

31 October 2017

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***Options Paper for Short-term Holiday Letting in NSW – LegalVision submission***

We are excited to make a submission to the NSW Government about the current regulation of short-term holiday letting (STHL). **Enclosed** is our submission in response to your Options Paper.

LegalVision is a market disruptor in the commercial legal services industry. Our innovative business model and custom-built technology assist our lawyers to provide a faster, better quality and more cost-effective client experience. We closely work with strata clients across Australia under our Property and Commercial Team. Many of our clients also use technology to build their business and connect with customers, including developing online marketplaces that offer short-term letting.

We believe better regulatory and governance measures can improve the synchronicity between these two important sectors of NSW – domestic/commercial strata-titled living and advances in technology. We welcome the opportunity to continue our involvement in this consultation process.

Yours sincerely



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## Options Paper for Short-term Holiday Letting in NSW Submission from LegalVision ILP Pty Ltd

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### 1 - The Legal Ability for Owners Corporations to Prohibit or Restrict Short-Term Letting (STHL)

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1. The Owners Corporation of a Strata Scheme (**Scheme**) is principally responsible for the management of the Scheme, including the management of:
  - 1.1. the common property;
  - 1.2. finances;
  - 1.3. administration;
  - 1.4. keeping accounts; and
  - 1.5. taking out insurances.
2. An Owners Corporation is also empowered to add to or amend the by-laws that facilitate its management of the Scheme. Currently, there are restrictions as to the matters which by-laws can regulate, noting that by-laws:
  - 2.1. are made in relation to the administration, control, use or enjoyment of the lots or the common property;
  - 2.2. must not be harsh, unconscionable or oppressive;
  - 2.3. must not prohibit or restrict the devolution of a lot;
  - 2.4. must not restrict children; and
  - 2.5. must not prevent the keeping of an assistance animal.

3. In its role as manager of the Scheme, an Owners Corporation must have the ability to manage how owners use their lots. This includes Short Term Holiday Letting (**STHL**).
4. STHL poses a dilemma for the Owners Corporation of a scheme. On the one hand, the authority of the Owners Corporation should not extend to prohibiting or restricting owners' rights in dealing with their lot in terms of restricting the enjoyment of their property rights altogether to lease or license their lots. However, on the other hand, an Owners Corporation should have adequate power to ensure that an owner's enjoyment of their property doesn't take away from the communal enjoyment of lots and common property.
5. We are of the view that:
  - 5.1. the law should not permit Owners Corporations to ban STHL.
  - 5.2. the use of lots for STHL and the management of its impacts within a scheme can adequately be dealt with through by-laws and specific legislative amendments, including specific provisions preventing Owners Corporations from being able to prohibit STHL altogether; and
  - 5.3. policy and technological directions in society are such that sharing economies are infiltrating all aspects of modern life. High-density living is no exception and indeed, as owners continue to enter into this on-demand style of living (factoring in population increases and clustering in city areas), the ability to exploit these technological economies will be expected. Consequently, the law should be reactive to these emerging factors rather than prohibitive.

## 2 - Amending the Strata Schemes Management Act (SSMA)

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1. At present, there are aspects of an Owners Corporation's ability to manage the common property in relation to STHL within a Scheme that are ambiguous or vague. It is our contention that the *Strata Schemes Management Act 2015 (NSW) (SSMA)* would benefit from legislative clarification in this regard.
  
2. Whilst Owners Corporations can currently restrict aspects of STHL under the SSMA:
  - 2.1. the remedies for breach are often inadequate;
  - 2.2. notification provisions are unclear; and
  - 2.3. there are no model by-laws in relation to STHL.
  
