

HOME-SHARING IN SOUTH AUSTRALIA: PROTECTING THE RIGHTS OF HOSTS, GUESTS, AND NEIGHBOURS

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Internet facilitated home-sharing services like Airbnb present new challenges for South Australian law because they appear to create seemingly novel legal relationships. This article considers whether South Australian law adequately protects the rights of hosts, guests and neighbours who are affected by home-sharing agreements. It argues, first, that home-sharing is currently a legal activity and land use in most of South Australia; secondly, that the relationships between host and guest are capable of being recognised under residential tenancy and property law; and thirdly, that while current legislation protects home-sharing neighbours living in strata housing, the law of private nuisance is not capable of protecting the rest. This article concludes that the rights of the host and guest are capable of being recognised and regulated by existing domestic law; however, it suggests that local councils should set up home-sharing complaints systems to protect neighbours.

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I INTRODUCTION

Internet home-sharing services like Airbnb have created new ways of obtaining accommodation, which now push the boundaries of South Australian law. The original Airbnb model was simple and convenient: hosts advertised online and shared space in their homes with guests who sought short-term accommodation.¹ However, the model has grown and evolved.² Hosts have moved beyond simple space-sharing — many now share their entire homes while away, and even regularly share investment properties instead of renting them out. This evolution has created the new activity of ‘home-sharing’, to which South Australian laws are not entirely adapted.³ Currently, neither parliament, nor local councils have specifically addressed home-sharing.⁴ A lack of recognition of home-sharing by lawmakers has created uncertainty for those directly involved: it means that people using online services such as Airbnb, either as hosts or guests, are not aware of the legal rights, obligations or relationships they commit to, or whether their activities are permitted at all. There are also implications for people living near home-sharing properties: neighbours may have few rights to recourse when their enjoyment of their land is affected by the home-sharing business.

¹ Airbnb, *How it Works* <<https://www.airbnb.com.au/help/getting-started/how-it-works>>.

² Airbnb’s evolution has been spectacular; the company is now valued at US\$30 billion and advertises over 87 000 listings in Australia: Guy Dwyer and Tristan Orgill, ‘Living like a Local or Rampant Tourism? Short-Term Holiday Letting in New South Wales and the Regulation of Sharing by Planning Laws’ (2017) 22 *Local Government Law Journal* 3, 7.

³ See, eg, Tom Lodewyke, “Significant Legal Issues” Posed by Rental Platforms’ (14 March 2017) *Lawyers Weekly* <<http://www.lawyersweekly.com.au/news/20733-significant-legal-issues-posed-by-rental-platforms>>.

⁴ Council ‘Development Plans’ do not align with this new business model and only three councils have enacted by-laws to specifically regulate an aspect of home-sharing: see Part II, Section B: Is Home-Sharing Legal in South Australia?

This article raises the question of whether specific regulation of home-sharing is needed in South Australia to clarify and protect the fundamental rights of the hosts, the guests and the neighbours. It aims to identify the key legal rights and obligations of these parties under current laws, and to recommend the type of action the South Australian Parliament or local councils need to take to regulate home-sharing adequately. The article will argue that the existing legislation governing residential tenancies and strata law, as well as traditional law of property, do not need to be modified to protect private rights of the host, guest, and neighbour in home-sharing agreements. It will also argue that the law of nuisance does not adequately protect many neighbours (ie, those not covered by the strata legislation) and will suggest that local councils should establish home-sharing complaints systems as part of the ongoing planning law reform.

The article begins in Part II by introducing the home-sharing model and considering whether home-sharing is legal under current South Australian law. Part III explores the key rights of hosts and guests who enter home-sharing agreements by examining the legal nature of their relationship and the application of tenancy legislation. In Part IV, the article analyses the rights of neighbours who are adversely affected by home-sharing, discusses the tort of private nuisance as a solution and considers the need for regulation of home-sharing by strata corporations.

II HOME-SHARING IN SOUTH AUSTRALIA

A *The Home-Sharing Model*

While short-term renting and holiday houses are nothing new,⁵ advances in technology have led to the rise of Airbnb and the wider ‘sharing economy’⁶ — an internet-based economic model that allows people to maximise returns from their underused assets by temporarily sharing them with others.⁷ The ‘power of the internet’ differentiates the peer-to-peer Airbnb home-sharing

⁵ Dwyer and Orgill, above n 2, 5.

