

TRANSCRIPT

STANDING COMMITTEE ON THE ENVIRONMENT AND PLANNING

Inquiry into the Owners Corporations Amendment (Short Stay Accommodation) Bill 2016

Melbourne — 24 March 2017

Members

Mr David Davis — Chair

Ms Samantha Dunn

Ms Harriet Shing — Deputy Chair

Mr Khalil Eideh

Ms Melina Bath

Mr Cesar Melhem

Mr Richard Dalla-Riva

Mr Daniel Young

Participating Members

Mr Greg Barber

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Ms Colleen Hartland

Staff

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Witnesses

Mr Trevor Atherton (affirmed), chair of regulations and government relations committee, and

Ms Andrea Wilson (affirmed), president, Holiday Rental Industry Association.

The DEPUTY CHAIR — All right. We might kick off the, it being 10 am. So I would like to welcome members of the public to today's hearing from the Environment and Planning Committee insofar as it's inquiring into the Owners Corporation Amendment (Short Stay Accommodation Bill) 2016.

We will be having the Chair, David Davis, arrive at some point but as the Deputy Chair what I might do is kick things off so that we can keep to schedule today. We have got a number of witnesses from which we need to hear. So the Committee is hearing evidence today in relation to an inquiry into the Owners Corporation Amendment (Short Stay Accommodation Bill) 2016 and that evidence is being recorded by Hansard.

To the witnesses that who are here today for our first hearing, Mr Atherton and Ms Wilson, welcome to the public hearings of this particular Committee. Just to advise you that all evidence taken at this hearing is protected by parliamentary privilege, therefore you are protected against any action for what you say here today, but if you do go outside and repeat the same things, those comments may not be protected by this same privilege.

I would invite you to make a submission and some opening remarks to the Committee. What I would ask you to do is to keep those remarks to five or ten minutes. What we would then like to do is to be able to ask you some questions, so that will allow us the maximum amount of time necessary to do that.

So over to you, to work out how you would like to proceed.

Mr ATHERTON — So Deputy Chair, I appear on behalf of the Holiday Rental Industry Association of which I am a founding director and presently the Chair of the Regulations and Government Relations Committee. I appear with my colleague, Andrea Wilson, who is President of the Association and is managing director of her own well-respected short-term rental management business in Victoria called Holiday Shacks.

The HRIA was launched in 2012 as the peak National body to represent the Short Term Rental Industry of Australia. Members include owners, agents and the major digital distribution platforms. Through current membership, we represent over 50 000 properties spread across 1500 destinations around Australia.

Personally, I have been involved in tourism all my working life, as a lawyer, policy advisor, investor, operator including the last 15 or so years in short-term rental which for simplicity I will call STR. I have also specialised in property law in practice and academe and including I taught strata title law at Bond University for seven years where I was an assistant professor.

I have been a key advisor to the HRIA and other stakeholders through the Victorian panel process, and through similar processes in other States throughout Australia, and in all the leading cases that have been litigated in Australia.

Our submission of 22 December provides a comprehensive review and analysis of the legislation from the industry's perspective and it does three things; it rebuts a lot of the negative propositions put by opponents of STR, it highlights some of the unintended consequences that we think would flow if the bill was legislated.

And thirdly it makes a series of recommendations. Let me just highlight a few key points about those things. I won't repeat them obviously because they are in the submission and we can talk about them.

The DEPUTY CHAIR — Yes, you can take that as read, that the recommendations and conclusions have been received.

Mr ATHERTON — So in relation to the negative propositions, I would just like to say this. In the course of the proceedings, the Committee will no doubt hear many negative assertions, allegations and misconceptions about short-term rental. When considering these, I respectfully urge the Committee to go back and test them against the material we've provided. Generally, there is no research or robust evidence to support them, and they do not stand up to critical analysis.

The DEPUTY CHAIR — Now, just to interrupt you there, Mr Atherton. I note that you appear to be reading from a document which is *Opening for Trevor Atherton*.

Mr ATHERTON — Sure.

The DEPUTY CHAIR — And that's a document of some five pages in length. Given the time that we have and the fact that we can actually have this incorporated into the materials by the secretariat and noted as having received. Perhaps you might want to add to what's in this document in relation to the key concerns. One of the opportunities that you have today is to expand upon what you have got in writing with further oral evidence.

Mr DALLA-RIVA — Anything within, I think, Deputy Chair that — that within the five pages you think should be the real — —

Mr ATHERTON — All right, okay.

The DEPUTY CHAIR — Yes, should be highlighted.

Mr DALLA-RIVA — Then maybe a few questions.

Mr ATHERTON — In terms of unintended consequences, if you recall from the panel process, the objective for the panel was not to interfere with property rights, not to damage tourism, and not to complicate divisiveness and litigation in owners corporations. We say this legislation does all of those things in spades, and so it really — the legislation doesn't reflect the objectives or the findings of the panel which is one of our main submissions, we've made it several times but it's a very important one because it suggests to us the legislation has not been well thought through and it's not been backed by all the research that had been done.

In terms of unintended consequences, I go through those in detail, I won't repeat those in this opening, but I discovered a new one yesterday. The legislation is designed to target short-term rental and to make owners and managers of short-term rental properties liable for the sins of their guests. So if their guests do something wrong, negligently or intentionally, the owner is vicariously liable.

