

Draft
LGNSW Submission on *Short Term Rental*
Accommodation – Regulatory Framework

September 2019

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1. Opening

LGNSW is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to make a submission to the Department of Planning, Industry and Environment (DPIE) and Department of Customer Service (DCS) on the proposed new regulatory framework for Short Term Rental Accommodation (STRA).

It is pleasing that our previous calls for consultation on the entire STRA package were heard and that the draft planning instruments, code of conduct and supporting regulations have been exhibited together. It is essential that councils and others view the related legislative proposals and documents in a single package.

LGNSW supports the integrated regulatory approach for STRA which comprises the mandatory code of conduct and new state-wide planning regulations. LGNSW also welcomes the proposal for a registration system, but we believe it must be overseen by the NSW Government, not industry-run.

This submission is informed by consultation with our metropolitan and regional members through a survey and council forum.¹ It contains comments on the overall regulatory framework and highlights local government's particular concerns and recommendations. This submission makes 15 recommendations, with key highlights summarised below:

- The NSW Government must recognise that enforcement of the planning provisions will in some areas, impose additional time and resources for councils. The proposed cost-recovery measures must include a component to assist local government deal with the additional compliance costs associated with the new framework.
- The state-wide 'blanket' provisions for annual STRA thresholds are not applicable or appropriate in every area, so it is crucial for councils to be able to tailor the policy to suit local conditions.
- LGNSW recognises the importance and benefits of short-term rental accommodation to local economies, and considers it is critical to have a robust and respected regulatory framework that balances the economic benefits and the potential negative impacts of STRA. We are concerned, however, that the relatively generous provisions for STRA in NSW appear to be moving in the opposite direction from those being imposed by overseas jurisdictions.
- Overseas experience of the effects of STRA on amenity, community and housing affordability has led to a tightening of the regulations for short-term letting. In NSW, all stakeholders acknowledge that the industry is growing rapidly and a regulatory framework is needed to manage this escalating trend and balance the benefits and impacts. LGNSW urges the government to implement a robust and respected STRA framework from the outset or we risk being unable to achieve this balance. We have recently witnessed the consequences of a weak regulatory system in relation to the building industry, and local government wants to avoid any unmanageable and undesirable outcomes arising from rapid industry growth and inadequate regulation. It is therefore critical to ensure the planning requirements, Code of Conduct and the property register are enforceable and all participants agree to accept their responsibilities.

¹ Council forum (September 2019): 17 council officers participated; member survey (August 2019): 37 council representatives (elected, general managers and senior staff) responded.

While LGNSW undertook preliminary consultation with members, the exhibition period has not been sufficient to enable detailed consultation and analysis of the proposals. The limited timeframe is particularly challenging for councils because a 28-day consultation period is inadequate to accommodate public consultation and council meeting cycles. LGNSW would like the relevant agencies to further engage with councils to resolve the detailed implementation elements before implementation commences.

This is a draft submission awaiting review by the LGNSW Board. Any revisions will be forwarded in due course.

2. Background

The NSW Government has proposed an integrated policy framework for STRA, which includes a state-wide planning framework, a mandatory Code of Conduct for STRA and related regulation.

The following documents set out the proposed framework:

- a) Short-term Rental Accommodation: A new regulatory framework discussion paper
- b) Draft Code of Conduct for the Short-term Rental Accommodation Industry
- c) Draft Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2019
- d) Draft State Environmental Planning Policy (Short-term Rental Accommodation) 2019
- e) Draft Environmental Planning and Assessment (Short-term Rental Accommodation) Regulation 2019 and accompanying 'Short-term Rental Fire Safety Standard'.

