

Do we have a Housing Crisis in our State?

If Federal, State and Local Government Legislation were enforced, well in excess of 216,000* dwellings would be added to New South Wales' Long-Term Housing Supply

* Estimate of housing lost to short-term rentals in 2014 (NSW Parliamentary Inquiry 2016 Report)

NEW SOUTH LAND AND ENVIRONMENT COURT Judgment [2013] NSWLEC 61

If an environmental planning instrument provides that: a) specific development is prohibited on land to which the provision applies, or b) development cannot be carried out on land with or without development consent, a person must not carry out the development on land.

A (short-term rental) breaches, offends and undermines the planning regime of the (name) LGA and ultimately of the State...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 (neighbours) has been, as the evidence overwhelmingly demonstrates, severe.

(The Respondent) stated: "I have no control over any other person do I really, in realism [sic], I can only control my own conduct I can't control other – other people's conduct."

The council has been content for the Court to resolve the matter. On any view, this is unsatisfactory and amounts to an effective abrogation by the council of its fundamental duties and responsibilities...the council, by its inaction, has, in my opinion, failed to fulfil its core functions and has failed its constituents.

Section 20(2) of the LEC Act states:

- (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract.
- (b) To review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract.

TABLE OF CONTENTS - Neighbours Not Strangers

Introduction	2
State Government and STHL	3
STHL and the Massive Drain on Housing	5
Tapping into City and Regional Centres' Housing Supply	6
An Industry-Administered 'Code of Conduct'	7
NSW Residential Tenancies Act	8
Existing Residential Development Consent Conditions and Zoning	8
Certified, Accredited STHLs Permitted Without 'Nightly Caps'	9
NSW Land and Environment Court	10
Conclusion	11
Voluntary Orders Sought	12
Data: Increase in Airbnb Listings by Local Government Area – DEC16 – DEC18	13/14
Inside Airbnb 18/01/19 - http://insideairbnb.com/index.html	

2 - Neighbours Not Strangers

INTRODUCTION

New South Wales is suffering from an acute housing affordability crisis¹. While low- and moderate-income households have long experienced difficulties finding decent and affordable housing, many of what were once considered well-to-do households are today struggling under real economic pressure. A cursory scan of recent media coverage illustrates this trend is worsening in many areas of our State.

Airbnb, Expedia and other Online Travel Agents (OTAs) have been shown to remove housing options from Residents, thereby worsening our housing crisis. And Airbnb and Expedia/HomeAway (formerly known as Stayz) are two of an unknown number of OTAs.

NSW Deputy Premier and Minister for Small Business John Barilaro has one of his properties² – the \$5 million Dungowan Estate – operating as a STHL/wedding venue at \$2,832.00 per night. There is no record of our Minister for Small Business ever making a statement on the impacts Airbnb, Expedia/HomeAway and other OTAs have on the financial viability of small, accredited Accommodation Providers - Small Business Minister Barilaro has offered no support to our Accommodation Providers.

State MP Jodi McKay has her short-term rental³ listed on 75 OTA platforms.

The Hon Thomas George MP had his apartment⁴ listed on over 150 OTA platforms. The property was listed on NSW Land and Environment (LEC) Court Orders with Penal Notice. In a statement to the ABC in mid-2018 Mr George wrote: *“I have never seen or received any correspondence from the Department of Premier and Cabinet referring me to (the) ICAC⁵. I have never used AirBnb or any other online platform...”* Repeating: Mr George’s property was listed on over 150 OTA platforms.

In 2014 there were an estimated 216,000 short-term rental premises in NSW/ACT⁶. NSW Minister for Innovation and Better Regulation Matthew Kean has since written that there are no updated figures available on the current number of homes across NSW lost to STHL.

In June 2016, in an interview with The Australian, Airbnb’s Sam McDonagh claimed that we are *“Airbnb’s most penetrated market in the world”*.

The 2016 Parliamentary Inquiry’s ‘Coure Report’ recommended that STHLs be given the ‘green light’ across NSW, with no limit on the number of residential dwellings lost to commercial rentals.

At the time of the Parliamentary Inquiry, Airbnb (alone) had 29,657 listings across NSW. In December 2018, Airbnb’s level of “penetration” had seen that figure climb to 64,856 homes⁷. This represents an increase of 119% to a single, be it arguably the most successful, OTA. Airbnb will dispute these figures; the only statistics acceptable to them is ‘data’ that it has commissioned and volunteered without peer review scrutiny to the Media and the NSW Parliament.

The NSW Government’s Department of Planning & Environment writes that 12 NSW Local Government Authorities (LGAs) now have STHL provisions in their Local Environmental Plans (LEPs) *“generally allowing owners to occasionally let their dwellings for a short-term without the need for consent. Three councils provide short-term letting as exempt development”⁸*.

In March 2018 and again recently, we asked Senior Staff at the Departments of Planning and Fair Trading to identify the 12 councils reported to now permit STHLs in their LEPs, to also confirm that when a State Government rezones lands ‘in the interests of the public need’ compensation is paid to home owners, and to state whether or not they are aware of any disclosure by an official branch of the NSW Government - Destination NSW – of its partnerships with OTAs. No response has been forthcoming.

STHL effectively alters the ‘Use’ of a *Building Codes of Australia (BCA) Class 1(a)* (single-family freestanding) dwelling to a *BCA Class 1(b)* or *Class 3* dwelling – or sees *Class 2* flat dwellings operating as a *Class 3* facilities.

