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ARE ANTI AIRBNB BY-LAWS VALID?

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HAS FAIR TRADING GOT IT WRONG? ARE ANTI AIRBNB BY-LAWS VALID?

Are by-laws prohibiting unlawful short term accommodation through Airbnb valid? Recent statements made by NSW Fair Trading representatives suggests they are not. But, has Fair Trading got it wrong?

Introduction

Recently, NSW Fair Trading modified its well known “Strata Living” handbook to indicate that by-laws prohibiting short term lettings are invalid. Then, last week, a spokesperson for the Minister for Innovation and Better Regulation, Matthew Kean, who is responsible for NSW Fair Trading, reinforced Fair Trading’s message by stating that by-laws prohibiting short term letting are not valid. The media has interpreted this to mean that it is not possible to make by-laws which prohibit unlawful short term accommodation including through websites such as Airbnb. But is the media spin correct?

Power to Make By-Laws

An owners corporation has a broad power to make by-laws. This includes by-laws to control the use of the apartments in its building. And an owners corporation is also able to make by-laws that cover the same topics dealt with in the model by-laws.

The model by-laws for new strata schemes deal with short term or holiday letting. For example, Model By-Law 17 requires an occupier of an apartment to notify the owners corporation if the occupier changes the existing use of the apartment to short term or holiday letting and Model By-Law 18 requires owners and occupiers to ensure that their apartments are not used for any purpose that is prohibited by law.

By-laws Prohibiting Short Term Accommodation

This means that, in NSW, by-laws can prohibit or restrict apartments being used for unlawful short term accommodation. However there are two caveats that must be placed on the ability of a by-law to prohibit or restrict apartments being used for short term accommodation.

First, the by-law cannot prohibit or restrict a lease of an apartment. This means a by-law cannot state that owners and occupiers are prohibited from leasing or renting their apartments for periods of less than three months. But this does not mean a by-law cannot prohibit an apartment being used for unlawful short term accommodation.

Second, a by-law generally cannot prohibit the use of an apartment for short term accommodation if that use is legal. In some areas of NSW, the use of an apartment for short term or holiday accommodation is legal either with or without local council approval under local planning laws. Any by-law that prohibits an apartment being used for lawful short term accommodation will generally not be effective and will be overridden by the local planning laws.

The Wash Up

Despite these caveats, the position is clear. A by-law is able to control the way in which an apartment is able to be used. This means a by-law is able prohibit or restrict an apartment being used for unlawful short term accommodation including through websites such as Airbnb. Therefore, the statements made by the Minister’s spokesperson and those contained in Fair Trading’s “Strata Living” handbook are not entirely accurate and do not present a complete picture of the topic.

Conclusion

The NSW Government is reviewing the regulation of short term apartment accommodation in residential buildings and will soon release a discussion paper on proposed holiday letting legislation. However, until the NSW Government changes the law, by-laws will be able to prohibit or restrict unlawful short term accommodation

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.



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