

SHORT TERM RENTAL ACCOMMODATION FOR HOLIDAY AND OTHER VISITOR PURPOSES IN RESIDENTIAL STRATA COMMUNITIES IN NEW SOUTH WALES

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Summary

The intended changes to the planning system open residential strata communities to unlimited short term letting for tourists and visitors. There are no controls on the prevalence, turnover, or spatial distribution of multiple Lots used for short term letting dispersed through a strata community. There is no Local Council oversight of regulatory standards and no enforcement mechanism and there is confusion between agencies about how the planning system will interact with the Code of Conduct.

The Owners Corporation of Australia Ltd (OCN) regards short term letting as a commercial activity and a non-resident use that is high risk in a residential strata community. The changes are excessively generous while the social and financial consequences fall on residents, tenants and other investors who understand the negative impacts of STRA. It puts the security of residents, and the character, standards, and reputation of their strata in the hands of the tourism market, without their consent.

It will be a complete shock to many people who live in strata that investors in their building can start doing 'Airbnb', and, if those investors have 25+% of the unit entitlement that there is nothing owner occupiers or other investors can do to stop it.

The planning system should not permit a Lot to be used for short term letting in a residential strata community (wholly or partly) without the consent of the local council and the permission of the owners corporation. The policy does not 'strike the right balance' and should be reconsidered.

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1. Introduction

This is the submission of the Owner Corporations Network of Australia Ltd (OCN) in response to the Explanation of Intended Effect (EIE) on the Short-Term Rental Accommodation Framework.

OCN is a network of owners corporations across NSW who work together on the issues that confront the growing strata sector. The network has a wealth of experience and works together with members, partners and sponsors as the voice of strata owners in NSW.

- In NSW there are approximately 76,500 schemes with 819,5000 residential Lots. Half of all strata residents in Australia live in strata schemes in NSW (1,129,464).¹ The size and complexity of strata schemes is increasing, and multi-scheme developments are becoming more common.
- Recent data shows that renters are in the majority in 40% of Sydney. This pattern reflects high investor ownership, higher levels of urban density and the decrease in housing affordability.²
- The Sydney Housing Supply Forecast 2016 shows that 184,300 new dwellings will be built in the period 2016-17-2020-22, an 84% increase on the previous 5 years. It is estimated that up to 70% of newly approved dwelling are apartments. The growth of the strata sector is critical to achieving the growth, population and housing strategies of successive governments.
- The sector is rapidly expanding³ but housing affordability remains at critical levels in Sydney. Permitting residential apartments to be converted to lucrative tourist and visitor accommodation works against housing young and older Australians and undermines settled strata communities.⁴

The pressure for regulatory change has been driven primarily by the penetration of Airbnb into urban apartments designed and approved for residential living. The majority of listings are for whole apartments and the highest concentration of STRA listings are in higher socio-economic parts of the city, eastern suburbs, inner west, around the Harbour and beachside suburbs and locations attractive to tourists.⁵ Independent research is showing that STRA is having local impacts and accounting for up to 15% of rental properties in key locations in Sydney.⁶

The EIE blurs the distinction between this so called 'Airbnb phenomena' and the pre-existing practice of letting holiday homes in coastal areas. Legalising the use of every residential dwelling for STRA purposes across the entire state of NSW, is a radical change. Declaring STRA in residential strata communities, to be an 'exempt development' is an extraordinary leap. It is a major change of circumstances with far reaching implications for residential strata communities.

The EIE sets out changes to the *Standard Instrument (Local Environment Plans) Order 2006 (SIO)* and *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (SEPP)*. The changes are intended to 'simplify' planning law for Local Councils that have difficulty addressing tourism in residential premises because of the:

- transient nature of the use;

¹ There are about 2,200,793 strata residents in Australia and about 1,129,464 of them live in NSW. The mix between strata owners and renters is approximately 62% to 48%. <file:///F:/Registration/STRATA%20SECTOR%20NATIONAL%20DATA%20REPORT%202018.pdf>

² <https://www.smh.com.au/business/the-economy/renters-now-in-the-majority-in-over-40-per-cent-of-sydney-report-20181.html>

³ In NSW 38% of all scheme have been built since the year 2000.

⁴ The objects of the EPA include, '... to promote the delivery and maintenance of affordable housing' (s1.3(d)).

⁵ <https://www.businessinsider.com.au/airbnb-rental-prices-in-sydney-and-melbourne-2018-5>

⁶ <AHURI-Final-Report-305-Technological-disruption-in-private-housing-the-case-of-airbnb.pdf>

- lack of information about STRA activities; and
- resource burden of proving non-compliance.

These challenges are magnified in strata communities that carry the disproportionate burden of STRA facilitated by global online platforms.

The presence of an unlimited number of residential Lots used for STRA purposes and dispersed through a strata community is not an innocuous activity. It cannot be dealt with in isolation from legal, social and financial implications for the strata community and owners corporation as a whole.

The stated objectives of the EIE include permitting STRA to:

- (i) occur in appropriate locations; and
- (ii) mitigate the impacts of STRA on communities;
- (iii) strike a balance between the availability of residential property for long term and short-term rental market in metropolitan areas.

These objectives cannot be met, especially in strata communities, under the proposed policy settings.⁷ It is clear this government has abandoned residential objectives; the owners and tenants who live in these communities and the investors who understand that STRA has negative and additional costs.

2. Public Participation and Consultation

The issue of short-term holiday and visitor letting in residential strata communities is controversial. There will be many strata residents, however, who are still unaware of the intended changes. Public consultation should be extended to allow time to raise public awareness through public information sessions and workshops. This is especially important for the strata sector.

The planning instruments are not subject to parliamentary scrutiny. This change is far too significant to proceed without the opportunity to review the Draft SIO and Draft SEPP. The instruments should be put on public exhibition and alongside the mandatory Draft Short Term Rental Accommodation Code of Conduct. This will enable stakeholders to see the detail of the instruments before they are gazetted. Local Councils also need to review the Code of Conduct in order to respond to the EIE.

