RESPONSE TO THE OPTIONS PAPER ON SHORT-TERM HOLIDAY LETTING IN NSW (JULY 2017)

Dear Director

1. PURPOSE OF THIS LETTER

1.1 The purpose of this letter is to provide you with our response to, and comments on, the options available for regulating short-term holiday letting (STHL) or short-term rental accommodation (STRA) in NSW. These options were canvassed in the Options Paper released by the NSW Government in July 2017 (Options Paper). In particular, our response focuses upon the proposed options for regulating STRA under the NSW planning law regime.

1.2 At the outset, we are grateful for being afforded the opportunity to provide our response to the Options Paper by way of writing to the Director of Housing Policy, filling out the submission form or completing the online survey. We have elected to provide our response by way of this letter rather than filling out the submission form or completing the online survey. We have done so because this allows us to better focus our submission on our area of expertise, planning law and regulation, and gives us greater flexibility to properly set out our comments.

2. STRUCTURE OF THIS LETTER AND BACKGROUND OF THE AUTHORS

2.1 We have structured this letter by addressing each section of the Options Paper in turn below. Given that our area of expertise is not in strata law, we have decided not to make any comments with respect to STRA in strata properties (the subject of Section 5 of the Options Paper).

2.2 In producing this letter, we have drawn heavily on our academic article which critically examines the 2016 Final Report of the Legislative Assembly Committee on Environment and Planning (Inquiry Committee) into the adequacy of regulation for STHL in New South Wales. The citation for that article is as follows:


2.3 A copy of our original manuscript for this Local Government Law Journal article is produced at Appendix 1 to this letter. For convenience, we will simply refer to our article as follows in this letter: Dwyer and Orgill 2017. We emphasise that this manuscript forms a critical part of our submission on the Options Paper. This is because the manuscript considers many of the relevant issues in greater detail than this letter.

2.4 By way of background, please find a brief overview of our respective biographies below:

(a) Guy Dwyer is a lawyer at the global commercial law firm Ashurst in Sydney, where he practises in environmental, planning and mining law. He is also an Associate of the Centre for Environmental Law at Macquarie University. He holds a
Bachelor of Science with a Bachelor of Laws (First Class Honours) from Macquarie University, and is currently a Master of Laws (coursework) candidate at the University of New South Wales.

Guy is the updating author for a chapter on land use planning for the Estate Agents’ Practice Manual NSW, and is also the updating author for eight chapters relating to environment protection, biodiversity conservation, heritage and environmental dispute resolution for Planning Law in Australia (both loose-leaf services published by Thomson Reuters). He formerly held the position of Commissioning Editor of the Australian Environment Review (December 2014 to January 2016).

From January 2013 to February 2014, Guy served as Tipstaff and Researcher to Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales. Guy has published numerous articles in several peer-reviewed environmental, planning and local government law journals. His work has been cited by the NSW Parliamentary Research Service in a briefing paper on planning law reform, and by the NSW Court of Appeal in the decision of Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council [2014] NSWCA 429. His work has also been cited by leading academics, judges and tribunal members in well-regarded journals. These journals include the Journal of Environmental Law (produced by the University of Oxford), the Environmental and Planning Law Journal, Environmental Impact Assessment Review and Australian Planner.

(b) Tristan Orgill is currently the Tipstaff to Acting Justice Simon Molesworth AO, Acting Judge of the Land and Environment Court of New South Wales. From February 2016 to February 2017, Tristan served as Tipstaff and Researcher to Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales. He holds a Bachelor of Arts with a Bachelor of Laws (First Class Honours) from the Australian National University and a Master of Environmental Law from the University of Sydney. Tristan is admitted as a lawyer of the Supreme Court of New South Wales.

Tristan has published numerous articles in two peer-reviewed legal journals; the Environmental and Planning Law Journal and the Local Government Law Journal. His articles have critically examined the NSW environmental and planning law regime with respect to the regulation of: mining development; renewable energy development; point-source pollution; and heritage conservation areas.

Tristan is due to commence working as a lawyer in environmental, planning and mining law at Ashurst in Sydney in February 2017.

