**OWNERS CORPORATION NETWORK OF AUSTRALIA PTY LTD**
**GUIDE TO NSW GOVERNMENT'S PROPOSAL FOR SHORT TERM LETTING IN NSW RESIDENTIAL STRATA SCHEMES (AUGUST 2019)**

"*This structure, Mr Stokes said, was relatively liberal by world standards and would allow the [Airbnb] industry to develop by itself*".[1]

## INTRODUCTION

The proposed "Airbnb reforms" if adopted will make it lawful for every residential dwelling, including apartments and strata townhouses, to be used for tourists and visitor accommodation without the need for planning permission. The innocuous sounding "short term rental accommodation" (STRA) radically re-writes the NSW strata housing model. The only protection you will have is the short-term letting by-law OCN campaigned for in 2018.[2]

It is crystal clear that "industry" players like Airbnb and Expedia and local property managers want complete freedom to profit from an unlimited number of STRA businesses dispersed among residents and operating from your apartment building. The debate has been framed entirely in terms of 'noise and nuisance' and the occasional party goer. The Code of Conduct allows the NSW Government to ignore important public policy issues like the loss of housing, amenity and strategic planning. It is also ignoring major impacts on strata schemes of STRA operations, the externalised costs of STRA businesses, security, privacy and other social issues. Residential tenants have been abandoned. Local Councils have been subordinated and by-passed.

In April 2019, OCN raised these critical planning issues with Minister for Planning and Public Spaces, The Hon. Mr Robert Stokes MP. Neither the Minister nor his Department had any answers.

The idea that STRA tourism will deliver any net benefit to the NSW economy is a fallacy.

## CONSULTATION PACKAGE

The current consultation package is open to **11 September for comment**. It consists of:

i. The draft State Environmental Planning Policy (Short-term Rental Accommodation) 2019 (SEPP) that will declare STRA to be "exempt development", meaning that no development consent from Local Council is required;3

ii. The draft mandatory fire safety standards that will require all dwellings used for STRA to meet additional fire safety standards. Penalties apply; and

iii. The draft "light touch" Code of Conduct for the Short-Term Rental Accommodation Industry, which imposes obligations on Guests but will be of little practical use for residential strata schemes.

iv. The Discussion Paper, which raises the possibility of an 'industry-led' Register.

1 Jacob Saulwick, Sydney Morning Herald, NSW to 'clear the decks' on development proposals, 28 August 2019, p.6
2 New section 137A of the *Strata Schemes Management Act 2015* (NSW) was passed by the Parliament in August 2018. It has not commenced. The definition of STRA is an agreement to occupy a residential dwelling for any period up to 3 months.
3 STRA on bush fire and/or flood prone land will be a complying development and require inspection and certification.

## PROBLEMS AND WEAKNESSES

**When a Cap is not a Cap:** In 2018 The Department of Planning and Environment (DPE) published an Explanation of Intended Effect (EIE) on proposed changes to the planning system. The EIE expressed the clear commitment that 180 days would be the maximum permitted Un-Hosted STRA in the Greater Sydney Metropolitan Area. This is clearly NOT the case. The 180 days only applies to the "exempt (or complying) development" pathway. A "Host" can apply for consent to conduct Un-Hosted STRA for 365 days a year.

This change of position is not explained in the Discussion Paper.

**Full-time STRA Business – the 21 Day Let Loophole:** An entirely new category of Un-Hosted STRA that evades the 180-day cap has been introduced. Un-hosted lets for 21 consecutive days or more will now NOT be subject to the 180-day cap if this SEPP is adopted. It will be impossible to monitor this mix. This is put forward on the dubious grounds that longer STRA causes less noise and nuisance to neighbours.

But there are far wider implications for apartment communities:

- Firstly, the 21 day + loophole shows that the NSW Government has abandoned any pretence of trying to contain short term letting to "home sharing". This is the result of global platforms and local companies fighting back against having any cap at all. It is also the result of a flawed state-wide approach that cannot discriminate between different uses, varying business models, different locations and demographics.

