

Draft
**LGNSW Submission on Short-term Rental
Accommodation Planning Framework -
Explanation of Intended Effect**

November 2018

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1. Opening

Local Government NSW (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 and Environment (DP&E) on *Short-term Rental Accommodation (STRA) – Explanation of Intended Effect (EIE)*. This is an issue of significant interest to NSW councils, both in metropolitan, rural and coastal areas.

LGNSW supports the introduction of a state-wide regulatory framework for short-term rental accommodation announced by the Government in June 2018 which comprises a mandatory code of conduct; amendments to strata law; and new state-wide planning regulations.

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 to manage this escalating trend.

Consistent with previous statements¹ LGNSW maintains that councils should have the option to determine their own threshold caps for STRA. This submission also reiterates LGNSW's consistent advocacy for the establishment of a registration system, together with ongoing data collection and research (beyond the first twelve months) to monitor the local impacts of STRA.

A significant concern of LGNSW and councils is that the changes being proposed in the EIE do not build in sufficient powers and tools to manage safety and amenity, ensure effective compliance and protect against potential impacts on affordable housing.

It is also unsatisfactory that councils are being asked to comment on the proposed planning framework without knowledge of what will be in the code of conduct. Local government cannot evaluate the planning system changes without an understanding of the content of the code of content and how the two will relate to one another. LGNSW is concerned these two key elements of the whole-of-government framework are being developed in isolation of one another.

This submission has been prepared in consultation with metropolitan and regional councils. It contains general comments about the proposed planning framework and its relationship with the code of conduct (see section 3) and specific comments on elements within the EIE, including some brief comments about what is missing.

This is a draft submission awaiting review by the LGNSW Board. Any revisions made by the Board at that time will be forwarded to DP&E in the form of an updated submission.

2. Background

- The NSW Government is seeking feedback on proposed amendments to planning regulations for STRA in NSW.
- The proposed state-wide planning rules are one part of an overall governance framework for STRA; the other elements are an industry-wide mandatory code of conduct and changes to strata legislation.

¹ LGNSW Submission to the Short-Term Holiday Letting (STHL) Options Paper, October 2017

- The results of numerous research about the impacts of STRA² - both domestic and international - show that multiple jurisdictions have introduced tighter regulations and registration frameworks for short-term letting, in response to concerns about the real and potential influence of STRA on the availability of affordable housing and impacts on local communities.
- In a move which LGNSW considers to be in reverse of the international trend, the NSW Government has adopted a less restrictive approach to regulating STRA. A similar finding was made in recent research by the Australian Housing and Urban Research Institute (AHURI)³ which compared the regulatory approaches of 11 international cities⁴ with the policy model proposed for NSW. AHURI concluded that NSW has “taken a very permissive approach to regulating short-term letting...Compared to the time limits adopted in major Airbnb markets around the world, the proposed 180-day limit for entire property listings in Sydney is very generous, and it is notable that local governments would not be able to set their own lower limits”.⁵

3. General comments

3.1 Whole-of-government framework

- LGNSW is concerned that the planning changes and code of conduct are being developed in isolation of each other and by two separate government departments. Councils are being asked to comment on the planning framework without knowing the content of the code, how it will work in practice and who will have responsibility for regulating it.
- Section 4.4 of the EIE promises that “all elements of the policy will work together to enable STRA, while managing potential impacts”⁶. However, as discussed throughout this submission, the EIE does not explain how the controls proposed will interface with the code of conduct.

Recommendation:

- 1 *The planning system and the code of conduct must work together, not in isolation, and need to be developed as a cohesive framework.*
- 2 *Councils and other stakeholders must have the opportunity to review the draft code of conduct before the planning changes are finalised.*

3.2 Provision for locally-determined planning responses

- As stated previously by LGNSW⁷, the regulatory framework must be flexible to adapt to the local situation, to be able to respond to the variation in the use, intensity, application and impacts of STRA in different locations across NSW.
- LGNSW agrees that STRA uses that are considered to be low impact should not require development consent. However, as the industry continues to expand, many councils – particularly in coastal areas – face a daily battle to manage compliance and complaints

² For example: AHURI, *Technological disruption in private housing markets: the case of Airbnb*, October 2018; Gurrán, N., Zhang, Y., Shrestha, P., Gilbert, C., *Planning responses to online short-term holiday rental platforms*, Research Project for Australian Coastal Councils Association Inc., September 2018; and Gurrán, N. and Phibbs, P., *When Tourists Move In: How Should Urban Planners Respond to Airbnb?*, *Journal of the American Planning Association*, 5 January 2017.