There is a real need for information sessions and a transition period for residential strata schemes. This concerns the entire package of planning, by laws and code of conduct measures.⁸

3. Overview

The stated intention is to create a state-wide definition of STRA and allow STRA in all residential dwellings as an 'exempt development', and, therefore, without the need for Local Council approval.⁹

- There will be no limit on Hosted STRA.¹⁰ Hosted STRA may operate 365 days a year in all areas and in all types of residential dwellings, including within strata schemes.

⁷ <file:///F:/Registration/STRATA%20SECTOR%20NATIONAL%20DATA%20REPORT%202018.pdf>

⁸ The EPA object include to provide increased opportunity for community participation in environmental planning and assessment (s.1.3 (j))

⁹ There is a single limited exception of bush fire prone land, when a complying certificate will be required.

¹⁰ The host must be present on site overnight. The EIE does not limit Hosted STRA to a primary home or principal resident.

- In the Greater Sydney Region, Un-Hosted STRA will be permitted in investment property and primary homes for any period up to 3 months consecutively,¹¹ for a maximum of 180 days in a calendar year.
- There is no limit on Un-hosted STRA outside of Great Sydney. The EIE indicates that Local Councils will be able to reduce the day cap for Un-hosted STRA but to no lower than 180 days. It is unclear whether this will be autonomous from central government.

The criteria for exempt development will include that:

- The building in which the STRA is proposed must comply at all times with all **relevant** planning, building, **strata**, fire safety and health **regulation**;
- STRA must not cause a contravention of any **existing condition** of the **most recent** development consent that applies to the building;
- STRA must comply with **relevant requirements under the strata scheme**;
- The dwelling must comply with safety standards, that include fire detection and escape measures and limits on occupation in all types of dwelling.

Local Councils have consistently asked for a state-wide definition, a state-wide register, the flexibility to respond to local conditions plus changes to powers and evidential burden to ensure enforcement is effective. The proposed changes:

- prevent flexible planning responses at the local level;
- do not include a requirement for the permission of the owners corporation;
- have no provision for registration;
- do not include changes to powers of the local council for enforcement purposes.

Taken together the proposals set out in the EIE raise real enforcement issues.

4. STRA in Residential Strata Lots

The EIE sets out the proposed definition of STRA as:

The commercial use of an existing dwelling, either wholly or partially, for the purposes of short-term accommodation, but does not include tourist and visitor accommodation.

STRA is a commercial transaction between unrelated parties that utilises residential premises for a short-term tourist and other visitor purpose. The EIE recognises that STRA is the commercial use of a residential dwelling but describes as an ‘ancillary’ ‘activity’ and part of the ‘residential use’ of residential premises that may suitably be declared an exempt development under the EPA.

The statement that ‘most councils do not specifically legislate for STRA and the use is commonly treated as an ancillary activity to the residential use of the dwelling’ is a broad generalisation. This ignores the

¹¹ The definition of short-term rental arrangement is any period less than 3 months consecutive.

residential objectives of residential zone, the Local Environment Plans (LEPs) of urban and coastal LGAs and the jurisprudence of the specialised superior Land and Environment Court.

The definition and the statement imply that STRA in strata communities is routinely practised or widely considered to be ancillary use of a residential strata property across NSW. This is completely incorrect.

The statement also implies that STRA is an innocuous activity in strata communities. This is incorrect.

It glosses over the impacts and implications of STRA in city apartment buildings and localities attractive to tourists and visitors; the beachside suburbs and in coastal locations.

It makes no reference at all to:

- conditions of development consent that explicitly exclude STRA in residential apartment buildings in mixed use and commercial zones;
- the objectives of residential zoning and the purposes of strata communities that provide efficient land use through higher density living in residential areas; and
- ignores the jurisprudence of the Land and Environment Courts on short term letting in apartment buildings and residential areas.

In fact, the majority of people have purchased residential strata properties where serviced apartments are prohibited and bed and breakfast accommodation (with host present) in a strata house (not apartment) requires the permission of the owners corporation (complying development). In high density areas, neither is permitted. The distinction between the proposed definition of 'short term rental accommodation' and other forms of tourist and visitor accommodation is not clear. It permits activities that have been prohibited, or only permitted in limited circumstances and with permission.

The EIE ignores these strata related legal facts.

To move STRA in residential strata communities from a prohibited use to a permissible use with development consent would be a radical change. But to propose that the prohibited use be declared exempt development is a very radical change indeed. It should not be proceeded with, particularly in the absence of real and meaningful community consultation.

The lack of any discussion of strata schemes in any detail in the EIE suggests that the impacts and implications for strata schemes are regarded as inconsequential collateral damage. It also suggests a fundamental misunderstanding of strata living in the formulation of the policy proposal.

Not a Residential or an Ancillary Use

In our view, STRA is neither a residential use nor an ancillary use of the dwelling. STRA is a commercial activity based on the transient occupation and non-resident use of a residential dwelling. The concept of "ancillary use" is a use that is providing necessary support to the primary purpose or function of the

development, in this case, a residential dwelling. STRA bears no necessary relationship to the residential purpose – at best it is irrelevant to the residential use and, at worst, STRA undermines it.¹²

In strata communities, the use of a Lot(s) for STRA purposes (wholly or partially) cannot be considered in isolation from the scheme of which it is a part. Residential strata schemes are designed so that all residents occupy the premises for normal residential living, without interference from commercial activities.¹³ In the case of STRA it is a commercial activity that exploits the entire scheme. The scheme collectively owns the common property and facilities and has duties to maintain and repair common property and to operate in the interests of the entire community, not individual Lot owners.