- Secondly, it enables private and corporate landlords to mix 'medium' and short term letting making STRA a viable full-time business model instead of residential tenancies.

- Thirdly, it gives the corporate letting industry free access to all residential apartment buildings in all zones and enables them to evade NSW "serviced apartments" rules.

**21 Day Loophole and Principal Place of Residence:** The new category means a permanent resident in a strata scheme could conduct un-hosted STRA for 21 days + without it counting toward the cap AND 180 days in a single year. This raises the question: when is their lot not their principal place of residence?

**Excessive 180 days:** Day caps are intended to be an economic lever to drive apartments back to the residential market. The Government knows the180-day cap is already excessive by world standards. OCN, the Tenants Union, the City of Sydney, and other metropolitan Local Councils like Inner West, have all said the cap must be lowered to 90 or 60 days. Many landlords are also concerned about the negative impacts of STRA and the Property Owners Association has also called for lower caps and a registration system.

**This is not "Home Sharing":** The stated "aim" of the State Environment Planning Policy (Short Term Rental Accommodation) 2019 is to support STRA as a "home sharing" activity (cl.3). It is clear that this SEPP is not about "home sharing". It does not restrict STRA to the principal home or set low caps in keeping with occasional letting of one's principal place of residence as happens elsewhere.

**Commercial Host:** The "Host" can be anyone – a local landlord, an overseas investor who owns 30 apartments in a single high-rise development or a commercial operator who spot purchases in your scheme. The NSW Government is blatantly encouraging commercial operators to utilise your common property assets to support their business ambitions and the profits of global booking platforms.

**Your development consent is not king:** There are thousands of people living in apartments located in mixed use and commercial zones like the CBD and Pyrmont who rely on their development consent conditions that prohibit short term letting to stop their homes turning into quasi-hotels.

The proposed SEPP does not contain any express override of existing conditions of development consent that prohibit short term letting. This could possibly be a good thing but it is not clear whether conditions that already prohibit short term letting will prevail.[4] We think not. This will be a shock to people who did their due diligence and chose their home carefully.[5]

Illegal "Airbnb style letting" has already taken hold in some CBD buildings.The problem is not confined to the city. Unless the SEPP is amended it takes the lid off ALL these buildings and hands them to the lucrative tourist market. At what cost?

**Costs imposed on all owners:** One of the many impacts will be a disproportionate cost to owners and the owners' corporations of these STRA operations (concierge workload, wear and tear on lifts, gyms and other utility areas, administration and management costs). Unless these are addressed, owner/occupiers and investors with residential tenants will be significantly subsidising the business models of those running STRA businesses.

The vast majority of residents do not have any concierge, building manager or security services. They are left to manage the building with fewer residents, cope with multiple strangers in their car parks, their corridors and their pools and pick up the mess. It is a violation of their security and their privacy. There is a real likelihood that Local Council's will issue fire orders where STRA is present.

In the US, the courts have recognised that an owners' corporation of a residential scheme in which some owners are using their lot for short term renters has a legitimate basis for levying additional fees and charges. The same should apply here.

**STRA is not a 'minor impact' in strata:** The cumulative impact of multiple STRA operating 180 days (possibly more with the proposed 21 day + loophole) in and around residents in a single apartment building is not a "minor impact" on that community.

- The SEPP offers no limit on the number of apartments that can be used for Un-Hosted STRA in a single scheme dispersed among residents.
- There is no threshold that triggers a re-classification of the building, or provides any certainty that an apartment building cannot be taken over by stealth.

If STRA is on average a 4-night stay, that is 45 changeovers in a single apartment (based on 180 days). In a residential scheme of 300 apartments where 10% convert to STRA, that is 1350 changeovers. In a small block of 4 units, 2 lots produce on average 90 change overs. There are buildings in Melbourne where 80% of the apartments are on the "Airbnb market". In Sydney, anecdotal evidence is this has already happened in the CBD.

