

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

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The Chair
Committee on Environment and Planning
Parliament House
Macquarie Street, Sydney, 2000

via Email: environmentplanning@parliament.nsw.gov.au

Attention: Committee Manager, Mr David Hale

Dear Mr Hale,

**RE: INQUIRY INTO THE ADEQUACY OF THE REGULATION OF SHORT-TERM
HOLIDAY LETTING IN NSW**

Leichhardt Council considered this matter at its meeting on 10 November 2015. Council resolved (C544/15P) to refer the attached submission to The Legislative Assembly Committee on Environment and Planning.

I note that in accordance with our correspondence with you on the 18th of September 2015, Leichhardt Council's submission will be accepted on Wednesday 11th of November 2015.

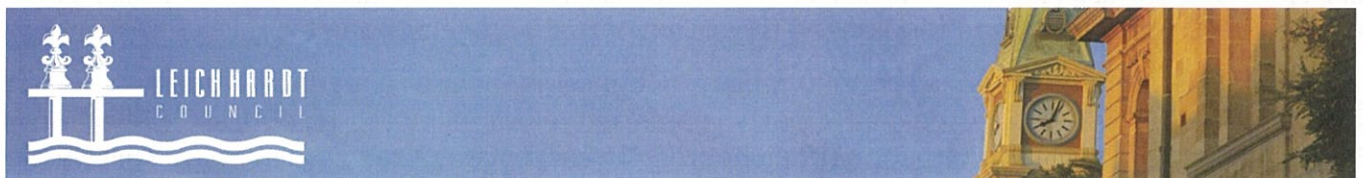
Should you have any questions or require additional information, please contact Council's Manager of Environment and Urban Planning, [REDACTED]

Yours sincerely,

[REDACTED]

Elizabeth Richardson
ACTING DIRECTOR ENVIRONMENTAL & COMMUNITY MANAGEMENT

**Submission in response to Legislative
Assembly Inquiry into the adequacy of the
regulation of short term holiday letting in New
South Wales**



By

Leichhardt Municipal Council

9 November 2015

Introduction

Further to resolution of Leichhardt Municipal Council (**Council**) on 10 November 2015 (Resolution C544/15P) I am writing to provide the Legislative Assembly with the Council's submission in relation to short term holiday letting.

Council understands that although the terms of reference for the inquiry are suitably wide to cover all forms of short term holiday letting the immediate reason for the inquiry is the prominence of Air BnB, an internet based booking service which allows homeowners to rent out their homes, in part or whole, for short term rentals.

Council's experience

Council has not so far prosecuted a property owner for operating an Air BnB facility. In one well publicised case, Council issued a stop work notice on unauthorised building work in Annandale, and in the process of investigating that matter, Council was informed that the works, in part, were designed to further an Air BnB proposal. Council has since regularised the status of that particular home.

As a consequence of that matter, Council is aware anecdotally of many such arrangements in the municipality, some estimates climbing to 400 such short stay accommodation throughout Leichhardt. These have not resulted in many complaints by neighbours about their operation.

Up to six months ago, Council had no complaints about short term stays.

The number of complaints however is rising. Council has issued one Penalty Infringement Notice (PIN)(October 2015); five notices of intention to issue an order under section 121B of the *Local Government Act 1993*; and one order under s121B. These actions have all been within the last six months. Compliance advises that they are now receiving approximately one complaint per week on average.

Significantly, the complaints are not about noise or outrageous behaviour, but merely the perception that a new person or people are occupying the premises each week. It is the feeling of unease that the changing tide of faces brings on. If the legislature allows this type of development to be regularised, citizens in residentially zoned areas may have to come to terms with this phenomena. They will not be able to assume the same people in the same house or unit until the For Sale sign goes up. As a community we will have to deal with a constant parade of new faces.

Although the impact on residential owners appears to be relatively low, Council is concerned that the short stay visitors may be an important part of the local economy. Leichhardt municipality benefits from a large number of restaurants and cafes and these visitors may be the difference between business success and failure. Again, the evidence is largely anecdotal.

