

Article Information

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Strata Sorrows for Opponents of AirBNB

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In the decision in [Estens v Owners Strata Plan 11825](#), NSW Civil and Administrative Tribunal (NCAT) found that the Owners Corporation did not have power to make the by-law in question.

Does this mean lot owners have free rein to list their properties on AirBNB despite by-laws purporting to ban short-term letting? In NSW the answer appears to be yes.

The Owners Corporation in the *Estens* case, comprised a block of 6 units located in Woolhara, Sydney, followed the procedures set out in the [Strata Schemes Management Act \(SSMA\)](#) to consider and pass a by-law which was not reproduced in the decision. However it appears common ground that the by-law sought to prohibit short-term letting being undertaken by another lot owner in the block.

The critical problem for the Owners is that s139(1) of the SSMA requires that:

A by-law must not be harsh, unconscionable or oppressive.

Further, s.139(2) of the SSMA states that:

No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

The Tribunal found that the by-law in question, in seeking to ban short term letting, **was** seeking to prohibit or restrict the lease of the unit, or alternatively if the letting was considered a license, was seeking to prohibit the devolution of a lot. This is consistent with a [previous decision](#) in Victoria of [Swan v Ucker](#) which found that AirBNB lettings were leases (and not a licence). The *Swan* decision was not referred to by the Tribunal in this case.

However, in reaching their decision the Tribunal did refer to the [NSW Legislative Committee Environmental Planning Report from October 2016](#) which considered (and rejected) the suggestion that Owners Corporations should be granted powers to ban short term letting.

It is worth noting that Fair Trading in NSW has for some time warned that by-laws seeking to block AirBNB and other short term rentals [would likely be invalid](#). Fair Trading, in effect, has taken the position of pushing responsibility for dealing with short term letting to Council planning and enforcement by Council.

While there was no apparent reference to the requirements of development consent by Council in the *Estens* case, likely due to the small nature of the block, the decision puts Owners Corporations, particularly in larger buildings, in an awkward position.

While the Local Environmental Plans (**LEP**) enacted by Councils override strata by-laws, Councils are notorious for not enforcing their own LEP and development consents which ban short-term letting, so if an Owners Corporation produces a by-law in terms identical to the development consent, those Owners may well find the by-law is invalid and Council is unwilling to take action to enforce restrictions on short term letting.

The *Esten* decision also did not refer to the lengthy decision of the Victorian Supreme Court in [*Owners Corporation PS 501391P v Balcombe*](#) which found that Victorian Owners Corporations had no power to make by-laws banning short term letting but which also specifically left the door open to NSW Courts finding to the contrary (due to technical differences in the underlying acts governing strata in each state). The recent Western Australian decision of [*Byrne v The Owners of Ceresia River Apartments Strata Plan 55597*](#) was also not considered. In that decision the WA Court of Appeal did not disturb the validity of a by-law which banned short term letting of apartments in that state.

Despite the inconsistent decisions at the state level, it remains to be seen if by-laws targeting short term letting via other means (such as access to keys, restrictions on the number of persons present in a lot and other “management and use” by-laws) will be effective at managing or ending short term letting in apartments where the majority of lot owners do not wish such short term letting to take place. Overcrowding and short term letting remain hot topics in strata and are unlikely to go away.

Given the very narrow grounds on which NCAT decisions may be appealed, only a legislative response would practically empower Owners Corporations to ban AirBNB or other short term rentals in their buildings in the absence of Councils taking action.