¹ <https://grattan.edu.au/wp-content/uploads/2018/03/901-Housing-affordability.pdf>

² <https://www.homeaway.com.au/holiday-rental/p9153347>

³ <https://www.airbnb.com.au/rooms/10925611?guests=1&adults=1>

⁴ http://bridgeportapartmentssydney.org/Links_%26_Reviews.html

⁵ Reference: A223460 – 7 July 2015 Paul Miller, General Counsel, Premier & Cabinet

⁶ <https://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

⁷ Data supplied by Inside Airbnb 19/01/19

⁸ <https://www.planning.nsw.gov.au/~media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx>

3 - Neighbours Not Strangers

Gosford City Council is regularly quoted as one example of a NSW LGA where it is now permissible to STHL without restriction. Yet Gosford's LEP⁹ sets out clearly that to be 'exempt' or 'complying development' all provisions of the *BCA* must be satisfied. The LEP also specifies that in the case of Class 1(b) or Class 2-9 premises, buildings must have a current fire safety certificate or statement and fire safety equipment installed in accordance with manufacturer's specifications.

The Gosford LEP has 'additional local provisions' on STHLs. It states: "*The objective of this clause is to require development consent for the temporary use of dwellings containing 5 or 6 bedrooms as short-term rental accommodation.*" And: "*Despite any other provision of this Plan, development consent may be granted for the use of a dwelling containing 5 or 6 bedrooms as short-term rental accommodation.*"

Gosford City Council does not appear to have in place any system whatsoever whereby those operating STHLs are checked and certified as fit for operations as fulltime or temporary STHLs.

Gosford, as of December 2018, had 1,665 Airbnb listings, an increase of 422% over the previous two-year period. Another OTA¹⁰ advertises 3,543 STHLs for the NSW Central Coast.

During the Parliamentary Inquiry into STHLs, Committee Member Jamie Parker MP¹¹ asked the secretariat to see whether Gosford council actually included consents permitting holiday rentals, not just zoning, and whether or not short-term stay accommodation was permissible, as the City of Sydney and other councils have issued development consent and residential zoning where short-term stay tourist/visitor accommodation are specifically banned¹². There is no evidence that the secretariat followed through on Mr Parker's request.

STATE GOVERNMENT AND STHL

Destination NSW's activities appear identical to those of Airbnb, Expedia and other OTAs. In almost all cases, residential dwellings are advertised and sold as STHLs whilst they concurrently:

- **Fail to comply** with Federal, State and Local Government Legislation in regards to Building Codes, Disability Access and Residential Zoning legislation, plus would fail to take into account the recommendations of multiple Coronial Inquiries,
- **Fail to contribute** proper revenue by often avoiding the payment of commercial rates and taxes,
- **Fail to control** the behaviour of clients; there being no requirement to staff the premises while clients are 'in house',
- **Fail to complete** their business activities in accordance with a vast range of workplace, fire and rescue, health, pool safety, alcohol and food preparation legislation, plus other requirements.

The **2016 Parliamentary Inquiry on the adequacy of regulation of short-term holiday letting in NSW's** 'Terms of Reference' were clearly set out. The Committee was tasked with reporting on:

- a) The current situation in NSW and comparison with other jurisdictions
- b) The differences between traditional accommodation providers and online platforms
- c) The growth of short-term and online letting, and the changing character of the market
- d) The economic impacts of short-term letting on local and the state economies
- e) Regulatory issues posed by short-term letting including customer safety, land use planning and neighbourhood amenity, and licensing and taxation
- f) Any other related matters

By any reasonable measure, the Inquiry failed: The Committee failed to investigate, address and report back on the Terms of Reference.

⁹ <https://www.legislation.nsw.gov.au/#/view/EPL/2014/42/historical2016-12-23/full>

¹⁰ <https://www.bedroomvillas.com.au/listing?q=Central%20Coast%20NSW,%20Australia&ref=home>

¹¹ <https://www.parliament.nsw.gov.au/ladocs/transcripts/9/Sydney%202nd%20Hearing%20Transcript%20-%20Corrected.pdf>

¹² <https://www.parliament.nsw.gov.au/ladocs/transcripts/9/Sydney%202nd%20Hearing%20Transcript%20-%20Corrected.pdf>

4 - Neighbours Not Strangers

The Parliamentary Hearing Committee Chairman Mark Coure MP sought no Legal advice during the Inquiry. The 'Coure Report' went on to recommend that STHLs across NSW be deemed 'exempt' and 'complying development' in buildings constructed, certified and purchased for Residential Use only.

Other anomalies with the Parliamentary Inquiry include, but are not limited to:

- NSW Residents with first hand lived experience of STHLs were not granted permission to address the Parliamentary Hearing Committee. In their place, a Melbourne-based STHL Operator who coaches landlords in the conversion of Residential Housing into STHLs – Ms Jodie Willmer – was invited to speak,
- Small, accredited Accommodation Providers had their Submissions marked “confidential”,
- NSW Residents who had made Submissions to the Inquiry which provided: a) forensic accounting reports demonstrating the financial costs to strata owners when STHLs are present, b) direct reference to current NSW Legislation, c) links to NSW Land and Environment Court judgments, d) details of State MPs’ “Illegal Use of Premises” and details of MPs properties listed on LEC Orders with Penal Notice, and e) correspondence from Legal Counsel for the Department of Premier and Cabinet referring MPs STHL activities to the ICAC...all these Submissions too were marked by the Committee as “confidential”. To provide a third-party with a copy of a “confidential” Submission would see the author/s deemed “In Contempt of Parliament”.

Subsequently, Ministers Matthew Kean and Anthony Roberts released a STHL '**Options Paper**'¹³ calling for feedback of STHLs. Their document also recommended that STHLs been deemed 'exempt' and 'complying development'. Ministers Kean and Roberts sought no Legal advice.

In December 2017, reportedly at the behest of the Minister for Innovation and Better Regulation Matthew Kean, NSW Fair Trading requested “**details of collusion between Agents and OTAs**”. A shortlist of 'Agents' was in turn provided. Top amongst them was **Destination NSW**.

In 2015, one month prior to the calling of the Parliamentary Inquiry into STHL, a 'partnership agreement' between Destination NSW and Expedia/HomeAway¹⁴ was signed. Destination NSW's Annual Report 2017-2018¹⁵ continues to make repeated references to the Organisation's links with Expedia Inc's brands. There was and continues to be no disclosure of the State Government's direct facilitation of unlawful STHLs in residential dwellings.

