

Planning implications of short term home rentals

Kaylene Perissinotto, senior associate, Leanne Bowie Lawyers

We all love to jump online and book cheap holiday accommodation – a house or apartment as our own temporary base as a tourist. Perhaps we’ve even listed our own home – or the beach house - as a holiday rental to make some extra cash. There has been a global explosion in the short term home rental market, driven by online platforms such as AirBnb and StayZ. But what are the planning implications of these rentals? The complex legal issues surrounding short term holiday rentals have not been sufficiently addressed by state and local governments in Queensland, although Queensland is far from being alone in that regard.

In October 2017, Queensland’s Tourism Minister, Kate Jones MP, announced at the Local Government Association conference that she would establish a taskforce to consider implications of short term rental platforms, with the Industry Reference Group expected to report its recommendations early in 2018¹. A *Peer-to-Peer Economy and Short Term Letting Industry Reference Group*, with representatives from the industry, local government, academic and accommodation sector has been established. The Minister’s office says *“In exploring options for a balanced policy approach to this form of short-term holiday letting, members have considered key issues for the visitor economy and local government, including neighbourhood amenity, disruption to sense of community, guest safety, land use planning, housing affordability and destination marketing...Options will be progressed further by (the department) for consideration by the Queensland Government in the near future.”*²

Already, the divisions between the interest groups are clear. The Premier’s office has stated that “there need to be rules in place to protect visitors, but changes could not disadvantage traditional accommodation providers³”. A strong majority of local governments (led by Noosa Shire Council) recently voted to lobby the State Government to require short term accommodation providers to supply property addresses to local councils, to determine compliance with planning requirements and to allow imposition of tourism levies. Conversely, platform providers are lobbying to avoid over-regulation, and Strata Community Association Queensland has called for self-regulation by property owners⁴.

¹ The Gladstone Observer *“Airbnb hits out at Council’s regulation plan”* 22 October 2017

² Letter from the Office of the Minister for Innovation and Tourism Industry Development and Minister for the Commonwealth Games to the author dated 14 May 2018

³ Courier Mail *“AirBnb boss calls for certainty as tourism sector attempts to limit growth of service”* 16 November 2017

⁴ Press Release by Strata Community Association Qld 17 November 2017, Courier Mail *“AirBnb boss calls for certainty as tourism sector attempts to limit growth of service”* 16 November 2017

1. What is online home rental?

Since 2008, with the conception of AirBnB, the world has witnessed the rapid growth of the global phenomena of online business platforms listing short term holiday rentals. These businesses link hosts and guests, and provide a payment gateway. AirBnB, a market leader in the field, now offers rentals in 200 countries, and claims to have enabled 140 million guest bookings around the world⁵. AirBnB commissioned research shows 70% of Queenslanders support “home-sharing”, and that AirBnB guests spent more than \$244m in regional Queensland in 2015-16⁶. This is consistent with the Deloitte Access Economics 2017 study⁷, finding that in one year, 343,800 Airbnb guests in Queensland spent \$331 million in this state.

The *Planning Regulations 2017* (Sch. 24) define ‘short term accommodation’ to mean:

*“(i) providing accommodation of less than 3 consecutive months to tourists or travellers;
or*

(ii) a manager’s residence, office, or recreation facilities for the exclusive use of guests, if the use is ancillary to the use in subparagraph (i)”.

There are two types of rentals, in essence:

- i. renting a room or rooms in a home, where the owner remains in residence⁸; or
- ii. renting the whole premises – this can be the temporary rental of a person’s principal place of residence (e.g., whilst the owners are themselves away on holiday) or a property which is a holiday home⁹.

2. What’s the problem?

Hosts and users of the platforms are enthusiastic about the benefits – a new income source, cheaper holiday accommodation, even a sensation of “connection” with strangers from across the world – but there is an equally vocal criticism of the impact of these short term rentals.

⁵ www.airbnb.com.au

⁶ Courier Mail “AirBnb boss calls for certainty as tourism sector attempts to limit growth of service” 16 November 2017

⁷ Deloitte Access Economics “Economic effects of Airbnb in Australia” 2017

⁸ Under the BCC City Plan, this is a “home based business” where it is subsidiary to the principal residential use. Noosa SC refers to “type 1 home hosted” where guests stay less than 3 months but the owner is onsite.