2.5 It is important to stress that the views expressed in this letter are our own and do not represent the views of our employers or any other third parties.

3. COMMENTS ON SECTION 1 – BACKGROUND ON STRA

3.1 We generally agree with the comments made on page 7 of the Options Paper under the sub-heading "Short-term Holiday Letting and its Contribution to NSW".

3.2 In respect of the comments made on page 7 of the Options Paper under the sub-heading "2016 Parliamentary Inquiry", we consider that this is an accurate summary of the key recommendations made by the Inquiry Committee to the NSW Government. We also agree that the NSW Government, in its response of 19 April 2017, indicated "general support for the key recommendations". However, the phrase adopted by the Government in its response to many recommendations, being "qualified support", was both ambiguous and largely unexplained. Hence, the nature of the qualifications to the Government's general support for various significant recommendations was unclear.
In the second column of page 7 of the Options Paper, the Inquiry Committee’s report of October 2016 (and the process leading up to that report) is summarised. This is appropriate because the planning law reforms canvassed in the Options Paper appear to be predicated on, or at least significantly influenced by, the work of the Inquiry Committee (noting the introduction to Section 6 of the Options Paper). Given this, we make the following comments on the Inquiry Committee’s report in response to Section 1 of the Options Paper.

In our critique of the Inquiry Committee’s report of October 2016, we significantly disagreed with, and criticised, a number of the key planning law reform recommendations made by the Inquiry Committee concerning the regulation of STRA by the NSW planning system. The reasons for our disagreement are fully detailed in Dwyer and Orgill 2017.

Subject to the comments we make in other sections of this letter below, the essence of our position on the Inquiry Committee’s key planning law recommendations set out in its Inquiry Report can be summarised as follows:

(a) We agreed with the intent of Recommendation 1(a): that the Standard Instrument – Principal Local Environmental Plan should be amended to include a definition of STRA in the category of "tourist and visitor accommodation".

However, we consider that it would be both impractical and undesirable for there to be only one standard definition of STRA contained in the Standard Instrument. This is because the three main types of STRA, namely:

(i) letting of one or more vacant bedrooms within a place of residence whilst the owner or occupier continues to live at the property;

(ii) letting a place of residence while the owner or occupier is temporarily absent from the property from time-to-time (e.g. renting a place of residence when the owner or occupier goes on a family holiday overseas); and

(iii) letting a vacant property, which is not occupied by any person as a place of residence, all year round,

are largely incompatible with each other for the purposes of any single definition of STRA.

To that end we proffered three standard definitions of STRA, being:

- "short-term tourist room accommodation";
- "short-term rental accommodation (place of residence)"; and
- "short-term rental accommodation (vacant premises)".

The content of these definitions is outlined in Dwyer and Orgill 2017.

(b) Recommendation 1(b) – i.e. that the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Exempt and Complying Development SEPP) should "allow [STRA]" – was, in our opinion, poorly expressed and unclear. To the extent that we understood the recommendation, we significantly disagreed with it.

In our view, it is (currently) prudent to continue with but adapt the traditional land-use planning model for regulating STRA in NSW, rather than regulate the use of land as STRA as exempt or complying development (ECD). We maintain
that position for numerous reasons, of which the following are particularly important:

(i) Regulation of development as ECD, despite being capable of improving efficiency, is intrinsically a blunt instrument. Once a given type of development is classified as ECD, the prospects of that development being regulated in some other way in the future (e.g. through development assessment) are likely to be substantially narrowed. Once classified, it may be politically difficult and potentially unfair to reverse the ECD classification of such development. When a form of development is relatively uncontroversial and the nature of the market for that development is well known (e.g. letter boxes), this narrowing of discretionary control is not usually significant.

However, given that the use of land as STRA is rapidly expanding, much of this expansion has occurred in a relatively short period of time and presents a range of complicated regulatory challenges, significantly narrowing the scope to regulate such development is, in our opinion, risky. Taking this risk might be justified if there was compelling evidence that the existing regulatory approach is detrimentally hampering the STRA market to a substantial extent. Yet, this does not appear to be the case. Of course, as time passes and more is known about the modern STRA market, it will always be possible to reform the regulatory system to regulate STRA development as ECD.

