

Short-Term Letting in NSW

Options Paper

Options Paper July 2017
NSW Planning & Environment
NSW Fair Trading

Response to Options Paper



Holiday Rental Industry Association

Holiday Letting Organisation Byron

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EXECUTIVE SUMMARY

The recommendations and findings of the Legislative Assembly Committee on *The adequacy of regulation of short-term holiday letting in NSW* provide a rational guideline and the opportunity to implement self-regulation through a coalition of the NSW Government and the Short Term Residential Accommodation industry.

It is recognised that assuring planning certainty by amending the Standard Instrument LEP and other relevant instruments to include a clear definition of STRA is an essential first step.

This response by the Holiday Rental Industry Association (HRIA) and Holiday Letting Organisation Byron (HLO) is focused on a proposed regulatory framework that involves mandatory registration of properties that requires compliance to a revised Code of Conduct.

Registration would be a condition of exempt and complying development.

The natural home for the Code of Conduct and the registration of properties is with NSW Fair Trading. There is already a comprehensive guide on the Fair Trading website which addresses many of the management issues that face STRA operators.

http://www.fairtrading.nsw.gov.au/ftw/Consumers/Buying_services/Travel/Holiday_home_rentals.page

The HRIA's Recommendations and Conclusions has 3 main elements:

- 1) Planning certainty by amending the Standard Instrument of Principal LEP**
- 2) Industry self-regulation by a revised HRIA Code of Conduct**
- 3) Mandatory registration of all STRA properties**

Our recommendations include a combination of government and self-regulation. We believe that the emphasis should be on industry self-regulation but need the amendment of planning law to include a new SEPP. The SEPP will make registration compulsory and will include mandatory acceptance of the HRIA Code of Conduct as a condition.

Importantly, no property can be promoted on digital portals without valid registration.

HRIA - OVERVIEW

The HRIA, in conjunction with HLO Byron, acknowledges the value and quality of the NSW Government's process and the clarity afforded by the Options Paper. We also recognise the Options Paper's success in creating the outline for a model that will address issues and provide a flexible and enduring solution through a light touch regulatory framework

Whilst having national representation as the peak industry body, The HRIA is well positioned to collaborate in developing and implementing the approach in NSW via a local state chapter. The fact that a national board and specially convened industry forum has contributed to the proposals put forward by the NSW committee is a positive indicator of growing industry alignment.

Throughout the process of the NSW Parliamentary Inquiry and the subsequent information contained in the Options Paper, it is abundantly clear that STRA provides huge benefits to the economy and unlocks unused capital potential.

Whilst presenting some negatives aligned with the quality of behavioural management, the general consensus is that these can and will be effectively addressed through the creation of a relatively simple regulatory system.

We propose a strategy that addresses the pertinent issues.

Key recommendations from the 2016 Parliamentary Inquiry were that the NSW Government:

- *amend planning laws to regulate short-term rental accommodation,*
- *allow home sharing, and letting a principal place of residence, as exempt development,*
- *allow empty houses to be let as exempt and complying development,*
- *strengthen owners corporations' powers to manage and respond to STRA issues in strata properties, and*
- *commit to further investigating impacts from STRA on traditional accommodation operators, and opportunities to reform their regulation.*

Whilst favouring self-regulation, it is felt that a partnership of the industry with the NSW Government will afford the most effective approach.

There are very good reasons for this:

- The NSW Department of Planning & Environment (DoP&E) and the NSW Department of Fair Trading (NSWFT) are already very much invested in STRA.
- The DoP&E was the convener and facilitator of the committee that produced the original Code of Conduct.
- The DoP&E is responsible for the planning instruments that need to be amended.
- The NSWFT have had a comprehensive guide to STRA for many years and are involved in associated consumer issues.
- Furthermore the Legislative Assembly Committee recommends *that the NSW Government participates in the management of the Holiday and Short-Term Rental Code of Conduct to ensure that it has a broadly base management structure, including community representation, and increases its industry coverage.*

The common goal is to have a regulatory system that is uniform and applicable to every owner. STRA is provided by an owner to guest occupants. It is important that owners are aware of the responsibilities that this involves. Currently, it is very easy for an owner to enter the market without having any experience or guidance due to the advent of the internet.

The real issue is behavioural management. Planning strategies will never effectively provide the necessary behavioural management tools. However, any pertinent planning factors can be adequately addressed by inclusion in the Code of Conduct. These are empowered as Terms & Conditions of the License to Occupy which regulates STRA occupancy.

