NO LONGER UNREGULATED, BUT STILL CONTROVERSIAL: HOME SHARING AND THE SHARING ECONOMY

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The short-term rental accommodation market has experienced incredible growth as a result of technological innovations. This article explores the impact of this phenomenon on property and the concept of ownership in Australia. It does so, first by drawing on Kellen Zale's framework of sharing, which breaks down the activities associated with the sharing economy and applies it in the Australian context. This helps us understand that in many respects, short-term rental accommodation is better characterised as part of the sharing-for-profit economy. This characterisation explains and justifies the choices that Australian states and territories have made in regulating the short-term rental market. This article also analyses disputes that have arisen in Australia concerning short-term rentals, and concludes that whilst the sharing economy prioritises access to property over ownership of it, property law continues to protect the privilege of ownership.

I INTRODUCTION

In her decision at first instance in *Swan v Uecker* ('*Swan*'),[1] a proceeding which culminated in the 2016 decision of the Victorian Supreme Court in *Swan v Uecker* ('*Swan Appeal*'),[2] Member Campana of the Victorian Civil and Administrative Tribunal ('VCAT') referred to Airbnb's effect on the residential tenancy market as 'unregulated and controversial'.[3] As this article demonstrates, Airbnb and similar platforms are no longer unregulated in Australia but Airbnb remains a

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1 [2016] VCAT 483.

2 (2016) 50 VR 74. See Nick Lenaghan, 'Melbourne Landlord Wins Airbnb Case', *The Australian Financial Review* (online, 10 June 2016) <http://www.afr.com/real-estate/melbourne-landlord-wins-landmark-airbnb-case-20160609-gpfa3g>.

3 *Swan* [2016] VCAT 483, [1].

prominent and controversial example of what is often referred to as the 'sharing economy'.[4]

The term 'sharing economy' refers to 'any marketplace that uses the Internet to bring together distributed networks of individuals to share or exchange otherwise under-utilized assets'.[5] In the sharing economy, ownership of assets is not transferred; people, instead, create income from 'sharing' their excess or under-utilised assets.[6] The travel and accommodation markets have been the most heavily affected by the sharing economy, thanks to the well-known platforms Uber[7] and Airbnb[8] respectively. In the accommodation market, other platforms such as Couchsurfing[9] and Stayz[10] also play a role. Thousands of other online platforms have emerged, including some that facilitate the selling of second-hand clothes and shoes,[11] and the delivery of food.[12]

Online platforms like Airbnb and Stayz enable millions of people to find cheap and convenient accommodation, and allow millions of homeowners or tenants to obtain income from their extra space.[13] Although the practice of home sharing did

4 Nicola Philp, 'Until We Sort It Out, Airbnb Will Bring Out the Worst in Some People', *The Age* (online, 28 July 2018) <https://www.theage.com.au/national/victoria/until-we-sort-it-out-airbnb-will-bring-out-the-worst-in-some-people-20180726-p4zts3.html>; Clay Lucas, 'Neighbours' Lives Turned Upside Down by Airbnb and Other "Disruptors"', *The Age* (online, 25 July 2018) <https://www.theage.com.au/politics/victoria/neighbours-lives-turned-upside-down-by-airbnb-and-other-disruptors-20180725-p4ztg9.html>; Jacob Kagi, 'Call for Airbnb Crackdown to Target Investors, Holiday Homes in Western Australia', *ABC* (online, 13 February 2019) <https://www.abc.net.au/news/2019-02-13/call-for-airbnb-crackdown-to-target-wa-investors-holiday-homes/10807774>; Simeon Thomas-Wilson, 'Councils Target Airbnb Rise', *The Advertiser* (Adelaide, 14 June 2018) 6; Simeon Thomas-Wilson, 'Airbnb to Face New Council Scrutiny', *The Advertiser* (Adelaide, 5 June 2018) 11; Laura Crommelin, Chris Martin and Laurence Troy, 'Airbnb Regulation Needs to Distinguish between Sharing and Plain Old Commercial Letting', *The Conversation* (online, 5 June 2018) <https://theconversation.com/airbnb-regulation-needs-to-distinguish-between-sharing-and-plain-old-commercial-letting-97613>; Lisa Visentin and Alexandra Smith, 'NSW Government to Impose 180-Night Cap on Airbnb Properties in Sydney', *The Sydney Morning Herald* (online, 5 June 2018) <https://www.smh.com.au/politics/nsw/nsw-government-to-impose-180-night-cap-on-airbnb-properties-in-sydney-20180605-p4zjj6.html>; Tooran Alizadeh, Reza Farid and Somwrita Sarkar, 'Airbnb: Who's In, Who's Out, and What This Tells Us about Rental Impacts in Sydney and Melbourne', *The Conversation* (online, 21 May 2018) <https://theconversation.com/airbnb-whos-in-whos-out-and-what-this-tells-us-about-rental-impacts-in-sydney-and-melbourne-95865>.

5 Christopher Koopman, Matthew Mitchell and Adam Thierer, Mercatus Center, George Mason University, Submission to Federal Trade Commission, *The 'Sharing Economy': Issues Facing Platforms, Participants, and Regulators* (26 May 2015) 2 <https://www.mercatus.org/system/files/Koopman-Sharing-Economy-FTC-filing.pdf>.

6 Iis P Tussyadiah and Juho Pesonen, 'Drivers and Barriers of Peer-to-Peer Accommodation Stay: An Exploratory Study with American and Finnish Travellers' (2018) 21(6) *Current Issues in Tourism* 703, 703.

7 'About Us', *Uber* (Web Page, 2019) <https://www.uber.com/en-AU/about/>.

8 'About Us', *Airbnb Press Room* (Web Page) <https://press.airbnb.com/about-us/>

9 'About Us', *Couchsurfing* (Web Page) <https://www.couchsurfing.com/about/about-us/>.

10 'About HomeAway', *HomeAway Stayz* (Web Page) <https://www.stayz.com.au/about-us>.

11 'About', *Depop* (Web Page) <https://www.depop.com/about/>.

12 'How Uber Eats Works', *Uber Eats* (Web Page) <https://about.ubereats.com/>.

13 Jim Minifie, 'Peer-to-Peer Pressure: Policy for the Sharing Economy' (Report No 2016–7, Grattan Institute, April 2016) 1 <https://grattan.edu.au/wp-content/uploads/2016/04/871-Peer-to-peer-pressure.pdf>.

not begin with Airbnb,[14] Airbnb has played a prominent role in revolutionising the concept of home sharing by the way it has replaced traditional modes of searching, negotiating and paying for lodging with its online platform.[15] Airbnb provides the platform which directly connects the parties and facilitates the payment of the booking fee,[16] of which Airbnb takes a percentage.[17]

The online platforms that operate in the home-sharing market, like much of the sharing economy, are characterised by two key characteristics. The first is the use of technology such as smartphones, app software and GPS systems, that enable those who want to monetise or commercialise unused assets and those who want access to them to find each other in sufficient quantities and at the right time using in-built trust verification methods which lower transaction costs.[18] Second, is the way they have disrupted and replaced traditional models of business based on the 'business-to-consumer model'[19] with 'direct economic interaction'[20] between consumers and suppliers. This model is based on what are often referred to as peer-to-peer transactions. As Zale notes, third parties retain a clear commercial interest in the sharing economy and indeed actually undertake functions that are 'essential to the existence of many peer-to-peer marketplaces'.[21] For example, third party companies develop and provide the platform that links the users described above, provide the mechanisms that support the (often) monetary transactions and enable the trust verification mechanisms to function and flourish.[22]

In many cases, these services and functions are provided for a fee.[23] As analysed in Part II, these, and other, considerations call into question some of the lofty aspirational goals that many sharing economy platforms aspire to. Whether Airbnb is properly considered a true example of the sharing economy or is just another way of doing business is considered in Part II because it helps to understand some of the legislative responses to the short-term rental accommodation that are analysed in Part III.

These technological innovations have changed the behavioural patterns of participants in the residential tenancy and the short-term rental accommodation market and appear to have challenged settled principles of property law. The Airbnb phenomenon has led, in Australia and abroad, to a range of disputes and

14 Daniel Guttentag, 'Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector' (2015) 18(12) *Current Issues in Tourism* 1192, 1195.

15 Alex Lazar 'Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours' (2018) 3 *UniSA Student Law Review* 49, 52; Rebecca Leshinsky and Laura Schatz, '"I Don't Think My Landlord Will Find Out": Airbnb and the Challenges of Enforcement' (2018) 36(4) *Urban Policy and Research* 417, 418.

16 Deloitte Access Economics, *Economic Effects of Airbnb in Australia: Airbnb Australia* (Report, 2017) 11.

17 Ibid.

18 Kellen Zale, 'Sharing Property' (2016) 87(2) *University of Colorado Law Review* 501, 536.

19 Ibid 539.

20 Ibid.

21 Ibid 540.

22 Ibid.

23 Ibid.

litigation between hosts, guests and neighbours,[24] as well as between landlords and tenants.[25] Traditional participants in the accommodation industry, which have long been the subject of regulation, have argued that online platforms like Airbnb are unfairly advantaged if they are free from the regulation that applies, for example, to hotels and have called for the short-term rental phenomenon to be tightly regulated.[26] Claims such as these are resisted by providers like Airbnb and Stayz who argue that regulation reduces availability of accommodation options and therefore the freedom to choose, and that it decreases the opportunities to benefit from economic opportunities provided by the digital economy.[27] Debates and disputes such as these have invoked a range of responses from governments at both state and local level. These responses are examined in Part III. Part III also explores the interconnected impact of a number of judicial decisions about short-term rentals conducted through Airbnb and similar online platforms in order to offer some conclusions about the current responses of Australian property law to home sharing.

In undertaking this analysis of the short-term rental phenomenon in Australia, this article expressly adopts Zale's conceptual framework and taxonomy of sharing which she developed in response to the lack of a 'doctrinally cohesive and normatively satisfying way of talking about the underlying activities within the sharing economy'.[28] According to Zale, the sharing economy blurs a number of familiar binary divisions that law uses to describe human behaviours: gratuitous/non-gratuitous, commercial/non-commercial, and formal/informal.[29] These binaries are explained and given context in Part II.

This article also considers another characteristic aspect of the sharing economy: the use of 'familiar property law forms'[30] in ways that challenge existing legal frameworks. This is illustrated particularly in the analysis in Part IV of the *Swan* litigation[31] which depended very much on the difference between two significant features of Australian property law, the lease and the licence. The consequences of the decision in the *Swan Appeal*, that the short-term rental accommodation that was offered in that case was a lease rather than a licence, are examined in Part V.

The clarity offered by Zale's framework enables a deeper understanding of the broad spectrum of activities that take place under the banner of the sharing economy. Zale's framework helps us understand what it means to share property in the short-term rental context. As this article argues, this understanding contextualises the disputes that have been litigated in Australian courts and

24 There is even a website devoted to the negative impacts of Airbnb where guests, hosts and neighbours report their negative experiences with Airbnb: 'Uncensored Airbnb Stories & Reasons Not to Use Airbnb', *Airbnb Hell* (Web Page) <https://www.airbnbhell.com/>.

25 *Swan Appeal* (2016) 50 VR 74; *Swan* [2016] VCAT 483; *Li v Yang* [2018] VCAT 293; *Alex Taxis Pty Ltd v Knight* [2016] VCAT 528 ('*Alex Taxis*'); *Wong v Doney* [2016] NTCAT 57.

26 Kagi (n 4).

27 Ibid.

28 Zale (n 18) 509–10.

29 Ibid 510.

30 Ibid.

31 *Swan* [2016] VCAT 483; *Swan Appeal* (2016) 50 VR 74.

explains the responses of Australian legislatures to the challenges of short-term rentals and the role of property law in that response.

II UNDERSTANDING THE SHARING ECONOMY IN THE CONTEXT OF THE SHORT-TERM RENTAL ACCOMMODATION PHENOMENON

Airbnb was launched in 2008 in San Francisco by two university graduates who advertised three air mattresses on the floor of their apartment during a time of peak demand for short-term accommodation.[32] By 2016, Airbnb was valued at USD $25 billion.[33] The platform has over two million properties listed in over 34,000 cities in 191 countries.[34] It was launched in Australia in 2012.[35] In 2015–16, over 800,000 Airbnb stays were booked for 2.1 million guests in Australia.[36] A 2017 report placed Sydney and Melbourne at fifth and sixth in the world for most users of the platform.[37] Airbnb is not the only platform in the online short-term accommodation rental market, but it is a significant player in that market. Its name is almost synonymous with the online short-term accommodation rental phenomenon.

