

SHORT-TERM LETTING IN NSW

'OPTIONS PAPER'

Response from:

Neighbours Not Strangers

October 2017

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Neighbours Not Strangers

Short-Term Lets Have No Place in Our Homes

NSW GOVERNMENT'S 'OPTIONS' PAPER Short-Term Holiday Letting in NSW

EXECUTIVE SUMMARY:

In May 2017 we presented to Ministers of the NSW Parliament our Report: *Give Us Your Homes – The Rise and Rise of Short-Term Letting in NSW*¹. There has been no acknowledgement of the Report or its contents.

Fact: The short-term tourist/visitor letting of a residential property is a Planning and Zoning issue. Homeowners, however long ago, had a 'choice' and exercised that choice by signing contracts and purchasing property - residential single-family dwellings and/or residential flat dwellings. Nearly all concurrently signed with financial institutions, committing to residential home loan mortgages. Others entered into a residential tenancy agreement and leased a residential dwelling. Others still purchased commercial property. All freely exercised a 'choice'. When purchasing residential property the conveyancy process includes clear instructions as to the 'permissible use with or without consent' of a property.

There are those who, respecting our legislation, have chosen to invest - usually hundreds of thousands of dollars more - to upgrade a single-family dwelling to the standards mandated to facilitate a commercial *Bed & Breakfast*, *Guesthouse* or *Boarding House* operation. That was their 'choice', and they are now seeing their livelihoods decimated by unrestricted competition from unlicensed, unregulated short-term rental operators.

The terms "Home Sharing" and "The Sharing Economy" are complete misnomers for what is the mass advertising of residential homes for rent as commercial premises. From night one, these short-term rentals are a commercial rental for maximum financial gain; income received from residential tenancies being shunned as 'insufficient' by those involved in this corporatisation of housing. *Airbnb* argues that their landlords have the 'right' to 'share' homes. They do not have the 'right' to operate from residential premises an unlicensed, commercial:

- Bar, café or restaurant, because they have a kitchen,
- Panel beating shop, motor mechanics or other car repair facility, because they have a garage and yard,
- Dry-cleaners, because they have washing machine, iron, wardrobes/racks/coat hangers,
- Backpackers lodge, guesthouse, serviced apartment, motel or hotel, because they have a bedroom.

A property rented as short-term holiday rental accommodation to persons using or occupying it other than in the ordinary family or household way, has been judged by the *NSW Land and Environment Court* as not satisfying the meaning of the term "domicile", and as lacking the requisite degree of permanence of habitation or occupancy for the property to be considered a "dwelling-house". Effectively, a 'change of use' has occurred.

Short-term holiday landlords, agents and platforms are putting Class 1(a) and Class 2 – *Building Codes of Australia (BCA)/National Construction Codes (NCC)* single-family dwellings and flat dwellings, plus bunk beds in roof cavities, spaces under stairs, mattresses in pantries, tents, campervans, tree houses, granny flats, garages, sheds etc – to a Class 1(b) and Class 3 BCA/NCC 'use' without any of the BCA/NCC infrastructure mandated.

In line with legislation, NSW Land and Environment Court judgments plus Residents' expectations:

The use of Class 1(a) property for Class 1(b) and Class 3 use should be permissible subject to Neighbours'/Council approval and on strict condition of the following:

The property in question is the primary place of residence of the Applicant seeking licensing of said property for tourist/visitor accommodation purposes,

The Licensee is restricted to one such licence – the license covering his/her primary place of residence,

The property to be upgraded to meet infrastructure requirements for class 1(b) or class 3 property (see BCA/NCC. See also, City of Sydney *Visitor and Tourist Accommodation Development Control Plan*),

Recommending also: an **Affordable Housing Levy** be applied to **all new Applicants** wishing to convert a residential property for use as tourist/visitor accommodation. (City of Sydney *Affordable Housing Levy* to form the template for such a Levy),

A further **non-negotiable condition** of licensing: the property **must be staffed 24/7 by the license holder or onsite manager**,

Payment of an annual license fee, which will produce a **license number for each dwelling, which must be quoted on all listings where a property is advertised**. (See *Platform Accountability* – page 15)

Once this criterion is met, landlords have the right to advertise their property for short-term tourist/visitor rentals via the Agent/s and/or on the platform/s of their choice; hundreds of options are available to them.

¹ https://docs.wixstatic.com/ugd/5a8126_114b8679b641482f951bd0bf596782d8.pdfhttps://docs.wixstatic.com/ugd/5a8126_e3c9aed8660e40668e8c6ab3e492ecc9.pdf

The use of Class 2 residential flat-dwelling property for short-term tourist/visitor accommodation is unacceptable. Submissions to the NSW Parliamentary Inquiry – *Maestri Towers/Dr Michael Heaney* – set out the unsustainable and unfair financial costs forced upon all strata owners when one or more owners within a strata scheme operate short-term tourist/visitor rentals in a class 2 flat dwelling building. Class 2 flat dwelling property does not meet Class 3 BCA/NCC standards; to share the cost of the required structural upgrades amongst all owners would be unfair as judged by the *NSW Land and Environment Court (LEC)*. LEC case law has consistently and repeatedly judged ‘mixed use’ – STRL with Permanent Residents – as “*fundamentally incompatible*” , , , .

As a general rule, Land Use legislation is governed by the State, implemented and enforced by Local Government authorities. It is incumbent on legislators that the power afforded them under the *NSW Environmental Planning and Assessment Act*⁶ and *NSW Environmental Planning and Assessment Regulation 2000*⁷ is adequate and that **their power and responsibility to enforce legislation is exercised.**

Inherent within the term "domicile" is, as a long line of authority in this jurisdiction has established, the notion of a permanent home or, at the very least, a significant degree of permanence of habitation or occupancy. NSW case law examples supporting this position include but are not limited to:

(Potter v Minahan [1908] HCA 63; (1908) 7 CLR 277 at 288; North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 21 NSWLR 532 at 538A-B; [1992] North Sydney Council v Sydney Serviced Apartments Pty Ltd; [2001] Foster v Sutherland Shire Council; KJD York Management Services Pty Ltd v City of Sydney Council [2006] NSWLEC 218; (2006) 148 LGERA 117 at [8]-[18]; City of Sydney Council v Waldorf Apartments Hotel Sydney Pty Ltd; [2007] 187 Kent street v Council of the City of Sydney; [2007] 187 Kent street v Council of the City of Sydney Appeal; [2008] NSWLEC 97; (2008) 158 LGERA 67 at [38]; Warlam Pty Ltd v Marrickville Council [2009] NSWLEC 23; (2009) 165 LGERA 184 at [35]-[36]; Najask Pty Ltd v Palerang Council [2009] NSWLEC 39; (2009) 165 LGERA 171 at [15]; Vic Vellar at [32]; Dooralong Residents Action Group Pty Limited v Wyong Shire Council [2011] NSWLEC 251; (2011) 186 LGERA 274 at [110]; 820 Cawdor Road at [24]; [2011] Council of the City of Sydney v Oaks Harmony; [2011] Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri) 234; [2011] Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri) 235; GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143 at [20]-[27] and Haddad at [47]; [2013] Dobrohotoff v Bennic; [2014] Council of the City of Sydney v Con Kotis/Australian Executive Apartments at [14/4923].

In terms of illegal short-term rentals, Local Government representatives admitted to the NSW Parliamentary *Inquiry* that they have imposed voluntary moratoriums on taking action against breaches of Planning legislation. It is appropriate here to quote directly Justice Rachel Pepper of the *NSW Land and Environment Court*:

“...it appears that the council has been content for the Court to resolve the matter. On any view, this is unsatisfactory and amounts to an effective abrogation by the council of its fundamental duties and responsibilities. These duties include, amongst other things, to manage development and coordinate the orderly and economic use of land within the area under its control. By leaving it to the Court to determine this important issue, the council, by its inaction, has, in my opinion, failed to fulfil its core functions and has failed its constituents.”

Where too an individual landlord might claim that they are unaware that use of a residential property for short-term rental agreements is not *permissible* this, according to the NSW Land and Environment Court, “*is not sufficient*”⁸.

It must be stressed: the “*fundamental incompatibility*” of mixing short-term tourist/visitor rentals with permanent residents is not confined to those living in strata buildings. The judgement of the Hon. Justice Rachel Pepper – [2013] *Dobrohotoff v Bennic*⁹ – must be studied in its entirety, as all points covered are relevant to the so-called *options* presented in NSW Ministers Roberts and Kean’s ‘*Options Paper*’. Justice Pepper’s judgment should also be read in conjunction with the other judgments listed previously in this document.

Successive NSW Ministers for Local Government have permitted the growth of illegal rentals to reach such an extent that *Airbnb*’s Brent Thomas was happy to tell *The Australian* newspaper on 19 September 2017¹⁰: “*This country has the highest percentage of active Airbnb users in the world...*” A former staffer of Gabrielle Upton, current Minister for Local Government, is now one of *Airbnb*’s army of employees here in NSW. As too, are so many others who were former employees of senior ‘*policy makers*’ and *Airbnb*’s growing list of ‘*corporate partners*’.

² <https://www.caselaw.nsw.gov.au/decision/549f8bb83004262463ada6bc>

³ <https://www.caselaw.nsw.gov.au/decision/549f99013004262463b0cb15>

⁴ <https://www.caselaw.nsw.gov.au/decision/54a6344b3004de94513d842a>

⁵ <https://www.caselaw.nsw.gov.au/decision/54a6364d3004de94513d90dd>

⁶ http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/epaaa1979389/

⁷ http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_reg/epaar2000480/

⁸ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWLEC/2013/61.html?stem=0&synonyms=0&query=title>

⁹ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWLEC/2013/61.html?stem=0&synonyms=0&query=title>

¹⁰ <http://www.theaustralian.com.au/business/technology/hotel-lobby-circles-the-wagons-to-shut-us-out-airbnb/news-story/9aedf5c6b1a78c00f4aae0bacc20fd69>

Local Government NSW's President Keith Rhoades, wrote in his submission¹¹ to the Parliamentary *Inquiry* into the adequacy of legislation on short-term rentals:

"NSW case law establishes that short-term renting of a house does not change its residential character... While a number of matters have proceeded to the Land and Environment (sic) Court, even the court has not been able to provide clear direction on how to apply these definitions and has recognised that there is ambiguity in the law. The court has not been able to provide a definitive position on the vexed problem as to when a dwelling or dwelling house used as a holiday home becomes another activity, due to the level of regularity of that property being rented for a 'holiday house'. This is partly due to the range of activities that have come before the court and the court's recognition that the matters before it are often the more extreme cases that are not necessarily typical.

Nevertheless, the court has provided guidance on the issues that includes:

- *A dwelling house that is rented out for a holiday home for a short period of time is a bone fide use of a dwelling house and does not change its use per se. The commercial arrangements of the rental of the property are not relevant to the use - see Dobrohotoff v Bennic [2013] NSWLEC61.*
 - *The repeated rental of a property may change its use; depending on the circumstances-same as above case.*
 - *90 days has been offered as a reasonable period to determine whether a change of use has occurred - see Sutherland Shire Council v Forster & Anor [2003].*
- A number of councils have amended their LEPs and DCPs to resolve these issues locally. A prominent court case, Dobrohotoff v Bennic [2013] NSWLEC61, found the ongoing and repetitious use of a dwelling house in Terrigal as a party house as an illegal activity in a Residential 2(a) zone. Subsequently, in 2013/4 Council:*
- *amended its LEP (by introducing cl 7.6) that requires DA consent for certain size dwellings to be rented for short term stays; and*
 - *inserted section 13 in its Development Control code that provides planning standards to manage short term rentals in dwellings."*

Mr Rhoades and his Chief Executive were asked by us to substantiate their claims to Parliament, given that our understanding of case law plus that of a recently retired Commissioner of the *NSW Land and Environment Court* could not be more different to theirs. We also asked whether or not such amendments to LEPs by a Local Government authority effectively circumvent *BCA/NCC criteria, Commonwealth legislation on Disability Access*, plus the recommendations of multiple *Coronial Inquiries* and *Inquests*. No response was received.

The *NSW Local Government Act*¹² sets out precisely a Council's duty in relation to the making and determining of applications for approval, compliance, orders, entry onto land and other powers, including recovery of cost of entry and inspection and compensation, the authority to enter premises and under what circumstances entry may be made to a residence, search warrants, how councils exercise their functions and how councils can be made accountable for their actions. The NSW Ombudsman is empowered to investigate councils who fail to enforce legislation within six weeks of being notified of an issue. Again, here is a classic case of abrogation of duty by those in local councils across NSW. All residents who have had their concerns and complaints about short-term rentals ignored by councils should perhaps now simultaneously contact and complain to the NSW Ombudsman.

Yes, the use of residential housing for tourist/visitor purposes has been carried on in NSW for many years and legislators, unless on the receiving end of consistent pressure from profoundly disrupted individual homeowners, have always turned a blind eye to this "illegal use of premises". Those engaged in this activity know of Federal and State Legislation, *LEC* case law plus issues of non-compliance. One indicator alone: the exact location of the properties under the control of STR operators is never indicated or advertised.

Properties rented short-term are made available for stays as short as 60-minutes. Just as with any hotel, the listings and/or instructions received will provide for a "check in" and "check out" time, have *deposit* and *cancellation* policies, and provide for a *cleaning fee* and *credit card payments*. No *condition report* will be presented and agreed prior to occupation and no *bond* will be lodged with the *Residential Tenancies Bond Board*. Clients occupying strata properties will usually receive direct instructions to "be discreet about mentioning 'Airbnb' to anyone in the building and under no circumstances should guests ever leave the keys with the concierge." Other than Owner/Occupiers, for those occupying residential premises the *NSW Residential Tenancies Act 2010* applies to 'any residential tenancy agreement entered into' after the commencement of the Act: A 'residential tenancy agreement' is defined to mean any agreement, whether or not in writing and whether express or implied, under which any person for valuable consideration grants to any other person a right to occupy, whether exclusively or otherwise, any residential premises, or part of residential premises, for the purpose of residence. In relation to short-term rentals, the *NSW Residential Tenancies Act* is "crystal clear" in terms of *Premises to which the Act does not apply*¹³, and *Agreements to which the Act does not apply*¹⁴. It is unsettling to have to direct NSW Tenants' Union Staff to these sections of their *Act*.

¹¹ <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/53903/Submission%20No%20197%20-%20Local%20Government%20NSW.PDF>

¹² http://www5.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/

¹³ <https://www.legislation.nsw.gov.au/~view/act/2010/42/part1/div2/sec7#>

¹⁴ <https://www.legislation.nsw.gov.au/~view/act/2010/42/part1/div2/sec8>

Short-term tourist/visitor rental agreements are NOT residential tenancy agreements:

RESIDENTIAL TENANCIES ACT 2010 - SECT 7

Premises to which Act does not apply

7 PREMISES TO WHICH ACT DOES NOT APPLY

This Act does not apply in respect of the following premises:

- (a) premises to which the *Landlord and Tenant (Amendment) Act 1948* applies,
- (b) premises used to provide residential care or respite care within the meaning of the *Aged Care Act 1997* of the Commonwealth,
- (c) serviced apartments, that is, buildings or parts of buildings used to provide self-contained tourist and visitor accommodation that are regularly cleaned by or on behalf of the owner or manager,
- (d) premises used as a hotel or motel,
- (e) premises used as a backpackers' hostel,

RESIDENTIAL TENANCIES ACT 2010 - SECT 8

Agreements to which Act does not apply

8 AGREEMENTS TO WHICH ACT DOES NOT APPLY

(1) This Act does not apply to the following agreements:

- (h) an agreement made for the purpose of giving a person the right to occupy residential premises for a period of not more than 3 months for the purpose of a holiday,

Sydney is ranked 4th in the world in terms of *Airbnb* listings. How then can a *NSW Tenants' Union* report¹⁵ claiming no adverse impacts on rent due to short-term rentals – a report praised repeatedly by *Airbnb* – be taken seriously, especially when Union Staff fail to respond to questions of whether or not they are *Airbnb* landlords/users?

Short-term tourist/visitor rentals across NSW have exploded over recent years. The statement made by *Airbnb's* Sam McDonagh in June 2016 is noted: “*Australia is our most penetrated market.*”

Real estate agents, booking platforms and all others engaged in the short-term rental of homes are fully cognisant of the fact that they are breaching multiple levels of legislation. They understand the difference between a *residential* and *commercial* property and a *residential* and *commercial* lease, and an *agreement to occupy*.

NSW homeowners have undertaken all due diligence when purchasing residential single-family dwellings and residential flat dwellings. Retrospectively deeming buildings and residential suburbs as ‘mixed use’ for the financial benefit of a small minority and multi-billion dollar foreign-owned booking platforms is in effect rezoning by stealth and is unacceptable. Residents’ rights to the quiet enjoyment of their homes and their residential neighbourhoods are due all priority over those intent on distorting our housing supply and breaking our laws for higher commercial profits.

Stressing again for the record: Short-term rental landlords, agents and platforms are diverting housing stock - real estate - for commercial tourist/visitor accommodation purposes. This action involves the penetration and control of homes and their unlawful, unregulated use simply for higher commercial profits. There is no limit to the amount of housing stock that is now exposed to a practise carried out by commercial operators, with our NSW homes advertised to tourists and visitors from all countries except Syria, Iran and North Korea:

“There has been a steady loss of existing lower-priced housing stock in Sydney’s inner suburbs since the late 1980s, when developers began to convert older buildings into budget tourist accommodations (known as “backpacker” hostels; Peel & Steen, 2007). Attempts to control this process through the planning system have improved safety standards and restricted the location of these hostels to designated areas, although the loss of low-cost rental housing has continued. Thus, the entrance of Airbnb in Sydney occurred within a local context already concerned by the intrusion of tourists in residential areas.” (Gurran/Phibbs¹⁶)

Note too, decade-long efforts by *Residential Action Groups*, such as those along the NSW North and South Coasts, who have endeavoured to enlist, without success, the assistance of their Local Councils in enforcing Planning and Zoning legislation.

STR Platform operators recruit landlords by way of finely tuned marketing and the lure of greatly increased profits. *Airbnb-type* rentals are not ‘*sharing*’ homes with those in need of a home. Those who use residential dwellings for short-term tourist/visitor rentals – the landlords, clients and platform operators - deliberately block residents’ access to affordable housing by way of a huge pricing impediment. Short-term rental platforms are multi-billion dollar businesses backed by venture capital. Period.

The funds available to the likes *Airbnb* to literally ‘*buy and lie*’ their way to controlling our homes and rupturing communities appear limitless. The exact amount that has been spent in NSW on contracting the services of *political lobbyists* and *corporate partners*, the recruitment of whole teams of employees, plus *advertising* and *marketing* since the announcement in September 2015 of a *Parliamentary Inquiry* is unknown; *Airbnb* and others refuse to respond to questions. And the sending of a single email from *Headquarters in Ireland* will rally a response from a whole army of *Airbnb* ‘*converts*’ intent on bypassing urban building, health, safety, planning and

¹⁵ <https://files.tenants.org.au/policy/2017-Airbnb-in-Sydney.pdf>

¹⁶ <http://www.tandfonline.com/doi/full/10.1080/01944363.2016.1249011#.WG8eCzLpZ6k.twitter>

other regulatory controls. *Airbnb's Head of Global Community* – that is the title Douglas Atkins goes by - entitled his 2004 book: “*The Culting of Brands: Turn Your Customers into True Believers*”.

Reference testimony given before the Parliamentary Hearing Committee: a Representative from the *NSW Business Council* stated that he was a regular ‘user’ of *Airbnb* while travelling. This admission does not appear in the transcript of the Hearing; witnesses have the right to alter testimony prior to publication. The *Business Council's* representatives were extraordinarily enthusiastic about the activities of STR operators, so much so that one Parliamentary Inquiry Member questioned whether they had any concerns whatsoever for their Accommodation Industry Members. They did not. Seven weeks ago *Airbnb* reportedly donated US\$100,000¹⁷ to a San Francisco merchant group. In 2015, during one short campaign, *Airbnb* spent \$8,000,000 to defeat legislation¹⁸. **In NSW, who has the power to investigate the amount of money paid to date, and to whom?**

Airbnb's argument that landlords have the ‘right’ to share their homes receives the same response in jurisdiction after jurisdiction around the world; the same, relevant pushback is delivered. The objective of STR landlords is not ‘sharing’ with fellow residents/tenants; quite the opposite. The objective is extracting the highest financial return possible via a commercial use of a residential property, while categorically shunning those in need of sharing a rental home and dismissing the ‘rights’ of others to live in designated residential buildings and residential suburbs.

Examples of *aiding and abetting* and breaking of Planning/Zoning legislation on a massive scale include statements made by Trevor Atherton of *Atherton Advisory Pty Ltd*, the registered lobbyist for *Expedia/Stayz* plus the *Holiday Rental Industry Association* in: 1) an ABC Radio Interview¹⁹, and 2) testimony²⁰ given under oath to the Parliament of Victoria – the Hansard record is clear. Atherton freely admitted that short-term rentals are a breach of legislation, going so far as to declare them as “*illegal in New South Wales*”.

Another fact: *Airbnb, Expedia/Stayz and clones* take no responsibility for regulatory compliance or minimising the severe adverse impacts of their commercial activities. ‘Privacy concerns’ are used as a means of achieving ‘non-disclosure’ each and every time their trade practices are questioned and challenged. This places squarely upon the shoulders of legislators a ‘catch us if you can’ contest and ensnares individual homeowners and those seeking a rental home in classic *David v Goliath* confrontation. *Airbnb* “encourages hosts to think carefully about their responsibilities. Hosting offers rich experiences, but comes with a certain level of commitment”²¹. There: *Airbnb* has addressed the whole spectrum of and met all global obligations when it comes to “compliance”; its contract with landlords sees it completely absolved of any further legal accountability/responsibility/involvement. Only when challenged by legislators does *Airbnb* engage, using its corporate bulk to demand its landlords’ ‘right’ to breach legislation. *Airbnb's* CEO Brian Chesky: “*We think government should exist as the place of last recourse*”²².

NSW has specific legislation dealing with unlicensed trading by a corporation and individuals²³. Those covered include: real estate agents, stock and station agents, business agents, strata/community managing agents and on-site residential property managers. Those working in the ‘industry’ are required to apply for a certificate of registration. Different *certifications of registration categories* apply to different industry sectors. *The Property, Stock and Business Agents Act 2002*²⁴ sets out the *Rules of Conduct and Discipline*. Monetary penalties apply: \$11,000 for an individual and \$22,000 for a corporation.” The Act also has specific instructions regarding deposits, refunds, written agreements, trust accounts and contracts.

The same Act says: “*You do not require a licence to manage or operate a general boarding house, but all boarding houses which provide accommodation to 5 or more people for a fee must be registered with Fair Trading*.” Why does the Act give short-term rental operators such a total ‘free ride’ on matters of compliance?

A specific exemption under the same Act reads: “*short term accommodation booking agents (for stays of not more than 2 months), one does not need a licence if the stays are less than 2 months and one does not accept any money from people making a booking*”. It would therefore equate that, under the Act, when one does take money in NSW from people booking short-term accommodation of less than 2 months, it is a condition of the Act that one does hold a licence. How and when has this requirement been enforced and how many enforcement notices and disciplinary fines have been issued to date? Are we safe in estimating that no one has been fined; do we have yet another level of legislation, specifically applying to short-term tourist/visitor rentals, which is not being enforced?

As with *Transport of London's*²⁵ decision (22 September 2017) that *Uber* is unfit to run a taxi service, thereby stripping them of their licence to operate in the City of London, in the interests of our residents and visitors, we too demand that the NSW Government take similar action against Real Estate Agents and online booking platforms who make available class 1(a) and class 2 dwellings as unregulated, unsafe short-term tourist/visitor rentals.