The key elements of the integrated framework are summarised below:

<p>Planning Framework</p>	<p>The draft State Environmental Planning Policy (Short-term Rental Accommodation) 2019 will introduce:</p> <ul style="list-style-type: none"> - A new definition of STRA. - New 'exempt' and 'complying' approval pathways that enable STRA within certain day limits: <ul style="list-style-type: none"> Where the host is present, STRA is 'exempt development' for 365 days per calendar year. Where the host is not present, and the site is not on bushfire prone land or a flood control lot, STRA is 'exempt development' for: <ul style="list-style-type: none"> ▪ 180 days in Greater Sydney; and ▪ 365 days in regional areas; except where a council varies this to no lower than 180 days. <p>Where the host is not present, and the booking is for 21 or more consecutive days, the booking will not count towards the above day thresholds.</p> <ul style="list-style-type: none"> • A Fire Safety Standard which will apply to dwellings used for STRA, and an amendment to the <i>Environmental Planning and Assessment Regulation 2000</i> to introduce this.
<p>Code of Conduct</p>	<p>A draft Code of Conduct for the STRA Industry that will apply to hosts, guests, online booking platforms and letting agents.</p>

	A draft <i>Fair Trading Amendment (Code of Conduct for STRA) Regulation 2019</i> that will support the Code's implementation.
Register	The NSW Government is considering introduction of a new industry-led STRA property register.

3. LGNSW position on integrated STRA framework

LGNSW recognises the contribution and benefits of STRA to local economies but considers that regulation of the industry is needed to balance the interests of industry participants while managing impacts on local communities across NSW. (See previous submissions².)

While the proposed framework has brought together the planning and industry regulation and addresses some previously raised issues, LGNSW has concerns about the practical implementation of the framework. These are discussed below.

3.1 Integrated Approach

LGNSW supports an integrated approach to STRA but there are some requirements in the planning instrument, Code of Conduct and regulation documents that could be better linked or clarified to minimise regulation issues for councils and confusion within the industry.

For example:

- Provisions in the SEPP should include a requirement to comply with registration and compliance under the *Fair Trading Amendment Regulation 2019* prior to the properties being used for STRA.
- Although the discussion paper indicates that the Commissioner for Fair Trading will be responsible for administering and enforcing the Code of Conduct and the exclusion register, including complaint handling (page 14), councils are concerned communities will expect them to be involved which will have cost and resourcing implications. (This is discussed further in section 3.3.)

3.2 Planning Instruments

a) Day limits for STRA

The proposed framework enables STRA to occur in residentially zoned premises without planning approval, with certain caps imposed. Where STRA is **hosted** (i.e. the owner is on the premises sharing their home with the guest(s)), this can occur all year round and is supported by local government³. However, it is where STRA is not hosted that presents the most significant concerns across the local government sector. In Greater Sydney, **un-hosted** STRA is permissible in residential premises for 180 days each year. Regional councils on the other hand have flexibility to decide whether to impose a 180-day threshold, or whether to permit STRA to occur all year round.

² See LGNSW Submissions to: STRA Explanation of Intended Effect (EIE), Oct 2018; and *Short-Term Holiday Letting (STHL) Options Paper*, Oct 2017

³ More than 60 percent of our survey respondents said they agree with the proposal that where the host is present, STRA properties are 'exempt development' for 365 days per year. One respondent disagreed, with the remainder being 'unsure'.

LGNSW welcomes the allowance given to regional councils to nominate different day limits for un-hosted STRA. It is noted that the SEPP limits un-hosted STRA to 180 days in the council areas of Ballina, Lake Macquarie, Clarence Valley (in specific mapped areas) and Muswellbrook (in specific mapped areas).

Consultation with our members confirmed there are wide-ranging preferences across local government in NSW relating to the day limits for un-hosted STRA, from 30 days in some council areas to having no limit in other areas, depending on their local circumstances. State-wide 'blanket' provisions are not appropriate in every area. To address this variation and diversity, there should be provisions built into the framework to enable all councils to determine the number of days that properties can be used for STRA in their local government areas, and to stipulate areas where day limits apply so they can balance local economic, tourism and long-term housing needs. LGNSW has welcomed the provision for the 90-day limit in Byron Bay allowed for under Ministerial Direction 3.7.

Recommendation 1:

Councils must be able to consider the potential impacts of STRA based on their local circumstances and be empowered to make decisions regarding the maximum number of days for un-hosted STRA. This must be more flexible and not be restricted to an upper limit threshold of 180 days.

