



There has been much debate and uncertainty as to how much control (if any) strata by-laws can impose on strata lot owners to regulate, limit or even ban 'Air BNB' and other short stay letting arrangements.

This issue was recently considered by the NSW Civil and Administrative Tribunal (NCAT). In *Estens v Owners Strata Plan 11825*, Ms Estens owned an apartment in a block of 6 units located in Woollahra and had been renting out her apartment using Air BNB. The Owners Corporation followed the procedures required to pass a by-law which had the effect of banning short term letting in the building. Ms Estens challenged the validity of the by-law.

NCAT found that the Owners Corporation did not have power to make the by-law in question. The obstacle for the Owners Corporation is that Section 139(1) of the Strata Schemes Management Act states that “a by-law must not be harsh, unconscionable or oppressive”. Section 139(2) 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”. The Tribunal found that the by-law, in seeking to ban short term letting, was seeking to prohibit or restrict the lease of a unit, or alternatively, if the letting was considered a licence (and not a lease) was seeking to prohibit the devolution of a lot.

What are the concerns of Owners Corporations with short term lettings?

Some of the concerns raised by Owners Corporations are:

- Additional wear and tear on common property – an increase in people traffic and turnover of short-term guests is causing damage and extra wear and tear to the building.
- Fire safety issues – fire safety issues may differ for tourism based buildings as opposed to residential buildings
- Insurance – whether the building’s public liability insurance covers Air BNB guests. If it does not, or if the insurer denies a claim because the use of a property as a short term rental will breach the policy, the owners of the strata lots in the building are liable to cover any damage on a joint and several basis.
- Unruly behaviour, overcrowding and noise.

Is the legislation likely to change?

Fair Trading NSW warns in its ‘Strata Living’ publication “strata laws prevent owner’s corporations restricting an owner from letting their lot, including short-term letting. The only way short-term letting can be restricted is by Council planning regulations”.

Council planning regulations (Local Environmental Plans) vary from Council to Council and may provide that the use of a property for short-term letting may require development consent. Local Environment Plans enacted by Councils override Strata by-laws. If this is the case, and that development consent has been obtained, the short-term letting



can occur. If however development consent has not been obtained, the Owners Corporation would need to persuade Council to enforce its planning laws and some Councils are more enthusiastic than others about enforcing these. It is also possible for individuals to bring their own court action to enforce planning laws, but this can be cost prohibitive.

A NSW Parliamentary Inquiry into the Adequacy of the Regulation of short term holiday letting in NSW in its report on 19 October 2016 recommended that Strata Owners Corporation be given the right to prosecute unruly behaviour and damage, and recover compensation, but not have the right to restrict short-term lettings.

Are there any alternatives?

A by-law regulating the short term lettings, but not prohibiting it, would be more likely to be enforceable particularly if the regulation was moderate. The by-laws might regulate the length of stay, the number of guests, and make the lot owner responsible to ensure compliance with the by-laws. Some Owner's Corporations have reacted by:

- Installing security systems where access keys/swipe cards cannot be duplicated
- Installing security systems that will only give permanent tenants access to common area such as car parks, pools and gyms.

If you or someone you know needs help or advice regarding strata by-laws or strata living in general, or any other property issue, please contact one of our [accredited property law specialists](#), [Michael Battersby](#) or [John Bateman](#) on 02 4731 5899 or email property@batemanbattersby.com.au.