This is against every fundamental principle of law and justice that there is. It is a very rare thing to do in legislation.

The DEPUTY CHAIR — Vicarious liability you mean?

Mr ATHERTON — To make an innocent party responsible — in employer/employee it arises, but that's about the only example. To make an innocent party responsible for the sins of another is a very rare thing because it's unfair.

The DEPUTY CHAIR — What about the landlord/tenant arrangement?

Mr ATHERTON — I'm sorry?

The DEPUTY CHAIR — So if you have a situation whereby a tenant causes damage to a third party, where a landlord might therefore be held responsible at law, that's a form of vicarious liability.

Mr ATHERTON — If the landlord has been negligent or is in some way responsible I agree, but just to make a person who is an innocent party responsible for the sins of another is rare. So for example, if I hire a car from Hertz and I drive it and crash into somebody, they don't sue Hertz, they sue me, the driver. The person who actually owns the property that's being rented is usually not responsible unless the car hasn't been properly serviced or they authorised them to do illegal things or whatever.

But the interesting thing is this. Is that that's quite draconian and quite — we say, quite unfair on owners and managers of short-term rental properties. But the unintended consequence is this. If you read the definitions very carefully it doesn't just catch owners and managers of short-term rental properties. It catches every owner of an apartment in a building who has anyone staying short-term, whether that be family or friends or relatives or even dates — I read an article last week in the paper, in one particular building in Sydney, there is more short-term arrivals from dates on Tinder and Grindr, said the person, than there are short-term rentals.

So there's all sorts of people coming and staying in buildings short-term. So even an owner having any of those people stay, and you'd be a very unfortunate and sad person not to have friends and family and lovers staying from time to time, you'd have thought, those people, unless you've got none of those people staying, you're caught by this legislation.

So your children stay for the weekend and they leave a pot boiling on the stove and the building burns down, you are responsible.

The DEPUTY CHAIR — How does that fit with the purpose of the Bill itself?

Mr ATHERTON — Totally contradicts the purpose of the Bill — —

The DEPUTY CHAIR — So how is that then able to be incorporated, and as a lawyer, you would understand that you need to be bound by the way in which the Bill is constructed.

Mr ATHERTON — Sure.

The DEPUTY CHAIR — So if that's at odds fundamentally with the purpose, which is the evidence that you've just given, how is that actually something that catches the sorts of situations that you've just outlined?

Mr ATHERTON — Because that's what the definitions mean. The definitions look at short-stay occupants and short-stay occupants are anybody who had a tenancy or a lease or a licence to be there. When someone comes onto your property, by legal definition they have a licence or a permission to be there. A licence means permission to be there. I am putting my old property law lecturer hat on now. So a licence means permission to be there.

So if you are the owner and you give anyone permission to stay in your property short-term, that's a licence — that's a short-term stay arrangement as is defined in the legislation. So you are caught. You are liable to pay compensation if they misbehave and cause interference. You're responsible for repairs and damage to the property, et cetera.

All those quite tough things that are imposed on short-term renters, in fact, fall upon everybody in the building who has a person staying for less than — no more than six nights, and I think that's an unintended consequence.

Mr DALLA-RIVA — Yes. Can I ask, what section is that within the Bill and I have asked for copies of the Bill so just give us some guidance.

Mr ATHERTON — So the definition — —

Mr DALLA-RIVA — As you could imagine — —

Mr ATHERTON — Okay.

Mr DALLA-RIVA — Just so everyone knows the process, is that the legislation's come from the Lower House. It then goes to our Chamber. We have referred it off to one of these standing committees of which we are all part of.

Mr ATHERTON — Yep.

Mr DALLA-RIVA — So some may have more in-depth knowledge of the Bill.

Mr ATHERTON — Sure.

Mr DALLA-RIVA — So this is about taking evidence. I should also just remind everyone the terms that the Chamber had established for members of parliament, are the terms of reference. I gather everyone has been given a copy of that. So we are bound by the Chamber, who has directed us to look at the three outcomes and the date that we have to report.

So I don't know if the secretariat want to make sure that that's provided again to everyone, but just so we've got coverage, so we don't venture into areas outside of our area.

Mr ATHERTON — I think it's is a very important point.

Mr DALLA-RIVA — I accept that. I accept that.

Mr ATHERTON — So section 4 — definitions, the definition of short-stay accommodation arrangements ‘means a lease or licence for a maximum period of seven days and six nights to occupy a lot or part of a lot affected by an Owners Corporation’. Licence at law has a very clear meaning. Licence is a permission. Permission to be there. A licence can either be for reward or it can be gratuitous.

If a licence is gratuitous, it’s no more than a defence to trespass. It’s just your permission to be there. So you invite the children over for the weekend or the relatives or anyone else into your place for no more than six nights, that is a short-stay accommodation arrangement and all that is in the Bill then follows and your liability

— —

The DEPUTY CHAIR — Could you just read the purpose into the record as well, please? Just so that again we’ve got the context around the way in which this Bill has been drafted for specific reasons.

Mr ATHERTON — ‘The purpose is to amend the Owners Corporation Act’ — this is in Section 1.