4 Section 3.16 of the Environment and Planning Assessment Act 1979 (NSW) enables an environmental planning instrument (like the SEPP) to override other Acts, regulations, by laws, and covenants. The EPA Act does not allow the override of a development consent condition but the rules of interpretation that apply in planning law probably mean that, in fact, the specified activity (STRA) renders the condition null and void.

5 The Draft SEPP contains a note that states that specifying the development as "exempt development" does not authorise the contravention or any condition of development consent (cl 9 note 2). However, that is not given effect to by any provision in the Draft SEPP. To protect residential buildings in high density locations, like the CBD and Pyrmont, there must be an express clause to the effect of Note 2, not just a note.

The Draft SEPP offers no protection at all. There will be no oversight by Local Council.

- In NSW, “serviced apartments” are prohibited in most residential zones in which apartment buildings are permissible. In mixed use zones “serviced apartments” may be permitted subject to conditions that require segregation onto a different floor, on-site manager and a medium-to-high rise building must have two lifts. This is because “Un-hosted” transient occupation has been shown to be incompatible with residential living.

- Even the Complying Development Standards for a ‘Bed and Breakfast’ in zones where B & B is permitted require that if the “dwelling house” is subject to the *Strata Schemes Management Act 2015 (NSW)* or the *Community Land Management Act 1989* (NSW), it must have the prior approval of the owners corporation, or the community, precinct or neighbourhood association.[6]

None of these basic considerations apply to STRA. The townhouse entrepreneur can open a B&B with no planning permission with 2 “Guests” per bedroom at a time. Multiple “Hosts” with individual apartments or a single “Host” with multiple lots in a single scheme can operate their STRA business from your apartment building.

The Code of Conduct requires nothing more than that the “Host” informs the owners corporation and their neighbours that this is what they intend to do. No conditions apply.

**Loss of strategic planning capability:** Under the Draft SEPP metropolitan councils are prevented from lowering the cap below 180 but could increase it! The default outside of Sydney is absolutely no limit at all. Local Councils have to jump through hoops to prove the case for any cap. In the lead up to the March State Election, Byron Bay secured 90-days proving the point that STRA is not a ‘minor impact’. The state-wide approach is fundamentally flawed and out of step with the majority of countries where local councils apply zoning restrictions and caps to address local conditions. For residential strata schemes the by law will be their only protection once the protection of the Local Environment Plan is removed or their development consent condition nullified.

## FIRE SAFETY STANDARDS MONITORING AND ENFORCEMENT

**Mandatory Additional Fire Safety Standards:** OCN supports strong mandatory fire safety standards with significant penalties for non-compliance because the presence of short-term stayers increases the risk of fire in a residential dwelling. In particular, the threat to life of all residents is increased significantly with the presence of short-term holiday visitors in high rise apartment buildings. It is why fire safety standards are more onerous for the short-term tourism and visitor accommodation industry. It is disappointing that the STRA industry regards sensible fire safety standards as a ‘burden’.

There has been more than one fire at the Neo2000 Spencer Street building in Melbourne. In the last cladding fire occupants were reported to have taken plastic and wrapped it around the smoke alarm to stop it activating in the case of cooking or other products of combustion in an apartment. The previous fire was caused by a towel left on an air conditioning unit.[7]

6 Clause 4.2 State Environment Planning Policy (Exempt and Complying Codes) 2008. http://www5.auSTRAii.edu.au/au/legis/nsw/consol_reg/seppacdc2008721/s4a.2.html

7 https://www.theage.com.au/national/victoria/same-as-grenfell-tower-cladding-fears-as-fire-rips-through-melbourne-cbd-apartment-building-20190204-p50vgl.html

The Melbourne Fire Brigade investigation into the Lacrosse cladding fire in 2014 highlighted the problem of increasing the occupancy and presence of short-term stayers:

"Some individuals or companies rent apartments on long leases, furnishing them, then renting them out either short term or on a bed by bed basis. This is facilitated via the use of sites as Airbnb, Wotif and other internet sites on which owners or small operators can advertise and facilitate bookings." Giuseppe Genco, Municipal Building Surveyor, City of Melbourne, April 2015.[8]

**STRA must be "Complying Development":** OCN says that all STRA must be classified as "complying development" not "exempt development". This will be the only way that the Local Council is able to check that the fire safety standards are complied with.