Council is concerned at the potential impacts from home based short term holiday accommodation for a number of reasons. Council is a largely residential Local Government Area on the edge of the largest CBD in the Commonwealth of Australia. Any rise in this type of accommodation is likely to impact heavily on Leichhardt, particularly those areas close to water views and transport to the City.

Further, property values in Leichhardt are high, and it is likely that residents will want to capitalise on any opportunities to obtain a return on investment, even if that return is on the family home.

The criteria within the Inquiry are listed below, and the Council makes its observations to the Inquiry within those questions.

The current situation in NSW and comparison with other jurisdictions

While the Legislative Assembly has called for a comparison of NSW with other jurisdictions, presumably outside Australia, this submission will confine itself to the Council's own experience and that of other NSW Councils, rather than exhaustively reviewing the international legislative scene.

One of the difficulties posed to regulators by short term accommodation concerns its identification and the need to gather evidence of its existence. Short term holiday renters create land use challenges which will become obvious below. To counter these conflicts Council needs to be able to define what the use is; and then be in a position to gather evidence should there be a need to regulate or close down an operation that is acting contrary to the planning law. In some respects the intensity and duration of use can be the chief determinant of what regulatory response is necessary.

For example, if a home owner does an outright house swap with a person or family of similar nature, there may be no regulatory impact. One family moving to London, and being replaced by another family, using the property in exactly the same way, poses no regulatory dilemma.

In fact, many uses if they are relatively low impact will remain, to the eye of the Council, completely unknown. An "empty nest" couple who let out a bedroom occasionally to an individual or couple will not make any noticeable impact.

However, uses of this nature rarely remain low impact and low intensity. In the recent case of *Dobrohotoff v Bennic* [2013] NSWLEC 61 the Court dealt with short term holiday lettings. The house owned by the respondent was within a residentially zoned area. The house in question was an unremarkable 4 bedroom house. The problem was not the house, but the use to which it was put. Thus at Paragraph 8:

The Dobrohotoffs record a history of noisy and disruptive tenants who have rented the property both before and after its sale to Ms Bennic. These tenants have often engaged in antisocial behaviour that has significantly adversely impacted the amenity of the Dobrohotoffs. Loud music, flashing lights, bucks and hens nights "(sometimes involving strippers, or worse)", and frequent parties, often extending into the early hours of the morning, are recurrent themes. Understandably, this has caused the Dobrohotoffs, and in particular Mrs Dobrohotoff, a significant amount of stress and anxiety. It has resulted in the Dobrohotoffs making arrangements to vacate their house on weekends and during school holidays in order to avoid the almost inevitable disturbance caused by the groups of people who rent the property. They are contemplating selling their house and moving elsewhere.

In a detailed judgement Pepper J looked at what she called the two limbs of the test (see paragraph 33). What is the actual use to which the property is put; and the use for which it is designed.

Her Honour concluded that although the property was designed as a residential home, its use was for something entirely different. Groups of renters could take the property and use it for parties and other activities that, by their intensity, were more

than what one would expect for a residential property. The noise and inconvenience caused by the holiday renters was inconsistent with the use by the rest of the residents within the zone. The holiday rental had to go.

By the same token short term rentals can create a problem if the property is used inconsistently with the zoning. If the parties of “strippers and worse” continue the use causes a major problem.

Yet Airbnb parade their service as one where visitors can “live like a local”. If the visitors indeed are living like locals, there is no regulatory challenge. Regulators need to be aware that people travelling hundreds, if not thousands of kilometres to enjoy Australia are unlikely to be “living like locals”.

In Leichhardt, how can short term rentals be accommodated? The range of uses within the definition of tourist and visitor accommodation is set out in the dictionary to the LEP. The Dictionary is the same as that for any Standard Instrument Order, so the challenges are the same state-wide.

tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

- (a) backpackers' accommodation,
 - (b) bed and breakfast accommodation,
 - (c) farm stay accommodation,
 - (d) hotel or motel accommodation,
 - (e) serviced apartments,
- but does not include:*
- (f) camping grounds, or
 - (g) caravan parks, or
 - (h) eco-tourist facilities.