LGNSW does not support the new provision that un-hosted bookings of STRA for 21 or more consecutive days should not contribute to applicable day thresholds. Councils see this provision as problematic and may be a loophole which would facilitate year-round short term letting in residential premises.⁴ It may effectively allow for the permanent use of the property for STRA. Issues raised by our members include difficulties in measuring and compliance and its potential use by landlords to avoid requirements under the *Residential Tenancies Act* for properties rented to longer term tenants.

Recommendation 2:

LGNSW recommends deletion of the 21-day consecutive booking provision to remove potential loopholes that could allow year-round short-term letting in residential areas.

b) Compliance with exempt and complying development provisions

While STRA is generally supported and a regulatory framework is welcomed by local government, overwhelmingly, councils are concerned about the ability to ensure compliance under the proposed exempt and complying development pathways. Key areas where this is a concern include:

- How to verify that the host is present;
- Fire safety certificates required under Part 2, Clause 9 (2) (c) of the draft SEPP;

⁴ Comments from respondents in our member survey:

- *"The exemption provided by booking for 21 or more consecutive days does not count to the day cap can potentially make the 180 day cap redundant (i.e. can be exploited as a loophole)".*
- *"There is no effective mechanism to prove non-compliance, particularly with the 21 day exclusion."*
- *"With the inclusion of the 21 days not being counted in the 180 days, it virtually means that residential accommodation will morph into full time 'short term stays' at the detriment of long term residents seeking accommodation."*

- The maximum number of persons per bedroom and total persons allowed under Part 3, Division 1, Clause 11 (b) of the SEPP; and
- Difficulty enforcing compliance with the number of days particularly with an industry-led register. (More than three-quarters of respondents in our member survey said their council is concerned about how compliance with the number of days a property is used for STRA will be enforced.)

As evidenced in our member survey, councils report the difficulty in gathering the evidence required to ensure compliance with the planning provisions for STRA:

“It is unclear as to how the number of days will be monitored and enforced.”

“Information about properties must be made available to local government for compliance purposes and also for data collection in relation to housing.”

“Without registration and record keeping [it is] impossible to enforce.”

Recommendation 3:

Local government strongly supports the proposed property register which is critical to provide data for regulatory compliance and enforcement. We recommend the register is overseen by the NSW Government, not industry-run.

c) Bushfire prone land and flood control lots

Risks associated with bushfires and flooding are important considerations. In terms of practical implementation, the draft SEPP requires un-hosted STRA properties on bushfire and flood prone land to satisfy certain requirements. These will be regulated as complying development. It is likely that there will be existing dwellings used for STRA in those areas raising the question of existing use rights. Once the SEPP commences, these properties may not comply with the proposed provisions. Councils in some regional areas have raised the issue that the extent of these bushfire provisions will apply to large areas and may be too considered restrictive. This could have the perverse effect of restricting STRA in areas where councils rely on this form of accommodation as a significant contribution to their local economy.

Recommendation 4:

LGNSW recommends that the DPIE work with councils to identify possible options and provisions in the SEPP to address this issue.

d) Relationship to state and local housing objectives

The SEPP excludes certain forms of dwellings from its operation (e.g. boarding houses, seniors housing, group homes), but does not exclude dwellings such as those approved for affordable housing under the *Affordable Rental Housing SEPP2009 (ARHSEPP)* and *SEPP No. 70 - Affordable Housing (Revised Schemes)*. This means that in some areas where STRA is highly sought-after, the core objectives of these state policies for affordable housing could be undermined by the use of these dwellings for STRA. Evidence of this was reported following the publication of a recent study⁵ in the Byron Shire LGA:

⁵ Southern Cross University, Airbnb in the Byron Shire— Bane or Blessing? An Investigation into the Nature and Range of Impacts of Airbnb on a Local Community, March 2019

“Almost 100 Byron Shire residents say they have been forced out of rental properties so owners could list them as short-term holiday lettings (STHL) on Airbnb or other STHL platforms, according to new research from Southern Cross University.”⁶

In areas of high tourist demand where a significant number of properties are being used for STRA, the balance between residential and commercial may shift and therefore undermine the planning outcomes (and importantly the housing objectives) of local planning schemes.