The DEPUTY CHAIR — Yes.

Mr ATHERTON — ‘To regulate the provision of short-stay accommodation arrangements in lots’.

The DEPUTY CHAIR — Thank you.

Mr ATHERTON — So that’s the purpose. It uses this term short-stay accommodation arrangement, well I’ve just read you the definition of that.

The DEPUTY CHAIR — Yes.

Mr ATHERTON — So the definition has — by the definition it is widened to capture everybody in the building who has someone to stay over. I think that’s quite clear actually, because why should one group of users of a building be treated any differently from another? Why should the building target and discriminate against short-term rental when the things are risks and issues in a building, interference with amenity, damage to property; these are serious risks to a building. The Bill should apply to everybody. So I am actually quite pleased to discover that because in many other respects, the Bill doesn’t apply to other owners, but we do notice that in this respect it does, and that may give opponents to the building who actually want to use this as a tool to discourage or really prohibit short-term rental. It may give them some pause for thought.

The DEPUTY CHAIR — Ms Wilson, would you like to add anything to what Mr Atherton said?

Ms WILSON — Mr Atherton has been a key speaker for the HRIA.

The DEPUTY CHAIR — Okay, that’s fine, I just want to make sure that you have an opportunity to add anything else that you wish to say.

Ms WILSON — Thanks so much.

Mr ATHERTON — You are here beside me, that all that matters.

The DEPUTY CHAIR — And you do have an opportunity to do that so that’s incorporated into what we have dealt with.

Ms WILSON — Thank you.

Mr ATHERTON — The last point, we are talking recommendations, right.

The DEPUTY CHAIR — Yes.

Mr ATHERTON — So we make two main recommendations. The first is that, and this was the main recommendation of the panel. The industry’s self-regulatory code of conduct is a tool which if properly implemented would deal with most of these issues. We say this sort of legislation is unnecessary because the holiday rental code of conduct which the panel found to be the most effective way of dealing with what essentially are behavioural issues, the panel recommend that — that was their prime recommendation, to use the code of conduct rather than legislation.

So our primary recommendation is that this Committee ought to recommend that this legislation be deferred for a period of two years to allow the code to be properly promoted and implemented and tested to see whether this sort of draconian legislation is really necessary.

The DEPUTY CHAIR — So when you're talking about the code to be — well, the purpose of the two-year trial that you're looking for. What do you see as being capable of being achieved during that time, where the code is effectively a soft code?

Mr ATHERTON — I think what we could do, we could carefully monitor the level of complaints and issues that we have now. We could carefully monitor and measure how those complaints are dealt with as the code is — the code can be more robust in some respects to deal with these issues.

We can monitor how well the code deals with that. We can tinker with code and when new issues arise or if we find new ways of dealing with issues, we can implement them and then by the end of two years, the government will have real data and that's what's missing from this whole scenario. Real data to go on and say, 'Well, these really are issues. The industry can't get its act together. We do have to legislate'.

The DEPUTY CHAIR — So what's the tipping point at which we move from soft regulation into something harder, and when would you stop being satisfied with that as a process to enable these issues to be properly explored? I mean, on the one hand we have a Bill which you say is draconian and completely unnecessary; on the hand we've got a code which is voluntary and soft. Where is the point at which things change from something which is acceptable in your view to something which is not?

Mr ATHERTON — When the level of complaints and the level of discontent with short-term rentals in apartment buildings, when that subsides, I think you will be able to judge that the code is working. If those level of complaints and the level of discontent in apartment buildings don't subside and the evidence shows that the problem is short-term rentals, and not other people in the building misbehaving, then I think the government will have the proper research basis then to proceed down this more draconian path.

The DEPUTY CHAIR — So one of the things — to take you back to the terms of reference for this particular inquiry, relates to the impact on individuals, families, apartment owners and owners corporations of short-stay letting, so that's not a licence arrangement. It fits within the definition of a short-stay provider which means the owner of the a lot or part of a lot that is leased or licensed by the owner to a person under a short-stay accommodation arrangement. So arguable then, it does become more specific around the way in which that occurs and arises.

How do we actually get to a point where we can properly understand that impact if the goal posts are consistently changing with that two year period? This is what I'm trying to flesh out in the context of the evidence that you've just given.

Mr ATHERTON — Deputy Chair, we would be hoping to convince you that this legislation should be put to one side and looked at again in two years' time.

Ms HARTLAND — Why? I mean — —

Mr ATHERTON — Because it is draconian — —

Ms HARTLAND — If I could finish the question. I have been to a number of community meetings in Docklands with both — I am Colleen Hartland, I represent the Western Suburbs, but I have been to a number of community meetings with Dockland residents with our councillors and other people, for years I've been getting horrendous stories about misbehaviour of short-term leases. So how long do the other tenants have to put up with that behaviour before it's rectified? And if you've got a code of conduct, why isn't it working?

Ms WILSON — Can I just say something? The HRIA has actually implemented a trial using the code of conduct in one building in the city at the moment with the owners corporation's agreement. So that building is Flinders Wharf. So we implemented the trial in December, the 16th, just right before the key high period where obviously there's lots of disturbance and noise, we think. And we released this on 16 December, along with key brochures, information that were disseminated to 300 of the residents, property owners, property managers in that building. So the mix in that building is there's about 73, 74 short-term accommodation businesses. There is a further 13 or 14 run Airbnb apartments and the rest are residents of that building.