¹⁷ <http://www.sfexaminer.com/sf-merchant-group-mulls-100000-donation-airbnb-advocate/>

¹⁸ <http://www.breitbart.com/big-government/2015/11/02/airbnbs-8m-political-campaign-vs-proposition-f/>

¹⁹ <http://www.abc.net.au/radio/hobart/programs/nightlife/is-airbnb-all-that-its-made-out-to-be/8661592>

²⁰ https://www.parliament.vic.gov.au/images/stories/committees/SCEP/Owners_Corporations_Amendment_Bill/Transcripts/1-HRIA.pdf

²¹ <https://www.airbnb.com.au/help/article/1377/responsible-hosting-in-australia>

²² Clampet, “Airbnb CEO responds to Illegal Rentals Story”, Tom Slee

²³ http://www.fairtrading.nsw.gov.au/ftw/Property_agents_and_managers/Licensing_and_certification.page?

²⁴ http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/psabaa2002385/

²⁵ <https://tfl.gov.uk/info-for/media/press-releases/2017/september/licensing-decision-on-uber-london-limited>

Under *Australian Consumer Law*²⁶, it should be considered that *Airbnb*, *Expedia/Stayz* and other short-term letting agents and operators' conduct demonstrates a lack of corporate responsibility in relation to a great number of issues that have major implications. These include but are not limited to their unsatisfactory approach to:

- Consumer guarantees,
- Safety,
- Proper business practices,
- Unfair contract terms,
- False and misleading claims,
- Remedies,
- Mandatory reporting requirements,
- False and misleading representations/testimonials,
- Supply after accepting payments,
- Sales practices,
- Payment and supply of goods and services.

Assuming our senior Public Servants have considered our *Federal Competition and Consumer Act*²⁷, plus the *Warranties and refunds – a guide for consumers and business*²⁸ and the *Trade Practices Act*²⁹, it would have been useful to have had some idea of the source of the following statement which appears in the '*Options Paper*'. In fact, we asked who authored the '*Options Paper*'. No answer was provided:

*"In NSW, any attempt to regulate STHL ownership may be anti-competitive and would need to be carefully considered"*³⁰.

Recapping: given that *Transport for London* has led the way with action on *Uber's* malpractice and given the poor business standards of *Airbnb-type* operators, we wait to see how Ministers and Public Servants manage to orchestrate arguments and policy whereby short-term rental agents and platforms are permitted to continue shoddy operations in NSW.

One NSW operator recently shocked Senior Public Servants by declaring: *"Disabled guests can simply choose to stay instead with an approved accommodation provider where they will have disabled access and facilities."* A recent *Rutgers University* study³¹, based on more than 3,800 *Airbnb* booking requests sent by researchers, reported that bias is common; travellers with disabilities are more likely to be rejected and less likely to receive '*pre-approval*' or '*temporary clearance*' from *Airbnb's* landlords. STR landlords operate by flouting regulations and the conditions imposed on other accommodation providers under our *National Disability Discrimination Act*³²:

"Here's the flip side of the tech revolution: Platforms like Airbnb seem to be perpetuating or increasing opportunities for exclusion, both economic and social." (Lisa Schur, professor at the Rutgers School of Management and Labor Relations.)

When it comes to discrimination, add to the list of those on the receiving end: Gay couples, Muslims, people of colour and varying ethnic backgrounds, single men, groups, people with children, etc.

One never hears of Hotels rejecting booking requests based along such lines, yet discrimination is rife across short-term rental platforms. Facebook groups have *Airbnb 'hosts'* swapping all type of unscrupulous advice.

Airbnb for one has confirmed in testimony to a Federal Senate *Inquiry* that they route income and profits from short-term rentals through Ireland, where of course taxes are lower. *"Their Australian operations merely provide support services for (the) parent company based (effectively in the US, but for tax purposes) in Ireland."*³³ Sending this untaxed revenue offshore for services delivered here alarmed Australian Federal Senators. \$\$Millions lost?

STR platform operators want Government to grant them access to our homes, with those based in NSW promising, '*hand on heart*', that an industry-managed *Code of Conduct* is guaranteed to solve every sort of issue. This approach has failed miserably to date; if it hadn't, we wouldn't be locked in this very process. Parliament's *Inquiry* and the '*Options Paper*' did not and cannot guarantee that any *Code* would be in the least bit effective. In support of this stance, a 2014 Report³⁴ from Deakin and Monash Universities concluded:

"Voluntary, non-regulatory guidelines tended to be seen as more productive for bringing about change, although this came with the risk of divergent activities and that key issues would remain unresolved. Voluntary, practice-led developments also had the potential to raise complexity and confusion rather than reducing it."

²⁶ http://www.fairtrading.nsw.gov.au/ftw/About_us/Legislation/National_reforms_to_consumer_laws/Consumer_law_changes_in_NSW.page

²⁷ <https://www.accc.gov.au/system/files/Small%20Business%20and%20the%20Competition%20and%20Consumer%20Act.pdf>

²⁸ <https://www.accc.gov.au/system/files/Warranties%20and%20refunds%20-%20a%20guide%20for%20consumers%20and%20business.pdf>

²⁹ http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/num_act/tpa1974149/

³⁰ <http://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

³¹ https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/disability_access_in_sharing_economy.pdf

³² http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/dda1992264/

³³ <http://www.smh.com.au/business/the-economy/uber-airbnb-reveal-they-send-profits-offshore-20151006-gk2v5z.html>

³⁴ <https://www.cpaaustralia.com.au/~media/corporate/allfiles/document/professional-resources/sustainability/effective-integrated-reporting.pdf?la=en>

A 2015 Australian Competition and Consumer Commission report³⁵ into the *sharing economy and the Competition and Consumer Act* concluded that there should be no different standards required to those operating in traditional markets:

“Platform providers certainly have incentives to provide a high quality and safe service, and both enforced and reputational quality mechanisms can support these incentives. Whether these result in a similar level of quality to that which would be socially optimal (and therefore improve on a more direct regulatory approach) will depend on the particular case in question. Quality and reputation are one of concern for platforms, but their financial concerns extend to other areas (such as securing adequate network size) and then these pressures may work against an optimal level of consumer protection.”

Federal Labor Party Member Andrew Leigh noted:

*“It is not clear that these internal processes and feedback mechanisms are sufficient to guarantee public safety or consumer rights. The lack of transparency about how these schemes operate, coupled with a lack of legal enforcement mechanisms, raises questions about whether Australian consumers are appropriately protected when using sharing economy services.”*³⁶

If an industry-managed *Code of Conduct* is doomed to failure – as we know it is – how could *empowering strata committees* to oversee this super-charged commercial activity deliver any better results?

We strongly recommend that legislators disregard the *Grattan Institute* report³⁷ on short-term rentals; the narrowness, lack of data and any semblance of proper scrutiny of the NSW short-term rental landscape should see this work and ‘findings’ dismissed as (now outdated plus as some academics have judged) “*appalling*”. The *NSW Business Council* recommends this report to Parliament; the advice of their representatives appear extremely conflicted, which merely lends weight to our argument. Others are somewhat kinder, describing the report as taking an “*ideological free-market position that doesn’t care for data*”, and concluding that it is better described as “*prejudice rather than evidence-based*”. By way of one reputable example only, we refer instead to the recent *Boston Journal of Economics* paper³⁸, which concludes:

“Almost half of Boston’s Airbnb listings are offered by those with more than one simultaneous listing in the city”, plus “there is a direct correlation between Airbnb density and the price of housing. If Airbnb growth persists at current growth rates in areas where demand for rental housing is outpacing supply, rents will continue to increase.”

According to the ‘*Options Paper*’, which quotes the now discredited *Parliamentary Course Inquiry*, “*STHL is estimated to be worth \$31.3 billion nationally, providing income for property owners and creating jobs through the establishment of new businesses to manage transactions between property owners and customers. In NSW, STHL constitutes approximately 50% of the national total...*”³⁹ Notably, no data was provided to back this claim. We believe these figures may have been volunteered by the *NSW Business Council* – please see earlier remarks.

Numerous reports have been commissioned and volunteered by *Airbnb* and *Stayz/Expedia*, claiming enormous financial contributions to our State’s economy. Of course, were *Airbnb* and *Stayz/Expedia* to disappear, tourists and visitors would cease visiting and staying...yes? *No*. Taking *Airbnb* and *Expedia/Stayz*’s claims of hundreds of millions of dollars spread across NSW - all thanks to them - by comparison, the City of San Francisco’s independent Financial Controllers’ data concluded:

“The citywide economic harms associated with higher housing costs are fairly severe. According to the REMI model, removing a single housing unit from the market would have a total economic impact on the city’s economy of approximately –\$250,000 to –\$300,00 per year. This exceeds the annual total economic benefit from visitor spending, host income, and hotel tax, given prevailing short-term rental rates.

On a net basis, then, a housing unit withdrawn from the market to be used for short-term rentals produces a negative economic impact on the city, even if the unit generates host income, visitor spending and hotel tax every day of the year.”⁴⁰

NSW Ministers Anthony Roberts and Matt Kean’s ‘*Options Paper*’ aims to “*provide a framework...enabling the activity to continue to take place, without unduly impacting on local communities and the safety of visitors*”. The legislative framework to facilitate these aims already exists and extends across many levels of legislation.

The “*activity*” – the short-term tourist/visitor rental of residential dwellings - must only take place as a licensed and regulated activity in Class 1(b) and Class 3 premises. Under *no other circumstances* can it be tolerated.

Full deregulation of the Construction Industry, using the Ministers’ words (*italics*): *would enable the activity*, as it is currently being practised with complete disregard to compliance, *to continue to take place*. Ministers: It also leaves those needing residential housing within a residential community with ‘No *Options*’. The activity - short-

³⁵ <https://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf>

³⁶ https://d3n8a8pro7vnm.cloudfront.net/andrewleigh/pages/3724/attachments/original/1429683593/Sharing_the_future_-_Discussion_Paper_-_Australian_Labor.pdf?1429683593

³⁷ <https://grattan.edu.au/wp-content/uploads/2016/04/871-Peer-to-peer-pressure.pdf>

³⁸ <http://www.tandfonline.com/doi/full/10.1080/01944363.2016.1249011>

³⁹ <http://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

⁴⁰ http://sfcontroller.org/sites/default/files/FileCenter/Documents/6458-150295_economic_impact_final.pdf?documentid=6457

term holiday/tourist rentals – continues to greatly impact on local communities. The activity is compromising the safety of (residents and) visitors, is putting lives in peril and places the financial viability of residents at serious risk.

Those charged with finding solutions for our ever-growing number of homeless residents are all too aware of the impact *Airbnb*-type rentals are having on communities everywhere; they have not been consulted by our Ministers.

Ministers Roberts and Kean's *Options Paper*: "**in 2014** (a request for an updated figure was declined) **there were an estimated 216,000 short-term holiday letting premises in NSW/ACT however, the limited evidence currently available suggests that the impacts of STHL on rental availability is negligible.**"⁴¹ **Unbelievable.**

In stark contrast, the *NSW Department of Family and Community Services* has a wealth of statistics⁴². Recent meetings and discussions lead one to understand that, where the Parliamentary *Inquiry* plus '*Options Paper*' are concerned, there has been no engagement across Departments with those in Planning and those working in Family and Community Services. Housing Minister Roberts claims repeatedly: "*I lose sleep over our dire housing situation*". One wonders if Minister Roberts ever engages in conversation with the Hon. Pru Goward MP, the Minister for Family and Community Services and Minister for Social Housing.

Media is full of news on the state of housing and rental (un)affordability in NSW. Why doesn't the issue of the short-term rentals ever rate a mention in these news stories? Is it because so many '*individuals of influence*', from our Deputy Premier down, are profiting from this activity? The number of apartments deemed affordable for very low-income families across the United States fell by more than 60% between 2010 and 2016.⁴³ Will there be any end to illegal short-term rentals here in NSW, or are we to believe that we are immune from such a scenario?

In Christchurch New Zealand (10/09/17) fire gutted an *Airbnb* rental⁴⁴. Six members of one family were hospitalised. Fortunately no one was killed. This incident went completely unreported in the NSW Media. Rarely does news of the serious negative consequences of short-term holiday rentals reach us here in our State.

Many lives – predominately young lives – have been lost as a result of fires in unsafe lodgings. These tragic incidences cannot be ignored. Our Federal and NSW legislation is the result of ongoing constant modification and upgrading, with the aim of protecting residents and those who come to study, work and holiday in NSW. We provide this closing summary from the Queensland State Coroner in respect of the **Palace Backpackers Hostel fire in Childers**. Coroner Michael Barnes wrote:

"It is apparent that since the fire there has been a very high level of commitment and activity across numerous State Government departments and local authorities that has seen a metamorphosis in building fire safety. However, there is always a risk that as the horror of the Palace Backpackers Hostel fire fades from the public consciousness, and new priorities demand the commitment of extra financial and human resources, these reforms will be allowed to degrade. I know the professional and volunteer fire fighters of this State who risk their lives when fires occur would prefer sufficient resources continue to be devoted to prevention. It is incumbent on their superiors and the State Government to continue to provide the leadership and the resources to enable that to happen."

The death of a four-year-old Victorian child in a fire at a holiday rental property near Adaminaby in July 2015⁴⁵ is currently under review by the NSW Coroner. It was reported that the family booked the property via "*a sharing economy platform*". Presently there is nil oversight of such properties. In remembering also the 20 lives lost in the fires at Sandgate and Childers⁴⁶, the deaths of Sunil Patel, Jignesh Sadhu and Deepak Prajapati at Footscray⁴⁷, of Leigh Sinclair and Christopher Giorgi in Brunswick⁴⁸, and Connie Zhang (and Ginger Jiang) at Bankstown⁴⁹, **no abrogation of National Fire and Disability access requirements is acceptable.**

The rights and concerns of those who have purchased into properties and suburbs zoned *residential* are being ignored: the fundamental incompatibility of mixing short-term holiday rentals with permanent residents, the total disregard for Construction Codes and Disability Legislation, the non-compliance with Fire & Rescue requirements, the massive number of unmonitored tenant evictions and displacements to make way for tourists, the gutting of residential buildings and neighbourhoods, the breakdown of security, the penetration of and elevated levels of criminal activity in high rise communities⁵⁰, the demands on our Police Force, the commercial rental of homes for *minimum 60-minute bookings*, the devaluation of property adjacent or in close proximity to short-term rentals, the diverting of income for services provided in Australia to off-shore low-taxing countries...reports abound of lies and deceit, theft and destruction, sexual harassment, vile intimidation, the imposition of grossly inflated surcharges (price gouging), and utterly reckless and illegal activity of every sort. This is our reality due to *Airbnb*-style rentals.

As to the sheer numbers and behaviour of short-term tourist/visitors, NSW Police based in Byron Bay have described their operating conditions as nothing less than that of a '*war zone*'. Plus, given the examples of *Airbnb*

⁴¹ <http://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

⁴² <https://www.facs.nsw.gov.au/facs-statistics>

⁴³ http://www.freddiemac.com/multifamily/pdf/rental_affordability_worsening.pdf

⁴⁴ <https://www.stuff.co.nz/national/96699723/fire-crews-battle-christchurch-house-fire>

⁴⁵ <http://www.abc.net.au/news/2015-07-24/young-child-dies-in-house-fire-while-on-holidays/6645090>

⁴⁶ http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/86647/cif-childers-palace-hostel-fire-20060707.pdf

⁴⁷ https://www.justiceconnect.org.au/sites/default/files/Coroner%27s%20findings%20-%20Patel_0.pdf

⁴⁸ http://www.coronerscourt.vic.gov.au/resources/2c43be8d-f8f6-41a0-b66a-bcd8d4375f2a/leighsarahsinclair_372706.pdf

⁴⁹ <http://www.coroners.justice.nsw.gov.au/Documents/Zhang%20findings%2018%2009%2015%20FINAL.pdf>

⁵⁰ <http://crg.aic.gov.au/reports/1314/29-1112-FinalReport.pdf>

rental properties reportedly being used in the lead up to the recent Manchester bombing and Las Vegas shooting massacre, City of Sydney *Airbnb* rentals being used by illicit drug suppliers and for drug parties, it is disturbing in the extreme that no attempt appears to have been made to consult with NSW Police during the Parliamentary *Inquiry* or prior to the release of the '*Options Paper*'. It is after all the members of our Police Force and NSW Fire and Rescue officers who are the first responders when serious incidents occur. Parliament's handling of this situation leaves residents feeling nothing less than extremely exposed and perpetually anxious.

In Toronto, short-term tenants were ordered by their Fire Department to leave premises⁵¹ when fire inspectors judged conditions "*an immediate threat to life*". Unless a residential property has been upgraded for commercial occupation, all such rentals should be seen as "*an immediate threat to life*".

Have *Airbnb*, *Stayz* and Parliamentarians figured in the increased costs associated with Police and Fire & Rescue Services' action in their claims of financial windfall to our State? As for Coronial Inquiries, the silence is deafening.

Residents have had to be directly engaged in this Parliamentary process since August 2015, when the *Inquiry* into the adequacy of legislation covering short-term letting in NSW was announced. It must be clear by now to those in Government and to Public Servants that granting tourists/visitors unregulated and unlicensed access to residential housing places before all residents a '*Pandora's Box*' that, once opened, will take years of serious conflict, grief and enormous expense to attempt to rein back in.

NSW Parliamentary Committee Members did not seek any legal advice during their *Inquiry*, nor was advice sought in the preparation of the '*Options Paper*'. Thus it seems that the intention was to '*green light*' the activities of short-term rental operators; read transcripts of parliamentary hearings, note the limp tenor of questioning, and note also that multiple submissions by those opposed to the activities of *Airbnb and Co* had '*Confidential*' labels applied to them - disclosure of contents by the authors equates to '*contempt of Parliament*'.

It is in our opinion unreasonable in the extreme that individuals without resources and funding have been pitted against the US\$31-billion *Airbnb* and others, and have had to articulate to Parliamentarians the reality, magnitude and illegalities of this issue. It is again residents who have had to steer those in authority in the direction of multiple levels of legislation, reports, findings, recommendations etc.

We believe it is incumbent on our Ministers and all those in Parliament to demonstrate to us how and why this use of our homes and the dismantling of our residential communities should be permitted, given all that we have gathered and presented to date plus all that is known globally in terms of data and anecdotal information on STRs.

Airbnb has announced that it now has more than 4,000,000 listings worldwide – more listings than the top five hotel brands combined - while a new competitor to rival *Airbnb*, *Google*⁵², has put in place plans to extend its footprint in the short-term rental market. *Google* hopes to soon increase its inventory, inventory type and partners, with investors continuing to flood in to capitalise on housing.

Absent from the '*Options Paper*' is any mention on when legislators will attempt to cap the number of homes lost to commercial rentals. This concern seems furthest from their minds.

It is inconceivable that councillors and council employees across our State do not understand that the '*burden of proof*' in circumstances such as the illegal short-term tourist/visitor rental of residential homes is anything but absolutely straight forward and uncomplicated: it is based on the '*balance of probability*' and not that required as '*criminal proof*' ie, '*beyond any reasonable doubt*'. All the available evidence, such as availability charts that are clearly viewed on rental platforms, real estate agents' booking calendars which can be easily subpoenaed, advertising signage, affidavits from neighbours, photographs, reviews etc, is more than enough evidence to prove that a '*change of use*' has occurred when a single-family dwelling or flat-dwelling is operating in breach of regulations as a short-term tourist/visitor rental. One asks: is it the case that all Council Staff across NSW are profoundly incompetent, or could this be an indication that corruption is alive and well within our Local Councils?

The Parliament of New South Wales undertook a yearlong *Inquiry* and then subsequently produced an '*Options Paper*' without any broad-based consultation with those affected by this intrusion into their residential buildings and suburbs. Both processes have throughout appeared to heavily favour only those who are set to profit enormously from this commercial use of residential property. Our current legislation seems to be under direct threat - a '*what can be done to alter legislation*' approach - in order to satisfy the demands coming from US-based platform operators and local Real Estate Agents intent on diverting property away from residents.

We have had volunteered to us copies of some Responses lodged with Parliament – our observations:

We note that some of the Responses are authored by those who have undisclosed '*connections*' with *Airbnb*, some authors are former senior staff members of high-ranking NSW State Ministers plus the holders of degrees in property Law, have provided advice to various State Departments, etc. One expects that these individuals would acknowledge, refer and draw upon current NSW legislation, plus take into consideration when preparing documentation for Parliament, the unavoidable fact that short-term rental operators are drawing on residential housing for their stock-in-trade.

⁵¹ https://www.thestar.com/news/city_hall/2017/06/05/toronto-fire-department-finds-significant-fire-code-violations-in-short-term-rentals.html

⁵² <https://www.housingwire.com/articles/40978-meet-airbnbs-newest-competitor-google>

Such qualified individuals cannot fail to see the very many areas of legislation that are being circumvented by those involved in the short-term rental of residential housing. Added to this, the rights of residents to live in a *residential* environment and the interests and needs of those who are complying with legislation and are operating *'fit for purpose'* regulated tourist/visitor accommodation deserve no less respect and consideration than residents in residential housing. All this however has been completely set-aside in written Responses to the *'Options Paper'*, in complete deference to the commercial interests of *Airbnb, Expedia/Stayz* etc. Indeed, Parliament is requested to view short-term rentals as *'exempt development'* through the Standard LEP for all NSW councils, *'provide quick diagnostic checks for STR operators'*, note that the *'application of licences may have unintended consequences'* and asked to *'minimise the administrative burden imposed on STR market participants'*. The authors also write that any new regulatory framework should *'look to also support the emergence of new offerings'*. Much more has, without doubt, been written to Parliament... One single point of note relates to any proposal put forward to introduce 'caps' on the number of nights a residential property can be rented as an unregulated short-term rental:

One suggestion was Government to set caps - maximum 90-days short-term rental in any one year:

- Who will monitor and control this...Government? From *'night one'*, this is a commercial use of residential premises and must trigger all Building Code/Disability/Fire & Rescue upgrades etc.
- Such 'use' is *'fundamentally incompatible'* with the designated zoning on a residential dwelling and the amenity of residential buildings and surrounding neighbours in residential suburbs.
- Operators already have systems in place that see the number of nights booked are spread over several booking platforms, thereby efficiently and effectively circumventing any such 'limit'. Such a 'system' would also require the co-operation of every booking platform/agent, which has never been achieved.
- Reference international press plus numerous academic reports etc – to date, nowhere has *Airbnb* met the terms of any *'agreement'* they have entered into with authorities in other jurisdictions. *Airbnb* landlords in NSW are already communicating via Social Media on ways to circumvent current/new legislative requirements and restrictions.

We cannot see where the potential financial benefits of job creation and infrastructure investment in the *Accommodation* and *Hospitality* sectors through channelling tourists/visitors into licensed properties has been considered or calculated into any policy objectives. In fact, we cannot see where Inquiry Members or successive Ministers for Planning and Innovation and Better Regulation have presented any evidence-based data.

From the outset, we have set out to work collaboratively with those in Parliament and their representatives. Those within our Community first greeted with relief the announcement of the Parliamentary *Inquiry* into short-term rentals however, all requests of ours to meet and present to the Ministers responsible have been rejected.

Our current Planning and Zoning legislation is *'world's best'*. Our Land and Environment Court case law judgments fully support our current structure and the needs of residents to a safe and peaceful living environment. Any change to legislation must be fully justified and quantified in terms of the cost to individuals, communities, and those who rely on employment in and by way of the *Accommodation* and *Tourism* sectors. Our housing should not be deregulated, with the keys to our homes gifted to off-shore operators and a minority of commercial landlords.