It is recognised that there needs to be a standard of management that is met by every owner or operator of a STRA dwelling, including dwellings operating within a Strata title. The Code of Conduct is the appropriate instrument to achieve this.

An industry body such as the HRIA will take time to build a critical mass that captures every owner engaged in STRA. However, a partnership with Government will be effective in reaching most owners whether or not they choose to be a HRIA member. This is a similar situation to the real estate industry where there are statutory regulations that all REAs must comply with but they may not choose to be members of their industry body, the Real Estate Institute of NSW.

PLANNING CERTAINTY - OVERVIEW

Parliamentary Inquiry recommendation;

- *amend planning laws to regulate short-term rental accommodation,*
- *allow home sharing, and letting a principal place of residence, as exempt development*
- *allow empty houses to be let as exempt and complying development.*

The appropriate amendments would include making registration a condition in the SEPP, which in turn includes the Code of Conduct. If appropriate, the prohibition to advertise any property for STRA without a valid registration number might be included in the SEPP.

It is evident that the activity of providing short-term residential accommodation (STRA) has always been, and is generally, a legal activity in dwellings that have residential development consent. The fact that it has not been defined adequately in planning instruments, whilst being an innominate use, has caused much confusion in the ongoing debate concerning STRA. The focus in dealing with the real issues has been distracted. Once planning certainty is established through clearly defining STRA as a permitted residential use, the establishment of a regulatory system becomes relatively simple with fewer obstacles to stakeholder alignment.

We support the Parliamentary Inquiry's recommendations and urge the NSW Government to move swiftly to amend the planning laws by clearly defining STRA as a permitted residential use.

We recommend that:

- Exempt development is applied to all dwellings up to 6 bedrooms and that complying development is required for dwellings with more than 6 bedrooms.
- Mandatory registration of all STRA, which includes the undertaking to comply with the Code of Conduct.

PLANNING CERTAINTY (CONTINUED)

- compliance with Code of Conduct is introduced as a condition of exempt and complying development.
- STRA is defined as; ***short-term residential accommodation*** means a dwelling, or part of a dwelling, that provides short-term accommodation, but does not include bed and breakfast accommodation or serviced apartments. Short-term means each stay does not exceed three consecutive months.
- STRA to be mentioned and explicitly excluded in the “tourist and visitor accommodation” definition of Standard Instrument – Principal Local Environmental Plan [2006-155a], to clearly separate the residential versus commercial aspect of this type of accommodation.

Tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

(a) backpackers’

accommodation,

(b) bed and breakfast

accommodation,

(c) farm stay accommodation,

(d) hotel or motel

accommodation,

(e) serviced apartments,

but does not include:

(f) camping grounds, or

(g) caravan parks, or

(h) eco-tourist facilities, or

(i) **short term residential accommodation.**

DETAILED PROPOSED REGULATORY FRAMEWORK

LICENCE TO OCCUPY

As extensively documented elsewhere, the key to managing STRA evolves through the understanding that the guest occupying the dwelling is not a tenant and is not subject to a Residential Tenancy Agreement. Instead the guests are granted a Licence to Occupy with an occupancy agreement containing specific Terms & Conditions. Failure to comply with these Terms & Conditions can result in the licence being terminated and the guest then being required to vacate the dwelling.

The Code of Conduct sets out a minimum standard for the Terms & Conditions of the Licence to Occupy.

We recommend that a mandatory standard Licence to Occupy be introduced to ensure that every dwelling used for STRA is compliant with the Code of Conduct. This would be the equivalent of a Residential Tenancy Agreement as used for long term rentals. As with an RTA, it is recommended that there is capacity for additional clauses to cover special conditions that may be unique to a particular property, strata building, fire zone or Local Government area.

In the case of a property that is leased by an owner to a tenant on a long-term basis who then engages in STRA, there must be disclosure and consent via a written agreement that grants this authority. This will be a mandatory condition of any registration by a tenant.

CODE OF CONDUCT

There has been criticism that the current Code has not had the widespread effect envisaged when it was launched. This will be solved by making compliance with the Code mandatory as part of registration as a STRA operator. Also it is recognised that the Code needs to be revised and amended into more simple language for the benefit of all readers.

