

Neighbours Not Strangers

WITHOUT PREJUDICE

The Hon Gladys Berejiklian MP
All Member of the NSW Parliament
PARLIAMENT OF NEW SOUTH WALES

Dear Premier Berejiklian and Members of the NSW Parliament

REF: Fair Trading Amendment (Short-Term Rental Accommodation) Bill

Tomorrow, 19 June 2018, Minister Matthew Kean's *Fair Trading Amendment (Short-Term Rental Accommodation) Bill* will be debated in the NSW Parliament.

Premier Gladys Berejiklian, you have not responded to questions over MPs '*conflicts of interest*' on this matter. So far we know of five State MPs who have failed to disclose short-term rental properties on their Declarations to Parliament; we suspect there are many more:

Deputy Premier John Barilaro (LNP) - seven-bedroom *Airbnb* Estate¹
Three LNP MPs properties on these NSW Land and Environment Court Orders² - referred to the ICAC
Labor's Jodi McKay³ – five-bedroom *Airbnb* property plus granny flat⁴

All that has been presented to us to date in response to Parliament's (almost) three-year review of this issue leaves NSW Residents with close to zero confidence that this critical issue can be entrusted to Members of our State Parliament. It would appear that Parliamentarians still have no understanding of the complexities and profound repercussions of industry short-term holiday/visitor rentals.

Minister Kean's Bill, trumpeted by him as a "*crack down*" and given full Media coverage, proposes an '*Industry Code of Conduct*' plus other recommendations that will grant '*open slather*' to all short-term rental platform operators.

Of note, an *Industry Holiday Rental Code of Conduct* has been in place in NSW since 31 May 2012. The Hon Brad Hazzard, who at the time was the NSW Minister for Planning and Infrastructure, endorsed this *Code of Conduct*. *DestinationNSW*, an official branch of the NSW Government, also has a *Code of Conduct and Ethics*.

Since May 2012, there does not appear to have been a single example of enforcement or penalties issued under either Code, despite reports of hundreds and hundreds of serious complaints related to short-term holiday rentals. Consider too that those who are in possession of a short-term holiday rental dwelling have been granted a '*license to occupy*'. There is no legislation that compels platform users to provide Government Issued photo identification, plus Minister Kean makes no mention of the fact that no authority - including the NSW State Police - has the right of entry when complaints are notified. See this weekend's repeat **fiasco in Melbourne**⁵. Neighbours next to this Melbourne property say they now "*fear for their lives*".

Frankly, Minister Kean's '*Code of Conduct*' is considered unworkable.

Members of the NSW Parliament know too well that we have a major crisis in housing affordability and homelessness. The impacts of short-term holiday rentals on residents are very well known and documented in our case law.

The 1,040 members of our Residents Group – *Neighbours Not Strangers* - plus their family members, have undertaken all due diligence and invested in Residential housing. Small, commercial accommodation businesses are impacted upon hugely. We cannot support the proposal presented by Minister Matthew Kean in his Fair Trading Amendment Bill 2018.

We have borrowed heavily from current legislation covering the City of San Francisco and ask that our Full Requirements, as presented in our following document, be implemented.

Sincerely

Trish Burt
Convener
Neighbours Not Strangers
Email: neighboursnotstrangers@gmail.com
Date: 18/06/2018

¹ <https://www.airbnb.com/rooms/12811913>

² https://docs.wixstatic.com/ugd/5a8126_1e32ab553a7f4d1fb34c7f14b3fc9f40.pdf

³ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-97130/link/20>

⁴ <https://www.airbnb.com/rooms/10925611>

⁵ <https://au.news.yahoo.com/control-partygoers-leave-holes-walls-trashing-rental-home-111851604.html>

Neighbours Not Strangers

Short-Term Lets Have No Place in Our Homes

New South Wales

Fair Trading Amendment (Short-term Rental Accommodation) Bill (The Bill) 2018

“Overview of Bill¹ - The objects of this Bill are as follows:

1. (a) to amend the Fair Trading Act 1987 to authorise the regulations to declare a code of conduct applying to participants in the short-term rental accommodation industry,
2. (b) to amend the Strata Schemes Management Act 2015 to allow the by-laws for a strata scheme to prohibit short-term rental accommodation in the case of premises that are not the principal place of residence of the person who is giving the right of occupation.”

NOTE: The Bill proposes, “A by-law made by a special resolution of an owners corporation may prohibit a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is not the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.” And, “A By-law has no force or effect to the extent to which it purports to prevent a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.”

“The NSW Strata Schemes Management Act 2015 also states - Section 139 Restrictions on by-laws
(1) By-law cannot be unjust. A by-law must not be harsh, unconscionable or oppressive.”