It is our judgment that the *'options'* put forward in Ministers Roberts and Kean's *'Options Paper'* do nothing to support residents seeking housing, residential communities, or legitimate commercial operators who need to sustain and grow their businesses. Our legislation is straightforward; it works. Apart from a system of Licensing plus holding Agents and Booking Platforms accountable, any more regulation, any noise from STR operators about a self-managed *'Code of Conduct'* etc will merely add complexity and play right into their hands/pockets.

Short-term rental profiteers shroud their operations in myth: *sharing...caring...community...hosts...guests...and* from the level of seemingly *free publicity* spread across recent blanket media coverage, one thing *Airbnb and others* do undoubtedly have are *'journalist friends'* and/or deep, deep pockets to pay for such reporting. We go so far as to claim that of late, very clear examples of *'cash-for-comment'* Media have been widespread.

Here we have *Airbnb and Co's* bald faced, political agenda, and the game currently in play – control of and profit from our homes - is anything but *'fair'*. We have been pitted against oligarchs worth billions of dollars. Ministerial diaries tell of those who are refused entry and then the access granted to those powered by vast sums of money.

Is the purpose of the Parliamentary *Inquiry* and *'Options Paper'* simply the means by which Government hopes to dismantle our Planning framework plus deregulate all areas of Building and Construction across our State? Who will ask the *'hard questions'* and undertake the necessary *'checks'*? (See *Tourism Australia/Mantra Group/Accor Hotels* – page 41.) It beggars belief that regulatory changes are being contemplated to satisfy *Airbnb and others* without any apparent insight into or care of what such proposed changes mean now and into the future.

Our *Community Group Neighbours Not Strangers* - 900 individuals, their family members and neighbours, plus our NSW coalition Community Groups - are on the receiving end of that forced upon us by landlords, agents and platform operators who have established commercial operations in residential buildings and suburbs, without any consideration or concern for those around them or adherence to *compliance* and *regulatory* requirements. We emphasise too that NSW residents are still very much ignored by way of State and Local Government's total inaction. Legislators have an ethical and moral obligation to act in order to protect the rights, safety and genuine concerns of residents when legislation is deliberately and wilfully ignored, as is demonstrably the case here.

There is no doubt as to the scale and serious repercussions of this illegal activity. At the same time, we acknowledge our *'world's best'* legislation; others are currently seeking to replicate that which we have. Yet without enforcement our legislation carries no currency whatsoever.

When a landlord has gained the approval of Neighbours/Council, modified a class 1(a) property to class 1(b) or class 3 (BCA/NCC) standards and licensed the operation, they have the right to commercially rent.

Where there are unregulated, unlicensed operations, residents and neighbours have a right to procedural fairness when it comes to the serious issues provoked by uncontrolled short-term rentals:

- Residents have undertaken all due diligence and chosen to live in *Residential* buildings and/or *Residential* zones,
- The NSW Residential Tenancies Act is clear on what agreements are not *Residential Tenancy Agreements* plus what properties are not covered under the *Residential Tenancies Act*,
- Short-Term tourist/visitor rentals in buildings that are not constructed for commercial use expose occupants and neighbours to real and severe health and safety issues. Members of our State Parliament have been informed of the potential issues and liabilities. Should they choose to legalise the short-term tourist/visitor occupation of residential property and ignore these warnings, this may lead to a class action for compensation to Residents, given loss of amenity and lifestyle, potential decline in property values, etc,
- In almost all cases, residential property let as commercial short-term rental accommodation does not comply with the multiple-levels of legislation applicable to legitimate tourist/visitor accommodation; in other jurisdictions this has been deemed *"an immediate threat to life"*.
Again, Members of our State Parliament have been informed of the potential issues and liabilities. In the case of permanent injury or loss of life in a property *'not fit for purpose'*, again there may very well be just cause for legal action and compensation,
- Any dismantling of current legislation would no doubt trigger a call for full deregulation of all National Building and Construction standards and all Planning and Zoning legislation, plus give weight to the argument that the entire Tourist and Visitor Accommodation sector across NSW must be deregulated. Compensation would be due to titleholders of residential property plus those who have invested in regulated Tourist and Visitor Accommodation that is built, or has been modified, to very specific BCA/NCC standards. This would obviously include existing *Bed & Breakfast, Motel* and *Backpacker* operators etc,
- The NSW Ombudsman's Enforcement Guidelines for Councils⁵³ are clear. This Government and its Ministers identified and documented the issues and very real problems with short-term tourist/visitor rentals five years ago. At the very least, given the serious and threatening conditions under which many have been forced to live for years on end, Residents are owed an explanation as to why Ministers and Local Government administrators have failed to act,
- It is incumbent upon Legislators to acknowledge the grave financial and social impacts that unregulated, unlicensed, uncontrolled short-term tourist/visitor rentals are bringing to those seeking safe, secure, affordable housing, and the severe negative impacts this illegal use of residential property imposes on neighbours, communities and legitimate commercial operators,
- Councils must be mandated to immediately commence enforcement action against those who are breaking our Laws and placing the lives of residents, tourists and visitors at risk,
- The NSW Government must revoke the *licence to operate* held by those agents and platform operators illegally offering short-term tourist/visitor rentals in unlicensed residential dwellings.

The proliferation of illegal short-term tourist/visitor rentals is a critical issue for residents and for legitimate tourism accommodation providers. Anything short of the immediate enforcement of our legislation plus the introduction and implementation of a regulatory licensing system for all tourist/visitor accommodation is unacceptable. Unacceptable also are the so-called *'options'* that Ministers Roberts and Kean have presented.

Numerous Members of the NSW Parliament were renting residential properties short-term to tourists/visitors, contrary to all manner of legislation and without disclosing ownership of the property and/or income to the Parliament. These State MPs and their Legal cohort were severely threatening neighbours who questioned their activities. We wrote and asked the former Premier how we as individual residents might have faith in the parliamentary process when the issue of short-term rentals came before the NSW Parliament. Mike Baird did not answer. The same question must now be put to Premier Gladys Berejiklian and the Ministers of her Government.

Trish Burt
Convener
Neighbours Not Strangers

⁵³ http://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/29856/Enforcement-Guidelines-for-councils.pdf

INSIDE AIRBNB – is an independent, non-commercial set of tools and data that allows one to explore how *Airbnb* (only) is being used in cities around the world. Murray Cox, a New York-based independent digital storyteller, community activist and technologist, conceived the project, compiled and analyzed the data and built the site. John Morris, designer and graphic artist, designed and directed the user experience. On 29 October Murray sent updated data to **Neighbours Not Strangers** for the Sydney and the Northern Rivers regions. We summarise that data below. For any questions about the site or the data, please contact murray@murraycox.com.

SYDNEY – 03 October 2017:- 27,360 listings

61.2% entire homes/apartments
37.2% private rooms
1.5% shared rooms
31.8% multi-listings
68.2% single listing

Some Airbnb hosts have multiple listings. A host may list separate rooms in the same apartment, or multiple apartments or homes available in their entirety.

Hosts with multiple listings are more likely to be running a business, are unlikely to be living in the property, and in violation of most short term rental laws designed to protect residential housing.

Local Government Area:-

Ashfield - 187
Auburn - 203
Bankstown - 113
Blacktown - 132
Botany Bay - 299
Burwood - 101
Camden - 25
Campbelltown - 68
Canada Bay - 308
Canterbury - 193
City of Kogarah - 139
Fairfield - 30
Holroyd - 101
Hornsby - 279
Hunters Hill - 66
Hurstville - 124
Ku-Ring-Gai - 231
Lane Cove - 256
Leichhardt - 796
Liverpool - 73
Manly – 1,474
Marrickville – 1,026
Mosman - 435
North Sydney – 1,111
Parramatta - 326
Penrith - 74
Pittwater - 978
Randwick – 2,534
Rockdale - 447
Ryde - 356
Strathfield - 93
Sutherland Shire - 353
Sydney – 6,579
The Hills Shire - 176
Warringah – 1,405
Waverley – 4,544
Willoughby - 366
Woollahra – 1,359

SYDNEY – 03 April 2017:- 24,038 listings

60.8% entire homes/apartments
37.8% private rooms
1.5 % shared rooms
30.1% multi-listings
69.9% single listings

An Airbnb host can setup a calendar for their listing so that it is only available for a few days or weeks a year. Other listings are available all year round (except for when it is already booked).

Entire homes or apartments **highly available** year-round for tourists, probably don't have the owner present, could be illegal, and more importantly, are displacing residents.

Local Government Area:-

Ashfield - 149
Auburn - 137
Bankstown - 85
Blacktown - 121
Botany Bay - 252
Burwood - 110
Camden - 21
Campbelltown - 51
Canada Bay - 260
Canterbury - 151
City of Kogarah - 108
Fairfield - 22
Holroyd - 83
Hornsby - 244
Hunters Hill - 53
Hurstville - 92
Ku-Ring-Gai - 216
Lane Cove - 211
Leichhardt - 709
Liverpool - 55
Manly – 1,318
Marrickville - 914
Mosman - 382
North Sydney – 1,007
Parramatta - 234
Penrith - 68
Pittwater - 830
Randwick – 2,267
Rockdale - 397
Ryde - 287
Strathfield - 81
Sutherland Shire - 335
Sydney – 5,675
The Hills Shire - 152
Warringah – 1,207
Waverley – 4,154
Willoughby - 311
Woollahra – 1,299

SYDNEY'S TOP AIRBNB LANDLORDS:-

Vincent Buckley – Furnished Properties “Boasts **185-215 Airbnb listings**”

<https://www.airbnb.com/users/show/4335104>

Tel: (02) 9518 8828

admin@furnishedproperties.com.au

www.furnishedproperties.com.au

Lisa Peterson - L'Abode Accommodation

170 Airbnb listings

<https://www.airbnb.com/users/show/7409213>

Tel: (02) 2919 52804

info@labodeaccommodation.com.au

www.labodeaccommodation.com.au

Keris Hodge – The Apartment Service

122 Airbnb listings

<https://www.airbnb.com/users/show/15739069>

Tel: (02) 9953 7288

keris@apartmentservice.com.au

www.apartmentservice.com.au

Sabrina

117 Airbnb listings

<https://www.airbnb.com/users/show/36410227>

Luxico Holiday Homes

114 Airbnb listings

<https://www.airbnb.com/users/11914644/listings>

Tel: (02) 8046 6206

book@luxico.com.au

www.luxico.com.au

Serviced Houses Australia

100 Airbnb listings

<https://www.airbnb.com/users/show/15651267>

Tel: 1 800 259 485

info@servicedhouses.com.au

www.servicedhouses.com.au

Steve Keir - Your Home Away From Home

80 Airbnb listings

<https://www.airbnb.com/users/show/2450066>

Tel: (02) 8622 1070

stevek@yourhomeawayfromhome.com.au

www.yourhomeawayfromhome.com.au

Don Blinkley - Property Providers

78 Airbnb listings

<https://www.airbnb.com/users/show/16357713>

Tel: (02) 9969 7599

www.propertyproviders.com.au

Awaba Properties

70 Airbnb listings

<https://www.airbnb.com/users/show/4298915>

Tel: 0410 638 706

www.awaba.com.au

Beach Holiday Homes

54 Airbnb listings

<https://www.airbnb.com.au/users/show/113874>

Tel: (02) 9641 2357

bondibeachpad@gmail.com

www.bondibeachholidayhomes.com

Kirstie

53 Airbnb listing

<https://www.airbnb.com/users/show/16026854>

Prestige Property Agency

43 Airbnb listings

<https://www.airbnb.com/users/show/14138978>

Tel: (0) 9357 4086

www.prestigepropertyagency.com.au

Rosio – Bondi Beach Rentals

46 Airbnb listings

<https://www.airbnb.com/users/show/48627526>

Tel: (02) 9365 3663

info@bondibeachrentals.com

www.bondibeachrentals.com

Northern Beaches Holidays

43 Airbnb listings

<https://www.airbnb.com/users/show/30021442>

Tel: (02) 8919 0189

john@nbholidays.com.au

<http://www.nbholidays.com.au>

Contemporary Hotels & Beach Houses

53 Airbnb listings

<https://www.airbnb.com/users/show/3046924>

Tel: (02) 9331 2881

info@contemporaryhotels.com

<http://contemporaryhotels.com.au>

Gabriel HomeHost

38 Airbnb listings

<https://www.airbnb.com/users/show/101139031>

Tel: 1300 17 17 18

john@email.com

<http://homehost.com.au>

Andrea

36 Airbnb listings

<https://www.airbnb.com/users/show/33325403>

Inna

36 Airbnb listings

<https://www.airbnb.com/users/show/70570922>

Anna

30 Airbnb listings

<https://www.airbnb.com/users/show/38478183>

Anthony

30 Airbnb listings

<https://www.airbnb.com/users/show/4995302>

NORTHERN RIVERS – 21 October 2017

4,256 Listings

75.4% entire homes/apartments
24.5% private rooms (often multiple rooms/property)
0.1% shared rooms
48.3% multi-listings
51.7% single listings

Local Government Area:-

Ballina Shire - 394
Byron Shire – 2,655
Clarence Valley Council - 249
Kyogle Council - 32
Lismore City Council - 155
Richmond Valley Council - 15
Tweed Shire Council - 756

TOP AIRBNB LANDLORDS:-

A Perfect Stay

104 Airbnb listings

<https://www.airbnb.com/users/show/1649158>

Tel: (02) 6684 7728

info@aperfectstay.com.au

<http://www.aperfectstay.com.au>

Temple Retreats

55 Airbnb listings

<https://www.airbnb.com/users/show/119329>

templeretreatsbyron@gmail.com

Sarah – Unique Estates

44 Airbnb listings

<https://www.airbnb.com/users/show/5310774>

Tel: (02) 6680 9888

<https://uniqueestates.com.au>

North Coast Lifestyle Properties

42 Airbnb listings

<https://www.airbnb.com/users/show/106329043>

Tel: (02) 6685 1839

<http://www.nclp.com.au>

Byron Bay

42 Airbnb listings

<https://www.airbnb.com/users/show/7633683>

Tel: (02) 6680 8666

<https://www.byronbayaccom.net>

Andrew – Kingscliff Sales and Rentals

32 Airbnb listings

<https://www.airbnb.com/users/show/35917499>

Tel: (02) 6674 5888

www.salesandrentals.com.au

Arana Yorston – Corporate Boardies Property

34 Airbnb listings

<https://www.airbnb.com/users/show/14817888>

Tel: (02) 6674 8843

<http://www.corporateboardies.com>

NORTHERN RIVERS – 02 April 2016

2,350 Listings

64.8% entire homes/apartments
34.6% private rooms (often multiple rooms/property)
0.6% shared rooms
57.9% single-listings
42.1% multi-listings

Local Government Area:-

Ballina Shire - 252
Byron Shire – 1,483
Clarence Valley Council - 139
Kyogle Council - 17
Lismore City Council - 92
Richmond Valley Council - 8
Tweed Shire Council - 359

Destination Byron Bay

30 Airbnb listings

<https://www.airbnb.com/users/show/16160864>

Tel: (02) 6680 7733

www.destinationbyronbay.com.au

Diane

28 Airbnb listings

<https://www.airbnb.com/users/show/1354295>

Jo – Byron Beach Realty

25 Airbnb listings

<https://www.airbnb.com/users/show/14062958>

Tel: (02) 6680 8110

jo@byronbeachrealty.com.au

www.byronbeachrealty.com.au

Helen

24 Airbnb listings

<https://www.airbnb.com/users/show/9154522>

Kylie – LJ Hooker Lennox Head

23 Airbnb listings

<https://www.airbnb.com/users/show/133445462>

Tel: (02) 6687 7888

<https://lennoxhead.ljhooker.com.au>

Lauren

22 Airbnb listings

<https://www.airbnb.com/users/show/23632675>

Yamba Beachside Accommodation

19 Airbnb listings

<https://www.airbnb.com/users/show/55472952>

Beach Houses

16 Airbnb listings

<https://www.airbnb.com/users/show/37742462>

Tel: (02) 6684 6052

<http://www.beachhousesofbyron.com.au>

GUIDELINES (extract)**2.1 What is regulation?**

A local government regulatory function is any function under an Act, Regulation or other statutory instrument which empowers local government to create, impose, enforce or administer rules that control the actions of others.

2.2 What is enforcement?

Enforcement can be seen simply as the pointy end of regulation aimed at and reserved for serious or deliberate contraventions of laws. Broadly speaking enforcement can be seen as any punitive measure taken against an individual or a business for breaching a law. Measures range from lower level options such as cautions to imprisonment at the top end of the scale. It is now widely accepted that enforcement should focus not just on punishment, but equally on changing the non-compliant behaviour, remedying and addressing the problems caused by non-compliance and acting as a deterrent to future and general non-compliance.

Therefore enforcement is one among many options that can be chosen to achieve the overall objectives of a regulatory scheme. Often it is the last option used when others have failed or the conduct is particularly serious as pointed out by Freiberg: In modern compliance theory, enforcement is seen as an action to be used when persuasion fails or when advice about compliance is not taken.⁴ Seeing enforcement and compliance in a broader context of councils' regulatory responsibilities enables councils to have an overarching objective and be deliberate about what compliance outcomes they want to achieve rather than just react to reported instances of non-compliance. If the goal is to change behaviours to achieve beneficial outcomes in the interests of the community and to address harm caused by non-compliance then the options available to councils are many and can be tailored to individual circumstances.

2.3 What do councils regulate?

Councils have many and varied regulatory functions. The main ones include:

- Planning – eg, development controls, development consents, certification of complying developments, and change of use approvals.
 - Building and construction – eg, certification and compliance with building standards, and fire safety requirements.
 - Environmental protection – eg, native vegetation, noxious weeds, waste management, noise control, coastal protection, underground petroleum storage systems, storm water drainage, sewage and grey water systems, contaminated land, and solid fuel heaters.
 - Public health and safety – eg, food safety, mobile food vendors, skin penetration businesses, cooling towers, warm water system, and swimming pools.
 - Parking and transport – eg, road openings and closures, structures in or over roadways or footways, traffic management plans and controls, public car parks, and road access.
 - Companion animals management – eg, registration of dogs and cats, dangerous dogs, and surrendered animals.
 - Liquor and restaurants – eg, controls on licensed premises, and restaurants on footpaths.
 - Public areas and issues – eg, graffiti, hoardings, signs, waste bins, protection of public places, busking, street theatre, parks and playgrounds, public events, trees, and filming.
 - Other activities – eg, hairdressers, beauty salons, mortuaries, backpacker accommodation, boarding houses, camping grounds, and caravan parks.⁵
- ⁵ 2. IPART 2013 review of Local Government Compliance and Enforcement, Regulation Review - Draft Report October 2013, Independent Pricing and Regulatory Tribunal.

Regulators' Code of Conduct, United Kingdom (BERR 2007:16). 4. Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010, p. 204. 5. Stenning & Associates, Register of regulatory functions undertaken by Local Government in NSW, Final Report, Oct 2012, Version 3.0, available at www.ipart.nsw.gov.au 6 Enforcement guidelines - December 2015 NSW Ombudsman

2.4 Why is regulation important?

A significant amount of government regulation is directed to the prevention or minimisation of harm, whether it is harm to health, welfare, safety, property or to the environment.⁶ In western democracies it is often said that governments govern by consent. In this context councils can be considered to be an arm of government which regulates by consent and on behalf of ratepayers:

- for the collective good, the welfare of the community or the public interest
- to prevent or to minimise harm
- to promote social policies (eg to preserve or protect the environment)
- to manage risks
- to uphold social order.

Councils can be seen as guardians of public trust. For example, the community can trust that the food they buy at food outlets inspected by their local council will not poison them, they will not encounter stray dogs that will bite them, there will be enough parking spaces, etc.

The objects section of an Act will often list the specific nature of the harm that is being addressed and explicitly state the regulatory purposes of the legislation. Councils should ascertain the regulatory outcomes to be achieved from the object clauses of the legislation wherever available and incorporate the objectives of the various regulatory schemes they administer in any compliance policy or plan.

2.5 Regulatory principles

The following guiding principles, which are now widely accepted by regulators, should underpin any compliance and enforcement program:

Accountability and transparency

Councils need to be accountable for the efficiency and effectiveness of their compliance and enforcement activities as well as any unreasonable failures to take appropriate action. This means that activities need to be open to scrutiny. Councils are answerable for their decisions on why they took action or decided not to act. This should be transparent to the general public, people who report alleged unlawful activity, alleged offenders and other stakeholders. To achieve accountability and transparency councils should:

- publish compliance/enforcement policies
- document and make publicly available their compliance priorities and strategies
- explain decisions made in particular circumstances by the giving of comprehensive and meaningful reasons, particularly when there has been a departure from adopted policy or standard practice
- have a mechanism for consultation and feedback from industry and other stakeholders on their compliance activities
- identify and explain the principal risks against which they are acting in all the major regulated areas
- develop and publish clear standards for performance
- measure and publish performance results against the standards
- have a complaint resolution mechanism to deal with any concerns about the conduct of compliance officers and decisions made
- have a publicly available complaint policy
- have clear procedures for internal and external review of decisions where applicable. Providing information about the approach, priorities and reasons for decisions improves understanding and certainty and promotes trust by the community.

Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010, p. 10. 7. See Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010. Enforcement guidelines - December 2015 NSW

Fairness and consistency

Publicly available procedures need to be fair, appear to be fair, and be consistently implemented. Consistency in decision making can be achieved by defining outcomes, identifying risks and describing the type of response that is likely to be chosen for different levels of non-compliance.

However, this must not lead to a one-size-fits-all approach and must be balanced with the need to consider the circumstances and facts of each individual matter. The blanket application of policy or law without regard to individual circumstances discourages the community from approaching council, as they may feel the council will not act reasonably.

Proportionality

The level of enforcement action should be proportionate to the level of risk and seriousness of the breach, with more serious breaches attracting a more severe response. Seriousness could be measured by:

- impact/harm caused
- whether or not the conduct is intentional
- whether or not a precedent would be set if the council were to respond in a particular way (or not respond at all).

However, councils should be flexible and take individual circumstances into account when determining the enforcement response, and avoid applying policies too rigidly. For more guidance on applying discretion see Section 5.

More generally, enforcement should:

- aim to change the behaviour
- aim to eliminate financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and issue
- be proportionate to the nature of offence and level of harm caused
- aim to rectify the harm where appropriate
- aim to deter future non-compliance.

Timeliness

Delays in responding to allegations of unlawful activity can result in difficulties for the council. For example, the passage of time may result in unauthorised works being further advanced, making them more difficult to remedy or

rectify. Similarly, if a council has been aware of an issue for a considerable period of time but takes no action (so creating an expectation that no action would be taken), it becomes more problematic.

Councils should encourage their staff (from all areas of the council's administration) to report suspicions or concerns. This will help the council respond to unlawful activity at the earliest opportunity. To ensure timely responses to allegations of unlawful activity, councils should have performance standards and ways to monitor progress.

2.6 What are the regulatory options?

Regulation aims to change behaviour so as to avoid or address problems, minimise harm and ensure the common good of the community. There are many options available to councils for achieving specific outcomes, depending on the particular circumstances. These include:

- education campaigns
- provision of information/advice on how to be compliant
- incentive programs to reward good compliance
- negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern
- issuing a warning or a formal caution
- issuing a letter requiring work to be done or activity to cease in lieu of more formal action
- issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate
- carrying out the works specified in an order at the cost of the person served with the order
- issuing a penalty infringement notice • issuing a summons in the local court
- seeking an injunction through the courts to prevent future or continuing unlawful or criminal activity • taking prosecution action.