(ii) As a practical matter it would be an onerous task for legislators to devise specific, unambiguous and simple development standards for the various different types or forms of STRA within the Exempt and Complying Development SEPP. Even if it was possible to do so, it is not farfetched to suggest that there may be particular types or forms of STRA that are incapable of meeting the relevant development standards. How would STRA which does not meet the relevant development standards be regulated? In our view, this risk of regulatory uncertainty and confusion is less apparent when STRA is properly regulated under a traditional land use planning model, for the reasons given in Dwyer and Orgill 2017.

(iii) The available evidence concerning the challenges that STRA poses to the continued effectiveness of, and public satisfaction with, land-use planning in NSW suggests that it is premature to “fast track” the expansion of STRA by making such use of land ECD. In fact, there is a considerable risk that such a regulatory approach may, in the long term, cause considerable damage to the STRA market. If classifying STRA development as ECD facilitates the rapid expansion of STRA in tourism hotspots, public backlash could eventually result in the NSW Government (or, where possible, local governments) coming under pressure to hastily reverse the regulatory approach and, perhaps, unduly over-regulate such development.

(iv) The traditional land-use planning model would likely be more effective, if adapted, at striking a sound balance between achieving clarity, certainty, consistency and efficiency in land-use planning regulation of STRA at the State level and granting local councils the discretion to regulate such matters at the local level.

(c) We disagreed with Recommendation 2: that short-term letting of rooms in any property where the landlord or host is present be permitted as exempt development. In our opinion, it would be preferable to adapt the existing land-use planning regime to effectively regulate this form of STRA. This is so for the following reasons:
(i) To some extent, infrequent letting of bedrooms in a property is already permitted in some cases by the doctrine of ancillary use, as explained in further detail in Dwyer and Orgill 2017.

(ii) If the recommendation of the Inquiry Committee were to be accepted, it is difficult to see how prescriptive development standards or criteria could be satisfactorily drafted to regulate this form of STRA effectively under the Exempt and Complying Development SEPP. This is principally because it could lead to a regulatory quagmire of confusion, inefficiency and uncertainty: if a particular proposed use of land for "hosted" STRA does not comply with the specified exempt development standards, that development proposal may fall into a regulatory vacuum.

Under the Exempt and Complying Development SEPP, if the STRA proposal does not comply with the specific development criteria, the Exempt and Complying Development SEPP has no further application. In contrast, under the traditional land-use planning regime, if the proposal does not meet the criteria of the relevant STRA definition under a Local Environmental Plan, it would simply be a matter of resorting to the "catch-all" entry for innominate purposes in the Land Use Table to ascertain whether the proposed STRA is permitted with consent or prohibited.

(iii) The apparent objective of the Inquiry Committee in making Recommendation 2 was to ensure that low-impact STRA involving the letting of rooms in a place of residence (while the owner/host is present) is permitted without development consent. That objective, however, can be achieved without the need to resort to classifying this type of STRA as exempt development – ie by making a minor revision to the existing content of Local Environmental Plans to address circumstances where the doctrine of ancillary use does not apply. To that end, we suggest that the following standard definition (or a similar variation of it) be included in the Standard Instrument LEP:

**short-term tourist room accommodation** means one room, or multiple rooms, which:

a. is or are located within a building or place which is predominantly used as a place of residence;

b. is or are occupied by guests for tourism purposes on a temporary and commercial basis:

i. when the owner or occupier remains in permanent residence at the building or place;

ii. for a maximum period of 90 days in a given year, to be calculated from 1 January to 31 December in the given year; and

iii. at a ratio that does not exceed two people per available bedroom,

but does not include bed and breakfast accommodation, short-term rental accommodation (place of residence) or short-term rental accommodation (vacant premises).

Note. Short-term tourist room accommodation is a type of **tourist and visitor accommodation** – see the definition of that term in this Dictionary.

