

## OWNERS CORPORATIONS CANNOT RULE AGAINST AIRBNB TYPE OPERATIONS

The Victorian Supreme Court in [Owners Corporation PS501391P v Balcombe \[2016\] VSC 384](#) has decided that an Owners Corporation that sought to create a rule prohibiting short term tenancy use of apartments was invalid. This case has also attracted a lot of media attention, but with respect, a lot has been ill informed. This was a similar reaction to the Victorian Supreme Court decision dealing with a lease under which a tenant allowed an AirBnB customer to occupy the apartment [see our earlier article [here](#)].

The Court provided the following summary:-

*“1 The main question in this appeal is whether owners corporations (previously called bodies corporate) have the power to make a rule prohibiting short-term letting of apartments. I have found that, under both the Subdivision Act 1988 (Vic) (see paragraphs [99] to [124] below), the Owners Corporations Act 2006 (Vic) (see paragraphs [145] to [188] below) and the regulations made under those Acts, Parliament did not demonstrate an intention to confer such extensive powers on owners corporations principally for the following reasons:*

- (a) A review of the development of strata title legislation indicates the principal role of the body corporate or owners corporation was to manage and administer the common property of a strata subdivision.*
- (b) The relevant legislation does not disclose any intention for owners corporations to have power to substantially interfere with lot owners’ proprietary rights; or for owners corporations to effectively have an unappealable right to overrule uses permitted under planning legislation.*
- (c) A parliamentary intention to provide to owners corporations powers that could substantially inhibit the conduct of lot owners on their own lot would need to be expressed in clear and unambiguous language.*

*I have further found that the relevant rule, in this case, was not deemed to be valid by s 27(2C) of the Subdivision Act 1988 (Vic) (see paragraphs [128] to [132] below), or the transitional provisions of the Owners Corporations Act 2006 (Vic) (see paragraphs [136] to [144] below).”*

The Court noted the particular rule with its introductory comments as follows:-

*“13 At the inaugural general meeting of the appellant [Owners Corporation PS501391P] on 10 August 2004, the appellant adopted ‘Additional Rules’ by special resolution pursuant to reg 220(1) of the Subdivision (Body Corporate) Regulations 2001 (Vic). The Additional Rules were recorded with the Registrar of Titles on 21 September 2004 and included the following rule (‘Rule 34’):*

#### **34 RESTRICTIONS – CONDUCTING TRADE**

*34.1 The Proprietor or Occupier of a residential Lot must not use a Lot or the Common Property for any trade, profession or business (other than letting the Lot for residential accommodation to the same party for periods in excess of one month), nor permit any other person to do so, unless:*

- (a) The person conducting the trade, profession or business is a full time resident of the Lot and only operates a home office with a maximum one (1) employee; and*
- (b) The relevant planning scheme does not prohibit the relevant trade, profession or business to be carried on in a Lot; and*
- (c) The Lot owner has obtained all necessary permits from the relevant authorities to enable the relevant trade, profession or business to be carried on in a Lot.*

*34.2 Except for commercial/retail Lots, the Proprietor or Occupier of a residential Lot must not use that Lot or any part of the Common Property for any trade or business nor permit others to do so.”*

This decision was an appeal from VCAT which affirmed the VCAT decision.

Simply, the background to the case was that Balcombe lived in a high rise block of apartments known as Watergate Apartments and utilised her apartment in that block to conduct a business known as “Docklands Executive Apartments”. Balcombe utilised 14 apartments within the Watergate Apartments in her business for short term leasing. In evidence Balcombe claimed that there was a minimum 7 day lease.

The Court determined this decision on the basis of statutory interpretation and Parliament’s purpose in passing the Victorian legislation. It will be interesting to see whether this decision is appealed. Further, it will be interesting to see the Victorian State Governments foreshadowed “anti-party” legislation and the impact that it may have on short term leasing arrangements such as this case or AirBnB arrangements.

The Owners Corporations Amendment (Short stay Accommodation) Bill 2016 is currently before the Victorian Parliament.

This case should be contrasted with the earlier decision in [Swan V Uecker \(2016\) VSC 313 \(10 June 2016\)](#) [see our article [here](#)] which was whether a tenant under a residential lease and the right to allow AirBnB customers to occupy the apartment without the Landlord's prior consent. That decision did not refer to the rules of the Owners Corporation nor the ability of the Owners Corporation to make amendments to the rules.

It is arguable that the Owners Corporation should have the power to create rules prohibiting short term leasing, holiday letting or AirBnB type arrangements. The Court found that the legislation in New South Wales is far broader and would enable the valid making of such rules.

There is little doubt that these types of arrangements are generating enormous publicity and in some cases controversy. We await further developments.

**Date Published: 2 August 2016**

**Victor Hamit**  
**Wentworth Lawyers Pty Ltd**  
Level 40  
140 William Street  
MELBOURNE VIC 3000

Tel: +61 3 9607 8380  
Mobile +61 408 590 706

Email: [vhamit@wentworthlawyers.com.au](mailto:vhamit@wentworthlawyers.com.au)  
Website: [www.wentworthlawyers.com.au](http://www.wentworthlawyers.com.au)

*Disclaimer:*

*These materials are provided as a general guide on the subject only, not as specific advice on any particular matter or to any particular person. Please seek specific advice on your own particular circumstances as situations and facts vary.*

*Liability limited by a scheme approved under the Professional Standards Legislation*