Macrory Review of Regulatory Justice: Making Sanctions Effective, First report Professor R.B. Macrory, November 2006. 8 Enforcement guidelines - December 2015 NSW Ombudsman

2.7 What is the best regulatory model?

There is no single most appropriate regulatory action. The appropriateness of any given action will depend on many factors, including council's compliance priorities, available resources, the nature of the unlawful activity and also matters which may be difficult to determine, such as the reasons for the particular non-compliance.

To balance the need for consistency against appropriate application of significant individual discretion vested in decision-makers, and also the need to tailor a compliance response to particular circumstances of the case, councils should consider the outcomes they want to achieve.

There are two basic questions that all regulators grapple with:

- where to best allocate limited resources to achieve the most impact (eg who or what to target), and
- how compliance officers should apply the tools available to them, eg should a punitive measure be applied straight off or should the compliance officer try to negotiate an outcome through education and persuasion first and then escalate the approach depending on the response.

There are many different approaches and models of regulation that attempt to answer these two questions. There is now broad agreement among practitioners and academics that the best way to allocate limited resources available is through risk-based regulation.¹⁰

2.8 What is risk-based regulation?

Risk-based regulatory programs work on the basis that the type of compliance action chosen will be dependent on an evaluation of the degree of risk, and the impact of the non-compliance on the regulatory agency's ability to achieve its objectives.

The risk-based approach works well for the allocation of limited resources which can be targeted and focused on areas of greatest risk as evaluated by the agency. It is a way to target resources where they are most needed and where they will produce the greatest impact. A risk-based assessment model can be applied to proactive compliance activities and also in response to reports alleging that unlawful activity has occurred. See sections 2.10 and 2.11 below.

Closely related to a risk-based approach is the principle of proportionality. This requires that enforcement action is proportionate to both the risks and to the seriousness of the breach. This means that compliance and enforcement strategies are based on an escalating model of enforcement, ie the response escalates as the risk and seriousness of the breach increase.

This is sometimes referred to as responsive regulation and is often combined with risk-based approaches. Commentators caution that risk-based approaches to compliance and enforcement, while helpful in prioritising and targeting resources, do not help answer the question about what enforcement tool or strategy is the best option to achieve compliance in 6

Environmental Regulation', Journal of Environmental Law 23:2 (2011), pp. 169-201. 10. Ibid, p. 170. 11. Ibid, p. 174. Enforcement guidelines - December 2015 9 NSW Ombudsman

HOLDING PLATFORMS ACCOUNTABLE:-

A list of questions relating to the content and claims made in the 'Options Paper' was presented to representatives of the Department of Planning and Environment and the Department of Innovation and Better Regulation. From one Department we received no response. From the other Department, we were informed:

"Additional information related to short term holiday letting will not be released during the consultation period". (Our concerns relating to the 'Options Paper' are found at page 42.)

Confirmation was sought and received as to the level of Legal consultation entered into by Members of the NSW Parliamentary Hearing Committee that reviewed the current legislation covering the short-term rental of residential properties. The response was:

"No legal advice was sought by the NSW Parliament at any time regarding the inquiry into the regulation of short-term letting. Nor was the Parliament shown or asked for any comment on, the NSW Government's options paper." (Criticisms relating to the NSW Parliamentary Inquiry into Short-Term Letting are found at Page 45.)

Minister Anthony Roberts has, as far as Strata is concerned, been connected with this issue since September 2012 – **more than five years**; we are referring specifically to Minister Roberts' Report entitled: *Making NSW No. 1 Again - Shaping Future Communities*⁵⁴. The Report correctly tied short-term tourist/visitor rentals with overcrowding and highlighted the key areas of impact in residential flat-dwellings (only):

"Some owners and head tenants use their units in a strata or community scheme to offer accommodation to a large number of people. Bunk beds and partitioned sleeping areas can maximise the number of occupants and, in return, maximise the profit made by the owner or head tenant. Effectively these units are being used as a de facto backpacker hostel, boarding house or serviced apartment. Examples of more than six to eight people living in a two-bedroom unit are not uncommon. There are even claims of an emerging practice called 'hot bedding', where occupants use the same beds in rotating shifts.

Short-term rentals and overcrowding in schemes can impact on the amenity of other residents and the levies payable by all owners. Some of the problems that have been noted include more noise complaints, increased water consumption, not enough parking and a greater strain on facilities and common property as a result of overuse. Overcrowding also has obvious fire safety implications.

Some stakeholders believe that the current law provides insufficient power for schemes to deal with overcrowding and the problems associated with short-term rentals. A by-law cannot prohibit or restrict the leasing of a lot. This provision was included originally to prevent a scheme from imposing a blanket ban on tenants. It could be argued that the law has failed to keep up with the changing nature of rental arrangements in some schemes.

One option that has been suggested is for the law to set a limit on the number of persons who may occupy a residential lot (e.g. no more than two persons per bedroom). Alternatively, schemes could be permitted to impose such limits through a by-law. How such a law would be monitored or enforced is unclear, given that some people may claim to be visitors or short-term guests. A law like this may also indirectly discriminate against large families and those from different cultural or ethnic backgrounds. In 2006, the City of Sydney Council introduced a condition of consent for newly built apartments limiting the number of adult occupants per bedroom to two. It is understood that, to date, no court action to enforce this condition has been taken by the Council.

Another option suggested is to allow schemes to make a by-law prohibiting short-term rentals (e.g. those less than 3 months) or rentals which are not covered by the Residential Tenancies Act 2010. However, this may only encourage sham tenancy agreements to be entered into and would not address overcrowding problems created by head tenants.

A further option could be to tackle the problem at the other end and focus on dealing with undesirable outcomes. If there is a regular turnover of occupants of a particular lot, with a proven pattern of by-law breaches, a scheme could be given the ability to apply to the CTTT for an order prohibiting similar letting arrangements for that lot in the future.

Empowering schemes to set and enforce their own rules in this area may assist when it is only one or a small handful of lots involved. However, in some instances many lots may be being used in this fashion, meaning the minority of owner/occupants affected will have little success in persuading the scheme to do anything about the problem. Therefore, an alternative approach could be to empower local councils to fine owners in breach of zoning, development consents, Local Environment Plans or safety laws rather than relying on individual schemes to take action."

The notion of a by-law in strata schemes to either permit or deny Owners or Tenants the ability to operate short-term letting will indeed penalise Owner/Occupiers and Tenants. A clear case in point is the situation in the Sydney

⁵⁴ http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Making_nsw_no_1_again_shaping_future_communities.pdf

strata building known as *Bridgeport*, where the former short-term letting cohort still maintains control of the building after Court Orders were issued to stop their illegal activities, and Resident Owners, who brought to the Council's attention the large-scale short-term rental operation, are still apparently discriminated against on an ongoing and persistent basis. Short-term rentals have returned to the building; the strata committee refuses to take action of any sort against those involved in this activity, and so too the City of Sydney.

Importantly: Delegating responsibility for the monitoring and control of one's neighbour's 'Use' of a Residential dwelling – a free-standing, single family home or flat-dwelling – automatically pits neighbour against neighbour in never-ending competition, rupturing communities in which individuals are meant to live in a cohesive fashion. Worst case scenarios involve **strata scheme owners being financially liable, without limit, in the case of deaths and permanent injuries, plus loss of building, personal possessions and ongoing expenses of alternative accommodation, all because of another (usually absent) owner's commercial short-term rental of a neighbouring property.** The NSW Parliamentary Inquiry found that mandatory building insurance in strata was awaiting a 'test case', which would determine whether or not an insurer refuses to pay where short-term tourist/visitor rentals were a clear breach of the *Determination of Development Application*.

The '*Options Paper*', signed off by Ministers Anthony Roberts and Matt Kean, could very much be said to have the appearance of being *ghost written* by those in the short-term rental industry.

Considering the work that is being done around the world by legislators and community activists who are fighting to protect their homes and the rights of community members, the lack of action on short-term rentals here in New South Wales can, we suggest, be the result of only one thing: Many, from our Deputy Premier down, appear to be profiting directly from this commercial activity.

Ultimate responsibility and liability for short-term tourist/visitor rentals is with the owner of each individual property. When the actions of individual commercial landlords are challenged by legislators, it is the multi-billion dollar platform, *Airbnb*, that has stepped in and commenced legal action against cities and states. To date, it appears that all legal actions mounted by *Airbnb* have ultimately seen them forced to withdraw.

The symbiotic relationship between commercial landlords, agents and platforms cannot be ignored nor dismissed.

That *Airbnb* redirects housing away from residents is well documented; one would be hard pressed (or deliberately blind) not to notice the work being undertaken on this issue overseas. The lack of any focussed work to establish the scale of the practice here in NSW, in the midst of perhaps our worst housing crisis, has seen STR operators and agents running amok and profiteering on a grand scale, plus the total lack of support from legislators for those working to have our legislation enforced is well noted by residents and of great concern.

Work done recently by the City of Vancouver, whose housing situation mirrors that of Sydney's plus other smaller regional NSW centres, was at first applauded. Housing advocates have subsequently highlighted the flaws in Vancouver's initial response, most notably that of letting *Airbnb* and others '*off the hook*' in terms of responsibility for premises rented unlawfully via their platform.

Without platform/agent accountability measures, one predicts that *Airbnb* and others will continue to feed off our residential housing. And with expectations of higher and higher levels of *Tourism* from China and India...one cannot see a point at which the demand for access to housing for commercial purposes will ever reach any limit. Are legislators content to sit back and watch this happen?

No promise or measure of goodwill could or would curb the insatiable financial targets of the short-term rental operators with more and more players – such as *Google* – entering the market.

It is our contention that NSW should learn from other jurisdictions and avoid any watering down whatsoever of regulations, only to be forced to return to the issue many years later.

NSW is in the unique position of having very adequate regulations and legislation. And platform accountability is key to ensuring enforcement of short-term rental regulations.

Following is an outline of how platform accountability can be used as a means of avoiding the problems faced by many other cities. The city of San Francisco (population 4.6 million to Sydney's 5 million) acknowledges the massive cost to them through lost housing. San Francisco is one example of how to hold agents and platforms to account.

It cannot be stressed enough, by way of warning: No *Memorandums of Understandings (MoUs)* between *Airbnb* and others should ever be considered; they cannot be relied upon, as has been shown, time and again.

Why Put In Place Platform Accountability:

Airbnb and others must be held accountable and liable for properties advertised on their websites that do not meet the requirements of safe, regulated *Tourist and Visitor Accommodation*. All other accommodation providers across Australia are held to account for ensuring they follow rules and meet regulations, so why then have the activities and practices of *Airbnb* and clones been tolerated to date; why exemptions just for short-term rental operators?

Platform accountability equates to short-term rental agents and platforms policing their own landlords, ensuring that all advertised properties are licensed, as per those already running regulated Bed & Breakfast, Motel and Backpacker operations etc. Local Government Areas are responsible for ensuring that applicants meet Building Code, Disability and Fire & Rescue criteria; approval by way of a license number should then be passed to a State Government-held License Register.

Without platform accountability *Airbnb* and others will continue to advertise and profit from illegal listings, and non-disclosure results in authorities being unable to achieve the essential levels of public and visitor safety necessary.

Examples of *Airbnb*'s circumvention of regulations abound: in the city of Whistler (BC), short-term rentals of less than four days are illegal, yet *Airbnb* advertises and rents high numbers of properties to tourists⁵⁵. In New York City, the vast majority of properties advertised on *Airbnb* continue to be illegal, despite state and city laws that seek to regulate their market⁵⁶. In Berlin, despite regulation, the advertisement of illegal properties increased on *Airbnb*'s website by 54% in a little over one year⁵⁷. In Barcelona, municipal government authorities have gone so far as to put up public art installations, placing beds in strategic locations with signs in several languages saying: "Just because this bed is available on the internet doesn't mean it's legal"⁵⁸.

Steps To Platform Accountability:

Platform Accountability is a three-stop process:

First, Local Government Authorities have to develop rules and regulations around short-term tourist/visitor rental use – the City of Sydney's *Visitor and Tourist Accommodation Development Control Plan*⁵⁹ has already been volunteered as a template.

Second, a permit system must be set up to ensure that properties operating as short-term rentals meet all the relevant *construction, access, safety, health, taxation* standards and requirements etc.

Third, all short-term rental agents and platforms must be licensed to operate in NSW and the license agreement must include terms and conditions that legally bind them to advertising only those properties which have been cleared and licensed to operate. Should agents and platforms such as *Airbnb, Stayz* etc advertise illegal listings, they will be fined for each day an illegal listing is advertised plus lose their right to operate within our State.

Platform accountability forces *Airbnb* and others to effectively police their landlords and ensures that Planning, Zoning and all other areas of legislation are met, without exception. *Airbnb* and others have the resources and technical capacity to re-tool their operations in ways that ensure that they facilitate only lawful activity. One of the most obvious ways to go about this procedure is to treat a city/council issued short-term rental permit number in the same way as credit card information. Providing an invalid permit number, as with that of an invalid credit card number, should automatically put a stop to the registration process. The *Transport for London/Uber* example shows that operators in the 'sham/share economy' must take community expectations and concerns seriously or they will not be permitted a presence in our State.

This structure will also silence the claim by Local Councils that they do not have the facilities to enforce legislation.

Important Lessons to be learnt from San Francisco and Platform Accountability:

Airbnb strongly resists all efforts to be held accountable for unlawful listings. The company's political playbook to date has relied on offloading responsibility and accountability to thousands of individual landlords, thereby absolving it of accountability vis-à-vis government authorities. This manoeuvre is clearly expressed in a recent statement made by Alex Dagg, *Airbnb's public policy manager* for Canada: "Essentially, it's really the host's obligation to comply with laws, it's part of our terms of service that we have."⁶⁰ In San Francisco however, "*Airbnb* says it is ready to police its hosts, taking action it has long claimed is invasive, unrealistic or unwieldy."⁶¹

How did *Airbnb* arrive at changing its attitude and operations in its hometown? Following is a summary of the way in which San Francisco discovered that an approach to relying on *Airbnb*'s landlords to comply with local short-term rental regulation was unworkable. This provides a clear lesson for NSW:

⁵⁵ Correia, Cory. 2017. "Whistler proposes bylaw to restrict short term rentals." *CBC*, Jun 7. Accessed Jul 25, 2017. <http://www.cbc.ca/news/canada/british-columbia/whistler-rentals-airbnb-housing-1.4149027>.

⁵⁶ Walker, Aameena. 2017. "Anti-Airbnb bill wants NYC hosts to disclose their full addresses." *Crunch*, Jul 19. Accessed Jul 25, 2017. <https://ny.curbed.com/2017/7/19/15994284/nyc-airbnb-legislation-addresses>.

⁵⁷ Hill, Steven. 2017. "How the Berlin government could rein in Airbnb and protect local housing." *Salon*, Jun 30. Accessed Aug 10, 2017. http://www.salon.com/2017/06/30/how-the-berlin-government-could-rein-in-airbnb-and-protect-local-housing_partner/.

⁵⁸ Congostrina, Alfonso L. 2017. "Barcelona launches "bed protest" against illegal Airbnb apartments." *El Pais*, Jul 20. Accessed Jul 25, 2017. https://elpais.com/elpais/2017/07/20/inenglish/1500539176_923596.html.

⁵⁹ http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0005/119543/visitortouristaccomdcp_150306.pdf

⁶⁰ Israel, Solomon. 2017. "Canada's biggest cities move to regulate Airbnb, but it's no easy task." *CBC News*, Jun 17. Accessed Jul 25, 2017. <http://www.cbc.ca/news/business/airbnb-municipal-regulations-canada-1.4164056>.

⁶¹ Said, Carolyn. 2016. "Airbnb, under the gun, is ready to cooperate with SF." *San Francisco Chronicle* Jul 25, 2017. Accessed Jul 25, 2017. <http://www.sfchronicle.com/business/article/Airbnb-under-the-gun-is-ready-to-cooperate-with-10612040.php>.

In February 2015, San Francisco legalised short-term rental companies such as *Airbnb*, *HomeAway*, *VRBO*, *FlipKey* and others. In order to be legalised, landlords had to obtain a business registration certificate and register with the San Francisco Treasurer and Tax Collector. They had to ensure that they had commercial property liability insurance plus pay the City's 14% *transient occupancy tax*. Importantly, to prevent landlords from evicting tenants to create *ghost hotels*, second homes and investment properties were excluded from the short-term rental market, and entire home listings were tied to a host's principal residence and capped at 90 days per year.⁶²

Yet, after a 15-month period, only 15% (1,282 out of 7,046) landlords had complied with San Francisco's ordinance⁶³, while *Airbnb* listings continued to grow⁶⁴. The City's Board of Supervisors realised that the City's rules and regulations are ineffective if platform accountability and liability were not part and parcel of any policy response. On 07 June 2016, San Francisco's Board of Supervisors voted on an additional set of rules and, in a 10-0 vote, required short-term rental agents and platforms to only post rental listings from landlords who had registered with the City, or face up to \$1,000 in daily fines.⁶⁵ Aaron Peskin, Member of the San Francisco Board of Supervisors referred to this important amendment in the following way: "We are closing a long-standing loophole by holding the hosting platforms accountable for the hundreds of units (rented by) unscrupulous individuals who have taken multiple units of affordable housing off the rental market."⁶⁶

The same day San Francisco's Board of Supervisors arrived at its unanimous decision to establish platform accountability and liability, *Airbnb* sued the City, claiming it had violated the *Communications Decency Act*, a federal law that protects websites from liability for the content uploaded by users.⁶⁷ On 08 November 2016, federal judge James Donato rejected the company's claim. Donato said that the San Francisco ordinance "does not regulate what can or cannot be said or posted in the listings. It creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."⁶⁸

Not long after the federal judge rejected *Airbnb's* request, the company agreed to cooperate with the City and help enforce the regulations. "In a dramatic about-face, *Airbnb* says it is ready to police its San Francisco hosts..."⁶⁹ The San Francisco example shows that *Airbnb* is clearly in a position to comply with municipalities' rules and regulations, but only after they have exhausted all possible means to oppose them.

Toronto Proposes Platform Accountability:

The city of Toronto appears to have taken San Francisco's approach to heart. City Staff have developed a proposal that includes permitting landlords, agents and platforms to only post lawful listings, ie properties that have received a municipal permit number.⁷⁰

MoUs: *Airbnb's* Way to Avoid Accountability:

Airbnb and others appear to have convinced NSW Legislators that their activities are crucial to the financial viability of our State's economy. Without them, tourist and visitors will, according to the STR operators, no longer be seen in our cities and towns. One could predict that a directive by legislators to penalise unscrupulous operators in NSW might see *Airbnb* pull out the MoU card. There should be no engagement with *Airbnb* and others over any such a proposal.

A MoU between *Airbnb* and the City of Amsterdam had *Airbnb* agreeing to "notify hosts in a powerful manner that they were obliged to offer homes for rent in compliance with applicable rules."⁷¹ Needless to say, this didn't prevent three-quarters of Amsterdam's listings from violating local legislation.⁷²

A MoU between the City of Seattle and *Airbnb* specifically states that it is "not intended by the parties to be a legally binding agreement or (to) create legal obligations for the parties."⁷³ Rather than helping cities to regulate

⁶² Fishman, Stephen. N.A. "Overview of Airbnb Law in San Francisco." Accessed Jul 25, 2017. <http://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html>.

⁶³ City of San Francisco. 2016. Policy Analysis Report. Budget and Legislative Analyst's Office.

⁶⁴ Shaban, Bigad, Jeremy Carroll, and Kevin Nious. 2016. "Thousands Violate SF Housing Laws Using Airbnb, Few Face Penalties." *NBC Bay Area*, May 19. Accessed Dec. 20, 2016. <http://www.nbcbayarea.com/investigations/Bay-Legal-Thousands-violate-SF-housing-laws-few-face-penalties-380218621.html>.

⁶⁵ Sabatini, Joshua. 2016. "SF legislators approve tougher rules for Airbnb." Jun. 7. Accessed Jul 25, 2017. <http://www.sfoxaminer.com/sf-legislators-approve-tougher-rules-airbnb/>.

⁶⁶ Said, Carolyn. 2016. "Airbnb, HomeAway would police rentals under proposed SF law." *SF Gate*, Apr 25. Accessed Jul 25, 2017. <http://www.sfgate.com/business/article/Airbnb-HomeAway-would-police-rentals-under-7306756.php>.

⁶⁷ Benner, Katie. 2016. "Airbnb in Disputes With New York and San Francisco." *New York Times*, Jul 25, 2017. Accessed Jul 25, 2017. https://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html?_r=0.

⁶⁸ Benner, Katie. 2016. "Airbnb in Disputes With New York and San Francisco." *New York Times*, Jul 25, 2017. Accessed Jul 25, 2017. https://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html?_r=0.

⁶⁹ Said, Carolyn. 2016. "Airbnb, under the gun, is ready to cooperate with SF." *San Francisco Chronicle* Jul 25, 2017. Accessed Jul 25, 2017. <http://www.sfchronicle.com/business/article/Airbnb-under-the-gun-is-ready-to-cooperate-with-10612040.php>.

⁷⁰ City of Toronto. 2017. Proposed Regulations for Short-term Rentals for Consultation. Toronto: Municipal Licensing & Standards and City Planning.

⁷¹ Zetland, David. 2017. "Holiday rental giant Airbnb is harming Amsterdam's communities." *DutchNews.NL*, Apr 3. Accessed Jul 31, 2017. <http://www.dutchnews.nl/features/2017/04/airbnb-is-harming-amsterdams-communities/>.

⁷² Johnson, Cat. 2016. "Amsterdam Updates Agreement with Airbnb to Combat Illegal Hotels, But is it Enough?", Dec 5. Accessed Jul 31, 2017. <http://www.shareable.net/blog/amsterdam-updates-agreement-with-airbnb-to-combat-illegal-hotels-but-is-it-enough>.

the short-term rental contagion, MoUs disempower government authorities in exchange for *promises that come cheap* and have not curtailed the explosive growth in listings.

Developing MoUs with *Airbnb* gifts the pro-short-term rental lobby group some positive media headlines along the lines of “*tackling*” the *Airbnb contagion*, but in reality this only exacerbates an already explosive issue.

What has been learned from experiences in cities around the world is that legislators need to develop legally binding language and structure that will be used to hold short-term letting landlords, agents *and* platforms directly accountable for each and every listing.

BUILDING CODES OF AUSTRALIA (BCA)/ NATIONAL CONSTRUCTION CODES (NCC):-

We take this opportunity to quote, by way of a concise example, Council of the City of Sydney correspondence, Ref: CSM 169348 ([20 March 2017](#)):

"Airbnb and companies like this are using premises for a 'use' which requires consent (basically the commercial letting of a residential property). Airbnb provides a service that is a change of 'use' that relates to the definition with the Sydney Local Environmental Plan (SLEP) and within the Standard Instrument to that of a 'Visitor and Tourist style accommodation'. The 'use' is associated with the definition of a 'Class 3' in the Building Codes of Australia. As such, to use a residential apartment (Class 2) for a 'use' supported by the Airbnb framework a Development Application is typically required.

...the Sydney Development Control Plan (DCP) does not endorse mixed residential uses in a building unless specifically designed and built in accordance with the provisions of the DCP. In short, without consent, the use of Airbnb and companies like this is a technical breach and may have other implications which the building owners should consider, such as life safety concerns, loss of amenity for other residents, reduction in security and increased running costs for the building.

Under current planning controls:

- Tourist and visitor accommodation is not permitted in residential zones; and*
- Residential accommodation and tourist accommodation in the same building must be on separate floors and have separate lifts.*

The City does not support changing this long-term policy, which is in place to protect neighbourhood amenity and visitor safety..."