If this minor revision were to be implemented, each local council should be invited to amend the Land Use Table in its LEP to categorise "short-term tourist room accommodation" as either permitted without consent, permitted with consent or prohibited in each of the following zones: R1 (General Residential); R2 (Low Density Residential); R3 (Medium Density Residential); and R4 (High Density Residential). In circumstances where a
local council had sufficient evidence to suggest that this type of STRA was indeed of low impact, that council could proceed to categorise it as permitted without consent. That, of course, would be a matter for individual councils to determine (unlike under the Exempt and Complying Development SEPP, which would effectively strip local councils of this decision-making power).

(d) We disagreed with **Recommendation 3**: that short-term letting of a principal place of residence be permitted as exempt development. Our reasons were as follows:

(i) The justification for Recommendation 3 – i.e. that this type of STRA would be "low impact" - **is not sufficiently supported by (empirical) evidence**.

(ii) In the absence of a reliable evidence base which demonstrates that STRA, in all its different forms, is generally a "low impact" activity, we do not consider it appropriate for the specific type of STRA that forms the focus of Recommendation 3 to be listed as exempt development under the Exempt and Complying Development SEPP. Rather, we consider that the proper approach is to adapt the existing land use planning model, as detailed in our response to Recommendation 1.

(e) **Recommendation 4** was that short-term letting of empty properties be permitted under the Exempt and Complying Development SEPP as either exempt development, where the particular STRA development does not exceed applicable impact thresholds, and complying development, where the development exceeds applicable impact thresholds.

We found this recommendation to be unclear and therefore difficult to properly engage with. Nevertheless, to the extent that we understood it, we **significantly disagreed** with it. Our reasons were as follows:

(i) As it is unclear what the Inquiry Committee proposes the "applicable impact thresholds" to be, or even a range of possible impact limits, it is not prudent to recommend that the use of "empty properties" for STRA be eligible to be ECD. Unless such a recommendation is accompanied by an explanation of what the relevant "impact" criteria are proposed to be how can one meaningfully comment on whether that reform would be appropriate?

(ii) No persuasive justification has been provided as to why a model based on development standards is a superior model for regulating STRA in NSW than the traditional land use planning model. **It is not a self-evident truth that low-impact land uses (as distinct from low-impact (physical) works) should be regulated as ECD.** In fact, it would be relatively unprecedented for any use of land (as opposed to the construction of particular specified buildings or structures) to be regulated in this way.

(f) We generally agreed with **Recommendation 7**: proposing the creation of a compliance system which considers the use of investigative powers contained in Division 1C of Part 6 of the *Environmental Planning and Assessment Act 1979*, the Holiday and Short-Term Rental Code of Conduct and "party house" provisions. However, we disagreed with the use of streamlined development assessment (complying development certificates) on the basis that (for the reasons expressed above) we favour adapting the existing land use planning model.
4. COMMENTS ON SECTION 2 – REGULATION OF STRA

4.1 On page 8 of the Options Paper, it is observed:

A final policy approach will need to consider both the benefits of STHL as well as the nature and extent of the negative impacts and red tape for business and citizens.

To determine which policy option is appropriate, it is important to establish a clear, evidence-based understanding of the nature and significance of the impacts of STHL on the community. Even in the absence of sufficient data, policy options should still be guided by the relative significance and likelihood of the problem, and the outcomes sought.

4.2 We wholeheartedly agree with these observations. However, in our view, the Inquiry Committee did not have a "clear, evidence based understanding of the nature and significance of the impacts of STHL on the community" when it made its recommendations that, in essence, the planning law regime should be reformed so as to regulate STRA under the Exempt and Complying Development SEPP.

4.3 In our opinion, the absence of sufficient (let alone comprehensive) evidence on the impacts of STRA dictates the adopting of an approach whereby any law reform should be grounded in a through consideration of all of the plausible and significant risks of STRA, including the potential social impacts, and the available precautionary or preventative measures to mitigate such risks. The correct application of this approach, in our view, would favour – at the current time – the adaption of the existing land use planning model to address STRA rather than regulating STRA via the Exempt and Complying Development SEPP. This is especially the case where the latter regulatory approach would necessarily constitute a 'one-size-fits-all' approach for every local community in the State.