On 15 January 2019 a letter was received from Destination NSW's A/CEO Ross Pearson. In regards to the Parliamentary Inquiry and Destination NSW's lack of disclosure, Mr Pearson wrote that the Inquiry “*essentially focussed on the approach to regulating short-term holiday letting in NSW and the economic significance of the Industry. As such, the Inquiry's Terms of Reference did not require the disclosure of OTA partnership arrangements, including that with Expedia...*”

In Ross Pearson's correspondence there is no mention of the need for 'compliance' oversight or what the NSW Land and Environment Court has repeatedly and consistently judged to be the “*fundamental incompatibility*” of mixing permanent residents with STHLs. Mr Pearson also avoids any reference to non-compliant housing competing directly with accredited Accommodation Providers. Destination NSW's focus is instead one of using NSW homes for “*tourist/events promotion*”, “*growth in key visitor markets*”, and “*maximising the economic impact of visitors*”. The rights of residential Title Deed holders, the eviction and dislocation of tenants, including essential workers and students, and the appropriation of residential dwellings for STHL use, do not rate a mention in Destination NSW's economic objectives.

National Parks and Wildlife NSW's involvement in STHL has not been disclosed and the Dutch-based Booking.com, its seemingly preferred OTA facilitator, has not been mentioned. Booking.com's parent company is the US\$12.681 billion (2017) Booking Holdings, which also owns Agoda.com, Kayak.com, and Cheapflights.com, amongst others.

When questioned about one specific National Parks NSW property a spokesperson - 'John Parks' – wrote: “*the pictured tourist park cabins were compliant with the Building Codes of Australia at the time of installation. The certification you mention came in after the installation of the cabins.*”

¹³ https://www.planning.nsw.gov.au/~/_media/Files/DPE/Other/short-term-holiday-letting-options-paper-20-July-2017.ashx

¹⁴ <http://www.travelmonitor.com.au/category/news/todays-news/expedia-and-destination-nsw-team-up/>

¹⁵ <https://www.destinationnsw.com.au/wp-content/uploads/2018/11/destination-nsw-annual-report-2017-2018.pdf?x15361>

5 - Neighbours Not Strangers

It therefore follows that National Parks NSW has made no modifications to its STHLs to ensure that they comply with recommendations made by State Coroners, current BCA specifications or other legislated requirements.

In terms of NSW Small Business/Accredited Accommodation Providers, no mention is ever made of what compensation will be paid to those who have upgraded dwellings to operate certified STHLs and contribute by way of the payment of commercial rates and taxes. The NSW Government has acknowledged Taxi plate operators were owed compensation following Uber's operations being approved by Parliament. Certified Bed & Breakfast, Motel, Hotel, Guest Houses etc will be overlooked?

Nowhere in any Government documentation is there displayed consideration for the rights of Residents who, having undertaken all due diligence, have purchased into buildings and residential zones clearly constructed for and certified for use as Residential premises only. This extends to Residents who have fought for and finally seen obtained LEC Orders banning STHLs in their neighbourhood and strata buildings.

Cities and States across North America and Europe have cracked down on residents using online OTAs such as Airbnb. Montreal's latest strategy is to direct its employees to remove from public property small lock boxes¹⁶ that contain keys allowing short-term clients to enter apartments on their own. Here in Sydney the Council of the City of Sydney charges rent to commercial operators using outdoor space however Council CEO Monica Barone has refused to remove lock boxes affixed to Council property.

Ms Barone has been asked to respond to questions on the rights of residents who have purchased homes in buildings and areas within the City where zoning and building certification emphatically state that STHLs are an "Illegal Use of Premises" – City of Sydney's name for this STHL activity. Ms Barone recently wrote that such activity is now considered "low-risk".

Despite much Media coverage and requests from Local Residents, the Byron Shire has not seen any move to the Land and Environment Court or request for Orders lodged.

Minister for Local Government Gabrielle Upton, whose electorate includes some of the most penetrated Airbnb suburbs in our State, will not see to LGAs enforcing residential zoning.

SHORT-TERM RENTALS and the MASSIVE DRAIN on HOUSING

As is common with Airbnb, Expedia and others OTAs, the vast number of residential dwellings used exclusively for holiday rentals are located in high demand areas, be they close to centres of learning and training, hospitals and other critical infrastructure, or in areas of interest to travellers. Most of the NSW coastline and areas such as the Blue Mountains, Snowy Mountains etc have seen their long-term rental supply greatly diminished and replaced by holiday lettings. In these same areas, tenant evictions continue unchecked and dwellings still available for residential tenancies see rents climb sharply.

According to Minister Matthew Kean, Airbnb, HomeAway and others contribute \$31 billion annually from ghost hotel activities. The Minister has not provided independent data to substantiate this claim.

Airbnb and other OTAs promote themselves as 'good corporate citizens' yet attention must be focussed on the impacts their activities impose, both socially as well as economically, on residential communities.

It must be emphasised that our work in the first half of 2018, at the request of the NSW Department of Fair Trading, showed that in Regional NSW, Expedia/HomeAway (formerly known as Stayz) would hold the majority market share, due in large part to long-term collaboration between Real Estate Agents and Expedia/Stayz. Yet no precise data is available on the scope of Expedia's intrusion into housing.

