

Airbnb? Not so fast!

The use of Airbnb is becoming increasingly popular in Australia's capital cities and, whilst it appears yet to gain any substantial traction in the Cairns region, no doubt this will come soon. We are already starting to see properties being advertised for sale as being suitable for a buyer to purchase as an investment, and then generate income through Airbnb.

For those who do not know, Airbnb is an online, short-term accommodation booking service, which allows individuals ("hosts") to place their property in the accommodation market, and for people looking for accommodation ("guests") to book private homes and other properties to stay in, rather than staying in a hotel. Airbnb charges a fee based on the rent for the stay. It, like Uber, has become a significant player in the digital, sharing economy. However, for those looking to list their property on Airbnb (and for their neighbours) things are not quite as simple as they seem. Some important issues to consider are:

1. town planning controls;
2. body corporate issues;
3. lease agreements;
4. insurance issues; and
5. security issues.

Town planning controls

Generally, the temporary use of a dwelling for short-term accommodation whilst the normally permanent resident is away on holidays or for some other reason, will not raise any town planning issues. In that situation, the use of the property remains a permanent residential use, and the temporary holiday accommodation is merely a minor, incidental use.

However, the position changes when the property begins to be used for short-term accommodation either on a full-time basis, or for a significant period of time so that it can be said that there has been a material change of use of the property from permanent residential to short-term accommodation, or perhaps both. There is no set, mathematical formula as to what constitutes a material change of use. It will be a question of fact and degree in a particular case, but certainly if a property is being used for short-term accommodation on a regular basis for more than a couple of months in a year, then the issue needs to be considered.

Making a material change of use to a property is likely to require a development approval, depending on the zone in which the property is located under the council's town planning scheme. This is particularly the case where the property is located in a residential zone in the planning scheme. In those zones, it is very likely that the owner of the property would need to make an application for a development approval, and that application would be impact assessable, meaning that it needs to be publicly advertised and members of the public (including neighbours) can make submissions about the application. This process can take several months and cost thousands of dollars, and there is a strong chance that the council would refuse to issue a development approval on the basis that it is not consistent with the planning scheme.

Carrying out development, such as making a material change of use from permanent residential to short-term accommodation, without a development approval is an offence under the *Planning Act*, for which the maximum penalty is \$567,675.00. Offenders can also be ordered to stop the offending conduct.

Body corporate issues

If the property is part of a community titles scheme, it may also be necessary to obtain permission from the body corporate to make the change of use. By-laws of community titles schemes cannot discriminate between different types of residential uses, such as short-term or long-term, however, if the property includes a car park, courtyard, balcony or other area which is exclusive use common property, then the application for development approval needs to include those areas. Because those areas are common property, the consent of the body corporate (as owner of the common property) is required in order to make the development application. The body corporate might well refuse to grant that consent.

The issue is also one which is receiving some attention in the context of law reform for community titles schemes. It may be that in the near future a body corporate is given the power to make by-laws which prohibit a lot within a scheme from being used for short-term or holiday accommodation.

Lease agreements

It is possible that a tenant who leases a property under a residential tenancy might choose to list the property on Airbnb in the hope of making more income from short-term accommodation rentals than the rent which they are required to pay under the residential tenancy agreement, and thus generate a profit. However, the tenant will require the landlord's permission to do so, as letting the property on Airbnb amounts to subleasing, which requires the landlord's consent under both the standard Residential Tenancies Authority tenancy agreement, and also under the *Residential Tenancies and Rooming Accommodation Act*. The landlord is perfectly at liberty to refuse that consent, and in our view would be prudent to do so, in order to maintain control over his or her asset.

Insurance issues

A person listing a property on Airbnb needs to carefully consider how that will impact on the insurance cover for the property. Many insurance policies have exclusions for damage or loss suffered or caused by a tenant or invitee of the insured. There are also common exclusions for business activities, which probably includes the business of providing short term accommodation. Therefore, if a guest rents the property through Airbnb and causes damage or steals some item of its contents, the host's insurance may not respond and cover the loss. Similarly, if a guest through Airbnb had a fall or accident and injured themselves on the property, the host might be held liable for damages and the insurance might not respond, which would be financially disastrous.

Other liability issues

As mentioned above, theft or damage to the property or its contents may not be covered by standard insurance policies. Airbnb does have what it calls a host guarantee contained in its terms and conditions. It covers up to \$1,000,000.00 in damage, with some exceptions. Airbnb itself, however, cautions that it is not a replacement for insurance. It may not necessarily cover the loss which the host suffers in a particular situation.

If the host is not covered by insurance, and the host guarantee does not help, then the host will be left to pursue the guest who caused the damage by suing them, or through criminal proceedings. The obvious problem is that guests using short-term accommodation are, by their nature, usually from out of town, and quite possibly from another country, which makes such proceedings difficult and probably prohibitively expensive.

Finally, if a property used for short-term accommodation is regularly the source of disruption and interference to neighbours, it is quite likely that the owner could be held liable to the neighbours for damages for nuisance, and their activities could be restrained by an injunction. This would require a repetition of incidents involving an unreasonable interference with the neighbours' peaceful enjoyment of their property, but nevertheless it is a significant possibility.

Conclusion

Airbnb may well be a lucrative and flexible way of maximising the use of a particular property. However, like any new activity, it is important to carefully consider the issues involved, and seek appropriate advice, in order to avoid making a costly mistake.

For more information about this issue and all property related matters please contact our accredited property law specialist and partner, Nigel Hales on 07 4036 9700.