Airbnb has already commented on the failure of these uses to address their “product”: See Airbnb submission to the *White Paper: A new Planning System for NSW (2014)*.

Council agrees that there is a need for an additional category, but does not concur with the laissez faire attitude of Airbnb.

Airbnb sought a definition which would allow such short term stays to not be seen as a commercial use, and to not penalise home owners for so using their properties.

The difficulty with this approach is that it fails to identify the many negative uses that may come from short term stays. If properties are subdivided to allow visitors to operate from someone's home, there will be impacts on surrounding home owners and residents. If a home is used for, say, only 30 days per year there may be no impact. More than this, or with users who are not using a home in the same way the home owner uses it will result in a conflict of uses.

The existing categories within the Standard Instrument LEP are:

Backpackers

This is defined within the LEP as:

backpackers' accommodation means a building or place that:

- (a) *provides temporary or short-term accommodation on a commercial basis, and*
- (b) *has shared facilities, such as a communal bathroom, kitchen or laundry, and*
- (c) *provides accommodation on a bed or dormitory-style basis (rather than by room).*

Short term rentals could be accommodated in this manner. It is permitted with consent within the R1, R3, B2 and B4 zones, but prohibited in the B1 zone.

Although not noted within the LEP, there is a likelihood that any development application for this use will require a proponent to undertake fire rating or other work.

Bed and Breakfast

Within the Leichhardt LEP 2013 a bed and breakfast is defined as:

bed and breakfast accommodation means an existing dwelling in which temporary or short-term accommodation is provided on a commercial basis by the permanent residents of the dwelling and where:

- (a) *meals are provided for guests only, and*
- (b) *cooking facilities for the preparation of meals are not provided within guests' rooms, and*
- (c) *dormitory-style accommodation is not provided.*

The LEP further limits bed and breakfast establishments to providing no more than 3 bedrooms.

Bed and breakfast accommodation is permitted with consent in all residential areas. However, by using the site as a bed and breakfast, the owner automatically changes the classification of the building under the National Construction Code Series Volume 2 for Class 1a and Class 1b. In order to legally operate an owner would need to maintain new fire rating standards. This will usually be quite expensive, and will be a financial burden on those persons who just want a little extra income from the use of the property as short term accommodation.

The ability to provide meals to visitors poses another regulatory challenge. There is an entire regime of food inspection and regulation brought on by the ability to provide meals. If meals are not provided this part of the regulatory burden disappears.

Farm stay accommodation is not relevant to Leichhardt.

Hotel or motel accommodation

This is defined within the Dictionary as:

hotel or motel accommodation means a building or place (whether or not licensed premises under the Liquor Act 2007) that provides temporary or short-term accommodation on a commercial basis and that:

- (a) *comprises rooms or self-contained suites, and*
- (b) *may provide meals to guests or the general public and facilities for the parking of guests' vehicles,*
but does not include backpackers' accommodation, a boarding house, bed and breakfast accommodation or farm stay accommodation

This use is permitted with consent within the R1, R3, B2 and B4 zones, but prohibited in B1. Again, an application to start a short term accommodation application in this category is likely to require more regulation and fire rating.

The fact that meals may also be offered to the public at large means that this is an unlikely vehicle for short term accommodation, but it is possible. Anecdotally, Council is aware that some owners seek to take their current homes and convert them so that the visitors need never trouble the home owners, by creating separate entry ways. Visitors can then access the rooms, undertake laundry and prepare food themselves. The home owner can collect the rent, yet never actually meet or interact with the visitor. If a property is divided in this way, there are additional costs, as well as potential regulatory implications for things like fire rating.

Serviced Apartments

The Dictionary defines these as:

serviced apartment means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner's or manager's agents.

Generally these will not be part of the types of accommodation that the Inquiry is looking into. Serviced apartment by definition are a standalone use that allows for short term accommodation. They have been the subject of previous legal decision making in the Court of Appeal in NSW. They also relate to the use of an entire building for that purpose. The environmental impacts of such an application will have been assessed by the Council at the time the application was made.