4.4 In this respect, we strongly disagree with the below underlined observations made on page 8 of the Options Paper:

Government regulatory intervention may address some issues associated with STHL but should not be seen as the default option where other solutions may exist. The regulation of STHL in NSW could range from minimal intervention to substantial Government regulation. Direct regulatory intervention would be warranted in cases where it is demonstrated as the best available option to address a problem, and is likely to result in a positive net benefit to the community at large. Alternatively, non-regulatory approaches could include incentives for better self-regulation, or working with stakeholders through co-regulation arrangements.

4.5 In our opinion, the proposition that "[d]irect regulatory intervention would be warranted in cases where it is demonstrated as the best available option to address a problem, and is likely to result in a positive net benefit to the community at large" seems to be reflective of a "suck it and see" approach. We do not consider it to be consistent with good governance or the expectations of the public to only (reactively) directly regulate an emerging form of development with proven impacts (such as amenity impacts) after a problem has manifested itself.

4.6 In any event, this observation sits uncomfortably with the fact that STRA, and every other use of land, is currently regulated under the planning law regime in most of NSW. The NSW Government is considering whether to reform the planning law regime to directly regulate STRA in a different way. Thus, the relevant question is what regulatory framework should be in place, not whether there should be a regulatory framework at all. Of course, it is open to the Government to completely excise STRA from being regulated under the planning law regime. However, that has never been proposed.

4.7 On page 9 of the Options Paper, under the heading “Current Regulation of STHL in NSW”, it is stated that:

STHL is currently regulated in a piece meal manner through the planning system.
4.8 We agree that it would be beneficial to standardise the regulatory approach to STRA whilst maintaining flexibility for councils to regulate according to local circumstances. In our view, the "standardisation" aspect is best achieved in the present climate by including three new definitions in the Standard Instrument LEP (as noted in section 3.5(a) above of this letter). The aspect of "giving councils some flexibility" is best achieved by enabling local councils to determine how the standard definitions are to be listed in each zone of the Land Use Table for its LEP – i.e. whether a particular type of STRA is permitted without consent, permitted with consent or prohibited.

4.9 To be sure, we fail to see how the regulation of STRA via the Exempt and Complying Development SEPP would afford councils any real degree of flexibility to regulate STRA having regard to local circumstances. Rather, the proposed approach would likely prevent local councils from regulating STRA in any meaningful way. Hence, the proposed model would inevitably constitute a 'one-size-fits-all' regulatory approach to STRA that ignores local circumstances and the aspirations of local communities.

5. **COMMENTS ON SECTION 3 – IMPACTS ASSOCIATED WITH STHL**

5.1 We generally agree that the main types of potential impacts of STRA are those identified on pages 10–12 of the Options Paper. However, we are of the view that some important potential impacts are either not identified or have not been adequately considered at any stage of this law reform process. For example, the potential impact of STRA in converting local places into places of tourism is not properly identified. Any suggestion that STRA will pose no risk to transforming local areas of residential accommodation into 'non-local' tourist areas is not credible.

5.2 Additionally, although the Options Paper properly concedes that the evidence regarding the impact of STRA on housing affordability is currently "limited", the apparent adoption of the suggestion that this impact is "negligible" is worrying. If the evidence of this potential impact is limited, which it certainly is, then the proper observation is that the relevant risk is not yet known. To reiterate, we do not consider a 'suck-it-and-see' approach to the regulation of STRA to be appropriate in light of the very significant ongoing growth of STRA throughout NSW. We suggest that the public is unlikely to be impressed in ten years’ time if the evidence, once it becomes available, shows that STRA has, for example, had a very significant impact on housing affordability in some parts of NSW but that STRA was regulated on the hope that it would not.

5.3 We should also note here that the challenges and impacts associated with STHL were considered at some length in Dwyer and Orgill 2017, drawing upon examples from numerous jurisdictions.