⁶ Airbnb has been said to ‘epitomise’ the sharing economy: see Kellen Zale, ‘Sharing Property’ (2016) 87 *University of Colorado Law Review* 501, 502.

⁷ See Lara Major, ‘There’s No Place like (Your) Home; Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation’ (2016) 53 *San Diego Law Review* 469, 470; Stephen R Miller, ‘First Principles for Regulating the Sharing Economy’ (2016) 53 *Harvard Law Review* 147, 150; Adam Thierer et al, ‘How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem”’ (2016) 70 *University of Miami Law Review* 830, 834.

model from traditional lodging: searching, interaction and payment are all facilitated and simplified by online portals.⁸

Legal problems with the home-sharing model are surfacing as it gains popularity. Issues with taxation of transactions,⁹ home insurance,¹⁰ confidentiality of user information,¹¹ and liability for tortious conduct of guests¹² are being discussed around the world, alongside the wider ongoing debate about the effect of home-sharing on the hotel industry and wider economy.¹³ This article, however, will not attempt to solve all the problems that home-sharing poses for South Australia. The discussion focuses on the fundamental issues affecting the private rights of the home-sharing host, guest, and neighbour.

B Is Home-Sharing Legal in South Australia?

Generally speaking, everything which is not forbidden is allowed.¹⁴ Online home-sharing is not expressly addressed by any South Australian law, but the scenarios it creates resemble traditional methods of sharing accommodation, some of which are already regulated. Home-sharing often takes the form of one of three scenarios:¹⁵

⁸ Chad Marzen, Darren A Prum and Robert J Aalberts, ‘The New Sharing Economy: The Role of Property, Tort and Contract Law for Managing the Airbnb Model’ (2017) 13(2) *New York University Journal of Law and Business* 295, 300.

⁹ See 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* (2016) 48–9 [3.146]–[3.150] (‘NSW Legislative Assembly Committee on Short Term Holiday Letting’); Thomas A Dickerson and Sylvia O Hinds-Radix, ‘Taxing Internet Transactions: Airbnb and the Sharing Economy’ (2014) 86 *New York State Bar Journal* 49; Marzen, Prum and Aalberts, above n 8.

¹⁰ NSW Legislative Assembly Committee on Short Term Holiday Letting, above n 9, 46–8 [3.133]–[3.145].

¹¹ See generally Sophie Bradshaw, ‘Airbnb and Uber: The Need for Social Sharing Sites to Gain Trust through Privacy Compliance’ (2015) 12(6) *Privacy Law Bulletin* 153.

¹² See, eg, Talia G Loucks, ‘Travelers Beware: Tort Liability in the Sharing Economy’ (2015) 10 *Washington Journal of Law, Technology & Arts* 329, 331–5.

¹³ See generally Miller, above n 7.

¹⁴ See the often-repeated phrase quoted by Stanley Mosk in ‘The Common Law and the Judicial Decision-Making Process’ (1988) 11(1) *Harvard Journal of Law & Public Policy* 35, 39: ‘In England, everything is permitted except what is forbidden. In Germany, everything is forbidden except what is permitted. In France, everything is allowed, even what is prohibited. In the USSR, everything is prohibited, even what is permitted.’

¹⁵ In Melbourne and Sydney, nearly 60 per cent of all Airbnb listings are entire homes: see Airdna, *Sydney, Australia: Market Overview* (2017) <<https://www.airdna.co/city/au/sydney>>; Airdna, *Melbourne, Australia: Market* (2017) <<https://www.airdna.co/city/au/melbourne>>.

1. The host continues to reside at the property and shares part of the property with guests ('present host');
2. The host leaves their principal place of residence temporarily and makes the entire property available to guests ('temporarily absent host'); or
3. The host does not reside at the property, and makes the entire property available to a series of short term guests on a continuing basis ('permanently absent host').¹⁶

With these three scenarios in mind, this Section considers whether home-sharing is a legal activity, and whether it is a lawful land use under planning law.

