

Opinion Piece – Short-Term Letting – NSW Government backs Airbnb in Final Policy¹

Introduction

Late Friday 9 April 2021 the NSW Government quietly “announced” its stripped-down and “final” short-term letting policy. In the middle of a housing crisis, the Government has legalised “Airbnb” facilitating the loss of thousands of apartments and houses across NSW. In a bizarre twist, it used an amendment to the Affordable Rental Housing Policy 2009 to achieve its goal!² This would be comic if it was not such a tragic exercise of political cowardice.

The impetus for the policy has been the exponential and illegal penetration of Airbnb into the urban housing market. It is no surprise then that the major beneficiaries are the Big Platforms who lobbied to dismantle the NSW planning system. Ironically, those global Platforms, like so many investors, are not domiciled in the Local Government Area (LGA), the State or even Australia.³

The policy was smuggled out with no warning to local government, housing groups or the hotel industry, which is on life support. It certainly takes some chutzpah to bend over for booking platforms like Airbnb and Expedia in the middle of a pandemic with house prices soaring, homeless and housing shortages increasing, and tenants facing debt and eviction. Meanwhile, licensed tourist accommodation is going to the wall.

Strange Bedfellows: Airbnb and Affordable Housing SEPP!

On Friday, the Minister for Planning amended the State Environment Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP) to legalise short-term letting as “exempt development” in all zones across NSW. The single definition of STRA⁴ will be inserted into all Local Environment Plans and commence on 31 July 2021.⁵ Later this year the policy will be incorporated into the Housing SEPP as just “another housing tenure” and “housing diversity”, disguising the mass transfer of critical housing to the tourist market.

In short, the policy permits use of a residential dwelling for short stays for up to 180 days a year in the Greater Sydney Area. The short stay could be an hour, a day, a week – there is no minimum period. There has already been a carve out to exempt short lets of 21 days or more from the overall cap.⁶ In areas outside of Sydney, there is no limit whatsoever on un-hosted STRA (except for some prescribed areas) regardless of local conditions.⁷

The policy strips all NSW councils of their planning powers and prevents them from setting their own “cap”, this includes Sydney councils facing serious affordability problems. Regional councils have also been given no opportunity to apply to reduce caps of 90 days (like Byron) to solve their housing problems as they deal with the fallout from bush fires, floods and COVID-19 migration. Yet, Expedia has still complained that the already excessive 180 day “cap” has been extended to some LGAs outside of Sydney and is calling for another six-month delay.⁸

¹ Jane Hearn BA LLB GAICD OCN spokesperson on short-term letting.

² Short-term rental accommodation - (nsw.gov.au)

³ Airbnb has also been the trojan horse for sharp operators who have long been a problem in Sydney.

⁴ STRA is defined as a commercial let for any period up to 3 months

⁵ State Environment Planning Policy (Affordable Rental Housing) Amendment (Short Term Rental Accommodation) 2021.

⁶ The blanket policy fails to differentiate locality or markets. The 21-day let was a later carve out to assist the corporate letting industry that has gone under the radar. It is unclear whether these occupancies will be reported at all.

⁷ There are several LGAs that now come within the 180 cap including, Greater Sydney Region Councils, Ballina, Bega, Byron, Dubbo, City of Newcastle, and certain zones in the Clarence Valley and Muswellbrook LGAs.

⁸ *Day cap on Airbnb properties expanded*, Sydney Morning Herald, 12 April 2021, page 3.

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Let's make no mistake – this is a policy designed for commercialised Airbnb. It is full time high turnover short stay accommodation for tourists and Platforms like Airbnb and Expedia see no role for Local Council or the needs of local communities. There has already been a silent displacement of residents as thousands of apartments have been lost in Sydney and other have moved to escape the nuisance. This policy does nothing to arrest that trend. Regional towns are facing housing shortages due to bush fires, floods and internal migration accelerated by COVID 19. Yet, in the highly impacted LGA of Byron Bay, a special application for a 90-day cap remains undetermined. Other impacted councils have had no opportunity to apply to the Minister for a 90 days cap before the policy was announced. Ironically, this very liberal approach is justified to promote “economic recovery” in towns that have experienced a tourist boom as Australians travel locally but are facing housing shortages because of catastrophic climate events and the global pandemic.