The existence of ‘holiday apartments’ in some locations does not represent the vast majority of the strata sector. In many such schemes the residents, who are long term locals and people who have retired to coastal areas, are struggling with the growth of online rentals in their home.¹⁴

The planning system already recognises the systemic issues relating to STRA in strata communities:

- ‘Serviced apartments’ are prohibited in residential zones. In mixed use zones serviced apartments may be permitted subject to conditions that require segregation onto a different floor, on-site manager and a medium-to-high rise building must have two lifts. This is because disaggregated ‘Un-hosted’ transient occupation has been shown to be incompatible with residential living.
- Bed and Breakfast is a prohibited use in high density residential zones.
- The complying development standards for a ‘Bed and Breakfast’ in zones where it is permitted require that if the “dwelling house” is subject to the *Strata Schemes Management Act 2015 (NSW)* or the *Community Land Management Act 1989 (NSW)*, it must have the prior approval of the owners corporation, or the community, precinct or neighbourhood association.¹⁵

Transient STRA in strata communities is not an innocuous ancillary use with a ‘minor impact’. STRA is an invasive, disruptive, value-reducing use of strata schemes designed, approved for residential use and chosen for that purpose by the owners and tenants who live there.

There is no material difference between STRA in a residential apartment, or a ‘serviced apartment’ and, in no circumstances, would a ‘BnB’ be approved in a residential apartment block. In a ‘dwelling house’ where it may be permitted, it still requires owners corporation permission.

The strata scheme could be as small as a two-lot converted older house in the inner city or surrounding suburbs, a beachside eight-unit 1930s building with shared garden and laundry and washing lines, an up-market townhouse complex in a coastal area, a multi scheme community development set in gardens with apartments directly overlooking an open pool, or high-rise residential apartment building with facilities like a gym, and pool for residents. These are the homes of older citizens, singles and young families who have chosen to invest in strata and the thousands of tenants who either choose strata or

¹² There is no residential purpose being served by an apartment that is used wholly for STRA. STRA is irrelevant to the residential purposes of a primary home. In one instance the resident has to vacate and in the other she or he may remain.

¹³ A development that is ancillary refers to, for example, garages or car parks to enable premises to be used as a residence.

¹⁴ <https://stokes2013.files.wordpress.com/2018/09/acca-online-str-research-project-report-final-24-09-2018.pdf>

¹⁵ Clause 4.2 State Environment Planning Policy (Exempt and Complying Codes) 2008.

http://www5.australia.edu.au/au/legis/nsw/consol_reg/seppacdc2008721/s4a.2.html

who have no choice but to rent. The conduct of STRA is a violation of their privacy, and the security and the amenity of their home environment.

The EIE should explicitly recognise that it is in fact the intention of the proposed changes to directly engage the rights, interests and obligations of ALL owners of the strata property in the strata scheme in which short term letting is taking place. This is not solely a private matter for the STRA lot owner or renter. In many cases owners are an overseas investor with no interest in the scheme.

The argument made by companies like Airbnb, that it would be 'unfair to discriminate against' the people who live in apartments from being able to STRA, is misleading. The entire planning system is based on the necessity to take account of differential impacts based on local conditions. The principle of non-discrimination has little relevance when managing scarce economic resources and social impacts. In any case, 'equal protection of the law' envisages differential treatment to achieve a legitimate aim.

In strata communities there is a more direct impact on a larger cohort of people and those impacts are complex and varied. It is self-evident that the presence of an unlimited number of residential apartments used for tourists and visitors dispersed through a strata community is not the same as the conditions that pertain to the use of single free-standing dwelling in a rural locality. The nature of strata title is fundamental different from Torrens Title property, which has its own challenges. This fact is missed by most academic researchers whose expertise lies in housing supply and affordability.

5. Exempt Development Classification

The EPA relevantly provides that *an exempt development is a development that is declared to be exempt development by an environmental planning instrument because of its minor impact* (s 1.6(2)).¹⁶

The EIE confirms that the intended effect of the changes is to declare STRA (hosted and un-hosted) to be 'exempt development' for all residential dwellings in all zones where dwellings are permitted across the entire State of NSW, except on bush fire prone land when it will be complying development.

Minor Impact

To be an 'exempt development' it must be a type of development that has a 'minor impact'. The intention is to facilitate uses so minor there is no justification for requiring local council approval, provided certain standards are met. In our view, declaring STRA as an 'exempt development' is not consistent with the object and purpose of the EPA or the concept of 'exempt development'. It is a blanket policy, which is inherently arbitrary.

The consequences of this 'hands off' approach to STRA is exacerbated in strata communities. It removes any active consideration of the risks and impacts of STRA in strata communities and no control over the prevalence, spatial distribution or intensity of STRA where people live in close proximity with mutual obligations to manage the scheme in the interests of the strata community.

Transient STRA in a residential strata community is not a 'minor impact'. Exempt development means an unlimited number of Lots can be used for STRA dispersed throughout a strata community. It means that de-facto serviced apartments can operate from anywhere in a building or estate at any time of the year. The policy enables the de-facto 'bed and breakfast' to operate on a full-time basis from any strata

¹⁶http://www8.australia.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/epaaa1979389/s1.6.html

apartment, townhouse, villa anywhere on an estate or apartment building. It can operate all year round and increase on the weekend, public holidays, school holidays, seasonal holiday periods.

There is no restriction as to who could operate the STRA, and, act as a 'Host'. The definition of 'short-term rental accommodation' is based on the broad concept of 'Host Present' or 'Host not Present'. There is no definition of 'Host' in the *Fair-Trading Act 1987* (NSW) (FTA), the EPA or the Standard Instrument. The Code of Conduct equates 'Host' with the definition of an industry participant: *a person who, pursuant to a short-term rental accommodation arrangement, gives another person the right to occupy the residential premises to which the arrangement relates.*¹⁷

The ordinary meaning of the word 'host' is a person who receives or entertains other people as guests. In actuality the 'Host' could be the owner, a tenant, a licensed or unlicensed agent, or a corporate Head Tenant or a 'manager' for whom the apartment is their 'principal home' but who operates STRA and shares the profit with the actual owner. The occupant could be the beneficiary of a Trust. It is difficult to say that an overseas investor with multiple apartments is a 'Host'.

Security

Security is an indicator of 'liveability' and the choice that many people make about a property and a locality when choosing a home. It is one of the major reasons why people choose to live in strata schemes. Instant booking systems mean that anybody from anywhere in the world has access to private residential apartment buildings and secure car parks. There is little to no verification or screening of Guests and no control over the Visitors that a Guest invites into the strata community. The privacy and security of these buildings is rendered void.