Recommendation 5:

LGNSW recommends that DPIE clarifies and rationalises its objectives in different state housing policies so that important affordable housing objectives are prioritised and are not undermined by unintended effects of the STRA policy.

e) Fire Safety Regulation

Ensuring appropriate and adequate fire safety standards for STRA are in place and well-understood by STRA operators is essential. Oversight of fire safety compliance is critical, but councils are concerned about a lack of clarity around compliance requirements for fire safety and their ability to determine compliance with the fire safety provisions, for dwellings being used for STRA. The fire safety provisions applicable to STRA properties should be clearly reflected in the Code of Conduct and draft SEPP. In the exhibited documents, the code is silent on fire safety inspections and the only reference to the fire safety regulation in the draft SEPP is a note under Part 3 of the draft SEPP (page 7). This is not clear enough and could be easily missed by STRA operators.

Recommendation 6:

The draft SEPP should be amended to include fire safety as a specific clause, to ensure that fire safety standards are not overlooked by STRA operators.

For STRA under exempt development, there is no annual certification required and therefore councils will not know if the fire safety requirements are being maintained. The provisions need to be amended to address this, and council practitioners have suggested clause 16 of the boarding house SEPP (ARHSEPP) might be a model provision; it states that within 12 months of registration the fire safety requirements must be met.

Recommendation 7:

A mechanism is needed to ensure the fire safety requirements in STRA properties are being met and maintained, and fire safety provisions for boarding houses in the ARHSEPP could provide a suitable model.

f) Other comments

Councils have identified some potential unintended consequences of the STRA provisions:

- Developers of high-rise buildings may rely on the STRA provisions to withhold dwellings from the (sale or long term-rental) market (but allow their use as STRA) until the warranty period for major building defects has passed.
- The policy has no provision to restrict the number of properties being made available for use as STRA. In some sought-after STRA locations (e.g. within the City of Sydney, Waverley and other LGAs), the potential use of whole blocks of apartments for STRA could effectively turn them into tourist accommodation (quasi hotels).

⁶ <https://www.echo.net.au/2019/03/byron-residents-say-airbnb/>

Recommendation 8:

The 12-month review of the STRA framework should assess any potential unintended consequences. This should include concerns about the withholding of properties for use as STRA by developers during the building defects warranty period; and intensification of STRA uses within entire residential apartment buildings, rendering them as quasi hotels.

- Potential for landlords to use the 21-day provision to avoid requirements under the Residential Tenancies Act for properties rented to longer term tenants. As discussed in section 3.2a), **LGNSW recommends removing the 21-day provision.**
- The Code of Conduct does not discuss swimming pool compliance; this is a concern raised by some councils which should be addressed in the regulatory package.

Recommendation 9:

LGNSW recommends that DPIE work with councils to ensure that swimming pool compliance is addressed in the regulatory package for STRA.

3.3 Code of Conduct and complaints management

A strong and enforceable Code of Conduct applicable to all STRA participants is necessary to ensure the framework has integrity and is respected by all in the community – both STRA participants and the community. However, there is some concern about how councils will be able to effectively manage compliance of the proposed framework, respond to complaints and the resourcing and cost impacts.

While the framework seeks to address amenity impacts through the Code of Conduct and regulation under the *Fair Trading Act 1987*, councils are concerned that they will still receive and be expected to deal with complaints, which may have **considerable cost and resourcing implications for councils**. This was reflected by some respondents in our member survey:

“Councils will shoulder most of the compliance burden, not Fair Trading.”

“We cannot resource this compliance.”