6. **COMMENTS ON SECTION 4 – SELF-REGULATION**

6.1 On page 13 of the Options Paper, it is stated:

The evidence relating to the impacts associated with STHL where most hosts operate without incident supports the view that the vast majority of STHL does not require Government regulatory intervention.

6.2 We are not persuaded that the overwhelmingly anecdotal evidence presented before the Inquiry Committee allows for the bold statement that "the vast majority of STHL does not require Government regulatory intervention". The very fact that the NSW Government has held an Inquiry Committee to investigate this important issue contradicts the statement, as does the observation made on the very next page of the Options Paper that (emphasis added):

There is value in greater ongoing monitoring and reporting on STHL by industry. This is particularly the case given the paucity of information relating to the impacts associated with STHL.
6.3 We agree with the observation on page 14 that there is a paucity of information relating to the impacts associated with STRA and consider it to be a **decisive reason** for favouring an approach for regulation which adapts the traditional land use planning model - rather than an (unprecedented) approach under which the Exempt and Complying Development SEPP forms the flagship of STRA regulation in NSW.

6.4 Moreover, we emphasise that the implicit presumption – contained in both the Inquiry Committee's Report and the Options Paper – that STRA is currently not subject to Government regulatory intervention is erroneous. At present, the planning law regime throughout NSW does regulate the use of land as STRA through legislation and environmental planning instruments, such as Local Environmental Plans. The fact that STRA may not be expressly nominated as a type of land use in some of the Local Environmental Plans for different local government areas does not demand a contrary conclusion. This is because STRA is also regulated as an innominate purpose for the use of land in circumstances where it is not expressly nominated in a Local Environmental Plan as a purpose of land use. To be sure, it may be that the applicable regulatory controls are not significantly enforced (as examined in Dwyer and Orgill 2017) but that does not mean that STRA is not regulated by planning laws.

7. **COMMENTS ON SECTION 5 – STHL IN STRATA PROPERTIES**

7.1 As noted earlier, we do not consider ourselves to have the requisite degree of knowledge and experience in strata law to properly engage with this section of the Options Paper.

7.2 Accordingly, we do not make any comments in respect of Section 5.

8. **COMMENTS ON SECTION 6 – REGULATION THROUGH THE PLANNING SYSTEM**

8.1 To a large extent, our comments above have already addressed the matters raised in Section 6 of the Options Paper. As a result, we can be relatively brief in our comments here.

8.2 First, in respect of the observations made under the heading “How STHL is Defined” (page 16 of the Options Paper), we consider that use of consistent definitions of the different types or forms of STRA in the Standard Instrument LEP is desirable for the reason given by the NSW Government – i.e. that it would “make it easier to operate STHL in NSW, as well as providing clarity for local councils, operators and owners”.

8.3 The following further observations are made on page 16 of the Options Paper:

The Government considers that STHL is acceptable in a residence up to a point that it becomes a more intensive commercial type of use (i.e. tourist and visitor accommodation).

Based on the principle of allowing STHL to occur where residential use of dwellings is allowed, it is suggested that the most appropriate definition of STHL is as a dwelling, or part of a dwelling, that provides short-term accommodation, but does not include tourist and visitor accommodation.

8.4 In our view, there are two main problems with the above language.

8.5 The first problem is that the NSW Government appears to consider that there is a clear dividing line between STRA which is carried out in a residential dwelling on the one hand, and a "more intensive commercial" type of use of a residential dwelling on the other. Yet, it offers no explanation of what that clear dividing line between "acceptable" and "unacceptable" STRA is in the Options Paper.

8.6 The second problem is that the NSW Government seems to proceed on the assumption that "acceptable" STRA will be development for the purpose of residential accommodation, whereas "unacceptable" STRA will be development for the purpose of tourist and visitor accommodation. In our view, this appears to rely on an untenable legal fiction that "acceptable" STRA is residential accommodation and "unacceptable" STRA is tourist and
visitor accommodation. It is untenable because any use of land for the purpose of STRA will almost invariably be a type of "tourist and visitor accommodation" and not a type of "residential accommodation". Adopting a common sense approach, a guest who rents a STRA property is axiomatically using that land as a tourist or visitor and is not a resident. Hence, if a property is mostly used to host STRA tourists and visitors, it is illogical to maintain that the purpose of the use of that property is to provide accommodation for residents.