Our Response:

An amendment to the Fair Trading Act and a by-law must not retrospectively alter the Residential status of a property. A Bill submitting that a by-law may overturn NSW Residential Title Deed conditions plus leave non-participating Property Owners living in a perpetual ‘transit’ environment plus responsible for major, ongoing financial costs can but only be considered “*harsh, unconscionable and oppressive*”.

The Bill amendment also proposes:-

AN INDUSTRY CODE OF CONDUCT:

An “**Industry Holiday Rental Code of Conduct**” has been in place in NSW since 31 May 2012. The Hon Brad Hazzard, who at the time was the NSW Minister for Planning and Infrastructure, endorsed this *Code of Conduct*. **DestinationNSW**, an official branch of the NSW Government, also has a **Code of Conduct and Ethics**.

Since May 2012, there does not appear to have been a single example of enforcement or penalties issued under either Code, despite reports of hundreds and hundreds of complaints concerning short-term holiday rentals. Consider:

- Those in residence in a short-term holiday lettings are there under a ‘*license to occupy*’; the Bill does not clarify whether any authority (including NSW State Police) have a right of entry following a complaint,
- Short-term holiday rental industry participants are under no legal obligation whatsoever to furnish Government Issued Photo Identification. It is therefore impossible to establish who is involved in any ‘*license to occupy*’,
- The Bill (and its said ‘*Code of Conduct*’) does not substantiate what constitutes ‘*a contravention*’,
- The Bill does not say what methods are permissible for the ‘*collection of evidence*’,
- The exact type of surveillance recording/material that must be produced a propos ‘*a contravention*’ is not given,
- The Bill appears not to have taken into consideration any common law claim of ‘*nuisance*’ made by an owner or occupier of a STHL on the basis of unreasonable interference with the enjoyment of a property,
- The Bill offers no distinction between a claim of ‘*contravention*’ by a neighbour, or a counterclaimed of ‘*nuisance*’ by the owner or occupier of a short-term holiday rental letting reported to be ‘*in contravention*’,
- The Bill does not clarify whether the use of video or still cameras to record evidence would be considered an ‘*anti-social activity*’ when individuals are recorded within the ‘*private*’ area/s of a short-term holiday letting,
- The recording of individuals or vehicles in a public space, such as a public road, may be accepted in a court of Law, but the Bill presents no legal advice on the value or weight that such evidence may carry,

¹ <https://www.parliament.nsw.gov.au/bill/files/3525/First%20Print.pdf>

- The Bill gives no indication of the likely success of any enforcement action (Ref: ***Raciti v Hughes, unreported, NSW Supreme Court, 1995***),
- The 'Code of Conduct' will have limited adherence; *Airbnb* Company representatives told Senior NSW Public Servants that they would "support" a 'Code of Conduct' but ***Airbnb will not*** be a party to any such 'Code'.
- ***DestinationNSW, NSW National Parks and Wildlife Services, NSW State Members of Parliament*** and their immediate family members appear not to have disclosed financial links with short-term rental platforms,
- Almost all holiday rental platforms are headquartered overseas:

Frankly, a 'Code of Conduct' is considered unworkable

Reminding Members of Parliament: Residential Housing is for the housing of NSW Residents