Through Airbnb, a 'host' lists an empty property (or room) online, and then a 'guest' who needs accommodation can book a 'stay' in the property.[38] Airbnb short-term rental takes a range of formats depending on whether the host is 'present', 'temporarily absent' or 'permanently absent'.[39] The first, involving the host who is present, is Airbnb's original model,[40] and resembles a situation where a friend occupies a spare room and uses other shared facilities in a house.[41] The second involves the host temporarily leaving their principal place of residence and making the entire property available to a guest.[42] Finally, the last scenario describes a situation where the host does not reside at the property at all and makes the entire property available for short-term rentals on an ongoing basis.[43] Once finalised, these rentals can be used for a range of purposes such as 'short/medium term vacations, interim housing, business trips, party venues [and] anonymous criminal hideaways'.[44]

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32 Guttentag (n 14) 1192; Minifie (n 13) 5.
33 Minifie (n 13) 5.
34 Laura Schatz and Rebecca Leshinsky, 'Up in the Air(bnb): Can Short-Term Rentals Be Tamed?' (2018) 7(2) *Property Law Review* 105, 105.
35 Deloitte Access Economics (n 16) 11.
36 Ibid 5.
37 Tenants' Union of New South Wales, *Belonging Anywhere: Airbnb and Renting in Sydney* (Report, March 2017) 4 <https://files.tenants.org.au/policy/2017-Airbnb-in-Sydney.pdf>.
38 Guttentag (n 14) 1192.
39 Lazar (n 15) 52–3; David Parker, 'Home-Sharing, Airbnb and the Role of the Law in a New Market Paradigm' (2018) 3 *UniSA Student Law Review* 72, 73.
40 Parker (n 39) 73.
41 Lazar (n 15) 52–3.
42 Parker (n 39) 73.
43 Ibid.
44 Schatz and Leshinsky (n 34) 105.

The Airbnb model is a convenient way of understanding the issues that arise with short-term rental accommodation. In addition, a number of the cases analysed in this article concern short-term rentals that were facilitated by the Airbnb platform.[45] Unless specifically referring to an Airbnb arrangement, this article uses the term short-term rental to describe the activity generally, regardless of the actual online platform used.

The multiple ways in which a short-term rental can be created can be analysed and understood in the context of Zale's framework of the sharing economy.[46] Zale's framework helps us understand what it means to share property in the short-term rental context. It does so by breaking down the activities of short-term rentals arranged through an online platform like Airbnb. In turn, this enables the activities to be placed against certain binary descriptors of human behaviour, namely, gratuitous/non-gratuitous, personal/commercial, and formal/informal, which are discussed below.[47]

A Gratuitous/Non-gratuitous Sharing

Gratuitous sharing does not involve any expectation of consideration, whether in monetary or non-monetary form.[48] As Zale notes, altruistic giving has a long history and is often associated with charitable activities, though in modern times it is also associated with other benefits, such as taxation minimisation purposes or social status.[49] The significance of consideration in the description of non-gratuitous sharing implicates another dichotomy: monetary and non-monetary. The issue here, as Zale puts it, is whether 'the sharing activity involves the exchange of money, either as consideration or as the item being shared'.[50] Zale suggests that it is relatively straightforward to characterise a sharing activity as either a monetary or a non-monetary sharing activity.[51] The online platform Couchsurfing which typically connects a present host[52] with travellers who are then able to stay for free in a spare room of their property,[53] is an example of such gratuitous sharing. An Airbnb stay which typically would involve monetary consideration, would exemplify non-gratuitous sharing.

B Formal/Informal Sharing

The sharing economy straddles the boundary between the formal: that which constitutes 'official, regulated society'[54] and the informal: that which lies outside of any formal regulation, typically in terms of taxation, planning, wage and labour

45 *Li v Yang* [2018] VCAT 293; *Alex Taxis* [2016] VCAT 528; *Swan Appeal* (2016) 50 VR 74; *Wong v Doney* [2016] NTCAT 57.
46 Zale (n 18).
47 Ibid 510.
48 Ibid 517.
49 Ibid 517–18.
50 Ibid 521.
51 Ibid.
52 Lazar (n 15) 52–3.
53 De-Jung Chen, 'Couchsurfing: Performing the Travel Style through Hospitality Exchange' (2018) 18(1) *Tourist Studies* 105, 106; Zale (n 18) 521.
54 Zale (n 18) 518.

standards, and of health and safety regulations.[55] As Zale explains, formal sharing can include 'market-based, commercial sharing' activities, such as Netflix, as well as non-monetary sharing, such as that exemplified by the services offered by a local library.[56] Informal sharing is linked closely with the underground or shadow economy and has been the subject of criticisms due to its ability to exclude people from full participation in the economy.[57]

In the home sharing context, the distinction between the formal and the informal sphere is illustrated in the approaches various jurisdictions have taken to the question of whether home sharing activities conducted through online platforms like Airbnb constitute activities that require approval under relevant land-use planning regulations. These issues are illustrated, for example, in the decisions in *Dobrohotoff v Bennic* ('*Dobrohotoff*')[58] and in *Genco v Salter* ('*Genco*')[59] which concern short-term sharing and planning law and are considered in detail in Part III.

C Commercial/Non-commercial Sharing

The final dichotomy described by Zale's concept of sharing concerns whether the activity or use is commercial or non-commercial. Zale suggests that it represents a significant threshold for the justification of government intervention: it is warranted if the activity is commercial but unjustified if not.

In the home sharing context, Zale suggests that the Hegelian personality and human flourishing theory of property, articulated, in particular, by Margaret Radin, clarifies the nature of the dichotomy and the difficulty in justifying the intrusion of government regulation into the home sphere.[60] Radin argues that 'to achieve proper self-development – to be *a person* – an individual needs some control over resources in the external environment'[61] and includes the home on the list of property that 'we unhesitatingly consider personal'.[62] Zale points out, however, when homeowners use their homes like a hotel the claim to immunity becomes difficult to defend,[63] and views about the location of the threshold for government intervention are disputed.

In 2018 the Australian Taxation Office ('ATO') responded to a perceived failure by individuals who earn income through short-term rentals facilitated

55 Ibid 518–19.

56 Ibid 518.

57 Ibid 520. Although not strictly relevant to home sharing, the decision of the Australian Fair Work Commission ('FWC') in *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 provides a useful example of the difference between formal and informal sharing and the significance of participating in the underground or shadow economy or in the formal regulated economy. In that case, a bicycle courier who delivered food and beverages ordered by consumers through Foodora's online platform was held to be an 'employee' of Foodora (rather than an independent contractor) and was entitled to compensation under the *Fair Work Act 2009* (Cth) for unfair dismissal.

58 (2013) 194 LGERA 17.

59 (2013) 46 VR 507.

60 Zale (n 18) 524.

61 Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957, 957 (emphasis in original).

62 Ibid 967.

63 Zale (n 18) 524.

through online platforms to comply with taxation obligations and promulgated its *Sharing Economy Accommodation 2016–17 to 2019–20 Financial Years Data Matching Program Protocol* ('*Protocol*').[64] The ATO *Protocol* empowers the ATO to obtain data from accommodation platforms (and/or their financial institutions) about individuals who received payments as a result of short-term accommodation rentals arranged through online accommodation platforms. The data will be used to '[i]dentify and educate … and assist'[65] those who fail to meet their taxation obligations. The ATO justified the *Protocol* stating that certain home sharing activities had become commercial and that 'some people using sharing economy platforms are failing to report their income, either on purpose or because they assume their level of activity constitutes a hobby and doesn't require reporting'.[66]

D The Sharing or Sharing (for Profit) Economy?

As Schatz and Leshinsky note, much of the academic commentary about companies like Airbnb and Uber focuses on whether short-term rentals are properly part of the sharing economy which is 'underpinned by the desire for sustainability and collaborative consumption'[67] or whether they are simply commercial short-term letting operations conducted via an app.[68] While most of the companies that use an online platform and make the platform available to consumers via the internet or a smart phone app might aspire to the 'idealized, non-monetary version of the sharing economy',[69] they are substantial commercial enterprises. Indeed, research in 2016 found that approximately 25% of Sydney's Airbnb listings were for properties permanently offered for short-term rental and which were thus unavailable for use as long-term housing.[70] This behaviour is more accurately described as the 'sharing-for-profit economy'[71] and can be understood

64 The ATO *Protocol* is issued pursuant to powers conferred on the Commissioner of Taxation by s 353-10 of sch 1 to the *Taxation Administration Act 1953* (Cth). See Commissioner of Taxation, 'Notice of Data Matching Program – Sharing Economy Accommodation 2016–17 to 2019–20 Financial Years' in Commonwealth, *Government Notices Gazette*, No C2018G00634, 10 August 2018; 'Sharing Economy Accommodation 2016–17 to 2019–20 Financial Years Data Matching Protocol: At a Glance' *Australian Taxation Office* (Web Page, 10 August 2018) <https://www.ato.gov.au/general/gen/sharing-economy-accommodation-2016-17-to-2019-20-financial-years-data-matching-protocol/> ('At a Glance').

65 'Sharing Economy Accommodation 2016–17 to 2019–20 Financial Years Data Matching Protocol: Program Objectives' *Australian Taxation Office* (Web Page, 10 August 2018) <https://www.ato.gov.au/general/gen/sharing-economy-accommodation-2016-17-to-2019-20-financial-years-data-matching-protocol/?page=2#Program_objectives>.

66 Australian Taxation Office, 'At a Glance' (n 64).

67 Schatz and Leshinsky (n 34) 108.

68 Crommelin, Martin and Troy (n 4); Laura Crommelin, Laurence Troy, Chris Martin and Chris Pettit, 'Is Airbnb a Sharing Economy Superstar? Evidence from Five Global Cities' (2018) 36(4) *Urban Policy and Research* 429. For other research results in relation to Sydney, see also Nicole Gurran and Peter Phibbs, 'When Tourists Move In: How Should Urban Planners Respond to Airbnb?' (2017) 83(1) *Journal of the American Planning Association* 80.

69 Zale (n 18) 527.

70 Crommelin, Martin and Troy (n 4).

71 Zale (n 18) 527.

by considering its two key traits: the monetisation of unutilised or underused assets,[72] and the prioritisation of access over ownership.[73]

Some argue that the ability to monetise under-utilised assets in this way unlocks economic opportunities for all in times of increasingly precarious employment,[74] but, in the short-term rental context, it raises a particular concern. The ability to monetise underused space, rooms, apartments and houses is based on an 'implicit underlying requirement that an individual must own – or at least possess – property that others seek to access'.[75] Thus the ability to monetise underused assets and benefit from the promised economic opportunities is effectively limited to those who own the assets.[76] This is illustrated vividly in the *Swan* litigation.[77] The Victorian Supreme Court held that two tenants who offered their rented apartment on Airbnb on the basis that they would be absent while the Airbnb guest was in possession had breached a condition of their lease which prohibited subletting of the apartment without their landlord's permission. This was because the Court reasoned that this form of short-term rental constituted a lease, and therefore was a prohibited sublease of their rented apartment.[78] This left the tenants exposed to the landlord's termination of their tenancy. As the analysis of the *Swan Appeal* and its consequences in Parts IV and V shows, this decision enlivens laws that empower a landlord to refuse consent to a tenant who seeks to participate in the sharing economy by offering short-term rental arrangements of their rented property.

With regards to prioritisation of access, from the perspective of the consumer the sharing economy prioritises 'access to, rather than ownership of, property'.[79] It means that a consumer does not need to own something in order to easily benefit from access to it or from temporary use of it.[80] Zale explains that a focus on access means that: 'assets are increasingly being used more intensively than they traditionally were, as multiple people – owners and non-owners – use property which formerly was typically only used by a single owner'.[81]

In the home-sharing context, people with access to the property (both owners and tenants with the owner's consent), can now use it in a manner and to an extent that has not previously been possible. This intensification of residential use is challenging because as it takes on more of a commercial quality it conflicts with traditional residential land uses from which it is usually separated.[82] The intensification of use lies at the heart of many complaints that residents have about impacts to their amenity from neighbours using their properties for short-term

72 Ibid 527–8.
73 Ibid 533.
74 Schatz and Leshinsky (n 34) 108.
75 Zale (n 18) 532.
76 Ibid 533.
77 *Swan* [2016] VCAT 483; *Swan Appeal* (2016) 50 VR 74.
78 *Swan Appeal* (2016) 50 VR 74, 103 (Croft J).
79 Zale (n 18) 533.
80 Ibid 534.
81 Ibid.
82 Justice Brian J Preston, 'The Australian Experience on Environmental Law' (2018) 35(6) *Environmental and Planning Law Journal* 637, 639; Schatz and Leshinsky (n 34) 107.

rentals.[83] As analysed in Part III below, responding to the problems of intensification of use is a significant aspect of the mechanisms that New South Wales ('NSW') and Victoria have employed in response to the short-term rental phenomenon.

An appreciation of the elements of sharing, the values that some assert belong to the sharing economy and the characteristics that are associated with commercial short-term home sharing activities give an insight into the disputes that have come before Australian courts and how they are grappling with the short-term rental phenomenon. It also enables us to understand how various Australian parliaments have chosen to respond to this dynamic phenomenon. Significant reported decisions are analysed and a snapshot of the state of regulation in all Australian jurisdictions is presented in the following Part of this article.