That which is written above is reinforced in case law in the NSW Land and Environment Court, plus the basis upon which residents have purchased into residential housing in the City of Sydney Local Government Area. Following are the *Classes of Buildings* which are most often affected by a ‘*change of use*’ involving short-term rentals:

Class 1 - Class 1a A single dwelling being a detached house, or one or more attached dwellings, each being a building separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.

Class 1 – Class 1b A boarding house, guest house, hostel or the like with a total area of all floors not exceeding 300m², where not more than 12 reside, and is not located above or below another dwelling or another Class of building other than a private garage.

Class 2 – A building containing 2 or more sole-occupancy units each being a separate dwelling.

Class 3 - A residential building, other than a Class 1 or 2 building, which is a common place of long term or transient living for a number of unrelated persons. Example; boarding-house, hostel, backpackers accommodation or residential part of a hotel, motel, school or detention centre.

Any change from a (residential) Class 1 or 2 building to a Class 3 building must trigger major changes in such things as the following – this is not a complete list:

- Building form
- Rooms, recreational areas and facilities – height, floor space ratio, and setback, ceiling heights/bunks, sleeping room occupancy requirements, kitchen areas, bathrooms, laundries and drying facilities,
- Amenity
- Access for People with Disabilities
- Energy and Water Efficiency
- Waste
- Materials selection, including but not limited to, fire resistant materials/flooring/window dressings etc

⁷³ City of Seattle. 2016. “Memorandum of Understanding “. Accessed Jul 31, 2017. <http://murray.seattle.gov/wp-content/uploads/2016/11/Seattle-OEM-Airbnb-Disaster-Response-MOU-Final.pdf>.

- Car Parking
- Signage
- Operation and Management, including noise management
- Annual certification
- Fire Safety, including fire extinguishers and fire blankets, fire dampers, fire stairwells, position and number of fire escape routes
- Health, Amenity and Safety Standards

Note: The classification of buildings and the type of construction can vary from the standard model depicted in the tables. Concessions can be provided that change the type of construction. The concessions can relate to the design of the building, its size, and the number of escapes.

Other BCA classes of buildings include:-

Class 4 – A dwelling in a building that is Class 5, 6, 7, 8 or 9 if it is the only dwelling in the building.

Class 5 – An office building used for professional or commercial purposes, excluding buildings of Class 6,7,8 or 9.

Class 6 – A shop or other building for the sale of goods by retail or the supply of services directed to the public. Example: café, restaurant, kiosk, hairdressers, showroom or service station.

Class 7 – Class 7a – A building which is a car park.

Class 7 – Class 7b – A building which is for storage or display of goods or produce for sale by wholesale.

Class 8 – A laboratory, or a building in which a handicraft or process for the production, assembling, altering, repairing, packing, finishing or cleaning of goods or produce is carried on for trade, sale or gain.

Class 9 – A building of a public nature.

Class 9a - A health care building, including those parts of the building set aside as a laboratory.

Class 9b – An assembly building, including a trade workshop, laboratory or the like, in a primary or secondary school, but excluding any other parts of the building that are of another class.

Class 10 - A non-habitable building or structure.

Class 10a – A private garage, carport, shed or the like.

Class 10b – A structure being a fence, mask, antenna, retaining or free standing wall, swimming pool or the like.

Class 10c – A private bushfire shelter.

When the NSW Government announced in late 2015 a Parliamentary Inquiry into the adequacy of legislation covering short-term holiday/visitor rentals in NSW we approached Assistant Director for **NSW Fire & Rescue**, Greg Buckley. He referred directly to the BCA and the consideration being given to it in Queensland, relevant to the explosion in high-rise residential buildings being occupied by short-term clients. Mr Buckley stated:

"The issue of short-term letting is an important and live issue which should come under close scrutiny, especially in light of the Coroner's Inquiry and Inquest into the death of Connie Zhang at Bankstown".

Following is a report⁷⁴ from the **Unit Owners Association of QLD**, which summaries the October 2014 proposal for changes to the classification of Class 2 and Class 3 buildings:

SUBJECT Definition of NCC Classifications 2 and 3

BCA Volume One: BCA Volume One: Part A3. Table D3.1 Class 1b

The Proposal:

Definition and correct use of the word "dwelling". Part A3.2 Class 1b(ii). Table D3.1 Class 1b.

The proposal is to:

1. Amend the above parts of the NCC to the correct terminology as required by the Office of the Parliamentary Council - Drafting Manual; and,

2. Insert the definition of "Dwelling" as contained in the Macquarie Concise Dictionary (sixth edition) to the NCC Volume 1 General Provisions i.e.

"Dwelling: 1. a place of residence or abode; a house. 2. continued or habitual residence."

3. Amend the definition of Class 1b (ii) to remove "dwellings" and insert "buildings" thus stating:

"4 or more single buildings located on one allotment and used for short - term holiday accommodation,"

4. Amend Table D3.1 (a) Class 1b (Access for people with a disability) to remove "dwellings" and insert "buildings".

⁷⁴ <http://www.uoaq.org.au/news-link/28-28-oct-2014-proposal-for-change-ncc-classifications-2-and-3>

The Current Problem:

Deficient drafting standards introduced to the NCC at the 2011 amendments by the misuse of the word "dwelling" out of context, and with the incorrect definition of the word, "dwelling" contrary to the Drafting Manual of the Office of the Parliamentary Council. Drafting standards require consistency in the use of words." Dwelling" in the original definition of Class 1 and 2 buildings is consistent with the Macquarie Dictionary, but inconsistent with the use of "dwelling" introduced in the definition of Class 1b and the definition in the Class 1b that is repugnant to the Macquarie Dictionary.

The aim of the Building Code Australia (BCA) and supporting State legislation should be to ensure that buildings are constructed to a standard for a specified end use, and that they are in fact used for that constructed and intended use. In some situations the higher standard Class 3 building may be used for Class 2 long-term occupation; however, **the use of Class 2 buildings for Class 3 transient accommodation defeats the objective of the BCA and Disability Discrimination ACT (DDA).**

The Australian Building Codes Board (ABCB) appears to be implementing a policy of erosion of the distinction between Class 2 and Class 3 buildings by establishing standards that are common to both. This is evident in the new smoke detection standards, fire equipment standards, emergency signage standards and relaxation of public address system standards. Access and egress standards have also been standardised, understandably because of the post 2010 requirements of the Disability Discrimination Act Access to Premises standards. If this is ABCB policy for new buildings, then developers, and building owners, will be required to accept that the original intent of the BCA to reduce building costs for residential buildings will no longer apply. The ABCB will be answerable for increased costs to the community and for the achievement and maintenance of acceptable standards of structural sufficiency, safety, health and amenity for the benefit of the community now and in the future. Also the disharmony created by failure to segregate long term residential and short term accommodation users.

In reality, there are thousands of Class 2 buildings in Australia that are being incorrectly used for Class 3 accommodation. These building are not subject to the multipurpose construction standards now being applied to new Class 2 and Class 3 buildings. Therefore transient accommodation residents being accommodated in pre 2010 Class 2 buildings are being exposed to sub-standard fire detection and access and egress standards.

The UOAQ considers that the ABCB has failed to clearly and specifically define Class 2 building use by failing to include the Macquarie Dictionary definition of "dwelling" in the BCA Volume 1 General Provisions.

In 1980, by way of an inter-government agreement, a national body called the Australian Uniform Building Regulations Co-ordinating Council (AUBRCC) was formed. This organisation, which consisted of the Commonwealth, state and territory governments, was principally created to develop a national building code. This task was successfully completed in 1990 with the production of the Building Code of Australia (BCA90).

The BCA relates to building use and is defined by the Australian Building Codes Board as:

"The goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future."

Definition of Class 2 and Class 3 buildings:

The two building classifications of interest to this proposal are:

- Class 2 (Long term residential buildings); and
- Class 3 (Short term accommodation buildings).

The 1980/81-standardisation committee derived the building classification definitions from an assembly of submissions of building codes from every State and Territory in Australia and also submissions from New Zealand. Terminology used in Europe and the United States of America was also considered. The understanding of definitions used in drafting the BCA was derived from the Concise Oxford Dictionary. (At that time the Australian Government standard for legislative drafting.)

There was clear logic to the development of the definitions within the guidelines established for the creation of a national building code, and the definitions of words used complied with the Office of Parliamentary Council - Drafting Manual.

Class 1 buildings were, and are, clearly understood as private residential dwellings.

Class 2 buildings were considered to be private residential dwellings (Class 1) built above, beside or below each other. The aim of the committee was to restrict regulation to that applying to Class 1 dwellings unless there were structural or safety requirements that justified additional regulation - thus minimum fire alarms and no access requirements for persons with a disability. The objective was to minimise cost of construction consistent with meeting the objectives of the committee and minimum burden on the community.

Class 3 buildings were considered to be commercial application buildings providing accommodation for a variety of applications and a variety of persons. This included commercial hotels, motels, boarding houses, student accommodation, etc. Thus the safety standards had to meet the worst case scenario of these uses. Fire alarm

systems had to be fully automatic and provide coverage for the entire building (AS 1670). Access and egress was required for persons with a disability, structural sufficiency had to be developed to withstand high occupancy numbers, materials had to be higher fire resistance and escape systems had to be to the highest standards available in 1980/81. Class 3 buildings were of necessity more expensive to construct, but the committee was of the mind that higher construction costs could be absorbed because of the commercial nature of the buildings.

There was no doubt in the minds of the standardisation committee that they had clearly defined the classifications and building use.

Confusion as to the intent of Class 2 definition:

Unfortunately following the introduction of the Building Code Australia **some developers working in concert with Local Government building inspectors began a campaign to confuse the intended classification of Class 2 and Class 3 building use.** The confusion was created by casting doubt on the definition and use of the word 'dwelling'. This confusion varied from State to State, but was far more prevalent in Queensland where the State Government turned a blind eye to the incorrect use of buildings - both Class 1b and Class 2.

This blind eye approach included Class 1b buildings until the tragic loss of 20 lives by fire at Childers and Sandgate. Following these disasters the Queensland Government quickly developed an understanding of Class 1a and Class 1b use and fire regulations. Legislation was introduced and standards enforced. This understanding did not extend to Class 2 and Class 3 buildings primarily, because of pressure from developers and the tourism industry.

New South Wales subsequently introduced its own clarification of the word 'dwelling':

HOME BUILDING REGULATION 2004 - REG 6

Definition of "dwelling"- certain residential buildings and other structures excluded. For the purposes of the definition of "dwelling" in section 3 (1) of the Act, the following are declared to be excluded from that definition:

- (a) a boarding house, guest house, hostel or lodging house;
- (b) all residential parts of a hotel or motel;
- (c) any residential part of an educational institution;
- (d) accommodation (other than self-contained units) specially designed for the aged, persons with a disability or children;
- (e) any residential part of a health care building that accommodates staff;
- (f) a house or unit designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation;
- (g) any part of a non-residential building that is constructed or adapted for use as a caretaker's residence;
- (h) a moveable dwelling (with or without a flexible annexe) within the meaning of the Local Government Act 1993 that is, or is capable of being, registered under the Road Transport (Vehicle Registration) Act 1997 (such as a caravan or a motor home);
- (i) a residential building for the purposes of which development consent can be granted only because of State Environmental Planning Policy No 15-Rural Land sharing Communities.

What evidence exists to show there is a problem:

The UOAQ is the single largest organisation in Queensland representing some 405,000 unit owners. The UOAQ also recognises the importance of our members to the Queensland tourism industry. There are two distinct groups involved in unit ownership; the investment owners who provide the tourist accommodation, and the long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence. Unfortunately these two groups of occupiers, in most circumstances, are incompatible.

The use of Class 2 buildings for holiday letting has considerable implication for the tourist industry. The two types of residents are in conflict and tourists often become involved in heated arguments about noise, use of facilities and care for the complex.

The ABCB public consultation paper on noise levels in buildings, reported that an UK Department of Environment, Transport and Regions' January 2001 document states:

"Noise, at the sort of levels encountered in dwellings, can lead to a wide range of adverse health effects including loss of sleep, stress and high blood pressure. Qualifying the risks attributable to exposure to environmental noise and, particularly, neighbour noise is difficult but it is suggested that there are between one and ten deaths per year in the UK (these being suicides or as a result of assaults) attributed to noise from neighbours. The number of less severe problems attributed to noise (such as stress, migraines, etc.) is estimated to be about 10,000 per year."

The WA Government 2003 report "Investigation of the Impact of Combining Tourist and Permanent Residential Accommodation on Tourist Zoned Land and the Impact of Strata Titling of Tourist Accommodation" found:

"There is potential for conflict between short stay tourists and residents in a tourist facility due to the different objectives of the two groups in being at the premises. This conflict can manifest itself in many ways but has

two primary outcomes:

- * A de-valuation of the "tourist" experience available at the development through there being a non-tourist character or ambience to the facility,
- * An impact on the amenity of the resident due to different lifestyle priorities to short stay tourists, who in many cases have a higher "recreation priority".

A 2013 study *Residents' Experiences in Condominiums: A Case Study of Australian Apartment Living*, Ron Fisher & Ruth Mcphail. Griffith Business School, Gold Coast Campus, Griffith University, QLD, Australia supported these findings:

".....the tendency to focus on sales based on mixed usage militates against the interests of tourists, live-in owners, long-term renters and local authorities, all of whom recognise the benefits of segregating tourists from resident owners and long-term renters. The potential for conflict between tourists and resident owners in multi-use complexes is high."

The Hotel Motel Accommodation Association (HMAA) also argues:

"Long-term residents in buildings used as 'de facto hotels and motels' suffer a considerable loss in amenity, due to increased noise and activity from transient tourists, as well as diminished security."

"Apartment residents should not have to share their amenities, such as gardens, pools and gyms with 'guests' (in effect, strangers),....."

".....increased visitor thoroughfare, including the movement of luggage, increases maintenance costs of corridors, lobbies, lifts and car parks.....a cost borne ultimately by permanent residents who do not enjoy any of the monetary benefit of the rental apartments and are unfairly cross-subsidising these owners (in addition to incurring the losses in amenity referred to above)."

The HMAA also stated:

"All providers of similar accommodation types should be required to comply with the same regulations, legislation and standards." That is, the HMAA members who must comply with Class 3 building standards and costs are being disadvantaged by tourism operators using Class 2 buildings as transient holiday and tourist accommodation.

The Tourism and Transport Forum Australia has expressed similar concerns to those stated by the HMAA:

"Legitimate operators face higher operating and compliance costs by providing properly trained staff, responsible management, compliance with building standards, disability access, insurance levies, and payment of commercial council rates."

The standard of visitor accommodation constitutes a major part of the longer-term memory of the visitor/tourist experience, and certainly is one of the major subjects of recommendation to friends and associates. Thus the standard of accommodation has considerable impact on new and repeat tourism business experienced by UOAQ accommodation providers.

The Objective: How will the proposal solve the problem?:

The BCA now renamed the National Construction Code (NCC) and incorporating the BCA has the previously stated mission statement:

"The goals of the Building Code Australia (BCA) are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety, health and amenity for the benefit of the community now and in the future."

This mission statement clearly tasks the ABCB with the authority, responsibility and duty of care to the Australian people to correctly and accurately define the standards required to achieve "structural sufficiency, safety, health and amenity for the benefit of the community now and in the future."

The NCC 2014 continues to state: *"The ABCB's mission is to address issues relating to safety, health, amenity and sustainability in the design, construction and performance of buildings."*

These standards and mission statement are understood by the ABCB as evidenced by the non-binding clarification paper issued in 2012, but the ABCB appears to lack the intestinal fortitude to confront developers.

The ABCB cannot abdicate this authority, responsibility, and duty of care and retain any credibility. Six years to establish a definition of the specification of Class 2 buildings that are the basis for achieving an understanding of the core elements of their mission statement is unacceptable by any performance standard.

The following Part of the BCA specifically states the 'Principles' and 'Intent':

PART A3 CLASSIFICATIONS OF BUILDINGS AND STRUCTURES

A3.1 Principles of Classification Intent

To state the basis of any decision regarding the classification of a building or part of a building.

The use of a building determines its classification. Use is determined on the basis of its design, construction or adaptation.

Classification Intent:

To categorise buildings of similar risk levels based on use, hazard and occupancy.

Classification is a process for understanding risks in a building or part, according to its use. It must be correctly undertaken to achieve BCA aims as appropriate to each building in each circumstance.

The logical conclusion from the above is that the BCC before advising the ABCB in determining the construction standards to meet a defined use and building classification must understand the intent of the classification definitions (in this case Class 2 and Class 3). If the BCC does not understand the link between use and classification it cannot specify the standards required of the BCA (NCC). E.g. BCA Specification E2.2a para. 3. (AS 3786) for long term residential Class 2 buildings and BCA Specification E2.2a para. 4. (AS 1670) for short term accommodation Class 3 buildings, thus compromising fire safety standards. This past clear understanding of fire standards has now been blurred by the NCC introducing combined Class 2/Class 3 standards and exemptions.

The proposed 'Guide' to the understanding of Class 2 and Class 3 building use was fully supported by the Unit Owners Association of Queensland Inc.(UOAQ). As returning the intended use of Class 2 and Class 3 buildings to the intent of the (AUBRCC). The UOAQ was, and is, most concerned that the document was proposed as a 'Guide' and not a clear definition of the correct building use. We see this as an open invitation to the blind eye approach as was experienced with Class 1a and 1b until some 20 deaths by fire forced the Queensland Government to act. **It would be a tragic reflection on the ABCB and the Federal Government if a fire in a Class 2 building is being used for Class 3 purposes, resulted in hundreds of death by fire.**

The UOAQ recommends in the strongest possible terms that the General Provisions to the BCA be amended to include a definition of Dwelling: 1. a place of residence or abode; a house. 2. continued or habitual residence. The incorrect use of the word "dwelling" then be deleted from the NCC Volume 1 as recommended at the 'Proposal' to this paper.

This extremely simple amendment will permanently clarify the correct use of Class 2 buildings and can be adopted by every state and territory as part of the May 2015 NCC amendments.

What alternatives have been considered:

Because of the confusion introduced as to the intended definition and use of Class 2 and Class 3 buildings, and lack of definition of "dwelling" in the BCA, the ABCB placed on its Annual Business Plan for 2006: 'The clarification of the definitions of Class 2 and Class 3 buildings'. Four years later (2010) the ABCB declared that the BCC was unable to reach agreement as to suitable definitions, and therefore the project would be discontinued.

Following this failure of the BCC and ABCB to achieve satisfactory definitions of the Class 2 and Class 3 building classifications, the Australian Government Productivity Commission released its Annual Review of Regulatory Burdens report in August 2010. This report raised concerns about classification and use of Class 2 and Class 3 buildings, and tasked the ABCB with reviewing the definitions and use of Class 2 and Class 3 buildings. In 2011 the ABCB sought submissions from stakeholders in relation to Class 2 and Class 3 building classification. On 6 August 2012 the ABCB issued a non binding clarification paper on the understanding of Class 2 and Class 3 definitions.

On 19 December 2012 the ABCB circulated a letter effectively putting the clarification exercise on hold for two years.

The BCC from 2006 to 2010 was unable to agree on an acceptable definition. In total this task has now been on the ABCB agenda for six years plus another two years in abeyance. The ABCB appears to be either incapable of or unwilling to produce a definition of Class 2/3 buildings, and considering the six years already dedicated to this simple task, plus two years in abeyance, appears to be most unlikely to achieve a satisfactory resolution of the problem. The delay simply allows developers to continue building sub-standard accommodation – primarily for the tourist industry - but owned by the mum and dad investors of Australia.

The letter issued from the ABCB clearly indicates that it has been influenced by the development lobby to discontinue the clarification exercise because it will be financially disadvantageous for the developers to construct the correct Class 3 buildings where they are now constructing less expensive Class 2 buildings for short term accommodation.

This apprehension of collusion between the ABCB and developers was further strengthened in 2011 by the introduction of an amended definition of Class 1b buildings.

The original Class 1b definition was amended in May 2011 by the addition of paragraph (ii)

(ii) "4 or more single dwellings located on one allotment and used for short-term holiday accommodation"

Resulting that the Class 1b definition reads:

(b) Class 1b —

(i) a boarding house, guest house, hostel or the like—

(A) with a total area of all floors not exceeding 300 m² measured over the enclosing walls of the Class 1b; and

(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation, which are not located above or below another dwelling or another Class of building other than a private garage.

The introduction of “(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation.” is:

- contrary to the stated objective of the introduction of Class 1b;
- contrary to the Macquarie Dictionary definition of ‘dwelling’.... as a ‘dwelling’ cannot be used in conjunction with short-term holiday accommodation and also maintain consistency with the Macquarie Dictionary definition;
- contrary to the BCA statement: “Guest, boarding, or lodging houses which do not meet the criteria for a Class 1b building are classifiable as Class 3 buildings. Correctly, 4 or more single dwellings located on one allotment and used for short - term holiday accommodation would best be classified as a motel - Class 3.

The introduction of the amended definition appears to be completely unnecessary except for the purpose of diluting the construction standards of holiday (tourist) accommodation and further confusing the understanding of ‘dwelling’ as originally confined to Class 1, Class 2 and Class 4 (part) buildings.

Confusion was achieved in the Victorian Supreme Court (Paul Slater v Building Appeals Board and Ors) VSC279 Beach 30 May 2013 where his Honour Judge Beach⁷⁵ at [48] & [49] found that the new Class 1b definition diluted (confused) the definition of ‘dwelling’.

By way of contrast, there is no evidence of confusion in NSW Land and Environment Court judgments nor at a Planning level over the definition of ‘dwelling’ and the different Planning categories.

“A number of categories of tourist and visitor accommodations are defined by this instrument (NSW Standard Instrument-Local Environmental Plan (Gurran, 2011), including “backpackers’ accommodation”, “bed and breakfast accommodation”, “hotel or motel accommodation”, and “serviced apartments”. Local governments are then able to assign these different types of accommodations to specific land use zones. The Technical Appendix summarizes the NSW tourist and visitor accommodation types that most closely resemble offerings available via Airbnb, and outlines the overarching state and local planning frameworks applicable to each.

All forms of tourist and visitor accommodations are regarded as a “development” and therefore require planning permission. If the activity is to occur within an existing dwelling, hosts must seek a “change of use” permission. “Bed and breakfast accommodation” is typically permitted within dwelling houses (not apartments) in lower-density residential zones...if operators obtain approval and pay a “development contribution” (akin to an impact fee) toward local facilities and services before starting business.” (Gurran/Phibbs⁷⁶)

The UOAQ protested this change of definition to Building Codes Queensland (BCQ). This letter was responded, and subsequently forwarded to the ABCB as recommended by BCQ. This Proposal for Change results from the ABCB response.

The Impacts - Who will be affected by the proposal?:

- Long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence.
- Investment unit owners seeking a return on investment from short-term rental.
- Caretakers and letting agents seeking to illegally holiday let units in Class 2 buildings.
- Developers who will be forced to comply with the intent of the NCC and construct building for purpose.
- Persons with a disability who will be protected from occupation of pre 2010 buildings without adequate egress in the event of fire.
- State Governments who will be forced to amend legislation that is offensive to the NCC and DDA.
- Local Governments who will be required to correctly classify Class 2 and Class 3 buildings during development application processing.
- Australian tourism industry where dedicated, professionally managed, designed for purpose, facilities are not available to meet the standards expected by international travellers.

In what way and to what extent will they be affected by the proposal:

Unit owners: Long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence.

⁷⁵ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2013/279.html?context=1;query=Salter%20Beach>

⁷⁶ <http://www.tandfonline.com/doi/full/10.1080/01944363.2016.1249011#.WG8eCzLpZ6k.twitter>

Mixed-use buildings are distressing to residential owners because the issue we are addressing is to provide surety to purchasers who wish to live in residential property not affected by short-term rental. The desire for quality of residential living accords with basic human rights, and will be an increasing problem as residential unit living increases. The 2013 Griffith University study went to great pains to explore the frustration that purchasers experienced clarifying the building class issue, then ultimately finding that short-term rentals were introduced into their property. Class 2 buildings should provide the means for that surety.

