©ngad - stock.adobe.com

By-laws cannot prevent holiday or short term lettings

Recent publications by some corporate lawyers have intentionally or otherwise encouraged bodies corporate to consider enacting by-laws to ban holiday and short term lettings. That is despite the *Body Corporate and Community Management Act (BCCMA)* prohibiting such by-laws.

John Mahoney,
Partner, Mahoneys

Blanket claims that bodies corporate can use their by-law making power to prevent different types of lettings are wrong. The basis for the claims is a recent District Court decision which concerned a complex (Fairway Island) governed by the *Building Units and Group Titles Act (BUGTA)*. The arguments used seek to apply the judge's comments in that case to the term "residential use" where used in the *BCCMA*.

Enacting such by-laws will likely lead to disputes between owners, bodies corporate and resident managers – with no real winner other than body corporate lawyers.

Managers could be excused for thinking that this is yet another attack on our industry which is already suffering from reduced occupancies and consequential revenue loss with border closures. Some might also see such an attack as similar to those faced by buyers and sellers of management rights in the assignment process, which has become protracted and difficult and where body corporate lawyers are charging the outgoing manager legal fees of thousands of dollars, and in some cases tens of thousands of dollars, for acting in the assignment.

Many experts with far greater experience than me consistently maintain, justifiably, that the best community title schemes are those where the body corporate manager, the resident manager and the committee work together for the benefit of all owners, not against each other. Hopefully bodies corporate considering such by-laws will recognise this and work with, rather than against their resident manager to address any perceived problems with short term lettings.

Whilst this article sets out why a body corporate under the *BCCMA* cannot prohibit a particular form of lettings it should be remembered that planning laws and development approvals might act to prevent holiday or short term lettings.

Residential use

The crux of the issue is the term "residential use". What exactly does that term mean?

The proper approach is to give the words of a statutory provision the meaning which the legislator is taken to have intended them to have. This is ascertained by consideration of the text (the actual section); context (the entirety of the *BCCMA* and its regulation modules); and purpose (here, *BCCMA*, sections 2 – 4). The interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

Text and context

The *BCCMA* does not define "residential use". As Isaacs J commented in a high court decision ".. (the word) "resident" and its cognate terms "reside", "residing" and "residence," are terms not of art or defined legal import but of very flexible meaning, acquiring whatever precision they have in any given case from their surroundings."

Some guidance of what the legislators intended might be gained from section 111C of the *BCCMA* which defines a residential lot as, one the subject of (or immediately available to be the subject of) a lease or letting for accommodation for long or short term residential purposes.

Whilst that definition contemplates that there are long-term and short-term types of residential purposes it may not be entirely relevant as it is used in the context of a specified two lot scheme in a different part of the *BCCMA*, it is nevertheless indicative of what the term might encompass.

To the extent that there is any ambiguity as to the meaning of the term, the regulations may be used to construe the Act itself. The regulations likewise define an accommodation

lot as, one the subject of (or immediately available to be the subject of) a lease or letting for accommodation for long or short term residential purposes. Once again the legislators contemplated long-term and short-term types of residential purposes.

Purpose of *BCCMA*

In looking at the purpose of the *BCCM Act*, the primary object of the Act is expressed in section 2 as to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects. One of the secondary objects expressed in section 4 is to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of lot owners, and intending buyers of lots.

Parliament clearly intended tourism within community titles schemes. This is reinforced in the explanatory note to the *Body Corporate and Community Management and Other Legislation Amendment Act 2007* which reads in part:

"Clause 4 recognises the important contribution the community titles sector makes to Queensland's tourism industry, particularly through the provision of short-term holiday accommodation. The amendment in part encourages bodies corporate to consider tourism issues in the administration of their schemes."

Similarly, the explanatory note for the *2020 Accommodation Module* includes this statement: "The (new module) provides management processes designed for community titles schemes that are used predominantly for short or long-term letting purposes (including for example, holiday letting or serviced apartment operations) with the need for accommodation management."

It is clear from the secondary objects and the extrinsic material that parliament intended for short term holiday letting to be operated from a community titles scheme. It is also clear from the text of section 180(3) that parliament thought there was more than one type of residential use.

But is short term holiday letting a residential use?

The dictionary suggests not. But as Isaacs J says, "resident" and its cognate terms "reside", "residing" and "residence," are terms not of art or defined legal import but of very flexible meaning. This is where section *14A of the Acts Interpretation Act* comes to the fore. The interpretation to be preferred is that which best achieves parliament's purposes. Here, one of those purposes is to encourage "Queensland's tourism industry, particularly through the provision of short term holiday accommodation". That is best achieved by interpreting short term holiday letting as a form of residential use.

BUGTA v BCCMA

BUGTA yields a different result because of the absence of sections 2 - 4 of the *BCCMA*. The Fairway Island decision involved the construction of a by-law and its validity. *BUGTA* does not have an equivalent of section 180(3) of the *BCCMA* and the validity question was determined by reference to the general lawmaking power in section 30(3) of *BUGTA* which has no equivalent of sections 2 – 4 of *BCCMA*. The issue in the Fairway Island case was a different question under different legislation.

It cannot be said that had the by-law in Fairway Island been made under the *BCCMA*, it would have been upheld for the same reasoning because the validity issue would be determined by reference to section 180(3) which would be given the meaning set out above. Hopefully bodies corporate will not embark on a mission of enacting by-laws to ban holiday or short term lettings. That will only lead to division, disputation and disruption with the body corporate not achieving what it hopes to. Even putting aside section 180(3), the by-law would need to overcome sections 169 and 180(7) which prevent by-laws which are unreasonable, oppressive or those which prohibit otherwise lawful activities.

A more detailed technical analysis can be found on the Mahoneys website. ■