III JUDICIAL AND LEGISLATIVE RESPONSES TO THE SHORT-TERM RENTAL PHENOMENON IN AUSTRALIA

This Part considers the responses of governments across the Australian jurisdictions to the short-term rental accommodation phenomenon and considers them in light of Zale's analysis of the sharing economy. It is evident that intensification of use and the amenity impacts of that use, caused by the prioritisation of access to assets rather than ownership is a key driver of the responses. Similarly, government responses appear to reflect an intention to regulate commercial activities, involving the scenario where a host is not present on the premises, rather than non-commercial activities. The responses across the Australian jurisdictions focus on land-use planning laws and/or laws that enable strata or community corporations to take action to enforce standards of behaviour in the face of non-compliance with those standards. The responses taken in both NSW and Victoria are the strongest and involve both mechanisms.

In order to understand why states and territories have taken action or, in some cases, are contemplating it in response to the short-term rental accommodation phenomenon, it is first necessary to understand some of the legal controversies that have arisen in the context of litigation concerning short-term rental accommodation. These controversies involve planning law and policy, and strata title law. They thus involve a combination of public law tools that vest power in public authority, such as a local council, and the vesting of power in private entities to enable them to take action affecting the interests of other private entities. These issues are examined below, first from the perspective of land-use planning law and then from the perspective of the strata title law.

A Land-Use Planning Law Cases

The 2013 case of *Dobrohotoff* concerned a home which the owner, Ms Bennic, used as an investment property and rented out as a short-term holiday home,

83 See generally *Airbnb Hell* (n 24).

through online booking platforms such as Stayz.[84] The question before the Court was whether this conformed with the approved purpose, namely the use of the land as a dwelling-house or whether it constituted a different land use that required planning approval. The neighbours, Mr and Mrs Dobrohotoff, had repeatedly complained to the Gosford City Council about the persistent use of the property by Ms Bennic's guests as a party house and the impacts that this use had on them.[85] Evidence before the Court indicated that the tenancies were often 'for periods of a week or less for the purpose of bucks and hens nights, parties or for the use of escorts or strippers'.[86] The Council's inaction prompted the Dobrohotoffs to seek remedies under the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*').[87]

Central to resolving this issue was the construction of the term 'dwelling' for the purposes of relevant provisions of the *Gosford Planning Scheme Ordinance*'s Residential Zone. In that zone, development 'for the purpose of … dwelling-houses' required planning consent and this was the approved use of the land in question.[88] The *Gosford Planning Scheme Ordinance* defined dwelling-house to mean 'a building containing 1, but not more than 1, dwelling' and, in turn, it defined dwelling as 'a room or number of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile'.[89] The term 'domicile' however was not defined. Pepper J drew on a line of authorities that indicated that the use of land as a dwelling-house required an occupancy 'in much the same way as it might be occupied by a family group in the ordinary way of life'[90] and that there was 'at the very least, a significant degree of permanence of habitation or occupancy'.[91] Given that the relevant provision of the *Gosford Planning Scheme Ordinance* referred to the use of land for the purposes of a dwelling-house, it was not enough that the property had the physical characteristics of a dwelling-house; it had also to be used for that purpose.[92]

Her Honour concluded that 'as a matter of fact'[93] the grant of a tenancy for periods of a week or less for the types of parties that were held was not an occupation of the property 'in the same way that a family or other household group in the ordinary way of life would occupy it'.[94] Accordingly, the property was not being used for the purpose of a dwelling-house and the use required approval under the *EPA Act*.[95] Pepper J made two further observations that provide insights into the difficulties associated with the disruption that the short-term rental

84 *Dobrohotoff* (2013) 194 LGERA 17, 19–20 [3]–[4] (Pepper J).
85 Ibid 20 [7]–[9] (Pepper J).
86 Ibid 27 [44] (Pepper J).
87 Ibid 21 [10] (Pepper J).
88 Ibid 22–3 [22] (Pepper J).
89 Ibid 25 [32] (Pepper J).
90 Ibid 26 [40] (Pepper J), quoting *South Sydney Municipal Council v James* (1977) 35 LGRA 432, 440 (Reynolds J). See also *Ashfield Municipal Council v Australian College of Physical Education Ltd* (1992) 76 LGRA 151.
91 *Dobrohotoff* (2013) 194 LGERA 17, 27 [45] (Pepper J).
92 Ibid 26 [38]–[39] (Pepper J).
93 Ibid 27 [44] (Pepper J).
94 Ibid.
95 Ibid 30 [60] (Pepper J).

phenomenon presents and that offer some understanding of the NSW government's response.

First, Pepper J was critical of the fact that the Gosford City Council had failed to either enforce the provisions of its own planning scheme which it had appeared to acknowledge meant that short-term holiday rental was prohibited in the relevant zone, or to amend the relevant planning scheme, as other local councils had done, to clarify the position of short-term holiday rental in the council area.[96]

Second, Pepper J acknowledged some of the inherent difficulties in defining what constitutes short-term holiday rental as a land use and in a way that would allow it to be subjected to appropriate legal regulation. Her Honour accepted that, '[s]ubject to any requirement of permanency',[97] there may be a variety of situations where a building would meet the definition of 'dwelling-house' despite being occupied infrequently and gave the examples of a holiday house 'used exclusively for a limited amount of time during the year by a family (or even time shared between several families)'.[98] Her Honour indicated that, for example, a house owned by a company that is rented to employees and their families 'for short durations'[99] could constitute 'dwelling-houses'.[100]

The 2013 decision of the Victorian Supreme Court in *Genco* was another planning case concerning the use for short-term rentals of a number of apartments in a multistorey apartment complex in Melbourne's Docklands. The case dealt with whether this contravened section 40(1) of the *Building Act 1993* (Vic) which prohibits a person from occupying a building in contravention of a current occupancy permit.[101] The apartments in question had an occupancy permit based on the Building Code of Australia's definition of a Class 2 building, which is 'a building containing 2 or more sole-occupancy units each being a separate dwelling'.[102] Melbourne City Council's building surveyor determined that the use of the apartments for short-term rental accommodation changed the Building Code of Australia classification from Class 2 to Class 3, meaning that it was now 'a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including … a residential part of a hotel or motel'.[103]

The owner appealed that determination to the Building Appeals Board, which refused it stating that the definition of dwelling 'does not include the use by short-term guests resulting from a commercial enterprise which is conducted in a hotel style', and indicated that a stay of 'anything up to 30 days was "short-term"'.[104]

The Victorian Court of Appeal ultimately overturned that decision stating that the definition of dwelling in the context of the relevant scheme did not involve a

96 Ibid 21 [13]–[17] (Pepper J).
97 Ibid 27 [43] (Pepper J).
98 Ibid.
99 Ibid.
100 Ibid.
101 *Genco* (2013) 46 VR 507, 509 [4] (Nettle JA), quoting the *Building Act 1993* (Vic) s 40(1).
102 Ibid 509 [3] (Nettle JA), quoting the Building Code of Australia.
103 Ibid.
104 Ibid 516 [38] (Nettle JA).

temporal requirement.[105] Osborn JA indicated that the relevant legal definition of dwelling accorded with the ordinary sense of the word, namely 'premises [that] possessed the characteristics ordinarily found in buildings used or let for human habitation as homes'.[106] Thus a building containing the facilities ordinarily found in a dwelling such as a toilet, bathroom, cooking facilities and rooms appropriate for sleeping and daily living, would be a dwelling and remain as such regardless of the period it is occupied.[107]

Both *Dobrohotoff* and *Genco* demonstrate how home sharing can straddle the boundary between the formal and informal categories of sharing developed by Zale. They also show that much of the litigation surrounding home sharing is related to commercial rather than non-commercial sharing.

The fact that short-term rentals, facilitated through online platforms, can take place in physical spaces that are identical to those that are typically associated with residential uses and are not able to be differentiated from those uses in the way traditional hotel or motel land uses might be identified has challenged existing land-use categories. This is particularly so in the context of multistorey apartments where the intensification of use is felt most acutely by neighbours.

B Strata Title Cases

The use of apartments in multistorey apartment buildings for short-term rentals regulated by strata title schemes is contentious not only from the perspective of land-use planning law. As Sherry notes, disputes arise between resident owners who complain about amenity impacts and overuse of common property areas[108] and investor owners who seek to maximise the return from their investment.[109] The published decisions, examined below, have considered attempts by corporate bodies to regulate or prevent short-term rentals in a strata title context. These cases turn largely on the legislative scheme which gives strata corporations the power to make by-laws and illustrate the need for explicit legislative intent to authorise the use of power vested in private entities to regulate or control the property interests of other individuals.

The 2016 decision of the Victorian Supreme Court in *Owners Corporation PS 501391P v Balcombe* ('*Balcombe*')[110] concerned the same Docklands apartment complex that was the subject of the litigation in *Genco*[111] and an attempt by the owners corporation of the apartment complex to use the rules of the strata corporation to prevent the respondents from operating the short-term rental accommodation business.[112] The rule prohibited an owner of a lot in the complex from using the property for any trade, profession or business, other than letting the

105 Ibid 516 [38]–[39] (Nettle JA), 528 [111] (Osborn JA).
106 Ibid 527 [101], quoting *Bakes v Huckle* [1948] VLR 159.
107 Ibid 527 [101].
108 Cathy Sherry, 'Recent Developments in Strata Law: By-Law Making Power and Short-Term Letting' (2016) 90(12) *Australian Law Journal* 853, 853.
109 Ibid.
110 (2016) 51 VR 299.
111 Ibid 304–5 [4]–[11] (Riordan J).
112 Ibid 299.

lot for a minimum of 30 days and had been enacted pursuant to a broad power[113] contained in a regulation in force at the time.[114] The scheme contemplated Standard Rules that applied to all owners corporations but also that additional rules could be created. The rule in question fell into the latter category.

The test for the validity of a rule of this kind was whether it was 'within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws'.[115] The Court held that the rule was not within the scope of the relevant legislation and regulations that were in force at the time.[116] It held that 'it was parliament's intention that a body corporate's power with respect to the regulation of conduct on lots would be limited to its power to enforce the Standard Rules'.[117] The Court then dealt with the alternative argument for validity, namely, that the rule was valid because Parliament had intended that bodies corporate would have the power to regulate conduct, such as noise and nuisance, that was within the scope of the Standard Rules. The Court indicated that Parliament contemplated only a very limited role for the owners corporation in the regulation of conduct within lots.[118] This was so particularly in light of the common law statutory interpretation presumption against an intention to interfere with vested property rights.[119] The Court stated that it was 'fundamentally important that persons are entitled to conduct themselves on their land and buildings as they like, subject to prohibitions created by common law, such as nuisance, or by legislation, such as planning and environmental regulations'.[120] Sherry has rightly lauded this judicial recognition of the fact that a strata title lot is a freehold fee simple and deserves protection as such, in particular, from the exercise of a power vested in private citizens that could have significant consequences.[121]

The importance of the terms of the legislation in determining the extent of the powers it confers upon strata title bodies corporate is evident in *Byrne v Owners of Ceresa River Apartments Strata Plan 55597* ('*Byrne*')[122] where relatively similar facts led to the opposite outcome in light of the broad by-law making powers contained in Western Australian strata title law. Section 42(1) of the *Strata Titles Act 1985* (WA) provides that the ability of a strata title company to make laws extends to matters 'relating to the management, control, use and enjoyment of the lots and any common property', subject only to the proviso that a by-law may not be inconsistent with the legislation itself. The by-law in question in *Byrne*, provided that 'a proprietor of a residential lot may only use [their] lot as a

113 Sherry (n 108) 853.
114 *Subdivision (Body Corporate) Regulations 2001* (Vic) reg 220(1).
115 *Balcombe* (2016) 51 VR 299, 326 [84] (Riordan J), quoting *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 577 (Gummow J).
116 *Balcombe* (2016) 51 VR 299, 333–40 [108]–[124] (Riordan J). See *Subdivision Act 1988* (Vic); *Subdivision Act (Body Corporate) Regulations 2001* (Vic).
117 *Balcombe* (2016) 51 VR 299, 335 [112] (Riordan J).
118 Ibid 338 [123] (Riordan J).
119 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42] (French CJ).
120 *Balcombe* (2016) 51 VR 299, 339 [123] (Riordan J).
121 Sherry (n 108) 857.
122 (2017) 51 WAR 304.

residence', and that a proprietor of a residential lot may 'grant occupancy rights in respect of [their] lot to residential tenants'.[123] The Western Australian Supreme Court held that it validly prevented an owner of a lot in the apartment complex from using the apartment for short-term rental accommodation. This was because the use of the terms 'residence' and 'residential tenants' in the by-law involved a use of the lot as a person's 'settled or usual abode'.[124] Short-term rental accommodation guests could not be said to be using the property in that way. Again, the decisions in both *Balcombe* and *Byrne* relate to situations where there had been home sharing on a commercial, rather than non-commercial scale.