⁹ If the rental is for less than 3 months, this is “short term accommodation” as defined by the Planning Regulations sch 24. If the rental is for more than 3 months, the use may be a “dwelling house”, “dual occupancy” or “multiple dwelling” depending on the number of separate households on the premises, under the Regulations.

Indeed, Californians refer to people who sublease properties for short stay accommodation at a profit as “parasite entrepreneurs”¹⁰!

There are both economic and amenity impacts of short-term rentals. A growth in short term rentals impacts directly on housing affordability, for home buyers and home renters. The short term rental boom drives up prices and removes stock from the general rental market. The experience around the globe is that pressure on tight rental vacancy rates in high demand areas is exacerbated where online holiday listings of entire homes expands.

Further, an influx of tourists in an otherwise residential area can impact on amenity. Residents complain that tourists generate increased noise, rubbish, traffic and parking congestion, and can be loud and drunk. There is also the long-term effect of the increase in short term residents and the consequential decrease in permanent residents. As has previously been witnessed in areas with a high proportion of holiday homes, the needs of such a population are different – for example, schools may close as permanent resident family numbers decrease, and where tourism is seasonal, many shops and restaurants may close for large portions of the year as they do not cater to the needs of the reduced number of “locals”.

For these reasons, legislators around the world are grappling with the implications of short term rentals, and considering whether they are legal and whether they are to be encouraged, regulated or prohibited.

3. Is it legal?

In Queensland (as in many other jurisdictions) this ‘grey area’ of law varies enormously in different locations, depending on each local government’s planning scheme provisions and nuances in the character of the individual use, particularly whether it is for the whole or part of a house.

Queensland is the only state which introduced legislation to control so-called “party houses”. However, the “Party House amendments” to the *Sustainable Planning Act 2009* (carried forward to s.276 of the *Planning Act 2016*) only addressed a small part of the problem – the provisions only apply to houses regularly used for parties. Section 276 does not address the more general issues of online short term home rentals.

Consequently, there is a piecemeal solution to a bigger problem, through widely varying planning scheme provisions and local laws.

For example, Brisbane City Plan’s¹¹ tables of assessment make such a use subject to code assessment in higher density residential zones such as Tourist Accommodation Zone, and impact

¹⁰ www.lexology.com “The law is catching up with short-stay AirBnb style accommodation in Australia”

¹¹ <http://eplan.brisbane.qld.gov.au/>

assessment in lower density residential zones. This allows the Brisbane City Council to regulate short term accommodation and manage its impacts on the neighbourhood.

In contrast, Noosa Shire Planning Scheme does not regulate short term accommodation by way of the renting of an entire house, despite an estimated 2000 homes being listed by accommodation provider websites for visitor accommodation¹². If a whole house was listed on Airbnb for holiday rental, it would not be within the current planning scheme definition of Visitor Accommodation¹³. The property would fall within the “detached house” use, and consequently would be ‘accepted development’ in the Detached House Zone. Noosa Shire Council has missed a chance to regulate the use of these houses by successive holidaymakers so as to ensure residential amenity for neighbours. A new planning scheme for Noosa is likely to address these issues - but not necessarily in a way that is consistent with the adjoining Sunshine Coast Planning Scheme.¹⁴

This leads to uncertainty and inconsistency, with not only the lawfulness of short term rentals varying between local government areas, but also the conditions (or lack of conditions) varying considerably, for no apparent reason. No-one can seriously expect international tourists to know whether the holiday home they have booked is within the boundaries of Noosa Shire Council or the Sunshine Coast Council area, let alone the zoning of the location and its applicable category of development and assessment.

A further complicating factor is that under the *Planning Act 2016*, all development that is NOT identified as assessable or prohibited development in a “categorising instrument”¹⁵ is taken to be ‘accepted’, i.e., lawful without the need for an approval and conditions. Councils that have not clearly identified the situations in which short term rentals are legal, and the guidelines and standards which regulate such development, may find that there are limited options to regulate this planning change in the future, given that established uses will continue to have ‘existing

¹² Noosa Council Housing Needs Assessment Report prepared by Briggs & Mortar Pty Ltd, endorsed by Noosa Council for the purpose of informing the drafting of the new planning scheme 20 April 2017, Courier Mail “*AirBnb shuts door on Coast address-sharing plan*” 7 October 2017

¹³ (Because, based on the definition of that term in the planning scheme, it is not designed for visitors (i.e. designed as a home), isn’t home hosted and doesn’t consist of two or more dwelling units).