³ AHURI, *Technological disruption in private housing markets: the case of Airbnb*, October 2018

⁴ *Ibid.*, section 5.3

⁵ *Ibid.*, p 72

⁶ STRA EIE, p 13

⁷ LGNSW Submission to Short-term Holiday Letting Options Paper, p 10

associated with STRA activities. The findings of a recently published research project conducted on behalf of twelve NSW councils concluded that “stronger local planning frameworks may be needed to ensure that the holiday rental sector remains low impact and compatible with residential communities”.⁸

- Similarly, AHURI’s “findings suggest that including provision for locally-determined thresholds for whole of premises STL, and a requirement for registration in the suite of changes would produce more equitable and efficient outcomes”⁹.
- LGNSW maintains that councils and their communities must have a say in deciding how and where STRA will be allowed to occur in their area and must be able to determine locally-applicable maximum caps for STRA.

Recommendation:

- 3 *There should be flexibility in the planning framework for STRA, with provisions for a locally-determined planning response to help manage specific and acutely-localised impacts.*

3.3 Compliance and enforcement

- The NSW Government’s entire STRA framework will be ineffective if the DP&E and Department of Finance, Services and Innovation (DFSI) do not properly enforce the exempt and complying criteria in the planning framework and the conditions and penalties in the code of conduct.
- DFSI and DP&E have indicated they are neither resourced nor empowered to undertake these functions, and no further amendments to existing compliance and enforcement powers are proposed¹⁰. LGNSW understands it is the Government’s intention that the code will be administered by an industry-based entity. It is unclear whether this will encompass compliance with the planning conditions such as the day thresholds.
- Councils already dealing with short-term rental issues in their local area fully understand the compliance challenges. This is evidently the number one concern for local government in relation to the proposed regulatory framework for STRA. Relevant data and information about STRA activities is essential for enforcement purposes. Councils do not have access to this information and therefore are not in a position to perform this function. Many councils are facing considerable and rapid growth of STRA in their areas, with already insufficient resources and information. Specific examples in councils’ individual submissions highlight and emphasise these challenges.
- The lack of transparency on enforcement of the code of conduct and the planning framework raises multiple questions for councils. LGNSW requests that DFSI and DP&E clarify and advise on the following:
 - Who is responsible for enforcing the code of conduct and managing the complaints process?
 - What will be the penalty for people/properties who breach the planning conditions? It is unclear how a breach of the planning conditions will be treated and whether the penalties and exclusions in the code of conduct will apply.
 - How will the 180-day cap in Greater Sydney be enforced and will a breach of the cap will be treated as a breach of the code of conduct? If not, this raises the

⁸ Gurrán, N., Zhang, Y., Shrestha, P., Gilbert, C., *Planning responses to online short-term holiday rental platforms*, Research Project for Australian Coastal Councils Association Inc., September 2018, p 52

⁹ AHURI, *Technological disruption in private housing markets: the case of Airbnb*, October 2018, p 73

¹⁰ STRA EIE, p 17

question of what penalties would be applicable under the planning framework for those who operate beyond their allowable 180-day limit.

- What is the process for dealing with complaints? Councils will be one of the first ports of call therefore they need to be clear about where complainants should be directed.

