

Is Airbnb lawful in WA?

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Airbnb is a disruptive worldwide trend affecting the global short stay accommodation and holiday rental market and is becoming increasingly popular in Western Australia.

What was previously in the realm of traditional businesses in the tourism industry is now within the reach of the person in the street.

However, the rapid expansion of the Airbnb network is attracting many new accommodation providers who do not have a sufficient understanding of the legal considerations and ramifications surrounding this new business arena. That is understandable because it is relatively easy for anyone to become an Airbnb 'host'.

What do hosts need to consider before renting out their property on Airbnb?

The regulatory bodies that govern this area are principally the local government authorities for the district in which the property is located.

Their powers are given to them by applicable planning legislation. In Western Australia, it is in the form of the *Planning and Development Act 2005* (WA) (the Act).

That statute finds expression in the local planning schemes and policies of local government authorities, whose responsibility is to monitor land use in their district.

So the first port of call for an intending provider, or host, is the local planning scheme and local planning policy.

People considering becoming a host need to turn to such local schemes and policies as part of their due diligence to help answer the question: is it lawful for one to offer short stay accommodation through Airbnb?

The first question to consider is whether short-stay rental accommodation is a permitted use for the area where the property is located.

If, after checking the planning scheme, the answer is yes, then the next question is whether the provider needs to obtain an approval from the local government authority.

What are the relevant local rules?

Each local government has its own zoning rules, contained in their local planning scheme (sometimes also known as a town planning scheme). These schemes should be accessible at your local government authority, and are probably on their website as well. They should include a zoning table and a scheme map.

Such schemes identify the permitted uses for the properties in the area. Typically, a house or apartment will be a property where the permitted use is as a residential property.

Just because a property is permitted for residential use does not mean that it will also be permitted for short stay accommodation. It is quite possible that the zone is only for residential use, especially if it is the policy of the local government authority to keep it suburban and for growing families.

It may be a different story in another district, such as one that promotes itself as being a tourist hub or considers that the zone is one that is amenable to multiple uses. For example, in a city centre, it is expected that residences, offices and retail outlets and restaurants exist side-by-side.

If the property is in a zone where short-stay rental accommodation is a permitted use, then prospective hosts may just need to seek approval from the local government authority.

However, such approvals are likely to include a requirement for the authority to conduct a public consultation process, where one might encounter objections. Sometimes, in such matters, the emotions of neighbours can be more challenging than the bureaucracy (real or perceived) of the local government authority!

How do hosts make an application to use their property for short-stay accommodation purposes?

Under the Act, using a property for short-stay accommodation requires planning approval. You would need to submit an application to the local government, in the terms set out in the Act and the local government's local planning scheme.

Do all local governments have a local planning policy for short-term accommodation?

No, some do not. However, you may need to seek permission under other land uses which might achieve the same outcome. For example, it may be possible to adjust the offering and seek approval as a bed and breakfast establishment (assuming, of course, that breakfast is made available) by the provider.

The Airbnb phenomenon is a recent one and the majority of local planning policies were created some years ago. This means that in many cases, the typical local planning policy was created on certain assumptions about how the world operated.

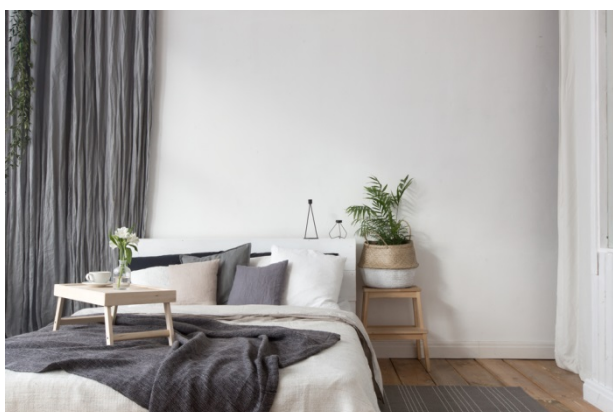
In the old days, the concept of “short-term accommodation” was associated with hotels, motels and bed-and-breakfast enterprises. The idea that a homeowner would routinely open their home to strangers on holidays would have been curious.

Chances are, therefore, that the local regulatory framework will not have considered whether an Airbnb host is a homeowner using his or her home in a particular domestic way or whether that host is using his or her home to run a short-term accommodation business – a discussion which would influence how one creates or amends a planning scheme or policy.

It may well be the case that many local authorities need to revise and update their planning schemes and policies to cater to the demands of the Airbnb brigade.

Until then, the landscape may look unpredictable and consistent from one local area to another.

In the meantime, Airbnb hosts will have to negotiate their way through a matrix of differing schemes and policies as framed before the internet era.



What exactly do local governments require of hosts in their policies on short term accommodation?

Each local government has their own rules in their planning scheme and policies. Those, in turn, take into account how people in that community define its character, for examples, whether it is a district for growing families, or a tourist hub.

People intending to become Airbnb hosts should check (or have a lawyer check) the particular requirements under the schemes and policies that govern the locality where the property is situated.

To give a general idea, such requirements might include:

- Requiring the registration of a ‘change of use’
- Maximum rental periods, such as no more than 3 months in a 12 month period
- Limits as to the number of occupants
- Submitting a development application for approval by the local government – there is generally a fee for this
- Submitting a management plan
- Maintaining a guest register, and/or
- Considering onsite parking requirements

What if I have a property that is on a strata title?

As well as negotiating the pathway through the local planning scheme and policy, a provider whose property is in a strata-titled property will also need to have a look at the by-laws of the strata company to check whether the use for short-stay accommodation complies with the by-laws.

In the 2017 Supreme Court of Appeal decision of *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597* [2017] WASCA 104, the Supreme Court of Western Australia upheld a decision made by the State Administrative Tribunal that the use of Mr Byrne’s apartment for short-stay accommodation was in breach of the strata company’s by-laws.

Such by-laws are controlled by the majority of the owners of the properties in the development. Therefore, this case is a potent reminder that the intending host should check, or get their lawyer to advise on, the detail of the specific, applicable by-laws.

The by-laws of a strata company may either be unique to that development or else they may be very similar to numerous others.

As with local planning schemes and policies, the strata company by-laws of the particular development in which the property is located might well have been conceived before the Airbnb era. Those by-laws give rights and obligations to every owner of a property in the development.

Some will be owner-occupiers and some will be long-term landlords. This disparate community will therefore hold a range of attitudes towards the idea of holiday-makers coming and going.

It can be very challenging to get a strata company, and the majority of the owners, to agree to Airbnb hosting.

Therefore, the intending Airbnb host would do well to get a legal interpretation of the strata by-laws, before asking the strata company for permission.



Conclusion

This internet-linked tourism/holiday accommodation industry may look new. However, the need to pay attention to all applicable regulatory frameworks remains unchanged.

Many local authorities are considering whether their local planning schemes and policies are adequate enough to cater to this new industry or whether they should be updated.

Prospective hosts should do thorough due diligence before listing themselves on Airbnb.

Disclaimer: The content of this article is intended only to provide a summary of subject matter. It is not intended to be comprehensive nor does it constitute legal advice. You should seek legal advice for your specific circumstances.

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