

A person is sitting on a striped rug, holding a smartphone. To their left is a dark green backpack with brown leather straps and a wide-brimmed hat. The background is a wall made of vertical wooden slats. The scene is lit with warm, natural light.

HOW AUSTRALIA'S NEW SUBLETTING LEGISLATION WILL AFFECT AIRBNB



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OVERVIEW

As of June 2018, the Australian government has revealed new legislation around short-term stays in strata schemes.

On 5th June 2018, the NSW state government revealed a new set of legislations that will have big impacts on strata inhabitants and short-stay companies.

Currently, land use in New South Wales is regulated by The Environmental Planning and Assessment Act 1979 which requires Councils to prepare Local Environment Plans (LEPs) in a uniform matter. The Act accounts for tourist and visitor accommodation such as hotels and bed and breakfasts, but it does not explicitly reference short-term holiday letting services such as Airbnb. Therefore, this makes it difficult for Councils to regulate short-term stays like they would with other forms of accommodation.

THE CURRENT AUSTRALIAN SHORT-STAY MARKET

With data from Inside Airbnb and The Australian showing massive adoption rates, there exists a need for regulation and accountability. For example:

- There were 180,000 Airbnb listings in Australia in 2017, up 1300% from 2013
- There was an 87% increase in total listings over 2017
- Homes available for rent have increased from 43,610 in 2016 to 89,863 in 2017
- Multi-listings (multiple listings by a single user) have increased over 2017
- Host earnings in 2017 were \$978 million, over a 60% increase from 2016

The fact is that currently, it is not clear if companies such as Airbnb are legally operating within a strata scheme as it all depends on the individual schemes themselves. In order to combat the negative impacts of short-term stay arrangements such as increased costs, damage to property, and health and safety risks, many schemes have attempted to implement different rules and by-laws, with some banning short-term letting completely.

Conversely, owners who are annoyed at being barred from the short-term accommodation market are actively challenging these by-laws in both the New South Wales Civil and Administrative Tribunal (NCAT) and equivalent state tribunals across Australia. However, because of a lack of regulation, prosecutors and defendants alike are seeing a lack of consistency in convictions.

Case 1: Estens v Owners Corporation (2017)

In his article, NCAT Rules Against Short Term Letting By-Law, lawyer Carlo Fini refers to the case of Estens v Owners Corporation in 2017. In this instance, the owner-occupier Ms Estens would list her unit on Airbnb whenever she was travelling overseas or interstate. However, another owner-occupier, Ms Tesoriero “complained of people (presumably Ms Estens’ Airbnb guests) using the common laundry in a manner causing disruption to her peace and enjoyment and also complained of men relaxing on Ms Estens’ deck (once again presumably Ms Estens’ Airbnb guests), drinking beer and watching her. These strangers made Ms Tesoriero feel uncomfortable.”

Despite the fact that the Owners Corporation had passed a by-law prohibiting short-term letting, Ms Estens still won. NCAT found that the by-law prohibiting short-term letting infringed the Strata Schemes Management Act 2015 which states that “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.” Furthermore, even though NCAT is not bound to defer to either the NSW Fair Trading Publication or the NSW Legislative Committee Environment Planning Report, both documents were used by NCAT as a justification for their decision.

As Fini states at the end of his article, “given the brevity of NCAT’s decision and its failure to deal with the issues in any depth, this decision is unlikely to be the end of the dispute about whether an Owners Corporation can pass a by-law that bans short-term letting.”

Case 2: Swan v Uecker (2017)

However, mere months earlier in 2016, Mrs Catherine Swan found that her tenants, Barbara Uecker and Michael Greaves, had been sub-letting her two-bedroom apartment on Airbnb. The case originally went to the Victorian Civil and Administrative Tribunal (VCAT). Originally, VCAT ruled in favour of Uecker and Greaves, stating that they were merely licensing the unit rather than sub-letting it.

Mrs Swan chose to take the case to the Victorian Supreme Court, where her lawyer argued that by listing the entire apartment and granting guests “exclusive possession” of the property, the tenants were in fact leasing it. Justice Clyde Croft ruled in favour of Swan, evicting Uecker and Greaves and returning Swan’s home to her possession.

