unit owners association of queensland inc

PROPOSAL FOR CHANGE

NATIONAL CONSTRUCTION CODE SERIES

SUBJECT	Definition of NCC Classifications 2 and 3
BCA Volume One:	BCA Volume One: Part A3. Table D3.1 Class 1b
BCA Volume Two:	N/A
Guide to Volume One:	N/A
PCA Volume Three:	N/A

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The Proposal

Definition and correct use of the word "dwelling". Part A3.2 Class 1b(ii). Table D3.1 Class 1b.

The proposal is to:

1. Amend the above parts of the NCC to the correct terminology as required by the Office of the Parliamentary Council - Drafting Manual; and,
2. Insert the definition of "Dwelling" as contained in the Macquarie Concise Dictionary (sixth edition) to the NCC Volume 1 General Provisions. i.e.
   "Dwelling: 1. a place of residence or abode; a house. 2. continued or habitual residence."
3. Amend the definition of Class 1b (ii) to remove "dwellings" and insert "buildings" thus stating:
   "4 or more single buildings located on one allotment and used for short - term holiday accommodation,"
4. Amend Table D3.1 (a) Class 1b (Access for people with a disability) to remove "dwellings" and insert "buildings".

The Current Problem.

Deficient drafting standards introduced to the NCC at the 2011 amendments by the misuse of the word "dwelling" out of context, and with the incorrect definition of the word, "dwelling" contrary to the Drafting Manual of the Office of the Parliamentary Council. Drafting standards require consistency in the use of words." Dwelling" in the original definition of Class 1 and 2 buildings is consistent with the Macquarie Dictionary, but inconsistent with the use of "dwelling" introduced in the definition of Class 1b and the definition in the Class 1b that is repugnant to the Macquarie Dictionary.

The aim of the Building Code Australia (BCA) and supporting State legislation should be 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 objective of the BCA and Disability Discrimination ACT (DDA).

The Australian Building Codes Board (ABCB) appears to be implementing a policy of erosion of the distinction between Class 2 and Class 3 buildings by establishing standards that are common to both. This is evident in the new smoke detection standards, fire equipment standards, emergency signage standards and relaxation of public address system standards. Access and egress standards have also been standardised, understandably because of the post 2010 requirements of the Disability Discrimination Act Access to Premises standards. If this is ABCB policy for new buildings, then developers, and building owners, will be required to accept that the original intent of the BCA to reduce building costs for residential buildings will no longer apply. The ABCB will be answerable for increased costs to the community and for the achievement and maintenance of acceptable standards of structural sufficiency, safety, health and amenity for the benefit of the community now and in the future. Also the disharmony created by failure to segregate long term residential and short term accommodation users.

In reality, there are thousands of Class 2 buildings in Australia that are being incorrectly used for Class 3 accommodation. These building are not subject to the multipurpose construction standards now being applied to new Class 2 and Class 3 buildings. Therefore transient accommodation residents being accommodated in pre 2010 Class 2 buildings are being exposed to sub -standard fire detection and access and egress standards.

The UOAQ considers that the ABCB has failed to clearly and specifically define Class 2 building use by failing to include the Macquarie Dictionary definition of "dwelling" in the BCA Volume 1 General Provisions.

In 1980, by way of an inter-government agreement, a national body called the Australian Uniform Building Regulations Co-ordinating Council (AUBRCC) was formed. This organisation, which consisted of the Commonwealth, state and territory governments, was principally created to develop a national building code. This task was successfully completed in 1990 with the production of the Building Code of Australia (BCA90).

The BCA relates to building use and is defined by the Australian Building Codes Board as:

"The goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future."

Definition of Class 2 and Class 3 buildings

The two building classifications of interest to this proposal are:

Class 2 (Long term residential buildings); and

Class 3 (Short term accommodation buildings).

The 1980/81 standardisation committee derived the building classification definitions from an assembly of submissions of building codes from every State and Territory in Australia and also submissions from New Zealand. Terminology used in Europe and the United States of America was also considered. The understanding of definitions used in drafting the BCA was derived from the Concise Oxford Dictionary (At that time the Australian Government standard for legislative drafting).

There was clear logic to the development of the definitions within the guidelines established for the creation of a national building code, and the definitions of words used complied with the Office of Parliamentary Council - Drafting Manual.

Class 1 buildings were, and are, clearly understood as private residential dwellings.