1 *Home-Sharing as an Activity*

Although the online Airbnb model is novel, all three of the common home-sharing scenarios are essentially ordinary private transactions. The law sees no problem with allowing a friend to occupy a spare room ('present host'), or having someone house-sit while on holiday ('temporarily absent host'), or renting out an investment property ('permanently absent host'). These types of private agreements are barely regulated, and are certainly not prohibited. It is only when the home-sharing activity moves away from being a private arrangement, and begins to look like a commercial service, that the law takes a regulatory interest.¹⁷

Using services like Airbnb to facilitate home-sharing does not instantly turn the host's home into a regulated hotel or motel in the traditional sense. However, a property used for large-scale home-sharing, such as a guest house or lodging house, can begin to resemble a more commercial operation; and at this point, the host may be subject to regulation. Three South Australian councils have enacted by-laws¹⁸ which require hosts to obtain permits before they can lawfully operate 'lodging houses'.¹⁹ Adelaide City Council's by-laws apply to the running of 'building[s] or part thereof ... providing accommodation where the occupants share facilities (toilets, ablutions and

¹⁶ See also Dwyer and Orgill, above n 2, 29–31.

¹⁷ The development of hotels is strictly regulated in metropolitan Adelaide and requires planning permission: see, eg, Government of South Australia, *Development Plan: Adelaide (City)*, 24 September 2015 ('Development Plan: Adelaide (City)').

¹⁸ Councils have a general power to enact by-laws 'for the good rule and government of the area, and for the convenience, comfort and safety of its community': *Local Government Act 1999 (SA)* s 246(2).

¹⁹ Corporation of the City of Adelaide, *Lodging Houses*, By-Law no 9, 31 May 2011; City of Burnside, *Lodging Houses By-Law 2014*, By-Law no 7, 1 September 2014; City of Port Adelaide Enfield, *Lodging Houses*, By-Law no 6 of 2015, 14 July 2015.

kitchens) ... but not ... a flat nor any motel, hotel, or health care facility'.²⁰ Meanwhile, council by-laws in Port Adelaide Enfield require owners to obtain permits to operate buildings 'available for occupation by five or more persons on a commercial basis', but not flats, motels, hotels, health care facilities, schools, or institutional boarding houses.²¹ 'Commercial basis' in this context has been defined to mean 'available for members of the public generally for a charge which is more than a token'.²² Therefore, within the boundaries of these three councils, hosts whose premises are not divided into separate 'flats'²³ would require a permit to host more than two guests (or five in Port Adelaide Enfield) on a service like Airbnb, provided it is available to the public and for payment.²⁴ However, in the vast majority of the State, home-sharing remains an entirely legal and unregulated activity.

2 Home-Sharing as a Land Use

The regulation of planning and land use in South Australia is left to local councils by the current *Development Act 1993* (SA) ('Development Act'). The Act enables each council to enact a custom 'Development Plan' for their region,²⁵ which informs residents about 'what can and cannot be done in the future on any piece of land in the area'.²⁶ Development Plans restrict changes to the 'use' of land;²⁷ in most residential zones, use of land as a 'dwelling' is permitted, and 'non-complying' uses include hotels, motels, and

²⁰ Corporation of the City of Adelaide, *Lodging Houses*, By-Law no 9, 31 May 2011, cl 1.5.

²¹ City of Port Adelaide Enfield, *Lodging Houses*, By-Law no 6 of 2015, cl 6.9.2. The Burnside Council by-laws are similar, but do not require occupation on a 'commercial basis': City of Burnside, *Lodging Houses By-Law 2014*, By-Law no 7, 1 September 2014, cl 3.8.

²² *Buckle v Carrington Cottages Management Inc* [2002] SARTT 11 (23 January 2002); *Hu v Sun* [2009] SARTT 19 (30 December 2009).

²³ A 'flat' is defined as 'any self-contained suite of rooms designed, intended or adopted, for separate occupation including bathroom and sanitary conveniences provided for that occupation': Corporation of the City of Adelaide, *Lodging Houses*, By-Law no 9, 31 May 2011, cl 1.3; City of Burnside, *Lodging Houses By-Law 2014*, By-Law no 7, 1 September 2014, cl 3.6; City of Port Adelaide Enfield, *Lodging Houses*, By-Law no 6 of 2015, 14 July 2015, cl 6.6.

²⁴ Interestingly, the Burnside City Council imposes a very tight regulatory scheme for lodging houses, regulating everything from the level of natural lighting to the individual pieces of bedroom furniture: City of Burnside, *Lodging Houses By-Law 2014*, By-Law no 7, 1 September 2014, cl 5–13.