This is a very significant impact on the security, privacy and well-being of residents. The majority of crime is opportunistic and open-ended access by a changing population of transient occupants destroys security. It disrupts the secure environment and creates uncertainty. In most apartment buildings security is very limited or not at all. Larger schemes have relied on security fobs, but it is now widely known that fobs are easily copied, and are copied for criminal purposes. This has led to expensive upgrades for some schemes. This option is unavailable to smaller, poorer schemes housing long term residents. It is common knowledge that non-professional 'Hosts' have myriad ways of avoiding By Laws, using lock boxes padlocked to fences, bicycles, attached to fire hose reels in unlocked cupboards, handled by a local café owner or friend.

Declaring STRA to be an 'exempt development' has far reaching implications for strata communities:

- cumulative impact of multiple Lots used for STRA dispersed throughout the strata;
- exposure of all residents to STRA at all times (un-hosted and hosted);
- changing population of transient occupants;
- shifting patterns of investor behaviour shifting between short term and long-term tenancies;
- invasion of privacy, security and amenity;
- destruction of security of a residential building previously reserved for residents;
- the higher safety risks to residents, their buildings and common property facilities;
- negative impact on amenity and social cohesion as the 'community' is lost;
- increased complexity of strata administration and management;

¹⁷ Section 54A(a) *Fair Trading Act 1987* (NSW).

- intensified wear and tear on common property and higher risks associated with STRA.

There are unanswered questions about insurance and legal liabilities and costs imposed on all owners if a use is declared an 'exempt development' and 'part of a residential use' while acknowledging that it is commercial activity. These are significant but as yet unresolved policy questions. The policy work on the 'package' is incomplete and all strata owners are being exposed to the risks and consequences of unlimited liability.

In strata communities 'exempt development' means there will be no mechanism to:

- limit number of Lots in a single scheme used for STRA;
- prevent the conversion of buildings to STRA;
- regulate the spatial distribution of Lots used (wholly or partly) for these purposes;
- require council's approval or the agreement of the owners' corporation;
- reduce the cap or limit peak times to protect the use of facilities for residents;
- ensure compliance with health, fire or strata scheme requirements;
- prevent the deterioration of a residential building overtime as fewer residents means less on-site attention to maintenance and repairs that tend to increase with STRA use.

STRA cannot operate or be separated from the common property or the rights or interests of other strata owners. It is frequently the quality of the building, the location or facilities that are used to sell the lot as a 'destination'. This has social, legal and financial implications for the owners corporation:

- (i) The common property includes features within a Lot such as fire doors, windows, balcony doors, subfloor surfaces. This implicates all owners in the standards of the STRA business and the safety and security of STRA 'Guests' within the Lot and on the strata scheme premises. It exposes owners' corporations to additional costs of maintenance and repair.¹⁸
- (ii) Lifts, secure car parks, the corridors and access to residential floors of apartment buildings are used by residents going about their private business. The presence of a changing population of STRA Guests and service staff that clean, style and change linen is a violation of privacy and security of residents. The condition of these common areas is also the responsibility of the entire owners corporation which bears the cost of increased wear.
- (iii) Facilities like pools, gyms, spas, tennis courts, marinas are the collectively owned property of the entire owner group and operate under conditions of development consent that reserve them for the exclusive use of residents. By laws require residents to accompany their guests while on common property.
- (iv) If an owners corporation wished to commercially exploit its own facilities it would have to consult the community, adopt resolutions and apply to Local Council. The declaration of STRA to be an exempt development is an unexplained but clear intention to enable a private individual or company to exploit collectively owned facilities for private profit, without the consent of the owners corporation or the Local Council.

The proposed declaration of 'exempt development' cover the entire state of NSW. It removes the protections of the EPA Act that is structured to support and enhance land use and achieve certain

¹⁸ For example, the lock on the window accidentally broken by an STRA Guest is a cost to the owners' corporations. The accidental overflowing of the bath damages the common property and the property of the Lot owner below; false fire alarms incurs a severe penalty for the owners' corporation not the individual apartment owner/occupan.

objectives. The EIE confirms the intention to remove from Local Councils basic land use tools, with possible exception of a reduction of Un-hosted STRA but to no lower than 180 days.

Requiring STRA with development consent in strata apartments, townhouses and villas is more likely to protect the residential character of a scheme and enable a proper consideration of issues such as fire safety. It would also allow a record of consent conditions, which can then be enforced by the Council and an easily searchable record of which properties have consent, and which do not.¹⁹ No STRA to be permitted in a strata community without the permission of the owners corporation.

6. Strata Communities and Capping STRA

It is apparent the implications for strata communities was not a consideration when:

- setting the day cap at 180 for Un-hosted STRA in the Greater Sydney Region;
- allowing unlimited Un-hosted STRA outside of Sydney; and
- no cap at all on Hosted STRA in any location, or dwelling type.

The proposed cap of 180 days is unlikely to interfere with the business of most 'Hosts' in the Greater Sydney Region (or elsewhere). It is significantly more generous than comparable mature cities that have caps of 90, 60 and 30 days. There is an increasing body of data from independent researchers that show a loss of housing supply in Sydney and disruption to residential tenancies market. The same adverse impacts are effecting popular regional coastal areas across Australia, including, in NSW, in towns like Byron Bay.

The research is an underestimate of STRA because it is focused on Airbnb. It ignores other major platforms and, in specific locations, the smaller agencies that have taken advantage of the lack of planning enforcement. There is also no research that focuses exclusively on strata schemes, but the known areas of high short term letting are also in locations of high residential density where strata schemes are, in some case, the majority of the housing type.