Recommendations:

4 *DP&E and DFSI should:*

- a. *clarify who will be responsible for enforcing the regulatory framework for STRA i.e. the code of conduct and the planning framework; and*
- b. *build in provisions to address the current gaps between the planning framework and the code of conduct so that these can work together effectively.*

3.4 Registration system

- For enforcement of the proposed STRA planning framework, the following information will be needed:
 - Which properties are registered for STRA – details of bedroom numbers, etc
 - Whether the host is present.
 - Commencement date for STRA.
 - Number of nights used for STRA.
 - Number of bedrooms.
 - Number of guests.
- Having a registration system in place is an essential tool to providing this key information. Many other jurisdictions overseas have adopted this approach and LGNSW recommends that the NSW Government agree to introduce a similar system.
- LGNSW has consistently advocated for a registration system to enable effective monitoring and compliance of STRA. There is provision for a registration system in the *Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018* enables the code of conduct to include a registration system.¹¹

Recommendation

- 5 *The NSW Government introduce a registration system of residential premises used for the purposes of STRA, as provided for in the Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018.*

3.5 Affordable Housing

- The supply of affordable housing is a big concern for many councils as the popularity of STRA via on-line platforms proliferates. Councils are justifiably concerned that some elements of the proposed planning changes will further erode the availability of affordable housing by removing long term rental properties from the market.
- The AHURI report referred to earlier certainly confirms these claims. The research found that the concentration of commercial STRA listings in inner-city and beachside locations “reduces the availability of long term rentals and creates further affordability pressure in

¹¹ Section 54B (2) (c) provide for the registration of residential premises used for the purposes of short-term rental accommodation arrangements and for the registration system to include details about when residential premises are used for those purposes

areas that are generally well connected by public transport and within access to employment hubs, essential services and amenities”¹².

Recommendation

- 6 *There should be a review of the impacts of the STRA policy framework on housing market changes (including cost and availability) after the first 3 years and again after 5 years following commencement of the new STRA framework.*

3.6 Twelve-month review of STRA and further research

- LGNSW welcomes the NSW Government’s commitment to review the “entire reform package”¹³ after the first twelve months of operation. LGNSW recommends that the NSW Government commits funds for ongoing research to monitor the local impacts of STRA, and in particular the long-term impacts on affordable housing. This research would assist the state agencies involved in policy setting for STRA, councils and industry to fully understand and measure the overall impact of STRA on the community, and the impacts/benefits of planning regulations where these have been in place for some time.

Recommendation

- 7 *The NSW Government commits funds for ongoing research beyond the first twelve months from commencement of the STRA framework, to monitor the local impacts of STRA and inform future policy directions.*

4. Specific comments

4.1 Land use definition and permissibility

- The EIE proposes the following definition for STRA:
“the commercial use of an existing dwelling, either wholly or partially, for the purposes of short-term accommodation, but does not include tourist and visitor accommodation.”
- LGNSW assumes that the term ‘*tourist and visitor accommodation*’ used here is a reference to its meaning as defined in the Standard Instrument - Principal Local Environmental Plan (Standard Instrument LEP)¹⁴. In other words, the STRA definition seeks to make a distinction between STRA and other similar forms of temporary accommodation for tourists and visitors. This definition may be confusing for the layperson because most people take STRA to be associated in some way with tourist/visitor/holiday

¹² AHURI Media Release, *Tourists turf out tenants in Airbnb hotspots*, 8 November 2018

¹³ The Hon. Scott Farlow, Legislative Council, 14 August 2018: “to ensure that they are delivering on our intentions, the Government has committed to reviewing the entire reform package 12 months after the code has commenced”.

¹⁴ Dictionary – *tourist and visitor accommodation* means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

- (a) backpackers’ accommodation,
 - (b) bed and breakfast accommodation,
 - (c) farm stay accommodation,
 - (d) hotel or motel accommodation,
 - (e) serviced apartments,
- but does not include:
- (f) camping grounds, or
 - (g) caravan parks, or
 - (h) eco-tourist facilities.

use. To reduce confusion, it is recommended that an explanatory note or extra wording be included to help clarify the term 'tourist and visitor accommodation'.

- LGNSW understands the meaning of 'short-term' to apply to anything up to 3 months, with anything longer than this being subject to a lease under the *Residential Tenancies Act 2010*. It is recommended that any supporting communication material should make this clear when the planning changes come into effect.
- The EIE proposes to make STRA permissible wherever a legal dwelling is permitted. This would allow STRA in all residential and all rural zones, and in commercial zones where dwellings (e.g. shop top housing) are permitted. STRA will be also permitted in secondary dwellings. However, boarding houses, seniors housing and group homes will be excluded from STRA. LGNSW supports the exclusion of these forms of residential accommodation which will help protect their original intended purpose.
- Placing the definition in the Standard Instrument LEP as proposed, without any other related provisions in the LEP may create some confusion for potential STRA applicants. It could potentially result in a situation where a council is presented with a development application for STRA where a dwelling is permitted which they have no legal mechanism to refuse. It is therefore recommended the definition be placed in the Codes SEPP rather than the SILEP.