²⁵ *Development Act 1993* (SA) s 23 ('Development Act').

²⁶ Government of South Australia: Department of Planning, Transport and Infrastructure, *Guide: Development Plans and Development Plan Amendments* (October 2013) 5 [3.3].

²⁷ See *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400, 406 [27]: '[I]n planning law, use must be for a purpose ... The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued'.

backpackers' hostels.²⁸ Therefore, whether home-sharing is permitted under a Development Plan will depend on whether, by home-sharing, the host changes the use of their land to a 'non-complying' use.²⁹ The State Government clarified this issue in March 2016 by releasing an 'Advisory Notice' designed to assist with interpretation of the laws as they relate to home-sharing. The Notice states:³⁰

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 ... 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.³¹

This Notice confirmed that home-sharing does not constitute a change of land use unless physical alterations are made. However, at the time of writing, South Australian planning law is undergoing reform. The *Planning, Development and Infrastructure Act 2016* (SA) ('PDI Act') received royal assent in April 2016 but has only partially come into operation.³² Under the *PDI Act*, individual Development Plans for each council will eventually be abolished and replaced with a state-wide 'Planning and Design Code' ('the Code').³³ The Code will be developed by a newly formed committee in consultation with 'councils, industry and communities,'³⁴ and will divide the

²⁸ *Development Plan: Adelaide (City)*, above n 17, 149; Government of South Australia, *Development Plan: Port Adelaide Enfield Council*, 22 August 2017, 134–5.

²⁹ A change in use is recognised when a new use supersedes a previous use, when there is a commencement of new use after period of non-use, or when an additional use is commenced in addition to the existing one: *Development Act* s 6(1).

³⁰ Government of South Australia: Department of Planning Transport and Infrastructure, *Building: Application of the Change in Use Provisions — Dwelling Status*, Advisory Notice 4/16, March 2016.

³¹ Ibid. The notice also points out that what constitutes 'change of land use' under s 6 of the *Development Act* has no relation to the time a dwelling is or is not occupied, any short-term leasing, or any platforms or tools used to facilitate occupancy or rental: at 2. The Victorian Supreme Court came to a similar conclusion when confronted with a similar issue: see *Genco v Salter* [2013] VSCA 365 (12 December 2013).

³² *PDI Act* s 2. The *PDI Act* will eventually wholly repeal the *Development Act: Planning, Development and Infrastructure Act 2016* (SA) sch 2 pt 2. At the time of writing, a majority of the *PDI Act* remains inoperable, including all provisions relating to the Planning and Design Code: *Planning, Development and Infrastructure Act (Commencement) Proclamation 2017* (SA).

³³ *PDI Act* ss 65–8. The Code is intended to remove the burden of 'maintaining convoluted development plans' from local councils and instead to provide them with a simpler set of regional plans and a menu of zoning options: South Australia, *Parliamentary Debates*, House of Assembly, 28 October 2015, 6 (John Rau).

³⁴ Government of South Australia: Department of Planning, Transport and Infrastructure, *Planning and Design Code* (16 August 2017) SA Planning Portal

State into planning zones, sub-zones, and overlays, all of which have different planning rules.³⁵ At the time of writing, the Code is still in a ‘research’ phase and no timeline has been given for its implementation.³⁶

As the law currently stands, therefore, home-sharing is an entirely permitted land use, unless physical development is undertaken to turn it into something other than a dwelling. Given that the new Planning and Design Code is yet to be developed, it remains to be seen whether it will bring a change.

3 Should Home-Sharing Be Regulated?

From the perspective of the host and the guest, it is difficult to find any reasons why home-sharing should be an activity that requires a permit, or even why it should be regulated in any way. As long as the home-sharing operation does not take the form of a hotel (in which case, the people seeking accommodation expect a certain standard), home-sharing arrangements are private agreements and the parties should be free to decide the terms. The Airbnb model operates on this premise; hosts price their listings according to the standard of accommodation provided, and guests can inspect the listing and its reviews before entering the agreement.³⁷ Naturally, the neighbours of home-sharing owners have different concerns and their perspective is considered in Part IV.

