



strata
community
association®
NSW

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PREPARED BY: SCA (NSW)

SUBMISSION

*Short-term rental
accommodation
regulatory framework*

Introduction

Strata Community Association (NSW) is the peak industry body for Strata and Community Title Management in New South Wales. Membership includes strata managers, support staff, committee members and suppliers of products and services to the industry. SCA (NSW) has in excess of 3,000 members who help oversee, advise or manage a combined property portfolio with an estimated replacement value of over \$400 Billion. In the same way that our members act as professional advisers and advocates for owners' corporations, SCA (NSW) proudly fulfils the dual roles of a professional institute and consumer advocate.

Summary

The emergence of the Short-Term Rental Accommodation (STRA) market has been a divisive issue for many strata communities. On the one hand, it has created opportunities for some owners and investors to generate a new form of income from their properties which servicing a growing accommodation market among the travelling public. On the other hand, the behaviour of some people using online booking services like Air-BnB and Stayz.com has had a range of negative impacts on long term residents.

The policy objective - to enable local economies to continue to benefit from STRA, while protecting communities from anti-social behaviour such as noise – is commendable.

However the proposed framework is fatally flawed in seeking to rely on self-regulation for enforcement – an approach that has failed in all similar major tourist centres¹ – and in incentivising owners corporations to block legitimate STRA activity with excessive and costly fire safety provisions.

We note that the framework deals sensibly with the different needs of regional locations that depend on STRA type accommodation for tourism. The same common-sense approach should be applied to strata communities.

Individual owners, permanent residents and owners corporations do not want to be compliance 'watch-dogs'. In every international city that has gone down a similar self-regulatory path, the experience has been one of endemic non-compliance driven by competition between platforms. Services such as AirBNB that have tried to enforce compliance have been under-cut by competitors whose unregulated hosts do not bear the same costs.²

Meanwhile the proposed fire regulations treat residential buildings like hotels, yet they are designed and built for a completely different purpose.

The framework suggests a default position where any lot owner or occupier in any residential scheme could run an STRA business irrespective of the views of other owners or residents. All existing by-laws restricting or prohibiting STRA would be over-ridden.

Where the lot is not the host's principal place of residence, the owners corporation, through a by-law, may prohibit STRA in that lot. The additional cost of proposed fire safety measures, which would effectively require the whole building to be upgraded to a hotel standard, would create a very powerful incentive for every owners corporation to do so at the first opportunity.

A more effective approach would be to ensure compliance with the existing requirements by making current building certification a condition of STRA registration.

¹ <https://www.thestar.com.my/tech/tech-news/2019/07/05/as-families-flee-paris-fingers-point-at-airbnb/>

² <https://skift.com/2018/01/11/vacation-rental-search-startups-face-intensifying-rivalry/>

Like other forms of regulated industry, participants should fund the cost of regulation as part of the cost of doing business rather than imposing that burden on taxpayers. To simplify matters, we suggest that a registration fee for STRA providers be collected through compulsory additional public liability insurance. Owners corporations pay for increased wear and tear on the common property. Under section 106 of the Strata Schemes Management Act 2015, owners corporations are required to repair and maintain the common property irrespective of how the damage occurred.

Owners corporations have also expressed concerns about increased strata insurance premiums – again to be paid by all owners. It is not clear whether provisions in strata legislation dealing with insurance differentials due to the change of use of a lot will apply. STRA may be considered ‘normal’ use once legislation establishes it as another form of tenancing.

Unfortunately, with the benefit of the experience of other tourist destinations, it would appear the proposed framework is doomed to fail, and any implementation timetable should also provide for a full review after 12 months.

Key Recommendations:

1. The framework should provide for an active government compliance monitoring and enforcement function that does not rely on industry self-regulation.
2. STRA operators and their clients should bear the costs of regulation, for example through a registration fee collected through compulsory public liability insurance;
3. Fire safety regulations, other than within lots being used as STRA, should focus on compliance with existing fit-for-purpose standards rather than impose a new and unnecessarily high hurdle on any building with an STRA lot.
4. Owners corporations should be empowered to seek reimbursement from an STRA host for any repair to common property due to damage by their clients;

Comments on consultation questions

1. What is your view on the form of and provisions in the STRA SEPP, Regulation and Safety Standard?
2. Are there any elements of the draft instrument that are open to misinterpretation or require further clarification?
3. What are your views on new policy elements relating to days, flood control lots and bushfire prone land?

The proposed fire safety requirements for STRA are very similar to those for hotel accommodation and affect the common property of a strata scheme as well as individual lots. Strata buildings are not hotels and it is entirely inappropriate to expect owners to bear the cost of meeting those standards.