Fire safety in residential strata schemes must not be left to the 'self-regulating' fragmented 'industry' of amateur "Hosts" or platforms. It poses an unacceptable to risk to all residents.

It is not possible for an owners' corporation to know whether the fire safety upgrades have been done or whether the work meets the standard, whether it has damaged the common property or whether it interferes with the building's fire safety system.[9]

In Sydney and across NSW there are hundreds if not thousands of older low-rise apartments buildings that do not meet modern fire safety standards. The presence of STRA is a risk to all residents and it is more likely that a Council will issue a fire order that the building be upgraded in terms of fire safety and that will be a cost to the entire owners' corporation

The fire risks in modern buildings are also higher and the combustibility especially of modern furniture is also much greater than 25-30 years ago. On 20 August 2019, Mr Wayne Smith, CEO National Fire Industry Association explained to the NSW Inquiry on Building Regulation that increased combustibility was to such an extent that:

> *…. egress time for a person in a modern apartment fire with modern furniture today is about six times less than what it was in the nineties. So instead of having 17 minutes to get out of the building, you have like three minutes to get out of the building—to get out of the apartment, not the building.* [10]

The latest apartment block fire reported in a modern high rise building in the centre of Canberra City is attributed to a 'smouldering cigarette setting fire to 'combustible' balcony furniture'. The fire spread to the 100 per cent polyethylene-core panels on the building and burned on both sides of a balcony partition separating two apartments.[11]

It is notable that the fire standards applicable to a class 2 building (residential flat building) do not address the fire risks of cooking, BBQs, or smoking on balconies in multi-unit buildings. These are common problems with short stay visitors who do not observe by laws or local customs. It is unclear whether STRA will be permissible in a multi-unit building that has flammable cladding or other fire safety defects.[12] How would a 'Guest' know whether the building has an up-to-date fire safety certificate or fire safety statement?

8 https://www.melbourne.vic.gov.au/sitecollectiondocuments/mbs-report-lacrosse-fire.pdf
9 Section 186D of the EPA Regulations 2000 provide that no consent of the owners' corporation is required to install smoke alarms.
10https://www.parliament.nsw.gov.au/lcdocs/transcripts/2194/Public%20Accountability%20Committee%20Tuesday%2027%20August%202019%20-%20UNCORRECTED.pdf
11 https://www.afr.com/property/residential/combustible-cladding-ignited-in-canberra-apartments-fire-20190820-p52j15
12 https://www.abc.net.au/news/2019-08-23/cladding-and-mould-forces-residents-out-of-apartment-block/11443976

## REGISTRATION SYSTEM

**The Register:** The Government's commitment to a registration system is welcomed. But this is a public function and needs to be part of the compliance and enforcement system not a superficial data base designed or controlled by the STRA industry.

The Local Council submissions to the DPE consultation in 2018 told the NSW Government the same thing. It should be open to any appropriate government agency to run the registration system or a neutral platform should be able to tender for the project. Key stakeholders like Local Government NSW and OCN must be part of designing the system. Local Council and Fire and Rescue NSW should have direct access to The Register.

The Register should enable Local Council and Fire and Rescue NSW to know how many apartments are listed on the STRA market in a single high rise building.