C Legislative Responses

1 New South Wales

Following the 2016 report of a parliamentary committee into short-term holiday letting in NSW,[125] the NSW government consulted on a 2017 Options Paper[126] and in 2018 it announced a policy framework for implementation in 2019. It said that the policy framework 'strikes a balance between supporting the economic value of the industry and managing impacts on the community'[127] and contemplates a combination of measures: (i) using land-use planning law mechanisms; (ii) mechanisms that draw on consumer protection law and which will use a mandatory Code of Conduct for online accommodation platforms, letting agents, hosts and guests;[128] and, finally, (iii) legislation that confers express powers on strata corporations to make a by-law that prohibits short-term letting, in certain circumstances. These are analysed below.

(a) Land-Use Planning Mechanisms

The NSW framework contemplates clarifying the place of short-term rental accommodation in the NSW planning system by defining the concept and setting out the circumstances where approval is required. The definition will define 'short-term rental accommodation' as 'the commercial use of an existing dwelling, either wholly or partially for the purposes of short-term accommodation, but does not include tourist and visitor accommodation'.[129] This definition means that only

123 Ibid 310 [18] (The Court).

124 Ibid 335 [148] (The Court).

125 Legislative Assembly Committee on Environment and Planning, Parliament of New South Wales, *Adequacy of the Regulation of Short-Term Holiday Letting in New South Wales* (Report No 1/56, October 2016).

126 Department of Planning and Environment (NSW) and Department of Fair Trading (NSW), 'Short-Term Holiday Letting in NSW' (Options Paper, July 2017) <https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/~/media/084123120FFE47649087BCF055367542.ashx>.

127 Department of Planning and Environment (NSW), 'Explanation of Intended Effect: Short-Term Rental Accommodation Planning Framework' (October/November 2018) 5 <https://www.planning.nsw.gov.au/~/media/Files/DPE/Other/Short-term-Rental-Accommodation-EIE.ashx> ('Explanation of Intended Effect').

128 'New Short-Term Holiday Letting Regulations', *NSW Government Fair Trading* (Article, 15 August 2018) <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-short-term-holiday-letting-regulations>.

129 'Explanation of Intended Effect' (n 127) 9.

home-sharing activities which fall within the commercial category of Zale's framework will be regulated. It provides that short-term rental accommodation is an acceptable land use where: the use of a dwelling is permissible for the zone; the dwelling already has the requisite planning approval; and no physical alterations are made to accommodate the short-term rental use.[130] These proposals are significant in light of Pepper J's comments in *Dobrohotoff*[131] highlighted above, about the lack of clarity about the place of short-term rental accommodation in NSW planning law.

The NSW framework envisages an amendment to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) to provide for exempt development and complying development status and associated approval pathways depending on where the property is and whether or not the owner of the property is present. If the host is present on site overnight, it is proposed that short-term rental accommodation will be exempt development and can be undertaken 365 days a year.[132] The host's on-site presence will mean that the host can manage guest behaviour and impacts on neighbours.[133]

In contrast, where the host is not present, and the property is not on land that is defined as bushfire-prone then the exempt development status will only apply to a property if it is used for short-term rental accommodation for a maximum of 180 days per year and is within the Greater Sydney area.[134] Outside the Greater Sydney area, the use is unlimited on land that is not defined as bushfire-prone, though local councils will, in light of local circumstances, have the ability to restrict it to 180 days per year if they choose.[135] Where a host is not present at a site that is in an area within a defined bushfire-prone area, the use will require complying development approval, in recognition of the safety requirements.[136]

(b) Code of Conduct

The *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* (NSW) ('*Fair Trading Amendment Act*') inserts division 4A in part 4 of the *Fair Trading Act 1987* (NSW) and provides for the establishment of a Code of Conduct that, under the act, will be applicable to all 'participants'[137] in the short-term accommodation industry from 2019.[138] This means, specifically, that it applies to those who provide online booking services for short-term accommodation agreements; those whose business is as an agent to enable people to enter into short-term accommodation agreements; those who provide and those who are given a right to occupy residential premises; and, more broadly, any other person,

130 Ibid.
131 *Dobrohotoff* (2013) 194 LGERA 17, 21–2 [9]–[17].
132 'Explanation of Intended Effect' (n 127) 11.
133 Ibid.
134 Ibid.
135 Ibid.
136 Ibid.
137 *Fair Trading Amendment Act* sch 1 item 54B(1).
138 'New Rules for Short-Term Holiday Rentals', *NSW Government* (Web Page, 15 August 2018) <https://www.nsw.gov.au/news-and-events/news/new-rules-for-short-term-holiday-rentals/>.

prescribed by the regulations, who facilitates short-term rental accommodation arrangements.[139]

The legislation also sets out a non-exclusive list of matters that the proposed Code of Conduct may deal with. These include setting out the rights and obligations of the participants;[140] establishing a system for the registration of residential premises used in the short-term accommodation industry and when they are so used;[141] setting up a complaints resolution mechanism;[142] and the ability to keep a register of participants who have failed to comply with the proposed Code.[143]

The scheme also enables the Code of Conduct to create criminal offences for certain breaches[144] and to identify provisions that are to be enforced via a civil penalty mechanism.[145]

The Code of Conduct represents the potential for commercial short-term rental accommodation to be regulated in a way that may reflect the concerns of more traditional holiday accommodation providers.

(c) New South Wales Strata Title Law

The *Fair Trading Amendment Act* also amends the *Strata Schemes Management Act 2015* (NSW) by inserting section 137A which ensures that an owners corporation in NSW may, via a special resolution, prohibit a lot from being used for the purposes of short-term rental accommodation if the lot is not the principal place of residence of the person offering the 'short-term rental accommodation arrangement'.[146] Conversely, the amendment also invalidates any existing by-law that purports to prohibit short-term rental accommodation if the lot is the principal place of residence of the person offering the 'short-term rental accommodation arrangement'.[147] The scheme defines 'short-term rental accommodation arrangement' as 'a commercial arrangement for giving a person the right to occupy residential premises for a period of not more than 3 months at any one time'.[148]

The NSW strata title amendments thus use time as a way of controlling intensity of use and have chosen three months as the threshold for allowing the exercise of the by-law power to control it. Equally, the definition of 'short-term rental accommodation arrangement' only affects arrangements at the commercial end of Zale's framework, exempting any non-commercial, personal accommodation arrangement.

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139 *Fair Trading Amendment Act* sch 1 item 54A (definition of 'short-term rental accommodation industry participant').
140 Ibid sch 1 item 54B(2)(a).
141 Ibid sch 1 item 54B(2)(c).
142 Ibid sch 1 item 54B(2)(f).
143 Ibid sch 1 item 54B(2)(g), (i).
144 Ibid sch 1 item 54C.
145 Ibid sch 1 item 54D(1).
146 Ibid sch 2.
147 Ibid.
148 Ibid sch 1.

2 Victoria

Victoria has taken a statewide approach to regulating short-term rentals by increasing the powers available to strata corporation owners to take action in response to the adverse impacts experienced by neighbours of apartments that are occupied under a short-term rental accommodation arrangement. Although dealing with amenity, this approach does not use land-use planning law tools; rather it enables the private enforcement[149] of rules by owners corporations, though the involvement of the VCAT imposes significant safeguards on the exercise of that power.

The *Owners Corporations Amendment (Short-stay Accommodation) Act 2018* (Vic) commenced operation on 1 February 2019[150] and introduced a new scheme into the *Owners Corporations Act 2006* (Vic)[151] designed to regulate the provision of short-stay accommodation arrangements in lots that are part of an owners corporation.[152] The Victorian scheme only applies to properties that are part of an owners corporation. A 'short-stay accommodation arrangement' is 'a lease or licence for a maximum period of 7 days and 6 nights to occupy a lot or part of a lot affected by an owners corporation'.[153]

The scheme establishes conduct standards which are expected of short-stay occupants and provides for a complaints mechanism that may involve an application to the VCAT for a range of remedies where those standards are not met.[154] The standards may be breached by engaging in any of the following:

- Unreasonably creating noise that is likely to substantially interfere with the peaceful enjoyment of other lots, other than where written permission has been given for the noise to be made;[155]
- Behaving in a way that is likely to unreasonably and substantially interfere with the peaceful enjoyment of another lot;[156]
- Using or allowing a lot or common property to be used so as to cause a substantial hazard to the health, safety and security of any person or an occupier;[157]
- Unreasonably and substantially obstructing the lawful use and enjoyment by an occupier or an occupier's guest of the common property;[158] or

149 Sherry (n 108) 858.

150 Linda Dessau, 'Acts of Parliament: Proclamation' in Victoria, *Victorian Government Gazette*, No S 380, 14 August 2018. See also Jim Malo, 'Victorian Airbnb Unit Owners Can Now Be Fined and Banned, Houses Unaffected', *Domain* (online, 31 January 2019) <https://www.domain.com.au/news/victorian-airbnb-unit-owners-can-be-fined-and-banned-from-tomorrow-houses-unaffected-797590/>. See generally Tim Graham and Leila Idris, 'Legislative and Regulatory Updates: *Owners Corporations Amendment (Short-stay Accommodation) Act 2018* and Mornington Peninsula Shire Council's *Short Stay Rental Accommodation Local Law 2018*' (2019) 34(4) *Australian Property Law Bulletin* 50.

151 *Owners Corporations Act 2006* (Vic) pt 10 div 1A ('*Owners Corporations Act*').

152 *Owners Corporations Amendment (Short-stay Accommodation) Act 2018* (Vic) s 1.

153 *Owners Corporations Act* s 3 (definition of 'short-stay accommodation arrangement').

154 Ibid s 159A(1).

155 Ibid s 159A(2)(a).

156 Ibid s 159A(2)(b).

157 Ibid s 159A(2)(c).

158 Ibid s 159A(2)(d).

- Substantially damaging or altering, intentionally or negligently a lot or the common property or a structure that forms part of a lot or the common property.[159]

Where a short-stay occupant has breached one or more of these standards, an owner or an occupier of a lot, or a manager may make a complaint to the owners corporation.[160] The owners corporation must decide whether to take any action.[161] If it does take action, it is empowered to require any breach to be rectified,[162] or to apply to the VCAT to resolve the dispute about the alleged breach of the proscribed conduct.[163] The powers available to the VCAT include: the power to order that a short-stay provider be prohibited from using the lot for short-stay accommodation where there have been at least three separate notices of a complaint within the last 24 months;[164] the power to make an award for compensation for loss of amenity,[165] which is capped at $2,000 for each affected occupier;[166] and the power to award a civil penalty against a short-stay occupant.[167]

The powers conferred by the Victorian scheme on the VCAT to order that a short-stay provider be prohibited from using the lot for short-stay accommodation where there have been at least three separate notices of a complaint within the last 24 months[168] represent a significant departure from the principles, espoused by Riordan J in *Balcombe*, about the importance to a lot owner of freedom from restrictions on the use and enjoyment of their lot.[169] However, any such restriction is not imposed by the owners corporation by its by-laws, as is contemplated by the NSW scheme. Instead any such order can only be imposed by the VCAT.

The scheme does not explicitly apply only to commercial short-stay accommodation arrangements, however the preconditions for making a complaint, which apply in many respects a reasonability test, may well suggest that, in practice, commercial short-stay accommodation arrangements will be more likely to come within the scope of the legislation.

3 Queensland, South Australia, Northern Territory and Australian Capital Territory

The Queensland and South Australian governments have indicated that land-use planning schemes are relevant in the response to the short-term rental accommodation phenomenon, although their responses are in stark contrast with each other.

The Queensland government's approach has used only land-use planning law and policy to regulate the amenity impacts to neighbours arising from commercial

159 Ibid s 159A(2)(e).
160 Ibid s 159A(1).
161 Ibid s 159B.
162 Ibid ss 159D(1), (2)(a).
163 Ibid ss 159D(1), (2)(b), 159E(1).
164 Ibid s 169D.
165 Ibid s 169E(1).
166 Ibid s 169E(3).
167 Ibid s 169G.
168 Ibid s 169D.
169 *Balcombe* (2016) 51 VR 299, 338–9 [123] (Riordan J).

short-term rentals that are used as so-called party houses. A 'party house' is defined as a 'premises containing a dwelling that is used to provide, for a fee, accommodation or facilities for guests' where:

(a) guests regularly use all or part of the premises for parties (bucks parties, hens parties, raves, or wedding receptions, for example); and
(b) the accommodation or facilities are provided for a period of less than 10 days; and
(c) the owner of the premises does not occupy the premises during that period.[170]

The *Planning Act 2016* (Qld) provides that a planning scheme may provide generally that a material change of use for a party house is a development that requires assessment;[171] provide assessment benchmarks for any assessment;[172] and may establish a 'party house restriction area' for any part of the relevant local government area.[173]

Section 276(2) of the *Planning Act 2016* (Qld) makes it clear that where a relevant local government authority establishes a party house restriction area, like that established by the City of Gold Coast,[174] then any approval or permission for use as a residence did not and does not include use as a party house. A person who seeks to use a residence as a party house will first require approval to do so. The requirement that guests 'regularly' use the premises for parties likely limits the application of the scheme to commercial home sharing, and interestingly, as the dwelling is to be provided for a fee, gratuitous sharing is excluded from regulation.