Any owner seeking to offer a legitimate compliant STRA service will face stiff resistance from other owners. Were the framework to provide for cost recovery from the STRA owner, it would most likely render that proposition uneconomic. More likely, the owners corporation would simply seek to pass a by-law prohibiting STRA in that lot.

Rather, fire safety measures within a lot being used as STRA should be the subject of a separate compliance certificate. The focus for the rest of the building should be on compliance with existing standards.

A 2012 University of New South Wales report 'Governing the Compact City' noted that 15% of strata buildings surveyed had a lack of or defective fire safety measures. More recently, a 2018 pilot study by Nicole Johnston of Deakin University and Sacha Read of Griffith University found that 15% of all building defects surveyed related to fire safety.

Any owner, for STRA or any other purpose, is entitled to obtain from the owners corporation a current certificate of inspection from an appropriately A1 or C10 qualified fire engineer as the current Annual Fire Safety Statements system has failed in many instances. The absence of such certification should concentrate the minds of all owners, not just STRA operators.

3. Are the general obligations for industry participants adequate? If not, what other general obligations should be considered? Why?
4. What types of STRA information will be useful for the Secretary to collect to inform the further improvement of the Code and the STRA regulatory framework? Why?
6. Are the specific obligations on booking platforms, letting agents, hosts, guests and facilitators in the Code adequate? If not, what other obligations should be considered for each of these industry participants? Why?

As a minimum, the following should be required for registration for STRA activity.

- Emergency 24/7 contact numbers for the letting agents and owners corporation;
- A formal legal right under the engagement provisions ("terms and conditions" of letting) to remove guests who contravene the by-laws and engage in anti-social behaviour;
- A security deposit;
- Landlord insurance to cover damage to common property, cleaning etc;
- Public liability insurance with specified covers appropriate to the risks of STRA and including a registration fee
- Certification of compliance with STRA fire standards for that lot.
- Certification by an A1/C10 Fire Safety Engineer of compliance with the existing systems required for that building.

Failure to meet these must be counted towards a "2 strikes and you're out" rule that results in cancellation of registration for 5 years.

The legislation should also compel STRA hosts to notify owners corporations of their activities and their license registration number.

They should also be required to provide guests with a copy of the by-laws highlighting relevant restrictions on residents e.g., no pets, no smoking etc.

7. Is the complaints process detailed in part 6 of the Code sufficient? If not, what other matters should be considered or set out in the process? Why?

Owners corporations should not be expected to police compliance and the framework provides no other formal mechanism. Self-regulation has been shown to be entirely ineffective in a market that rewards non-compliance through lower costs, as shown in all major cities that have gone down this path.

The framework provides that "complainants may be industry participants such as hosts and guests, or non-industry participants such as neighbours and owners corporations". The role of police in serious matters should be clearly acknowledged as well.

The proposed register of 'bad' tenants is welcome but, again, the framework is not clear on how compliance is to be monitored and complaints lodged.

8. Are the grounds for recording a strike fair and reasonable? What other matters (if any) should the Commissioner consider when deciding whether to record a strike? Why?
9. What are potential ways to facilitate access to the exclusion register while limiting potential privacy impacts? What factors should be considered?
10. Is the review process clear and sufficient? What other matters (if any) should be considered? Why?

Overall the proposed grounds for recording a strike appear reasonable though, as suggested earlier, they should include compliance with minimum registration requirements.

Ideally, STRA marketing platforms should automatically exclude any operator who does not have a current registration. Alternatively, they should provide a prominent link to the current register of STRA hosts, who could also be required to provide their registration details in their advertising and letting agreement. In practice, obtaining their co-operation consistently across the market has proved difficult elsewhere. No jurisdiction appears to have achieved anything like 100 per cent compliance given the proliferation of new and niche platforms.

Lax enforcement or difficult-to-enforce rules have let down STRA regulations in New York³, Chicago⁴, Santa Monica⁵ and many other places. Those cities have since moved to stricter STRA rules. It would be a good idea for any government looking to regulate STRAs to visit these cities and others suffering from the unwanted side-effects of the recent STRA boom (e.g. Vancouver, San Francisco, Madrid, London, Paris, Berlin, Amsterdam).

Access to the bad client register could be restricted to registered STRA hosts. Potential clients should provide formal identification to the host, such a driver's license, passport etc.

11. Are the proposed penalty notice offence and civil penalty provisions appropriate? What provisions should or should not be identified as penalty notice offence and/or civil penalty provisions? Why?