8.7 Consequently, if only STRA development that is for the purpose of residential accommodation is acceptable, it follows that many forms of STRA will be unacceptable. We cannot imagine that this would accord with the Government’s intention to facilitate STRA. Having said that, we of course accept that the degree to which a particular type of STRA is a commercial enterprise can vary significantly.

8.8 Accordingly, we consider that every type or form of STRA which is defined in the Standard Instrument LEP should be regarded, in planning law terms, as a species of the genus of "tourist and visitor accommodation".

8.9 In the case of Botany Bay City Council v Pet Carriers International Pty Ltd [2013] NSWLEC 147, Preston CJ of the LEC clearly explained (at [28]) the notion of genus vs species of purpose of development:

A use of land can also be for two or more purposes. The purposes may or may not be conflicting. Non conflicting purposes have similarities in character. An example of non conflicting purposes are those which have a genus-species relationship: one purpose is a genus (such as "industries") and the other purpose is a species falling within that genus (a particular kind of industry such as "extractive industry" or "rural industry").

8.10 If the NSW Government, in recommending that STRA should not generally be viewed as "tourist and visitor accommodation", was concerned with avoiding a situation where certain, less intensive types of STRA are treated in a similar way to (for example) bed and breakfast accommodation, those concerns can easily be addressed by effectively amending the Land Use Tables in the given LEP. More specifically, where each type or form of STRA (i.e. as species of the genus "tourist and visitor accommodation") is expressly nominated as permitted without consent, permitted with consent or prohibited development, the significance of the genus "tourist and visitor accommodation" will diminish. This can be illustrated by the following observations of Biscoe J in the decision of Hornsby Shire Council v Trives (No 3) [2015] NSWLEC 190 (emphasis added):

[88] … In the present case the genus is “residential accommodation” and is not listed as permissible development in the land use table. Some defined species, including dwelling houses, of that genus are listed as permissible but they do not include secondary dwellings, dual-occupancies or multi dwelling housing, which describe the proposed structures.

[89] In my opinion, dual occupancy, secondary dwellings and multi dwelling housing are prohibited in the R2 zone having regard to the following considerations. First, they, together with dwelling houses, are species of the genus “residential accommodation”, which is not expressed to be permitted with consent in that zone. Secondly, they are not included in the species of residential accommodation, including “dwelling houses”, expressed to be permitted with consent in that zone. Thirdly, the LEP land use tables for other zones expressly permit with consent or expressly prohibit the genus “residential accommodation” or species of the genus including “secondary dwellings”, “multi dwelling housing” and “residential flat buildings”. In particular, “secondary dwellings” and “dwelling houses” are each expressly permissible with consent in zones RU1, RU2, RU4 and RU5. “Multi dwelling housing” is expressly permissible with consent in zones R3 (as are “dwelling houses”) and B1, and is expressly prohibited in zones E2, E3, W1 and W2. “Residential flat buildings” (a defined exception to “multi dwelling housing”) are expressly permissible in zones R3, R4 and B1 and are expressly prohibited in zones E2, E3 and W2. “Residential accommodation” is expressly prohibited in zones B1, B2, B3, B4, B5, B6, INI 1, INI 2 and INI 4.

[90] It can be seen that the various land use tables distinguish between and pick and choose among the various species of the genus “residential accommodation” as to which are permissible with consent, or pick the genus. In the R2 zone the LEP picks for permission with consent some species of that genus including “dwelling houses” but not the species “secondary dwellings”, “dua-l-occupancies (detached)” and “multi dwelling housing”. Those species are prohibited by the sweeper provision in item 4 of the land use table.
8.11 Under the adapted traditional land use planning model we propose, we consider that local councils should be able to "distinguish between and pick and choose among the various species of the genus ["tourist and visitor accommodation"] as to which [species of tourist and visitor accommodation, including each type or form of STRA] are permissible with consent", permissible without consent or are prohibited.