In contrast, the South Australian government is prepared to tolerate the inability of the current land-use planning law framework to apply specifically to short-term rental accommodation. This is notwithstanding the views of some South Australian local councils that would like some form of regulation.[175] The government's position is set out in an Advisory Notice,[176] a non-binding interpretive aid.[177] It points to the silence in the South Australian planning scheme about the length of time or frequency with which a dwelling[178] is occupied, the type of occupation arrangements agreed between the parties, and the mechanism used to facilitate the occupancy.[179] It concludes that

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170 *Planning Act 2016* (Qld) ss 276(5)(a), (b) and (c).
171 Ibid s 276(1)(a).
172 Ibid s 276(1)(b).
173 Ibid s 276(1)(c).
174 '*Planning Act 2016*: Council of the City of Gold Coast Public Notice Repeal of *Temporary Local Planning Instrument No 3 (Party Houses) 2017* for the City of Gold Coast Adoption *Temporary Local Planning Instrument No 4 (Party Houses) 2018* for the City of Gold Coast' in Queensland, *Queensland Government Gazette*, Vol 377, No 20, 2 February 2018, 82.
175 Eugene Boisvert and Claire Campbell, 'Adelaide Council Calls for Airbnb Accommodation to Be Regulated Like Hotels', *ABC* (online, 13 June 2018) <https://www.abc.net.au/news/2018-06-13/holdfast-bay-calls-for-airbnb-regulation/9864484>.
176 Advisory Notice: Building, *Development Act 1993* (SA), No 04/16, March 2016 <https://www.saplanningportal.sa.gov.au/__data/assets/pdf_file/0007/285352/Building-advisory-notice-04-16-Administration-Application-of-the-change-in-use-provisions-dwelling.pdf> ('Advisory Notice').
177 Ibid.
178 A 'dwelling' is defined as 'a building or part of a building used as a self-contained residence': *Development Regulations 2008* (SA) sch 1 (definition of 'dwelling').
179 Advisory Notice (n 176) 2.

> a dwelling will remain a dwelling if it is occupied sporadically; let out during holiday periods to short-term occupants; let for short-term use; or if the owner lives overseas or interstate and uses it occasionally and then for relatively short periods. Unless development is undertaken to physically alter the dwelling such that it is no longer a dwelling, it remains a dwelling.[180]

Whether the use of a dwelling for short-term rentals might otherwise constitute 'development'[181] under the *Development Act 1993* (SA) and require approval[182] is to be determined on a case-by-case basis. It appears that the equivalent position applies in the Northern Territory and the Australian Capital Territory.

4 Western Australia and Tasmania

In both Western Australia and Tasmania, parliamentary committees[183] have been established to inquire into the short-stay industry. The terms of references of both committees place particular emphasis on exploring regulatory options for the short stay industry, including those involving land-use planning powers. At the time of writing, the work of both parliamentary committees is in progress.

IV ACCESS AND OWNERSHIP: AIRBNB AND HOME SHARING

As Zale notes, the commercial activities conducted under the banner of the sharing economy, like those of Airbnb, prioritise access over ownership. This challenges the privilege which has traditionally been enjoyed by those who own property. This challenge is illustrated clearly in a series of published decisions from Australian courts and tribunals that concern short-term rentals arranged through online platforms by hosts who are the tenants, rather than the owners, of the rental property that is the subject of the short-term rental. As is apparent from the analysis below, the ease with which anyone can offer access through platforms like Airbnb, and thereby seek to participate in the sharing economy's benefits, has caused a significant problem for residential landlords who benefit from legislation throughout Australian jurisdictions that prohibits subleasing without the landlord's consent. This section considers five reported cases in Australia where landlords have attempted to evict tenants for doing just that: purporting to sublet without consent.[184] In each case, whether the tenant had illegally sublet the property and breached their tenancy depended on whether they had granted exclusive

180 Ibid.

181 *Development Act 1993* (SA) s 4.

182 Ibid s 32.

183 'Inquiry into Short-Stay Accommodation', *Parliament of Western Australia* (Web Page) <http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/5A2D93940DDF1D254825833800277F1C?opendocument>; 'Legislative Council Select Committee Short-Stay Accommodation in Tasmania', *Parliament of Tasmania* (Web Page, 2010) <http://www.parliament.tas.gov.au/ctee/Council/LC%20Select%20ShortStay.html>.

184 *Li v Yang* [2018] VCAT 293; *Janusauskas v Director of Housing* [2014] VSC 650 ('*Janusauskas*'); *Alex Taxis* [2016] VCAT 528; *Swan Appeal* (2016) 50 VR 74; *Wong v Doney* [2016] NTCAT 57.

possession of the property to another.[185] As the cases demonstrate, key concepts of property law have responded to, perhaps even resisted, the challenges of home sharing, and may continue to privilege the position of owner.

In *Janusauskas v Director of Housing* ('*Janusauskas*'), a tenant who was going on holiday advertised his two-bedroom flat on the online platform Couchsurfing.[186] Two travellers saw the listing and organised to move into the property whilst the tenant was away.[187] The VCAT found that the tenant had granted exclusive possession of the property to the travellers, so had sublet the flat without consent in breach of his tenancy.[188] Accordingly, the VCAT granted the landlord a possession order,[189] a court order which compels a tenant to vacate a rented property.[190] On appeal, the Supreme Court of Victoria upheld the VCAT's decision.[191] In 2016, in *Wong v Doney*,[192] landlords who discovered their leased property on Airbnb served a notice on their tenants requiring them to '[r]emove all advertising of [the property] from the Internet'.[193] In that case, the notice contained insufficient details,[194] so the Northern Territory Civil and Administrative Tribunal refused the possession order without considering whether the tenants had illegally sublet the property.[195] Also in 2016, in *Alex Taxis Pty Ltd v Knight* ('*Alex Taxis*'),[196] a tenant admitted that Airbnb guests had occupied private rooms of her rented property when her landlord alleged she had sublet without consent.[197] The tenant argued that she was present during each stay, so she had not granted exclusive possession of the rented property to the Airbnb guests.[198] In that case the VCAT held that 'offering [private] rooms on Airbnb' did not constitute subletting.[199] As noted above, in the *Swan Appeal* the Supreme Court of Victoria granted a landlord a possession order after she had tried to evict her tenants for listing their entire rented apartment on Airbnb.[200] The 2018 decision in *Li v Yang*[201] concerned a landlord who visited his leased property only to find that an Airbnb guest was staying there.[202] In that case, it became apparent that the tenants were permanently absent hosts: they had not occupied the property at all and Airbnb guests had stayed

185 *Janusauskas* [2014] VSC 650, [16] (Emerton J); *Li v Yang* [2018] VCAT 293, [35] (Member Boddison); *Alex Taxis* [2016] VCAT 528, [30] (Member Kirmos); *Swan Appeal* (2016) 50 VR 74, 85–6 [31] (Croft J); *Wong v Doney* [2016] NTCAT 57, [16] (Senior Member Bruxner).
186 [2014] VSC 650, [3], [6] (Emerton J).
187 Ibid.
188 Ibid [27]–[28] (Emerton J).
189 Ibid [12] (Emerton J).
190 *Residential Tenancies Act 1997* (Vic) s 330.
191 *Janusauskas* [2014] VSC 650, [67] (Emerton J).
192 [2016] NTCAT 57.
193 Ibid [6] (Senior Member Bruxner).
194 Ibid [22]–[28] (Senior Member Bruxner).
195 Ibid.
196 [2016] VCAT 528.
197 Ibid [4], [11] (Member Kirmos).
198 Ibid [11].
199 Ibid [31] (Member Kirmos).
200 *Swan Appeal* (2016) 50 VR 74, 74, 105 [81] (Croft J).
201 [2018] VCAT 293.
202 Ibid [7] (Member Boddison).

at the property.[203] The VCAT followed the decision in the *Swan Appeal*, finding that the Airbnb guests had exclusive possession of the entire property so a sublease had been granted.[204] Accordingly, the landlord was entitled to the possession order.[205]

Four of the five cases above concern the use of Airbnb, and the non-gratuitous form of sharing discussed by Zale. In the fifth, *Janusauskas*, the Couchsurfing platform was used in the way Airbnb was used in *Swan*, and despite the Couchsurfing platform prohibiting hosts from charging a fee for accommodation,[206] the travellers did pay rent,[207] so that case also involved non-gratuitous sharing. In fact, none of the decisions referred to above fall into the 'gratuitous sharing' category of Zale's framework. *Janusauskas*, *Li v Yang* and *Swan* each involved absent hosts. This arrangement, as considered in detail below, is more likely to be a breach of a tenancy and the most likely to illustrate the preference of property law for those who own property. This is amply illustrated in the *Swan Appeal*, which is considered in detail below.

A *Swan* – The Facts

In August 2015, Ms Swan entered a residential tenancy agreement with Barbara Uecker and Michael Greaves over Ms Swan's apartment in Melbourne's St Kilda.[208] An express term of the tenancy prohibited Uecker and Greaves from subletting without Ms Swan's written consent as the landlord.[209] In January 2016, Ms Swan discovered that Uecker and Greaves had been renting the apartment to Airbnb guests without her consent.[210] Upon discovering this, Ms Swan issued a notice to vacate the apartment under section 253 of the *Residential Tenancies Act 1997* (Vic).[211] When Uecker and Greaves failed to vacate, Ms Swan applied to the VCAT for a possession order.[212]

The basis of the dispute was the agreement between Uecker and Greaves and the guests ('the agreement'). The terms of the agreement were contained in the standard agreement obtained from the Airbnb website.[213] Guests could choose to occupy the entire apartment for $200 per night, or one bedroom for $102 per night.[214] Ms Swan's case was that the agreement constituted an unapproved

203 Ibid [18] (Member Boddison).
204 Ibid [36]–[37] (Member Boddison).
205 Ibid [38] (Member Boddison).
206 'Couchsurfing Policies', *Couchsurfing* (Web Page) <www.couchsurfing.com/about/policies/>.
207 *Janusauskas* [2014] VSC 650, [6] (Emerton J).
208 Tim Graham and Rachael Joachim-Rovira, '*Swan v Uecker*' (2016) 31(6) *Australian Property Law Bulletin* 98, 98.
209 *Swan Appeal* (2016) 50 VR 74, 76 [2] n 2 (Croft J).
210 *Swan* [2016] VCAT 483, [7] (Member Campana); ibid 82 [18] (Croft J).
211 Bill Swannie, 'Trouble in Paradise: Are Home Sharing Arrangements "Subletting" under Residential Tenancies Legislation?' (2016) 25(3) *Australian Property Law Journal* 183, 186 ('Trouble in Paradise'); *Swan Appeal* (2016) 50 VR 74, 82–3 [22] (Croft J). See also Bill Swannie, 'Airbnb and Residential Tenancy Law: Do "Home Sharing" Arrangements Constitute a Licence or a Lease?' (2018) 39(2) *Adelaide Law Review* 231.
212 Graham and Joachim-Rovira (n 208) 98.
213 *Swan Appeal* (2016) 50 VR 74, 83 [24] (Croft J); ibid.
214 *Swan Appeal* (2016) 50 VR 74, 82 [19] (Croft J).

sublease when the guests occupied the entire apartment.[215] If the guests selected that particular option, they would 'have use of the entire 2 bedroom apartment' and Uecker and Greaves would reside elsewhere to allow the guests to have the apartment 'all to [themselves]'.[216] The apartment was available for between three and five nights and the agreement listed check-in and check-out times.[217] It contemplated 'House Rules' which guests were required to follow, including a no-smoking policy and restrictions on noise and the use of the kitchen.[218] It also stated that Uecker and Greaves would provide tourist information to the guests upon request.[219] The agreement expressly described the stay as 'merely a licence granted by [Uecker and Greaves]' and provided that if guests stayed past the check-out time, 'they [would] no longer have a license to stay' and Uecker and Greaves could make the guests leave.[220]

The VCAT identified that the issue to be decided was whether the agreement was a lease between Uecker and Greaves and the guests, or alternatively whether it was a licence to occupy the apartment.[221] If the former, Uecker and Greaves had sublet the apartment without Ms Swan's consent, enabling her to issue the notice and terminate the lease.[222] If the latter, Uecker and Greaves had not breached the tenancy and Ms Swan would have had no basis to serve the notice.[223] The important distinction between a tenant and a licensee is that the tenant has the legal right to exclusive possession of the premises.[224]

VCAT Member Campana was satisfied that the apartment had been used by Airbnb guests without Ms Swan's consent.[225] However, she found that there was no grant of exclusive possession, and that rather the relationship between Uecker and Greaves and the Airbnb guests was a licence to occupy the apartment.[226] Accordingly, the VCAT refused Ms Swan's application for a possession order and Ms Swan appealed.