It is recommended that the DP&E clarifies whether STRA is also excluded from other forms of accommodation, such as manufactured and relocatable homes (caravans, tents, etc).

Recommendations

- 8 *DP&E should revise the STRA definition and/or add explanatory notes to clarify the terms 'short-term' and 'tourist and visitor accommodation'.*
- 9 *DP&E should clarify whether STRA will be excluded from other forms of accommodation (such as manufactured and relocatable homes).*
- 10 *All communication material produced by DP&E and DFSI when the changes come into effect should contain clear and thorough explanations of key words and phrases used in relation to STRA.*

4.2 Development approval pathways

- The development pathways available for STRA will be either exempt or complying, depending on certain conditions.
- DP&E has made it clear in recent information sessions, there is no proposal to introduce a requirement for development consent for STRA, however the EIE is not explicit about this. LGNSW understands this to mean that once the 180-day limit in any calendar year is reached, the activity is effectively prohibited. If STRA is permissible in all legal dwellings, but restricted beyond the 180-day cap, the EIE should clarify what planning mechanisms will be used so that development consent cannot be granted beyond the exempt and complying development criteria. Unless this is made clear, some STRA operators may mistakenly assume there is an approval pathway for development consent to operate beyond the 180-day cap. In addition, all communication material about STRA must make it clear that there is no development application (DA) pathway for STRA and the use is effectively prohibited beyond the 180-day cap is reached.
- Under the proposed planning framework, the presence of a 'host' is a key element because it dictates the permissible number of days and whether the use is exempt or complying development. LGNSW assumes the intention is that the 'host' would be the owner or long-term resident of the property. However, the term 'host' is not defined in the EIE. In the short-term rental industry, 'long-term residents' and 'hosts' are not necessarily the same

thing - a host may be the letting agent, or the owner of the property, or the usual resident of the property (who is 'sharing' their home). To avoid confusion the EIE must clarify this important distinction and align the terms and definitions used in the code of conduct and the planning system. Where the term 'host' is used in the planning system, it should have the same meaning as that referred to in the code.

- For compliance purposes, the planning provisions must be clear on whether the number of days applies to 'actual bookings' or 'availability' of the premises for STRA. As discussed earlier, access to the relevant data on the activities of STRA properties will be fundamental for the regulators.

Recommendations:

- 11 *That the planning changes include a clear definition of the 'host' as the 'long term resident' in relation to a STRA property. Further, this definition must be consistent with the relevant definitions used in the mandatory code of conduct.*
- 12 *DP&E should clarify whether the number of days applies to 'actual bookings' or 'availability' of the premises for STRA.*

4.3 Ability of regional councils to determine the permissibility of STRA

- While LGNSW welcomed the fact that councils in regional NSW have some say on the caps (i.e. may reduce to 180 days), the LGNSW continues to maintain that councils should have the option to determine their own caps. Councils are best placed to understand their local conditions and the need to balance local impacts with the economic benefits of STRA.
- It is unclear whether there is scope for councils to determine a limit that sits somewhere between 180 and 365 days. The DP&E should make this made clear.
- Many regional councils intend to consult their communities about specific length-of-stay thresholds, but the 8-week deadline for expressions of interest does not allow sufficient time to consult their communities. A number of councils have subsequently elected to postpone a decision until they have more time at a later stage.

