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Précis Paper

Australian Tenancy Law and Practice

The sharing economy has boomed since the introduction of the internet. There are divergent views on the issue of short-term letting, especially of strata lots. The issue has been decided by Courts in various jurisdictions in different ways even though the operative provisions in these jurisdictions are very similar.

Discussion Includes

- **The sharing economy**
- **Overseas Jurisdictions**
- **The position in NSW**
- **The Victorian approach**
- **The Western Australian approach**
- **A recent Privy Council decision**

Précis Paper
Australian Tenancy Law and Practice

1. **In this edition of BenchTV, Derek Cassidy QC (barrister) and Brian Ralston (barrister) discuss the current law in NSW, Western Australia, and Victoria as it relates to short-term letting of strata scheme lots.**

The sharing economy

2. **The "sharing economy" can be defined as an economic system in which assets or services are shared between private individuals, either free or for a fee. This is typically done by means of the internet. The sharing economy is not new - it is the internet that has affected its reach.**
3. **When one looks at the sharing economy, one is not necessarily looking at the altruistic economy: one is looking at a commercial economy with a degree of sharing.**

Overseas Jurisdictions

4. **Legally, Airbnb and other forms of short-term rental have led to much dispute and confusion**
5. **New York State introduced legislation that prevented the letting of apartments with three or more rooms for periods of 30 days or less. In 2016, New York City also enacted legislation that imposed fines for short term letting.**
6. **Conversely, in London, where temporary sleeping accommodation was historically held to constitute a material change in use and required planning permission, those restrictions were eased in 2015. Therefore, residential premises in London can now be used as temporary accommodation without being considered a change in use if the total number of nights does not exceed 90 nights in the same calendar year, and the person providing the premises pays council tax.**
7. **In 2017, Japan passed legislation relaxing the availability of short-term accommodation but local councils are able to impose their own restrictions.**

The position in NSW

8. **The NSW Government commissioned a report into the adequacy of the regulation of short-term holiday letting which was published in 2016. A catalyst for the report was the different regulations in different council areas at the time. For instance, it was possible for a person who was providing short term accommodation in a council area where it was prohibited to be liable for prosecution.**
9. **Legislating in terms of short term accommodation has the problem of covering a divergent number of circumstances. For example, an elderly person who rents their**

spare room out to someone who might be able to assist them around the house. In Victoria, the *Residential Tenancies Act 1997* (Vic) does not apply to occupational licenses but, in NSW, the *Residential Tenancies Act* 2010 (NSW) does. Accordingly, the tenant would not even have to have exclusive possession of their bedroom, or any other part of the house, to constitute a residential tenancy for the purpose of the Act.

10. The 2016 Committee found that there was no consistent State-wide definition of short term rental accommodation and, it regarded short-term letting of residential property as a residential use of the same character of long-term letting or traditional tenancy. The 2016 Committee therefore did not consider that any form of registration was necessary.

11. In June 2017, a short term holiday letting option paper was issued inviting feedback. The options included: greater self-regulation by industry, registration of STHL operators along with acceptable standards of operation, changes to strata laws, stronger regulation through the planning system, or a combination of these approaches.

12. In relation to strata title, the Committee went off on a tangent because it appears to have accepted the Government submission that no by-law is capable of operating to prohibit or restrict a dealing with a lot and an owners corporation cannot seek to restrict a lot owner from offering short-term accommodation in the owners lot. There have been recent authorities which indicate that that view might be incorrect.

13. In *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63, the NSW Civil and Administrative Tribunal held that a by-law passed by the Owners Corporation that purported to prohibit short-term letting of units in the building was invalid. The Tribunal's decision involved a construction of the provisions of section 139(2) of the *Strata Schemes Management Act 2015*. Section 139(2) relevantly provides:

> ....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.

14. The Tribunal did not, however, consider section 136 which provides:

> (1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.
>
> (2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law

15. At [23], the Tribunal found:

> (T)hat the manner in which the Airbnb tenancy is devolved by the landlord is sufficient to constitute a tenancy or lease with a specific commencement date and a specific end date…During that time the tenant has exclusive use of the property and the arrangement is properly described as a lease rather than a licence. It is likely that a licence would also be covered in the use of the word devolution in any event.

16. At [24], the Tribunal found that the by-law was invalid because it infringed section 139(2) of the *Strata Schemes Management Act 2015*. That is currently law in NSW but there may be some future changes.