Crucial to the decision in *Swan* was whether the Airbnb agreement in substance and effect granted a right of exclusive possession to the guests[227] and thus constituted a lease rather than a licence. The difference between the two has been an important issue in tenancy law for many years.[228] Under the English common law doctrines of tenure and estates, interests in land are either freehold or leasehold.[229] A leasehold interest arises when a freehold owner grants exclusive

215 Ibid.
216 *Swan* [2016] VCAT 483, [23] (Member Campana).
217 Swannie, 'Trouble in Paradise' (n 211) 185–6.
218 Ibid 188; *Swan* [2016] VCAT 483, [23] (Member Campana).
219 Swannie, 'Trouble in Paradise' (n 211) 186.
220 *Swan* [2016] VCAT 483, [41] (Member Campana).
221 Ibid [30]–[31] (Member Campana).
222 Christopher Pearce, 'The Search for a Long-Term Solution to Short-Term Rentals: The Rise of Airbnb and the Sharing Economy' (2016) 35(2) *University of Tasmania Law Review* 58, 73.
223 Ibid.
224 *Radaich v Smith* (1959) 101 CLR 209, 222 (Windeyer J) ('*Radaich*').
225 *Swan* [2016] VCAT 483, [25], [29] (Member Campana).
226 Ibid [46] (Member Campana).
227 *Swan Appeal* (2016) 50 VR 74, 74. See also *Radaich* (1959) 101 CLR 209, 217 (Taylor J).
228 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 308.
229 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 299 (Williams J).

possession of land to another for a definite period, whilst retaining the reversionary interest.[230] The landowner becomes the lessor (or landlord), and the other party becomes the lessee (or tenant).[231] Originally, a lease was not an estate in land and the relationship between a landlord and tenant was contractual.[232] A tenant only had personal remedies against their landlord for breach of contract.[233] By the end of the 15th century, however, with the development of the action of ejectment, a tenant could recover land of which they had been dispossessed.[234] A tenant then had a proprietary interest in land, enforceable against anyone who interfered with it, rather than merely personal rights pursuant to a contract.[235]

By contrast, a contract that grants a right to use or occupy land may constitute a mere licence that does not transfer any proprietary interest in the land.[236] The 'classic definition'[237] of a licence comes from the 1673 decision in *Thomas v Sorrell*[238] where it was stated that a licence 'properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful'.[239] Building contractors, employees, students, lodgers, boarders, and hotel guests, for example, are generally all occupiers of land pursuant to a licence.[240]

The fundamental legal distinction between a lease and a licence is based on the 'theoretical distinction between real property on the one hand and personal rights on the other'.[241] Proprietary interests conferred by a lease are rights in rem.[242] A tenant who has a right to exclusive possession can exercise that right by excluding all persons, including the landlord, from the land.[243] The ability to enforce legal rights against third parties is the essential element of property ownership.[244] In

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230 Edgeworth (n 228) 301; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 306; Brendan Edgeworth et al, *Sackville & Neave: Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 691, 694; Paul Babie, 'Property, Choice and Obligation: The *Australian* Law of Leases and Licences' in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016) 180, 185.

231 Anthony P Moore, *Commercial and Residential Tenancies: The Laws of Australia* (Thomson Reuters, 2008) vii.

232 *Street v Mountford* [1985] 1 AC 809, 814 (Lord Templeman); Edgeworth et al (n 230) 691.

233 *Street v Mountford* [1985] 1 AC 809, 814 (Lord Templeman).

234 Adrian J Bradbrook, Clyde E Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) 674; Edgeworth et al (n 230) 691; Samantha Hepburn, *Australian Property Law: Cases, Materials and Analysis* (LexisNexis Butterworths, 2nd ed, 2012) 281–2.

235 *City of Rockingham v PMR Quarries Pty Ltd* (2001) 118 LGERA 93, 98 [37] (Hasluck J) ('*Rockingham v PMR*').

236 Gray and Gray (n 230) 337; Bradbrook, Croft and Hay (n 234) 6; Edgeworth et al (n 230) 9; Edgeworth (n 228) 317; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 633 (Dixon J).

237 *Rockingham v PMR* (2001) 118 LGERA 93, 98 [38] (Hasluck J).

238 (1673) Vaugh 330; 124 ER 1098.

239 Ibid 1109 [351] (Vaughan CJ).

240 Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 6th ed, 2016) 28.

241 Nicholas Shaw, 'Contractualisation and the Lease–Licence Distinction' (1996) 18(2) *Adelaide Law Review* 213, 214.

242 *Rockingham v PMR* (2001) 118 LGERA 93, 98 [37] (Hasluck J); Hepburn (n 234) 20.

243 *Rockingham v PMR* (2001) 118 LGERA 93, 98 [40] (Hasluck J).

244 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 298–9 (Williams J); Edgeworth et al (n 232) 22.

contrast, a licence does not create any interest in land and merely confers a right in personam, enforceable only against the other party to the contract.[245] A licence prevents the licensee from being a trespasser,[246] but the licensee cannot typically bring an action in trespass against another.[247] A tenant is 'in the real sense' the owner of the land, subject to certain restrictions.[248] By contrast, a licensee can 'in no sense call the land [their] own'.[249]

Leases and licences share several characteristics: both are created by contract, both involve the occupation of land and often contain similar terms,[250] but exclusive possession is the distinguishing feature.[251] This is reflected in a long line of Australian and English cases,[252] and in the leading authority,[253] the decision of the High Court of Australia in *Radaich v Smith* ('*Radaich*').[254]

In *Radaich*, a landowner granted a milk bar operator the 'sole and exclusive license … to supply refreshments' from a shop and to 'carry on the business of a milk bar therein'.[255] In the agreement, the parties expressly referred to themselves as '[licensor]' and 'licensee'.[256] The agreement allowed the milk bar operator to open and close the shop, to keep stock inside the shop, and required the licensee to 'give up possession' of the shop at the end of the term.[257] All of the judges agreed,[258] that the effect of the agreement was to grant the milk bar operator a 'right to exclusive possession for … [a] term' and where 'it becomes necessary to identify a particular transaction as either a lease or a licence', that factor must be decisive.[259] The agreement gave the milk bar operator a right to 'carry on the business of a milk bar', which could only be fully enjoyed with exclusive possession of the shop.[260] The use of the words 'licensor' and 'licensee' in the agreement did not derogate from the grant of exclusive possession.[261] Accordingly, the agreement was a lease between the landowner and the milk bar operator.[262]

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245 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 300 (Williams J); Edgeworth (n 228) 317; Adrian J Bradbrook, 'Creeping Reforms to Landlord and Tenant Law: The Case of Boarders and Lodgers' (2004) 10(3) *Australian Property Law Journal* 157, 164.

246 Bradbrook, Croft and Hay (n 234) 77.

247 Gray and Gray (n 230) 339.

248 *Street v Mountford* [1985] 1 AC 809, 816 (Lord Templeman); ibid 309.

249 *Street v Mountford* [1985] 1 AC 809, 816 (Lord Templeman).

250 Shaw (n 241) 214.

251 Moore (n 231) 11.

252 *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405; *Landale v Menzies* (1909) 9 CLR 89; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Radaich* (1959) 101 CLR 209; *Lewis v Bell* (1985) 1 NSWLR 731; *Street v Mountford* [1985] 1 AC 809; *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174; *Rockingham v PMR* (2001) 118 LGERA 93; *Western Australia v Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Genco* (2013) 46 VR 507. See also Bradbrook, Croft and Hay (n 234) 6.

253 *Lewis v Bell* (1985) 1 NSWLR 731, 734 (Mahoney JA).

254 (1959) 101 CLR 209.

255 Ibid.

256 Ibid.

257 Ibid 216 (Taylor J).

258 Ibid 213 (Dixon CJ), 214 (McTiernan J), 217 (Taylor J), 220 (Menzies J), 222 (Windeyer J).

259 Ibid 217 (Taylor J).

260 Ibid 215 (McTiernan J).

261 Ibid 214 (McTiernan J), 216 (Taylor J).

262 Ibid 209.

Windeyer J's judgment in *Radaich* is considered the most authoritative statement of the principle.[263] His Honour stated:

> What then is the fundamental right which a tenant has that distinguishes [their] position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it … ascertained whether such an interest [is] given? By seeing whether the grantee was given a legal right of exclusive possession of the land.[264]

If someone is granted exclusive possession, Windeyer J concluded, '[they are] a tenant' and 'cannot be other than a tenant, because a legal right of exclusive possession is a tenancy'.[265] Thus, the fact that the Airbnb agreement used by Uecker and Greaves called itself 'merely a licence granted by the Host'[266] was not decisive. Uecker and Greaves could not 'escape the legal consequences of one relationship by professing that it is another',[267] and nor could they allow the label of an agreement to determine its legal classification.[268] If the label of the agreement as a licence was contradicted by a grant of exclusive possession, the agreement was a lease.[269]

Uecker and Greaves also argued that the short duration of the stay, the online payments on the Airbnb platform, and the strict check-in and check-out times indicated that a licence was intended by the parties.[270] The duration of the stay was irrelevant, as it is possible to create a tenancy for 'days … [or] even for hours'.[271] The one-off online payment was also not decisive as a lease can determine the method of rent payment and, moreover, regular rent is not essential to the creation of a lease.[272] The check-in and check-out times were also irrelevant to the classification of the agreement as a lease has a certain duration, upon expiry of which the tenant must vacate the premises.[273]

Lodgers, along with boarders, are the most common example of licensees of residential premises,[274] and are denied proprietary rights because they do not have exclusive possession.[275] If the owner resides upon the premises and '[retains] … general control and dominion' over the property, the occupier is a lodger.[276] If the Airbnb guests had only occupied one room, Uecker and Greaves would have retained general control over the property, and the guests would likely have been lodgers. Uecker and Greaves would not have created an unauthorised sublease.

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263 Moore, Grattan and Griggs (n 240) 665.
264 *Radaich* (1959) 101 CLR 209, 222 (emphasis omitted).
265 Ibid.
266 *Swan* [2016] VCAT 483, [41] (Member Campana) (emphasis omitted).
267 *Radaich* (1959) 101 CLR 209, 222 (Windeyer J).
268 *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174, 176 (Tadgell JA).
269 *AG Securities v Vaughan* [1990] 1 AC 417, 462 (Lord Templeman); Gray and Gray (n 230) 354.
270 *Swan* [2016] VCAT 483, [43] (Member Campana).
271 *Genco* (2013) 46 VR 507, 514 [29] (Nettle JA).
272 Edgeworth (n 228) 301; Bradbrook, Croft and Hay (n 234) 37; Edgeworth et al (n 230) 765.
273 Moore, Grattan and Griggs (n 240) 735; Gray and Gray (n 230) 405.
274 Peter Butt, 'Tenants, Lodgers and Boarders' (2006) 80(7) *Australian Law Journal* 423, 423; Moore (n 231) 350.
275 Bradbrook, Croft and Hay (n 234) 80.
276 *Frieze v Unger* [1960] VR 230, 237 (Sholl J).

A residential occupier is a boarder if they are provided with 'services which require the [owner] to exercise unrestricted access to and use of the premises'.[277] The services may include cooking meals or cleaning. In that case, legal possession remains with the owner.[278] A hotel guest is a boarder, as the owner has a broad 'right to enter for cleaning and other purposes'.[279] Uecker and Greaves were available by phone, reinforcing the fact of their absence, for any guidance the guests may require.[280] This is significantly different to services provided to a boarder, where the owner requires regular access to the premises.

Uecker and Greaves argued that the fact that they were entitled to make guests leave if they overstayed was indicative of a licence.[281] However, under a lease a landlord retains limited rights, such as the right to enter, inspect and repair the premises.[282] Such rights are a 'reflection of the [landlord's] reversionary interest'[283] and their limited nature 'serves to emphasise the fact that the [tenant] is entitled to exclusive possession'.[284] Even the 'House Rules' were not so extensive as to be inconsistent with exclusive possession.[285]

It is unlikely that with their Airbnb agreement Uecker and Greaves intended to create a landlord and tenant relationship with all the attendant rights and duties.[286] However, the *Radaich* test means that a lease has an 'objective existence [independent] of the wishes of the parties'.[287] Intention is only relevant to determine what rights the parties intended to give, and consequently, what the parties intended for the agreement as a whole.[288] The relevant intention is the intention to grant rights consistent or inconsistent with exclusive possession.[289] Any intention of the parties to determine the legal classification of the transaction is not relevant.[290] Once the rights are determined by reference to the parties' intention, the question of whether the agreement is a lease or a licence can be answered by whether, objectively, the rights are of exclusive possession.[291] In *Swan*, Uecker and Greaves intended to stay elsewhere to allow the guests 'to have [the apartment] all to [themselves]', to the exclusion of all others.[292] The guests were thus granted exclusive possession of the apartment, subject only to the

277 *Street v Mountford* [1985] 1 AC 809, 818 (Lord Templeman).
278 Edgeworth (n 228) 319; Bradbrook (n 245) 159.
279 *Genco* (2013) 46 VR 507, 514 [28] (Nettle JA).
280 *Swan Appeal* (2016) 50 VR 74, 82 [20] (Croft J).
281 *Swan* [2016] VCAT 483, [41]–[42] (Member Campana).
282 Edgeworth (n 228) 306–7; *Street v Mountford* [1985] 1 AC 809, 816 (Lord Templeman).
283 *Wilson v Anderson* (2002) 213 CLR 401, 411 (J Basten QC) (during argument).
284 *Street v Mountford* [1985] 1 AC 809, 818 (Lord Templeman).
285 See *Living and Leisure Australia Ltd v Commissioner of State Revenue* (2017) 106 ATR 910, 922 [23] (Croft J).
286 Swannie, 'Trouble in Paradise' (n 211) 187.
287 Shaw (n 241) 216.
288 *Lewis v Bell* (1985) 1 NSWLR 731, 737 (Mahoney JA).
289 Shaw (n 241) 216.
290 Ibid.
291 *Lewis v Bell* (1985) 1 NSWLR 731, 737 (Mahoney JA).
292 *Swan* [2016] VCAT 483, [23] (Member Campana).