The rationale for a registration system is self-evident. Identifying STRA properties, the owner/ "Host", their agent or "nominated representative", having data on address, location, intensity, volume, days of availability, days of occupation, number of rooms, and type of STRA is necessary in order to develop a profile and analysis of the "industry".

It must not be possible "Host" to register strata property in a scheme that has a by law prohibiting STRA. It must not be possible any person who is not the actual owner be the registered Host and, in the case of residential tenants, there must be evidence that the landlord has expressly permitted the conduct of STRA by the lessee. The OCN position is that STRA, especially in strata buildings, must require a complying certificate and this should be required as part of the registration process. This kind of essential data is needed for regulatory oversight and enforcement. There is already evidence of illegal subletting facilitated via short stay apps and existing occupation limits are violated.[13] This has been a persistent problem in both Sydney and Melbourne.[14]

**Host obligation:** There must be an enforceable obligation for Hosts to register the premises before it is used for STRA purposes. This should be part of the general planning requirements (Part 2 SEPP STRA) or the specific development controls (Part 3). It must be clear that conducting STRA in unregistered premises is illegal and that penalties apply. This is not clear from the SEPP or the Discussion Paper. The Host should identify all platforms on which their property is listed, identify days of availability and report nights of occupation. The planning laws should not be changed to allow STRA in residential apartment buildings until the Register is in place.

**Platform Obligation:** There must also be a legal obligation for Platforms and agents not to list an unregistered residential dwelling for STRA. The international experience shows that without such an obligation Platforms will continue to list thousands of illegal apartments. Significant fines for non-compliance should go toward the operation costs of the Register.

13https://www.theage.com.au/national/victoria/spencer-street-apartment-fire-fire-breaks-out-in-cbd-flat-20151231-glxbty.html ; https://www.theage.com.au/national/victoria/spencer-street-apartment-fire-fire-breaks-out-in-cbd-flat-20151231-glxbty.html

14 https://www.smh.com.au/national/nsw/illegal-accommodation-city-of-sydney-cracks-down-on-black-market-syndicates-20150615-gho8ie.html

## ACTION

**Make a submission to the Department of Planning.**

**Tell your Local MP and the Minister for Planning and Public Spaces,**

**The Hon. Robert Stokes MP**

**All STRA in all residential strata schemes must be made a complying development not exempt development** to ensure mandatory fire safety standards are met, with inspection by local council or a private certifier.

**Un-hosted STRA** in residential strata schemes must be capped at a maximum 90 and preferably 60 days for the Greater Sydney Region to contain STRA to "Home Sharing". All Un-Hosted STRA is to count toward the maximum cap. No exceptions.

**Residential strata schemes** in mixed use and commercial zones with express prohibitions on short term letting must have their development consent conditions preserved.

**Register:** The planning law changes should not start without the Register, which must be a government run register or a neutral platform not part of the short-term letting industry. The Register must include reporting of day of occupation (caps), the Host must disclose all the platforms on which the premises is listed. Local Councils must be involved in designing the system and have unimpeded access to data. The Register must generate a unique Host ID.

**Host obligation:** There must be an enforceable obligation for Hosts to register their premises, before it is listed and used for STRA purposes. This should be part of the planning law criteria so it is clear the use of unregistered premises for STRA is illegal and penalties apply. The Host must display the unique Host ID on all listings.

**Platform Obligation:** There must also be a legal obligation for Platforms and agent not to list an unregistered residential dwelling for STRA. The international experience shows that without such an obligation Platforms will continue to list thousands of illegal apartments. Platforms must also have an obligation to share data with state and local government. All listings and other advertising must display clearly the Host's unique ID.

**Residential schemes** must have authority to levy charges and fees to Hosts conducting STRA.

**Local Councils** must have flexibility to set a lower cap and apply zoning restrictions to meet their strategic planning objectives.

Owners Corporation Network of Australia Ltd
Level 5, 95 Pitt Street, SYDNEY NSW 2000
T: 61 2 8197 9919
E: enquiries@ocn.org.au