3. Examples of the issues highlighted in paragraph 2 above include:
  - 3.1. The absence of a statutory definition of STHL in the SSMA. Note that to remedy this, Schemes have applied their own definitions within by-laws that loosely align with Local Government rules and regulations. However, there is no uniformity across the SSMA as a result.
  - 3.2. An Owners Corporation's legal ability to restrict (or prohibit) STHL is not set out in the SSMA.
  - 3.3. There are limited dispute remedy provisions for Owners Corporations with regard to STHL disputes, noting:
    - 3.3.1. Owners Corporations must use the existing dispute mechanisms within the SSMA to pursue owners and occupants. This includes breach of a by-law, or those disputes that fall within the broader powers of the New South Wales Civil and Administrative Tribunal (**NCAT**).
    - 3.3.2. The effect of the situations highlighted in paragraphs 3.2 and 3.3 above has led to by-laws being overturned for lack of power (see case examples below at paragraph 4).
    - 3.3.3. The penalty provisions do not specifically deal with breach of STHL by-laws. Such breaches are as serious as situations of overcrowding and can often also involve overcrowding. An Owners Corporation's inability to effectively manage these issues both before the short-term rental and if there is a breach, has a real and damaging effect on both the scheme property and aesthetic for community owners and occupiers. This becomes a public policy issue.

3.3.4. There is no specific power in the SSMA that imposes joint and several liability for owners and occupants in breach of STHL by-laws.

3.4. The notification provisions within the SSMA and the *Strata Schemes Management Regulation 2016 (SSMR)* are limited in their application to STHL. The current model by-laws provide for notification of STHL arrangements, but do not specify what information is required of owners or occupants.

3.5. There are no model by-laws on STHL to provide guidance to Schemes.

4. At present, many Owners Corporations are seeking advice on by-laws to restrict or prohibit STHL. These by-laws remain tenuous, and by-laws seeking to prohibit STHL have been found to be unlawful across many States where they impinge on the ability of an owner to deal with their lot.

4.1. Recent examples include:

4.1.1. *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52

4.1.2. *Owners Corporation v Balcombe* [2016] VSC 384

4.1.3. *Macleay Tower & Villas* [2017] QBCCMCmr 12

5. In our view these problems can be remedied by inserting clear guidelines within the SSMA and SSMR. We set out proposed legislative amendments below, including the submission of a model by-law specifically dealing with STHL.

## Suggested Amendments to the Strata Schemes Management Act 2015

1. Insert definition of STHL that aligns with the *Environmental Planning and Assessment Act 1979* (EPAA) reforms.
2. Insert specific amendment to section 139(2) SSMA to include STHL as an item the by-laws cannot prohibit.
3. Insert sub-section to section 147 SSMA to increase the civil penalty applicable to breaches of by-laws regulating STHL.
  - 3.1. This could be in line with section 137 SSMA (occupancy limits) and corresponding penalty provisions (section 147(3) SSMA).
4. Insert sub-section to sections 146 and 147 SSMA to introduce joint liability to owners and occupants for breach of by-laws regulating STHL.
  - 4.1. This provision may include a defence to joint liability for an owner where that owner took reasonable steps to remedy the breach once notified by the Owners Corporation.
5. Insert new sub-section within section 258 SSMA requiring owners or occupants to notify the Owners Corporation in writing, or by electronic means, of a licence, lease, or sublease relating to an STHL activity, including the following information:
  - 5.1. the identity details of the proposed short-term renters, including name, phone number, address and email address;
  - 5.2. proposed length of stay;
  - 5.3. platform used to facilitate the hosting; and
  - 5.4. statement on measures to comply with the by-laws implemented by the Owner.
6. This information set out in paragraph 5 above would be kept on the Owners Corporation records separate and confidential to the other records.
7. Insert new model by-law dealing with STHL. We have included a template example below at Annexure A.

7.1. This model by-law would permit the Owners Corporation to restrict aspects of the use of lots for STHL and place requirements on Owners for information, notification and use of the property.

8. Insert new section into Division 3, Part 12 that provides a specific application process for monetary penalty claims for breach of STHL by-laws.