Apartments and Home Units

The above considers only the use of stand-alone houses and residences. What happens when the owner of a home unit offers their property for short term accommodation?

One outlet for the Council is to allow the Owners Corporation to regulate that use. Presumably a unit offered for short term accommodation will be the entire unit; or it will be a variety of bed and breakfast use or other lower intensity operation. The other unit holders and the OC may be interested in how an individual unit holder uses their home for short term accommodation.

The matter has recently been reviewed in Victoria by the Civil and Administrative Tribunal in *Owners Corporation PS501391P v Balcombe* [2015] VCAT 956. In this matter the Tribunal considered the making of several internal By Laws preventing short term stays.

It is difficult to say how much of the decision can be relevant to NSW. The Tribunal, in a well-considered judgement, looked at the power of the OC to make certain By Laws in the light of Victorian law. The case has some echo of *Dobrohotoff* in that the owners using the units for a home were troubled by the use of the units for short term stays. The building the subject of the litigation was known as the Watergate building, but the impact of the short term stayers gave it the reputation as the "Partygate" building. Like *Dobrohotoff* the building became known for bucks and hens nights, and the "deleterious impact on residents".

Generally the Tribunal found that the By Laws limiting the use of the premises against short term rentals were outside power. Rules requiring fire rating upgrades were found to be appropriate, but those preventing short term accommodation were found to be outside power.

Council is aware that the State is currently reviewing the various Strata Acts. In the context of this review Council urges the Legislature to take into account whether home units should be capable of short term accommodation and to allow Owners Corporations to allow or prohibit such use.

Car Parking

Council's DCP requires no car parking to be provided within the residential R1 zone. See Leichhardt DCP 2013 Part C1.11.1. In theory, any home converted to short term accommodation would require an assessment of parking. Some visitors may not require parking (backpackers) but with some other visitors or tourists there is an expectation that there will be a hire car, or a car they have purchased for the term of the holiday. Dependent upon the number of persons offering short term accommodation this may result in an enormous impact on Council.

In newspaper articles correspondents have opined that there may be up to 400 short term accommodation offerings in the LGA. If that is the case the impact on traffic alone would be enormous.

Where is the owner?

Although Council can point to no individual case within the municipality, the evidence from other instances, most notably the two cases cited above, indicates that there may be one significant factor in determining how to deal with short term accommodation: if the owner actually continues to reside while the visitor is present, it seems that the owner will exercise more control over the visitors activities.

In the traditional bed and breakfast the owner still resides at the property. Where the owner's own peace of mind will be disturbed by a raucous tenant, the chances are that the owner will take immediate steps to correct the situation without requiring any activity by the regulator. For this reason Council believes that short term accommodation should distinguish between uses where the owner remains on site, and one where the owner is an absentee landlord, happy to collect the rent, but less interested in the day to day running of the visitor's activities.

The differences between traditional accommodation providers and online platforms

Airbnb and other similar platforms offer an internet based service for connecting potential visitors with home owners offering accommodation. Owners offer their homes on the web site with the conditions of use attached. The booking service charges a fee, between 5% and 15% of the transaction for making the introduction. The introductions agent owns nothing: they are doing no more than putting two parties together.

This creates its own problems. If the property offered turns out to be less salubrious than the visitor bargained for, they must take this up with the lessor. If the tenant "trashes" the home, the lessor has little recourse. There have been a number of horror stories in foreign media about substandard units made available to an

unwitting public; and homeowners who lost thousands after holiday makers destroyed homes. This submission has nothing to say on that issue. Regulation at the State level may require some form of bond or insurance to protect either party, but this problem does not ultimately concern Council as a regulator.

If Australian rentals become known for their poor quality, or for misrepresenting the kind of accommodation that is on offer, this may impact the NSW tourism industry. While many operators complain about the interference of the “nanny state” if Australia fails to have internationally recognised standards in this field, it may be that overseas visitors will be unlikely to take up short term rentals where the only guarantee comes from a computer generated profile.