Class 2 buildings were considered to be private residential dwellings (Class 1) built above, beside or below each other. The aim of the committee was to restrict regulation to that applying to Class 1 dwellings unless there were structural or safety requirements that justified additional regulation - thus minimum fire alarms and no access requirements for persons with a disability. The objective was to minimise cost of construction consistent with meeting the objectives of the committee and minimum burden on the community.

Class 3 buildings were considered to be commercial application buildings providing accommodation for a variety of applications and a variety of persons. This included commercial hotels, motels, boarding houses, student accommodation, etc. Thus the safety standards had to meet the worst case scenario of these uses. Fire alarm systems had to be fully automatic and provide coverage for the entire building (AS 1670). Access and egress was required for persons with a disability, structural sufficiency had to be developed to withstand high occupancy numbers, materials had to be higher fire resistance and escape systems had to be to the highest standards available in 1980/81. Class 3 buildings were of necessity more expensive to construct, but the committee was of the mind that higher construction costs could be absorbed because of the commercial nature of the buildings.

There was no doubt in the minds of the standardisation committee that they had clearly defined the classifications and building use.

Confusion as to the intent of Class 2 definition

Unfortunately following the introduction of the Building Code Australia some developers working in concert with Local Government building inspectors began a campaign to confuse the intended classification of Class 2 and Class 3 building use. The confusion was created by casting doubt on the definition and use of the word 'dwelling'. This confusion varied from State to State, but was far more prevalent in Queensland where the State Government turned a blind eye to the incorrect use of buildings. Both Class 1b and Class 2.

This blind eye approach included Class 1b buildings until the tragic loss of 20 lives by fire at Childers and Sandgate. Following this disaster the Queensland Government quickly developed an understanding of Class 1a and Class 1b use and fire regulations. Legislation was introduced and standards enforced. This understanding did not extend to Class 2 and Class 3 buildings primarily, because of pressure from developers and the tourism industry.

New South Wales subsequently introduced its own clarification of the word 'dwelling":

HOME BUILDING REGULATION 2004 - REG 6

Definition of "dwelling"-certain residential buildings and other structures excluded. For the purposes of the definition of "dwelling" in section 3 (1) of the Act, the following are declared to be excluded from that definition:

(a) a boarding house, guest house, hostel or lodging house;

(b) all residential parts of a hotel or motel;

(c) any residential part of an educational institution;

(d) accommodation (other than self-contained units) specially designed for the aged, persons with a disability or children;

(e) any residential part of a health care building that accommodates staff;

(f) a house or unit designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation;

(g) any part of a non-residential building that is constructed or adapted for use as a caretaker's residence;

(h) a moveable dwelling (with or without a flexible annexe) within the meaning of the Local Government Act 1993 that is, or is capable of being, registered under the Road Transport (Vehicle Registration) Act 1997 (such as a caravan or a motor home);

(i) a residential building for the purposes of which development consent can be granted only because of *State Environmental Planning Policy No 15-Rural Land sharing Communities.*

What evidence exists to show there is a problem?

The UOAQ is the single largest organisation in Queensland representing some 405,000 unit owners. The UOAQ also recognises the importance of our members to the Queensland tourism industry. There are two distinct groups involved in unit ownership; the investment owners who provide the tourist accommodation, and the long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence. Unfortunately these two groups of occupiers, in most circumstances, are incompatible.

The use of Class 2 buildings for holiday letting has considerable implication for the tourist industry. The two types of residents are in conflict and tourists often become involved in heated arguments about noise, use of facilities and care for the complex.

The ABCB public consultation paper on noise levels in buildings, reported that an UK Department of Environment, Transport and Regions' January 2001 document states:

> *"Noise, at the sort of levels encountered in dwellings, can lead to a wide range of adverse health effects including loss of sleep, stress and high blood pressure. Qualifying the risks attributable to exposure to environmental noise and, particularly, neighbour noise is difficult but it is suggested that there are between one and ten deaths per year in the UK (these being suicides or as a result of assaults) attributed to noise from neighbours. The number of less severe problems attributed to noise (such as stress, migraines, etc.) is estimated to be about 10,000 per year."*

The Western Australian Government 2003 report "*Investigation of the Impact of Combining Tourist and Permanent Residential Accommodation on Tourist Zoned Land and the Impact of Strata Titling of Tourist Accommodation"* found:

> *"There is potential for conflict between short stay tourists and residents in a tourist facility due to the different objectives of the two groups in being at the premises. This conflict can manifest itself in many ways but has two primary outcomes:*
>
> * *A de-valuation of the "tourist" experience available at the development through there being a non-tourist character or ambience to the facility.*
>
> * *An impact on the amenity of the resident due to different lifestyle priorities to short stay tourists, who in many cases have a higher "recreation priority".*

A 2013 study *Residents' Experiences in Condominiums: A Case Study of Australian Apartment Living*, Ron Fisher & Ruth Mcphail. Griffith Business School, Gold Coast Campus, Griffith University, QLD, Australia supported these findings:

> *".....the tendency to focus on sales based on mixed usage militates against the interests of tourists, live-in owners, long-term renters and local authorities, all of whom recognise the benefits of segregating tourists from resident owners and long-term renters. The potential for conflict between tourists and resident owners in multi-use complexes is high."*

The Hotel Motel Accommodation Association (HMAA) also argues:

> *"Long-term residents in buildings used as 'de facto hotels and motels' suffer a considerable loss in amenity, due to increased noise and activity from transient tourists, as well as diminished security."*
>
> *"Apartment residents should not have to share their amenities, such as gardens, pools and gyms with `guests' (in effect, strangers),……"*
>
> *".....increased visitor thoroughfare, including the movement of luggage, increases maintenance costs of corridors, lobbies, lifts and car parks…..a cost borne ultimately by permanent residents who do not enjoy any of the monetary benefit of the rental apartments and are unfairly cross-subsidising these owners (in addition to incurring the losses in amenity referred to above)."*

The HMAA also stated: "All providers of similar accommodation types should be required to comply with the same regulations, legislation and standards." That is, the HMAA members who must comply with Class 3 building standards and costs are being disadvantaged by tourism operators using Class 2 buildings as transient holiday and tourist accommodation.

The Tourism and Transport Forum Australia has expressed similar concerns to those stated by the HMAA.

"Legitimate operators face higher operating and compliance costs by providing properly trained staff, responsible management, compliance with building standards, disability access, insurance levies, and payment of commercial council rates."

The standard of visitor accommodation constitutes a major part of the longer term memory of the visitor/tourist experience, and certainly is one of the major subjects of recommendation to friends and associates. Thus the standard of accommodation has considerable impact on new and repeat tourism business experienced by UOAQ accommodation providers.

The Objective

How will the proposal solve the problem?

The BCA now renamed the National Construction Code (NCC) and incorporating the BCA has the previously stated mission statement:

> *"The goals of the Building Code Australia (BCA) are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety, health and amenity for the benefit of the community now and in the future."*

This mission statement clearly tasks the ABCB with the authority, responsibility and duty of care to the Australian people to correctly and accurately define the standards required to achieve "structural sufficiency, safety, health and amenity for the benefit of the community now and in the future."

The NCC 2014 continues to state: "The ABCB's mission is to address issues relating to safety, health, amenity and sustainability in the design, construction and performance of buildings."

These standards and mission statement are understood by the ABCB as evidenced by the non-binding clarification paper issued in 2012, but the ABCB appears to lack the intestinal fortitude to confront developers.

The ABCB cannot abdicate this authority, responsibility, and duty of care and retain any creditability. Six years to establish a definition of the specification of Class 2 buildings that are the basis for achieving an understanding of the core elements of their mission statement is unacceptable by any performance standard.

The following Part of the BCA specifically states the 'Principles' and 'Intent':

PART A3 CLASSIFICATIONS OF BUILDINGS AND STRUCTURES

> *A3.1 Principles of Classification Intent*
>
> *To state the basis of any decision regarding the classification of a building or part of a building.*
>
> *The use of a building determines its classification. Use is determined on the basis of its design, construction or adaptation.*
>
> Classification Intent:
>
> *To categorise buildings of similar risk levels based on use, hazard and occupancy.*
>
> *Classification is a process for understanding risks in a building or part, according to its use. It must be correctly undertaken to achieve BCA aims as appropriate to each building in each circumstance (underline emphasis added).*

The logical conclusion from the above is that the BCC before advising the ABCB in determining the construction standards to meet a defined use and building classification must understand the intent of the classification definitions (in this case Class 2 and Class 3). If the BCC does not understand the link between use and classification it cannot specify the standards required of the BCA (NCC). E.g. BCA Specification E2.2a para. 3. (AS 3786) for long term residential Class 2 buildings and BCA Specification E2.2a para. 4. (AS 1670) for short term accommodation Class 3 buildings, thus compromising fire safety standards. This past clear understanding of fire standards has now been blurred by the NCC introducing combined Class 2/Class 3 standards and exemptions.