¹⁶ https://globalnews.ca/news/4826933/montreal-airbnb-illegal-apartments/?fbclid=IwAR0AXqA3iMYfpWUG6cJ3keJgpj9XncRC0SV1gHEuoygs_dVai5XG_Z1hrw

6 - Neighbours Not Strangers

As a result of zero enforcement of residential zoning and flying almost directly in the face of Legislators, the loss of homes to STHLs continues unabated. Following is an oversight of the dramatic % increases in Airbnb listings December 2016-2018. These figures¹⁷ cover a broad sweep of NSW LGAs:

Armidale – up 300%	Fairfield – up 316%	Orange - up 235%
Auburn – up 242%	Forbes – up 417%	Parkes – up 667%
Bankstown – up 172%	Gosford - up 422%	Parramatta – up 183%
Bathurst – up 291%	Goulburn Mulwaree - up 393%	Port Macquarie-Hastings - up 327%
Bega Valley – up 204%	Great Lakes - up 583%	Port Stephens - up 970%
Bellingen – up 179%	Greater Taree - up 335%	Richmond Valley – up 320%
Blacktown – up 140%	Griffith - up 900%	Shellharbour – up 885%
Blayney – up 292%	Hawkesbury - up 208%	Shoalhaven - up 541%
Blue Mountains – up 217%	Kempsey - up 620%	Singleton - up 277%
Botany Bay – up 195%	Kiama - up 647%	Snowy River - up 620%
Burwood – up 209%	Kyogle – up 300%	City of Sydney - up 79%
Byron – up 159%	Lake Macquarie - up 352%	Tamworth Regional - up 234%
Campbelltown – up 262%	Leichhardt – up 49%	Tumut - up 444%
Canterbury – up 169%	Lismore - up 173%	Tweed - up 321%
Cessnock - up 425%	Lithgow - up 191%	Upper Hunter - up 258%
Clarence Valley – up 339%	Liverpool – up 152%	Wagga Wagga – up 565%
Coffs Harbour - up 320%	Maitland - up 492%	Waverley – up 41%
Cooma-Monary – up 171%	Mid-Western Regional – up 193%	Wingecarribee - up 547%
Corowa Shire - up 606%	Murray - up 336%	Wollongong - up 316%
Dubbo - up 453%	Nambucca - up 286%	Wyong - up 411%
Dungog – up 335%	Newcastle - up 534%	Yass Valley - up 165%
Eurobodalla - up 286%	Oberon - up 258%	Young - up 400%

There is a great financial incentive to operate residential dwellings as illegal ghost hotels and serviced apartments. A small studio apartment at 371-373 Bourke Street Darlinghurst¹⁸ is currently rented through a licensed Real Estate Agent for \$350/week and sublet on Airbnb for up to \$500/night¹⁹.

The State Government is encouraging the unlimited access to homes by OTAs. Without enforcement and acknowledgement of residential construction, certification and zoning and, critically, the rights of Residents to live within a residential community, we will likely see many more apartment buildings turned into ghost hotels and suburbs transformed into transit zones.

TAPPING INTO OUR CITY AND REGIONAL CENTRES' HOUSING SUPPLY

Airbnb has always been quick to state its intention to work collaboratively with governments to 'make home sharing work', yet following an announcement from NSW Labor that it would require registration of all short-term rental listings, as often seen in other jurisdictions Airbnb Ireland sent emails to thousands of voters encouraging them not to vote Labor at the 2019 State elections²⁰. Airbnb's intentions are clear.

Airbnb, Expedia and others have access to data that clearly shows which of their listings are accredited accommodation providers and those that are illegal listings. Were OTAs to genuinely 'work with governments' it would be an easy task to delist illegal operators, yet this would see the great majority of listings wiped from OTA platforms. OTAs are actively 'aiding and abetting' an Illegal Use of Premises.

While many dwellings listed by OTAs no longer fall into the category of 'affordable housing', releasing this repository of ghost hotels and serviced apartments would nonetheless increase vacancy rates and provide options and relief to thousands of households needing long-term accommodation.

It is not uncommon to see bunk beds in roof cavities, spaces under stairs, mattresses in pantries, tents on apartment building roofs, campervans, tree houses, granny flats, garages, sheds etc advertised on Airbnb's platform. While not suggesting this is 'suitable long-term living arrangements', we bring this issue to the attention of Legislators; Airbnb is ever willing to profit from non-compliant accommodation.

¹⁷ Inside Airbnb 18/01/19 - <http://insideairbnb.com/index.html>

¹⁸ <https://www.domain.com.au/property-profile/7-371-373-bourke-street-darlinghurst-nsw-2010>

¹⁹ <https://www.airbnb.com.au/rooms/17109941?guests=1&adults=1>

²⁰ <https://www.neighboursnotstrangers.com/single-post/2018/12/15/NSW-YESsirEE-AIRBNB-Ireland-WANTS-YOU-TO-VOTE-LNP>

AN INDUSTRY-ADMINISTERED 'CODE OF CONDUCT'

The Real Estate Institute of NSW (REINSW) sees the recommendation to make STHLs 'exempt development' state-wide as an "Industry Win"²¹. The REINSW are party to formulating a planned 'Industry-Administered Code of Conduct'. The REINSW supports its members who divert residential housing into STHLs, as per testimony given by CEO Tim McKibbin²² at the Parliamentary Inquiry into STHLs. Residents Community Organisations and accredited Bed & Breakfast operators who are being forced to suffer the social and financial brunt of the consequences wrought by STHLs have been excluded from discussions on Minister Matt Kean's 'Code of Conduct'.

During testimony before the NSW Parliament, Messrs Daniel and Don(at) Kobeleff of Holiday Rental Solutions Central Coast²³ made repeated reference to an alteration to the LEP for the City of Gosford and a 'Code of Conduct'²⁴ endorsed by The Hon Brad Hazzard. That 'Code of Conduct' has been in force since 31 May 2012, yet one cannot find a single example of where this 'Code' has been enforced or penalties applied.

Destination NSW also has a 'Code of Conduct and Ethics' and again there seems no evidence that this 'Code' is applied or enforced, despite reports of hundreds of complaints surrounding STHLs.

A member of Minister Matt Kean's inner circle working on the 'Code of Conduct' writes: *"It is expected the Code will be pretty ordinary and generally unenforceable. There is not yet any meaningful mechanism for enforcing the proposed 180-day limit in the greater Sydney area either. There is a lack of any clear path on enforcing limits of any kind - among other matters."*

Following is an extract from Neighbours Not Strangers' correspondence submitted to Premier Berejiklian prior to the passage of a Fair Trading amendment Bill. This correspondence was not acknowledged:

- Those in residence in a short-term holiday letting 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 'licence 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 counterclaim of 'nuisance' by the owner or occupier of a STHL 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 STHL,
- 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,
- 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 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:

A 'Code of Conduct' is considered unworkable.