The penalty notice and civil penalty offences in Appendix 3 should not be regarded as exhaustive but subject to modification as experience of the framework grows. That said, they will have little relevance in the absence of any effective mechanism for enforcement.

Consideration should be given to extending the power to order a monetary penalty to NCAT, a relatively low cost and less formal forum that generally can provide quicker determinations. More timely decisions would be more effective in dealing with aberrant behaviour.

12. Does clause 22B(1) appropriately capture end to end property management services that specifically service STRA properties? Why or why not?
13. What other organisations or persons should be prescribed classes of STRA industry participants (if any?) Why?

³ <https://ny.curbed.com/2018/4/17/17246830/nyc-airbnb-illegal-hotels-crackdown-funding>

⁴ <https://therealdeal.com/chicago/2018/10/08/a-law-that-was-designed-to-fail-aldermen-want-more-enforcement-of-airbnblike-vacation-rentals>

⁵ <http://smdp.com/report-airbnb-hosts-make-millions-in-santa-monica-from-illegal-listings/164554>

Property management services is a broad classification covering strata managers, facilities managers, building managers among others so it would be appropriate to include “STRA managers” and “property letting agents,” noting that real estate agents also operate short term holiday lettings in tourist regions.

14. Is it appropriate to exclude the STRA industry participants set out in clause 22C? Why or why not?
15. What other STRA operators (if any) should be excluded from being covered by the Code? Why?

Hotels and motels have their own legislative frameworks. Caravans and cabins should fall within the STRA framework where they are not part of a holiday park or otherwise regulated tourist facility.

16. Is the appeals process clear and sufficient? What other matters (if any) should be considered? Why?

The limit of 21 days to make a decision may be too long for a very serious breach if the aim is to curb STRA activities affecting others.

17. Which industry participants should contribute to the cost of administering and enforcing the Code? Why?
18. How should costs be apportioned across different STRA industry participants? Why?

Fees should be charged as part of a registration process that must require public liability insurance. For administrative efficiency the registration fee should be included in the insurance premium.

19. Is the proposed penalty notice offence amount appropriate? Why or why not?

Penalties should reflect the seriousness of the breach and act as a deterrent. The proposed monetary penalties are modest but will be much more effective with the knowledge that another penalty would result in a ban for 5 years. Again, absent any effect enforcement mechanism, they will have little real impact.

20. How can industry be organised to develop and manage the registration system?
21. What would be the costs to industry in establishing and maintaining the register? How would industry propose to meet these costs?
22. What role should the Government play in developing or overseeing the register, if any?
23. Are there other outcomes a register should deliver?
24. How can the approach ensure registration applies to all STRA operators, regardless of how the property is advertised for rent?
25. What audit and verification processes would be needed to ensure accuracy of data?
26. Should there be separate or additional penalties for failure to register? If so, which industry participants should they be imposed on?

27. What information should the register collect? Why?
28. What role should different industry participants (e.g. hosts and booking platforms) play in the registration process?
29. What role should Government play in the registration process or providing information for the register?
30. Should any information on the register be made publicly available? If so, what information could be made available and why?
31. Should industry be required to report registration information, including number of stays (days), to Government and/or local councils? If so, how frequently? Why?
32. Should any information on the register be made publicly available? Why?

The key issue here is accountability for administering the register. In NSW self-regulation and self-reporting have failed badly in other contexts, such as private building certification. Overseas experience⁶ does not provide any comfort that the outcome would be any better in STRA.

Initially, a government agency should establish and maintain the register and actively enforce compliance. An industry-led governance structure should be a long-term goal for a time when the industry is stable and mature enough to act responsibly and be accountable to the wider community.

33. How much lead time would industry need to develop and establish the proposed STRA property register? Please provide reasons.
34. When should the STRA regulatory framework start? Please provide reasons.

The framework should come into effect as an integrated package, ideally from 1 July 2020 but no earlier than is required to put in place an effective enforcement regime that does not rely purely on industry self-regulation.

Some lead time also will be required for compliance with any new fire safety measures. Owners corporations will also need time to consider and adopt new by-laws where they wish to restrict STRA.

35. Do you support the proposed scope of the review? What additional considerations might be necessary?
36. What data sources could the NSW Government use to inform the review? How can industry and councils assist with data collection for the review?

A review of the framework after 12 months of operation will be essential to identify and remedy any unintended consequences, to be followed by a further comprehensive review after 5 years.

⁶ <https://www.theglobeandmail.com/canada/british-columbia/article-airbnb-not-required-to-enforce-rules-in-agreement-with-vancouver/>