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LEGAL UPDATE —  
SHORT TERM RENTAL  
ACCOMMODATION:  
PROPOSED LEGAL  
FRAMEWORK PUBLISHED  
BY NSW GOVERNMENT

**Daniela Terruso**  
Lawyer | BA LLB  
[Email](#) | [LinkedIn](#)

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## LEGAL UPDATE – SHORT-TERM RENTAL ACCOMMODATION: PROPOSED LEGAL FRAMEWORK PUBLISHED BY NSW GOVERNMENT

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### Introduction

The NSW Government has published the proposed legal framework that will form the planning side of the regulation of short-term rental accommodation (**STRA**) including the:

- a new draft State Environmental Planning Policy specifically dealing with STRA and making certain STRA exempt or complying development (**SEPP**).
- draft Code of Conduct to be incorporated by regulation under the Fair Trading legislation which will regulate hosts, guests and online platform service providers (**Code of Conduct**), and

The proposed changes are set out in the draft legislation and accompanying documentation that have been issued for public consultation and comment, together with a discussion paper by the NSW Government headed “*Short-term Rental Accommodation: A New Regulatory Framework*”, dated August 2019.

The time for making submissions on the draft legislation has closed. The draft legislation that will cover STRA is still displayed on the Department of Planning, Industry and Environment’s website for viewing:

<https://pp.planningportal.nsw.gov.au/exhibition/proposed-short-term-rental-accommodation-reforms>

### Changes to Strata Laws

The *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018 (Act)*, which forms part of the STRA regulatory framework, was passed a year ago and the Act is yet to commence operation.

Once the Act commences, it will add, amongst other things, a new section 137A into the *Strata Schemes Management Act 2015*. That provision will enable an owners corporation to make a by-law that prohibits a strata lot being used for the purposes of a STRA arrangement if that strata lot is not the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot on a short-term basis. In other words, a by-law made under section 137A will be able to apply to a person, if that person is providing “non-hosted short-term residential accommodation” under the proposed SEPP.

Therefore, that type of by-law, if made, will be able to apply to investors who do not reside in a strata lot but instead use the relevant lot for short-term letting purposes.

### The Loophole

The by-law will not be able to cover owners or occupiers who use a strata lot as their principal place of residence and who make the lot (or a room in the lot) available for STRA (whether they are present or not)

while the short-term letting happens. Those persons will be providing “hosted short-term rental accommodation” under the proposed SEPP. This is a loophole in the proposed laws because it will mean a person will be able to make their lot available for STRA even though they are not residing in the lot at the relevant time, for example, whilst a lot owner is travelling overseas for a 2 month holiday during Summer.

### **Changes to Planning Laws – New SEPP for STRA**

The Government proposes to introduce a new draft State Environmental Planning Policy specifically dealing with STRA and making certain STRA exempt or complying development (**SEPP**). The draft SEPP is exhibited on the website address set out above.

The draft SEPP:

- will apply state-wide, repealing existing STRA provisions in local planning instruments. However, in the case of the Byron Shire Council, by Ministerial Direction by the former Minister for Planning on 11 February 2019, that Council was invited to prepare a planning proposal that would limit STRA to 90 days a year in the most impacted towns of that local government area.
- introduces definitions for “hosted” and “non-hosted” STRA that will distinguish whether a person providing STRA is or isn’t a “host”, with a host being defined as being “a property owner, tenant or other permanent resident of a dwelling.”
- introduces hosted STRA as exempt development for certain dwellings all year round;
- introduces non-hosted STRA as exempt development for certain residential dwellings in the Greater Sydney Region, Ballina area or City of Lake Macquarie area, and certain land in the Clarence Valley area and Muswellbrook area as shown on the maps attached to the SEPP, to be used for STRA for up to 180 days in a calendar year, provided the dwelling is not on bushfire prone land or on a flood control lot;
- introduces non-hosted STRA as complying development where the same provisions for exempt development would have applied except for the fact the relevant land in question is situated on bushfire prone land or a flood control lot and specific requirements for such land or lot are complied with. Such dwellings will be subject to the same 180 day calendar year limit for use for STRA.
- Interestingly, non-hosted STRA bookings of 21 or more consecutive days will not count towards any applicable day limit.
- Also, the draft SEPP states that State Environmental Planning Policy No. 1 – Development Standards will not apply to land to which the SEPP applies – which in the SEPP is described as being the entire state of NSW. It is unclear how this is intended to operate.