8.12 Secondly, in respect of the discussion under the heading "The NSW Planning System and STHL", save for one matter, we generally agree with the discussion under that heading. That matter concerns the following observation on page 16 of the Options Paper:

However, the planning regulatory framework could become more interventionist when the potential impacts of STHL intensify and/or reflect commercial uses. In this case, STHL could become either complying development or require consent (Figure 2). If a planning approach is adopted, one challenge will be determining the criteria that would trigger complying development, or requiring consent. This could result in additional costs for government, hosts of STHL properties and users. It could also increase complexity to STHL industry, which may outweigh its value.

8.13 Figure 2 appears to suggest that 80% of STRA should be subject to "self-regulation" as "exempt development", 15% as "complying development" and 5% as requiring a development application to be made.

8.14 In our view, the NSW Government has clearly shown its hand throughout the Options Paper that its preference is to play as little a role in STRA regulation as it possibly can, and that local councils should play as little a role in STRA regulation as they possibly can.

8.15 In our opinion, the proposed approach is flawed and based on the absence of comprehensive, or at the very least sufficient, evidence as we have already explained. Further, it must be observed that the "challenge [of] determining the criteria that would trigger complying development, or requiring consent" is also present with respect to exempt development. This is because one generally must articulate the development standards that are to be met in order for particular development to constitute "exempt development". That problem could, however, be avoided if the particular form or type of STRA is listed as permitted without consent in a particular land use zone under a given LEP. Whether that is appropriate in a given circumstance is, in our opinion, something that a local council is best placed to determine.

8.16 With respect to the observations made under the heading "Options for Triggering Types of Development Approval" on pages 19 and 20 of the Options Paper, we consider that all the factors discussed there (e.g. regulate the length of stay, and so on) are factors of relevance to drafting appropriate definitions for each type of STRA for insertion into the Standard Instrument LEP. In this respect, we note that we have grappled with these factors in our proposed definitions outlined above to endeavour to provide an effective and simple regulatory framework.

9. COMMENTS ON SECTION 7 – REGISTRATION OR LICENSING

9.1 In our view, the use of a registration or licensing system may be appropriate to implement, under our suggested adaptation of the traditional land use planning model, in circumstances where the particular STRA is defined as permitted without consent in a given zone under the relevant LEP (with the consequence that it is regulated so as to not be subject to the development application process, including the merits assessment process that this entails).

9.2 The use of a registration or licensing system for STRA that is permitted without consent would, in our opinion, serve to provide an appropriate level of regulation for low-impact STRA in circumstances where the relevant local community has decided that such development need not be subject to a development assessment in particular places.
10. CONCLUDING REMARKS

10.1 We have, in this letter, attempted to provide a clear critique of the matters discussed in the Options Paper by the NSW Government from the perspective of two planning lawyers.

10.2 For the reasons we give in Dwyer and Orgill 2017, as well as in this letter, we consider that the most appropriate approach for regulating STRA in NSW is to adapt the traditional land use planning model. In our view, the regulation of STRA via the Exempt and Complying Development SEPP would be risky and confusing and would unnecessarily deprive local governments of the power to regulate what are principally local planning issues.

10.3 By contrast, we consider that the traditional, existing regulatory regime can be adapted in a way that strikes a better balance between regulatory clarity, certainty and consistency at the State level and vesting local governments with the discretion to regulate short-term holiday letting at the local level.

As mentioned at the outset of this letter, we are grateful for the opportunity to provide you with our comments on the regulatory options canvassed in the Options Paper. We would be happy to be contacted by any officer to discuss the matters we have raised in this letter or in Dwyer and Orgill 2017.

Yours sincerely

Guy Dwyer

Tristan Orgill

B Sc, LLB (Hons I) (Macq),
LLM candidate (UNSW)
Lawyer, Ashurst
Associate, Centre for Environmental Law,
Macquarie University

BA, LLB (Hons I) (ANU),
MEL (USyd)
Tipstaff to the Hon Acting Justice
Simon Molesworth AO (Acting Judge, Land and Environment Court of NSW)