The current National Code of Conduct is held by the HRIA. This is as a result of the original Code Administration Committee voting, with the approval of the DoP&E, for the Code created in NSW to be available nationally. It is acknowledged that in including the Code of Conduct in this NSW regulatory framework the Code will need to address factors that may be NSW specific. The HRIA will continue to be the custodian of the National Code of Conduct and will endeavour to harmonise any variation required by individual states. However, it is envisaged that the principle of applying the Code of Conduct as a fundamental STRA management instrument will be very similar nationally.

It is proposed that:

- the Code of Conduct be revised and amended so that it can be used as a management operating guide for all property owners and their service providers.
- the NSW Department of Planning and Environment and NSW Fair Trading participate with the HRIA Code Administration Committee in this revision.
- a template Licence to Occupy containing minimum standard Terms & Conditions is appended to the STRA Code of Conduct that all owners and their service providers, including advertising portals, are required to use.
- the revised Code of Conduct be held by the NSWFT.

REGISTRATION

The call for registration has been extensive during the process. There are many good reasons to adopt registration as a fundamental part of the regulatory framework.

- Notwithstanding that anyone engaged in STRA is visible online, it would satisfy those who have the perception that some operate under the radar.
- More importantly registration would contain a check list that addresses all the requirements of the Code of Conduct
- that STRA operators are educated on the Code of Conduct and make a commitment to operate under the Code.
- Registration will assure STRA properties are safe, insured, compliant and operate to a quality standard.
- Registration will protect consumers.
- Through a nominal fee, significant funds would be generated to finance administrative costs.

It is proposed that a registration system be introduced and this be held by NSW Fair Trading.

The registration will be enshrined in the new amended instrument (SEPP). Registration will be mandatory for all STRA properties and NO property can be offered or advertised without a valid registration number.

It is proposed that the registration process should be an online self-assessment where the consequences of fraudulent misrepresentation are made clear.

There is no evidence that there are any increased risks to the safety of short-term occupants compared with those residing in long-term accommodation.

Thus, it is proposed that third party accreditation is unnecessary and that the system is managed by exception. The modern consumer is very much invested in providing feedback. Consumer ratings and alerts will provide adequate notice for any non-compliances that may require intervention.

STRATA TITLE

Parliamentary Inquiry recommendation:

- *strengthen owners corporations' powers to manage and respond to STHL issues in strata properties.*

There is scope to empower strata title by-laws for STRA by including key clauses in the Terms & Conditions of the Licence to Occupy. The threat of eviction for non-compliance is a powerful management tool which can be very effective in managing behavior in any STRA.

There is also scope for specific Strata complexes to establish 'house rules' for the building eg in relation to pets, parking or pool use. These rules would be empowered, perhaps by NCAT, as Special Terms & Conditions to the License to Occupy. This would afford relevant and effective controls to regulate STRA thereby avoiding the prospect of excessive bans.

Owners of strata title dwellings will follow the same registration process as those of free standing dwellings and be bound by the STRA Code of Conduct.

COMPLAINTS MANAGEMENT

The HRIA acknowledges that effective complaint management is integral to the success of our proposed regulation changes. We recommend that NSW Fair Trading be the overarching authority for complaint management as the home of registration. The fees raised by the registration will be sufficient to cover the additional administration costs the complaint management will create. With a suitable cost sharing mechanism, the HRIA could also take part in managing complaints, but it will need cooperation from NSWFT.

The Code of Conduct requires property owners or their manager to keep a log of complaints.

However, some thought needs to go in to the fundamental reason for having a central register of all complaints generated. This would be an onerous and costly task.

CATEGORIES OF COMPLAINT

In our experience the key categories of complaint are as follows:

- Guest occupant (consumer) complaints about issues with the property.
 - not receiving the standard of accommodation that was expected during the booking process.
 - late payment, or not receiving, a full refund of the security deposit .
- Neighbour complaints about noise or unacceptable behaviour.
- Neighbour complaints about a lack of reasonable response to complaints by owners and managers.
- Owner complaints in relation to damage caused by guests.

The fundamental responsibilities lie with the two parties involved in the Licence to Occupy, namely the owner/manager and the guest occupant. Owners/managers are required to log any complaint. Most issues are settled satisfactorily. If not, the owner has recourse to authorities in the case of damage caused and the guest has recourse to NSW Fair Trading.

The key lies in ensuring both owner and guest are aware of their obligations commitments. Guests, to comply with the specific Terms & Conditions that apply to the License to Occupy, and owners to assure they maintain the standards of operation set by the Code of Conduct.

