

Outline of Oral Submissions

INDEPENDENT PLANNING COMMISSION

BYRON SHIRE SHORT TERM RENTAL PP

Case number PP-2021-3351

Prepared for **Airbnb**
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OUTLINE OF ORAL SUBMISSIONS

Introduction.

1. May I first acknowledge the Arakwal people of the Bundjalung Nation, the Traditional Owners and ongoing Custodians of the land on which we meet and work here in Byron Bay, Australia.
2. These submissions relate to the Planning Proposal to amend (now) State Environmental Planning Policy (Housing) 2021 (**SEPP (Housing)**) to provide caps for non-hosted short-term rental accommodation (**STRA**) in parts of Byron Local Government Area.
3. Section 112 of SEPP (Housing) provides relevantly that development for the purpose of non-hosted STRA in a “prescribed area” is exempt development for

the purposes of the SEPP if the dwelling is not used for non-hosted STRA for more than 180 days in a 365-day period.

4. Currently s. 112 provides for a 180 day cap for all STRAs in the Byron LGA.
5. The planning proposal seeks to amend section 112 to provide a 90 day cap on using dwellings for the purpose of STRA when not located on certain areas on a proposed Map, and for no cap to use STRA in those designated areas on the Map.
6. Those proposed designated areas will include much of the town of Byron Bay where 51% of non-hosted STRA is located.¹ Accordingly, taking into account the other proposed designated areas, the Planning Proposal affects less than half of the non-hosted STRAs in Byron LGA,
7. The Gateway Determination dated 24 June 2021 and the Altered Gateway Determination dated 3 June 2022 were both conditional, including relevantly the preparation of an Economic Impact Assessment.
8. An EIA was prepared by Urbis dated November 2021 **(the EIA)**.
9. Byron Shire Council engaged Prof Peter Phibbs to prepare a Peer Review of the EIA, which he provided 24 December 2021 **(the Peer Review)**.²

Airbnb Acceptance of SEPP and EIA.

10. Airbnb accept the current requirements in SEPP (Housing) as appropriate for the Byron LGA, and that no further amendments to SEPP (Housing) should be made. This would leave the entire Byron LGA as a prescribed area, and provide for a 180-day cap on the use of a dwelling for STRA throughout the Shire.

¹ Mr Luke Warton Dept Planning & Environment, Oral Submission to IPC 21 Feb 2023.

² Prof Phibbs's engagement is unclear – there appears no Council resolution to engage him, which would have occurred between the date of the EIA (November 2021), and the date of the Peer Review (24 December 2021). There is also no evidence of his brief.

11. Airbnb also accepts the conclusion of the EIA that the implementation of a 180-day cap across the entire Byron LGA represents the best proposed policy option. The authors of the EIA consider this option “to represent the preferred policy option from an economic perspective. It is estimated to provide the most substantial benefits across almost all relevant groups while minimising detrimental impacts on Visitor Market Visitors.”³
12. The Department’s Planning Delivery Unit and Byron Shire Council jointly engaged and funded Urbis to prepare the EIA.⁴ The need for an Environmental Impact Assessment was a key condition in the Gateway Determination. The EIA was prepared pursuant to a very detailed terms of Reference and Scope of Work, by persons with appropriate expertise.⁵ It is the only comprehensive environmental impact assessment about the Proposal.

Airbnb does not accept the Planning Proposal.

13. Airbnb does not agree with the Planning Proposal’s proposed amendments to SEPP (Housing), effectively to provide (a) for a 90-day cap in much of the Byron Shire LGA, and (b) no cap in a small number of select areas.
14. Airbnb notes the response by Cllr Ndiaye to a question by Commissioner Mackay at the oral submissions 20 February 2023 that the 90 day cap is proposed so that there is “no incentive [for a dwelling] to be an STRA”.
15. Airbnb will provide more information in relation to the following in its written submission. Airbnb submits that the imposition of such a 90-day cap will:
 - (a) significantly reduce the employment in the tourism and hospitality sector in Byron Bay,

³ EIA, p. 165

⁴ EIA p. 6 and p. 14.

⁵ EIA Appendix A, pp. 172-178

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- (b) have a questionable impact on the rental market (especially for affordable housing),
 - (c) cause a substantial detriment to tourism spending generally, including but not limited to STRA owners; and
 - (d) will also deeply divide the community and entrench inconsistency into the regulatory framework both in the LGA and in the NSW North Coast area.⁶

Airbnb does not accept the Peer Review.