## Code of Conduct

The Government is also planning to introduce a Code of Conduct with respect to STRA. The draft Code of Conduct:

- contains principal objectives which are to:
  - set out the rights and obligations of STRA industry participants,
  - provide for resolution of disputes and complaints concerning the conduct of the STRA industry participants,
  - outline the compliance and enforcement approach applying to contravention of the Code of Conduct; and
  - facilitate oversight of the STRA industry.
- Industry participants will be the booking platform (online booking service), letting agents, facilitators, hosts (including “non-hosts” as defined in the SEPP) and guests, and will also include persons who provide property management services for STRA.
- The Fair Trading Commissioner will be responsible for administering the Code of Conduct, and the proposed regulation to accompany the Code of Conduct enables the Secretary of the Department of Customer Service to impose fees on STRA industry participants to recover the costs incurred in connection with the enforcement and administration of the Code of Conduct.
- Contains provisions in Part 5 which will contain specific obligations relating to industry participants. Interestingly, Part 5 provides that a host or guest must not engage in conduct relevant to their capacity that contravenes the strata or community title by-laws that apply to the premises in their building. Guests under an STRA arrangement entered into with a host (irrespective of whether that person is present in the premises at the relevant time) are considered to be occupiers of that building and therefore bound by the by-laws for that building. The STRA arrangement entered into with a guest makes the guest something more than a mere visitor or invitee to the scheme, presumably even where the STRA arrangement entered into for such right of occupation is for an overnight stay.
- There are provisions in the Act providing for warnings to be given to STRA industry participants who contravene the Code of Conduct, and authorising the keeping of an exclusion register which will contain details of STRA industry participants who have failed to comply with the Code of Conduct.

Under the provisions of the Code of Conduct, a host, a host in relation to specific premises or a guest who receives two strikes (for conduct more than is than a minor breach as set out in the Code of Conduct) within two years, will be recorded on the exclusion register for a period of 5 years.

This has potential impacts in terms of who will have access to the exclusion register on the one hand and protection of guests and hosts’ private information if they are listed on the exclusion register on the other. Might this information be used to prevent a guest obtaining a lease for a longer



residential tenancy? Would such information be made available to an owners corporation who wishes to ascertain whether a particular lot owner or occupier can indeed host for STRA purposes or is on the exclusion register? These issues are yet to be resolved.

- There are provisions in the Code of Conduct which provide that an STRA industry participant may apply to the Secretary for a review of the decision of the Commissioner to issue a warning notice or direction or record a strike against that participant.
- The Code of Conduct contains a number of penalties if breached and can result in an STRA industry participant being guilty of an offence, or may enable a court to impose a civil penalty, under sections 54C and 54D of the Act respectively. Such breaches include:
  - failing to comply with a request from the Commissioner to produce information relating to the operation of the STRA industry or the Code of Conduct or with any direction issued by the Commissioner under Part 7 of the Code of Conduct;
  - failure by a booking platform, letting agent or facilitator to keep a record of the full particulars of each STRA transaction entered into using an online booking service. Such records must be kept for 5 years after the end of the occupancy period and be in readily producible form;
  - a booking platform or letting agent advertising the excluded premises or the premises of an excluded host as listed on the exclusion register.
  - a host offers premises or enters into an STRA arrangement when the specific premises with respect to the host is listed on the exclusion register, or that host is listed on the exclusion register and is prohibited from participating in the STRA industry;
  - a host enters into an STRA arrangement with a guest listed on the exclusion register;
  - a guest knowingly obtains keys, security passes or other instruments that facilitates access to the premises after the end of the occupancy period;
  - a guest fails to notify the host or the host's representative of any dispute or complaint about a guest's or visitor's behaviour as soon as possible after the incident has occurred;
  - a guest is listed on the exclusion register and prohibited from participating in the STRA industry as a guest;
  - an industry participant must not knowingly misrepresent the identity of a person seeking to enter or entering into an STRA arrangement, or premises because the person or premises is on the exclusion register

### **When will the New Laws Commence?**

At this stage, it is unclear when section 137A of the strata legislation, the proposed SEPP and the Code of Conduct will commence. It is possible that all the legislation which makes up this framework could commence as early as next year, however, the discussion paper mentions that as part of the proposed legislative framework, a central register needs to be established as envisaged by the Code of Conduct.

It is unclear who will be tasked with managing that central register, whether that will be the players in the STRA industry, local council or the NSW Department of Customer Service, and when that central register will come into being. It looks like the proposed SEPP might be passed with a delayed commencement, to align with the commencement of the Code of Conduct once that central register issue is finalised.

#### **Daniela Terruso**

Lawyer I BA LLB

[danielaterruso@muellers.com.au](mailto:danielaterruso@muellers.com.au)

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### **About JS Mueller & Co Lawyers**

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for 40 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.

02 9562 1266

[enquiries@muellers.com.au](mailto:enquiries@muellers.com.au)

[www.muellers.com.au](http://www.muellers.com.au)



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