The proposed 'Guide' to the understanding of Class 2 and Class 3 building use was fully supported by the Unit Owners Association of Queensland Inc.(UOAQ). As returning the intended use of Class 2 and Class 3 buildings to the intent of the (AUBRCC). The UOAQ was, and is, most concerned that the document was proposed as a 'Guide' and not a clear definition of the correct building use. We see this as an open invitation to the blind eye approach as was experienced with Class 1a and 1b until some 20 deaths by fire forced the Queensland Government to act. It would be a tragic reflection on the ABCB and the Federal Government if a fire in a Class 2 building is being used for Class 3 purposes, resulted in hundreds of death by fire. This would be the scenario if for example the Oaks Tower at 128 Charlotte Street Brisbane was to be involved in a major fire.

The UOAQ recommends in the strongest possible terms that the General Provisions to the BCA be amended to include a definition of Dwelling: 1. a place of residence or abode; a house. 2. continued or habitual residence. The incorrect use of the word "dwelling" then be deleted from the NCC Volume 1 as recommended at the 'Proposal' to this paper.

This extremely simple amendment will permanently clarify the correct use of Class 2 buildings and can be adopted by every state and territory as part of the May 2015 NCC amendments.

What alternatives have been considered.

Because of the confusion introduced as to the intended definition and use of Class 2 and Class 3 buildings, and lack of definition of "dwelling' in the BCA, the ABCB placed on its Annual Business Plan for 2006: 'The clarification of the definitions of Class 2 and Class 3 buildings'. Four years later (2010) the ABCB declared that the BCC was unable to reach agreement as to suitable definitions, and therefore the project would be discontinued.

Following this failure of the BCC and ABCB to achieve satisfactory definitions of the Class 2 and Class 3 building classifications, the Australian Government Productivity Commission released its Annual Review of Regulatory Burdens report in August 2010. This report raised concerns about classification and use of Class 2 and Class 3 buildings, and tasked the ABCB with reviewing the definitions and use of Class 2 and Class 3 buildings. In 2011 the ABCB sought submissions from stakeholders in relation to Class 2 and Class 3 building classification. On 6 August 2012 the ABCB issued a non binding clarification paper on the understanding of Class 2 and Class 3 definitions.

On 19 December 2012 the ABCB circulated a letter effectively putting the clarification exercise on hold for two years.

The BCC from 2006 to 2010 was unable to agree on an acceptable definition. In total this task has now been on the ABCB agenda for six years plus another two years in abeyance. The ABCB appears to be either incapable of or unwilling to produce a definition of Class 2/3 buildings, and considering the six years already dedicated to this simple task, plus two years in abeyance, appears to be most unlikely to achieve a satisfactory resolution of the problem. The delay simply allows developers to continue building sub-standard accommodation – primarily for the tourist industry - but owned by the mum and dad investors of Australia.

The letter issued from the ABCB clearly indicates that it has been influenced by the development lobby to discontinue the clarification exercise because it will be financially disadvantageous for the developers to construct the correct Class 3 buildings where they are now constructing less expensive Class 2 buildings for short term accommodation.

This apprehension of collusion between the ABCB and developers was further strengthened in 2011 by the introduction of an amended definition of Class 1b buildings.

The original Class 1b definition was amended in May 2011 by the addition of paragraph (ii)

> *(ii) "4 or more single dwellings located on one allotment and used for short – term holiday accommodation"*

Resulting that the Class 1b definition reads:

> (b) Class 1b —
> (i) a boarding house, guest house, hostel or the like—
> (A) with a total area of all floors not exceeding 300 m2 measured over the enclosing walls of the Class 1b; and
> (B) in which not more than 12 persons would ordinarily be resident; or
> (ii) *4 or more single dwellings located on one allotment and used for short-term holiday accommodation,*

which are not located above or below another dwelling or another Class of building other than a private garage.