²¹ https://www.reinsw.com.au/Web/Posts/Latest_News/2019/1_January/Industry_wins_in_short_term_holiday_letting_reforms.aspx

²² <https://www.parliament.nsw.gov.au/ladocs/transcripts/1919/Hearing%20-%20Public%20Hearing%20No%202.pdf>

²³ <http://www.holidayrentalsolutions.com.au/about>

²⁴ <https://www.parliament.nsw.gov.au/ladocs/transcripts/9/Sydney%202nd%20Hearing%20Transcript%20-%20Corrected.pdf>

NSW RESIDENTIAL TENANCIES ACT

The existing development consent conditions of many residential apartment buildings require a minimum tenancy agreement of three months under the *Residential Tenancies Act*.

The LEPs in most LGAs have been clear to state that STHLs are a 'prohibited use' in strata and residential zones.

The *Residential Tenancies Act 2010* is clear in relation to **premises to which the Act does not apply**²⁵.

The *Residential Tenancies Act 2010* is clear in relation to **Agreements to which the Act does not apply**²⁶

From 'night one', STHL agreements in NSW are a commercial use of residential dwellings.

EXISTING RESIDENTIAL DEVELOPMENT CONSENT CONDITIONS & ZONING

The NSW Department of Planning & Environment's *Explanation of Intended Effect, Short-term Rental Accommodation Planning Framework*²⁷ also radically suggests that every NSW residential dwelling should be deemed suitable for STHL. To declare STHLs as 'exempt development' retrospectively rezones every residential property and effectively removes from Title Deed holders their proprietary rights to said *Residential* property without any recourse to compensation.

STHLs, as judged by the NSW Land and Environment Court, are neither a residential use nor an ancillary use of a dwelling.

Residential buildings and zones have been set aside, specifically to isolate residents from commercial activity so that living conditions are conducive with community living.

The NSW Land and Environment Court, and to a much lesser extent some NSW Legislators, acknowledges the systemic problems directly linked to the unlawful use of residential dwellings for STHLs. The impacts on the lives of neighbouring residents are judged "severe".

Transient STHLs in residential buildings and zones provoke often-threatening conflict on an ongoing basis between commercial landlords and neighbouring residents²⁸.

Security is an indicator of 'liveability'. In conjunction with the findings of an Australian Criminology Report²⁹ - this Report has not been acknowledged by NSW MPs - recent Media coverage in Victoria tells of a reported rape and murders of Airbnb clients, the recent tragic death of another four-year old child, this time at a Brisbane Airbnb, plus multiple incidents of serious anti-social behaviour, violence and property damage. STHLs are not conducive with a secure living environment.

Transient occupants in residential buildings destroy the sense and actual measure of security for residents. Declaring STHLs 'exempt development' has far-reaching and profound, ongoing impacts.

The Parliamentary Inquiry into STHLs opted for a 'wait and see' position in terms of insurance. Residential Strata Scheme Owners carry 'unlimited liability'. When the value of a building itself could exceed \$300million, adding the value of contents, compensation for the death or permanent incapacity of residents³⁰ or others...for Parliament to ignore these issues would seem reckless in the extreme.

The proposal of 'exempt development' for STHLs for every NSW residential dwelling also removes the protections afforded under the *Environmental Planning and Assessment Act*³¹. The Act's main objective is: "To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's...resources."

Most focus in the area of STHLs is centred on Airbnb. This fails to take into consideration the unknown number of off-shore OTAs and smaller agencies in NSW who, due to complete lack of enforcement of

²⁵ <https://www.legislation.nsw.gov.au/#/view/act/2010/42/part1/div2/sec7>

²⁶ <https://www.legislation.nsw.gov.au/#/view/act/2010/42/part1/div2/sec8>

²⁷ <https://www.planning.nsw.gov.au/~media/Files/DPE/Other/Short-term-Rental-Accommodation-EIE.ashx>

²⁸ <https://www.caselaw.nsw.gov.au/decision/54a6399b3004de94513da983>

²⁹ <http://www.criminologyresearchcouncil.gov.au/reports/1314/29-1112-FinalReport.pdf>

³⁰ <http://www.coroners.justice.nsw.gov.au/Documents/Zhang%20findings%2018%2009%2015%20FINAL.pdf>

³¹ <https://www.legislation.nsw.gov.au/#/view/act/1979/203>

9 - Neighbours Not Strangers

residential zoning, have taken to converting most, and in many cases, all available residential dwellings to STHLs.

STHLs must not result in a contravention of any existing Development Consent that applies to a residential building or dwellings within a residential zone. Where consent has been given for STHLs in such areas without the consent of neighbours, compensation for loss of amenity must be due.

Every NSW strata scheme and residential zone that has development consent conditions (however expressed) which deem STHLs a 'prohibited use' must be protected and allowed to continue in force indefinitely.

Every building that has been upgraded to comply and operate as a certified BCA Class 1(b) or Class 3 dwelling and granted permission to provide STHLs must also be allowed to continue to operate as such indefinitely **on condition that** all Building Codes and other legislative requirements, including fire safety and health regulations, are met.

Where STHLs operate in a multi-dwelling property – BCA Class 3-9 – it is incumbent that Planning laws in NSW continue to strengthen safety and construction benchmarks in order to safeguard the health and safety of STHL clients.

STHLs should not be a 'permitted use' in BCA Class 2 residential flat dwellings.

Where STHLs are a 'permitted use', the number of guests must be limited to two persons per bedroom, and this must be strictly applied and enforced. Living areas, corridors, external grounds, caravans, tents, sheds etc must not be used to increase the number of occupants.

Development Consents permitting STHLs must guarantee that all critical fire safety standards are met, in accordance with the summary issued during the Inquest into the Palace Backpackers Hostel Fire BRIS-COR 404-418/00³².