However, under Queensland legislation there is no provision for permanent residential buildings that provide community expectations of lifestyle, amenity, safety and health, or residential accommodation with like-minded persons.

Investment unit owners seeking a return on investment from short-term rental.

Unit owners fall into two distinct groups, those who purchased for investment and those who purchased for private residential use. Those who purchased in a Class 2 building for investment, either knowingly or unknowingly, purchased in the wrong classification building. **Those who purchased for residential use purchased in the correct classification building. Any right thinking person must conclude that those persons who purchased in the correct classification building must be given priority in any dispute as to future building use.**

As population densities increase (in line with Government policy) the number of persons permanently accommodated in apartment buildings will increase. These persons have every right to expect accommodation standards that provide the amenity, health and safety equal to private residential houses. They should not be expected to live with noise, and short-term renters (strangers) using their recreational facilities such as swimming pools, garden areas and community lounges. The lifestyle expectations of permanent residents and short-term transient holidaying tourists are entirely incompatible.

Caretakers and letting agents seeking to illegally holiday let units in Class 2 buildings.

Building Letting Agents are the third group who must be given some consideration, but they are not on the same standing as building owners, albeit that they may own a unit in the building. Letting business returns from a 100% occupancy long term let building yielding 7% will be almost equal to business returns from a 65% let short term rental building yielding 12%.

Solicitors have financially benefited from the confusion surrounding the correct use of Class 2 buildings. Some Local Governments have fought extremely hard to achieve their interpretation of the correct use of Class 2 buildings (not always with success) but at great expense to ratepayers. The trail of court decisions is long and counter-productive to sound governance. The correct interpretation of 'dwelling' and 'residence' has been considered by many courts:

When considering the GST definition of "residence" the Federal Court looked at the definition of "residence" and "occupy" in the Macquarie and Oxford Dictionary, and noted with approval the comment made by the UK VAT and Duties Tribunal (*Urdd Gobiath Cymru v Commissioner of Customs and Excise* [1997] V &DR 273 at 279):

"A residence" clearly implies a building with a significant degree of permanency of occupation.

This same judgement also found that a Motel is not "Residential Accommodation" as residential implies a degree of permanency.

In *South Sydney Municipal Council v James and Anor* (1977) 35 LGRA 432, the issue for determination turned on the definition of "dwelling-house" which was defined in the relevant ordinance as "a building designed for use as a dwelling for a single family". At p 440, Reynolds JA said that a building is used as a dwelling-house within that definition:

"... if its use is such that it can fairly be said as a matter of fact that it is occupied in much the same way as it might be occupied by a family group in the ordinary way of life and that it is not a use and occupation more appropriately described in other categories of residential buildings."

The obiter dictum of Samuels JA was not followed by Bignold J in *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd and Anor* (1988) 66 LGRA 373 (at pp 381 - 382), his Honour preferring to adopt the approach of King CJ in *Masters v Padley*. The question in that case was whether a certain building was being used within the terms of a development consent authorising use as a "residential flat building". On appeal (*North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd and Anor* (1990) 21 NSWLR 532), Mahoney JA at 537 - 538 held that, in respect of the definition of "residential building" under the County of Cumberland Planning Scheme Ordinance, a number of descriptions were used involving different kinds of human habitation, and that the kind of human habitation involved in "residential flat building" within the definition envisaged a significant degree of permanency of habitation or occupancy.

In the context of a planning control which regulates the purposes for which land may be used, it is appropriate, in my opinion, to think in terms of the ordinary meaning of "domicile" as a "place of residence", an "abode" or a "house or home" (see *Macquarie Dictionary*) rather than in terms of its technical legal meaning as being a permanent residence to which the subject, if absent, has the intention of returning. Characterisation of use is not

generally concerned, from a planning control perspective, with the intentions of persons, but instead is concerned with the actual use to which the land is put (cf North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd and Ors (1989) 67 LGRA 344 per Kirby P (as he then was) at 353 in the context of existing uses).

NSW Land & Environment Court 3rd October 2002. Judge Pain

Eric Foster of Sylvania, owner of a residential strata unit in the "Tradewinds" building on the ocean front at South Cronulla was ordered to stop letting his residential unit for holiday and short term accommodation. Tradewinds is a 9 storey 42 residential unit building zoned 2c Residential which allows use of the units only as a person's permanent home or residential lease.

A further hearing in the Cronulla flat case: In the New South Wales Land and Environment Court Judge Pain in Sutherland Shire Council v Foster & Anor [2003] NSWLEC 2 (24 September 2002) paragraph 8 stated:

"In terms of these particular proceedings, I rely on the decision of Mahoney J in North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 71 LGRA 432. I particularly rely on a passage at 437:

"In the end, my conclusion is that the meaning of the consent, though not determined by, is to be read consistently with the use of language in the relevant definitions in the County of Cumberland Planning Scheme Ordinance. The definition of "residential building" requires nothing more than use for human habitation. However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency. Thus, a residential hotel may have a smaller degree of permanence than a residential club or a hostel. It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind or category of residential building which envisages a significant degree of permanency of habitation or occupancy. The description of a flat as a "dwelling" or a "domicile" carries with it the notion of that degree of permanency."

Regardless of the majority of court decisions siding with 'dwelling' as being a place of long term or permanent residence, some courts found the matter to lack clarity, and some courts found otherwise:

In the Victorian Supreme Court (Paul Slater v Building Appeals Board and Ors) VSC279 Beach 30 May 2013 where his Honour Judge Beach at [48] & [49] found that the 2011 NCC Class 1b definition diluted (confused) the definition of 'dwelling'. He returned the matter to the Building Appeals Board for review.

The Oaks Hotels & Resorts P/L v City of Holdfast Bay & Anor [2010] SARDC 16 (31 March 2010):

The referenced decision by the Environment, Resources and Development Court (ERDC) of South Australia, to allow misuse of a Class 2 building, is extremely confusing, and contrary to South Australian Government guidelines published at that time.

The Sydney Morning Herald 21 May 2014 reported a Victorian Civil and Administrative Tribunal decision to issue a cease and desist order against short stay letting operators. In this case the matter was the use of Class 2 units for what the Tribunal accepted was business operations.

The final word on the correct interpretation of "Dwelling Unit" is left to the Australian Bureau of Statistics: "A dwelling unit is a self-contained suite of rooms, including cooking and bathing facilities and intended for long-term residential use." (A definition that the ABCB may wish to adopt)

The point of all this is that unit owners should not have to resort to the Courts to determine the correct use of their building. A matter that falls within the responsibility and charter of the ABCB, but which the ABCB has failed to define over a period of some 24 years.

Developers who will be forced to comply with the intent of the NCC and construct building for purpose:

The intent of the AUBRCC was to introduce a logical sequence of building classifications based on type of occupancy and risk of that occupancy including type and numbers of persons resident, accommodated or working in a building.

This resulted in Class 1 for private residential, Class 2 sole occupancy units for private residential and Class 3 for public accommodation.

Understandably the AUBRCC failed to anticipate that some developers would try to manipulate the logical sequence and definition of building classifications for their own vested interests, thus causing confusion as to the definition and use of Class 2 buildings.

As a consequence of their actions, developers are now faced with the dilution of the difference in construction and fire and safety standards between Class 2 and Class 3 buildings to the point where new Class 2 buildings must meet the standards of Class 3 buildings with the associated cost increases. This will have limited effect on developers of pre-2010 Class 2 buildings, as these projects are completed and have been passed to the general public to try and reconcile the legality of use of their building.

Persons with a disability who will be protected from occupation of pre 2010 buildings without adequate egress in the event of fire.

The most vulnerable occupiers of Class 2 buildings built before 2010, being misused as Class 3, are persons with a disability. Class 2 building constructed before 2010 did not provide access and egress for persons with a disability. Fire detection standards were lower; there were no fire refuge areas, no public address systems, no Braille signage and no direct fire alarm contact to a fire reporting area. In the event of elevators being closed in the event of fire, (as is required) no provision for safety or egress of persons with a disability.

Clear definition of the correct use of Class 2 buildings will provide alerts to persons with a disability that pre 2010 Class 2 buildings are unsuitable for safe occupation.

State Governments who will be forced to amend legislation that is offensive to the NCC and DDA:

The Queensland State Government Body Corporate and Community Management Act 1997 section 180 (3) is offensive to the NCC and DDA by forcing bodies corporate to use Class 2 buildings for transient short term accommodation. Thus exposing bodies corporate to prosecution and liability either in the event of death by fire, or injury to a person with a disability.

Clear definition of the intent of use of a Class 2 building should force the Queensland Government to review their legislation. A clear definition of Class 2 building use would also provide clarity to the Courts.

Local Governments who will be required to correctly classify Class 2 and Class 3 buildings during development application processing.

The primary cause of acquiescence to the confusion of Class 2 building definition has been Local Government. Local Governments have failed to correctly classify buildings for purpose, and then failed to monitor correct use. This has given a green light to developers to build and then sell buildings by misrepresenting their end use.

Australian tourism industry where dedicated professionally managed designed for purpose facilities are not available to meet the standards expected by international travellers.

In 2003 the Western Australian government report of the Tourism Planning Taskforce that was an in-depth investigation into planning for future tourism sustainability. The Taskforce investigations provided the opportunity for the factors and issues that impact on the tourism industry, the tourist experience and tourist satisfaction, to be recognised.

The key principle identified was that a sustainable tourism industry, with its many inherent benefits, *“requires tourism development to be undertaken for tourism purposes.”* Past practise in Australia, in many instances, has been to build Class 2 residential accommodation buildings and then try to adapt them to tourism facilities. This has adversely impacted the tourism experience and the quality of living of permanent residents in these buildings. The UOAQ policy is, and has always been, that Governments should encourage the construction of Class 3 buildings purpose designed to cater for tourists and containing those features sought by tourists for relaxation and enjoyment.

The Hotel/Motel industry is fully equipped to provide tourist accommodation providing the standards and facilities expected by the touring public. Moreover, the staff in these facilities is professional hospitality personnel trained and qualified to provide the level of service expected by tourists. The recent development of hotels and motels with unit type accommodation and first class facilities has made provision of unit accommodation, with mum and dad caretakers, redundant.

There is no dispute that hotel/motel buildings must be constructed to BCA Class 3 standards providing the amenity, level of health and safety commensurate with tourist expectations. This is an expensive development scenario where the higher establishment and operating costs can be recouped from the more affluent tourist market. However, **hotel operators are not prepared to construct Class 3 buildings that are expected to operate in competition with lower cost Class 2 buildings.**

The distinction between Class 2 and Class 3 building use was clearly understood by the standardisation committee working on the predecessor to the draft BCA as far back as 1980. Class 2 buildings were defined as places of permanent residence and Class 3 buildings were defined as transient/commercial accommodation. The defined objective of the standardisation committee (that has since become the objective of the BCA) was:

The achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.

Two distinct types of building use was the vision of 1980/81 standardisation committee when first defining Class 2 buildings as places of private residence and Class 3 buildings as transient accommodation.

The use of Class 2 mixed-use buildings for tourist accommodation is of great concern to the UOAQ for safety of occupants and creation of problems for both the permanent residents and transient tourists.

The 2003 study and report by the Western Australian Government also found:

“There is potential for conflict between short stay tourists and residents in a tourist facility due to the different objectives of the two groups in being at the premises. This conflict can manifest itself in many ways but has two primary outcomes:

- A de-valuation of the “tourist” experience available at the development through there being a non-tourist character or ambiance to the facility.
- An impact on the amenity of the resident due to different lifestyle priorities to short stay tourists, who in many cases have a higher “recreation priority”.

Supporting this finding was the thesis of Kelly Cassidy, a final year PhD student at Griffith University, as reported in the Australian newspaper on 19 October 2007:

- “Apartment owners are far from one homogenous group.”
- “They mostly have different and competing interests.”
- “The conflict potential in many buildings is huge.”

Bill Randolph, director of the Faculty of the Built Environment at the University of New South Wales when endorsing the study (in the same edition of the Australian) said:

“Legislators, policy-makers and managers are all simply going to have to get their heads around this if they’re going to manage this sector into the future in an appropriate way.”

Consultation:

Who has been consulted and what are their views?

- The 2003 Western Government study quoted above.
- The 2013 Griffith University study quoted above.
- The Kelly Cassidy 2007 Doctorate quoted above.
- The UOAQ represents the unit owners of Queensland and to this end runs a ‘help line’ for members. The overwhelming complaint from owners is the conflict experienced in mixed use building. The conflict is between tourists and permanent residents, and caretaker/letting agents who have a conflict of interest between responsibility to residents and tourists (because tourist rentals are a source of income to the letting agent).
- The HMAA who must operate Class 3 buildings in competition with Class 2 building operators who have a lower base for return on investment and can therefore operate on lower returns.
- The Hotels Association Queensland who experience the same problems as the HMAA.
- Tourists in Class 2 buildings who experience a less than satisfactory standard of service provided by the Mum and Dad operators of Queensland’s infamous Management Rights.
- Residents in Class 2 buildings being operated as Class 3 (even by professional companies) These residents complain of:
 - slow elevator service because Class 2 building are constructed with the minimum number of elevators based on lower utilisation by permanent residents;
 - service staff using the elevators with linen and cleaning trolleys;
 - no linen service cupboards in a Class 2 building design, resulting in service trolleys blocking common property access areas and obstructing evacuation routes;
 - short term guests having higher utilisation than permanent residents of the indoor 25 m pool, outdoor pool, sundeck, sauna, gymnasium, guest lounge, BBQ facilities and entertaining area and basement car parking all requiring elevator utilisation; and
 - on-site restaurant and conference/meeting facilities requiring elevator services.
 - Owners Corporation Docklands Victoria, fighting to ban short term letting of their Class 2 building.

COMMONWEALTH DISABILITY (ACCESS TO PREMISES – BUILDINGS) STANDARDS:-

Relevant Legislation - On the 1 May 2011 the Commonwealth *Disability (Access to Premises – Buildings) Standards 2010 (Premises Standards)* was introduced and adopted into the *Building Code of Australia (BCA)* as well as state based legislation. The objectives of the Premises Standards are to ensure that “*dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability*”. The Premises Standards apply to new buildings and existing buildings being altered and sets out clear parameters for access requirements. Prior to 1 May 2011, there were no prescriptive requirements within the building regulations (including previous versions of the BCA) for Class 1b buildings, but lack of access to these buildings was (and still is) subject to complaints under the Disability Discrimination Act 1992.

When Do Access Requirements Apply:

The application of the access provisions of the Premises Standards and BCA apply to ‘specified’ types of Class 1b buildings:

- A newly constructed Class 1b building where one or more rooms is made available for rent.
- An existing residence (i.e. Class 1a house, unit, townhouse or the like) is converted to a Class 1b building where four or more rooms are made available for rent.
- An existing Class 1b building is being altered. In this case the new works and pathway from the new works to the principal entrance should comply, as well as an upgrade of the principal entrance if required.

- It also applies to short-term holiday accommodation such as cabins in caravan parks, tourist parks, farm stay, holiday resorts and similar tourist accommodation where there are four or more dwellings used for short-term holiday accommodation on the same allotment. In this case a proportion of the dwellings would need to be accessible.
- There are many variations in short-term accommodation that could be made available and landlords would need to carefully consider the implications of any scenario to ensure the correct application of the Premises Standards and BCA.

The Risk:

It is important to note that Class 1b buildings that are not included in the above definition of a 'specified' Class 1b building (i.e. with less than four dwellings on the same allotment or less than four bedrooms in a converted existing house) would continue to be subject to possible ODA complaints. But compliance with the Premises Standards and BCA would grant the landlord immunity under the provisions of both documents. **If a landlord fails to acknowledge the accessibility requirements of the building and operates the building without considering the needs for accessible accommodation, it will present a risk to the landlord under the DDA. A person with a disability could make a complaint to the Human Rights Commission under Section 23: Access to Premises, or Section 25: Accommodation. Furthermore, if a landlord operates any kind of boarding or rooming house without the necessary Building (or Planning) permits, the local Council could take action on the landlord including serving Notices and Orders that could see the landlord in the Magistrates Court where penalties, legal costs and criminal convictions could be imposed.** It is therefore important for all parties involved in the rooming house industry to consider accessibility in the early stages of planning for any rooming house. Taking accessibility into account during the design stage or feasibility stage has the potential of saving time and money.

Accessibility Considerations for a Class 1b Building:

The following are the typical access provisions required for a Class 1b building:

- Continuous accessible paths from the main pedestrian entries into the site
- An accessible car parking space (where on-site parking is provided)
- A continuous accessible path from the car park to the entrance
- An accessible entrance into the building via the principal entrance doorway
- Access to and within at least one bedroom and associated accessible bathroom facilities

Access to at least one of each type of common room/facility (e.g. kitchen, laundry, lounge, dining room, gym, swimming pool, patio area, games room, etc.)

Application of Premises Standards and the BCA⁷⁷:

(Note to readers: practice advice relates to the legislation in force at the time, which may since have been amended.)

This Practice Advice will assist the application of the Commonwealth Disability (Access to Premises – Buildings) Standards 2010 (the Premises Standards) within NSW.

Background information on the Standards and guidance on their implementation in NSW can be viewed at www.bpb.nsw.gov.au.

Difference in the application of the Premises Standards and the BCA:

The Premises Standards apply to the construction of new buildings and new parts of existing buildings. Unlike the Building Code of Australia (BCA), the Premises Standards also apply to a specified path of travel in an existing building (the 'affected part') and require a mandatory upgrade where that part does not comply with the Premises Standards.

The technical disability access requirements, which mirror the current disability access provisions of the BCA, are set out in Schedule 1 of the Premises Standards and are referred to as the Access Code for Buildings.

The Premises Standards do not apply to Class 1a buildings, or to a Class 10 building if it is associated with a Class 1a or a Class 4 building.

The Premises Standards also differ from the BCA with respect to how each applies to Class 1b and Class 2 buildings.

Class 1b buildings and specified Class 1b buildings:

A Class 1b building is defined in the Premises Standards and the BCA as:

One or more buildings which in association constitute:

- *a boarding house, guest house, hostel or the like —*
 - *(A) with a total area of all floors not exceeding 300m² measured over the enclosing walls of the Class 1b; and*

⁷⁷ <http://www.bpb.nsw.gov.au/application-premises-standards-and-bca>

- (B) in which not more than 12 persons would ordinarily be resident; or
- four or more single dwellings located on one allotment and used for short-term holiday accommodation, which are not located above or below another dwelling or another Class of building other than a private garage.

Under subclause (i) of this definition the nature of the use of the building (i.e. boarding house, guest house), the floor area and the number of residents are relevant factors. These factors do not apply to dwellings under subclause (ii).

However, the Premises Standards *only* apply to buildings identified as specified Class 1b buildings, defined as:

- (a) a new building with 1 or more bedrooms used for rental accommodation; or
- (b) an existing building with 4 or more bedrooms used for rental accommodation; or
- (c) a building that comprises 4 or more single dwellings that are:
 - (i) on the same allotment; and
 - (ii) used for short-term holiday accommodation.

Wherever the word 'building' is used in the definition of specified Class 1b building, it should be read to mean Class 1b building.

A *specified Class 1b building* is therefore a sub-category of Class 1b buildings.

For the Standards to apply, a building must first be within the definition of being a Class 1b building, and then must meet the further characteristics of a *specified Class 1b building*. Further, subclause (a) of the definition applies only to new buildings, sub clause (b) applies only to existing buildings, and subclause (c) applies to new and existing buildings.

What does short-term holiday accommodation mean:

While not defined in the Standards or the BCA, short-term holiday accommodation is typically rented out on a commercial basis for short periods without a lease agreement. **(NSW has clarity on this issue: See NSW Residential Tenancies Act Section 7 and 8(h).)**

Applying the BCA and the Standards to Class 1b buildings - Because the accessibility requirements for Class 1b buildings differ between the Premises Standards and the BCA, the application of their relevant provisions vary depending on the type of building work proposed.

New Class 1b buildings - A building is a new building under the Premises Standards if it is not a part of an existing building and if the application for a construction certificate (CC) or complying development certificate (CDC) for it is lodged on or after 1 May 2011.

The Premises Standards apply to a new Class 1b building only where the building is a *specified Class 1b building*. All Class 1b buildings that are new buildings are required to meet the disability access provisions of the BCA whether or not the building also meets the definition of *specified Class 1b building* under the Premises Standards. Where a building meets the disability access provisions of the BCA, it will also meet the corresponding disability access provisions of the Access Code under the Premises Standards.

If the building is a *specified Class 1b building* and compliance with the Access Code is not possible (i.e. deemed-to-satisfy solution, performance solution or a combination of both), relief from compliance is available if it can be demonstrated that compliance would impose unjustifiable hardship on a person (and an objection in relation to compliance with the corresponding provisions of the BCA may be required).

New parts of existing class 1b buildings:

The Standards also applies to a 'new part', and any 'affected part', of a **specified Class 1b building**. A part of a building is a new part if it is an extension to the building or a modified part of the building and an application for a CC or CDC is lodged on or after 1 May 2011.

Where an application for a CC or CDC is sought with respect to a new part of a building that is a specified Class 1b building (i.e. subclauses (b) and (c) of the definition):

- the work associated with the new part must meet the requirements of the Access Code and the BCA
- the Standards require (unlike the BCA) that the 'affected part' must comply with the Access Code.

If the 'affected part' of the existing building does not already meet the requirements of the Access Code, it will need to be upgraded to comply.

As with new *specified Class 1b buildings*, relief from compliance with the Access Code (including work that may be required to upgrade the 'affected part') may be possible on the basis of unjustifiable hardship.

Class 2 buildings:

The Premises Standards and the BCA define a Class 2 building as a building containing two or more sole-occupancy units, each being a separate dwelling. The Premises Standards do not apply to all Class 2 buildings or to all parts of a Class 2 building.

The Premises Standards apply to a Class 2 building only where:

- the application for the CC or CDC for its construction as a new building was lodged on or after 1 May 2011
- it has accommodation available for short-term rent.

The Premises Standards therefore do not apply to a Class 2 building (that has accommodation available for short-term rent) which existed before 1 May 2011, such as a building constructed in 2004 that is being modified, or a building constructed in 2011 under a CC applied for before May 2011.

This recognises the impact compliance with the Premises Standards could have on the owners of existing Class 2 buildings (particularly those that are walk-ups with parking on the ground floor and the first of the units on the first floor level).

In comparison, the disability access provisions in the BCA apply to all new Class 2 buildings and to alterations and/or additions to any existing Class 2 building. This does not include a car park associated with a Class 2 building, as this is a Class 7a building. Further, the BCA disability access requirements will only apply to new work to an existing building if it is within the areas nominated in BCA Table D3.1.

There is no requirement under the BCA to upgrade existing parts of a building that are not part of the proposed building works. For example, if the proposal involves refurbishment to an existing lobby area (common area) and no works are proposed to the principal entrance doorway, it is not necessary to upgrade this door unless it is a building to which the Premises Standards apply.

The Premises Standards and the BCA do not, however, apply to the internal parts of a sole-occupancy unit in a Class 2 building.