Interestingly, Justice Croft also saw fit to add a caution that his ruling should not be seen as a judgement against short-stay operators or short-term letting. “This case was not about the merits of Airbnb arrangements. Neither was this case about whether or not Airbnb arrangements might be said to be ‘illegal’ - either in some particular or in some general, non-legal, sense.”

With more and more litigation cases making headlines, it is clear the NSW government needs to establish a cohesive policy for short-stay accommodation. As stated by Sara Dolnicar, Professor of Tourism at the University of Queensland Business School, government and regulatory bodies need to strike a balance with sharing accommodation, given it has grown to represent a major part of the Australian tourism business.

“It’s a new business model, it’s here to stay, and it is changing the nature of the hospitality industry,” says Dolnicar. “You can’t put the genie back in the bottle, but do you want to really? What we as a society need to decide is which of its features should be proactively harvested, and which features need to be tinkered with to improve them.”



“It’s a new business model, it’s here to stay, and it is changing the nature of the hospitality industry,” says Dolnicar.

WHAT THE NEW LEGISLATION WILL ENTAIL

On the 30th May 2018, members of Parliament including the Committee on Environment and Planning met to discuss the adequacy of the regulation of short-term holiday letting in New South Wales and revealed new laws on 5th June 2018.

The deal came as a compromise after a backbench revolt in the Coalition joint party room weeks prior forced the government to cancel its originally planned announcement. After as many as 10 MPs indicated that they wanted to voice their opinions on the issue, NSW Premier Gladys Berejiklian was forced to delay proceedings to hear their concerns. Under the suggested policy, individual Owners Corporations would lack the power to ban Airbnb in their buildings, while a default policy of no daily caps on Airbnb-style lettings would apply across regional areas. Initially, NSW Minister for Better Regulation, Matt Kean, had successfully argued for no caps across the state, but this was soon shut down by Liberal backbenchers from Sydney.

The new legislation was successfully negotiated by all parties and will now operate by the following rules.

Strata Owners Corporations Are Given Banning Power

"It is curious that a 75 per cent majority of the owners in a strata complex can decide to redevelop the site, but the same majority cannot decide that they do not want holiday letting occurring in the place they thought was their residence. I would be looking at clearly empowering strata schemes in that regard."

- Julian Litton Ledger, Chief Executive Officer, Youth Hostels Association Ltd in his statement to the Committee on Environment and Planning

Under the new laws, owners corporations will have the ability to ban the use of Airbnb in their buildings if:

- The owner does not live in the rented unit
- 75% of owners agree to pass the appropriate by-laws

This targets investors who may be buying apartments to list on Airbnb, or rental tenants who are subletting without their landlord's knowledge. Conversely, it still allows owner-occupiers to put up their home for short-term accommodation while they are away.

Limit of 180 days per year

“This issue of commercial or non-commercial use is very important to councils because in a residential zone people are only paying residential rates but if a property is being used for a commercial purpose they want commercial rates. Airbnb says that “only” 7 per cent of their properties are leased for more than 180 days, which is six months. That is still several thousand properties. A council would probably like to see whether they could get commercial rates from them but that is by the by in one sense.”

- Jamie Parker, Member for Balmain in his statement to the Committee on Environment and Planning

Under the changes, hosts located within the Greater Sydney region will now only be allowed to let their home for up to 180 days (six months) a year. For regional areas outside of Greater Sydney, Council may choose to impose their own limits as long as they are for at least 180 days a year. According to Anthony Roberts, Housing and Special Minister of State, the length of 180 was chosen as it roughly corresponded to the number of weekends, public holidays and school holidays in a year.

Mandatory Code of Conduct

“[The Holiday Rental Code of Conduct] is an industry code that has been developed in conjunction with a number of players around Australia who provide online platforms for holiday rental businesses. It is a well-thought-out, comprehensive document. However, it does not necessarily fit the experiences of home hosts; it is not a one size-fits-all approach.”