So the brochures which clearly explained what the code of conduct was about, the purpose of the code and it's designed so if there was any complaints within the building within that period of time to explain the trial, then those complaints would be forwarded to the appropriate organisation being the HRIA, and so we've been working quite closely with owners corporation during this period of the trial to oversee and investigate the number of complaints, and what might arise from that collect data.

So it has actually been quite an interesting process. It's the first of its kind in Melbourne and there are other owners corporation buildings that are looking to come on board as well. They are really interested to be educated around what the code of conduct can offer them to assist with compliance, and so by way of example we are actually presenting at the Southbank Residents Association in the next few weeks at their next meeting to actually — —

The DEPUTY CHAIR — And they are appearing later today.

Ms WILSON — Yes. To educate them more fully. But — in essence this trial has been quite an interesting one. At the moment we haven't received adverse complaints, in fact we haven't received any negative complaints whatsoever, and we report in and check in on a regular basis with the president of that owners corporation.

The DEPUTY CHAIR — How many complaints had you had previously before the trial in December?

Ms WILSON — In Victoria?

The DEPUTY CHAIR — No, no, from Flinders Wharf. So again, if we're comparing apples with apples we need to look at the period before you implemented this process —

Ms WILSON — Certainly.

The DEPUTY CHAIR — of education and information and the way in which people understood the way in which the code would work.

Ms WILSON — Of course.

The DEPUTY CHAIR — Versus after.

Ms WILSON — Yes.

The DEPUTY CHAIR — So what does that look like?

Ms WILSON — Well, Flinders Wharf there hadn't been any data that had come from Flinders Wharf. We operate complaints, we receive complaints from around the country as a National body, however more specifically we were focused on Victoria around this complaint data in recent times. So nothing had been flagged to us in previous times from — —

The DEPUTY CHAIR — So you went from — so you applied a situation around the code of conduct to an area or a specific location at Flinders Wharf which hadn't had any complaints, and as a consequence of — sorry, and you introduced a process of information dissemination, assistance and resources provided to residents and owners whether through Airbnb or short-stay accommodation and residents, I suppose, and that off the back of that, you still had no complaints?

Ms WILSON — Not to our knowledge there hadn't been any complaints. There obviously was opposition within the owners corporation as to what short-stay actually meant, so what short-term rental meant. So this was about an education process as much as it was to collect data.

The DEPUTY CHAIR — So just — what benefit did that convey then, if we went from zero net complaints to zero net complaints with information being provided in the meantime?

Ms WILSON — Yes.

The DEPUTY CHAIR — I'm trying to understand — —

Mr ATHERTON — I can help on that, Deputy Chair. We have found in other situations, when the code is promoted it usually generates complaints, when people know they have an avenue for complaint and action will be taken, it usually generates complaints. So we're as surprised as the Committee that there haven't been — —

Ms HARTLAND — Why not use it in a building where there have been complaints?

Mr ATHERTON — That is our desire, yes.

Ms WILSON — That is our desire. This is — —

Ms HARTLAND — So you must identified buildings where there have been complaints so why not target one of those buildings or have you had no complaints?

Ms WILSON — We are still running the trial.

Ms HARTLAND — No, no, I'm asking about why not use it in a building where there's already been complaints, or have you not had any complaints, nobody's actually asked to use this process?

Ms WILSON — We have checked in regularly concierge — —

Ms HARTLAND — No, no, I asked is there a building that you would have had complaints from previously and why have you not used that building as a base, rather than a building where you've received no complaints from?

Ms WILSON — The owners corporation has to agree to come on board and — —

Mr DALLA-RIVA — In that, Ms Hartland — —

Ms HARTLAND — That's not the question I was asking.

Mr DALLA-RIVA — Yeah. And that was — I wrote that earlier on. You said of the 300 residents, 73, 74, 13, 14 you, in your evidence said and I put this in quotation, 'With the owners corporation agreement'.

Ms WILSON — Yeah.

Mr DALLA-RIVA — So for me it was that I guess it requires — if the owners corporation do not agree then they don't have to comply with the guidelines?

Ms WILSON — It's a voluntary — —

Mr ATHERTON — No, no, in fact, that's not quite right.

Mr DALLA-RIVA — Hang on, hang on. That's not your evidence. This is the evidence from Ms Wilson. I've tried to get — so you said it's with the agreement of the owners corp agreement. That was what you said and that's why I wrote it down.

Ms WILSON — If I may take a step back. This building approached us to actually run the trial so it was with consultation, we met with them and then the president took the trial information to the owners corporation at their next meeting.

Ms HARTLAND — So why — can I just ask why the owners corporation approached you for a trial if they hadn't had any complaints prior to the trial? What was the reason for them actually — —

Ms WILSON — I'm not sure if they had or hadn't had any complaints prior to the trial, that has to be something — —

The DEPUTY CHAIR — You said there were no complaints.

Ms WILSON — Well, not to my knowledge, not to my knowledge, that has not been tabled.