Traditional platforms involve a situation where the opportunities for land use conflict are limited. A person staying in a hotel, motel or commercial unit is renting a place in an area that expects to house tourists and visitors. Their unique needs are known, and the potential conflicts have been removed by placing the use in a convenient location, by conditions, or both.

The examples of *Dobrohotoff* and *Balcombe* cited above are evidence that short term users can be anathema to residential users, and if this potential for conflict is not recognised and planned for, there can be long term problems for both.

The growth of short-term and online letting, and the changing character of the market

Council has no examples of unregulated short term uses that have not been satisfactorily remedied. Anecdotally Council is aware that several places operate within the Local Government Area. However, none of these uses comes about as a result of a complaint.

Council has not collected any data indicating how many short term uses there are. It is possible that these run into the hundreds. However, if the use is not reported or complained of Council does not make a point of seeking out unauthorised uses.

Again, anecdotally, businesses indicate that short term users in residential areas are becoming a more important part of the local economy. If visitors are staying locally and enjoying the experience of “living like a local”, businesses within the LGA are benefiting over those in the CBD where the more traditional forms of accommodation remain. Although there are some local hotels and the like, Leichhardt is not prominent for its interstate and overseas accommodation. This is not to say there will be no impact on local businesses. If short term, web based accommodation becomes the norm, traditional service providers must suffer. Those businesses which provide jobs in these services will necessarily suffer.

The economic impacts of short-term letting on local and the state economies

If there is a general move away from traditional tourist services, those businesses which provide accommodation must suffer. Whether the number of people choosing to stay in a residential suburb will create more job opportunities for local restaurants, coffee shops and retail stores is difficult to say.

On balance, Leichhardt businesses are likely to benefit from short term accommodation provision. The area does not have a large number of traditional

accommodation units, and the local cafes and restaurants are likely to benefit from the extra custom. Even where visitors have come to “live like a local” most will be prepared to spend more money on food, coffee and retail than they would compared to the average resident.

Regulatory issues posed by short-term letting including customer safety, land use planning and neighbourhood amenity, and licensing and taxation

Defining the use and collecting evidence

Perhaps the greatest regulatory difficulty posed to Council is the ability to obtain evidence where an operation is undertaken in such a way as to cause conflict with residential users. As stated above there are probably already within the LGA several, if not several hundred, short term stays operating. Generally they are conducted by owners interested in low intensity, low impact use, and their tenants have generally followed suit.

However, if a home owner were to regularly engage with a *Dobrohotoff* style tenant, one of Council’s problems would be proving it. An owner could argue that there was a “one off” bad tenant. Should they be precluded from offering the property because of one bad instance?

Take for example the amendment to exempt development in the Gosford LEP 2014. Under Schedule 2 there is specific mention of short term rental:

Short-term rental accommodation

- (1) *The subject dwelling must be located in a zone where dwellings are permitted with consent.*
- (2) *The dwelling must not contain more than 4 bedrooms.*
- (3) *The dwelling must be serviced by a general waste garbage bin of at least 240L capacity.*
- (4) *If the dwelling is located in a bush fire prone area, a bush fire evacuation plan must be attached to the dwelling in a prominent location.*
- (5) ***There must not have been more than 2 written complaints to the Council concerning the activities taking place on the property from the occupiers of separate dwellings located within 40m of the subject dwelling within the preceding 12 months.*** (my emphasis)

Remember, this is the Council involved in the *Dobrohotoff* case. It appears to Leichhardt Council that a provision which rests upon whether or not someone has lodged a complaint about a particular use is bound to be problematic. While this may recognise uses to which the property is put that are inherently in conflict, it could also be as a result of bad will between neighbours.

The fact that the Council has sought to insert a provision about past complaints (and more importantly, that the Department has agreed to its insertion) shows that proving the use is an inherent problem. At the lower end of the scale (e.g. an owner who occasionally rents a room to a tourist) this use may be difficult to prove. The number of complaints, we submit, may not be a fair test of the usage due to the possibility of vexatious neighbours.