A public register that identifies STHL properties must be maintained and available for public inspection.

A transparent mechanism, whereby all STHL properties are identified, must be made available so that compliance issues may be monitored and enforced.

CERTIFIED, ACCREDITED STHLs PERMITTED WITHOUT 'NIGHTLY CAPS'

In line with current legislation, NSW Land and Environment Court judgments, Residential Title Deed Holders and Residents' proprietary rights, plus the rights of Accredited Certified Accommodation Providers/Small Business Owners, STHLs to be permitted without a 'nightly cap' under specific conditions. Once criterion is met, license holders to have the right to advertise their STHL via the Agent/s and/or on the platform/s of their choice:

The use of Class 1(a) property for Class 1(b) and Class 3 use should be permissible subject to Neighbours'/Council approval. The property must comply at all times with all relevant planning, building, fire safety and health regulations:

The property in question must be the primary place of residence of the Applicant seeking licensing of said property for tourist/visitor accommodation purposes,

The Licensee is restricted to one such licence – the license covering his/her primary place of residence,

The property to be upgraded to meet infrastructure requirements for Class 1(b) or Class 3 property (see BCA. See also, City of Sydney *Visitor and Tourist Accommodation Development Control Plan*),

Recommending also: an **Affordable Housing Levy** be applied to **all new Applicants** wishing to convert a residential property for use as tourist/visitor accommodation. (City of Sydney *Affordable Housing Levy* to form the template for such a Levy),

A further **non-negotiable condition** of licensing: the property **must be staffed 24/7 by the license holder or onsite manager** while clients are 'in house'.

Payment of an annual license fee will produce a **license number for each dwelling, which must be quoted on all listings where a property is advertised. Neighbouring residents must be able to identify whether a dwelling has been authorised for STHL operations.**

³² https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/86647/cif-childers-palace-hostel-fire-20060707.pdf

10 - Neighbours Not Strangers

The use of Class 2 residential flat-dwelling property for short-term tourist/visitor accommodation is unacceptable. Submissions to the NSW Parliamentary Inquiry – *Maestri Towers/Dr Michael Heaney* – set out the unsustainable and unfair financial costs forced upon all strata owners when one or more owners within a strata scheme operate short-term tourist/visitor rentals with a building. Class 2 flat dwelling property does not meet Class 3 BCA/NCC standards; to share the cost of the required structural upgrades amongst all owners would be unfair, as judged by the *NSW Land and Environment Court*. LEC case law judges 'mixed use' – STHLs with Permanent Residents – "fundamentally incompatible"^{33, 34, 35, 36}.

Mandatory licensing scheme to apply to all properties advertised and sold as short-term tourist/visitor accommodation, with the intention of ensuring that the following minimum requirements are met:

- That all Building Codes of Australia Class 1(a) dwellings have been upgraded to a Class 1(b) or Class 3 dwellings
- That properties are compliant with Federal Disability Access Legislation
- Local Government Development Approval has been granted for short-term tourist/visitor accommodation in said residential dwellings
- That properties are subject to annual Fire Inspections and meets all Fire & Rescue criteria
- Where present, swimming pools meet all legislation relevant to tourist, visitor and multi-occupancy developments
- When commercial clients are in residence, properties must be staffed
- A licence for the serving of alcohol (*Liquor Act 2007*) is held where beverages are provided
- Compliance with the *NSW Food Safety Act* is met
- Compliance with all *Work Cover* legislation is met
- Compliance with the *NSW Property Stock and Business Agents Act 2002* is met
- A licence to act as a party venue/wedding facility is held, where such events are promoted and hosted
- Compliance with the *Hospitality Industry General Award 2010* is met
- Where necessary under legislation, GST contributions are paid
- Where necessary under legislation, State Land Tax is paid
- Where necessary under legislation, gross domestic council rates are paid
- Where necessary under legislation, all necessary septic upgrades (or similar) have been undertaken
- Where necessary under legislation, commercial water rates to be paid
- Commercial public liability insurance is mandatory
- All NSW Land and Environment Court judgments and Orders to be upheld

NSW LAND AND ENVIRONMENT COURT

As a general rule, Land Use legislation is governed by the State, and implemented and enforced by Local Government Authorities. It is incumbent on legislators that the power afforded them under the *NSW Environmental Planning and Assessment Act*³⁷ and *NSW Environmental Planning and Assessment Regulation 2000*³⁸ is adequate and that **their power and responsibility to enforce legislation is exercised.**

A property rented as a STHL to persons using or occupying it other than in the ordinary family or household way, has been judged by the LEC as not satisfying the meaning of the term *"domicile"*, and as lacking the requisite degree of permanence of habitation or occupancy for the property to be considered a *"dwelling-house"*. Effectively, a *'change of use'* has occurred.

³³ <https://www.caselaw.nsw.gov.au/decision/549f8bb83004262463ada6bc>

³⁴ <https://www.caselaw.nsw.gov.au/decision/549f99013004262463b0cb15>

³⁵ <https://www.caselaw.nsw.gov.au/decision/54a6344b3004de94513d842a>

³⁶ <https://www.caselaw.nsw.gov.au/decision/54a6364d3004de94513d90dd>

³⁷ http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/epaaa1979389/

³⁸ http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_reg/epaar2000480/

11 - Neighbours Not Strangers

Inherent within the term "domicile" is, as a long line of authority in this jurisdiction has established, the notion of a permanent home or, at the very least, a significant degree of permanence of habitation or occupancy. NSW case law examples supporting this position include but are not limited to:

(Potter v Minahan [1908] HCA 63; (1908) 7 CLR 277 at 288; North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 21 NSWLR 532 at 538A-B; [1992] North Sydney Council v Sydney Serviced Apartments Pty Ltd; [2001] Foster v Sutherland Shire Council; KJD York Management Services Pty Ltd v City of Sydney Council [2006] NSWLEC 218; (2006) 148 LGERA 117 at [8]-[18]; City of Sydney Council v Waldorf Apartments Hotel Sydney Pty Ltd; [2007] 187 Kent street v Council of the City of Sydney; [2007] 187 Kent street v Council of the City of Sydney Appeal; [2008] NSWLEC 97; (2008) 158 LGERA 67 at [38]; Warlam Pty Ltd v Marrickville Council [2009] NSWLEC 23; (2009) 165 LGERA 184 at [35]-[36]; Najask Pty Ltd v Palerang Council [2009] NSWLEC 39; (2009) 165 LGERA 171 at [15]; Vic Vellar at [32]; Dooralong Residents Action Group Pty Limited v Wyong Shire Council [2011] NSWLEC 251; (2011) 186 LGERA 274 at [110]; 820 Cawdor Road at [24]; [2011] Council of the City of Sydney v Oaks Harmony; [2011] Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri) 234; [2011] Council of the City of Sydney v Oaks Hotels and Resorts (re Maestri) 235; GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143 at [20]-[27] and Haddad at [47]); [2013] Dobrohotoff v Bennis; [2014] Council of the City of Sydney v Con Kotis/Australian Executive Apartments at [14/4923].

In terms of illegal STHLs, Local Government representatives admitted to the NSW Parliamentary Inquiry that they have imposed voluntary moratoriums on taking action against breaches of Planning legislation. The LEC judges this an *"abrogation by council of its fundamental duties and responsibilities"* and a *"failure to fulfil (a Council's) core functions and to have failed its constituents."*

As previously mentioned, a request from the NSW Department of Fair Trading for *"details of collusion between Agents and Short-Term Rental Platforms"* sees Destination NSW, in partnership with Expedia/HomeAway and other OTAs, apparently the largest facilitator of unlawful STHLs in NSW.

Critically, for owners of Residential apartments and dwellings in residential zones who acquired their properties fully aware of the development consent conditions intended to prevent short-term letting, **it must be borne in mind that a development consent may be regarded as a right or privilege acquired under a statute or statutory rule that would be preserved under s 30(1)(c) of the Interpretation Act 1987 (NSW) even if the Act under which the right was accrued is amended**³⁹.

The NSW Government must respect the proprietary rights of owners of existing residential dwellings where short-term tourist/visitor and other commercial activities are a prohibited use.

CONCLUSION

The NSW Parliament intends to endorse an unlimited number of STHL premises, resulting in an ever growing number of homes lost to tourism, occupied by transient visitors or sitting empty. This too is fundamentally incompatible with the primary purpose of Planning Controls and the mandatory need to provide housing. Parliament's proposal will, and in many instances already does, render residential buildings and areas unliveable. Studies by NSW academics have shown that such conditions impact heavily in key locations, resulting in a marked deterioration of housing supply, affordability and liveability.

The proposed 180-night 'cap' on properties within the Sydney Metropolitan Area and unlimited STHLs across the rest of NSW would be unworkable for LGAs, even in the event that an effective registration system were to be implemented. It would seem that no consideration has been given to how any such proposal could assure that STHL clients are accommodated under existing, legislated safety standards.

The 2016 Parliamentary Inquiry's first task was to undertake a comparison of our situation compared to that of other jurisdictions. The Committee failed to investigate and report, plus its proposal of 'exempt development' is still being promoted, with those opposed to such a move effectively silenced. This is completely at odds with the efforts and actions of legislators in other similar jurisdictions.

To classify STHLs as 'exempt development' leaves no NSW residential building or zone set aside for residential occupants; it is unreasonable to allow an unlimited number of STHLs into any residential building or suburb.

STHLs contravene all appropriate planning controls and retrospectively render void the Title Deeds of residential property owners.

³⁹ Harris v Hawkesbury City Council (1989) 68 LGRA 183 and Lederer v South Sydney City Council (2001) 119 LGERA 350 at 373

12 - Neighbours Not Strangers

It is considered that there is an extremely low level of public awareness, even amongst MPs and Public Servants, of the extreme impacts the proposed changes to NSW Planning Instruments will provoke.

An enforced system of registration and regulation would protect housing availability and allow those wishing to use their primary residence - single-family, freestanding dwelling - to 'share' their home under certified commercial conditions. This is what the 'home sharing movement' claims it desires.

All STHLs must be listed on a Register. A limit of one property per person must apply. Registration numbers must be visible anywhere said property is advertised, allowing open access to the true identification and location of the property, as is the case with accredited accommodation providers.

Every strata scheme/multi-resident dwelling that has an existing development condition (however expressed) that deems STHLs a 'prohibited use' must continue with said condition in force indefinitely.

An amendment to the Fair Trading Act and a Strata by-law must not retrospectively alter the residential status of a dwelling.

There should be no changes to the NSW Residential Tenancies Act that would reduce the rights of owners to prohibit STHL activity taking place in their property.

A 'Code of Conduct' does not substitute for a lifting of restrictions on STHLs in residential dwellings and zones.

VOLUNTARY ORDERS SOUGHT

We repeat our request to NSW Premier Gladys Berejiklian to join us in seeking joint voluntary Orders from the NSW Land and Environment Court (as per LEC case number 14/40923) against Destination NSW for its promotion and facilitation – and the “Illegal Use” - of Class 1(a) and Class 2 Residential dwellings for the purposes of short-term tourist/visitor rentals; the NSW Government to agree to pay all Legal Costs in connection with obtaining these Orders.

The proliferation of illegal STHLs is a huge problem for neighbouring residents, legitimate tourism accommodation providers and legislators, and after many years of consideration by Members of the NSW Parliament there remains insufficient scrutiny of this damaging practice.

The State Government must ensure that Local Government Authorities are mandated to enforce residential planning, zoning or approval to prevent the illegal short-term holiday letting of residential dwellings.