REVISION: FULL REQUIREMENTS NECESSARY UNDER THIS BILL -

- 1 **The NSW Department of Fair Trading must introduce a mandatory State registration scheme** for all properties advertised and used for industry short-term holiday rentals. The Short-Term Holiday Rental Registration License to be obtainable online plus administered by a Department of the NSW Government,
- 2 All dwellings operating as industry short-term holiday rental properties must have an individual license number, and this must be posted on all listings and advertisements,
- 3 **Short-term holiday letting allowed – no cap when License holder/Manager is present – Class 1(b) and Class 3 (Building Codes of Australia/National Construction Codes – BCA/NCC), SUBJECT TO:**
LGA Development Approval plus approval of neighbouring Residents in R2 Low Density and R4 High Density Residential Zones
Mandatory Registration and Licensing
Mandatory Commercial rates and taxes including NSW Land Tax charge
Mandatory compliance with all BCA/NCA, Fire & Rescue, Disability Discrimination legislation etc,
- 4 Short-term holiday letting allowed – **no cap should be required when License holder/Manager is present – Class 2 premises – SUBJECT TO and ONLY ON CONDITION THAT:**
LGA Development Approval for 'change of use' needs the approval of 75% of co-owners
Mandatory Registration and Licensing of all short-term holiday rental operations
Mandatory Commercial rates and taxes including NSW Land Tax charges paid by all License holders
Short-Term Holiday Rental Landlord Licence holders responsible for:
All upgrade costs to meet compliance with BCA/NCA, Fire & Rescue, Disability Discrimination legislation covering the entire property including all other dwelling units and common property – infrastructure upgraded and compliance must be on a par with Class 3 BCA/NCC properties
The License holder/s to be responsible for the cost of all building infrastructure upgrades, all other areas of compliance and ongoing maintenance, plus ongoing 24/7 building supervision. All Strata 'opt OUT' landlords to be exempt from the payments listed,
- 5 **Mandatory annual inspections will be applicable for all dwellings operating as industry short-term holiday letting properties**, as is the case with boarding houses.
- 6 **All dwellings operating as industry short-term holiday letting properties must carry liability insurance** of no less than \$1,000,000, and provide proof that the property liability coverage is an equal or higher amount being provided by any and all hosting platforms through which the License holder will rent the dwelling. Proof of liability insurance is required for each platform on which the dwelling is listed and advertised,
- 7 **The License holder to be responsible for proof that all Class 2 dwellings operating as industry short-term holiday letting properties** have been upgraded to Class 3 properties and property liability coverage in an equal or higher amount is being provided **which will cover all dwellings in the premises. Any/all higher commercial insurance fees must be met by the License holder/s.** The License holder/s must provide proof of liability insurance for each platform on which the dwelling/s is/are listed and advertised,
- 8 All Class 1(b) and Class 3 short-term holiday letting dwellings must remain compliant with all areas of legislation – Federal, State and Local Government,
- 9 **Following Development Approval for change of use, all Class 1(b), and Class 3 short-term holiday letting dwelling must comply with current Federal Disability Discrimination and Access Legislation,**

- 10 All Class 1(b) and Class 3 short-term holiday letting dwellings must be subject to NSW Fire & Rescue requirements on commercial dwellings, plus planning rules will apply to properties on bushfire prone land.** The License holder/s is/are responsible for all costs associated with upgrades to meet compliance,
- 11 The “business location” listed on the license is to include the actual street address of the licensed property plus the apartment/unit number if applicable. For example: 224/3 Smith Street, Newcastle. A 24/7 contact telephone number must also be displayed. This information is to be visible on all platforms where the property is listed and advertised,
- 12 The NSW State registration scheme will show whether a property is registered as an approved short-term holiday rental dwelling. No other identifying, private information of the License holder is posted online or provided to the public,
- 13 License holders must be the permanent resident and must live in the dwelling for at least 275 nights of any given calendar year.** Class 1(b) and Class 3 properties available for maximum 30 nights in any calendar year without onsite staffing, subject to all other requirements being met,
- 14 If the Class 1(b) or Class 3 property features multiple dwelling units, Licence holders may not live in one dwelling, while operating short-term rentals in a different dwelling,
- 15 If the License holder owns multiple dwellings, they may only register the specific dwelling in which they reside,
- 16 Repeating for emphasis: If the dwelling forms part of a strata scheme and is located within an apartment building, then the entire property, including all other dwelling lots and common property, must be compliant with all legislation covering commercial property, Class 3 (BCA/NCC) requirements, plus all other legislative requirements. All upgrade costs plus ongoing management/maintenance costs to be borne by the License holder/s. Owners who ‘opt OUT’ not liable for any costs related to commercial operations,
- 17 License holder applicants must have resided in the dwelling for at least 60 consecutive days prior to lodging an application to operate short-term holiday rental accommodation,
- 18 Once a short-term holiday rental license has been issued, listings and advertisements may be placed. License holders may then rent a portion of their dwelling for less than 90(*) consecutive nights while they or a building manager is resident in the dwelling for an unlimited number of nights per calendar year,
- 19 * License holders may only rent the dwelling or a portion of the dwelling while that are not present overnight during the time of the clients’ stay up to a maximum of 30 nights per calendar year,
- 20 License holders may not rent dwellings, or areas within a dwelling that were built without building permits,
- 21 All industry participants including booking platforms are subject to mandatory reporting,**
- 22 All Platforms and Industry participants must agree to provide data on all properties listed to the NSW State registration scheme and the Australian Tax Office,**
- 23 Commercial rates to apply to all industry short-term holiday rentals,** in line with commercial charges levied on hotels, motels, serviced apartments, guesthouses, bed & breakfast and other commercial accommodation providers,
- 24 DestinationNSW and NSW National Parks and Wildlife Services properties are not exempt,**
- 25 The register of all short-term holiday rentals must be made available online and at no cost, to enable those impacted upon to identify the short-term holiday rental property and the operator/booking platform,
- 26 For the avoidance of doubt, this Bill does not in itself authorise the use of residential dwellings for the purposes of short-term rental accommodation, when an environmental planning instrument prohibits that use.