¹⁴ In the meantime, regardless of whether “transitory accommodation” is legal within its planning scheme, Noosa Shire Council has imposed a Tourism and Economic Levy (<https://www.noosa.qld.gov.au/levies>) on all properties whether either the whole dwelling or a room or unit in the dwelling is used for short term accommodation rentals in the 2017/18 financial year. AirBnb has refused to provide addresses for homes listed on its site to facilitate collection of this levy (Courier Mail “*AirBnb shuts door on Coast address-sharing plan*” 7 October 2017). Residents in tourism regions of the Shire can seek an exemption from this levy where they are not providing short term accommodation – it seems, however, the prima facie presumption is that houses in tourist hotspots will be liable for the levy!

¹⁵ a regulation, or local categorising instrument such as a Planning Scheme.

lawful use rights' even if future planning schemes or amendments attempt to impose regulation. Only legislation could address this problem retrospectively.

Other issues to consider include:

- a. Standards and obligations placed on other, more traditional short-term accommodation (hotels, motels, etc.) such as fire safety standards and accessibility for disabled visitors, are not currently imposed on private homes. However, if these homes are being operated for commercial purposes, there are sound policy reasons that at least some of the same standards should apply.
- b. Generally, short term rentals are not addressed by the *Residential Services (Accreditation) Act 2002*, because that Act only applies where 4 or more people individually pay rent. This legislation is the tool by which the Queensland government has regulated the operation of more traditional forms of residential services (such as boarding houses) to ensure that standards are met.
- c. Body corporates, particularly when short term property letting in the building was unplanned, face issues of increased noise, security implications, and overuse of shared facilities. However, the current body corporate legislation prevents body corporates themselves restricting (by bylaw) the **type** of residential use – a body corporate cannot adopt a bylaw preventing short term lettings¹⁶.
- d. Are hosts of short term rental premises conducting a business? If so, this has many implications – including whether:
 - i. The income is being declared for tax purposes. Not only should income tax be paid on rentals received, but if the family home (or part of it) is used as a business, it may be subject to Capital Gains Tax upon sale of the asset.¹⁷
 - ii. The requirements of the *Work Health & Safety Act 2011* are met – owners who, through their leasing activities, fall within the definition of “conducting a

¹⁶ *Body Corporate & Community Management Act 1997* s. 180(3) provides that “if a lot may be lawfully used for residential purposes, the by-laws can not restrict the type of residential use”.

¹⁷ Further, the 2018 Federal Budget announced by Treasurer Scott Morrison in May 2018, plans the removal of the current exemption that allows offshore sellers of Australian accommodation online to (currently) not impose a GST charge. (www.budget.gov.au) When companies such as AirBnb are forced to report on their GST obligations to the ATO, this will have a knock-on effect to hosts, and will provide the ATO with much greater information about such hosts and their volume of rentals.

business or undertaking” must meet the stringent and sometimes onerous obligations of that Act, or risk serious consequences.

- iii. The insurance implications from the business use of the home are addressed, as standard homeowner policies do not generally provide cover for home-based business activities. For example, most home insurance policies do not cover people injured in the home if it arises from a business use, and public liability cover, to cover injuries to guests, should be obtained. Some platforms (such as AirBnb) provide host protection guarantee - the limits of such guarantees in terms of property damage and public liability should be carefully reviewed by prospective hosts. Existing insurers may have to be informed of the change in living conditions to avoid the policy being voided.

4. What is happening about this issue interstate/overseas?

Queensland is far from being alone in facing this complex set of problems. The issues are being discussed and debated across the world, as the spread of online direct accommodation booking sites increases. Concerns about planning regulations, amenity implications and economic pressures have resulted in many major international tourist destinations imposing strict boundaries on short term rental markets.

a. International approaches

The State of New York has clashed very publicly with AirBnB. Since 2011, the *New York State Multiple Dwelling Law*, which covers buildings with three or more units, prohibits transient rentals of fewer than 30 days at a time, unless the owner is present for the time a guest is renting. However, in 2016, New York State passed legislation making it not just illegal to rent a home in those circumstances, but illegal to advertise a listing that was so prohibited. In this way, the liability for the breach fell to the platform (such as AirBnB) in addition to the individual host. Litigation ensued, and was settled on the basis that AirBnB will work to regulate its listings, including a formalized process of tax collection through the website.