Ms HARTLAND — Or were there complaints or not? Sorry, we need to be really clear about this.

Ms WILSON — Yes, certainly.

Ms HARTLAND — Were there complaints before this trial or not?

Ms WILSON — What there was, was a lot of public discussion around this matter, and the president wanted to actually educate those within — on the owners corporation and others within the building, about what the code could offer. So she approached us keen to run this trial to actually see what it would result in.

Ms HARTLAND — But you, yourselves had not received any complaints in relation to the Flinders Wharf location before being approached by the owners corporation?

Ms WILSON — Not as a national body, no.

The DEPUTY CHAIR — Okay. Thank you.

Mr ATHERTON — Might I just add, the code applies to the building, whether the owners corporation agrees or not because the code binds the owner and the code binds the manager.

The DEPUTY CHAIR — How?

Mr ATHERTON — It binds and requires the owner to set very strict terms and conditions which govern the guest stay and the guest — the terms and conditions say, ‘You will behave or you will be thrown out’ summarily.

Mr DALLA-RIVA — But how?

Ms HARTLAND — How?

The DEPUTY CHAIR — How does it do that?

Mr DALLA-RIVA — I don’t get it.

Mr ATHERTON — It’s a contractual term and condition.

Ms HARTLAND — With who?

Mr ATHERTON — With the guest. So the guest breaks the contract, the guest ceases to have permission to be there. They become a trespasser and they are evicted and this happens all the time around the country and that’s how the code works.

Ms HARTLAND — How many buildings or how many short-term lease arrangements, are there in Melbourne that are using this code?

Mr ATHERTON — Everyone should be.

Ms HARTLAND — No, how many are?

Mr ATHERTON — As far as I know, everyone I know of is.

Ms HARTLAND — How many are?

Mr ATHERTON — Honestly I don’t know.

Ms HARTLAND — Could you seek that information, please because it’s really important.

Mr ATHERTON — Because — —

Ms HARTLAND — No, no, I asked a question. Can you see that information for us?

The DEPUTY CHAIR — If you can provide that to the secretariat after the hearing that would be helpful.

Mr ATHERTON — Yes, after the hearing. We only hear about it by exception.

The DEPUTY CHAIR — This is the great challenge that we have though with the evidence that we need to be able to assess. This is an inquiry that requires us to look at — to analyse forensically the data that we have, that we receive through evidence and where you're referring to anecdotal data, where you are referring to problems only being raised with you informally because you don't, in the case of Flinders Wharf at least, have any formal complaints to the national body.

We need more than that in terms of understanding why it is that you formed a conclusion that this is a draconian measure because the code, in and of itself, is good enough.

Mr ATHERTON — Maybe if I just explain better how the code works. The code puts an obligation on the owner and the manager to impose strict terms and conditions upon guests.

Mr DALLA-RIVA — Let me — so I want to go down to the Docklands. The Etihad — it is still Etihad?

The DEPUTY CHAIR — Today it is.

Mr DALLA-RIVA — So I go down there and I have a short-term arrangement with — —

Mr ATHERTON — Your neighbour?

Mr DALLA-RIVA — No, no, I want to go down there.

Mr ATHERTON — You are a guest.

Mr DALLA-RIVA — I want to spend the weekend watching footy.

Mr ATHERTON — Sure.

Mr DALLA-RIVA — Or Kiss is one of my favourite — —

Mr ATHERTON — Yep.

Mr DALLA-RIVA — Anyway, so I go down there and where in the code do — this is what I am trying to get around. Where is it me as a short term tenant see this code and it says to me that I cannot misbehave on these certain circumstances. Where is in the agreement?

Mr ATHERTON — It is in your contract with the owner when you book the property.

Mr DALLA-RIVA — But that's assuming that the owners corporation has — —

Mr ATHERTON — No, no, no, nothing to do with the owners corporation. The owner.

The DEPUTY CHAIR — Yes, that assumes that the owner has opted into the code.

Mr ATHERTON — Sure.

The DEPUTY CHAIR — And you said they should do but they are not required to.

Mr ATHERTON — I will tell you why they should because they — because the major portal Stayz and TripAdvisor FlipKey require their listed owners to abide by the code.

Mr DALLA-RIVA — Yep, understand.

Mr ATHERTON — The code requires them to have these terms of conditions.

Mr DALLA-RIVA — Is there a cost for the code?

Mr ATHERTON — No. It is self-regulatory.

Mr DALLA-RIVA — So I sit there and say, 'No, I can't be bothered with regulation as an owner. I'm just going to rent it out'.

Mr ATHERTON — Yep. The first time there's a complaint about you to the HRIA, it will be — they will say 'Are you complying with the code? Show us your terms and conditions'. You're not using them. You will be struck off. You will be delisted.

The DEPUTY CHAIR — So we are if we're only relying on the code, how do we deal with party houses?

Ms HARTLAND — Where neighbouring families and individuals report that they're being negatively —

Mr ATHERTON — Delisted. They're delisted.

The DEPUTY CHAIR — If they're not a member?

Mr ATHERTON — From the portals. No, no, they're delisted if they misbehave. If they don't — —

The DEPUTY CHAIR — Delisted from where?

