc. is made up of over 700 property owners and their managing agents.

HLO Byron's guiding principle is that owners have a right to let their properties whenever they want to, short term or long term. On the other hand, they should ensure that their properties are managed responsibly.

It wrote the first Code of Practice for holiday rental in Byron Shire in 2005. It was part of the team convened by the Department of Planning and Infrastructure in 2011 that formulated the current Code of Conduct for holiday rental and currently sits on the Code Administration Committee. It manages and funds the Noisy Neighbour Hotline as a community service and policing tool for non-compliant incidents.

This submission addresses the committee's headings and also proposes a solution to provide a uniform strategy that the NSW State Government could implement that addresses the key concerns about Short Term Rental Accommodation.

3 THE CURRENT SITUATION IN NSW AND COMPARISON WITH OTHER JURISDICTIONS

Holiday or short term rental accommodation in Australia has been a traditional activity since the 1800's. Many coastal towns and other popular destinations contained a large number of houses owned by families from surrounding cities. It is a form of accommodation favoured by those who prefer a local residential experience over that provided by hotels and resorts. For the owners, the revenue from renting has the obvious benefits in contributing to income. Those who rent are given the opportunity to enjoy the same experience as the owners.

Expert planners, legal advisers and the Department of Planning have stated that regulation through planning is an inappropriate strategy to deal with short term holiday rental.

The following excerpt is from a letter to the BSC general manager on the 12th Aug 2009 from Tom Gellibrand the, then, Deputy Director, General Plan Making and Urban Renewal.

“Holiday Letting

A review of the proposed approach to limiting holiday letting ("guest house (holiday home) accommodation") in certain precincts in the local government area has been undertaken. The proposed approach limits opportunities for low impact based

tourism uses across the local government area and is likely to result in economic impacts for individuals and the local community. The policy approach in this regard is that such provision of holiday accommodation in a dwelling is a use ancillary to the major purpose of the building.

The Department is currently looking at options in relation to holiday letting as the issue has State wide implications. While no final decision has been made I expect the conclusion will be that it is not appropriate to control holiday tenancies through the planning system. Accordingly I cannot agree with the current draft provisions within the draft LEP. Council is encouraged to continue the current model of self-regulation/management through the letting agents and landowners as a means of minimising any impacts. “

Furthermore, there is a fundamental flaw in the strategy of councils attempting to regulate short term holiday renting by means of development consent. Any change to the LEP designed to regulate short term letting in dwellings can only be prospective. Thus the existing pool of dwellings being currently let is not subjected to the new consent conditions. For example refer to the EPA Act section 109B.

109B Saving of effect of existing consents

(1) Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

(2) This section:

(a) applies to consents lawfully granted before or after the commencement of this Act, and

(b) does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent, and

(c) has effect despite anything to the contrary in section 107 or 109.

(3) This section is taken to have commenced on the commencement of this Act

Due to the absence of State Government leadership in making decisions on this issue, those who have taken an aggressive opposition to the practice of short term letting have resorted to searching through existing planning instruments to find terms to attach to short term letting in order to ban or restrict it. This has had the effect of causing doubt and confusion.

Byron Shire Council (BSC) initially tried to define properties engaged as Tourist Facilities simply to be able to eradicate short term rental from residential zones. For some time they claimed that it was illegal without supporting evidence.

It is significant that BSC uses the outcome of the 2013 Terrigal Land and Environment Court case, *Dobrohotoff v Bennic* (2013) 194 LGERA 17, to support the contention that holiday letting was not a permitted use of a dwelling. This reveals a fundamental misunderstanding of a judge's decision. [REDACTED]

[REDACTED] The problem was that the dwelling in question was being used for activities not permitted in its development consent, such as bucks and hens parties.

The demand for dwellings available for short term rental accommodation is the same throughout Australia. There are some differences in policies and reactions between states due to the fact that the focus has only recently emerged. However, the same dilemma faces all authorities when they attempt to using planning law to address a behavioural problem. Planning law deals with property and its uses, not human behaviour. The fundamental principle existing for all jurisdictions is that short and long term rental of a dwelling are equal aspects of residential use.

4 THE DIFFERENCES BETWEEN TRADITIONAL ACCOMMODATION PROVIDERS AND ONLINE PLATFORMS

There are three distinct functions associated with traditional rental accommodation of private dwellings.