The introduction of "(ii) *4 or more single dwellings located on one allotment and used for short –term holiday accommodation." is:*

i) contrary to the stated objective of the introduction of Class 1b;

ii) contrary to the Macquarie Dictionary definition of 'dwelling'.... as a 'dwelling' cannot be used in conjunction with short-term holiday accommodation and also maintain consistency with the Macquarie Dictionary definition;

iii) offensive to the Office of Parliamentary Council - Drafting Manual;

iv) contrary to the BCA statement: "Guest, boarding, or lodging houses which do not meet the criteria for a Class 1b building are classifiable as Class 3 buildings. Correctly, 4 or more single dwellings located on one allotment and used for short - term holiday accommodation would best be classified as a motel - Class 3.

The introduction of the amended definition appears to be completely unnecessary except for the purpose of diluting the construction standards of holiday (tourist) accommodation and further confusing the understanding of 'dwelling' as originally confined to Class 1, Class 2 and Class 4 (part) buildings.

Confusion has already been achieved in the Victorian Supreme Court (Paul Slater v Building Appeals Board and Ors) VSC279 Beach 30 May 2013 where his Honour Judge Beach at [48] & [49] found that the new Class 1b definition diluted (confused) the definition of 'dwelling'.

The UOAQ protested this change of definition to Building Codes Queensland (BCQ). This letter was responded, and subsequently forwarded to the ABCB as recommended by BCQ. This Proposal for Change results from the ABCB response.

The Impacts

Who will be affected by the proposal?

1. Long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence.
2. Investment unit owners seeking a return on investment from short term rental.
3. Caretakers and letting agents seeking to illegally holiday let units in Class 2 buildings.
4. Developers who will be forced to comply with the intent of the NCC and construct building for purpose.
5. Persons with a disability who will be protected from occupation of pre 2010 buildings without adequate egress in the event of fire.
6. State Governments who will be forced to amend legislation that is offensive to the NCC and DDA.
7. Local Governments who will be required to correctly classify Class 2 and Class 3 buildings during development application processing.
8. Australian tourism industry where dedicated, professionally managed, designed for purpose, facilities are not available to meet the standards expected by international travellers.

In what way and to what extent will they be affected by the proposal?

Unit owners: Long term residential owners seeking an apartment complex that provides the amenity, level of health and safety commensurate with community expectations for places of permanent residence.

Mixed use buildings are distressing to residential owners because the issue we are addressing is to provide surety to purchasers who wish to live in residential property not affected by short term rental. The desire for quality of residential living accords with basic human rights, and will be an increasing problem as residential unit living increases. The 2013 Griffith University study went to great pains to explore the frustration that purchasers experienced clarifying the building class issue, then ultimately finding that short term rentals were introduced into their property. Class 2 buildings should provide the means for that surety.

However, under Queensland legislation there is no provision for permanent residential buildings that provide community expectations of lifestyle, amenity, safety and health, or residential accommodation with like-minded persons.

Investment unit owners seeking a return on investment from short-term rental.

The primary consideration in any solution as to correct building use must be the building owners (Body Corporate). The owners must be allowed freedom of choice to determine by democratic vote how they want their building used. Unit owners fall into two distinct groups, those who purchased for investment and those who purchased for private residential use. Those who purchased in a Class 2 building for investment, either knowingly or unknowingly, purchased in the wrong classification building. Those who purchased for residential use purchased in the correct classification building. Any right thinking person must conclude that those persons who purchased in the correct classification building must be given priority in any dispute as to future building use - provided that the majority of owners support that building use.

As population densities increase (in line with Government policy) the number of persons permanently accommodated in apartment buildings will increase. These persons have every right to expect accommodation standards that provide the amenity, health and safety equal to private residential houses. They should not be expected to live with noise, and short term renters (strangers) using their recreational facilities such as swimming pools, garden areas and community lounges. The lifestyle expectations of permanent residents and short-term transient holidaying tourists are entirely incompatible.

Owners who purchased for short-term accommodation investment must be given equal consideration as residential owners when the majority of owners vote to retain short-term accommodation in a Class 2 building. However, this situation cannot be allowed to continue indefinitely and time frames must be established to either upgrade the building to Class 3, or change to the correct Class 2 residential use.

Caretakers and letting agents seeking to illegally holiday let units in Class 2 buildings.