- Jodie Willmer, Co-Founder, Guest Ready in her statement to the Committee on Environment and Planning

In order to ensure compliance with the new laws, and to reduce the number of infringements and infractions, Airbnb and other short-term stay operators must sign up to the new Code of Conduct, in addition to sharing their data with the state government. The mandatory code will address issues such as disruptive guests, noise levels, and damage to the property.

According to reports by the ABC, “guests and hosts who commit two serious breaches of the code of conduct within two years will be banned from all short-term holiday platforms for five years.” Furthermore, individuals who breach the code will face fines of up to \$220,000 while businesses will be fined up to \$1.1 million.

New Powers for Department of Fair Trading

“I hope the same progress can be made with online listed accommodation. Without that cooperation, you are absolutely right, enforcement would be very costly and practically impossible. The key lies in the agreement that can be reached with those providers. However, that agreement should not be struck on a voluntary basis; it should be mandatory.”

**- Robert Henke, Honorary Secretary, Backpacker Operators Association NSW Inc
in his statement to the Committee on Environment and Planning**

To enforce compliance with the Conduct of Conduct, the NSW Department of Fair Trading will be given new powers and abilities. They will now be able to:

- Appoint independent adjudicators to assess complaints against the code
- Use the data supplied by platforms to assess complaints
- Police online platforms and letting agents
- Maintain an online register of “strikes”



The **mandatory code** will address issues such as **disruptive guests, noise levels, and damage to the property.**

THE ARGUMENTS FOR THE NEW LEGISLATION

Since the government's announcement, people from every section of society (from local Councilors and workers to businesses, homeowners and renters) have argued the various pros and cons of the new legislation and how it will affect them.

FOR: Current short-term stays affect housing affordability

"People are leaving town... They can't get anything but short-term leases from April to October. Once holiday season kicks in, everyone gets kicked out. It's ripping our community apart."

- Planning Minister, Anthony Roberts

Some argue that the proliferation of short-term holiday rentals is affecting the ability of locals to find long-term rental accommodation and the new legislation hopes to combat this. According to Planning Minister, Anthony Roberts, the new caps aim to mitigate any negative impact on rental affordability as "Sydney has a huge rental market and we don't want to see any unintended consequences."

His case is supported by reports from Byron Shire Councillor, Michael Lyon, who has put forward that the Byron Bay community is noticeably impacted by short-stay holiday rentals, with locals struggling to afford accommodation during peak holiday seasons. According to reports by the ABC, visitors outnumber locals by a ratio of 70 to one, forcing local workers to leave Byron Bay for more affordable accommodation.

Similarly, data activist Murray Cox of Inside Airbnb found this to be the case in Tasmania where one in every 27 Hobart homes is listed on Airbnb. According to Cox, "Hobart has a 0.3 per cent vacancy rate. There's a thousand entire home listings in Hobart and 600 to 700 full-time rentals and that's impacting the rental market and it's also bringing the cost of housing up."

FOR: Short-term accommodation is disruptive to neighbours

Although short-term holiday letting can be beneficial for the person putting up the listing, it often proves problematic and disruptive to other tenants living within the strata scheme, compromising the property's security and usage.

Richard Frey, Founder of BnbGuard, states that these listings (and their accompanying issues) are not just limited to tourist hot spots and areas with popular nightlife, but are appearing all throughout residential suburbs in both Melbourne and Sydney.

“There’s also the issues with the amenity in buildings — unknown people wandering the hallways and in common areas, keys being copied and people coming in and letting themselves into the pool etc for the next 12 months.”

As a result, actual residents are faced with visitors who use their shared facilities (such as the pool, gym, or tennis court), without the same level of consideration for long-term care and maintenance as a permanent resident.

FOR: There are numerous nightmare stories of property damage

According to Reuben Schwarz, Co-Founder of BnbGuard:

“While the tenant gets some extra cash from this, your customers only get the extra wear and tear and higher risk of out-of-control parties, squatters and uninsured property damage — either because the guest isn’t on the lease or because the home is being used commercially. There’s even the chance a property you manage will become a pop-up brothel for a night.”