8.1. *This would then be mirrored in the NCAT Strata Disputes Form to commence an application.*

## 3 - Industry Self-Regulation

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1. The Holiday and Short-term Rental Code of Conduct (**the Code**) is the current mechanism for self-regulation in the STHL industry.
2. The Code sets out a number of guidelines and guiding principles designed to produce a more harmonious STHL industry. The Code, in its current form, is an admirable initiative. However, it has in our view, fallen short of providing robust remedies and control for Owners Corporations in NSW.
3. We submit that the Code requires updating to refine how it interacts with strata title properties and their stakeholders as follows:
  - 3.1. The current version of the Code is heavily focussed on the relationship between a rental provider (**Manager**) and the **Participating Organisations** that offer the service.
  - 3.2. Property managers of rental providers (**Property Manager**) are also included within the ambit of self-regulation. The Code seeks to encourage compliance by Managers through the Participating Organisations enforcing sanctions for a breach.
  - 3.3. Owners Corporations and by-laws are mentioned only briefly, in that the Manager is responsible for providing them to the renter. There is no comment on the content of those by-laws or their impact upon STHL.
  - 3.4. There are immediate issues with a voluntary code that does not integrate holistically with strata regulation and procedures, including:
    - 3.4.1. The Code requires the by-laws to be provided but does not impose any obligations on an owner to explain them, or understand how compliance can be met.
    - 3.4.2. Inadequate provisions for rectifying damage to common property.
    - 3.4.3. No requirement to engage with strata managers or Owners Corporation committees to understand common and lot boundaries, or procedures within a scheme. Owners do not always understand their scheme and are unable to provide correct information around common or lot property boundaries and the correct by-laws.



3.4.4. The enforcement provisions rely on Participating Organisations and Managers facilitating dispute remedy processes and do not specifically involve Owners Corporations in resolving disputes or sanctions.

3.4.5. Notice of the STHL arrangement to the Owners Corporation is not a mandatory requirement under the Code.

4. We are of the view that these issues can be resolved and adequately met through updating the Code and the strata laws collectively. More cross-pollination between these two areas will ensure that the Code reflects legislative requirements and offers consistency for dealing with strata titled schemes in the face of STHL and technological change.

## Annexure A - Example STHL Model By-law

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### Motion to Change the By-laws – STHL By-law – The Owners – Strata Plan No. XXXX

*The Owners – Strata Plan No. XXXX resolves:*

- (a) *by special resolution, pursuant to section 141 and section X of the Strata Schemes Management Act 2015 to add new By-law X for the benefit of the Owners Corporation as set out below; and*
- (b) *pursuant to section 273 of the Strata Schemes Management Act 2015, that the Strata Managing Agent be authorised to affix the seal and register this by-law on behalf of the Owners Corporation.*

### By-law No. X – Short-term Letting Restrictions

#### Scope of By-law

- 1) This by-law provides for the management of Short-Term Letting in the lots and on the common property within Strata Plan No. XXXX.
- 2) This by-law regulates how Owners and Occupants use the lots and common property in respect of Short-Term rentals organised for lots.
- 3) To the extent of any inconsistency with Local Authority Regulation Government regulation, such regulations prevail.

*[Note: If the scheme has a strata management statement, this statement should be amended to avoid conflicts and inconsistencies.]*

#### Definitions

- 4) In this by-law:
  - a) **Act** means the *Strata Schemes Management Act 2015* (NSW).
  - b) **Conditions of Notice** means the criteria that an owner or occupier must provide to the Owners Corporation in a Notice of Intention to use the lot for STHL.
  - c) **Notice of Intention** means notice provided to the Owners Corporation to use the lot for STHL from time to time.

- d) **Occupant** means the lessee, sublessee, licensee, sublicensee or other person authorised by the Owner to deal with the lot.
- e) **Owner** means the owner or owners of the lots from time to time in Strata Plan No. XXXX.
- f) **Owners Corporation** means the Owners Corporation of Strata Plan No XXXX.
- g) **Short-Term Letting (STHL)** means the granting of a lease, sublease or licence by an owner, or occupant over a lot in the scheme for a period less than 90 days.
- h) **Short-Term Letting Industry** means the collective Short-Term Letting Providers, whether organised by an Industry Association or otherwise.
- i) **Short-Term Letting Provider** means intermediaries that facilitate STHL through electronic means, or through an Agent in person or electronically.
- j) **Short-Term User (STU)** means the person or persons who organise to use the lot as a Short-Term Let, whether through an intermediary or otherwise.
- k) **Visitor** means non-owners or non-occupiers who attend at the building from time to time.