'House Rules' and the limited right of Uecker and Greaves to make them leave if they overstayed.[293]

Rather than remitting the case to the VCAT, Croft J finalised the appeal,[294] holding that 'the effect of the Agreement, fully analysed, does, in my view, mean that those guests enjoyed exclusive possession of the Apartment during their stay'.[295] As a result, the agreement was properly characterised as a lease.[296] Accordingly, the Supreme Court granted the possession order in favour of Ms Swan,[297] favouring the property rights of the owner at the expense of Uecker and Greaves.

V THE IMPLICATIONS OF THE *SWAN APPEAL*

The decision in the *Swan Appeal* had drastic consequences for the tenants who lost their tenancy of the St Kilda apartment. There are some obvious lessons for the parties to residential leases if they seek to protect their interests and there are some less obvious property law implications for landlords and tenants. These implications are considered below.

The first consequence of the determination that a short-term rental accommodation arrangement like the one considered in the *Swan Appeal* is a lease is that it is likely to benefit from the statutory exception to indefeasibility that Torrens legislation around Australia confers on unregistered leases of certain lengths.[298] Thus, an Airbnb guest's lease would be a legal interest protected from the claim of a subsequent registered proprietor of the property.[299] This may not create a problem in practice due to the time it takes to complete settlement, which means that guests would likely vacate the property before the new owner takes possession.

A second consequence of the *Swan Appeal* is that a lease of this kind would be protected by strata title legislation that prohibits strata corporations from creating by-laws that purport to restrict a 'dealing' with a strata lot. This issue was considered by the Queensland Civil and Administrative Tribunal ('QCAT') in

293 *Swan Appeal* (2016) 50 VR 74, 99 [61] (Croft J).
294 Swannie, 'Trouble in Paradise' (n 211) 188.
295 *Swan Appeal* (2016) 50 VR 74, 96 [53] (Croft J).
296 Ibid.
297 Ibid 105 [81] (Croft J).
298 In South Australia, for example, section 69(h) of the *Real Property Act 1886* (SA) provides that if, at the time a proprietor becomes registered, a tenant is in actual possession of the land pursuant to an unregistered lease for a term 'not exceeding one year' then the tenant's title is an exception to the registered proprietor's indefeasibility. Unregistered leases of up to five years are protected under Torrens legislation in Western Australia: *Transfer of Land Act 1893* (WA) s 68(1A). Torrens legislation in the Australian Capital Territory, the Northern Territory, NSW, Queensland and Tasmania protect unregistered leases of up to three years: *Land Titles Act 1925* (ACT) s 58(1)(d); *Real Property Act 1900* (NSW) s 42(1)(d); *Land Title Act 2000* (NT) ss 4 (definition of 'short lease'), 189(1)(b); *Land Title Act 1994* (Qld) s 185, sch 2 (definition of 'short lease'); *Land Titles Act 1980* (Tas) s 40(3)(d). In Victoria the interest, other than any option to purchase, of a tenant in possession of the land is an exception: *Transfer of Land Act 1958* (Vic) s 42(2)(e).
299 Babie (n 230) 189.

Body Corporate for Hilton Park v Robertson ('*Hilton Park*').[300] In *Hilton Park*, the QCAT cited the *Swan Appeal* and distinguished *Byrne* in light of the significant differences between the Queensland and the Western Australian legislation, and held that a by-law which restricted short-term holiday letting was contrary to section 180(4) of the *Body Corporate and Community Management Act 1997* (Qld).[301] Section 180(4) provides that a by-law cannot 'prevent or restrict a transmission, transfer, mortgage or other dealing with a lot'.[302] The extent of this particular implication will depend on the location of the scheme, as strata legislation varies in each Australian jurisdiction.[303]

Further, as a result of the characterisation of an Airbnb agreement as a lease, terms will be implied into the agreement by both the common law and relevant residential tenancy legislation.[304] Some of those implied terms are not relevant in an Airbnb context. For example, a tenant's implied obligation to pay rent[305] should not affect the transaction, as an Airbnb guest pays for the booking in advance. However, other implied terms may be relevant. A landlord's implied obligation to ensure furnished premises are fit for habitation will compel a host to ensure that the property is reasonably safe and free of defects.[306] An Airbnb guest will also have an implied right to quiet enjoyment of the property,[307] and the host will have to avoid interfering with that enjoyment.[308] The Airbnb guest will also have an implied obligation to give up the property in good repair,[309] essentially requiring guests to leave the property in the same condition as they found it.[310] Additionally, Airbnb hosts will have an implied right to enter the property at all reasonable times to inspect the condition of the property.[311] Realistically, however, these implied terms are unlikely to have much practical effect on the relationship between Airbnb hosts and guests. The terms are only implied if there are no express terms in the lease that deal with the relevant issue,[312] and most Airbnb agreements will contain similar express terms to those discussed above.

The public nature of the Airbnb review system may have rendered the implied terms largely irrelevant. After each Airbnb stay, the host and the guest can submit a review and rate their experience between one and five stars.[313] Those reviews are

300 [2018] QCATA 168.
301 Ibid 17 [83]–[84] (Member King-Scott).
302 *Body Corporate and Community Management Act 1997* (Qld) s 180(4).
303 K Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13(1) *Australian Property Law Journal* 1, 1.
304 David Kelly, 'A Licence to Lease? The Common Law Status of an Airbnb "Stay"' (2017) 39(2) *Bulletin (Law Society of South Australia)* 20, 21; Edgeworth et al (n 230) 725.
305 See, eg, *Real Property Act 1886* (SA) s 124(a).
306 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 364–5 (McHugh J).
307 *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199, 214 (Mason J).
308 *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [36]–[37] (Hill J).
309 See, eg, *Real Property Act 1886* (SA) s 124(b).
310 *Combara Nominees Pty Ltd v McIlwraith-Davey Pty Ltd* (1991) 6 WAR 408, 412 (Pidgeon J).
311 *Real Property Act 1886* (SA) s 125(b).
312 *Malzy v Eichholz* [1916] 2 KB 308, 313–14 (Lord Cozens-Hardy); *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207, 218 (Kirby P); Edgeworth (n 228) 350.
313 Deloitte Access Economics (n 16) 12.

publicly visible to all Airbnb users.[314] This system provides an incentive for hosts to provide a high standard of accommodation and for guests to behave respectfully,[315] achieving, in many respects, the outcomes to which many of the covenants (implied or express) are directed.

Finally, and as the *Swan Appeal*, *Janusauskas* and *Li v Yang*[316] all illustrate, one further but significant consequence is that a tenant who subleases their leased property may be evicted, further entrenching the privilege of ownership in the home sharing economy.

In the *Swan Appeal*, Uecker and Greaves were prohibited from subletting without their landlord's consent by an express term of their residential tenancy.[317] Most commercial and residential leases contain such a term,[318] and in the absence of a similar express term, the prohibition is implied by legislation into residential tenancies in Victoria.[319] The term in the *Swan Appeal* had the same effect as the term implied into Victorian residential tenancies by the Victorian act.[320] That implied term prohibits subletting without the landlord's prior written consent,[321] but a landlord cannot unreasonably withhold consent to a proposed sublease.[322] Additionally, a landlord cannot receive payment for giving that consent.[323] If a tenant sublets the premises without the landlord's consent, the landlord is empowered to issue a notice to vacate and terminate the tenancy.[324] If the tenant does not vacate the premises within 14 days of the notice, the landlord may apply to the VCAT for a possession order.[325] If the VCAT is satisfied that the tenant had sublet the premises without the landlord's consent, the Victorian act requires the VCAT to make the possession order.[326] The VCAT has no discretion to consider the merits of the case or the individual circumstances of a tenant.[327]

As noted, all residential tenancy laws in Australia prohibit subletting without the landlord's prior consent.[328] Most regulate the way in which that consent may

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314 Ibid 27.

315 Dora Stilianos and Kate Coen, 'Victoria Leads the Way: *Owners Corporations Act* Reforms to Address Short-Stay Accommodation Issues' (2016) 31(5) *Australian Property Law Bulletin* 84, 87; Guttentag (n 14) 1195.

316 [2018] VCAT 293.

317 *Swan Appeal* (2016) 50 VR 74, 75 [2] (Croft J).

318 Edgeworth (n 228) 392; Moore, Grattan and Griggs (n 240) 704; Hepburn (n 234) 341.

319 *Residential Tenancies Act 1997* (Vic) s 81. See also *Residential Tenancies Act 1997* (ACT) s 54; *Residential Tenancies Act 2010* (NSW) s 74; *Residential Tenancies Act 1999* (NT) s 78; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 238; *Residential Tenancies Act 1995* (SA) s 74; *Residential Tenancy Act 1997* (Tas) s 49; *Residential Tenancies Act 1987* (WA) s 49.

320 *Residential Tenancies Act 1997* (Vic) s 81.

321 Ibid s 81(1).

322 Ibid s 81(2).

323 Ibid s 84.

324 Ibid s 253(1).

325 Ibid s 322(2).

326 Ibid s 330(1).

327 *Le Guier v Black* [2017] VCAT 1456, [15] (Member Wilson).

328 *Residential Tenancies Act 1997* (ACT) sch 1 cls 72(1)–(2); *Residential Tenancies Act 2010* (NSW) s 74(1); *Residential Tenancies Act 1999* (NT) ss 78(2), 79(2)–(3); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 52, 238(2); *Residential Tenancies Act 1995* (SA) ss 74(1)–(2); *Residential Tenancy Act 1997* (Tas) ss 49(1)(a)–(b), (1A); *Residential Tenancies Act 1987* (WA) ss 49(1)–(3).

be given,[329] providing, for example that it not be withheld unreasonably or that a landlord may not charge for giving it. The varying degrees to which the legislation in each Australian jurisdiction permits a landlord to withhold consent is explored in more detail below. Residential tenancy laws across Australia also provide for a process that enables the landlord to terminate the lease where a breach, like an unauthorised subletting, has occurred and/or remains unremedied,[330] and for landlords and tenants to seek remedies from either a court or tribunal.[331] In some cases, the legislation provides other statutory guarantees that are absent from the Victorian scheme. For example, in South Australia where a landlord applies for a possession order the South Australian Civil and Administrative Tribunal ('SACAT') may terminate the tenancy and make the possession order if the tenant's breach is 'sufficiently serious' to justify termination.[332] However, the SACAT may also reinstate a tenancy if it would be 'just and equitable' to do so.[333] A similar discretion is included in the NSW scheme where the NSW Civil and Administrative Tribunal has the power to grant a possession order if the breach is 'sufficient' to justify termination.[334] Further, it may refuse the order if satisfied the breach has been remedied.[335]

Obviously, there are a range of preventative measures that a tenant seeking to offer the entirety of a leased premises for short-term rental accommodation could take. An obvious measure would be to discuss the proposal with the landlord, ideally before the landlord and tenant enter the lease.[336] There are examples of tenants in Australia who have entered into long-term leases for the sole purpose of renting them on Airbnb, but who have done so with the full knowledge and consent of the landlord.[337] The tenant could inform the landlord how often they intend to list the property on Airbnb and the reasons for doing so.[338] Many hosts list their properties to subsidise a holiday, in the same way that an owner-occupier might,[339]

329 *Residential Tenancies Act 2010* (NSW) ss 74(2), 75(1), (2), (5); *Residential Tenancies Act 1999* (NT) ss 79(2)–(3), 81(1); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 238(3)–(4), 239, 240; *Residential Tenancies Act 1995* (SA) s 74(2)(b); *Residential Tenancies Act 1987* (WA) s 49(2)(a)–(b).