Building Letting Agents are the third group who must be given some consideration, but they are not on the same standing as building owners, albeit that they may own a unit in the building. Letting business returns from a 100% occupancy long term let building yielding 7% will be almost equal to business returns from a 65% let short term rental building yielding 12%.

Solicitors have financially benefited from the confusion surrounding the correct use of Class 2 buildings. Some Local Governments have fought extremely hard to achieve their interpretation of the correct use

of Class 2 buildings (not always with success) but at great expense to ratepayers. The trail of court decisions is long and counter-productive to sound governance. The correct interpretation of 'dwelling' and 'residence' has been considered by many courts:

When considering the GST definition of "residence" the Federal Court looked at the definition of "residence" and "occupy" in the Macquarie and Oxford Dictionary, and noted with approval the comment made by the UK VAT and Duties Tribunal (Urdd Gobiath Cymru v Commissioner of Customs and Excise [1997] V &DR 273 at 279):

> "A residence" clearly implies a building with a significant degree of permanency of occupation.

This same judgement also found that a Motel is not "Residential Accommodation" as residential implies a degree of permanency.

In *South Sydney Municipal Council v James and Anor* (1977) 35 LGRA 432, the issue for determination turned on the definition of *"dwelling-house"* which was defined in the relevant ordinance as *"a building designed for use as a dwelling for a single family".* At p 440, Reynolds JA said that a building is used as a dwelling-house within that definition:

> *"... if its use is such that it can fairly be said as a matter of fact that it is occupied in much the same way as it might be occupied by a family group in the ordinary way of life and that it is not a use and occupation more appropriately described in other categories of residential buildings."*

The obiter dictum of Samuels JA was not followed by Bignold J in *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd and Anor* (1988) 66 LGRA 373 (at pp 381 - 382), his Honour preferring to adopt the approach of King CJ in *Masters v Padley.* The question in that case was whether a certain building was being used within the terms of a development consent authorising use as a *"residential flat building"*. On appeal (*North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd and Anor* (1990) 21 NSWLR 532), Mahoney JA at 537 - 538 held that, in respect of the definition of *"residential building"* under the County of Cumberland Planning Scheme Ordinance, a number of descriptions were used involving different kinds of human habitation, and that the kind of human habitation involved in *"residential flat building"* within the definition envisaged a significant degree of permanency of habitation or occupancy.

In the context of a planning control which regulates the purposes for which land may be used, it is appropriate, in my opinion, to think in terms of the ordinary meaning of *"domicile"* as a *"place of residence",* an *"abode"* or a *"house or home"* (see Macquarie Dictionary) rather than in terms of its technical legal meaning as being a permanent residence to which the subject, if absent, has the intention of returning. Characterisation of use is not generally concerned, from a planning control perspective, with the intentions of persons, but instead is concerned with the actual use to which the land is put (cf *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd and Ors* (1989) 67 LGRA 344 per Kirby P (as he then was) at 353 in the context of existing uses).

NSW Land & Environment Court 3rd October 2002. Judge Pain

Eric Foster of Sylvania, owner of a residential strata unit in the "Tradewinds" building on the ocean front at South Cronulla was ordered to stop letting his residential unit for holiday and short term accommodation. Tradewinds is a 9 storey 42 residential unit building zoned 2c Residential which allows use of the units only as a person's permanent home or residential lease.

A further hearing in the Cronulla flat case:

In the New South Wales Land and Environment Court Judge Pain in Sutherland Shire Council v Foster & Anor [2003] NSWLEC 2 (24 September 2002) paragraph 8 stated:

"In terms of these particular proceedings, I rely on the decision of Mahoney J in North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 71 LGRA 432. I particularly rely on a passage at 437:
"In the end, my conclusion is that the meaning of the consent, though not determined by, is to be read consistently with the use of language in the relevant definitions in the County of Cumberland Planning Scheme Ordinance. The definition of "residential building" requires nothing more than use for human habitation. However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency. Thus, a residential hotel may have a smaller degree of permanence than a residential club or a hostel. It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind or category of residential building which envisages a significant degree of permanency of habitation or occupancy. The description of a flat as a "dwelling" or a "domicile" carries with it the notion of that degree of permanency."

Regardless of the majority of court decisions siding with 'dwelling' as being a place of long term or permanent residence, some courts found the matter to lack clarity, and some courts found otherwise:

In the Victorian Supreme Court (Paul Slater v Building Appeals Board and Ors) VSC279 Beach 30 May 2013 where his Honour Judge Beach at [48] & [49] found that the 2011 NCC Class 1b definition diluted (confused) the definition of 'dwelling'. He returned the matter to the Building Appeals Board for review.