Impacts and Implications for Strata Communities

- OCN predicts that the excessive day cap means the character of strata communities will continue to change with more Lots used for STRA that would otherwise house long-term tenants or owner occupiers. This has implications for the future viability of strata schemes across the board. Remaining resident owners are left to cope and to manage a building on a day to day basis.
- The more that Lots are used for STRA the less attractive the building is to prospective purchaser for residential purposes and the greater the loss in value as a dwelling. It will only be strata schemes able to achieve a by-law excluding STRA that will retain their attractiveness and their property value. This leaves vulnerable resident owners and tenants to the threat of displacement by unencumbered short-term operators and poses a risk to other investors not part of the STRA

The 180-days is too high to moderate the volume or turnover of STRA in strata communities:

¹⁹ The EPA provides for a register of consents and certificates, which must be available for public inspection (s 4.58 (1)(2)).

- Investors can STRA any time of the year and resident owners and tenants are being encouraged to vacate every weekend, school holiday, public holidays, Easter, Christmas, New Year and Australia Day and major events. This is precisely when the majority of residents are at home and are entitled to expect to enjoy their home environment, including their own facilities, with their own family and friends without the intrusion of tourists or other visitors using their building, estate or facilities as a 'destination'.
- The intended changes invite the displacement of permanent residents with holiday makers, subverting the original land use planning decisions to set aside certain developments for residential purposes. The impacts in some locations is extremely severe, for example, Port Macquarie and Byron Bay have some of the highest rent to price ratios in NSW.

There is no limit at all on Hosted STRA.

- This ignores the de-facto 'bed and breakfast' operating all year on the same floor as residents. It is not uncommon for hosts to leave the premises and it is difficult to enforce.
- Tenants argue that Hosted STRA is not subletting. If this succeeds, the volume of STRA will increase, further undermining the authority of the owner to control how their Lot is used. There must be no amendments to the *Residential Tenancies Act* that would reduce the rights of the owner to prevent any STRA taking place in their property.²⁰

The effect is to force elderly residents, older couples, working singles, shift workers and young families and children to deal with a changing population of international tourists who want a cheap holiday for themselves and their family. This is an unfair and disproportionate burden on residents; it is a disincentive to remain in the scheme and a disincentive to serve on the strata committee. It is a disincentive to 'downsize' and release the family home to the market or relocate from urban areas to coastal or regional areas into any strata community that does not have a by law to exclude STRA.

By Laws and Code of Conduct

The serious and fundamental impacts on privacy, security, general amenity and character of a strata scheme cannot be addressed through general By Laws or the STRA Code of Conduct. A proposed by law to prohibit STRA can be defeated by a minority of 25%+ of unit entitlements.²¹ In schemes already penetrated by global platforms such as Airbnb, there is no prospect of achieving such a by-law. In a small scheme an investor with one or two apartments can decide the fate of the entire scheme.²² In a single CBD scheme one overseas investor owns thirty apartments. It is rare for an investor to reside in the community or be involved in administration or management of scheme.²³ This leaves a decreasing pool of owners willing and able to participate on strata committees and less people concerned with the condition and maintenance of the building.

²⁰ Proposals by Airbnb that a landlord should not be able to unreasonably withhold their consent is intended only to protect Airbnb access to strata apartments, mainly in hot spots in Sydney CBD, Eastern Suburbs and Inner West. STRA is not analogous to having a pet, where the landlord may not unreasonably refuse to allow it.

²¹ New section 137A (1) is limited to Lots that are not the Principal Place of Residence. That voting procedure cannot be amended to 50%+ to make it 'fairer' as this would keep schemes in state of constant uncertainty and vulnerable strategic interests of a commercial operator.

²² More than 20,000 residential strata schemes in greater Sydney have 10 or less lots City Futures Research Centre, Renewing the compact city: interim report, June 2015.

²³ Section 5, *Strata Scheme Management Act 2015* (NSW).

The amendment to the *Strata Scheme Management Act 2015* (NSW) expressly bars owners corporations from setting any limits on the use of primary homes for STRA to reduce the impacts on residents even at peak holiday periods.²⁴ This is despite the wish of a substantial majority of owners.²⁵

The Code of Conduct does not address the unlimited number of online rentals in strata communities. It is not concerned with the inherent disruption to privacy, security and the changed character of the community or the displacement of tenants and resident owners.

7. Exempt Development Criteria

The EIE includes a comprehensive set of criteria for exempt development status:

- The building in which the STRA is proposed must comply at all times with all relevant planning, building, strata, fire safety and health regulation;
- STRA must not cause a contravention of any existing condition of the most recent development consent that applies to the building;
- STRA must comply with relevant requirements under the strata scheme;
- The dwelling must comply with safety standards, that include fire detection and escape measures and limits on occupation in all types of dwelling.

In principle, OCN supports comprehensive mandatory regulatory requirements for all forms of STRA. The sector is plagued with the problems of defects from a construction industry that too frequently fails to meet regulatory standards.²⁶ Accordingly, there is threshold question as to how a Local Council, or any other regulatory authority, will identify premises used for STRA purposes or ensure that regulatory standards are, in fact, being met. There is no explanation of the consequences of not meeting the exempt development criteria in the EIE.

The same administrative challenges also apply to owners corporations, in particular the enforcement of by-laws and the 180-day cap. Importantly, several aspects of the criteria are the responsibility of the owners corporation and not the Lot owner or tenant.

The underlying rationale for changes to the planning system include the difficulty of obtaining information and evidence. STRA is easy to conceal and there is an influx of non-professional 'hoteliers' less well versed in the benefit of regulatory compliance.

This puts everyone at risk. The risks are increased in the higher density living of strata communities where transient tourists and visitors occupy the same building as genuine residents.

7.1. Existing Development Consent Conditions

- *STRA must not cause a contravention of any existing condition of the most recent development consent that applies to the building.*

²⁴ New subsection 137A (2) Strata Scheme Management Act 2015(NSW).

²⁵ In Toronto, Ottawa, Quebec, Vancouver, and places as diverse as Las Vegas and Brussels local authorities cannot license a STRA without proof of permission of the condominium council/building owner/commune.

²⁶ <https://www.smh.com.au/national/nsw/flaws-in-regulation-are-a-disaster-in-the-making-20120921-26c3i.html>

Existing Development Consent Conditions that Exclude STRA

The existing development consent conditions of several major residential apartment buildings require a minimum tenancy (3 months under the *Residential Tenancies Act 1997*). The residential buildings with these restrictions are generally located in mixed use or commercial zones because they are vulnerable to STRA. These schemes also have By Laws to give effect to the development consent conditions. The intention is to protect the residential nature of the building from the commercial activity which is now being proposed, without the consent of the Local Council or the owners' corporation.