## Approval to Short-Term Let

- 5) An owner or occupier of a lot may use their lot for STHL provided that:
  - a) the owner or occupier submits to the Owners Corporation a Notice of Intention setting out the Conditions of Notice requirements 14 days prior to the Short-term let commencing; and
  - b) the Owners Corporation does not respond within the 14 day period with written reasons as to why the lot should not be used for STHL.
- 6) An Owners Corporation must only refuse to permit use of the lot for STHL for the following reasons:
  - a) the use of the lot would lead to a breach of the by-laws for the scheme and such a breach cannot be mitigated sufficiently; or

- b) the use of the lot is not covered by the Owners Corporation insurance policy; or
  - c) the use of the lot would be an identifiable fire safety risk that the Owners Corporation is not required, or not equipped to manage; or
  - d) the use of the lot is not permitted under relevant Local Authority Regulation, or other State and Federal legislation prohibiting or restricting the use; or
  - e) the Owners Corporation is undertaking structural, or invasive rectification or capital works that would make the use of the lot unsuitable at that time; or
  - f) the person submitting the Notice of Intention is not authorised to deal with the lot; or
  - g) the Owners Corporation would by permitting the use put itself in breach of Local Authority Regulation, State or Federal law.
- 7) If the reason for refusal can be resolved by the Owners Corporation altering its management of the scheme, the Committee must call a General Meeting as soon as possible to put the matter to the Owners.
- 8) If the Owners Corporation fails to respond within the 14 day period, or does not respond to request further time that is reasonable in the circumstance, the Owners Corporation is deemed to have approved the request.
- 9) For the avoidance of doubt, the Committee is empowered to deal with notices and approvals under this by-law.

## **Conditions of Notice**

- 10) An owner or occupier providing a Notice of Intention under this by-law must include the following information within that notice, described as the Conditions of Notice:
- a) the identity details of the STU, including their:
    - i) phone number;
    - ii) ordinary residential address;
    - iii) email address; and
    - iv) copy of Licence or identity card.
  - b) the proposed length of stay;

- c) the Short-Term Letting Provider used to facilitate the STHL; and
  - d) a statement indicating how the owner or occupier intends the STHL to comply with the existing by-laws for the scheme.
- 11) The details provided in a Notice of Intention must be kept separate to and confidential from the records of the Owners Corporation.

## **Obligations for STHL**

- 12) An owner or occupier granted approval under this by-law must:
- a) abide by the by-laws;
  - b) comply with any lawful directions of the Owners Corporation or its representatives;
  - c) comply with Local Authority Regulation, State and Federal Laws; and
  - d) comply with any House Rules in place through the Short-Term Letting Provider, owner or occupant, or the Owners Corporation.

## **Indemnity**

- 13) The Owner indemnifies the Owners Corporation against legal liability, loss, claim or proceedings for injury, loss or damage to the common property or a third party as a direct result of the STHL.
- 14) Such loss or damage suffered by the Owners Corporation may be recovered from the Owner as a debt due and payable on demand with interest accruing at 10% per annum from the time the debt is incurred until the debt is paid.
- 15) For the avoidance of doubt, nothing in clauses 9 and 10 above limit the Owners Corporations ordinary legal rights under the Strata Schemes Management Act 2015, or other Local Authority Regulation, State or Federal law to claim against an Owner or Occupier in respect of the use of the lot for STHL.

## **Breach of By-law and Dispute Resolution**

- 16) The Owners Corporation reserves the right to revoke approval for STHL in respect of a breach of this by-law, should that breach not be rectified within 7 days after the Owners Corporation has notified the owner or occupier in writing to rectify the breach.

17) The Owners Corporation reserves its rights to pursue the Owner or Occupier, jointly or separately for breach of this by-law subsequent to sufficient notice and failure to remedy a breach.