The Victorian approach

17. In *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384, the Victorian Supreme Court held that the Owners Corporation did not have the power to create by-laws which purported to prohibit the short term accommodation.

The Western Australian approach

18. In *The Owners of Ceresa River Apartments Strata Plan 55597 and Haines* [2015] WASAT 72, a strata company took proceedings against Mr Byrne and other strata lot proprietors, alleging that they had used their lots for 'short-stay accommodation', contrary to by-law 16 of the strata scheme.
19. At first instance, the Western Australian State Administrative Tribunal found as a fact at [22] that Mr Byrne and the other respondents before the Tribunal had rented 'their respective lots out for purposes of short-stay accommodation' and made an order to the effect that Mr Byrne be restrained from utilising his lot for 'short-stay accommodation'.
20. At [24] The Tribunal found that:

    (t)he only ordinary, objective meaning that can reasonably be given to the words 'residence' and 'residential tenant' is that of an occupant who demonstrates the intention to reside at the lot for an extended or substantial period of time; who makes the lot his address; who intends to call the lot 'home' and to make the lot his abode.
21. Mr Byrne appealed that decision and, on appeal in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153, the Western Australia Supreme Court found at [11]:

    The submission by counsel for Mr Byrne must be rejected because the term 'resident' in the ST Act does not have an equivalent meaning to the term 'occupier'. In my view, the word 'resident' in the ST Act should be understood by reference to the ordinary meaning of that word.
22. At [12], the Court went on to state:

    Unlike the words 'proprietor' and 'occupier', the word 'resident' is not defined in the ST Act. On its ordinary meaning, the term 'resident' has the same meaning given to it by the learned Member, that is, it refers to a person who makes a lot his or her permanent place of abode.
23. Section 42(3) of the *Strata Titles Act 1985* (WA) places a limit on the operation of by-laws. It provides:

    No by-law, amendment or repeal of a by-law is capable of operating so as to prohibit or restrict the devolution of lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Act.

    The Supreme Court ultimately granted leave to appeal but dismissed the appeal. On appeal to the Western Australian Court of Appeal in *Byrne v The Owners of Ceresa River Apartments Strata Plan* 55597 [2017] WASCA 104, the Court said at [52] that:

    Mr Byrne submits, in effect, that order 2 of the Tribunal's orders purports to restrict devolution of lots for a particular use, including devolution by way of a lease for short stay accommodation. He contends that such rights are preserved by s 42(3) of the Strata Titles Act from restriction by any by-law.

24. The WACA considered what the words "other resident of a lot" meant in the context of section 42(6) of the *Strata Titles Act 1985* (WA). At [103]:

> The words 'other resident of a lot' in the phrase 'the proprietors and any mortgagee in possession ... or occupier or other resident of a lot' are evidently words of expansion. They denote a person who is not the proprietor, a mortgagee in possession or occupier, but who is otherwise a 'resident' of the lot. At least generally speaking, a person may be an occupier but not a resident.

Quoting the primary Judge at [81]:

> [T]he term 'resident' is not co-extensive in meaning with the term 'occupier'. That is because the definition of 'occupier' contains no reference to any requirement of residence....

25. The WACA continued at [111]:

> In the context of the obligations imposed and entitlements conferred on a 'resident' in the Strata Titles Act, the word 'resident' in the phrase 'resident of a lot' implies some degree of continuity of living at the lot. It would include, at least, someone who is making the lot his or her settled or usual abode. On the other hand, the word 'resident' would ordinarily not include, eg, a guest of the occupier or proprietor, or a visitor of the occupier or proprietor, who may stay for a few days.

26. At [154], the WACA stated that "By-law 16 does not operate relevantly as a restraint on alienation contrary to s 42(3) of the Strata Titles Act, but as a limitation on use" and, at [157], the Court considered "the use to which a proprietor may put his or her strata lot". It ultimately held that "by-law 16 does not prohibit or restrict dealings in a lot in a manner contrary to or that engages s 42(3) of the *Strata Titles Act*" and that, "accordingly, on its proper construction, by-law 16.1 read with by-law 16.2.1 means that a lot may only be occupied by persons who use the lot as their settled or usual abode": at [151].
27. The Western Australia Court of Appeal in *Byrnes* dealt with provisions that were almost identical that applied in *Estens* but came to a different view.