- Ownership
- Management
- Booking

These functions are the same for dwellings let for a short or long term. The time factor with short or long term rental makes no difference to the primary residential use of the dwelling. A detached observer would not be able to differentiate between short or long term occupants. The property's facilities are used in exactly the same way.

The only significant difference between short and long term rental of a property is that for occupancies over three months, the Residential Tenancy Act requires a lease to be drawn up between the property owner and the tenant. The property rights for the tenant that accompany the lease do not apply to the short term occupant. In this case an occupancy agreement that contains the terms and conditions that are stipulated by the owner is the defining legal document.

In some cases, owners will perform all three functions associated with the renting of their property. In others the owner will engage a manager to perform these tasks. They may be associated with a real estate business as an aspect of their sales and permanent rental portfolio or may be a dedicated manager or management business focussed only on short term rental.

Online platforms, commonly referred to as portals or OTAs (online travel agents), have developed along with the advent of the internet. All they do is provide online booking access between the property and the consumer. As such, other than the now standard practice of providing ratings through blogs, they have no hands on management function. The owner is the responsible entity. This responsibility may be delegated to a manager.

The internet has now developed into the primary tool for consumers to source most of their product and service needs through direct marketing by individual businesses. On line platforms facilitate this process by providing a website which has a significant critical mass for the consumer to choose from. There are many online platforms dedicated to short term rental accommodation. The large ones such as Stayz, Home away, Booking.com and Airbnb are complemented by smaller ones run by real estate and property management businesses. Sites such as E-Bay and Gumtree provide supplier to consumer connections for virtually any product, including accommodation.

Perhaps the biggest potential problem with online bookings for private dwellings is where the hotel model of the consumer is able to complete the transaction without any qualification process. This is acceptable for a hotel where the consumer still has to go through a front desk to gain access but is not adequate for the responsible management of a private dwelling. A decision must be made in the qualification process as to whether the prospective guest's purpose fits the residential use definitions for the dwelling.

The terms and conditions for each property can easily be included in the online information displayed through the portals.

If they are a service provider, such as a real estate business or a specific accommodation management business they simply perform the task of booking and property management in a manner that is in the best interests of the owner and his relationship with his neighbours. They still must qualify all enquiries received through any portal to satisfy this responsibility. Thus, the traditional accommodation providers still have the exact same function as they had before the portals came into being. They just have better tools nowadays.

5 THE GROWTH OF SHORT-TERM AND ONLINE LETTING, AND THE CHANGING CHARACTER OF THE MARKET

Any growth of the short term rental market may be associated to many factors that have contributed to changes throughout our society over the past few decades. One of these changes is population growth. Another is the rising affluence of this population and also its access to finance consumer purchases through personal debt.

Where there is intense visitor demand, large scale high density accommodation apartments become a viable investment accompanied by resorts etc. Where the critical mass of visitors

is less short term rental in private properties provides availability and flexibility that could not be sustained by hotel or resort properties.

Byron Bay or Byron Shire is somewhat of an anomaly. In 1988 the Shire Council was focused on filling the economic void caused by the closure of the local meat works. The councillors of the time were visionary enough to foresee the growth of the visitor economy and actively supported the letting of private residential dwellings to facilitate this.

Since that period, Byron Shire has had councils that have resisted any large scale development, opting for a village environment instead. At the same time the popularity of Byron Bay has skyrocketed at an unprecedented rate attracting many overnight visitors from Australia as well as from overseas. The internet has enabled people around the world to access places and opportunities with consummate ease.

One other change that has occurred is the pattern of when people take time off to visit. Once this was predominately focussed on the Christmas and school holidays. Now people visit through the year due to choice facilitated by more flexible employment opportunities.

Therefore towns like Byron have been actively encouraged and supported by the NSW State Government to roll out events and activities outside of peak times to encourage visitation during these periods. Byron Shire Council in association with the local visitor industry body, Destination Byron, has a marketing strategy to target a younger demographic (20 – 30 year olds) and DINK's (double income no kids) during these periods. Without children, these groups can come outside school holidays. These events include a writer's festival, fun run, triathlon, big swim, various surf competitions, Australia Rules and rugby competitions, music festivals such as Splendour in the Grass, Blues Festival and so on.

Again online letting is simply an aspect of the marketing and booking process that is widely used by consumers and providers alike for all products and services.