Simplified Policy Abandons Minimum Standards

The Government has also “simplified” the policy to ease the burden on Investor Hosts by removing important minimum standards and safeguards that protect the public and by ignoring others:

- **Bush Fire and Flood Prone land:** The original commitment required premises on bushfire and flood prone land to be treated as “complying development” but that has now been abandoned. This means that all STRA will be “exempt development”. There will be no council oversight even where properties are highly exposed to these risks, including apartment buildings where loss of power and evacuation is more difficult and lives are at stake.
- **No limit on number of occupants:** The occupation limit of “2 persons per bedroom or twelve guests, which ever is the lesser” has disappeared. There is a known problem of overcrowding in Airbnb apartments, which keeps them cheaper than hotels and licensed service apartments. It is a known cause of nuisance and fire risk and was directly mentioned in reports on the Lacrosse and Spencer Street fires in Melbourne. It is already common to see listings advertising one or two-bedroom apartments for 6 guest or more especially in the CBD, Pyrmont and Olympic Park.
- **Multiple un-related Guests in same property:** The original policy announcement prohibited un-related parties. The final policy permits individual rooms or beds in a shared bedroom to be rented to different guests, even if the Host is not present. No guest will know who else is in the property. These premises are equivalent to high-risk, unmanaged, boarding/guest houses.
- **No limit on number of bedrooms:** There is now no limit on the size of the property. These premises can operate without council consent regardless of how many bedrooms are made available for STRA. This is unlicensed unregulated hotels operating without oversight.
- **No car parking standards:** Parking multiple cars of guests and their visitors on and around properties causes nuisance. In strata, it blocks common property and visitor parking intended for residents' guests. The “exempt development” category includes not car parking standards.

It is clear, the NSW Government has abrogated its responsibility passing the buck back to local communities. The policy trashes housing targets, remove the strategic planning powers from local councils and undermines regulatory efforts to provide safe affordable housing. There is no competitive neutrality with the licensed tourist accommodation sector.

Registration System

The one chink of light has been Government's agreement to establish a registration system. But in an odd move, the purpose of the register has been narrowed to “ensure the safety of persons occupying the STRA accommodation. The access to the Register will be restricted to Customer Service, Local Councils, and any other

person, if the Planning Secretary, “considers it necessary to ensure the safety of a STRA Guest”.⁹ The Department of Planning is also disclaiming any liability or that the Register is reliable proof of the legality of the use of premises.

In most jurisdictions the Register (or part thereof) is public. In NSW, prospective purchasers, conveyancers, landlords, real estate agents, neighbours and Owners Corporations will face difficulty accessing the Register and can be block on privacy grounds. The strata sector needs information for legitimate purposes: disclosure to insurers; compliance with by-laws; investigation of security breaches or damage; and data for the assessment of use and costs. These matters are not within the statutory purposes of the Department of Customer Service, and are private property matters.

Shortfalls in Register Information

There are also some shortfalls in the range of information being collected. Regulation 186X specifies limited *registration information* to include name of the host or agent and the address of the premises, the type of premises, whether the STRA is hosted or un-hosted and a tick box that fire safety standards are complied with. Some of the shortfalls include:

- Strata Plan number is missing where the property is strata titled;
- Number of bedrooms available for STRA is missing;
- Whether the premises are the host’s Principal Place of Residence (or not).
- Name of the host is optional, yet vital to analysing aggregation of properties.
- No information about which agent or Platforms are used.

The system is to be managed by the NSW Government but it is ‘integrated’ with major booking platforms who will report occupation. This was always the aim of industry, and institutionalises them into the regulatory system. The MOUs are not public so, apart from Airbnb and Expedia, no-one knows which platforms have signed up. The market is highly fragmented and international experience is that Hosts will use other platforms to avoid the cap. It is unlikely many of the smaller specialist platforms will have the technology to deliver data into the registration system.