A recent Privy Council decision

28. In *O'Connor (Senior) and others (Appellants) v The Proprietors, Strata Plan No. 51 (Respondent) (Turks and Caicos Islands)* [2017] UKPC 45, the Privy Council considered by-laws created at the time of initial registration of the The Pinnacle apartment block in the Turks and Caicos Islands. All purchasers therefore acquired their strata lots subject to the by-laws, and with knowledge of their terms.
29. The operative Ordinance in the Turks and Caicos Islands, is the *Encouragement of Development Ordinance 1972*. The Turks and Caicos Ordinance was modelled on the New South Wales *Conveyancing (Strata Titles) Act 1961*.
30. Section 20(1) of the Ordinance provides that "... the control, management, administration, use and enjoyment of the strata lots ... shall be regulated by by-laws".
31. Section 20(4) of the Ordinance provides:

> "No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance."

32. The relevant by-laws were as follows:

> By-law 7.1 Each Proprietor shall: ...
>
> 9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month ... (Emphasis added)
>
> 16: Not use or permit to be used the Strata Lot or any part thereof for any illegal or immoral purpose, nor for the carrying on of any trade or business other than periodic renting or leasing of the Strata Lot in accordance with these by-laws unless such trade or business activity has been approved in advance by the Executive Committee in writing, which approval may be revoked for cause."

The Privy Council, at [16], considered that, for this purpose, a "Residential Strata Lot" is defined as "a Strata Lot which is intended for use as a residence" and that such restriction, that the lot was to be used as a residence, was not objectionable. The PC continued at [16] "By the same token there can be no objection in principle to the inclusion of words designed to define what is meant by use as a residence."

33. The primary Judge had found that the by-law was contrary to section 20(4) and, to that extent invalid, because it was expressed in terms which would restrict the grant of leases of less than a month. The Court of Appeal disagreed, holding that the by-law was in effect a restriction on use rather than on leasing as such.
34. The Privy Council considered at [5] that "the main issues in the appeal turn on the interpretation of those by-laws, and their validity having regard to section 20(4)" and that, at [15]:

> They are to be construed benevolently, having regard to their purpose in assisting the good management of the development for the benefit of its residents as a whole, and with a view if possible to avoiding inconsistency with the governing statute.

35. The PC held at [17] – [18] that:

> the latter part of the by-law (the part beginning "notwithstanding") is not a restriction, but a relaxation of what precedes….(and) The second part of the by-law is therefore essential to relax that restriction, by allowing reasonable residential use by others, including reasonable exploitation of the property for rental by others (whether lessees or licensees).
>
> ...
>
> The limitation to one month can be seen as designed to provide some definition of what is meant by "use as a residence" for this purpose. The character of the use is clearly affected by the length of occupation. Short-term use by holiday-makers is different in kind from longer-term residential use, even if it may be difficult to draw a clear dividing line.

36. Further, at [20]:

Seen in this light, in the Board's view, the emphasis of the second part of the by- law is not so much on the word "rental" (which in this context can be read as an ambiguous term apt to cover a letting or a licence), as on the period of occupation. By requiring rentals, and therefore occupation periods, to extend for at least one month, the by-law is seeking to ensure the degree of stability which is necessary to maintain the character of the residential use. In the Board's view this is properly regarded as part of a legitimate restriction on the use of the strata lot, to ensure that the residential purpose of the development is protected. It does not involve an impermissible restriction on leasing contrary to section 20(4).

BIOGRAPHY

Derek Cassidy QC

Barrister, Sydney

Derek Cassidy QC was admitted into practice in 1955 and was appointed QC in 1980. He retired from practice in 2008 at age 77. Initially at Selborne Chambers, Derek moved to Latham Chambers when he took silk. He was the chairman of the Medicare Participation Review Committee from 1975-2006, member of the Serious Offenders Review Board (then Council) 1990-1996, and President of the Medico-Legal Society of NSW 1980-1982. Derek originally co-authored with Michael Redfern the Australian Tenancy Practice and Procedure in 1986 which is published both online and as a loose leaf service. In 2017, his work was re-written as Australian Tenancy Law and Practice with co-author, Brian Ralston.

Brian Ralston

Barrister, Latham Chambers, Sydney

Brian Ralston was admitted to the Bar in May, 1982 having practised as a litigation solicitor in a suburban practice for 5 years. Coming from a general litigation practice, Brian has continued to practice in a wide range of jurisdictions since his admission to the Bar. His practice has a particular emphasis on commercial and equity matters, the *Family Provision Act*, the *Property Relationship Act* and, general commercial litigation. Brian has recently co-authored Australian Tenancy Law and Practice with Derek Cassidy QC which is available on Lexis Nexis.

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