Mr ATHERTON — Sorry?

The DEPUTY CHAIR — Delisted from your organisation?

Mr ATHERTON — Delisted from their listing on Stayz. Their property is no longer advertised for short-term rental.

The DEPUTY CHAIR — But how do you do that?

Mr ATHERTON — Just delist it. Stayz — —

The DEPUTY CHAIR — But how?

Mr ATHERTON — Stayz takes them off.

The DEPUTY CHAIR — How is that done?

Mr ATHERTON — They just — Stayz — they have a contract with Stayz saying 'These are the rules of your listing. You will abide by the code'.

Ms HARTLAND — Can you supply us with the evidence that says that that has actually happened in the past?

Mr ATHERTON — Absolutely.

The DEPUTY CHAIR — The other thing that Mr Atherton you've said is that they should be applying the code and you talk about providers and if you're talking about Stayz or other organisations, you referred to, was it Holiday Shacks or one of the other organisations? How many of these actually require the code to be applied as a condition for the provision of listing within their service?

Mr ATHERTON — Stayz, which is the largest entire property rental agency in the country. FlipKey which is a division of TripAdvisor. Airbnb, we are trying to persuade Airbnb to go that far.

The DEPUTY CHAIR — So they don't?

Mr ATHERTON — They don't. They have their own scheme which I guess they will talk about on another day.

The DEPUTY CHAIR — What about Couchsurfing and others?

Mr ATHERTON — We're not representing Couchsurfing, we — —

The DEPUTY CHAIR — No, no, I know. But, you know, this is the challenge, I think, that seems to be being fleshed out from the questions that this committee is asking is, if there is no requirement to opt in through the purposes of promotion, advertising or listing, and you say that there should be, but if there is not and the

code doesn't therefore apply, in terms of the implementation of those rights and entitlements for other people to have quiet enjoyment of the amenity, then don't they therefore fall out of the system, meaning that, you know — it is all fine until something goes wrong.

Mr ATHERTON — I understand, but it's a bit like councils have all sorts of rules and regulations and they manage them by exception. You would have to have a huge army of enforcement agents going through every person's property, on every single issue to make sure they're complying with the vast number of council regulations. It's impossible. So councils manage by exception and we manage by exception. We respond to complaints.

When there's a complaint you say, 'Okay, here's evidence of a property where something is going wrong'. We then drill down and say, 'Are you abiding by the code of conduct?' 'Show us your terms and conditions'. 'Are you properly screening guests?' 'Why weren't these people evicted?' 'How come it happened twice in a row?'

The DEPUTY CHAIR — So why is it that the Bill would be draconian where it would require everyone to comply with a minimum set of rules and regulations to apply across the board if there is a provision — —

Mr ATHERTON — Because the Bill introduces things like virtually unlimited liability for amenity. It introduces virtually unlimited liability for damage to property. It introduces fines. It puts in the hands of owners corporations a tool, a very serious powerful tools, which have the potential to be misused in unfair and vexatious ways.

The DEPUTY CHAIR — That's the case with any legislation though, isn't it? It's not about the legislation. It's about the implementation and where you have a vexatious or an improper purpose for using a power under legislation then the exercise of that power's invalid. I mean, you'd know that from legal practice.

Mr ATHERTON — Deputy Chair, if you are punishing the wrongdoer I have no problem with it. If you're punishing a murderer or rapist, hang them from the tree, that's fine. But if you're punishing an innocent person for the sins of another, it's an altogether different matter. It's unfair. It's unjust.

The DEPUTY CHAIR — So how do we reconcile that then with the public perception that where somebody makes a profit from an arrangement whereby their facility is able to be used and takes on the risk associated with that.

Mr ATHERTON — Sure.

The DEPUTY CHAIR — That they should not then be held responsible, at least to some degree, for anything that arises in the course of that — that profit making exercise?

Mr ATHERTON — One good reason is this. A landlord of a long term tenancy is not so liable for a tenant. In an apartment building, if a landlord lets their property to a long-term tenant, they can have a party every night, they can damage common property. They can all those sorts of things, and the person liable is the occupier, the tenant. The person liable is not the owner.

So this Bill changes all that and says if it's a short-term arrangement that usual rule which applies all around the country is not going to apply here. We're going to make the owner, the innocent owner, liable for the sins of a third person.

The DEPUTY CHAIR — So who should be responsible where the owner takes — —

Mr ATHERTON — The guest, the misbehaving guest. Throw the book at the misbehaving guest and we will bend over backwards to help you do that.

The DEPUTY CHAIR — Let's have a look at how that works in practice. All right. So if you are looking at pursuing somebody who has gotten together for a party house scenario. Invited around 150 of their closest friends. The police arrive. Everything is trashed. You know, areas of common usage such as foyers or lift wells or whatever are irreparably damaged, and you then go to try to find the person who's responsible and they have gone back to the United States, what then?

Mr ATHERTON — So this is where we would want to work closely with the government and with owners corporations because we think we have a better approach to that, and the better approach is this. The person who is really at fault here is the guest and they may have fled to the US. As part of the terms and conditions we take a bond. We take security from the guest for damage to amenity, damage to property, all those sorts of things.

