

Short term letting restrictions in NSW

Section 137A of the Strata Schemes Management Act 2015

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Introduction

Section 137A of the Strata Schemes Management Act 2015 (NSW) provides some clarity on an owners corporation's ability to make a by-law that regulates or prohibits short term letting within a strata scheme in New South Wales. Additionally, a code of conduct regime for short term letting participants will be introduced in sections 54A to 54E of the Fair Trading Act 1987 (NSW). The legislative amendments will come into force and have effect from 10 April 2020.

These amendments are relevant to any owners corporation that has a registered by-law restricting or prohibiting short term letting, or intends to make such a by-law.

Restriction or prohibition through a by-law

Short term letting, or a *short-term rental accommodation arrangement* as it is defined in section 54A, means a commercial arrangement that grants a person the right to occupy a residential premises for a period of less than 3 months.

Section 137A(1) allows a by-law to prohibit a lot being used for short term letting if the lot is not the principal place of residence of the person granting the right to occupy their lot. Subsection (2) states that such a by-law has no force or effect to the extent it purports to prevent a lot being used for short term letting if the lot is the principal place of residence of the person giving another the right to occupy the lot.

Put simply, a by-law can prohibit owners and occupiers of lots from renting out their apartment on short term letting platforms, like Airbnb and Stayz, but only if the apartment is not the primary residence of the owner or occupier. For example, an occupier of a lot can short term let their spare room while they continue to live in the apartment, or short term let the entire apartment while they travel overseas for a month.

If an owners corporation has previously made a valid by-law restricting or prohibiting short term letting, it will remain valid and effective but only to the extent that it does not apply to an occupier's principal place of residence being used for short term letting purposes.

However, what constitutes a valid by-law restricting or prohibiting short term letting is a more complicated question. In July 2017, the NSW Civil and Administrative Tribunal in *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52 made an order invalidating a by-law that prohibited illegal uses, which included short term letting. That by-law was invalidated pursuant to section 150 on the basis that the owners corporation did not have the power to make such a by-law in the face of section 139(2), which states that a by-law is incapable of operating to prohibit or restrict the lease of a lot.

Although there has not been any published decision in NSW on that question since *Estens*, other courts with similar laws have upheld the proposition that a by-law can operate to regulate and restrict short term letting. Most notable of which was the decision of the Privy Council in *O'Connor (Senior) and others v The Proprietors, Strata Plan No. 51 (Turks and Caicos Islands)* [2017] UKPC 45 (21 December 2017), in which the Privy Council held that the relevant by-law was a valid restriction on the use of a residential lot and did not involve an impermissible restriction on leasing contrary to a statutory provision vastly similar to section 139(2).

While *O'Connor* was a strong indication that *Estens* would not be followed in subsequent decisions, section 137A(1) makes it clear that an owners corporation has the power to make a by-law that restricts or prohibits short term letting, save for the principal place of residence exception.

However, beyond the power to make a by-law restricting or prohibiting short term letting under section 137A, the validity of any such by-law is

subject to planning law. Section 3.16(2) of the Environmental Planning and Assessment Act 1979 (NSW) operates to the effect that an environmental planning instrument (so as to enable or give effect to its purpose) may provide that any rule, regulation or by-law (which almost certainly includes the by-laws of a strata scheme) is ineffective to the extent that it purports to prohibit or restrict the development or use of land approved by the planning instrument.

Typically, most councils will have adopted such a provision in their planning instrument, which is ordinarily found at clause 1.9A of the council's Local Environmental Plan. A Local Environmental Plan will state what types of development and uses of land are prohibited, permitted with consent, or permitted without consent in respect of each zone within the municipality.

Matters are further complicated due to the definitions of land uses in the planning instruments lagging behind the rise of the share economy. A large degree of interpretation is required to determine whether the use of a residential lot for short term letting amounts to backpackers' accommodation, a bed and breakfast, a hotel or a serviced apartment so as to cause it fall under the definition of "tourist and visitor accommodation", which may be prohibited, or permitted with or without consent.

Additionally, section 136(2) states that a by-law has no force or effect to the extent that it is inconsistent with any other Act. If a council permits short term letting with or without consent, and has adopted the provisions of section 3.16 in the local environment plan, then any by-law purporting to restrict or prohibit short term letting will be invalid by reason of sections 136(2) and 3.16(2) of the respective Acts.

Code of conduct

Lastly, the Fair Trading Act amendments introduce provisions to support the introduction of a code of conduct for short term letting participants (which remains in draft form), as well as heavy financial penalties for breaching certain sections of the code. Offences under the code attract a maximum penalty of \$22,000 for individuals or \$110,000 for corporations, while there are even more hefty civil penalties for serious breaches of certain sections of the code.

Conclusion

The key considerations to take away are that:

- Section 137A confirms that an owners corporation has the power to make a by-law restricting or prohibiting short term letting.
- A by-law has no force or effect to the extent it purports to restrict or prohibit an occupier of a lot from short term letting their primary residence.
- Section 137A precludes a court or tribunal from adopting the reasoning in *Estens*, so similar matters are expected to be determined in line with *O'Connor*.
- If an applicable planning instrument adopts the provisions of section 3.16 and permits short term letting with or without consent, the by-law will be invalid.



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