Clear and Direct Communication

Importantly for strata, the STRA policy cannot override a DA condition of consent or a by law or lease that prohibits Airbnb.¹⁰ This is stated in the SEPP amendment, although it could be more direct.

The FAQ information does not explain this in sufficiently clear terms. It should explain that DA conditions often prohibit short-term letting, especially in high density urban areas and these conditions prevail. There is widespread illegal letting of apartments in violation of DAs, so this is important information. These premises cannot be registered for STRA and should be returned to the rental market. There also needs to be a clear and fair process for councils and strata schemes to notify the Secretary of Planning that DA conditions exist or a by-law prohibits registration of premises.¹¹

⁹ The terms and conditions that apply to registration state that the Department of Customer Service and local government authorities may use and disclose the information for their own statutory purposes, subject to the Privacy and Personal Information Act. This suggests that, in fact, the register has wider purposes than safety and that the individual’s consent may be required to disclose information on the register to a third party.

¹⁰ In the CBD and similar locations, it is common for local government to explicitly exclude short-term letting in development consent conditions and these conditions prevail. To adopt a by-law prohibiting investor owners short-term letting under new s 137A *Strata Scheme Management Act 2015* (NSW) requires at least 75 per cent of the vote in favor of the ban. Most affected schemes will not reach this threshold.

¹¹ Local councils have registers of DAs, including conditions, but will need resources to police the STRA system.

There also needs to be a process for auditing the Register, to ensure compliance and to test the quality, completeness and integrity of the data.

Short-Term Letting in Strata

It has taken over four years to deliver a “one size fits no-one” policy that undermines apartment living and disempowers local communities. To push back, strata schemes need to insist on compliance with DA conditions that prohibit STRA. In all other cases, schemes should adopt a by-law to prohibit STRA in Lots that are not the principal place of residence.

That said, it is clear that where Airbnb has already taken hold adopting a by-law will be difficult. Even where a majority want the prohibition a minority of absent investors can defeat the resolution and dictate the direction of the scheme.¹²

The STRA policy provides no solution and no hope. It will not stop quasi-hotels. It is an inflexible and failed policy before it starts. In NSW, it is open slather with no mechanism to cap the number of apartments flipped to tourists. Displacement of residents and conversion to STRA has been legalised. Removing basic standards like the occupation limits guarantees that overcrowding, nuisance and fire risk will continue.¹³

What is to be done? There have been only very minor concessions to strata communities. The new by-law power in s 137A of the *Strata Scheme Management Act 2015* (NSW) is one. The Code of Conduct requires a Host to notify the Owners Corporation that their Lot is being used for STRA. The Host must have public liability insurance.¹⁴ But the issues of security and cost shifting have been left unresolved and there has been no consideration yet of STRA management issues under the *Strata Schemes Management Act 2015* (NSW).¹⁵

Conclusion

The NSW STRA policy is a massive capitulation to the power of Airbnb and Expedia. It has dismantled important parts of our planning system and given the green light to private investors. Thousands of apartments have already been lost, disrupting residents and pushing key workers further from work, schools, hospitals, transport and other services. In regional communities, it will exacerbate housing shortages and increase pressure on lower waged and vulnerable communities.

The strata sector must support lower caps; demand that schemes can prohibit STRA entirely; stop ultra-short stays and overcrowding; and call for clear powers to manage STRA to protect security and allocate costs to Hosts.

¹² The resolution to adopt a by law requires at least 75 per cent of the vote in favour. Department of Planning wrongly suggest that only by-laws made under s 137A are valid. Independent advice indicates by-laws that implement a DA prohibition remain valid.

¹³ It is possible to adopt a by law limiting occupation to two persons per bedroom, except in relation to families.

¹⁴ Code of Conduct for the Short-Term Rental Accommodation Industry, commenced 20 December 2020.

¹⁵ STRA framework consist of (i) by law power; (ii) code of conduct; (iii) STRA policy; (iv) registration and fire safety standards.