The Issues with Short-term Accommodation and Use of Strata Property in Queensland

The Australian community has lived with the belief that local government was responsible for supervision of buildings and their use. Given that responsibility local government was guided and bound by Australian Building Codes. The fact that local government has turned a blind eye to short term rentals in Class 2 buildings should not suggest that the community has acquiesced to such approval.

The Australian Building Codes describe:

Class 1a	A single dwelling being a detached house, or one or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.
Class 1b	A boarding house, guest house, hostel or the like with a total area of all floors not exceeding 300m2, and where not more than 12 reside, and is not located above or below another dwelling or another Class of building other than a private garage.
Class 2	A building containing 2 or more sole-occupancy units each being a separate dwelling. This would include high rise strata buildings. This Class 2 definition describes the units as dwellings as defined in the Macquarie Dictionary as: "*1. a place of residence or abode; a house 2. continued or habitual residence*."
Class3	A residential building, other than a Class 1 or 2 building, which is a common place of long term or transient living for a number of unrelated persons. Example: boarding-house, hostel, backpackers' accommodation or residential part of a hotel, motel, school or detention centre.

The aim of the Building Code Australia (BCA) and supporting State legislation was to ensure that buildings are constructed to a standard for a specified end use, and that they are in fact used for that constructed and intended use. In some situations, the higher standard Class 3 building may be used for Class 2 long- term occupation; however, the use of Class 2 buildings for Class 3 transient accommodation defeats the entire objective of the BCA and Disability Discrimination ACT (DDA). This was especially true for buildings approved before 2011 when class 2 buildings were not required to be designed for persons with a disability.

Purchasers believed that purchasing a lot in a Class2 building would provide them with a residence in a scheme of long term occupancy within a community of like thinking owners.

In the late 1990's, manager/letting agents in Class 2 buildings started to rent units for short term rental, and the councils turned a blind eye to the practice. Because short term letting was so lucrative, the practice mushroomed exponentially, even though most financial benefit was found to be restricted to the letting agent.

There were some safeguards in this misuse, as manager/letting agents were required to live on site and be available 24/7 to supervise their tenants, which constrained poor behaviour. In 2014 this changed as legislation was passed permitting managers to live off-site.

Airbnb entered the scene on the presumption that people would be able to rent out their spare room, but quickly evolved to permitting unit owners to rent their unit on a short-term basis. Proper supervision of Class 2 building regulations may have prevented this evolution, but as councils had ignored their responsibility the practice quickly grew.

Of significant concern is where a body corporate may stand with their insurer should a catastrophe occur in a Class 2 building which has been used or misused for short term rental. Could the insurer claim that the building was being used for a purpose not intended for its use and avoid responsibility?

Current advice is: "Planning legislation is the mechanism that governs the use(s) to which a lot owner can put their private lot property to;" and councils are now scuttling to find the means to address their exposure.

Are Building Regulations Also Being Misinterpreted by Government to Satisfy Vested Interests

There is a view within some reliable strata circles as a result of arguments emanating from politicians and public servants who advanced debate that Accommodation Module and Class 2 classification permitted short term rental, that Class 2/3 issues are dead.

How could that be? There has been no amendment to legislation. There has been no consultation with stakeholders. In whose interest would the permitting of short tern rentals in Class 2 buildings benefit, certainly not the owners simply wanting a peaceful and harmonious lifestyle. So why are our politicians and public servants reinterpreting the intentions of introduced legislation.

What is a Class 2 building?

Australian Building Codes evolved from previous state regulations. The following describes that evolution.

Newsflash 327 included a succinct precis of the history of Class 2 buildings and the intent of the BCA definition. The Queensland historic legislation was also quoted:

> *"The Standard Building By-Laws 1975 (repealed), which preceded the BCA in Queensland, included the term 'dwelling units' in the definition of a class 2 building and required a dwelling unit to be suitable for use as a separate domicile. The dictionary definition of domicile includes 'a place of residence; an abode; a house or home; a permanent legal residence"*

Moreover, the Macquarie Dictionary defines dwelling as: "*1. a place of residence or abode; a house. 2. continued or habitual residence*." Furthermore:

BCA 88 (1988) included classifications from existing State and Territory Building Acts and Regulations. At that time, Class 2 buildings were: "*multiple residential, self-contained dwellings where occupants reside.*"

Adding further creditability to the Department of Infrastructure and Planning interpretation of the use of Class 2 buildings is the Australian Bureau of Statistics who define a 'Dwelling Unit': "A dwelling unit is a self-contained suite of rooms, including cooking and bathing facilities and intended for long-term residential use".

The South Australian Government have published their understanding of a Class 2 building as: "A building containing 2 or more sole-occupancy units each being a separate dwelling."