In London, entire home rental is limited to 90 days per year, and in Paris, the limit is 120 days. Websites such as AirBnB have assisted in the compliance with this restriction by preventing rentals above this limit on their websites. Legislation in Germany (Berlin) prohibits the short-term let of entire apartments to tourists without a city permit - offenders can face fines of up to €100,000. In Santa Monica, hosts must live on site during the stay, and must hold a business licence and collect the city tax – this has essentially prohibited “whole property” rentals. In Barcelona, hosts must apply for a licence and display it on any online advertisement – fines apply to both owners and online rental businesses when advertisements fail to reference the licence. In 2016, Airbnb & HomeAway were each fined €600,000 (on top of nominal fines in 2014 and 2015) for failure to do this – the fine was not appealed by HomeAway, and the city

continues to ramp up its efforts to find offenders, with toll-free numbers for anonymous reports of unlicensed rentals.

b. Australian approaches

In Australia, states have taken different positions, and some states have worked long and hard to avoid taking any position at all!

Legal in SA – In 2016, South Australia has expressly stated that AirBnB and similar services are legal in that state, issuing an advisory notice to clarify that a person’s period of stay in a residential property does not constitute a “change in use” under the previous *Development Act* (1993) or the new *Planning, Development and Infrastructure Act* 2016. This is responsive to Court decisions in Victoria, NSW and Queensland finding that such acts do constitute development and may require planning consent (discussed below). The advisory notice states “*a dwelling will remain a dwelling if it is occupied sporadically; let out during holiday periods to short term occupants; let for short term use; or if the owner lives overseas or interstate and uses it occasionally and then for relatively short periods. Unless development is undertaken to physically alter the dwelling such that it is no longer a dwelling, it remains a dwelling.*”¹⁸ (emphasis added)

Cases indicate legality concerns in NSW, Victoria & Qld - In *Dobrohotoff v Bennic*¹⁹, the NSW Land and Environment Court found that the short-term holiday rental accommodation of a home at Terrigal meant that the use was not as a dwelling house and accordingly was prohibited development within the relevant residential zone – the change in use to short term rental accommodation was “development” and required planning consent to be legal.

Similarly, in Queensland, the Planning & Environment court found, in the *Branbid*²⁰ decision in 2017, that rural land being used for temporary accommodation (in tents and vans) for hundreds of travelers in recent years constituted “development”, being a change in use for the rural property, and as the development was not defined in the planning scheme, required impact assessment and a development consent to be legal. In that case, it was irrelevant whether or not the travelers paid for the accommodation or the method by which travelers became aware of the accommodation.

Victoria’s tourism market was an early adopter of AirBnb, and Melbourne is one of the top 10 cities in the world for global travelers (according to AirBnb’s website). Indeed, the government agency Tourism Victoria entered an agreement with AirBnb in 2015 to promote middle and

¹⁸ [Building Advisory Notice 4/2016](#)

¹⁹ *Dobrohotoff v Bennic* [2013] NSWLEC 61

²⁰ *Whitsunday Regional Council v Branbid Pty Ltd* [2017]QPEC 3

outer suburbs such as St Kilda and Fitzroy, to encourage tourism to non-traditional areas.²¹ In Victoria last year, the Supreme Court²² held that an AirBnB rental constituted a lease, not a licence, and as such was contrary to the lessee’s covenant to not sublease her leased property, but specifically stated in the decision that the Court had not been required to address the legality of AirBnB. This follows a lengthy Victorian case²³ considering whether the use of some apartments in the Watergate (Docklands) building for short-term letting changed the classification of the building under the National Construction Code, and consequently the safety measures required for the building – this was found by the Court of Appeal to be a matter of ‘fact and degree’. However, in a related case, the Supreme Court of Victoria found that the body corporate for this building could not make a rule prohibiting short term rentals as this was outside the powers of the body corporate²⁴.

In 2009, the Western Australian Planning Commission issued guidelines regarding the short stay use of holiday homes for tourism accommodation (excluding guesthouses and where there is an on-site manager).²⁵ This was proposed to provide guidance to local councils on how they should address the issues within the local government planning framework, and suggested possible changes to planning schemes and the preparation of local planning policies tailored to address specific issues encountered by Councils. Many of the suggestions and proposals within that guideline would be useful to the current Queensland Industry Reference Group to review. However, despite this promising start, there is still inconsistency between council areas in that State, due to piecemeal adoption of these recommendations by Councils.