Prosecution

Consideration should be to replacing the consideration in sub clause (5) with a requirement that there are no PINs issued for an unauthorised use of a particular property. The PIN procedure allows the defendant to challenge the matter in Court. If a property continually has PINs or orders issued against it, this should be a matter which allows the Council to require development consent, and to allow the Council to impose suitable conditions to be imposed.

Rating

Under s516 of the Local Government Act 1993 properties are rated as residential if their “dominant use” is as residential land. Hotels, motels, guest houses, back packers and nursing homes are distinguished.

Where a property is used for regularly for short term accommodation for reward, Council sees no reason why the rating formula should not allow this to impact on rates. Motels, hotels and serviced apartments are asked to contribute on a commercial basis. It would be anti-competitive if residential offerors of short term accommodation were not taxed on the same basis.

Affordable Housing

Under clause 50 of State *Environmental Planning Policy (Affordable Rental Housing) 2009* the owner of a building is dissuaded from using the property as anything other than affordable housing once it has commenced that use. It is not impossible to change that use, and clause 51 provides a formula for declaring that a boarding house is no longer financially viable. With the increase in the availability of short term accommodation, it is quite possible that property owners will see more money in an Airbnb offering than in continuing to offer affordable housing.

The formula for allowing a change gives the applicant great latitude for arguing the viability of the continuing use, and Council fears that boarding house operators may be tempted to remove boarders and take on short term visitors.

The legislation should prevent a property used for affordable housing being converted over to short term accommodation. Council suggests preclusion for 10 years on the conversion (cf. clause 17 which preserves affordable housing under that Part for ten years).

Council’s suggested reforms to the Inquiry

Based on the above material Council submits that the following amendments to legislation are warranted:

1. The Standard Instrument LEP needs to include a new definition for “short term rental accommodation”.
 - a. Council is largely in agreement with the definition provided in the Gosford LEP as cited above, but does not agree that sub clause (5) is just or useful (whether there have been more than two complaints in the previous 12 months);
 - b. There should be a general qualification concerning the impact on the neighbourhood of noise, pollution and other adverse impacts, so that these impacts can be a reason for refusal or the basis of conditions for an approval;

- c. This type of accommodation should not allow meals to be served to remove one element of possible regulatory impact;
 - d. Consideration should be given to ameliorating the conditions of approval where the owner remains on site while the visitor is on the property, as opposed to absentee landlords who merely seek to use the property as a form of de facto hotel or serviced apartment;
 - e. Consent should be required in any circumstances where the number of guests requires a change in the category of building under the BCA, or any change to fire rating.
- 2. The Strata Titles Legislation should be amended to allow strata owners to determine whether units may be used for short term accommodation. If the majority of owners do not want this type of use, this should be sufficient to allow the strata to outlaw short term rentals.
 - a. If the Inquiry adopts this recommendation, consideration could be given to a provision similar to the proposed section 650A of the Local Government Act 1993 (as set out in the draft strata law changes) to allow Councils to prosecute breaches of the Owners Corporations By Laws in this regard.
- 3. Amend SEPP (ARH) to make it difficult for affordable housing owners to readily convert their properties into short term holiday accommodation.
- 4. Amend the Local Government Act 1993 section 517 and the Regulations to allow for differential rating of properties where short term accommodation becomes a major or “dominant” feature of the usage.

Council’s future course

Council continues to monitor the situation and awaits the State Government’s legislative response.

In particular Council is interested in the response of its rate payers and residents to the perception of unease or danger created by new people in the street constantly.

In the meantime Council is considering its own response by way of exempt development. No policy or measures have yet been agreed to but element of the proposed measures could be:

- 1. A category of use based upon the current definition of bed and breakfast, but without any food being offered;
- 2. A “no detriment” clause requiring that no proposal could any adverse impacts on neighbouring properties concerning noise, smell and the like;
- 3. The exempt category requiring the owner to be in residence while the visitors are in attendance;
- 4. Requirement for consent in another category where the proponent seeks to make physical changes to the building to separate the bedrooms, kitchens and bathrooms into de facto separate dwellings; or where the number of guests requires the building to be removed to another category under the BCA.