



SHORT TERM LETTING – THE PAST, THE PRESENT AND THE FUTURE

Short Term Letting has been one of the hottest topics affecting Owners Corporations and owners of apartments in Melbourne over the past few years where broad planning permits have been granted without consideration of the impact that short term letting is having on owner occupiers.

Typical complaints made by owner occupiers include party crowds causing a nuisance and misbehaving, increased pressures on Owners Corporation services and damage to common property, breaches of security and breaches of Owners Corporation Rules.

The “Watergate” case has received much publicity on this issue over the past few years. The Watergate case was subject to various appeals which ultimately held that neither the occupancy permits, planning permit or relevant planning scheme prohibited short term letting and thus short term letting continued to be a legal use of lots at the Watergate apartments.

Can short term letting be prohibited by an Owner Corporation Rule?

On 29 June 2015 Member Rowland of VCAT handed down her decision in the case of *Owners Corporation PS501391P v Balcombe* [2015] VCAT 956. This decision was but another link in the chain to years of legal proceedings relating to short term letting, and in particular the validity of an Owners Corporation Rule prohibiting it at the “Watergate” apartments.

The decision of Member Rowland in *Balcombe* concerned the validity of Rule 34 of the Owners Corporation’s Additional rules which sought to prohibit letting of lots on a short term basis. In determining the validity of the Rule, Member Rowland considered whether the power to make rules of an Owners Corporation conferred by Schedule 1 of the Owners Corporations Act and the Model Rules of an Owners Corporation applicable to all Owners Corporations provided any support as to the validity of the rule. In doing so, Member Rowland held that:

1. The Model Rules did not confer power upon an owners corporation to determine the use of the lot (which she felt was akin to determining the planning use of private lots) and therefore Rule 34 could not be validly made under the change of use power.
2. Rule 34 could not be made under the health, safety and security power for as there is no factual basis that short term letter affects the health, safety and security of other occupiers enabling the rule to be made under that power and there was no expert evidence to support the contention that short term letting created more of a health, safety and security risk to other occupiers than longer term occupiers.
3. There was little evidence regarding the behaviour of longer term occupants. Accordingly, it was difficult to determine that short term

- occupants caused more damage to common property and created more of a nuisance than longer term occupants.
4. The power enabling an Owners Corporation to regulate a matter does not empower the Owners Corporation to prohibit it altogether.

Having regard to the above, Member Rowland held that Rule 34 was invalid and therefore short term letting at the Watergate apartments is not prohibited by that Rule, or by the occupancy permit, planning permit and planning scheme.

What is being done about short term letting

Member Rowland's decision was subsequently appealed by the Owners Corporation to the Supreme Court in *Owners Corporation PS501391P v Balcombe* [2016] VSC 384. On 22 July 2016, Riordan J handed down his judgment dismissing the appeal and upholding Member Rowland's decision.

In June 2016 the Supreme Court found that two tenants who listed their rented apartment on Airbnb had done so illegally and in breach of subletting provisions of their lease agreement. This provided the Landlord the right to evict her tenants. Whilst this decision may be of assistance to Landlords' whose tenants are breaching their lease agreements, it does not provide much comfort to Owners Corporations.

What will provide some comfort to Owners Corporations is the *Owners Corporations Amendment (Short-stay Accommodation) Bill 2016* ("the OC Amendment Bill"). In response to public consultation and the real need for short term letting to be regulated, the OC Amendment Bill has been introduced to regulate the provision of short-stay accommodation arrangements in lots or parts of lots affected by an Owners Corporation.

A closer look at the OC Amendment Bill

Notable aspects of the OC Amendment Bill include:

1. The definition of short-stay accommodation arrangement which means a lease or licence for a maximum period of 7 days and 6 nights to occupy a lot or part of a lot affected by an owners corporation that is in a building wholly or partly classified as a Class 2;
2. A complaints procedure where a short stay occupant is engaging in conduct:
 - a. unreasonably creating noise likely to substantially interfere with the peaceful enjoyment of an occupier or a guest of an occupier of another lot;
 - b. behaving in a manner likely to unreasonably and substantially interfere with the peaceful enjoyment of an occupier or a guest of an occupier of another lot
 - c. using a lot or the common property, or permitting a lot or the common property to be used, so as to cause a substantial hazard to the health, safety and security of any person or an occupier;

- d. unreasonably and substantially obstructing the lawful use and enjoyment of the common property by an occupier or a guest of an occupier;
 - e. substantially damaging or altering a lot or the common property, intentionally or negligently
3. The requirement for a Notice to Rectify Breach where the Owners Corporation makes a decision to take action in respect of a breach by a short stay occupant;
4. Where a Notice to Rectify Breach is not complied with the Owners Corporation may seek from VCAT a prohibition order, civil penalty, loss of amenity compensation order or any applicable order that VCAT may make under section 165.

This Bill is due to come into operation as an Act on or before 1 July 2017. In the meantime, until the Act comes into operation, the current position is that short term letting cannot be prohibited. Notwithstanding this, the proposed Act does finally provide Owners Corporations with some comfort and occupiers may soon be able to sleep better at night.

For assistance on any owners corporation, building or property law matters, please contact Emilia Panayiotou, Mark Lipshutz or Jonathan Cohen at CLP Lawyers on 9042 2070 or at clp@clplawyers.com.au.



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