There are also many strata schemes that have adopted By Laws that prohibit or restrict STRA. These By-Laws are consistent with residential zoning and development consent conditions. There is no authoritative judicial determination that renders such By Laws invalid.

The EIE does not clearly explain how the environmental instruments will inter-act with development consent conditions, covenants or with By Laws.²⁷ Section 3.16 of the EPA enables an environmental instrument to suspend by-laws and private covenants and possibly a development consent condition. Clause 1.20 of the SEPP (Exempt and Complying Codes) 2008, suspends covenants, agreement and other similar instruments that would otherwise restrict the carrying out of the development (STRA).

There is no reference in the EIE to any provision that confirms that development consent conditions, by law or covenants that preclude STRA from a building will be saved and protected. This matter requires urgent clarification to provide certainty to the residents and owners of strata properties in these schemes.

There are several basic questions left unanswered by the EIE:

- Is this criterion intended purely to ensure that the building has development consent as a residential dwelling and nothing more?
- Does it protect conditions that exclude STRA from the scheme?
- What effect if any will the environmental instruments have on By Laws?
- Will the modification to a development consent on an unrelated matter but later in time become the 'most recent development consent' expunging conditions that preclude STRA?

OCN recommends that:

- Every strata scheme that has a development consent condition (however expressed) that precludes short term rentals must be protected and allowed to continue in force indefinitely.
- The Department should clarify how it will ensure the phrase 'most recent development consent' does not facilitate the loss of protection from STRA for these strata schemes.²⁸

7.2 Compliance with Relevant Regulatory Standards

- *The building in which the STRA is proposed must comply at all times with all relevant planning, building, strata, fire safety and health regulation.*

²⁷ Section 3.16 of the EPA provides that an environmental instrument may disapply any Act, or 'regulatory instrument' to enable a development to be carried out. This includes, any rule, regulation, by law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.

²⁸ It would be unusual for a later environmental instrument to effectively amend conditions of development consent.

OCN strongly supports mandatory requirements that, in order for a dwelling in a strata scheme to be used for any STRA purpose, the 'building' in which the STRA is proposed must comply at all times with all relevant planning, building, strata, fire safety and health regulations but these are unexplained.

Further, the prescribed intention of changes to planning law must include strengthening safety in dwellings that are to be used commercially for tourists, families on holiday, business visitors, travellers and others seeking STRA. In strata schemes this involves the safety of ALL residents.

- STRA must comply with **relevant requirements under the strata scheme**;

In principle, **OCN supports** the inclusion of 'strata regulation' and 'relevant requirements under a strata scheme' but the EIE provides no explanation as to the intent or the scope of these criteria.

This is a critical area for dialogue with the strata sector to ensure there is understanding how the planning system and strata schemes framework will inter-relate. It is imperative that there is an accurate and common understanding about how strata schemes work as a matter of law and practice.

STRA will not work in strata communities without the recognition of their characteristics of and the legal frameworks and management systems that enable them to operate, and, if these changes are adopted, that must now include the administration and management of STRA operating within their buildings and common property. There is a need for basic systems and information management tools, and, without this the entire 'regulatory package' will fail resulting in a further and serious loss of confidence in strata living.

Strata owners:

- are bound by mutual obligations to protect the interests of the scheme as a whole;
- share the costs of insurance, maintenance and repair of common property;
- refrain from activities that undermine the security, safety, and amenity of the scheme;
- adopt by laws and administrative arrangements to protect those common interests;
- elect office bearers who administer and manage schemes on behalf of all owners on a voluntary basis and may or may not have the assistance of other service providers;
- have unlimited liability and are jointly and severally liable for any debts, for example, injury or death of a STRA 'Guest' on common property.

OCN supports the criteria 4.2.4 for 'All Dwellings' that the number of guests must be limited to two persons per bedroom, and this must be strictly applied in strata communities.²⁹

It is common for a two-bedroom apartment to be advertised for six or more people for family holiday or groups that may use sofa beds or have unlimited number of children sleeping in living rooms. This is not normal residential use of a residential apartment and increases the intensity of the use and impacts on adjacent residents and the scheme. The two persons per bedroom criteria must include children.³⁰

As with much of the proposed package, there is silence on the enforcement of these requirements. The policy intention cannot be assured unless the question of enforcement is dealt with.

²⁹ Schemes can limit occupation to two persons per bedroom but that does not apply to family groups and not all scheme has such a by-law. It was adopted to prevent overcrowding and strata properties being used like quasi boarding houses.

³⁰ http://www8.auSTRAii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_reg/seppacdc2008721/s1.20.html

7.3 Fire Safety Regulations and Additional Specific Fire Safety Measures

There is an increased risk of fire when premises are used for STRA purposes and tourists and visitors are not familiar with the building. The height of strata buildings is increasing and the range of materials that are used is more diverse and more toxic. There are increased risks to occupants who have further to travel to exit a building. The older low and medium rise buildings do not have residential sprinkler systems, which has now been proven to be highly effective both domestically and internationally in suppressing fire in its early stages. An average height of an eight-storey building can be less than 24.8m in height and avoids the threshold for sprinkler systems.

The NSW Fire Brigade has undertaken research to support a Proposal for Change to mandate fire sprinkler systems in the 2019 National Construction Code (NCC) for new Class 2 and Class 3 shared residential accommodation buildings up to 25 metres in effective height. This was recommended by NSW Deputy Coroner Hugh Dillon following the inquest into the death of Connie Zhang, the life-changing injuries to Ginger Jiang, and the inquiry into the 6 September 2012 apartment fire in Unit 53, Tower B, 4 West Terrace, Bankstown.³¹ This is a welcome but there will be no retrospective application, and, without government assistance is too expensive for owners corporations to install.