This article does not consider the wider legal and political considerations beyond those of the host, guest, and neighbour.³⁸ Around the world, for various reasons, governments and councils have taken steps either to outlaw home-sharing,³⁹ or to embrace it.⁴⁰ Considering that so little regulatory action

<http://www.saplanningportal.sa.gov.au/our_new_system/planning_and_design_code>; See also *PDI Act* ss 6, 66.

³⁵ *PDI Act* s 66.

³⁶ Government of South Australia: Department of Planning, Transport and Infrastructure, above n 34.

³⁷ See Airbnb, above n 1.

³⁸ See Part II, Section A: The Home-Sharing Model.

³⁹ For example, short term leasing under 30 days is prohibited in New York (in buildings containing three or more units, unless the owner is present and there are only one or two guests) and in Berlin; see Joanna Walters, ‘Something in the Airbnb: Hosts Anxious as New York Begins Crackdown’, *The Guardian* (online), 13 February 2017 <<https://www.theguardian.com/technology/2017/feb/12/airbnb-hosts-new-york-fines-government-illegal>>; Matt Payton, ‘Berlin Stops Airbnb Renting Apartments to Tourists to Protect Affordable Housing’, *Independent* (online), 1 May 2016 <<http://www.independent.co.uk/news/world/europe/airbnb-rentals-berlin-germany-tourist-ban-fines-restricting-to-protect-affordable-housing-a7008891.html>>.

has been taken in South Australia to date, the ongoing planning law reform presents a good opportunity for councils to review their position on home-sharing.⁴¹ The development stage of the incoming Planning and Design Code should be used to consider the impact that home-sharing is having in each region and to ensure that the remaining 71 councils' inaction is not an oversight, but an informed decision.

III THE HOST AND THE GUEST

This Part considers the rights and obligations that a host and guest commit to once they enter into a home-sharing agreement. Section A asks whether the home-sharing relationship is a lease or a licence; and Section B considers whether the *Residential Tenancies Act 1995* (SA) applies to home-sharing.

A Lease or Licence?

Whether a home-sharing agreement constitutes a lease or a licence will have a significant effect on the parties' mutual rights and obligations. The differences stem from the nature of these relationships: a leasehold creates property rights, while a licence merely conveys a privilege.⁴² If a home-sharing agreement takes the form of a licence,⁴³ the rights and obligations of the parties will be limited to those mandated by the Airbnb contract and common law rules of contractual licences.⁴⁴ The guest is permitted to be on the land by mere invitation and can be evicted if the contract is breached.⁴⁵ However, more is required of both the host and the guest when their relationship is that of a landlord and tenant: covenants imposed by both common law and statute must be adhered to by the parties. Common law

⁴⁰ The NSW Parliament commissioned an inquiry in 2016 into the need for regulation of home sharing and presented findings very favourable to home-sharing: it was recommended that all forms of home-sharing be permitted under planning legislation: *NSW Legislative Assembly Committee on Short Term Holiday Letting*, above n 9, 2–4 [1.1]–[1.18].

⁴¹ A response from local councils should be preferred to a uniform state-wide approach. Home-sharing is an issue closely related to the character and needs of the locality, and local councils are in the best position to determine both. For example, rural councils may respond more favourably to home-sharing than metropolitan councils because many have a fluctuating (seasonal) population, making the building of hotels unsustainable.

⁴² See Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 9–10; *Thomas v Sorrell* (1673) 124 ER 1098.

⁴³ It will likely be seen as a 'contractual licence' because it originates in contract: see, eg, Edgeworth et al, above n 42, 9–10; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

⁴⁴ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 616–17.

⁴⁵ *Ibid* 630–1.

covenants (which are largely mirrored by the *Residential Tenancies Act 1995* (SA) where it applies) include: the tenant's right to quiet enjoyment of their land;⁴⁶ the tenant's obligation to use premises in a tenant-like manner;⁴⁷ the landlord's obligation to maintain fitness for purpose;⁴⁸ and the landlord's limited duty of care owed to the tenant.⁴⁹ Further covenants imposed by the *Real Property Act 1886* (SA) mandate that tenants must pay rent as agreed⁵⁰ and keep the premises in reasonably good repair.⁵¹

The law governing the distinction between lease and licence is settled. A lease is distinguished from a licence by the test of exclusive possession: if a tenant is intended to have possession of the premises to the exclusion of the landlord, the relationship will be seen as a lease.⁵² 'Exclusive possession' is evident when the tenant has 'unrestricted access to and use of' the premises.⁵³ This includes control over who is permitted on the premises,⁵⁴ when the premises will be locked,⁵⁵ or how the premises will generally be used.