The Oaks Hotels & Resorts P/L v City of Holdfast Bay & Anor [2010] SARDC 16 (31 March 2010):

The referenced decision by the Environment, Resources and Development Court (ERDC) of South Australia, to allow misuse of a Class 2 building, is extremely confusing, and contrary to South Australian Government guidelines published at that time.

The Sydney Morning Herald 21 May 2014 reported a Victorian Civil and Administrative Tribunal decision to issue a cease and desist order against short stay letting operators. In this case the matter was the use of Class 2 units for what the Tribunal accepted was business operations.

The final word on the correct interpretation of "Dwelling Unit" is left to the Australian Bureau of Statistics: "A dwelling unit is a self-contained suite of rooms, including cooking and bathing facilities and intended for long-term residential use." (A definition that the ABCB may wish to adopt)

The point of all this is that unit owners should not have to resort to the Courts to determine the correct use of their building. A matter that falls within the responsibility and charter of the ABCB, but which the ABCB has failed to define over a period of some 24 years.

Developers who will be forced to comply with the intent of the NCC and construct building for purpose.

The intent of the AUBRCC was to introduce a logical sequence of building classifications based on type of occupancy and risk of that occupancy including type and numbers of persons resident, accommodated or working in a building.

This resulted in Class 1 for private residential, Class 2 sole occupancy units for private residential and Class 3 for public accommodation.

Understandably the AUBRCC failed to anticipate that some developers would try to manipulate the logical sequence and definition of building classifications for their own vested interests .Thus causing confusion as to the definition and use of Class 2 buildings.

As a consequence of their actions, developers are now faced with the dilution of the difference in construction and fire and safety standards between Class 2 and Class 3 buildings to the point where new Class 2 buildings must meet the standards of Class 3 buildings with the associated cost increases. This will have limited effect on developers of pre 2010 Class 2 buildings, as these projects are completed and have been passed to the general public to try and reconcile the legality of use of their building.

Persons with a disability who will be protected from occupation of pre 2010 buildings without adequate egress in the event of fire.

The most vulnerable occupiers of Class 2 buildings built before 2010, being misused as Class 3, are persons with a disability. Class 2 building constructed before 2010 did not provide access and egress for persons with a disability. Fire detection standards were lower; there were no fire refuge areas, no public address systems, no braille signage and no direct fire alarm contact to a fire reporting area. In the event of elevators being closed in the event of fire, (as is required) no provision for safety or egress of persons with a disability.

Clear definition of the correct use of Class 2 buildings will provide alerts to persons with a disability that pre 2010 Class 2 buildings are unsuitable for safe occupation.

State Governments who will be forced to amend legislation that is offensive to the NCC and DDA.

The Queensland State Government Body Corporate and Community Management Act 1997 section 180 (3) is offensive to the NCC and DDA by forcing bodies corporate to use Class 2 buildings for transient short term accommodation. Thus exposing bodies corporate to prosecution and liability either in the event of death by fire, or injury to a person with a disability.

Clear definition of the intent of use of a Class 2 building should force the Queensland Government to review their legislation. A clear definition of Class 2 building use would also provide clarity to the Courts.

Local Governments who will be required to correctly classify Class 2 and Class 3 buildings during development application processing.

The primary cause of acquiescence to the confusion of Class 2 building definition has been Local Government. Local Governments have failed to correctly classify buildings for purpose, and then failed to monitor correct use. This has given a green light to developers to build and then sell buildings by misrepresenting their end use.

Australian tourism industry where dedicated professionally managed designed for purpose facilities are not available to meet the standards expected by international travellers.

In 2003 the Western Australian government report of the Tourism Planning Taskforce that was an in-depth investigation into planning for future tourism sustainability. The Taskforce investigations provided the opportunity for the factors and issues that impact on the tourism industry, the tourist experience and tourist satisfaction, to be recognised.

The key principle identified was that a sustainable tourism industry, with its many inherent benefits, "requires tourism development to be undertaken for tourism purposes." Past practise in Australia, in many instances, has been to build Class 2 residential accommodation buildings and then try to adapt them to tourism facilities. This has adversely impacted the tourism experience and the quality of living of permanent residents in these buildings. The UOAQ policy is, and has always been, that

Governments should encourage the construction of Class 3 buildings purpose designed to cater for tourists and containing those features sought by tourists for relaxation and enjoyment.