In addition to the discomfort and inconvenience that neighbours and other residents can experience however, there have been numerous Airbnb “horror stories” which have left hosts out of pocket, and sometimes even out of a home. Furthermore, although these situations are difficult from a personal perspective, matters become even more complex if the Airbnb host is subletting the property without the property owner’s knowledge as matters of public safety insurance now come into play.

For example, in 2016, the Sydney Morning Herald reported a case of drug users fabricating a story about a sick child to enter an Airbnb in Sydney’s Rozelle. While they were there, the “guests” caused more than \$10,000 in damage. According to the apartment’s owner, Holly:

“The place was completely ransacked – and absolutely stank like chemicals. The smell we later found out from the police was either ice or heroin. Fruit had been thrown at all the walls leaving them covered and stinking. A crack pipe was left in our vase. Our smoke alarm was covered so they could smoke inside. Cigarettes all over the apartment. Ash all over our \$2000 rug. Rubbish and debris literally everywhere. Used cigarettes all through our kitchenware and my cupboards. All our linen and towels stolen.

There was random green liquid on a lot of walls and all over the floor. The whole floor was covered in a strange sticky substance. Two towels were left on the floor covered in blood. Every single drawer, box and shelf was ransacked. All our furniture was in a different place. Table lamps were kicked in, bedside lamps were stolen, cushions stolen, Bose speakers stolen, an external hard drive was stolen. The list is endless.”

THE ARGUMENTS AGAINST THE NEW LEGISLATION

Given the current unregulated state of the short-term stay industry, the arguments supporting the new legislation are certainly compelling. However, other parties have argued that the new rules are not only pointless but arguably draconian.

AGAINST: Fair Trading Should Not Be Interpreting the Law

In the article “Short-Term Letting Laws - Are They Valid?” by David Edwards, Founder and Lawyer of Doyle Edwards Anderson Lawyers, Edwards explained that under the current Strata Living Handbook, “Owners Corporations are unable to restrict an owner from letting their lot, including short-term letting, and that the only way short term letting can be restricted is by council planning regulations.” According to Edwards, Fair Trading have updated the Strata Living Handbook, suggesting that such by-laws are invalid. Furthermore, Edwards argues that:

“The first thing to note is that the Strata Living Handbook is merely a guide and is not the law. NSW Fair Trading is entitled to their opinion about the law but their function is not to interpret the law. The interpretation of the law is the function of Courts and Tribunals.”

His view is supported by Amanda Farmer of Your Strata Property who states:

“Fair Trading now makes reference to it in their Strata Living Handbook. So what? A handbook is not a legislative instrument or jurisprudence. It does not make or change the law.

For Fair Trading to say that by-laws which restrict holiday lets are “invalid” is to apply their interpretation of section 139. It is not Fair Trading’s function to interpret the law. Fair Trading can tell owners what the law says. As any lawyer will tell you, determining what it means is a different exercise altogether...”

AGAINST: Airbnb Doesn’t Actually Affect the Rental Market

Previous sections in this article argued that Airbnb currently has a strong effect on the housing and rental market, especially in the Byron Shire and in Hobart. This view is generally supported, with the Wall Street Journal finding that “a 10% increase in Airbnb listings leads to a 0.39% increase in rents and a 0.64% increase in house prices”.

However, recent research shows that Airbnb might not have as much of an impact on the rental market, (at least in Australia), as we might think. In their article with Business Insider, Tooran Alizadeh, Reza Farid, and Somwrita Sarkar explained the lack of correlation as demonstrated in their paper “Towards Understanding the Socio-Economic Patterns of Sharing Economy in Australia: An Investigation of Airbnb Listings in Sydney and Melbourne Metropolitan Regions”. The researchers cross-referenced and analysed Airbnb listings data (supplied by InsideAirbnb) against those provided by Australian Bureau of Statistics Census-based SEIFA, the most-used national measure of socioeconomic status. Alizadeh, Farid and Sarkar found that:

- In Sydney, there are no low socio-economic areas with high numbers of rental dwellings that also have high numbers of entire house/apartment Airbnb listings. This means that Airbnb is not displacing the rental stock in the most disadvantaged pockets of the Sydney metropolitan region.
- In a small number of high socio-economic areas, the Airbnb market represents sizeable proportions of the rental market. For example in Waverly, Airbnb listings are equivalent to 25% of rental listings whilst Airbnb listings in Manly and Pittwater represent approximately 20% of the rental market size.
- Overall, Airbnb represents less than 3.5% of the total Sydney rental market, and the impact is not equally distributed, either geographically or socio-economically.