Environment Planning and Assessment Regulation 2000

All strata communities must comply with the fire safety requirements of the Environment Planning and Assessment Regulation 2000. Compliance with fire safety regulations is the responsibility of the owners' corporation not the individual STRA operator. The annual fire safety statement must be given to the Fire Commissioner, and, if the building is subject to essential fire safety measures, the statement must also go to the Local Council.

It is highly probable that hundreds of strata scheme buildings require additional fire safety measures and do not have accurate or current annual fire statements under the existing regulations. The NSW Government has a regulatory duty to ensure that no STRA is conducted in a Lot that is located within an apartment building that does not comply with the EPA Regulations.

There is no specific qualification, licensing or accreditation for fire safety contractors who too frequently tick the box on Annual Fire Statements. OCN is concerned that Local Councils do not routinely check Annual Fire Statements and are unaware of the extent of non-compliance and, in some cases, falsification.

It is highly probable that older strata schemes where fire safety requirements have been grandfathered more closely reflect the fire safety requirements at the time the scheme was built. These schemes will not meet basic requirements that apply to tourist accommodation.

This is why development consent is needed in order to make fire standards enforceable. The exempt development status guarantees there is no evidence that critical fire safety standards are being met. The process of consent means Local Council will look at the fire systems and, if necessary, issue a fire order.

It also means that the property will be inspected, evidence is provided and the register of development consents (with conditions) can be inspected. This give the public including owners corporations

³¹ NSW Deputy Coroner requested that the Australian Building Code Board (ABCB) to consider extending the current Deemed-to-Satisfy (DTS) Provisions for sprinkler protection to medium rise multi-storey residential buildings; <https://www.smh.com.au/national/nsw/flaws-in-regulation-are-a-disaster-in-the-making-20120921-26c3i.html>

transparent information and enables the Local Council to enforce the conditions. The planning system also needs public register that identifies the properties being used for STRA, that discloses to the consumer that the strata Lot meets regulatory standards, and, what those standards are.

Standard Instrument – Principal LEP

The Standard Instrument – Principal LEP includes compulsory requirements that to be an exempt development the building must have:

- (i) a current fire safety certificate or fire safety statement; or
- (ii) no fire safety measures currently implemented, required or proposed for the building.

It must be clear that these compulsory requirements apply to STRA.

Additional Fire Safety Requirements and Strata Schemes

The EIE sets out some additional mandatory criteria that deal with fire safety (p.12).

In all dwellings used for STRA, the intention in the changes to planning law is that:

- there must be - smoke alarms in each bedroom
- the alarms must be interconnected where there is more than one bedroom
- there must be a lighting system in hallways that is activated by the smoke alarm system.

The Department should clarify that it does not intend to include as an 'exempt development' residential Lots that are to be used for STRA in a strata scheme if these requirements are not met. It must be clear that in these circumstances the STRA will be prohibited.

It is unlikely that many, if any, individual strata Lots have internal smoke alarms in each individual bedroom that are interconnected. It would also be very unusual to find a strata Lot with internal hallways that are lit by a smoke alarm system.

OCN is not opposed to these requirements, rather OCN requires confirmation. There should be no obligation imposed on strata schemes to upgrade common property to meet these requirements or to take responsibility for the maintenance and repair of these features.

Section 186D of the EPA Regulations 2000 provide that no development consent or consent of the owners' corporation is required to install smoke alarms, but if the installation causes damage to any part of the common property the person who installed the alarm must repair the damage. It is probably not possible to install interconnected smoke alarms and lighting systems for internal hallways without involving common property as new wiring will be required possibly into the ceiling cavity, which almost always forms part of the common property. It is doubtful that section 186D was intended to cover installation of interconnected smoke alarms or systems that activate hallway lights.

OCN would be concerned if s 184D facilitated STRA upgrades that might pose any risk to the fire safety system of a strata building by permitting a Lot owner to initiate their own work.

Additional requirements for dwellings in multi-unit buildings only, include the requirements are that apartment front door must open from inside the dwelling without the need for a key, and doors that

open onto a shared corridor or entrance must have self-closing devices and seals. There must be an evacuation plan, evacuation signage must be displayed and there is an obligation to familiarise guests with the exit system. There must be a fire extinguisher and fire blanket in the kitchen. These standards involve both the individual Lot owner or tenant and the owners' corporation.

In many higher end strata schemes the fire safety measures include a sophisticated fire detection and alarm system that protects each Lot and the building as a whole. It is important that an exempt development does not interfere with systems already in place. If these additional requirements are needed, this must be at the cost of the individual Lot owner who chooses to STRA. It remains unclear how this will operate alongside the existing EPA Regulations applicable to the strata building as a whole.

An important element of all fire safety systems is timely evacuation to an agreed point outside the building. Residents get reminders and practice evacuation and residents with special needs are usually known to other residents. This is not the case for transient holiday makers who are not known to residents and not familiar with the building.

8. Implementation and Enforcement

The EIE does not provide any detailed explanation of the intended effect in terms of implementation and how enforcement will be executed.

It makes no reference to the powers of Local Councils, and how these apply to STRA. It does not explain what the consequences and sanctions are for breaching exempt development criteria. It is unclear how Local Councils (or owners corporation) will know whether the criteria for exempt development were being met – or not met. It is unclear how any shortfall in compliance will be known, assessed or processed – by whom, under what legislation or with what consequences or redress.

Part of the rationale for the changes to the planning system is that it has been difficult for Local Councils to get information regarding STRA activity and that STRA is easy to conceal. In strata schemes, it is common for building managers to be told by a 'Guest' that they are a friend or colleague although the apartment is in fact listed. The majority of schemes have no on-site management or security, and ordinary residents generally feel uncertain and often intimidated.

These practices make strata management impossible. It also casts suspicion over genuine family and friends and can result in false accusations. The prevalence of non-resident commercial operators is causing owners corporations to fund private services to detect illegal STRA. It means owners who are not profiting from STRA are bearing the cost. This will continue unless there is public registration, and, it is legislatively clear that owners corporations can levy additional fees on STRA 'Hosts' for extra costs.