COUNCIL OF THE CITY OF SYDNEY:

Council of the City of Sydney Staff report⁷⁸, as of June 2017, states that there were 120,656 residential dwellings. Of these:

107,680 were private dwellings (private ownership and rental dwellings, social (including public) housing, affordable rental housing,
12,967 dwellings were non-private dwellings (boarding house rooms, student accommodation rooms, residential care services),
9,561 social (including public) housing dwellings
835 affordable rental housing dwellings
3,205 boarding house rooms and
9,101 student accommodation rooms

The City of Sydney's housing targets are 7.5 per cent of all city housing to be social housing and 7.5 per cent of all city housing to be affordable housing, delivered by not-for-profit or other providers by 2030. The total housing target is 138,000 (private) dwellings by 2030, not including boarding houses, student accommodation or residential care services (non-private dwellings).

Council Staff were asked to confirm the total number of residential dwellings lost to short-term letting agents and platforms. Despite having been previously provided with details of agencies that monitor the operations of short-term letting operators, Council replied:

“City staff...do not collect or report on the number of short term lettings available in the City of Sydney LGA as there is currently no available method of collecting this data that is statistically robust. However, the research team will be looking into this over the next year to determine if there is a way that we can report on short term lettings”.

On 18 April 2013 a resident of the City of Sydney submitted a GIPA request in relation to the short-term letting operation in one particular residential building. City of Sydney Council did not immediately reply, and on 01 and 08 May 2013 the Applicant – a partner of a well-know Legal firm – followed up via email. He was subsequently provided with a large amount of material, including copies of correspondence, emails between City of Sydney staff, details of meetings, reports of action being undertaken including investigations and bookings made for overnight stays in the building under scrutiny, report backs on the stays etc. The Applicant in turn used this material in an attempt to extract monies from those who had drawn to Council's attention his and others' *“Illegal Use of*

⁷⁸ http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0012/289497/Research-Housing-Audit-June-2017.pdf

Premises". Were an agreement to pay the monies demanded rejected, Lawyers acting for the GIPA Applicant threatened that further legal plus court action would commence.

On 11 August 2017 a GIPA request was submitted in relation to the same residential building, where action by Council eventually culminated in the City of Sydney obtaining Orders from the NSW Land and Environment Court to stop a large short-term rental operation. Senior Solicitor for the City of Sydney advised residents back in 2014 that a *Senior Counsel* had been engaged to conduct this matter as, for the City, it was of critical importance to obtain a watertight judgment. As it transpired, no judgment was handed down; the Respondent voluntarily accepted the Orders of the Court, knowing from past Court proceedings that he was clearly in breach of the DA. Documentation would surely have been generated within Council plus prepared by Council for presentation to the Court. It is inconceivable that Council holds nothing on record on this matter.

To this second Applicant, Council supplied no correspondence or documentation; neither the documentation provided in 2013 or any subsequent material.

On 03 October 2017 Council wrote:

"Please note this enquiry is now considered complete. As per correspondence forwarded to you on 21 June 2017 from the CEO to the effect that any further correspondence from you on short-term letting in Sydney will be read, but may not be responded to, the Information Access Team will not respond to any further correspondence it receives from you in relation to this matter, but will rather refer it to the Office of the CEO."

It appears that the Council of the City of Sydney's CEO is selective when it comes to whom she/Council will furnish documentation in response to a GIPA application.

City of Sydney's Graham Jahn AM, Director – City Planning, Development & Transport, continues to approve and issue *Determination of Development Applications (DA)* whereby the short-term letting of a Residential Lot is an *"Illegal Use of Premises"*.⁷⁹ Such DAs read:

Restriction on Residential Development

The following restriction applies to buildings approved for residential use:

1. (a) The accommodation portion of the building (levels 3-24) must be used as permanent residential accommodation only and not for the purpose of a hotel, motel, serviced apartments, private hotel, boarding house, tourist accommodation or the like, other than in accordance with the *Sydney Local Environmental Plan 2012*.
- (b) A restrictive covenant is to be registered on the title of the development site in the above terms and restricting any change of use of those levels from a residential flat building as defined in *Sydney Local Environmental Plan 2012*. The covenant is to be registered on title prior to an Occupation Certificate being issued or the use commencing, whichever is earlier, to the satisfaction of the Council. All costs of the preparation and registration of all associated documentation are to be borne by the applicant.
- (c) If a unit contains tenants, it must be subject to a residential tenancy agreement for a term of at least three months.
- (d) No person can advertise or organise the use of residential apartments approved under this consent for short term accommodation or share accommodation.

The Council for the City of Sydney has a 100% success rate in taking the rights and interests of Residents suffering from the impacts of short-term tourist/visitor rentals to the NSW Land and Environment Court. Action has extended to defending Appeals against judgments of the Court:

- [2007] NSW LEC 382 – Justice J Jagot – 187 Kent Street v Council of the City of Sydney
- [2007] NSWLEC 88 – Justice C Brown – 187 Kent Street v Council of the City of Sydney – Appeal
- [2011] NSW LEC 234 – Justice J Sheahan – Council of the City of Sydney v Oaks Harmony
- [2011] NSWLEC 235 – Justice J Sheahan – Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri)
- [2011] NSWLEC 1054 – Justice C Murrell – Council of the city of Sydney v Oaks Hotels and Resorts (re Maestri)
- [2014] NSWLEC – Case No. 14/4923 – Council of the City of Sydney v Con Kotis/Australian Executive Apartments

City of Sydney Lord Mayor Clover Moore is on the record – NSW Hansard 08 April 2008:

2221 – PROTECTING APARTMENT RESIDENTS FROM IMPACTS OF SHORT-TERM ACCOMMODATION

Given the 2007 Land and Environment Court determination that there is a fundamental incompatibility between a mix of residential and serviced apartments that share the same floor and access points due to the difference in behaviour, living and activity patterns between short-term and long-term occupants:

- 1 What consideration has the NSW Government given to the following measures to prevent overcrowding and short-term occupancy in residential apartment blocks:
 - Restricting the number of adults on residential tenancy agreements to two adults per bedroom, with the maximum number of adults allowed equal to two times the number of bedrooms?
 - Banning residential sub-leases?
 - Setting minimum residential tenancy leases to three months?

⁷⁹ <https://cdn.online.cityofsydney.nsw.gov.au/dasearch/determined/1267318-8105298.PDF>

- 2 What other measures are being considered by the NSW Government to reduce short-term service apartment occupants letting in residential apartment blocks?

City of Sydney Lord Mayor Clover Moore is on the record in a Minute⁸⁰, calling for action against Illegal Accommodation, following a fire at an industrial site at Alexandria which destroyed shipping containers and caravans being used for accommodation: *“Overcrowding and illegal accommodation is a difficult problem faced by councils across Sydney because its underlying cause is a lack of affordable housing options. The City is currently developing a housing diversity and affordability strategy, and seeks the State Government’s active engagement to find solutions for this important issue.*

The City of Sydney is committed to the safety of our visitors and, for many year, has unsuccessfully lobbied successive State Governments for increased authority to take action about overcrowding and illegal accommodation.

Action called for by City of Sydney’s Lord Mayor included:

- Creating a new order under section 121B of the *Environmental Planning and Assessment Act 1979* specifically focused on unsafe and overcrowded premises.
- The new order would refer to ‘commercial places of shared accommodation’ and include any commercial operation where people stay on a short or long-term basis. It would apply to premises that are not approved for shared accommodation where the use leads to unsafe/unhealthy conditions or significant amenity impacts for neighbouring properties.
Currently, Order 1 in section 121B requires a council officer to specifically identify the unauthorised use, which requires sufficient evidence to identify whether the premises is a boarding house, a backpackers hostel or some other specific use.
- Extending use of circumstantial evidence from backpackers to all places of shared accommodation in section 124AA of the Act.
Currently, section 124AA provides that circumstantial evidence can be used in proceedings relating to the unauthorised use of premises as a backpackers hostel. The provision should be extended to other types of tourist and visitor accommodation and boarding houses.
- Extending use of s124AA to allow evidence of unauthorised works to alter a premise for shared accommodation (such as unauthorised partitioning) as prima facie evidence of such a use.
A similar provision was in the Environmental Planning and Assessment (Boarding Houses) Bill 2010 introduced by the Member for Ryde, Mr Victor Dominello MP.
There is also a need for a licensing regime for visitor and tourist accommodation premises comparable to that established for boarding houses.

A taskforce should be established with relevant NSW Government and local government representatives to develop these proposals and implement effective legislative changes.

The City of Sydney also has a Visitor and Tourist Accommodation Development Control Plan⁸¹. It is strongly recommended that this Development Control Plan form the basis for all landlords wishing to convert a Class 1(a) free-standing single family dwelling to Tourist/Visitor premises.

The City of Sydney has an Affordable Rental Housing Strategy⁸²:

“Overall, by June 2015 there were 753 affordable rental housing dwellings in the city, with more than 500 further dwellings in the development pipeline.”

However, **as at 03 October 2017, the City of Sydney Local Government Area had lost 6,579 homes to Airbnb alone⁸³**, with an unknown number of other short-term rental agents and platforms operating within the Local Government Area.

The City of Sydney also has an Affordable Housing Levy. We suggest that this levy be extended to all new Applicants across NSW seeking to convert, register, license Class 1(a) buildings to Visitor and Tourist Accommodation.

“All developments

In order to provide housing for a mix of income groups, development in Green Square is required to make a contribution towards affordable housing.

A developer may choose to provide affordable housing on-site or pay an equivalent monetary contribution to allow housing units to be built elsewhere in Green Square.

⁸⁰ http://www.cityofsydney.nsw.gov.au/__data/assets/pdf_file/0003/209928/140728_COUNCIL_ITEM31.pdf

⁸¹ http://www.cityofsydney.nsw.gov.au/__data/assets/pdf_file/0005/119543/visitorsortouristaccomdcp_150306.pdf

⁸² <http://www.cityofsydney.nsw.gov.au/vision/towards-2030/communities-and-culture/affordable-housing>

⁸³

<http://insideairbnb.com/sydney/?neighbourhood=Sydney&filterEntireHomes=false&filterHighlyAvailable=false&filterRecentReviews=false&filterMultiListings=false>

The aim is to provide about 330 rental units for very low to moderate income households as development continues in the area over the next 15 to 20 years.

City West Housing is currently the recommended affordable housing provider for Green Square.

Condition of consent

Affordable housing contributions form a condition of development consent. The Sydney Local Environmental Plan 2012 and the Green Square affordable housing program provide further information about the scheme.

Indexation

Monetary contributions are indexed to ensure they reflect the costs associated with providing affordable housing units over time. The rates are indexed yearly on 1 March, based on the established house price index for Sydney, for the previous year (December to December) using arithmetic averages of the quarterly index numbers.

Contribution rates

The contribution requirements effective from 1 March 2017 to 28 February 2018 are:

Residential development

- **On-site:** 3% of the total residential floor area must be provided as affordable housing.
- **Monetary:** \$221.01 per square metre of the total residential floor area.

Non-residential development

- **On-site:** 1% of the total non-residential floor area must be provided as affordable housing.

Monetary: \$73.64 per square metre.”

THE OWNERS CORPORATION NETWORK

In a letter to the then Minister for Innovation and Better Regulation, dated 10 March 2016, Strata Lawyer/Owners Corporation (OCN) Chairperson wrote on OCN letterhead:

“ONC seeks amendment to s.49 of the SSMA (s139 of the new Act), to enable owners in general meeting to exercise their democratic right to make by-laws relating to short term letting within their building.”

The position put forward by the then Chairperson, now spokesperson’ for the OCN, does not mention the need and considerable cost to upgrade building infrastructure for commercial use, nor is it the position arrived at and sent to their Board, by the OCN’s Sub-Committee on short-term rentals.

The goal set for the OCN’s short-term rental Sub-Committee was to present a policy to Parliament “to support the on-going improvement in communal living by confronting the inherent problems of short-lets of residential property”. The goal: “to maintain the distinction between residential use and that of holiday/tourist/visitor accommodation”. The six-page document concludes with:

“Actions Required: OCN should press for the following initiatives by the State Government: 1) The State Government in the parliamentary reform process must investigate how councils could be mandated to enforce residential planning, zoning or approval to prevent unauthorized short-term commercial letting of residential properties, and 2) The State Government must ensure that Development Consents are clear, comprehensive and precise as to the manner in which short term letting is dealt with; Development Consents for residential use should also state that no person can advertise or organize the use of the property for short term accommodation.”

The Chair of the OCN’s Sub-Committee on short-term letting, is on the record more recently writing:

“(Name) is clearly concerned about “where power rests” in a strata scheme despite changes to the Act that limit the number of proxies. She is right to be concerned.

Even under the new Act many tried and tested ways of getting and keeping control of a Strata Committee remain live and well in the world of apathetic owners. I expect we will also see power exercised in new ways as we move to Pre Meeting Voting. Indeed it would be naïve to think that some owners will not be influenced in the way they submit their electronic votes.

All this is important in how we find a solution to the Short Term Letting “STL”/Airbnb challenge.

To call for “Owners to Decide” whether a building allows STL is not a solution. It poses real risks for any owner who has bought an apartment as their “home” in the reasonable expectation that the Residential Development Consent meant that they could expect to live in a community of Residents. Why?

So how would “Let the owners decide” play out?

It is quite conceivable that commercial interests could secure sufficient power to support an application for a change of building status to short term accommodation.

That may not only mean a change of surroundings for any remaining “resident owners”, but they could also be faced with being levied for their pro rata share of the costs of any fire upgrades and compliance works required for the building’s new purpose. Is that fair and equitable?

The new Act has made it very clear that individual owners facing redevelopment of their homes and termination of their schemes needed special safeguards. Individual owners in buildings heading down the Short Term Letting path deserve equal protection.”

(www.ocn.org.au/comment/reply/2989/6493 - 25/01/2017)

An earlier declaration⁸⁴ by the OCN is still pertinent:

“An appeal on a proposal to convert the AEA Grand strata to serviced apartments has been refused by the Land and Environment Court. This is a significant decision and will be noted with great interest by many strata schemes around the city where short-term lets are, at the very minimum, disturbing the peaceful occupation by resident owners and tenants.

It follows recent OCN representations to City of Sydney forums and an OCN Seminar that discussed the topic. OCN has been vocal in its objections to mixed occupancies in residential buildings. Occupants of serviced apartments and other short-term letting arrangements cause more noise and wear and tear on the buildings than long-term residents, and there are anecdotal incidents of unruly and even threatening behaviour. Long-term residents are entitled to peaceful occupation. OCN also supports local authorities who commonly have issued a DA for the building based on its use as residences, and are then forced into acting against owners who flout that usage.”

The OCN is very much aware of the reality faced by many of its members, in particular the short-term letting activity in buildings where Residents/OCN Members describe their home lives as a *‘living hell’*.

Former and present members of Strata Committees have spoken directly with OCN Board Members and told of the seriousness and frequency of threats issued against those who have sought to uphold the *Residential Determination of Development Application* in their buildings. These threats have come from others who hold enormous legal and legislative power plus far greater financial resources than the recipients of the threats. More than one individual has received death threats.

It is considered by many that the OCN’s recommendation to make individuals within a strata scheme responsible for the actions of (almost always absent) investor owners and off-shore booking platforms is unrealistic and unfair in the extreme, plus this often places individuals in very dangerous and threatening territory, exposing all to financial ruin in the event that an insurer refuses to pay against a major insurance claim.

Numerous Members of the OCN have written and expressed their profound concerns and disagreement with the policy being put before Parliament by the OCN supposedly *‘in their names’*. The OCN has a system whereby Members’ comments must pass through moderation before they are published on their ‘Forum’. Comments and opinions such as those mentioned are not being transmitted to the OCN Membership.

On 24 October, at a Parliament House forum, the OCN’s spokesperson told those present: *“The road forward is for our Parliament to provide strata owners with the democratic right to decide on the use of their building.”* Indeed, those in strata and all others have already exercised their *‘democratic right’* and have invested in a *residential dwelling* – a home. There is nothing *‘democratic’* about the OCN’s silencing of those Members whose opinions differ from that which is being promoted by their spokesperson. There are those, both within and outside the OCN, for whom it is imperative that the residential status on their property – their home - is maintained.

The OCN’s Chairperson confirmed again to the Member base early this year that they are seeking substantial annual funding from the NSW Parliament; informal discussions commenced with Gladys Berejiklian during a Strata Christmas Party when she was Finance Minister. It was reported that a figure of up to \$500,000 per annum is sought. The OCN’s spokesperson has subsequently advised Public Servants and others that the OCN is prepared to manage any short-term rental licensing scheme; this proposal was met with laughter by those present.

OCN Members have been told: The *‘offer of the by-law’* on short-term letting is that of a *“softly, softly”* approach; there is still the hope of securing State funding. The OCN’s spokesperson has advised that, dependent of course on this funding, he hopes to *transition to retirement* on an annual consultancy fee in excess of \$250,000 from the OCN for the next five or so years.

The recommendation made to Parliament by the OCN, if adopted, will see an explosion in the imperative to call upon and pay for the services of Strata Lawyers. And those in strata will never, ever be secure in the knowledge that their property – their home - will remain *residential*.

⁸⁴ https://www.ocn.org.au/news_archive/200703

TENANTS' UNION OF NSW

The Tenants' Union of NSW are still parroting⁸⁵ *Airbnb's* claims about 'Mums/Dads' being the bulk of business in Sydney and NSW. The Tenants' Union's 'research' found "no clear correlation between rising rents and an increase in listings in Sydney's *Airbnb* hot spots, suggesting that deteriorating rental affordability across the city is not necessarily down to *Airbnb*." This was "in keeping with other analysis⁸⁶" presented by the Tenants' Union, that *Airbnb's* activities, despite report after report from major centres around the globe, the latest being Toronto⁸⁷ plus the 100 largest metropolitan areas in the United States, where data shows that *Real Estate Agents* – operators controlling whole stables of properties - is *Airbnb's* obvious preferred 'business model'.

Across the United States⁸⁸ and Europe, short-term rental platforms and agents are blamed for rising rents in college and tourist towns, as landlords choose to charge higher short-term prices for short lets, rather than issue long-term leases.

Of course, *Airbnb* and all other short-term rental operators will not produce data, citing 'privacy concerns' and any data produced by independent sources is always claimed by *Airbnb* to be flawed and inaccurate.

The NSW Tenants' Union continues to base their argument on the total proportion of vacancy rates across Sydney; this obviously distorts the picture, given that short-term rentals are centralised around city/coastal/harbour/tourist areas and 'essential service' centres such as Educational and Health precincts. Tracking rents via FACS for key Sydney Suburbs and NSW regions, where the vacancy rate is less than 3%, rents go up, up, up when short-term rentals move in. Meanwhile, the NSW Tenants' Union quotes *Airbnb*. *Airbnb* quotes the NSW Tenants' Union.

It is hoped that other submissions to the 'Options Paper' will also quote and provide analysis from sources such as the Botson Journal of Economics Working Paper 2016-03 by Mark Merante and Keren Mertens Horn: "Is Home Sharing Driving up Rents? Evidence from *Airbnb* in Boston"⁸⁹.

The NSW Tenants' Union's Ned Cutcher told the ABC that he "believes a renter should be allowed to share their leased property on *Airbnb* – as long as they bear responsibility for any problems. It's the kind of decision a rational adult person should be able to make about their housing."⁹⁰ On 28 June 2017 Mr Cutcher was asked if he had been quoted correctly by the ABC and whether or not he or any of his colleagues profited through *Airbnb*-type rentals. No response has been received.

Residential housing is for housing residents. For NSW tenants seeking rental homes, the main game is surely the fact that landlords are still free to evict tenants without reason at the end of a lease period. This allows landlords to 'test' short-term rentals at the expense of housing and rental stability for those in need of a quality home life.

REQUIRED: IMMEDIATE ENFORCEMENT OF NSW ENVIRONMENTAL PLANNING AND ASSESSMENT ACT- including but not limited to:

Subdivision 1 –

119B Appointment of investigation officers

- (1) The Secretary or a council may appoint persons (including any class of persons) as investigation officers for the purposes of this Division.
- (2) A person's appointment as an investigation officer may be made generally, or made subject to conditions or restrictions or only for limited purposes.

119C PURPOSES FOR WHICH POWERS UNDER DIVISION MAY BE EXERCISED

(1) A departmental investigation officer may exercise powers under this Division for any of the following purposes:

- (a) enabling the Minister or the Secretary to exercise their functions under this Act,
- (b) determining whether there has been compliance with or a contravention of this Act, including any instrument, consent, approval or any other document or requirement issued or made under this Act,
- (c) obtaining information or records for purposes connected with the administration of this Act,
- (d) generally for administering this Act.

(2) A council investigation officer may exercise powers under this Division for any of the following purposes:

⁸⁵ <http://tunswblog.blogspot.com.au/2017/09/how-do-you-solve-problem-like-airbnb.html>

⁸⁶ <http://tunswblog.blogspot.com.au/2017/05/rental-affordability-deteriorates-again.html>

⁸⁷ <http://upgo.lab.mcgill.ca/airbnb/Short-term%20Cities%202017-08-10.pdf>

⁸⁸ <https://www.wsj.com/articles/how-airbnb-affects-home-prices-and-rents-1508724361>

⁸⁹ http://repec.umb.edu/RePEc/files/2016_03.pdf

⁹⁰ <http://www.abc.net.au/news/2017-06-28/landlords-real-estate-agents-move-to-prevent-airbnb-sublets/8656414>

- (a) enabling a council to exercise its functions under this Act,
- (b) at the request of the Commissioner of Fire and Rescue NSW, determining whether or not adequate provision for fire safety has been made in or in connection with a building.

119G SEARCH WARRANTS

(1) An investigation officer may apply to an eligible issuing officer for the issue of a search warrant if the investigation officer believes on reasonable grounds that this Act is being or has been contravened at any premises.

(2) An eligible issuing officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an investigation officer named in the warrant:

- (a) to enter the premises, and
- (b) to exercise any function of an investigation officer under this Division.

SUBDIVISION 3 – Powers to obtain information and records

119J REQUIREMENT TO PROVIDE INFORMATION AND RECORDS

(1) An investigation officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as the notice requires in connection with an investigation purpose.

SUBDIVISION 4 – Miscellaneous provisions applying to exercise of powers

119M Offences

(1) A person must not, without reasonable excuse, fail to comply with a requirement made of the person by an investigation officer in accordance with this Division.

(2) A person must not furnish any information or do any other thing in purported compliance with a requirement made under this Division that the person knows is false or misleading in a material respect.

(3) A person must not intentionally delay or obstruct an investigation officer in the exercise of the officer's powers under this Division.

(4) The maximum penalty for an offence under section 125 arising under this section is a tier 3 maximum penalty.