6 THE ECONOMIC IMPACTS OF SHORT-TERM LETTING ON THE LOCAL AND STATE ECONOMIES

Using Byron Shire as an example, the overnight visitor economy would be devastated without the short term rental of private dwellings. Destination Byron and Destination NSW have clearly identified that overnight visitors provide the highest yield. They spend far more than day visitors and have the least negative impact.

Besides the primary activity of receiving rental income, there is a whole sector of goods and service providers that depend on overnight visitors. This includes but is not limited to cleaners, gardeners, linen services, electricians, plumbers, carpenters, restaurants, cafes, retail shops and hardware outlets who all benefit from the overnight visitor.

Some years ago the value of the visitor economy in Byron Shire was estimated at over \$400m. The wedding sector alone, which heavily relies on the availability of short term letting, is now thought to generate up to \$300m.

The NSW government's mission is to double visitor expenditure by 2020 and maximise the benefits of the visitor economy for NSW. A healthy short term rental sector is a very important factor in this objective. Big business cannot provide the flexibility and geographic scope that individual dwellings can.

7 REGULATORY ISSUES POSED BY SHORT-TERM LETTING INCLUDING CUSTOMER SAFETY, LAND USE PLANNING AND NEIGHBOURHOOD AMENITY, AND LICENCING AND TAXATION

7.1 CUSTOMER SAFETY

Short term letting poses no issues that are different or separate to the long term residential use of a private dwelling. There is no evidence that there are added safety risks to occupants who are in residence for a short period.

As such there is no practical need to change any of the building requirements for short term use. However, there is a huge economic disincentive to impose Class 1B conditions on a Class 1A dwelling.

7.2 LAND USE

The issue which has sparked concerns with short term letting is the unacceptable behaviour by the extreme minority of guests. This has led some LGAs, such as BSC, to propose a solution through planning by first claiming that somehow the land use had changed when the dwelling is let for a short period of time.

In 2005 the BSC attempted to ban short term letting in all residential zones without due regard to the economic and other consequences through creative interpretation of its LEP. This attempt was unsuccessful; as far as land use is concerned the primary use of the dwelling is the same for short term occupation as it is for long term. This aspect was further clarified by the Supreme Court of Victoria in the Watergate case. For dwellings in residential zones, planning regulation defines the primary use as residential and prohibits uses such as commercial purposes including functions.

It is inappropriate to attempt to deal with behavioural management issues through planning regulation. This opinion is widely held both by expert planners and lawyers.

7.3 NEIGHBOURHOOD AMENITY

Neighbourhood amenity is determined by the behaviour of occupants irrespective of whether they are long or short term. It is important for any neighbourhood that the occupants of all dwellings behave in a way that is acceptable to the neighbourhood. This is the case for all occupants, whether they are owners, occupants on a long term lease or occupants on short term rental.

The appropriate mechanism to provide responsible behavioural management is through the terms and conditions in an occupancy agreement, allied to the house rules, which dictate how guests conduct themselves whilst in residence. These can be tailored to meet the minimum requirements of the Code of Conduct and then extended to address other factors such as garbage and parking that may affect neighbourhood amenity.

There have been complaints that dwellings for short term rental affect the social fabric of the permanent residents. The fact is there has always been a significant number of traditional family holiday homes throughout the country that in past times may have been vacate for most of the year.

The number of complaints and issues is very small overall. In Byron Bay the complaints generated reflect a fraction of a percent of all occupancies. Rather than create a complex and expensive regulatory strategy, problems should and can be addressed by exception.

7.4 LICENSING

The question of licensing must be why? Then if there is a valid reason it must be applied to both short and long term rental accommodation. Given that any proposal to license short term rental would amount to providing a license for a currently permitted activity under the vast majority of development approvals for existing private residential dwellings, it would be unjust and unfair to discriminate on a basis of the time someone is in residence given that the use is exactly the same.

Taxation requirements are already in place for short term rental. It is exactly the same for permanent rental. The owner must declare all income and pay the appropriate tax as must all those who provide goods and services to that owner. The ATO is vested with the appropriate powers to facilitate correct reporting. It is not a state government function.

8 NATURE OF THE OPPONENTS

Years of HLO operating a compliance hotline where complainants are contacted to gauge the success of intervention shows that the overwhelming majority have no fundamental opposition to holiday letting, they just want peace and quiet.

There is significant political pressure to restrict short term rental accommodation in private dwellings that has been generated by organisations representing large business. It is well known that the large hotel and resort operators have long lobbied for restrictive regulation of the short term letting of private dwellings. This is an impractical proposition due to the fact that for good business reasons they could not provide alternative accommodation in all the locations serviced by private operators and they could not sustain the relatively low occupancy rates.

