

**Submission
No 212**

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

Organisation:

Name: Mr Harvey Sanders

Position:

Date Received: 18 April 2016

This is a matter of interest to me because the issue of short-term holiday letting, specifically in the form of Airbnb type operations, is of concern to myself and my fellow residents in the strata-titled unit block in which we reside. There is a desire to seek agreement from our Owners' Corporation to adopt a by law preventing such uses in individual units in order to pre-empt any possible amenity problems arising in the future from such activities taking place in our block.

Consideration

For convenience, I set out the specific provision, as follows:

(1) *By-law cannot prevent dealing relating to lot*

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.

I further note, that I have taken the expression "short-term holiday letting" to have the meaning as set out in the Executive Summary of the NSW Government Submission to the on-going Parliamentary Inquiry into this matter; namely,

"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". However, as I also noted, it is Airbnb type operations, which are of an ad-hoc and transitory character, that are of particular concern.

I note that in the aforementioned NSW Government Submission, the following appears:

"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 shortterm accommodation in the owner's lot" (see page 9).

In this context, it is not readily apparent why the transaction that is involved in a short-term holiday letting, specifically those such as Airbnb type operations, is a "dealing" for the purposes of section 49(1).

I say this because whilst the term “dealing” is not specifically defined in the SSMA it is, relevantly, I would have thought, defined in the Real Property Act 1900 (RPA), as follows:

Dealing—Any instrument other than a grant or caveat, including an electronic form of that instrument, being an instrument:

(a) that is registrable or capable of being made registrable under the provisions of this Act, or
(b) in respect of which any recording in the Register is by this or any other Act or any Act of the Commonwealth required or permitted to be made.

Accordingly, and on the basis that the transaction involved in a short-term holiday letting such as an Airbnb type of operation does not involve a transaction that is registrable, it would not appear to constitute a “dealing” and is not therefore covered by the provisions of section 49(1). Moreover, and as I noted above, such transactions are of an inherently ad-hoc and transitory nature.

I further note that in the document tabled to the Parliamentary Inquiry on the 14 March 2016 by Mr Stephen Goddard on behalf of the Owners Corporation Network the view was expressed that a short-term holiday letting involved a **lease** for the purposes of section 49(1) (see page 3). Once again, it is my understanding that the transaction involved in a short-term holiday letting such as an Airbnb type operation does not involve a lease.

On the basis of the above, it is not at all clear why the current conventional wisdom appears to be that section 49(1) operates so as to prevent an Owners’ Corporation from adopting a by law that prevents an individual owner from using their premises for the purposes of short-term holiday lettings such as Airbnb type operations.

I would further note that reliance on the need for an individual lot owner to obtain development consent from the local council is not applicable given the increasing likelihood that uses such as Airbnb will be made “exempt development” in many areas.

Conclusion

In summary, are you able to indicate the specific basis for the NSW Government's view, as expressed in its submission to the aforementioned Parliamentary Inquiry as to why section 49(1) of the SSMA operates so as to prevent the adoption of a bylaw by an Owners' Corporation preventing the use of an individual lot for Airbnb type operations?

In addition, are you able to advise whether the aforementioned current conventional wisdom regarding the interpretation of section 49(1), and the aforementioned NSW Government's view, is supported by judicial interpretation in the context of any relevant proceedings before the courts/tribunal?

In the event that it transpires that section 49(1) does, not, in fact, operate to prevent an Owners' Corporation from adopting a by law that prohibits an individual owner from using its property for short term holiday lettings like Airbnb are you able to advise on the possible ramifications, from the NSW Government's perspective, both generally and in the context of the ongoing Parliamentary Inquiry and its potential outcomes and recommendations?

I would also be interested to know whether those undertaking the aforementioned Inquiry would consider that a by-law worded in the way set out below would be acceptable whether or not what I described in my previous email as the current conventional wisdom as to the implications of section 49(1) of the Strata Schemes Management Act 1996 (NSW) in relation to the validity of such by-laws proves to be correct.

DRAFT BY-LAW

SHORT-TERM HOLIDAY ACCOMMODATION

An Owner or Occupier must not use the Parcel for short-term holiday accommodation including for Airbnb-type uses, bed-and-breakfast operations, guest houses, backpackers' accommodation, or accommodation for tourists, students, or people on temporary work visas, and the like. The restriction under this by-law on the use of the Parcel applies whether or not the Owner or Occupier has obtained any relevant approvals from the local council or other any other agency or consent authority for the

purposes of the Environmental Planning and Assessment Act 1979 (NSW) in respect of the use of the Parcel, and in circumstances where such an approval is not required – for example, where such a use is defined under a relevantly applicable environmental planning instrument as exempt development for the purposes of the Environmental Planning and Assessment Act 1979 (NSW).

For the purposes of this bylaw, short-term holiday accommodation means occupation of the Parcel for a period of less than three months and/or where that occupation is not subject to a residential tenancy agreement under the Residential Tenancies Act 2010 (NSW) and where any financial arrangement or agreement that might be entered into between the Owner or Occupier of the Parcel and the person or entity that occupies the Parcel for the purposes of short-term holiday accommodation does not constitute a dealing for the purposes of the Real Property Act 1900 (NSW).