

Bannermans Lawyers

Airbnb – Is Your Strata Building Becoming a Party Hotel?

The rapid expansion of Airbnb and other online letting services has become one of the most controversial issues for the strata sector. This remains something of a grey area legally. However, the NSW Government is currently conducting an enquiry likely to lead to regulation and the courts will likely consider some of the issues, so what can and can't be done should become clearer over time.

While the flexibility of such arrangements can be very convenient for apartment owners and visitors, that flexibility leads to a number of problems. Such arrangements could involve a true sharing arrangement, where an apartment owner makes an apartment available to a visitor while the owner is away on holiday. However, such arrangements could also involve a residential apartment being used for commercial activities, e.g. frequent, high rotation short-term lettings, i.e. the so-called "party hotel".

Such commercial activities can cause significant problems:

- Owners and occupiers of other apartments in a building where such activities are going on will be impacted by noise, behaviour, tidiness and other amenity issues. There are cases where apartments are being used for commercial activities, i.e. as de facto hotels, in buildings not suited for them, e.g. having inadequate fire safety measures, noise insulation and amenities.
- Visitors using such services do not have the benefit of the sort of regulation which applies to the hotel industry and so are in a dubious position in relation to issues such as consumer protections, safety, public liability and available insurance cover, disability access, hygiene and other standards.
- Owners using such services may well be breaching laws entering into such arrangements, e.g. tax laws, planning laws & strata by-laws. They are also in a dubious position in relation to public liability. This risk will be difficult to manage and homeowner insurance may not extend cover to such arrangements.

These problems can be severe enough for a strata owners corporation and other lot owners to consider taking legal action to curtail such activities within their building. This can be difficult, but there are things which owners corporations and lot owners can do:

- Attempting to persuade the local Council to enforce planning laws can be a useful avenue, but this is dependent on the relevant planning laws and a motivated council. There were cases decided by the courts several years ago, which found that short-term lettings can involve development, requiring development consent. That resulted in many councils rewriting local environment plans. Planning laws in relation to short-term lettings now vary widely from council to council. Even if particular arrangements breach applicable planning laws, some councils are more enthusiastic than others about enforcing them.
- Making a by-law restricting such activities may be an option, but until the courts have considered the issue, this is a grey area and such a by-law might not be enforceable. The difficulty is that the strata management legislation prevents a by-law from prohibiting or restricting a lease or other dealing relating to a lot and that

there is doubt about what this actually means. The limited case law to date suggests that these types of arrangements are probably not a lease and probably can be restricted by by-law. Of course, the more moderate the by-law, the more likely it is to be enforceable.

- A by-law regulating such arrangements, but not prohibiting them, would be more likely to be enforceable, particularly if the regulation was moderate. For example, such a by-law might involve prohibition of letting without development consent (if required), OC approval being required for lettings outside specified parameters, e.g. length of stay, number of guests or to blacklisted guests (previous troublemakers) and the owner being responsible for ensuring compliance with by-laws, including any additional behaviour and other requirements imposed by the particular by-law.
- A by-law outright prohibiting short-term lettings would be less likely to be enforceable, but less so if the definition of "short-term letting" is reasonably tight, e.g. restricted to arrangements involving multiple lettings in a period, e.g. 3 in a quarter and very short-term lettings, e.g. not exceeding 7 days per stay.
- An owners corporation considering such a by-law may want to go further and address excessive occupation issues, e.g. by limiting occupant numbers and restricting internal partitioning. There is greater scope for limiting the number of occupants under the new strata schemes management legislation expected to commence later this year.

We have been assisting owners corporations and their strata managing agents with such issues and could assist you if you are having such problems in your building.

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