The DEPUTY CHAIR — Say it's a \$500 bond. What happens in the event that we've got \$50 000 worth of damage?

Mr ATHERTON — Let's start with the small ones first so we can get to the harder ones then, right. So take the fine of \$2000 for interference with amenity. That's a fairly serious penalty, for a guest to pay. The weaknesses in the legislation is now, you do not give us a chance to impose that on the guest, because there is no time limit on when a lot owner or the owners corporation can make a complaint. It might be a week, it might be a month, it might be six months later. By that time the guest has gone back to the United States. They've already been given back their bond. The owners got no hold over them.

So if the legislation proceeds, one of the requirements we're suggesting is require the lot owner or the OC to be very prompt in taking action and to making a complaint, so that the owner has the opportunity to enforce the terms and conditions and the code and make the culprit pay.

So for example, if the legislation said the owners corporation shall, within 48 hours after departure of the guest, inform the owner that there is a problem and a complaint, the owner will then freeze the bond, right, and there's a fund, and there's a mechanism in place then, to make the culprit pay.

The DEPUTY CHAIR — And a party house situation? Let's go to the \$50 000 worth of damage scenario. They're the sorts of things that get discussed on our airways and gets lots of — —

Mr ATHERTON — Sure. So if you take such a cash bond, obviously no one's going to put a cash bond of \$50 000 up. But a more common practice these days is to take a credit card imprint and a credit card imprint is for a much larger amount. So up to a reasonable amount — up to a reasonable amount for damage, right, we can cover it. If the damage has become huge, I'm afraid that's a matter that has to be insured.

The DEPUTY CHAIR — So that would then be the owner's responsibility.

Mr ATHERTON — Under your legislation yes, and we say that's unfair.

The DEPUTY CHAIR — All right.

Mr EIDEH — Just one question of the HRIA. This code of conduct with the New South Wales government was completed in 2014. Has the result of this trial been published, and if so, are you in a position to comment on those trials?

Mr ATHERTON — Thank you, member, for raising that, because in fact the code was borne from — when the New South Wales government reached this situation five years ago and there were calls for legislation to deal with short-term rental, the government said, 'Well, we don't want to bring in all sorts of new draconian legislation. Is there any other way this can be done?' And the government worked with the industry to develop the self-regulatory code of conduct and the government has said, 'Give the code of conduct a trial period to see whether it can self-regulate and resolve the problems'.

That trial period expired some years ago and then the government held an inquiry, just like this inquiry, to say 'Well, has the code worked?' 'Is there anything else we should do?' And the committee that handed down its findings last year strongly endorsed the code and the strengthening of the code and the further rollout of the code, and then supplemented that with some planning provisions which imposed some more controls.

Now, I think, as we've said in our submission, it's difficult to impose the planning controls in Victoria because this is a permitted use. It is a legal use in Melbourne CBD. So unlike in New South Wales where it is illegal and the government is looking to legalise it, they can impose some planning provisions. Unfortunately in Victoria your hands a bit tied because it is a legal use, and as we all know, you can't come along after a land use is legal and make it illegal without paying compensation.

So the government's hands in Victoria are, to some extent and we concede this, are to some extent tied because you can't — it's difficult to impose planning type controls. So I guess that's why you've had to focus on what we say is draconian legislation and we have sympathy for that cause, but that doesn't stop us from pointing out things that we think are unfair and it doesn't stop us from pointing out things that we think could, quite easily be, tweaked to make less unfair and we say work better, to achieve the objective.

Ms HARTLAND — I've never actually found a self-monitoring scheme on a range of issues that actually works for the betterment of other community members. Why is it that you think that a self-monitoring system would actually assist other tenants in a building? And if I can go back to my previous question which was not answered. You are doing this trial at Flinders Wharf, can you describe or can you tell us a building where you have had a number of complaints from, and why didn't you choose a building that already had a number of complaints, rather than a building that has had no complaints?

Mr ATHERTON — If I could answer the first part of your question first, when you are saying you don't have faith in a self-monitoring thing.

Ms HARTLAND — No, I don't. I don't. That's my experience.

Mr ATHERTON — Okay. Good and I share that, I share that view.

Ms HARTLAND — Then why are you arguing for self-monitoring?

Mr ATHERTON — This is different.

Ms HARTLAND — Why?

Mr ATHERTON — Because this is not self-monitoring.

Ms HARTLAND — How is it not self-monitoring?

Mr ATHERTON — Because the people who complain are the neighbours. What triggers the code are neighbour complaints. The neighbours can have — there is a hotline on our website. The neighbour can complain that this particular owner and this guest is misbehaving. The owner's not doing the right thing. 'We're complaining to you under the code'.

Ms HARTLAND — And if the owner is not a member of your association what happens to the residents?

Mr ATHERTON — If they have got their property listed on Stayz, they'll be struck off.

Ms HARTLAND — All right. And if they don't?

Mr DALLA-RIVA — Airbnb?

Mr ATHERTON — Airbnb, I invite this Committee to encourage Airbnb — —

Ms HARTLAND — No, no. No, we're asking you.

The DEPUTY CHAIR — The Airbnb listing is not struck off though because they are allowed to be there without agreeing to the code.