In short, the researchers found that although Airbnb does put pressure on the rental market, it is currently limited to a small number of high-socioeconomic areas that are popular with tourists.

A 2017 report entitled “Belonging Anywhere: Airbnb and Renting in Sydney: A Report by the Tenants’ Union of NSW” supported these findings and even went a step further to state that Airbnb actually has minimal impact on the Sydney rental market. The study collated data from AirDNA, InsideAirbnb, the Department of Planning and Environment Population Projections, and the Rent and Sales Report and examined the impact of Airbnb on Sydney rentals, measured through the availability of rental properties and whether the rental prices of those properties have increased. The report stated that:

- For all of Sydney, there was no discernible effect on the vacancy rate. In fact there is a very weak positive relationship. This means that landlords are not taking property listings off the market to list them exclusively on Airbnb.
- Some suburbs such as Bondi and Manly experienced a seasonal effect on their vacancy rate but this was still minimal. Manly had the strongest negative correlation, but this was still very weak at $r = -0.26$ (where r stands for the correlation of vacancy rates). Other correlations were between 0.1 and -0.1.
- When comparing postcodes for the average increases in median rent for Sydney over the year to September 2016, and additionally the periods 2006-2011 and 2011-2016, the report found no link between particularly high numbers of Airbnb listings and rises in rent.

In short, the Tenants’ Union of NSW found that:

"Airbnb does not appear to have had a significant, singular impact on the tenants of Sydney. Even in Airbnb hotspots such as Sydney's Eastern Suburbs and CBD rents do not seem to have risen in response to Airbnb, at the exclusion of other factors."

AGAINST: The New Laws are Counterproductive and Draconian

For some, the new legislation will stifle innovation in what is the new sharing economy. Chris Miller, Managing Director of Vantage Strata and former President of Strata Community Australia (ACT Chapter) called the new laws counterproductive. Although he acknowledges the uses of having clarity and consistency, that was the only benefit he could find.

“... To impose Draconian restrictions on how people can use their homes and their investments is counterproductive to some of the inevitably challenging economic times. In the property industry, there’s a real convergence of technology and building design that will open up all sorts of challenges and opportunities, and we need to be able to strike the correct balance between progress and prudence.”

Short-term rentals site Stayz (owned by HomeAway), agreed that the proposal was a step backwards. In his comment to the ABC, HomeAway Director of Corporate and Government Affairs, Eacham Curry, expressed his concern:

“We fear these proposals will lead to a patchwork of regulation across the state, drive up the cost of accommodation and curtail the economic potential of the short-term rental sector. HomeAway does not support any proposal that infringes on the essential property rights of individuals. Further, the distinction between hosted and un-hosted accommodation will unnecessarily tilt the playing field in one direction, to detriment of many mum and dad investors across the State.”

There is no doubt these new laws are tough. In fact, Better Regulations Minister Matt Kean even described the reforms as the “toughest laws in world to crack down on bad behaviour”.



Overall, Airbnb represents less than 3.5% of the total Sydney rental market, and the impact is not evenly distributed.

A FINAL WORD

At this stage, the legislation remains in its early days, with many Owners Corporations and strata managers unsure about what the new laws mean for them. Minister Kean has acknowledged that the short-term letting issue has been a complex one to resolve: “We’ve been grappling with how to regulate this industry for a little over two years.”

According to Amanda Farmer of Your Strata Property, the current by-laws are still valid and binding. “The law has not changed. We expect that it will be some months before we will see the legislation which brings these proposed reforms into effect. Until then, it should be business as usual for those strata buildings that already have by-laws in place regulating short term letting.”



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