16. Airbnb submits that no weight should be given to the Peer Review, for the reasons set out as follows.

Bias by the Author.

17. The following matters clearly show apprehended, if not actual, bias by Prof Phibbs in his preparation of the peer review. His personal interest in the subject matter of the planning proposal, and thus his pre-existing state of mind (conscious or unconscious), disabled him from undertaking a proper peer review of the EIA.⁷ A fair-minded lay observer might reasonably apprehend that Prof Phibbs would not bring an impartial mind to the task required to properly carry out the peer review.⁸
18. The bias is shown through the following actions by Prof Phibbs:
- (a) Prof Phibbs is a member of the Advisory Board of the organisation called “Inside Airbnb”.⁹ The Peer Review did not refer to this.

⁶ Such inconsistency conflicts with the Dept Planning Aim for Uniformity Across the State - Mr Luke Warton Dept Planning & Environment, Oral Submission to IPC 21 Feb 2023.

⁷ See the High Court decision of *Ebner v Official Trustee* (2000) 205 CLR 337.

⁸ *Ebner v Official Trustee* at [83]

⁹ See <http://insideairbnb.com/about/>

Inside Airbnb “is a mission-driven activist project with the objective to provide data that quantifies the impact of short-term rentals on housing and residential communities, as well as create a platform to support advocacy for policies to protect our cities from the impacts of short-term rentals.”¹⁰

Part of Inside Airbnb comprises Resist Airbnb: “an inclusive and safe space where members are building a worldwide resistance against short-term rentals and predatory housing policy.”¹¹

- (b) Prof Phibbs is the author or co-author of numerous research papers relating to and criticising STRAs, including (a) one to which he refers in the Peer Review,¹² as well as the Reports prepared for Shelter Tasmania¹³ entitled “Monitoring the Impact of Short-Term Rentals on Tasmanian Housing Markets - Baseline Report” dated June 2022,¹⁴ as well as an Update Report thereto dated December 2022.¹⁵
- (c) personally made submissions to Hobart City Council in relation to its proposed amendment concerning STRAs.¹⁶

19. It is noted that Prof Phibbs makes no reference in the Peer Review of his association with Inside Airbnb, and makes only very limited reference to how his

¹⁰ See <http://insideairbnb.com/data-policies>

¹¹ See <http://insideairbnb.com/resist-airbnb>

¹² Gurrán, N., Phibbs, P. (2017). When Tourists Move In: How Should Urban Planners Respond to Airbnb? *Journal of the American Planning Association*, 83(1), 80-92.

¹³ Shelter Tasmania Inc, is an organisation whose mission is “to provide a collective voice for services and service users to effect positive change in the housing and homelessness sector”. See membership brochure at <https://shelertas.org.au/organisational-documents/>

¹⁴ See <https://shelertas.org.au/monitoring-the-impact-of-short-term-rentals-on-tasmanian-housing-markets-baseline-report/>

¹⁵ See <https://shelertas.org.au/monitoring-the-impact-of-short-term-rentals-on-tasmanian-housing-markets-1st-update-since-june-2022-baseline-report-dec-2022/>

¹⁶ Phibbs, P – Representation 107 regarding Hobart City Council Amendment PSA-21, 5 May 2022. There appears some inconsistency in that letter affecting conclusions therein:

if in total 47% of short-term rental properties also had a rental story from the long-term rental market, that number does not suggest that the majority of the properties in the STR market were previously in the longer-term rental market.

recent research (focusing more on housing issues) might concern the subject matter of the planning proposal the basis of this IPC case.

20. The activities set out in the preceding paragraph confirm, both individually and collectively, Professor Phibbs's ardent personal interest in the subject matter of the planning proposal the basis of this IPC case.

Purported Criticisms of no weight.

21. Further, in any event, the criticisms which Prof Phibbs makes of the EIA do not affect the EIA's validity and conclusions:
- (a) **First criticism (a).** Prof Phibbs's first criticism of the EIA is that "the authors have attempted to use the findings of the EIA as a decision making tool".¹⁷ With respect, that is hardly surprising: by assessing the economic impacts of a proposal, an EIA is automatically a tool in the decision-making process regarding that proposal. The authors knew that the persons making a decision taking into account the EIA would not be them.
- (b) **First criticism (b).** Prof Phibbs's criticises the authors of the EIA in giving each stakeholder group the same scoring weight in a scoring system.¹⁸ However, as soon as one weighs the relative importance of the impacts on different stakeholder groups, the outcome of the assessment is no longer unbiased. The authors of the EIA did this on purpose, and said:¹⁹

Importantly, these ratings are value-neutral. In other words, they do not reflect whether or not a potential impact is beneficial or detrimental. The reason for this being that whether an impact is beneficial or detrimental depends on the person or group being impacted. For example, increased property values would be

¹⁷ Peer Review page 3, 1st paragraph.