The EIE contains no mechanism that enables or explains how any regulatory agency may:

- identify properties used for STRA purposes; or
- inspect the premises to ensure that the regulatory standards and are being met;
- ensure that fire safety measures have been implemented or audit existing Annual Fire Statements;
- ensure that a property in the Greater Sydney Region is not used for Un-hosted STRA in excess of the 180-day cap or in any LGA with a day cap less than 365;
- know or insist that Hosted STRA is actually hosted by a resident owner or tenant;
- certify or ensure that the requirements of the strata scheme are met.

OCN urges the Department to include transparent mechanisms by which a property can be registered, and compliance monitored and enforced. The planning criteria should include a mandatory requirement that every residential premises used for Hosted or Un-hosted STRA must be placed on the public register for STRA. This goes to the 'use' of the residential dwelling and should be a pre-condition to listing under any regulatory system. The Parliament has provided the legislative basis for creating and administering a system, with a personal obligation to report nights of occupation.³² This needs to be implemented. This will provide the necessary coordination between different elements of the regulatory package.³³

9. Conclusion and Recommendations.

The intended changes set out in the EIE endorses the presence of an unlimited number of lots in a strata scheme used for STRA purposes with a changing population of transient occupants dispersed through a strata community. This is fundamentally incompatible with the primary residential purpose of a residential strata community. The intention to declare as an 'exempt development' on a state-wide basis the use of all types of residential dwellings for STRA purposes, is inherently arbitrary. It undermines the liveability of a strata community and the model of strata self-government. The impact on the residential tenancy market is already evident, and, under this policy, housing supply in key locations will worsen and the deterioration of affordability further aggravated.

The proposed 180-day limit for Sydney (unlimited elsewhere) is excessive and unenforceable by local councils or owners corporations, and, in the absence of any registration or mechanism for oversight, it is unclear how essential fire safety standards apartment buildings will be enforced.

The regulatory package does not adopt the 'opt in' approach for strata schemes that would have ensured STRA is prohibited unless 75%+ of all owners freely chose to permit the conversion of their scheme to STRA.³⁴ The consequence is that strata communities in the most affected areas are powerless to stop the conversion of their buildings to unregulated tourist and visitor accommodation.

In our view, NSW is out of step with international trends in comparable jurisdictions that limit STRA to primary homes, require a permit, use zoning restrictions, require the approval of the owners corporation and impose fines for breaches of restrictions.³⁵ The day caps of comparable cities are also significantly lower, for example, 90 (London), 60 (San Francisco) and 30 (Amsterdam).³⁶ The 'exempt and complying development' classification is not the appropriate planning mechanism to introduce STRA into residentially zoned communities (especially in strata). It provides no protection to the most affected residential buildings, and does not protect housing supply or affordability.

OCN recommends that:

- The period for public consultation on the EIE should be extended and the draft Code of Conduct should be exhibited concurrently with the EIE as a total "package" with an explanation of the registration and enforcement system.

³² Subparagraph 54B(20(c) of the *Fair-Trading Act 1987* (NSW).

³³ The obligation of platform companies to cooperate with the Department of Fair-Trading may assist in the case of a 'complaint, but it will not address the needs of owners corporations, Local Council and other regulatory authorities.

³⁴ The new section 137A (1) provides that an owners corporation may adopt a by law by special resolution to prohibit the use of a lot for STRA purposes if the lot that is not the primary residence. New section 137A (2) renders ineffective a by law that 'purports to prevent' a lot being used for STRA purposes if the lot is the primary home of person giving another person the right to occupy the lot.

³⁵ https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2017/06/Regulating%20Airbnb%20and%20the%20Short-Term%20Rental%20Market_FINAL.pdf

³⁶ <http://www.sfoxaminer.com/san-francisco-proposes-60-day-hard-cap-airbnb-rentals/>

- There needs to be a public awareness campaign by the Department of Planning and Department of Fair Trading with information sessions in Sydney and the regions before the closing time for submissions given the radical impact these changes will have on residential communities (especially strata communities).
- It needs to be made clear what the savings and transitional arrangements there will be for existing strata by laws that prohibit STRA, and existing development consent condition that prohibit STRA.
- The package should not be commenced until the fundamental issues identified in this submission have been reviewed and addressed, and, when the draft SIO and SEPP have been prepared these instruments should be exhibited so all stakeholders to see the detail of proposed changes.³⁷
- There needs to be a transition period of 3 months before any changes come into effect from the date the amendments are gazetted.

It is possible to create a co-regulatory model that respects the residential purpose of strata schemes; protects housing supply and allows short term letting in primary homes in line with local conditions.

- In all areas, any ‘residential dwelling’ that is subject to the *Strata Schemes Management Act 2015 (NSW)* or the *Community Land Management Act 1989 (NSW)* should have the consent of the Local Council and the prior approval of the owners corporation, and, where relevant the community, precinct or neighbourhood association (subject to by laws) before it is used for STRA.
- In Sydney, STRA should be restricted to Hosted STRA in the principal place of residence by the primary resident and limited to 60 days. In areas outside of Sydney, Hosted and Un-hosted STRA may be permitted by local council subject to the by laws of the scheme and the prior approval of the owners corporation.
- The Local Council should be able control STRA through zoning restrictions, or exclude STRA from a residential strata building through conditions of development consent to protect housing supply and affordability, or the residential nature of a strata scheme or character of the neighbourhood.
- Every strata scheme that has an existing development consent condition (however expressed) that precludes short term rentals must be saved and allowed to continue in force indefinitely. By laws that prohibit or restrict STRA should not be overridden.
- The operation of the “short-term rental accommodation” must comply at all times with by-laws, relevant development consent conditions and the mandatory Code of Conduct.
- The occupancy limit of two persons per bedroom must apply to all STRA, including, in strata communities. The use of living rooms, or other spaces for sleeping purposes should be prohibited.
- The subject dwelling must be placed on the STRA Register and the unique ID must be displayed clearly in all advertisements relating to the property. The STRA Register must be publicly available.

³⁷ Environmental instruments are not statutory instruments and are not subject to Parliamentary scrutiny.