Where there is an issue with properties that are not being consistently managed to the standards set down by the Code of Conduct the proposed system will afford access to a Code Administration Committee who will have the ability to apply sanctions including the suspension of active registration.

Matters involving criminal activity including fraud can, as now, be brought before the appropriate authorities.

Owners must be diligent in choosing guests to occupy their dwelling who will comply with the Terms & Conditions of the Licence to Occupy.

If there are legitimate, evidence based grounds to conclude that owners are not effectively managing this aspect they can be sanctioned by suspending their registration. This means that all advertising portals would be required to delist them until active registration is restored.

Online bookings were developed for the hotel industry where there is onsite management. Much STRA is provided in dwellings that don't have this facility.

The application of online bookings to dwellings without any management interface and where access can be made through a key safe provides a risk that needs to be carefully considered in the Code of Conduct. The current Code of Conduct does require that there be local management facilities to provide an onsite presence when and if required. The revision of the Code needs to include some requirement that the owner/manager can confidently take responsibility that the dwelling will be occupied for residential purposes as per the Licence conditions. Again the trend of the new sharing economies has great value to offer in developing reciprocal provider/consumer ratings. This can be used effectively by managers as part of their qualifying process.

There are more than enough legally empowered instruments to deal with such issues involving the activity of STRA. The problem is that there is generally a lack of knowledge as to what they are and how to use them.

It is recommended that all the available instruments are researched as to the applicability to STRA and they be included in the overall education program.

For example, LGAs have the power to apply Noise Abatement Orders that can escalate to significant penalties. This facility is not currently being used to its full potential in STRA matters due to inadequate communication and cooperation between LGAs and the STRA industry. Any new regulatory framework needs to redress this situation.

EDUCATION

The HRIA is committed to become an active partner in making the Code widely known in the STRA community and beyond in cooperation with the NSW government. The HRIA sees this as one of its core tasks in the implementation of self-regulation.

It is envisaged that all necessary information about registering for STRA would be available on the NSWFT website.

To achieve the most comprehensive and fast rollout reaching all stakeholders would involve a program jointly managed the NSW Government and the HRIA.

The database contained in the registration system will provide a great source of information, allowing for greater transparency of the STRA sector. The lack of statistics that has been mentioned in many submissions and at the hearings will be easily resolved as the registration process reaches a critical mass.

It will be possible to include richer data if needed by including specific questions on the registration form.

ILLUSTRATION OF THE PROPOSED REGISTRATION PROCESS

Owners Guide to Register as a Short-Term Residential Accommodation Provider

- a) Log on to Registration website
- b) Download Owners Guide to Short-Term Residential Accommodation pdf.
- c) Short Term Residential Accommodation Code of Conduct (STRA CoC).
- d) Fill out all mandatory documentation required to complete online registration.
- e) Fill out online registration form, which requires the agreement to comply with the STRA CoC and declaration that all details are true and correct.
- f) Pay registration fee.
- g) Receive registration number.

SAMPLE OF REQUESTED INFORMATION

1. Owners full name (or Company Name plus ABN)
2. Address of rental property
3. Rate assessment number of rental property.
4. Number of bedrooms
5. Maximum number of guests
6. Owner's Residential address
7. Owners Contact Phone Number (including After Hours)
8. Email address
9. Declaration that the Owner and their Manager, if applicable, agrees
to be bound by the NSW STRA Code of Conduct
10. Management Company and/or Managers Name
11. Managers Phone Number and Email Address
12. Declaration that all publicly available marketing information relating to the
rental property complies with the requirements of the Code of Conduct.
13. Confirmation that the Owner holds current Public Liability Insurance for
\$20,000,000.
14. Declaration that the property complies with building approval including that
swimming pools are compliant and approved smoke detectors are installed.

CONCLUSION

There is overwhelming evidence that the traditional holiday home rental has evolved as a part of the sharing economy to create wealth for both the owners of STRA dwellings and, most importantly, the nation overall.

This unlocking of capital tied up in property and the ease of access for all stakeholders must be considered a windfall that needs to be nurtured.

As with any rapid advance, there have been associated problems that have caused much legitimate concern. The concept of the sharing economy spreads wealth and accessibility to sectors of our community who were previously shut out.

We believe that the proposals outlined in this submission will create a framework that effectively addresses the impacts of the absence of a general standard of management.

The NSW Government and the HRIA have an opportunity to create a contemporary streamlined solution.

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