Recommendation:

- 13 *It is recommended that the DP&E advise the exact process which councils will be required to follow, should they choose to seek an amendment to the 365-day default cap in the future.*

4.4 Noise and amenity impacts

- Councils are very concerned that they will receive the majority of the complaints associated with noise and amenity impacts of STRA.
- It is strongly recommended that for STRA properties where the 'host' is not present, the exempt and complying conditions require signage on the property identifying a 24-hour contact and notification of these contact details to immediate neighbours. This is particularly important in strata properties because of the proximity of neighbours. Councils believe this type of signage and notification may assist in managing immediate complaints/issues with STRA.
- A complaints management system is one of the elements promised under the code of conduct, and councils believe that DFSI will be responsible for handling complaints, either directly, or by referral from councils.
- Noise and amenity complaints at STRA properties may be a one-off problem or a persistent and long-term issue. There are provisions under the *Protection of the Environment Operations Act 1997* (POEO Act) to deal with these issues, but it is unclear

how warnings and directions issued by a council or the NSW Police¹⁵ would be dealt with under the code of conduct.

Recommendations:

- 14 *The exempt and complying criteria should include a requirement for contact details to be made available via on-site signage and notification to immediate neighbours.*
- 15 *DFSI and DP&E clarify how the code of conduct will handle noise and amenity issues reported by councils or the NSW Police.*

4.5 Mandatory code of conduct

- As discussed earlier in this submission, the lack of transparency between the planning system and mandatory code of conduct has raised questions that require further clarification. Councils must have the opportunity to review the draft code and provide further comment on the planning framework before it is finalised.
- The planning system and code of conduct could be linked if the criteria for STRA under the exempt and complying pathways includes a requirement to comply with the code of conduct. As discussed earlier, a registration system will be an essential tool to provide regulators of the short-term rental industry the necessary data for enforcement purposes. At the very least, the code of conduct should include requirements for the booking platforms or other people responsible for a STRA property to provide details of their bookings, including number of days, number of guests and contact details to the relevant regulators.

Recommendation:

- 16 *The planning system and code of conduct could be linked if the criteria for STRA under the exempt and complying pathways included a requirement to comply with the code of conduct. This would help enable amenity and environmental issues to be managed through the of the code of conduct procedures.*

4.6 Other matters

- The EIE is silent on a number of matters, including:
 - Existing use rights – several councils have raised the question of how existing use rights will be handled, in those circumstances where councils already have provisions in their LEP and people currently have a valid development consent for STRA. It is recommended that DP&E work with councils individually to determine whether in certain circumstances the LEP provisions must be retained.
 - Flood-prone land – specific provision is made for bushfire-prone land, and for consistency, consideration should be given to whether the use of a property on flood-prone land for STRA should also be subject to certain conditions to protect and minimise the risk of potential harm to STRA guests during flooding.
 - Swimming pools – some councils have indicated that the change of use of a dwelling to permit STRA year-round will trigger certain regulatory requirements for there-yearly pool inspections. This needs to be clarified by DP&E.

¹⁵ Under the provisions of the *Protection of the Environment Operations Act 1997*

Recommendation:

- 17 *DP&E should advise how existing use rights and properties on flood-prone land will be handled, and whether the proposed planning changes will affect existing regulatory requirements for swimming pool inspections.*

5. Conclusion

- LGNSW recognises the importance and benefits of STRA to local economies and has welcomed the NSW Government's intention to regulate the industry.
- However, the regulatory framework must be enforceable, and the difficulties in obtaining evidence/information for compliance purposes present considerable enforcement challenges.
- This submission reinstates LGNSW's previous calls for the STRA planning framework to include provision for locally-determined planning responses. Councils must have the tools to respond to variations in the use, intensity, application and impacts of STRA in different locations across NSW. While flexibility for regional councils to have some say on the caps (i.e. may reduce to 180 days) has been welcomed, LGNSW maintains this should not be limited to a 180-day maximum. The planning changes should include provision for councils to determine their own caps.
- Regional councils have not had sufficient time to consult their communities about making the caps lower than the 365-day default limit. LGNSW has recommended the DP&E advise what process will be required should councils decide to reduce the caps in future.
- The impacts of STRA on housing availability and its negative impact on affordable rental housing have been a motivating factor for some overseas jurisdictions to introduce tighter regulations on the STRA industry. LGNSW cautions that the relatively generous provisions for STRA in the EIE appear to be moving in the opposite direction from overseas jurisdictions.
- As has been observed overseas, many councils, both metropolitan and regional, are apprehensive about the escalating potential impacts of STRA on affordable housing. Their concern is that the expanding use of STRA could result in an increasing number of dwellings being removed from the private rental market thus reducing the availability of long-term rental accommodation. LGNSW has recommended that ongoing research be undertaken to measure the long-term impacts of STRA on local housing markets.
- This submission highlights a number of gaps between the planning system and the code of conduct. Councils must have the opportunity to review the code of conduct and make before the planning changes are finalised.
- The key recommendations in this submission are:
 - There should be provisions for locally-determined planning responses to help councils manage specific and acutely-localised impacts.
 - DP&E and DFSI to build in provisions to address the current gaps between the planning framework and the code of conduct so that these can work together effectively;
 - NSW Government to introduce a registration system; and
 - NSW Government to commit funds for ongoing research to monitor the local impact of STRA, beyond the first twelve months of commencement of the regulatory framework.
- This submission has discussed some interpretation difficulties with the proposed definition of STRA and LGNSW has recommended clarification and/or rewording to avoid any

