

NSW Tribunal Confirms By-Laws Cannot Outlaw Short-Term Letting

In my August article, I made mention that the *Strata Schemes Management Act 2015* (Act) prevents an Owners Corporation from restricting an owner from letting their lot, including short-term letting. I made note that the only way short-term letting can be restricted is by Council planning regulations. This proposition has been backed up by the recent NCAT decision of *Estens v Owners Corporation SP 11825*.

Peta Estens lived in a unit in Woollahra and sought to invalidate a by-law on the basis that the Owners Corporation did not have power to make it. This particular strata plan comprised only five residential lots, all with an equal unit entitlement. An Extraordinary General Meeting was held on 16 February 2017 and passed (by way of a special resolution) a by law that was designed to prohibit short term letting of lots. Four owners were present at the meeting and three were noted to be in favour of the special by-law. Ms Estens was the dissenting owner and one owner was unfinancial.

The other owners had complained that Airbnb guests of Ms Estens' were using the communal washing machine and this was causing them disruption of their peace and enjoyment. One owner also claimed that men were sitting on the deck above her unit relaxing with a beer and she felt uncomfortable as they were strangers and apparently watching her.

Ms Estens had originally rented her unit through Airbnb whilst she was travelling interstate and overseas and stated that over a 12 month period, she had only received two complaints regarding misuse of the washing machine in the communal laundry. As a result of these complaints, she had changed her rules to prohibit pets and limit use of the washing machines. She said that she was very selective with her guests.

The Strata Manager provided submissions on behalf of the Owners Corporation and referred to section 136 of the Act relating to the making of by-laws for the management, administration, control or use and enjoyment of lots. He suggested that luggage was continuously moved in and out of the apartment and common areas, leading to a higher rate of wear and tear. He also referred to the obligations of owners under section 258 of the Act to notify the scheme in relation to a change in tenancy but there was no evidence to suggest that this section had not been complied with.

Ms Estens relied on section 139 of the Act dealing with unjust by-laws. This section states that a by-law must not be harsh, unconscionable or oppressive or capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

Section 150 of the Act states that the Tribunal may declare a by-law invalid if the Tribunal considers the Owners Corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive. Ms Estens contended that Airbnb letting is a "lease" within the meaning of section 139 of the Act.

The Tribunal Decision

The Tribunal was satisfied that the manner in which the Airbnb tenancy devolved by the landlord was sufficient to constitute a tenancy or lease with a specific commencement date and specific end date.

During that time, the tenant had exclusive use of the property and the arrangement is properly described as a lease rather than a licence. The Tribunal Member also went on to say that it was likely that a licence would also be covered in the use of the word "devolution" in any event.

Accordingly, the Tribunal was satisfied that the by-law as passed was invalid because the Owners Corporation had no power to pass that by-law by reason of the operation of section 139(2) of the Act.

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