REQUIRED: IMMEDIATE ENFORCEMENT OF NSW PLANNING AND ASSESSMENT REGULATION – including but not limited to:

PART 9 – FIRE SAFETY AND MATTERS CONCERNING THE BUILDING CODE OF AUSTRALIA

DIVISION 1

166 Statutory fire safety measures

167 Application of Part

DIVISION 2 – FIRE SAFETY SCHEDULES

168 Fire safety schedules

168A. (Repealed)

168B Installation of fire sprinkler systems in certain residential aged care facilities

DIVISION 3 – FIRE SAFETY ORDERS

169 Fire safety schedules and fire safety certificates

DIVISION 4 – FIRE SAFETY CERTIFICATES

171 Issue of final fire safety certificates

172 Final fire safety certificate to be given to Fire Commissioner and prominently displayed in building

DIVISION 5 - FIRE SAFETY STATEMENTS

175 What is an annual fire safety statement?

176 Issue of annual fire safety statements

177 Annual fire safety statement to be given to council and Fire Commissioner and prominently displayed in building

178 What is a supplementary fire safety statement?

179 Issue of supplementary fire safety statements

180 Supplementary fire safety statement to be given to council and Fire Commissioner and prominently displayed in building

181 Form of fire safety statements

DIVISION 6 - FIRE SAFETY MAINTENANCE

182 Essential fire safety measures to be maintained

DIVISION 7 - MISCELLANEOUS FIRE SAFETY OFFENCES

183 Fire safety notices

184 Fire exits

185 Doors relating to fire exits

186 Paths of travel to fire exits

DIVISION 7A - SMOKE ALARMS

186A Owners of existing buildings and dwellings must ensure smoke alarms are installed

186AA Owners of moveable dwellings must ensure smoke alarms are installed

186B Specifications for smoke alarms

186C Persons must not remove or interfere with smoke alarms

186D No development consent or consent of owners corporation required to install smoke alarms

186E Smoke alarms and heat alarms in certain existing buildings taken to be essential fire services

186F Transitional provisions relating to obligations under this Division

186G Transitional provisions relating to obligations under clause 186AA

DIVISION 7B - FIRE SPRINKLERS IN CERTAIN RESIDENTIAL AGED CARE FACILITIES

186H Definitions

186I Application

186J Requirement to install fire sprinkler systems

186K Nominated completion date

186L Postponement of required completion date for installation

186M Fire sprinkler systems to be installed in accordance with the Fire Sprinkler Standard

186N Final occupation certificate to be provided to Implementation Committee

186O Installation of fire sprinkler systems in facilities with 1 March 2016 as nominated completion date

186P Notices relating to residential aged care facilities without fire sprinkler systems

186Q Implementation Committee

186R Applications for complying development certificates and construction certificates for installation of fire sprinkler systems

DIVISION 8 – MISCELLANEOUS

187 Modification and supplementation of Building Code of Australia standards

189 Fire brigades inspection powers

SCHEDULE 5 – PENALTY NOTICE OFFENCES

Offences under the Act (Clause 284)

Offences under this Regulation

Provisions of Regulation

TAXATION:-

The issue of Taxation and short-term letting has been flagged with the Federal Commissioner for Taxation. **The issue of State-based taxes was overlooked by the NSW Parliament during their Inquiry. Why?** Again, by way of summary, we quote the following:

PARLIAMENT OF AUSTRALIA

Parliamentary Business – Senate Committees

Chapter 2 - A persistent problem⁹¹

2.13 Clearly, tax minimisation was a major driver in locating a company's headquarters and distribution hubs in low tax jurisdictions. But much to the committee's chagrin, the companies would not broach the subject. In some cases, the answers to questions stretched beyond credibility. For example, Airbnb (a US company) ventured that it set up its international office in Ireland principally to 'access talent':

Mr McDonagh: We closed some of those offices because one of our core values at *Airbnb* is to simplify. It just was not effective to have all of those offices and all of those people.

Senator EDWARDS: Why Ireland?

Mr McDonagh: I think Ireland is important for a number of reasons.

Senator EDWARDS: What is the No. 1 reason?

Mr McDonagh: I would say that the No. 1 reason we located ourselves in Ireland was for access to great talent.

Senator EDWARDS: Come on!

Mr McDonagh: It is generally the head of our global operations.

Senator DI NATALE: And the corporate tax rate in Ireland had nothing to do with it?

Mr McDonagh: We do not make any long-term decisions for the business based on tax rates.

⁹¹ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report%20part%202/c02

2.14 Compared with the Australian corporate tax rate of 30 per cent, the corporate tax rate in Ireland is 12.5 per cent but can be much lower, if not eliminated, through the use of structures like the 'double Irish Dutch sandwich'.

2.15 The audacity of certain multinationals in refusing to comply with legitimate and reasonable requests for information raises suspicions that they have something to hide. The unwillingness of many multinationals to discuss openly their tax arrangements underscores the need to establish mechanisms to increase transparency.

2.38 The nature of the digital economy provides opportunities for aggressive tax minimisation by allowing multinationals, such as Google, Microsoft, Uber and Airbnb, to deliver services using software platforms that can be located on the other side of the world. For example, Uber and Airbnb, based in the Netherlands and Ireland respectively, provide a platform for the exchange of services between Australians in Australia; yet the financial transactions associated with these services are undertaken in offshore jurisdictions and the Australian subsidiaries are reimbursed for expenses with a margin added on.

2.39 Emerging multinationals, such as Uber and Airbnb, are large enough to be captured by the significant global entity provisions and may choose to avoid the application of the MAAL (and the stronger penalties associated with it) by ceasing to book revenue overseas for the exchange of services between Australians in Australia. By booking revenues here, digital multinationals will move into a tax regime where the parent company will be reimbursed, through transfer pricing, for the intellectual property underlying the digital service. The creation of a permanent establishment should also give the ATO more access to information about the underlying corporate tax structure of these multinationals.

2.40 The committee does not accept the argument that activities within Australia represent only a small proportion of overall value creation, and considers that current transfer pricing principles need to be fully explored and, where necessary, redrafted to ensure that transfer pricing cannot be manipulated to the detriment of Australian tax revenue. For example, if Australian consumers are paying higher prices for goods and services than a comparable product in other countries, then arguably this represents a value creation activity in Australia. Rather than just paying tax on a relatively small net profit margin for distribution services, corporate income tax liabilities could be calculated on the difference between the Australian price and the cost of supply to other countries.

Message from Accommodation Association of Australia CEO, Richard Munro

"The release of the Short-Term Holiday Letting in NSW Options Paper has triggered an avalanche of desperate advocacy from multi-national companies such as Airbnb and Expedia, who own Stayz.

A report commissioned by those companies touting \$1.6 billion in revenue and some 14,000 FTE jobs created by them made for interesting reading. The 14,000 jobs created was probably the most far-fetched report I have heard since being in the role at AAoA and if this was truly the case, we would invite some evidence of state/territory payroll tax being paid by Airbnb or, for that matter, if it has paid any tax in Australia at all. Of course, we are unlikely to see any evidence like this as it probably doesn't exist.

What this increase in advocacy and commissioning a self-serving report does demonstrate is that these online global behemoths, which are utilising residential homes as quasi-hotels, are very concerned about the pressure we are bringing on to their "operations" in Australia.

The AAoA has been very active and will continue to advocate on behalf of our compliant members until there is transparency on the operations of the likes of AirBNB and they are, effectively, told to ensure that they comply

Neighbours Not Strangers volunteers the data compiled by the City of San Francisco's Financial Controllers⁹²:

"Removing a single property from the Housing Market costs cities between USD250,000 to USD300,00 per year, every year.

⁹² http://sfcontroller.org/sites/default/files/FileCenter/Documents/6458-150295_economic_impact_final.pdf?documentid=6457

TOURISM AUSTRALIA/MANTRA GROUP/ACCOR HOTELS

In September 2017, *Mantra Group's* Chief Executive Officer Bob East, was appointed Chairman of *Tourism Australia*. *Mantra Group* Staff advise that when acquiring new stock for their portfolio they do not build properties from scratch; they take over the management rights⁹³ of existing properties.

Mr East and *Mantra's* Development Manager Andrew McTaggart have been asked to confirm whether or not *Mantra* takes into their portfolio only those buildings that are certified Class 3 (Building Codes of Australia/National Construction Codes), or if the Group takes on property constructed as Class 2 (residential flat dwellings) for Class 3 use. They were also asked whether any building construction/materials upgrades are ever undertaken, plus confirmation of who is responsible for final certification - '*fit for occupancy*'. No response has been received.

French Hotel Group *AccorHotels* has launched a \$1.195 billion takeover bid for the *Mantra Group*, reportedly sending *Mantra* shares surging 18 %. Factor in: "*if any proposal is agreed, the proposal will be subject to regulatory approvals and other conditions to be determined...*"⁹⁴. Do all properties within the *Mantra Group* meet ABC/NCC class 3 requirements? Who will ask the questions and who will furnish answers?

In 2016 *AccorHotels* purchased the short-term rental platform *OneFineStay* and promotes hourly rates/stays⁹⁵. *Accor* has repeatedly reported that it intends to compete aggressively against *Airbnb's* intrusion into its traditional hotel/serviced apartment markets. "*Airbnb took from us, we will take from them*", *Accor* CEO.⁹⁶ The 'stock' for all this activity all comes from our housing supply.

The ACCC is reported to be concerned "*about a high concentration of hotel ownership in two markets... it will be interesting to see whether the ACCC factors the Airbnb market into its decision*"⁹⁷

REQUIRED: IMMEDIATE REVIEW RURAL WORKERS ACCOMMODATION ACT⁹⁸

Any deregulation in NSW of legislation covering residential housing must trigger a full review and similar deregulation of the Rural Workers Accommodation Act.

REQUIRED: REVIEW OF THE INFORMAL LODGING SECTOR IN NSW: A Regulatory Blind Spot (UNSW)

Any deregulation in NSW of legislation covering residential housing must trigger a full review and similar deregulation of the Informal Lodging Sector.

*"Fifty-eight beds, in 19 makeshift rooms, in a three-bedroom house. Ten people lodging in a single bedroom. Beds installed on apartment balconies, in bathrooms and laundries and, in one case, a pantry. A shower installed in a hall."*⁹⁹

REQUIRED: REVIEW OF BOARDING HOUSES ACT¹⁰⁰

Any deregulation in NSW of legislation covering residential housing must trigger a full review and similar deregulation of the NSW Boarding Houses Act.

Recent Research by AHURI on rooming and boarding houses: Peer reviewed¹⁰¹:

"Once upon a time you had a building that was being occupied by persons who were living there three or more months and it would be advertised as a boarding house and that was simple. Now you have places that people say are 'apartments' or 'student houses' or 'private dwellings... We need to reform the regulation of marginal rental accommodation, to more definitely draw a line between arrangements that are exploitative, unsafe and unacceptable, and those that are tolerable for their specific purpose of relatively short-term, accessible accommodation."

REQUIRED: REVIEW OF THE AUSTRALIAN HOMESTAY NETWORK – STUDENT ACCOMMODATION

There appears to be no scrutiny of this activity, despite Foreign Students contributing in excess of \$19.7 billion to the Australian Economy. A full review of the sector is surely warranted, given the deaths of three international students in lodgings in Victoria.

⁹³ <http://www.afr.com/business/tourism/no-wonder-accor-is-interested-in-mantra-talk-about-luck-20171009-gyxlmh>

⁹⁴ <http://www.theaustralian.com.au/business/mergers-acquisitions/mantra-surges-on-accors-12bn-bid/news-story/6c1e7685f31799bdd97a9d66d970baa7>

⁹⁵ <https://www.ft.com/content/ed99366c-bbaf-11e6-8b45-b8b81dd5d080>

⁹⁶ <http://www.afr.com/real-estate/commercial/hotels-and-leisure/airbnb-took-from-us-we-will-take-from-them-accor-ceo-20170504-gvynfd>

⁹⁷ <http://www.theaustralian.com.au/business/dataroom/accors-play-for-mantra-hits-an-acc-hurdle/news-story/c7995916f583ef05e040a9be58bb210a>

⁹⁸ <http://www.safework.nsw.gov.au/law-and-policy/legislation-and-codes>

⁹⁹ <http://blogs.unsw.edu.au/cityfutures/blog/2015/09/the-informal-lodging-sector-in-nsw-a-regulatory-blind-spot/>

¹⁰⁰ http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/bha2012164/

¹⁰¹ <http://blogs.unsw.edu.au/cityfutures/blog/2015/09/the-informal-lodging-sector-in-nsw-a-regulatory-blind-spot/>

Annexure 1 – Concerns Relating to ‘Options Paper’

The following concerns were raised in relation to the ‘Options Paper’. Replies to queries were not provided:

Prior to the release of the ‘Options Paper’, Please demonstrate where current NSW legislation covering short-term holiday letting was reviewed, assessed and deemed to be inadequate,

Please identify and substantiate any current failings in NSW Land and Environment Court case law judgments on short-term letting,

Are reports of an independent, 1980 NSW Fire Department survey of buildings in the City of Sydney, which found that 70% of property owned by the NSW Government failed to meet building code requirements, correct? If this Report is no longer accessible, please provide a copy of the latest report and inventory on State-owned buildings in the Sydney CBD area and their level of compliance with Building Codes of Australia (BCA) and Fire and Rescue criteria.

As per testimony given before the NSW Parliamentary Inquiry into short-term letting:

Please provide details of any meetings with NSW Rural Fire Service and Fire and Rescue NSW plus findings and resolutions on short-term holiday letting¹⁰², particularly around “*overcrowding in urban apartments and other accommodation where fire safety is also a high order issue for Fire and Rescue*”,

Please provide further clarification, from *Better Regulation* and *Fire and Rescue* perspectives on the “*more stringent fire safety standards around how frequent any short-term rental turn-over would be and how informed people need to be about evacuation procedures, alarms and the building code requirements when caught up in (short-term rentals)*”¹⁰³,

Please demonstrate, with data, what would be the “*quite different needs and issues*”¹⁰⁴ of NSW North Coast and South Coast residents,

Please demonstrate, by way of changes to the State Environment Planning Policy [SEPP] how *Better Regulation* will assess and justify to NSW Residents the application of short-term letting “*thresholds*” in residential buildings and zones,

Please provide details of the work done by *Better Regulation* specifically on:

- Establishing the number of agents and booking platforms, located here and overseas, selling NSW homes as short-term holiday rentals,
- Country of origin/nationalities of clients now using NSW homes as short-term tourist/visitor rentals,
- The total number of NSW homes now removed from our housing stock and used as holiday rentals,
- The number of NSW Residents who have been evicted and displaced from rental properties,
- The number of homeless residents in each of the NSW Local Government Areas that suffer from high rates of short-term holiday rentals,
- Data relating to displacement of essential workers and increased rental/mortgage costs.

If changes are implemented by Government, please clarify what, if any, differentiation and distinction will be made in a revised [SEPP] between strata, company title and Torrens title buildings; please demonstrate how such a scenario will be evaluated and arrived at; who will pay for the alteration of Title Deeds and mortgage documents state wide,

Please produce data from other jurisdictions on the effectiveness of any industry-controlled *Code of Conduct* and how this could apply in NSW, when it is impossible to identify and contact the agent or overseas booking platform which has granted access to a residential property,

In relation to short-term letting, please produce *Better Regulation’s* review and response to the Australian Criminology Research Advisory Council’s “*Crime in High Rise Buildings: Planning for Vertical Community Safety*”¹⁰⁵. Please also provide any data that has been collected on crime rates in NSW residential neighbourhoods where short-term holiday letting is present.

Focusing specifically on the *Options Paper*¹⁰⁶ itself, for review and comment purposes, please provide supporting documentation and data as follows:

¹⁰² <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9711/Hearing%20-%20Public%20Hearing%20No%202.pdf>

¹⁰³ <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9711/Hearing%20-%20Public%20Hearing%20No%202.pdf>

¹⁰⁴ <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9711/Hearing%20-%20Public%20Hearing%20No%202.pdf>

¹⁰⁵ <http://crg.aic.gov.au/reports/1314/29-1112-FinalReport.pdf>

¹⁰⁶ <http://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

- *“STHL is estimated to be worth \$31.3 billion nationally, providing income for property owners and creating jobs through the establishment of new businesses to manage transactions between property owners and customers. In NSW, STHL constitutes approximately 50% of the national total, accounts for 25% of total visitor nights and occurs in both regional and metropolitan areas. It is expected that STHL in NSW will continue to increase its share of visitor night demand over the next ten years.”* (Page 4)
- *“In 2014, there were an estimated 216,000 STHL premises in NSW/ACT.”* (Page 7. What is the current Jul-Aug 2017 figure.)
- *“Most online listings are managed directly by the owner of the dwelling rather than an estate agent.”* (Page 7)
- *“About one-third of accommodation supply in non-metropolitan coastal NSW is STHL and it is a significant contributor to regional economies.”* (Page 7)
- *“To determine which policy option is appropriate, it is important to establish a clear, evidence-based understanding of the nature and significance of the impacts of STHL on the community.”* (Page 8 – what evidence-based data has been produced?)
- *“NSW (including ACT) represents approximately 35% of holiday rental premises nationally.”* (Page 8)
- *“STHL contributes an estimated \$31.3 billion to the national economy including upwards of 238,000 jobs.”* (Page 8)

BCA Classification

- *“Some jurisdictions and courts in Australia have asserted that STHL can constitute a change in building classification under the Building Code of Australia (BCA). This can affect in NSW, among other things, the fire safety, health and amenity and disabled access (for people with a disability) requirements that apply, as well as whether development approval is required from the local council.”* (Page 11. Demonstrate please how this is being addressed.)
- *“This advantage is most stark at the boundary between [STHL] and bed and breakfast operators, who are arguably competing for the same customers. Consideration could be given to better aligning the regulatory requirements for low impact tourist and visitor accommodation, such as bed and breakfasts, and those for STHL.”* (Page 11. Please present data. Please set out how *Better Regulation* will address the needs and impacts on residents who are complying with legislation. Or will Government deregulate all B&B/Motel/Hotel/Backpack/Boarding Houses.)
- *“In NSW, any attempt to regulate STHL ownership may be anti-competitive and would need to be carefully considered.”* (Page 12. Please demonstrate how a concern over ‘anti-competitiveness’ will be weighed against the title deeds held by NSW Residents who have purchased homes in Residential buildings and suburbs.)
- *“However, the limited evidence currently available suggests that the impact of STHL on rental availability is negligible.”* (Please explain why there has been no “evidence” collected. Please substantiate how “negligible impact” can be claimed.)
- *“Sector-wide, transparent data collection and reporting from industry may help to ensure the issues can be monitored to facilitate an informed response from Government.”* (Page 12. Please establish how *Better Regulation* will obtain transparent data and confirm from whom this will be sourced, and then verified.)
- *“According to Airbnb’s Australian website the Friendly Buildings program is “a pilot program offered to help landlords, building residents who are Airbnb hosts, and their neighbours.”* (Page 14. Please demonstrate and present examples of where *Airbnb* is responding to the concerns of NSW Residents.)
- *“Most STHL operators provide complaint mechanisms for their listings, such as a website or a telephone number. Self-regulation could see a transparent and responsive complaint management system.”* (Page 14. Please demonstrate how residents are establishing the identity of the letting platform involved and how successful individuals have been in having their issues addressed.)
- *“There is value in greater ongoing monitoring and reporting on STHL by industry. This is particularly the case given the paucity of information relating to the impacts associated with STHL. If information about the growth of STHL in NSW and its impacts on the community was made publicly available it would provide data on the extent of any issues and inform the future regulatory management of the industry.”* (Page 15. Please demonstrate how and why the NSW Parliament is considering alterations to legislation in the absence of data.)
- *“The Committee did not accept that STHL was incompatible with strata living.”* (Page 16.)
- Please demonstrate how this critical statement is arrived at, given NSW case law.

- “There is no consistent definition of STHL across NSW.” (Page 18. Please list the NSW legislation that was considered, reviewed and discounted in order to arrive at this statement.)
- “The use of the planning system to manage STHL would be supported by provisions in the Environmental Planning & Assessment Act (EP&A Act) which allow investigation into on-going issues of non-compliance. The Act allows an investigation authority (i.e. council officers) to enter and search, obtain information and record evidence on, amongst other things, the use of a property.” (Page 19. When was the last time the EPA&A was enacted in relation to short-term letting. What explanation is there for the absence of enforcement of legislation in the intervening period in NSW and please justify why the Department/NSW Government has tolerated and permitted non-compliance with Planning and Zoning legislation across the State.)
- “Airbnb guests stay 2.1 times longer than typical visitors in Sydney and the average length of stay in Stayz listings is 6.2 days. In Sydney, the majority of Airbnb hosts rent their primary residences occasionally 37 nights per year. The average guest group for a Stayz listing is 3.7 adults and 1 child, which equates to 3-4 bedrooms. Anecdotal evidence suggests there are lower potential impacts associated with STHL where the principal resident (owner or tenant) is present during STHL, because it’s in the best interests of the host to monitor and respond to guest behaviour or neighbour complaints.” (Page 20. Please substantiate these statements in Minister Kean’s document; they appear to have been volunteered by Airbnb/Stayz/Expedia.)
- “The concept of a registration system hosted by a Government agency rather than an industry body, was supported by most of stakeholders including residents in strata buildings (finding 3).” (Page 21. Please substantiate this statement.)
- Please provide details of *Planning’s* reference to, consultation with, plus consideration of the following, and how advice and findings have been incorporated into the *Options Paper*:

Building Codes of Australia Board

National Disability Discrimination Commissioner

NSW Federation of Housing Associations

The National Construction Code Australian Institute of Architects / Australian Standards and Practices

The NSW Government Response to the Independent Review of the *Building Professionals Act 2005*¹⁰⁷

¹⁰⁷ <http://bpb.nsw.gov.au/sites/default/files/public/BP%20Act%20Review%20NSW%20Government%20Response.pdf>

Annexure 2 - Criticisms Relating to NSW Parliamentary Inquiry

The Community group *Neighbours Not Strangers* concurs with prominent property lawyers in rejecting recommendations made to Parliament in the Report on the short-term tourist/visitor letting of Residential Housing. The Report presented by Hearing Committee Chair Mark Coure MP fails to identify a single flaw with New South Wales' current, world-class legislation. A full and thorough review of the Committee's failings is called for. Faults in the Report include but are not limited to:-

Failure to address any of the Inquiry's Terms of Reference plus failure to seek data on:

- The current situation in NSW and comparisons with other jurisdictions,
- The differences between traditional accommodation providers – real estate agents offering residential tenancies versus agents/platforms providing short-term letting agreements on residential housing,
- The growth in short-term letting plus its impact on the residential housing market,
- The economic impacts of short-term letting on local and state economies,
- Regulatory and legal issues, including neighbourhood amenity, residents' safety, planning and land use controls, licensing – requirements demanded of tenants and from all regulated accommodation providers,
- The financing of bank loans and mortgages on property at interest rates based on residential occupancy plus negative gearing, capital gains offsets and land tax, when housing is in fact used for commercial purposes,
- Platform providers' and landlords' non-disclosure of data/income and taxation avoidance schemes.

Failure to refer to:

- NSW Land and Environment Court case law,
- NSW Residential Tenancies Act, Terms and Conditions,
- An Australian Criminality Report into the level of crime in 'mixed use' High Rise Buildings,
- The San Francisco Financial Controllers' Report on the Economic Impacts of short-term rentals on their City.

Failure to consult with:

- NSW Fire & Rescue,
- National Building Codes of Australia,
- National Disability Discrimination Commissioner,
- Academics mapping the effects of short-term rentals on Tenants/Residents, Housing and Communities,
- Homelessness NSW and other Community Housing Providers,
- Tenants' Union of NSW and Unions NSW,
- Residents who have been impacted upon socially and financially by short-term letting, save for four Residents - Byron (3) / Sydney (1) - amongst a total of 48 persons permitted to speak before the Committee.

Failure to consider and learn from experience overseas.

Failure to resolve Insurance issues, most notably, NSW Strata Scheme Lot Owners' unlimited liability.

Failure to verify so-called assurances given and figures quoted in witness' submissions and testimonies.

Failure to seek legal counsel apropos the recommendations made to Parliament and subsequent damages to be awarded to NSW Residents for removal of housing ownership rights and all resulting devaluation of property impacted upon.

Failure to identify conflicts of interest matters, not limited to parliamentarians' illegal short-term letting.

In rejecting the Report and Recommendations to Parliament *Neighbours Not Strangers* calls for:

- No retrospective changes to properties and areas presently zoned Residential,
- No retrograding of current NSW Legislation or deregulation of Residential Housing,
- All functioning State and Federal Legislation to be upheld,
- NSW Land and Environment Court case law to be upheld,
- NSW Local Governments to be mandated to enforce Planning and Zoning Legislation,
- Penalties for breaches of Planning Legislation to be increased.

Our home lives and residential rights are not 'commodities' open to plunder without limit by commercial operators.