The Hotel/ Motel industry is fully equipped to provide tourist accommodation providing the standards and facilities expected by the touring public. Moreover, the staff in these facilities is professional hospitality personnel trained and qualified to provide the level of service expected by tourists. The recent development of hotels and motels with unit type accommodation and first class facilities has made provision of unit accommodation, with mum and dad caretakers, redundant.

There is no dispute that hotel/ motel buildings must be constructed to BCA Class 3 standards providing the amenity, level of health and safety commensurate with tourist expectations. This is an expensive development scenario where the higher establishment and operating costs can be recouped from the more affluent tourist market. However, hotel operators are not prepared to construct Class 3 buildings that are expected to operate in competition with lower cost Class 2 buildings.

The distinction between Class 2 and Class 3 building use was clearly understood by the standardisation committee working on the predecessor to the draft BCA as far back as 1980. Class 2 buildings were defined as places of permanent residence and Class 3 buildings were defined as transient/ commercial accommodation. The defined objective of the standardisation committee (that has since become the objective of the BCA) was:

The achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.

Two distinct types of building use was the vision of 1980/81 standardisation committee when first defining Class 2 buildings as places of private residence and Class 3 buildings as transient accommodation.

The use of Class 2 mixed use buildings for tourist accommodation is of great concern to the UOAQ for safety of occupants and creation of problems for both the permanent residents and transient tourists.

The 2003 study and report by the Western Australian Government also found:

"There is potential for conflict between short stay tourists and residents in a tourist facility due to the different objectives of the two groups in being at the premises. This conflict can manifest itself in many ways but has two primary outcomes:

- *A de-valuation of the "tourist" experience available at the development through there being a non-tourist character or ambiance to the facility.*
- *An impact on the amenity of the resident due to different lifestyle priorities to short stay tourists, who in many cases have a higher "recreation priority".*

Supporting this finding was the thesis of Kelly Cassidy, a final year PhD student at Griffith University, as reported in the Australian newspaper on 19 October 2007:

- "Apartment owners are far from one homogenous group."
- "They mostly have different and competing interests."
- "The conflict potential in many buildings is huge."

Bill Randolph, director of the Faculty of the Built Environment at the University of New South Wales when endorsing the study (in the same edition of the Australian) said:

"*Legislators, policy-makers and managers are all simply going to have to get their heads around this if they're going to manage this sector into the future in an appropriate way."*

Consultation Who has been consulted and what are their views?

- The 2003 Western Government study quoted above.
- The 2013 Griffith University study quoted above.
- The Kelly Cassidy 2007 Doctorate quoted above.
- The UOAQ represents the unit owners of Queensland and to this end runs a 'help line' for members. The overwhelming complaint from owners is the conflict experienced in mixed use building. The conflict is between tourists and permanent residents, and caretaker/letting agents who have a conflict of interest between responsibility to residents and tourists (because tourist rentals are a source of income to the letting agent).
- The HMAA who must operate Class 3 buildings in competition with Class 2 building operators who have a lower base for return on investment and can therefore operate on lower returns.
- The Hotels Association Queensland who experience the same problems as the HMAA.
- Tourists in Class 2 buildings who experience a less than satisfactory standard of service provided by the Mum and Dad operators of Queensland's infamous Management Rights.
- Residents in Class 2 buildings being operated as Class 3 (even by professional companies) These residents complain of:
    - slow elevator service because Class 2 building are constructed with the minimum number of elevators based on lower utilisation by permanent residents;
    - service staff using the elevators with linen and cleaning trolleys;
    - no linen service cupboards in a Class 2 building design, resulting in service trolleys blocking common property access areas and obstructing evacuation routes;
    - short term guests having higher utilisation than permanent residents of the indoor 25 m pool, outdoor pool, sundeck, sauna, gymnasium, guest lounge, BBQ facilities and entertaining area and basement car parking all requiring elevator utilisation; and
    - on-site restaurant and conference/meeting facilities requiring elevator services.

- Owners Corporation Docklands Victoria, fighting to ban short term letting of their Class 2 building.

Wayne Stevens

President
Unit Owners Association Queensland Inc. 28 October 2014