The discussion paper (p.14) notes that the NSW Government “intends the administration and enforcement of the Code to be cost neutral to government” and various cost recovery methods are canvassed. Yet, there is no recognition in the discussion paper of the cost implications for councils or mechanisms for councils to recoup these costs and this is a concern for local government. It is assumed that the Commissioner for Fair trading will be responsible for compliance, with costs recovered through fees paid by industry participants. LGNSW endorses this principle that those benefiting from the STRA provisions must contribute to the cost of ensuring the new integrated framework works effectively and meets its objectives. However, this must include the compliance costs to local government.

Recommendation 10:

STRA participants should be required to pay a fee to cover the costs of regulation and compliance. Cost recovery mechanisms must take into account the costs to councils, to prevent cost shifting.

To help minimise the impacts of the anticipated additional compliance load on councils, adequate resources such as websites and public information programs for participants and local communities are required. (Refer to section 3.6.)

A further issue is the need for greater clarity about the relationship between breaches of the Code of Conduct and compliance with the SEPP.

3.4 Registration system

LGNSW has been advocating for a registration system for STRA for some time, and therefore welcomes the proposal to introduce a property register. Councils are not confident that an industry-led register will provide the available real-time data and information to implement compliance and this could undermine the integrity of the entire STRA framework. **Councils believe strongly that the register must be administered by the NSW Government (Department of Customer Service) and that the information in the register must be easily accessible and available in real-time to assist with compliance. The register must include up-to-date, accurate information on bookings, property compliance (number of bedrooms, number of guests etc), owner and host details.**

As recommended in section 3.2 b), LGNSW supports the proposed property register but recommends the register is overseen by the NSW Government, not industry-run.

Recommendation 11:

Clarification is required as to whether the register would include existing properties being used for STRA and how this will be required.

3.5 Implementation, Monitoring and Review

Further work on the proposed framework is required and councils must be engaged directly to resolve their specific implementation issues before implementation commences.

The property registration system and the Code of Conduct also must be in place before the SEPP commences.

Recommendation 12:

The SEPP should not commence until the property register and the Code of Conduct are in place and specific issues are resolved in consultation with councils.

When all components of the framework are in place, LGNSW supports the government's intention to undertake a review after 12 months operation. This review is important so that any unintended consequences or provisions that are not operating effectively can be addressed. However, LGNSW recommends that this is followed by a more comprehensive review of the framework 3-5 years after commencement.

Recommendation 13:

When all components of the framework are in place, a review after 12 months operation is supported and a further review in 3-5 years is recommended.

Many councils are concerned that the expansion of STRA is impacting the affordability and availability of long-term rental accommodation. As the use of residential properties for STRA may cause increased housing stress, LGNSW suggests that ongoing research be undertaken to measure the long-term impacts of STRA on local housing markets.

Recommendation 14:

LGNSW reiterates its previous calls for the NSW Government to commit funds for the ongoing research beyond the first year of implementation of STRA, and engage directly with councils to monitor the local impacts of STRA and inform future policy directions.

3.6 Public Education and Awareness

Once finalised, the implementation of the new framework should be supported by a public education and awareness program, including a dedicated webpage, hotlines and clear user guides and brochures, so the community and STRA participants know who is responsible for what, and where to go to register, learn how to comply and to raise any concerns.

Recommendation 15:

A strong public education program and dedicated communication material, delivered by the relevant state agencies in conjunction with industry, is considered essential for the effective regulation and implementation of STRA uses.

4. Conclusion

LGNSW welcomes the consultation of the entire STRA package, which has allowed councils to view these documents together. LGNSW supports an integrated approach to STRA but in some areas the planning instrument, compliance and regulation components proposed are not sufficiently linked and could present regulation issues for councils and confusion within the industry. LGNSW encourages the DPIE to engage closely with councils to iron out their specific implementation concerns.

LGNSW believes the 'blanket' provisions in the policy are not appropriate in every area, and the inability for councils to specify a day cap less than 180 days does not provide sufficient flexibility. In many instances, councils have elected not to limit the STRA threshold in their area, while other councils consider much tighter provisions may be necessary. To manage the impact of STRA to suit the diverse locations across NSW and potential impacts of STRA in different areas, it is crucial that the SEPP includes provisions that would allow councils to tailor the thresholds to suit certain local conditions and that these should not be capped at 180 days. The provision that un-hosted bookings of STRA for 21 or more consecutive days not contribute to applicable day thresholds is seen as problematic therefore removal of this provision is recommended.