confusion. Recommendations involve clarifying various definitional terms (e.g. 'host', 'short-term', 'tourist and visitor accommodation'); provide clear and thorough explanations in the supporting communications material for STRA participants; information about the planning and linkages a requirement to have signage for dispute management at property entries.

- A summary of recommendations is contained in **Attachment 1**.
- For further information in relation to this submission, please contact Jane Partridge, Senior Policy Officer Planning, on 02 9242 4093 or jane.partridge@lgnsw.org.au.

ATTACHMENT 1 – Summary of recommendations

- 1 *The planning system and the code of conduct must work together, not in isolation, and need to be developed as a cohesive framework.*
- 2 *Councils and other stakeholders must have the opportunity to review the draft code of conduct before the planning changes are finalised.*
- 3 *There should be flexibility in the planning framework for STRA, with provisions for a locally-determined planning response to help manage specific and acutely-localised impacts.*
- 4 *DP&E and DFSI should:*
 - a. *clarify who will be responsible for enforcing the regulatory framework for STRA i.e. the code of conduct and the planning framework; and*
 - b. *build in provisions to address the current gaps between the planning framework and the code of conduct so that these can work together effectively.*
- 5 *The NSW Government introduce a registration system of residential premises used for the purposes of STRA, as provided for in the Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018.*
- 6 *There should be a review of the impacts of the STRA policy framework on housing market changes (including cost and availability) after the first 3 years and again after 5 years following commencement of the new STRA framework.*
- 7 *The NSW Government commits funds for ongoing research beyond the first twelve months from commencement of the STRA framework, to monitor the local impacts of STRA and inform future policy directions.*
- 8 *DP&E should revise the STRA definition and/or add explanatory notes to clarify the terms 'short-term' and 'tourist and visitor accommodation'.*
- 9 *DP&E should clarify whether STRA will be excluded from other forms of accommodation (such as manufactured and relocatable homes).*
- 10 *All communication material produced by DP&E and DFSI when the changes come into effect should contain clear and thorough explanations of key words and phrases used in relation to STRA.*
- 11 *That the planning changes include a clear definition of the 'host' as the 'long term resident' in relation to a STRA property. Further, this definition must be consistent with the relevant definitions used in the mandatory code of conduct.*
- 12 *DP&E should clarify whether the number of days applies to 'actual bookings' or 'availability' of the premises for STRA.*
- 13 *It is recommended that the DP&E advise the exact process which councils will be required to follow, should they choose to seek an amendment to the 365-day default cap in the future.*
- 14 *The exempt and complying criteria should include a requirement for contact details to be made available via on-site signage and notification to immediate neighbours.*
- 15 *DFSI and DP&E clarify how the code of conduct will handle noise and amenity issues reported by councils or the NSW Police.*
- 16 *The planning system and code of conduct could be linked if the criteria for STRA under the exempt and complying pathways included a requirement to comply with the code of conduct. This would help enable amenity and environmental issues to be managed through the of the code of conduct procedures.*

17 *DP&E should advise how existing use rights and properties on flood-prone land will be handled, and whether the proposed planning changes will affect existing regulatory requirements for swimming pool inspections.*