¹⁸ Peer Review page 3, 2nd paragraph onwards.

¹⁹ EIA, page 9.

beneficial for property owners detrimental for prospective property purchasers.

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If a particular impact would benefit a particular group, the rating is positive for that group (e.g. +3). However if a particular impact would be detrimental to a particular group, the rating is negative for that group (e.g. -3).

- (c) Further, the criticism of a cumulative net benefits assessment in the EIA is misplaced given the specific requirement therefor in the final agreed scope of work.²⁰
- (d) **Second criticism.** Prof Phibbs's assertion that "The NSW Planning system is considering this change, not the Byron Bay LGA" ignores the history and foundation of the Planning Proposal, as well as the fact that the amendments (now to SEPP (Housing)) are limited to operate only in the Byron Shire LGA. Any impacts from the proposal further afield would not be the primary focus.
- (e) **Third criticism.** Prof Phibbs's makes the criticism²¹ against the authors of the EIA (my emphasis underlined) that "in a number of decisions they make, they downplayed the benefits of long-term renting and highlight the benefits of STRAs. In places it looks like the study might have been funded by STRA owners in Byron Bay rather than taking a broader perspective. On any view such a statement is inappropriate in a peer review, especially a review of a document the provenance of which is known to the author of the review.
- (f) **Fourth criticism.** Prof Phibbs's fourth criticism²² is that "in places the report lacks a level of detail required in a report for public expedition and

²⁰ EIA Appendix A, page 177.

²¹ Peer Review, page 3, 3rd paragraph.

²² Peer Review, page 3, 4th paragraph.

discussion". However, Prof Phibbs does not identify the location of such problem areas in the EIA.

22. Prof Phibbs's recommendation for some alterations to the EIA before its exhibition²³ ignores the final agreed scope of work pursuant to which the EIA was prepared.^{24 25}

Conclusion.

23. From the above, it can be seen that Airbnb submits:
- (a) The controls as currently set out in s. 112 of SEPP (Housing) for an STRA in a prescribed area (resulting in a 180 day cap throughout the LGA) are acceptable and appropriate for STRAs in the entire Byron Shire LGA.
 - (b) The recommendation of the EIA to utilise the current controls for a prescribed area to the whole of the Byron Shire LGA (a 180 day cap throughout the LGA) is acceptable and appropriate.
 - (c) The amendments to SEPP (Housing) pursuant to the Planning Proposal are inappropriate and as set out previously, will:
 - i. significantly reduce the employment in the tourism and hospitality sector in Byron Bay,
 - ii. have a questionable impact on the rental market (especially for affordable housing),
 - iii. reduce the income stream of STRA owners from tourists rentals; and

²³ Peer Review, page 7.

²⁴ EIA Appendix B, page 175-178.

²⁵ Prof Phibbs's reference to Chart 2.3 appears to be a reference to Chart 2.30 on p. 66 of the EIA.

iv. will also deeply divide the community and entrench inconsistency into the regulatory framework both in the LGA and in the NSW North Coast area.²⁶

24. I note the Department's statement²⁷ for they are currently pulling together the methodology for a 2-year review of the current controls, with those controls applying generally since 26 November 2021, and to the Byron Bay since 31 January 2022. There is well over a year's data at present.
25. Airbnb respectfully recommend to the IPC that it conclude that no further amendments to SEPP (Housing) should be made, and certainly not pending the outcome of the Department's review.
26. It is noted that the letter from the Minister for Planning to the Commission ostensibly dated 16 December 2022 appears to request that the Commission consider other associated matters as well. Such matters will be addressed in Airbnb's written submission to be provided to the Commission by 2 March 2023.

DATED 22 FEBRUARY 2023

SIGNATURE



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²⁶ Such inconsistency conflicts with the Dept Planning Aim for Uniformity Across the State - Mr Luke Warton Dept Planning & Environment, Oral Submission to IPC 21 Feb 2023.

²⁷ Mr Luke Warton Dept Planning & Environment, Oral Submission to IPC 21 Feb 2023.