LGNSW recommends that the DPIE work with councils to identify possible options and provisions in the SEPP that will address councils' concerns to manage risks and compliance concerns associated with bushfires, flooding and swimming pools. A further issue is the need for greater clarity about the relationship between breaches of the Code of Conduct and compliance with the SEPP.

The Code of Conduct and proposed property register are supported, however LGNSW recommends the register be administered by the NSW Government rather than an industry-led register as proposed and data should be available in real-time to councils. Councils have raised questions about their responsibilities and role (and perceived role) in managing compliance, particularly in relation to the planning provisions and the resourcing and cost impacts.

LGNSW considers that further work and engagement with councils is required to address the issues raised. The SEPP should not commence until the property register and the Code of Conduct are in place and the above issues are resolved in consultation with councils. When all components of the framework are in place, a review after 12 months operation is supported and a further review in 3-5 years is recommended.

For further information in relation to this submission, please contact Jane Partridge, Strategy Manager, Planning and Transport, on 02 9242 4093 or jane.partridge@lgnsw.org.au.

Appendix: Summary of Recommendations

Recommendation 1: *Councils must be able to consider the potential impacts of STRA based on their local circumstances and be empowered to make decisions regarding the maximum number of days for un-hosted STRA. This must be more flexible and not be restricted to an upper limit threshold of 180 days.*

Recommendation 2: *LGNSW recommends deletion of the 21-day consecutive booking provision to remove potential loopholes that could allow year-round short-term letting in residential areas.*

Recommendation 3: *Local government strongly supports the proposed property register which is critical to provide data for regulatory compliance and enforcement. We recommend the register is overseen by the NSW Government, not industry-run.*

Recommendation 4: *LGNSW recommends that the DPIE work with councils to identify possible options and provisions in the SEPP to address this issue.*

Recommendation 5: *LGNSW recommends that DPIE clarifies and rationalises its objectives in different state housing policies so that important affordable housing objectives are prioritised and are not undermined by unintended effects of the STRA policy.*

Recommendation 6: *The draft SEPP should be amended to include fire safety as a specific clause, to ensure that fire safety standards are not overlooked by STRA operators.*

Recommendation 7: *A mechanism is needed to ensure the fire safety requirements in STRA properties are being met and maintained, and fire safety provisions for boarding houses in the ARHSEPP could provide a suitable model.*

Recommendation 8: *The 12-month review of the STRA framework should assess any potential unintended consequences. This should include concerns about the withholding of properties for use as STRA by developers during the building defects warranty period; and intensification of STRA uses within entire residential apartment buildings, rendering them as quasi hotels.*

Recommendation 9: *LGNSW recommends that DPIE work with councils to ensure that swimming pool compliance is addressed in the regulatory package for STRA.*

Recommendation 10: *STRA participants should be required to pay a fee to cover the costs of regulation and compliance. Cost recovery mechanisms must take into account the costs to councils, to prevent cost shifting.*

Recommendation 11: *Clarification is required as to whether the register would include existing properties being used for STRA and how this will be required.*

Recommendation 12: *The SEPP should not commence until the property register and the Code of Conduct are in place and specific issues are resolved in consultation with councils.*

Recommendation 13: *When all components of the framework are in place, a review after 12 months operation is supported and a further review in 3-5 years is recommended.*

Recommendation 14: *LGNSW reiterates its previous calls for the NSW Government to commit funds for the ongoing research beyond the first year of implementation of STRA and engage directly with councils to monitor the local impacts of STRA and inform future policy directions.*

Recommendation 15: *A strong public education program and dedicated communication material, delivered by the relevant state agencies in conjunction with industry, is considered essential for the effective regulation and implementation of STRA uses.*