Trish Burt
Convener
Neighbours Not Strangers
21 January 2019

13 - Neighbours Not Strangers

INCREASE IN AIRBNB LISTINGS BY LOGAL GOVERNMENT AREA - DEC16 – DEC18

<i>SUM of Listings</i> NSW LGA	<i>Date</i> 10/12/16	<i>Date</i> 20/12/18	<i>% Increase</i>
Albury	52	178	242%
Armidale Dumaresq	31	124	300%
Ashfield	141	319	126%
Auburn	114	504	342%
Ballina	193	563	192%
Balranald	2	3	50%
Bankstown	68	185	172%
Bathurst Regional	56	291	420%
Bega Valley	225	683	204%
Bellingen	78	218	179%
Berrigan	5	23	360%
Blacktown	107	257	140%
Bland	3	8	167%
Blayney	13	51	292%
Blue Mountains	358	1,135	217%
Bogan	0	4	400%
Bombala	6	8	33%
Boorowa	2	12	500%
Botany Bay	228	673	195%
Bourke	1	5	400%
Broken Hill	32	34	6%
Burwood	90	278	209%
Byron	1,172	3,037	159%
Cabonne	13	64	392%
Camden	11	30	173%
Campbelltown	29	105	262%
Canada Bay	276	485	76%
Canterbury	128	344	169%
Carrathool	6	10	67%
Central Darling	2	3	50%
Cessnock	119	625	425%
Clarence Valley	108	474	339%
Cobar	0	1	100%
Coffs Harbour	179	751	320%
Conargo	1	2	100%
Coolamon	0	2	200%
Cooma-Monaro	14	38	171%
Coonamble	0	4	400%
Cootamundra	3	8	167%
Corowa Shire	16	113	606%
Cowra	1	15	1400%
Deniliquin	2	7	250%
Dubbo	19	105	453%
Dungog	20	87	335%
Eurobodalla	184	711	286%
Fairfield	19	79	316%
Forbes	6	31	417%
Gilgandra	0	4	400%

<i>SUM of Listings</i> NSW LGA	<i>Date</i> 10/12/16	<i>Date</i> 20/12/18	<i>% Increase</i>
Glen Innes Severn	10	30	200%
Gloucester	16	30	88%
Gosford	319	1,665	422%
Goulburn Mulwaree	14	69	393%
Great Lakes	122	833	583%
Greater Hume Shire	9	20	122%
Greater Taree	55	239	335%
Griffith	2	20	900%
Gundagai	9	25	178%
Gunnedah	8	16	100%
Guyra	2	10	400%
Gwydir	2	4	100%
Harden	3	16	433%
Hawkesbury	62	191	208%
Hay	1	10	900%
Holroyd	62	131	111%
Hornsby	225	394	75%
Hunters Hill	51	70	37%
Hurstville	85	193	127%
Inverell	4	16	300%
Jerilderie	0	2	200%
Junee	1	2	200%
Kempsey	54	389	620%
Kiama	72	538	647%
Kogarah	110	175	59%
Ku-ring-gai	205	346	69%
Kyogle	14	56	300%
Lachlan	0	5	500%
Lake Macquarie	100	452	352%
Lane Cove	211	286	36%
Leeton	0	2	200%
Leichhardt	695	1,039	49%
Lismore	77	210	173%
Lithgow	44	128	191%
Liverpool	50	126	152%
Liverpool Plains	4	11	175%
Lockhart	2	2	0%
Maitland	13	77	492%
Manly	1,347	1,854	38%
Marrickville	875	1,343	53%
Mid-Western Regional	92	270	193%
Moree Plains	0	7	700%
Mosman	381	556	46%
Murray	11	48	336%
Murrumbidgee	1	5	400%
Muswellbrook	5	9	80%
Nambucca	50	193	286%
Narrabri	10	14	40%

14 - Neighbours Not Strangers

INCREASE IN AIRBNB LISTINGS BY LOGAL GOVERNMENT AREA - DEC16 – DEC18

<i>SUM of Listings NSW LGA</i>	<i>Date 10/12/16</i>	<i>Date 20/12/18</i>	<i>% Increase</i>
Narrandera	0	7	700%
Narromine	0	2	200%
Newcastle	150	951	534%
North Sydney	1,036	1,442	39%
Oberon	12	43	258%
Orange	62	208	235%
Palerang	14	64	357%
Parkes	6	46	667%
Parramatta	191	540	183%
Penrith	58	133	129%
Pittwater	815	1,185	45%
Port Macquarie-Hastings	148	632	327%
Port Stephens	115	1,231	970%
Queanbeyan	17	53	212%
Randwick	2,345	3,493	49%
Richmond Valley	5	21	320%
Rockdale	356	798	124%
Ryde	269	595	121%
Shellharbour	13	128	885%
Shoalhaven	483	3,097	541%
Singleton	47	177	277%
Snowy River	115	828	620%
Strathfield	74	172	132%
Sutherland Shire	298	477	60%
Sydney	5,497	9,820	79%
Tamworth Regional	68	227	234%
Temora	3	17	467%
Tenterfield	10	38	280%

<i>SUM of Listings NSW LGA</i>	<i>Date 10/12/16</i>	<i>Date 20/12/18</i>	<i>% Increase</i>
The Hills Shire	141	270	91%
Tumbarumba	1	20	1900%
Tumut Shire	9	49	444%
Tweed	289	1,216	321%
Unincorporated NSW	1	5	400%
Upper Hunter Shire	12	43	258%
Upper Lachlan Shire	15	15	0%
Uralla	11	18	64%
Wagga Wagga	26	173	565%
Wakool	3	17	467%
Walcha	3	7	133%
Walgett	2	13	550%
Warren	0	2	200%
Warringah	1,157	1,855	60%
Warrumbungle Shire	11	19	73%
Waverley	4,043	5,696	41%
Weddin	2	8	300%
Wellington	4	7	75%
Wentworth	15	17	13%
Willoughby	311	543	75%
Wingecarribee	134	547	308%
Wollondilly	15	47	213%
Wollongong	159	662	316%
Woollahra	1,319	1,654	25%
Wyong	123	629	411%
Yass Valley	23	61	165%
Young	4	20	400%
Grand Total	29,657	64,856	119%