Byron Shire is also well known to be the hotspot of strident opposition to many issues and is an outlier amongst the NSW LGAs in this regard. The ideological opposition to STRA in Byron Shire is fostered by a noisy minority group who still maintain that short term letting is somehow an illegal activity.

9 REGULATION BY INDIVIDUAL LGA'S

HLO Byron asserts that it is in the best interests of the visitor economy to have a uniform platform for STHA across the state (and across the nation). Councils that have changed, or seek to change, their LEPs are creating a complicated and over reactive environment without addressing the root cause of issues that may cause concern or problems. The actual number of incidents that have resulted in neighbourhood problems is incredibly small, less than a fraction of a percent, when related to the overall number of successful and trouble free STRA occupancies.

Permanent and short term rentals involve the same use of a property. It is only over the last decade that any separation has been considered.

Some councils moved quickly to include STRA as a permitted use when they realised that there could possibly be a negative effect on the right for owners to make their properties available if the emergence of opponents prevailed.

The outcome of some council's intervention is the imposition of development consent conditions on properties that already have development approval for residential use. Gosford Council was the first. It is highly unlikely that this is actually legal as there is no actual change of use when short term renting from that of owner occupancy or long term rental. Furthermore, Division 10 of Part 4 of the EPA Act contains provisions whereby any new instrument generally only has prospective effect. That is to say, they only apply to development that is commenced after the making of the instrument. (HLO Byron has strong legal opinion to support this.)

Thus changing an LEP as a means to regulate the properties currently engaged in short term rent is a fundamentally flawed strategy.

The State Government needs to show effective leadership in providing a policy and a mechanism that provides surety for property owners and peace of mind for neighbours. To

this end the State Government took the initiative in 2011 to convene a committee drawn from those active in the STRA sector to create a Code of Conduct. It endorsed this Code and recommended that all Councils in NSW become participants.

10 THE SOLUTION – EMPOWERING THE CODE OF CONDUCT FOR SHORT-TERM RENTAL ACCOMMODATION THROUGH STATUARY MEANS

Long term rental conditions are defined in a Residential Tenancy Agreement defined by the Residential Tenancy Act.

Short term rental conditions are defined in an Occupancy Agreement defined by the Code of Conduct.

If the State Government enacts legislation that makes operating under the Code of Conduct mandatory for anyone engaged in STRA, a powerful management instrument would be created without the idiosyncrasies of the planning approach that a few councils have focused on.

There are very significant advantages associated with this.

- The focus immediately shifts from inappropriate and inconsistent planning regulation to behavioural management.
- Problems that are connected with behavioural issues are much more effectively dealt with in the short term case as non-compliance can result in prompt eviction.
- It would create an even playing field across all LGAs in NSW which is important to the visitor economy overall.
- LGAs would not have to grapple with the local political pressures resulting in complex problematic strategies.
- There would be no discrimination related to time of residence and no infringement on owner's rights.
- The combination of management compliance through the Code of Conduct and the cooperation with LGA instruments that enforce noise abatement would address any issue that causes problems with neighbourhood amenity.

11 CONCLUSION

Short term rental of private dwellings provides a significant overnight visitor bed capacity. It is extremely important to the success and growth of the dispersal and increase in visitor

spend targeted by the NSW State Government's 2020 on doubling the revenue generated by overnight visitors.

Owners choose to rent short term for many reasons other than simply to generate income. Many make the significant investment in a second dwelling to use as a family holiday home and many are planning to retire to their favoured destination. It is win/win situation for them, the guests who stay as well as the local and state economies.

The NSW State Government has already invested significant time and research into the benefits and problems associated with the short term holiday rental of private dwellings. It saw fit to convene an industry committee to write the Code of Conduct for the self-regulation of short term rental accommodation and supported the launch of this by requesting all LGAs in NSW to become participants.

Other than this initiative, there has been a lack of effective leadership to ensure that all LGAs had the same objective in considering the fundamental rights of property owners and the health of the visitor industry over emotive political pressures caused by a minority in opposition.

The history of the Byron Shire Council is a great example why the NSW State Government must provide a light touch, fair and non-discriminatory policy to end the uncertainty and doubt that has ensued. Ironically the current BSC draft STRA strategy relies on the Code of Conduct to provide standards and management practice guide in an otherwise fundamentally flawed approach.