The Newsflash goes on to state:

> "*The last few words are important as the only other definition that refers to 'dwellings' (before the 2011 National Construction Code (NCC) changed the definition of class 1b buildings) is the definition for class 1a buildings (i.e. houses that will normally be occupied by a number of related people on a long-term basis). Accordingly, the occupancy and use of the separate units in a class 2 building should be similar to a house. Because the residents are permanent and related, they will be familiar with the building, have a degree of control over (and vested interest in) what happens within the unit and in an emergency, they will know the best means of escape and will assist each other.*"

All of the above leaves no doubt as to the intended correct use of Class 2 buildings; therefore, the conclusion must be that the incorrect approval and construction of Class 2 buildings for Class 3 use was deliberate and blatant manipulation of the BCA. The draft 'Guideline' will now stipulate the definition for new building approvals after 01 May 2010. However, the non-retrospective intent of the 'Guideline' will leave a group of Class 2 buildings with no provision for access or escape by persons with a disability and, lower fire detection and alerting standards, being used as transient holiday resort complexes that should have been built to Class 3 standards.

A following bi-product of the misuse of Class 2 buildings has followed:

The Developer applies a Module to strata schemes in Queensland.

Under the *Body Corporate and Community Management Act* there is:

Standard Module

> *"(2) This regulation is the regulation module that applies to a community titles scheme if no other regulation module applies to it*."

Accommodation module

> *"(2) For this regulation to apply to a community titles scheme—*
>
> *(a) the lots included in the scheme must be predominantly accommodation lots;"*

Below are the Hansard recordings of the intended use of modules on the introduction of the current legislation.

https://www.parliament.qld.gov.au/documents/explore/ResearchPublications/LegislationBulletins/lb0697pb.pdf

The Body Corporate and Community Management Bill 1997

HANSARD REFERENCE SECOND READING:

Weekly Hansard, 30 April 1997 pp 1136-113

3.1.1 Regulatory Modules

Central to the objective of providing for flexible arrangements for community living are the regulatory modules provided for in Clause 22. In the second reading speech the Minister, referring to the flexibility proposed by the BCCM, stated

> *The primary means of achieving this flexibility is through a legislative structure that comprises an umbrella act, supported by separate regulatory modules that are tailor-made for specific types of development.*
>
> *It is intended that the legislation will commence with four modules in place...*
>
> *To repeat the mistake of 1994 and formulate an act which could not separate a law governing 500 room resorts, from that pertaining to a "Six-Pack" or duplex apartment, would be useless.*

This approach is a departure from the current situation where, in the words of the Minister,

> *...all developments were dumped under one law without consideration of the differing needs of dwellers and investors in these developments.*

The Minister went on later in the second reading speech to outline the initial four proposed regulatory modules

> *The **first module** [emphasis added] being the standard module, will provide for significantly regulated management processes and is designed to accommodate predominantly owner occupied buildings. It may include developments which are a mix of permanent residential and holiday letting.*
>
> *The **second** [emphasis added] is the accommodation module, which sets up management processes that are less regulated than the processes under the standard module. This module is intended for schemes that are used predominantly as holiday letting or serviced apartment operation with the need for accommodation management*

Carrington Court - Main Beach [2005] QBCCMCmr 710 (15 December 2005) determined:

> *"Consequently, the minimum requirement of 'predominantly' is the prevalence of accommodation lots which would satisfy the basic requirements of a special resolution and demonstrate supremacy or ascendancy. In quantifiable terms, this would be demonstrated if, given the number of accommodation lots in the scheme, a motion to adopt the Accommodation Module would be successful if the adoption of this Module was acceptable to a significant proportion of the owners of the accommodation lots, and the owners of the lots in the scheme which were not accommodation lots were largely powerless to prevent this outcome. Given the requirements for counting votes for a motion requiring a special resolution [18], I consider that the minimum number of accommodation lots must be 75% of the lots in the scheme for the section 3(2)(a) entry requirement to be satisfied. The existence of this number of accommodation lots allows the presentation of a motion to owners, and it is then a matter for all the owners to consider and determine whether to accept the module."*

The predominant difference between Standard Module and Accommodation Module is the opportunity for a developer to sell either a 10-year term (Standard) or 25-year term (Accommodation) management agreement. The ability to sell a 25-year term agreement is far more valuable to the developer as it would command a substantially higher price.

This has led to developers applying Accommodation Module to schemes that do not meet the qualifying criteria of 75% accommodation lots. It is given that schemes marketed and sold as resorts are likely to qualify for Accommodation Module. But schemes, that are marketed and sold as residences, purchased in the main by owner occupiers, having Accommodation Module applied in order that the developer can sell a 25-year management agreement goes beyond the objectives and intention of the BCCM Act and in the interests of consumer protection to those purchasers, should be immediately stopped.

How could such a re-interpretation be applied 20 years after legislation was introduced? There has been no amendment to legislation. There has been no consultation with stakeholders. There has been no review as to whose benefit would be served in the permitting of short tern rentals in Class 2 buildings clearly intended for long term

occupancy. There is no benefit to owners simply wanting a peaceful and harmonious lifestyle. Owners in a Class 2 building can still rent their unit, but that rental is limited to a minimum of 3 months. So why are our politicians and public servants not respecting the aforementioned intentions of introduced legislation, contrary to the interests of the owners who have purchased in good faith in those schemes who believe otherwise.