Ineligible properties where short-term rentals are not allowed: Certain types of properties are **not permitted** to be used as short-term holiday rentals. These include: Income-restricted affordable housing, social and public housing, student housing, beds in dormitories, tents, caravans, sleeping quarters in vans or recreational vehicles, boating and other similar watercraft, shipping containers, tree houses, garages, commercial office/retail or industrial (warehouse) space, and all other types of shelter which do not meet BCA/NCC Class 1(b) or Class 3 standards. Maximum number of occupants per room and per dwelling to be covered by BCA/NCC classifications.

Neighbourhood notification for single-family, free-standing Class 1(a) dwellings: For properties located in Residential R2 Low Density and R4 High Density Residential Zones, neighbourhood notification and approval plus Development Approval is required when the intention is to use the property for Class 1(b) or Class 3 short-term holiday rentals. The granting of a Development Approval which permits short-term holiday rentals must be subject to the approval of all property owners and residential tenants who live within 300 metres of the property.

SERIOUS CONCERNS: The proposed Bill - Division 4A, 54D Civil penalty for contravention of code of conduct

1. (1) A court **may** order a short-term rental accommodation industry participant to pay a monetary penalty if the court is satisfied that the participant has contravened a provision of a code of conduct that is identified by the code. **(No definitions have been identified.)**
2. (2) (b) the monetary penalty imposed under this section is a debt due to the Crown. **(No debt or compensation due to those neighbours whose property may have been damaged or those who have suffered “severe” amenity impacts. It would seem that State MPs have never been through NSW Fair Trading system.)**
3. (3) Applications must be made within two years of the date of a contravention.
4. **(4) An industry participant is not liable to be both punished for an offence and at the same time subject to an order, if the contravention is essentially the same act or omission. (Either a payment of penalty points will be levied OR an order will be issued, but not both.)**
5. (5) The court is not identified.

NSW Strata Schemes – 75% ‘opt **IN**’ - not, ‘opt **out**’ – must be required for short-term holiday rentals. NSW Residential flat dwellings have been sold as ‘Residential’, not industry/commercial transit property. Those who vote to ‘opt IN’ must be responsible for all costs associated with building upgrades of the entire building, ongoing 24/7 building supervision charges in line with commercial operations, plus all ongoing maintenance levies. Those who do not ‘opt in’ must be exempt from all upgrade and ongoing maintenance/management costs including the cost of 24/7 building supervision charges.

Minister Kean makes no reference² in his Bill of infrastructure upgrades required under the Federal Building Codes of Australia/National Construction Codes. The BCA/NCC were the reference points upon which Minister Kean based his arguments in relation to his Building Products (Safety) Bill 2017³. The Minister has not explained why there now appears to be no need for compliance with BCA/NCC upgrades in relation to this Bill – a bill which potentially affects every NSW resident.

CONCLUSION: With regards to any plan to retrospectively introduce short-term holiday rentals into Residential strata buildings and Residential zones, the NSW Land and Environment Court (LEC) judges that there is a **“fundamental incompatibility”** between a mix of short-term holiday rentals and permanent residents. The LEC also judges, with regards to a proposal that NSW Residential Strata Scheme properties be converted to permit Class 3 commercial short-term holiday rental accommodation:

“The proposal will require extensive building upgrades for fire safety and for access for persons with a disability.”

“The proposal will likely lead to a disproportionate financial burden on long-term residents, in terms of retrofitting the building, and as well, for operational repairs and maintenance...”

“Short-term residents have no long-term interest in the maintenance of the amenity within the building or the surrounding area...The harm caused to the environment is not limited to the undermining of the planning regime. The adverse impact on the amenity and wellbeing of the (Residents) has been, as the evidence overwhelmingly demonstrates, severe.”

Members of the NSW Parliament, we have a major crisis in housing affordability and homelessness. The impacts of short-term holiday rentals on residents are very well known and documented in our case law.

The 1,038 members of our Residents Group – Neighbours Not Strangers - plus their family members, have undertaken all due diligence and invested in Residential housing. Small, commercial accommodation businesses are impacted upon hugely. We cannot support the proposal presented by Minister Matthew Kean in his Fair Trading Amendment Bill 2018. We have borrowed heavily from current legislation covering the City of San Francisco. We now ask that our Full Requirements, as presented in this document, be implemented.

Trish Burt
Convener

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² <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-102475/link/61>

³ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-99762/link/61>