Parliamentary Inquiries in NSW and Victoria

Following the *Dobrohotoff decision*, and concern about the impacts of short term stay accommodation in different areas of the State, in 2015, the NSW Parliament established a parliamentary inquiry to consider “the Adequacy of Regulation for Short Term Holiday Lettings”. The inquiry heard submissions in 2015 and held public hearings in 2016, and in October 2016 made recommendations that the NSW government should amend planning laws to:

²¹ The Age “Whilst Uber is illegal, AirBnb gets government help” 6 December 2015

²² *Swan v Uecker* [2016] VSC 313 - in handing down his findings, Justice Croft warned against the appeal being used as a test case for the legality of Airbnb in Victoria, stating that the appeal was about the particulars of the lease in question.

²³ *Giuseppe Genco and City of Melbourne v Paul Kenneth Salter and Building Appeals Board* [2013] VSCA 365(the Genco case)

²⁴ *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 (the Balcombe case)

²⁵ Western Australian Planning Commission *Guidelines Holiday Homes - short stay use of residential dwellings* 2009 www.planning.wa.gov.au

- allow short term letting of rooms where the host is present, as exempt development;
- allow short term letting of a principal place of residence as exempt development;
- permit short term letting of empty properties (holiday homes etc.) as exempt development where applicable impact thresholds are not exceeded;
- enable body corporates to manage the impacts of short term letting in strata properties.

A response to Parliament in April 2017 generally supported the findings and recommendations of the Parliamentary Inquiry, however, the NSW government then issued a policy “Options Paper” to “engage with stakeholders, industry and the general public”, with responses due 31 October 2017. It is questionable how this engagement with stakeholders differs from the past 2 years of discussion, submission and engagement. Since October, the NSW State Government has taken no further steps to address these issues.

In Victoria, a similar inquiry on narrower terms of reference is being undertaken by Parliamentary Committee. The *Inquiry into the Owners Corporations Amendment (Short stay Accommodation) Bill 2016* considers the Bill currently before the Victorian parliament to address unruly behavior by people in short stay accommodation in apartment buildings. Under the reforms, apartment owners could be liable for any damage, noise or loss of amenity caused by their guests, and the VCAT tribunal given new powers to award compensation of up to \$2000 to neighbours, and ban short stay apartments which are repeatedly used for unruly parties. Whilst these proposed amendments are seen to address some of the issues arising from short term holiday lettings, they do not address the underlying planning law issue – does the use of a property as a short term accommodation constitute a change of use, and thus development?

Interestingly, the Victorian Parliamentary report states that “*Although unregulated, the short stay accommodation sector is legal in Victoria*” and bases this statement upon the Genco and Balcombe cases. However, those decisions did not consider the legality of the accommodation from the planning perspective, but rather the classification of buildings (as dwellings) under the Building Code of Australia.

5. What needs to happen next in Queensland?

To ensure consistency across Queensland, the most efficient solution (although not necessarily the only solution) would appear to be to amend the *Planning Act 2016* to address short stay accommodation.

In some ways, comparisons can be drawn to the disruption to the taxi industry caused by ride share company Uber – a new way of doing things was introduced, was rapidly accepted by the

population, and the rules and regulations governing the activity did not catch up for quite some time.

Similarly, the short-term accommodation phenomenon is an example of an industry – tourism – where some consistency needs to be shown across the State – or at least, across local government areas within the same general tourism region. It is ridiculous to expect that tourists will know whether their holiday rental is located in Noosa Shire or Sunshine Coast Council boundaries – they just know they want to holiday on the Sunshine Coast! Similarly, it would be too onerous to expect international home stay platforms to monitor the nuances of varying planning schemes across local government jurisdictions.

The State Government, through its Industry Reference Group, should address:

- Do homestays constitute a change of use? Is this affected by the amount of time per year that the property is used in this way? Is it affected by whether the owner is in concurrent occupation of the property?
- Which regions of Queensland are “tourist” regions, and require a consistent approach to homestays?
- What other legislative safeguards need to be put in place, for the protection of owners, neighbours and guests?

Whilst an Industry Reference Group, to identify the issues, is a useful first step, it is not as if the experience of other jurisdictions is not already readily available. In particular, the guidelines prepared almost 10 years ago by the Western Australian Planning Commission would be a useful document to review. This does not mean that Queensland needs to copy any particular existing solution, but it should help ease the way for the issues to be addressed sooner rather than later.