330 *Residential Tenancies Act 1997* (ACT) s 54(1); *Residential Tenancies Act 2010* (NSW) ss 87(1)–(2); *Residential Tenancies Act 1999* (NT) s 96B; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 280–1; *Residential Tenancies Act 1995* (SA) s 74(2c); *Residential Tenancy Act 1997* (Tas) s 42(1); *Residential Tenancies Act 1987* (WA) s 62(1).

331 *Residential Tenancies Act 1997* (ACT) s 54(1); *Residential Tenancies Act 2010* (NSW) s 87(4); *Residential Tenancies Act 1999* (NT) s 100A; *Residential Tenancies Act 1995* (SA) ss 80(5), 87(1); *Residential Tenancy Act 1997* (Tas) s 45; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 293; *Residential Tenancies Act 1987* (WA) s 71(1).

332 *Residential Tenancies Act 1995* (SA) s 87(1).

333 Ibid s 80(5).

334 *Residential Tenancies Act 2010* (NSW) s 87(4)(b).

335 Ibid s 87(5)(c).

336 Kelly (n 304) 21.

337 Lenaghan (n 2); Alison Worrall, '"I'm Not an Amateur": The Serial Renter Making a Living from Airbnb', *Domain* (online, 31 October 2018) <https://www.domain.com.au/news/im-not-an-amateur-the-serial-renter-making-a-living-from-airbnb-779369/>.

338 'How Should I Talk to My Landlord about Hosting on Airbnb?' *Airbnb* (Web Page) <https://www.airbnb.com.au/help/article/806/how-should-i-talk-to-my-landlord-about-hosting-on-airbnb>.

339 See Tenants' Union of New South Wales, *Belonging Anywhere: Airbnb and Renting in Sydney* (Report, March 2017) 17 <https://files.tenants.org.au/policy/2017-Airbnb-in-Sydney.pdf>.

and a landlord may be more likely to consent if they are aware of that. The parties could negotiate an increased rent in return for the tenant's desired use of the property, or could come to an agreement whereby the landlord takes a share of the profits obtained by the tenant by renting the property through Airbnb.[340] The parties could agree on how often the property will be sublet through Airbnb and how many people are allowed to stay in the property.[341] Additionally, they could agree on specific rules to be included in an Airbnb agreement to alleviate particular concerns the landlord may have.[342] A landlord may even ask that the rating systems used by the Airbnb platform be adopted to ensure that any Airbnb guest have a minimum star rating to stay in the property, to ease any fears the landlord may have about badly behaved strangers staying in the property.[343] A tenant could then implement this request into the Airbnb listing by requiring that guests have a minimum star rating to book the property.[344] A tenant who takes this approach would enable the landlord to maintain a measure of control over the property, which is the purpose behind the prohibition on subletting without consent.[345] This would enable the tenant to then participate in the sharing economy without fear of eviction.

These preventative measures all rely, to an extent, on the willingness of the landlord to accommodate the tenant's request to sublet, reflecting a privilege conferred on the landlord as owner.

The extent of an owner's discretion in refusing consent to a sublease varies depending on the jurisdiction. In the Australian Capital Territory, the landlord may withhold consent to a sublease, and there is no requirement for the landlord to act reasonably in doing so.[346] In NSW, the landlord may withhold consent 'whether or not it is reasonable to do so', unless the subletting results in only the partial subletting of the premises to one or more tenants in addition to the original tenant occupying the premises (which, in light of the *Swan Appeal*, would arguably constitute a licence rather than a sublease anyway).[347] In Tasmania, there is no requirement for the landlord to be reasonable in withholding consent to a sublease, and in addition, a tenant can only sublet if the tenant remains an occupier of the premises or if they sublet to an employee.[348] The legislation in these jurisdictions firmly entrenches the privilege of ownership in the context of home sharing.

Conversely, in South Australia,[349] Victoria,[350] Northern Territory,[351] Western Australia[352] and Queensland,[353] a landlord cannot unreasonably withhold consent

340 Kelly (n 304) 21.
341 *Airbnb* (n 338).
342 Ibid.
343 See Guttentag (n 14) 1195.
344 See Deloitte Access Economics (n 16) 11.
345 Swannie, 'Trouble in Paradise' (n 211) 190.
346 *Residential Tenancies Act 1997* (ACT) s 8(1), sch 1 cls 72(1)–(2).
347 *Residential Tenancies Act 2010* (NSW) ss 75(1)–(2).
348 *Residential Tenancy Act 1997* (Tas) s 49(1).
349 *Residential Tenancies Act 1995* (SA) s 74(2)(b).
350 *Residential Tenancies Act 1997* (Vic) s 81(2).
351 *Residential Tenancies Act 1999* (NT) s 79.
352 *Residential Tenancies Act 1987* (WA) s 49(2).
353 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 238(3).

to a sublease. What constitutes an unreasonable withholding of consent has not been fully resolved in Australia.[354] The primary judicial authorities on subleases predominantly relate to commercial leases, as opposed to residential tenancies, and appear to be more appropriate to situations where the tenant assigns their entire proprietary interest for the remainder of the term, rather than subletting the property for a few days through an online platform whilst retaining the reversion.[355]

However there is some guidance on where a residential landlord's refusal to consent is unreasonable.[356] In *Amey v Minister for Environment & Natural Resources*[357] Member Raymond commented that 'the question in assessing the reasonableness of refusal is whether there is evidence which would justify a reasonable person in making that decision'.[358] More recently, in 2011, the VCAT held that where the landlord refuses to consent to a residential assignment or sublease, whether the proposed assignee or subtenant was 'financially sound and reliable and [was] of good character' were important considerations.[359] In *Ward v Bray*,[360] the VCAT found that the ability of the proposed tenant or subtenant to pay rent was a 'critical factor'.[361] Queensland residential tenancies legislation directs the QCAT to have regard to the risk of damage to the premises.[362]

Based on these authorities, a landlord's refusal to consent to an Airbnb sublease is likely to be unreasonable. The landlord should not be concerned about an Airbnb guest's ability to meet the financial obligations[363] of an Airbnb sublease, as the guest's obligation to pay is to the original tenant, not to the landlord.[364] In fact, the extra income obtained by the original tenant from the guest would likely assist the original tenant to meet their financial obligations to the landlord. A tenant could also use the Airbnb rating system to argue that the landlord is unreasonably withholding consent. If a potential guest has a high rating and positive reviews, any doubts that the landlord may have about the 'character of the proposed [sublessee]',[365] or 'risk of damage to the premises'[366] are likely to be unreasonable. Accordingly, although the requirement for a tenant to obtain the landlord's consent entrenches the privilege of the person that owns the property, in these jurisdictions at least, the privilege is tempered by the imposition of a requirement of reasonableness on the landlord.

354 Moore, Grattan and Griggs (n 240) 709.
355 Moore (n 231) 107–8.
356 *Amey v Minister for Environment & Natural Resources* [1996] SARTT 14; *McGoff v Connolly* [2011] VCAT 2103; *Ward v Bray* [2017] VCAT 1935; *Le Guier v Black* [2017] VCAT 1456.
357 *Amey v Minister for Environment & Natural Resources* [1996] SARTT 14.
358 Ibid 5 (Member Raymond).
359 *McGoff v Connolly* [2011] VCAT 2103, [8] (Member Wentworth).
360 *Ward v Bray* [2017] VCAT 1935.
361 Ibid [37], [40] (Member Campana).
362 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 239(3).
363 *Ward v Bray* [2017] VCAT 1935, [35] (Member Campana).
364 Edgeworth et al (n 230) 694.
365 *Amey v Minister for Environment & Natural Resources* [1996] SARTT 14, 5 (Member Raymond).
366 See, eg, *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 239(3)(b).

VI CONCLUSIONS

Despite the sharing economy's blurring of the boundaries of familiar property law forms, the Victorian Supreme Court's decision in the *Swan Appeal* indicates that the doctrinal understanding of the dividing line between two significant property law forms, the lease and licence, remains clear. While it is likely that Uecker and Greaves thought they were creating, via Airbnb, a licence to occupy their apartment, the application of the *Radaich* exclusive possession test meant that they were, instead, granting a sublease without the landlord's consent, contrary to the lease they had with their landlord who then successfully evicted them. The application in the *Swan Appeal* of the *Radaich* test is not only a correct application by the Court of binding authority, it is also a sound application of the principles concerning exclusive possession albeit in a relatively novel factual scenario. That the *Swan Appeal* means that similar short-term rentals are in fact unregistered leases that encroach onto the role played by the concept of indefeasibility of registered title, one of the cornerstone principles of the Australian property law and the Torrens system, is not a drastic consequence of the decision. Nor is the fact that it converts the host and guest relationship into one of landlord and tenant, importing a range of rights and benefits implied by common law and legislation into that relationship. The statutory exception to the indefeasibility of title of an incoming registered proprietor may be of little practical benefit or use to a short-term tenant, and, the implication of terms into the lease might be tempered by the terms of the short-term rental agreement itself and may even be made redundant by the trust mechanisms such as the star rating provided by Airbnb. These implications of *Swan* are interesting, but not surprising, and not particularly problematic.

It is the effect of the breach, namely the exposure to eviction, rather than the cause in the *Swan Appeal* that is surprising and which, indeed, has troubled some.[367] The harshness of the exposure of Uecker and Greaves to eviction can be explained by the fact that Victorian legislation does not confer any discretion on the court in considering whether to make a possession order. This contrasts with other legislative schemes, such as those in NSW[368] and South Australia[369] where there is discretion in the making of a similar order. Nevertheless, the requirement in all Australian residential tenancy legislation for the landlord to consent to a sublease privileges those who own the asset, at the expense of those who do not. This is a typical characteristic of what Zale calls the sharing-for-profit economy.

The conclusion, drawn above, that the settled yet significant property law boundary that distinguishes a lease from a licence remains robust in the face of the challenge posed by the short-term rental accommodation phenomenon, shows that settled concepts of property law have not been weakened by the challenges posed by new technologies and business models such as those used by Airbnb. As illustrated in Part III's analysis of the *Dobrohotoff*, *Genco* and *Balcombe* cases

367 Swannie, 'Trouble in Paradise' (n 211).
368 *Residential Tenancies Act 2010* (NSW) s 87.
369 *Residential Tenancies Act 1995* (SA) ss 80(5), 87(1).

however, the intensification of use and greater amenity impacts that increased access brings have led to some significant legislative responses, particularly in NSW and Victoria, where Airbnb is notably popular. Zale's taxonomy of sharing provides a means of contextualising the issues that led to the litigation in these cases and assists in understanding the interrelated legislative responses. Applying Zale's key binary descriptors of sharing, namely gratuitous/non-gratuitous, commercial/non-commercial, formal/informal[370] and monetary/non-monetary[371] indicates that the primary focus of the responses of NSW and Victoria, the two jurisdictions that have taken the most significant steps to regulate short-term rental accommodation, have focused on the non-gratuitous, monetary, and commercial ends of the spectrum. In doing so, there are clear efforts to ensure that whoever operates at those ends of the spectrum does so formally.

The focus on commercial home sharing is clearest in NSW's policy framework: the commercial nature of the activity is built into the proposed statewide land-use definition that will, depending on the location and intensity of the activity, require a planning assessment and approval for it to be legally undertaken. Similarly, owners corporations in that state will only be able to regulate commercial short-term rental accommodation arrangements. The proposed Code of Conduct, backed by criminal and civil penalties, reflects an intention to regulate an array of short-term rental accommodation industry participants in a formal sense as an industry.

Victoria's scheme is not expressly directed at commercial short-term rental accommodation, but specifically addresses where it takes place: in lots that form part of an owners corporation, like the apartment complex in *Genco* and *Balcombe*. It focuses on the potential for more acute amenity impacts from intensification of use of a lot, in the context of a strata title complex. In Victoria, the use of a private legislative power rather than public law mechanisms, such as planning law, is significant in light of Riordan J's comments, expressed in *Balcombe*, about the importance of private property rights. The incursion on an owner's property rights in a lot is an indication of the strength of parliamentary intent to regulate short-term rentals in the context of an owners corporation in Victoria.

As Zale explains, the sharing economy prioritises access to, rather than ownership of, property.[372] The online platforms that underpin the short-term rental accommodation phenomenon provide those with access to property with an opportunity to utilise it to an extent that has not traditionally been possible. This intensification of use has led to both legislative responses and litigation across Australian jurisdictions. In response to complaints from neighbours and traditional accommodation providers, some Australian states have recognised a need for greater legislative regulation of commercial, non-gratuitous sharing, which may be more appropriately described as the sharing-for-profit economy. On the other hand, the application of traditional property law concepts and residential tenancy legislation in judicial decisions such as the *Swan Appeal* demonstrate that property

370 Zale (n 18) 518–20.
371 Ibid 521–2.
372 Ibid 527–8.

law can rise to the challenges posed by the short-term rental accommodation phenomenon, and ultimately still privilege the owner of the property over those who have access to it. The intensification of use associated with the sharing economy may well lead to calls for further reform across various areas of the law, including planning, development, contract, and consumer law, however there is no present need for reform to property law.