Mr ATHERTON — Airbnb has its own self-regulatory — —

The DEPUTY CHAIR — No, the question is they are not required to subscribe to the code before being listed on Airbnb currently.

Mr ATHERTON — It's a free county, and so they can — —

The DEPUTY CHAIR — No, but the answer is — —

Ms HARTLAND — So that's why self-monitoring doesn't work.

Mr ATHERTON — You could require them.

The DEPUTY CHAIR — No, the answer currently is no though, that Airbnb providers are not required to subscribe to the code.

Mr ATHERTON — Airbnb is a supporting organisation which means they endorse all the principles of the code — —

Ms HARTLAND — But they're not required to — —

Mr ATHERTON — They decide to do it in their own way.

Ms HARTLAND — Yeah. So they're not part of the self-monitoring. They not part of your scheme.

Mr ATHERTON — They have a different scheme of their own.

Ms HARTLAND — They're not part of your scheme.

Mr ATHERTON — They have their own scheme.

Ms HARTLAND — So a neighbour could not complain to you about Airbnb.

Mr ATHERTON — No, they complain to Airbnb and they get struck off.

Ms HARTLAND — Yeah, from what?

Mr ATHERTON — Airbnb.

Ms HARTLAND — You're not answering the question.

Mr ATHERTON — A misbehaving person can't say in business.

The DEPUTY CHAIR — All right. So someone who doesn't belong to any of those organisations and I can only presume there are quite a few out there, what happens to those?

Mr ATHERTON — They would not have a very high occupancy.

Ms HARTLAND — How do you know that?

Mr DALLA-RIVA — I go onto Gumtree and I advertise one of my properties — —

Ms HARTLAND — Or craigslist or one of the others.

Mr ATHERTON — As a long term practitioner in this business, they would not have a very high — they wouldn't be viable. Unless you're on Stayz, Airbnb and FlipKey, you're really — your occupancy will not cover your rates.

Ms HARTLAND — How many are on Stayz? How many people, you know, owners have actually been struck off in the last few years?

Mr ATHERTON — I can get those statistics for you.

Ms HARTLAND — Yes. And of all the other sites as well.

Mr ATHERTON — Yes.

The DEPUTY CHAIR — So I think just to summarise then what we're asking you to provide on notice. In the first instance, the number of complaints that you have received overall.

Mr ATHERTON — To the HRIA, okay.

The DEPUTY CHAIR — And any sites where there has been a voluntary introduction of the code and the information that you described with Flinders Wharf that has had complaints and what the before and after data looks like, along with what Ms Hartland has just asked for as well.

Mr DALLA-RIVA — And you referenced a New South Wales — was it a select committee report?

Mr ATHERTON — The parliamentary inquiry committee, yeah.

Mr DALLA-RIVA — I'd like to see what their terms were and what they said.

The DEPUTY CHAIR — Along with any data that you provided to them in the course of your evidence to that inquiry.

Mr ATHERTON — Sure.

Mr DALLA-RIVA — Bear in mind that the process for this is that we then prepare a report which then goes to the Upper House.

Mr ATHERTON — I understand.

Mr DALLA-RIVA — And the Upper House themselves will look at the evidence. So we are requiring the evidence of which members in the Chamber will reference and we may end up going back to a committee-of-the-whole process where some of those issues that you've raised about the purposes clause of the Bill may be clarified by the minister at the table who then will tell you where the government's position, which then gives you the legal position, having been there, done that.

Mr ATHERTON — Member, I think and I'm asserting my opinion, I think they will have great difficulty because distinguishing between that kind of arrangement where you have friends or family or lovers or whatever, stay at your place short-term, and short-term rental there's not much difference because our — —

The DEPUTY CHAIR — Short-stay provider is defined in the Bill as 'the owner of a lot or part of lot that is leased or licensed by the owner to a person under a short-stay accommodation arrangement.'

Mr ATHERTON — Okay.

The DEPUTY CHAIR — So that might also then be an area of which the Minister at the table and the committee stage of the Bill's deliberation can provide that further clarity.

Mr ATHERTON — Sure. Because if you are licensing part — if you are letting someone stay in a bedroom, you are licensing part of the lot.

Mr DALLA-RIVA — And the evidence might be from the Minister at the table that that is not the government's intent and if that's the case then there may be (indistinct).

Mr ATHERTON — Sure.

The DEPUTY CHAIR — Well, clarified, not amended. So this is again we're talking about a legislative process that may result in clarification in the Bill Committee stage, rather than a substantive amendment to the Bill. Just so that you're aware of that.

Mr ATHERTON — I understand.

The DEPUTY CHAIR — All right. So if you're in a position to be able to provide the answers and the further information to the Secretariat, along with what you provided to the New South Wales inquiry that would be very, very useful, and any further information that you think is relevant for the purposes of the evidence that you've given here today.

On that basis, thank you for your contribution. We have run out of time in what is a very dense area and we could well spend days here but that is not possible.

You will receive a copy of the transcript in the coming days for proof reading and from there, the Committee will continue with its deliberations.

Ms WILSON — Okay.

The DEPUTY CHAIR — On that basis, thank you very much.

Mr ATHERTON — Thank you, very much.

Mr DALLA-RIVA — Thank you.

Witness withdrew.