The standard Airbnb terms, which apply to all hosts and guests, make it clear that Airbnb intends their home-sharing agreements to be licences.⁵⁶ The contract defines the phrases 'short term rental', 'home sharing', and 'booking' in the same way: 'a limited license to enter and use the

⁴⁶ See, eg, *Markham v Paget* [1908] 1 Ch 697; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199, 214; *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [35]–[41]; *Residential Tenancies Act 1995* (SA) ss 65, 72 ('RTA').

⁴⁷ See, eg, *Warren v Keen* [1954] 1 QB 15, 20; RTA ss 69–71.

⁴⁸ See, eg, *Cruse v Mount* [1933] Ch 278; *Hill v Harris* [1965] 2 QB 601, 614–15; cf *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, 155–6 [33]–[42]; RTA ss 66–8.

⁴⁹ See, eg, *Jones v Bartlett* (2000) 205 CLR 166; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; RTA s 68; Peter Butt, 'Landlord's Liability for Defective Premises' (2006) 80 *Australian Law Journal* 284, 284–5.

⁵⁰ *Real Property Act 1886* (SA) s 124(a).

⁵¹ Ibid s 124(b). The obligation to repair does not include complete renewal or reconstruction, and 'reasonable wear and tear' with regard to the condition of the property is excepted: see *Lurcott v Wakely* [1911] 1 KB 905; *Proudfoot v Hart* (1890) 25 QBD 42.

⁵² *Radaich v Smith* (1959) 101 CLR 209, 214 ('Radaich v Smith'); *Street v Mountford* [1985] AC 809 ('Street'), 826–7; Leases also require certainty of duration; however, this is rarely an issue in Airbnb agreements.

⁵³ *Street* [1985] AC 809, 818.

⁵⁴ *Radaich v Smith* (1959) 101 CLR 209, 225.

⁵⁵ Ibid 217.

⁵⁶ Airbnb, *Terms of Service* <<https://www.airbnb.com.au/terms>>.

accommodation'.⁵⁷ However, when interpreting the nature of the relationship, courts will look beyond the label, and determine whether exclusive possession existed by examining the entire arrangement.⁵⁸ In *Radaich v Smith*,⁵⁹ an agreement to occupy premises was phrased as an 'exclusive licence'.⁶⁰ The High Court decided that despite deliberate avoidance of the labels of 'lessee' and 'lessor', the relationship took the form of a lease. McTiernan J explained that the relationship between the parties 'is determined by the law and not the label they chose to put on it'.⁶¹ This reasoning, and particularly the judgment of Windeyer J, received unanimous support from the House of Lords some years later in *Street v Mountford*⁶² and is now widely accepted as the correct approach.⁶³

If the label given by Airbnb is not determinative, how does the law classify the three home-sharing scenarios identified in Part II above? The Victorian Supreme Court considered this issue in *Swan v Uecker*⁶⁴ ('Swan'). In that case, Ms Swan leased a St Kilda apartment to Ms Uecker, who in turn hosted the property on Airbnb. The issue was whether hosting the property on Airbnb (as a 'temporarily absent host') constituted subleasing.⁶⁵ The matter to be decided was whether the relationship between Ms Uecker and her guests was a lease or a licence. Croft J considered the relevant authorities and concluded that the relationship was a lease⁶⁶—Ms Uecker had been granted exclusive possession by way of her own lease, and had 'effectively and practically passed that occupation, with all its qualities,' to her Airbnb

⁵⁷ Ibid.

⁵⁸ *Radaich v Smith* (1959) 101 CLR 209, 214.

⁵⁹ (1959) 101 CLR 209.

⁶⁰ Ibid 214.

⁶¹ Ibid.

⁶² [1985] AC 809, 826–7.

⁶³ See also the comments of McHugh J in *Western Australia v Ward* (2002) 213 CLR 1, 222–3 [502] citing Griffith CJ in *Landale v Menzies* (1909) 9 CLR 89, 100–1: '[A] contract giving a person the legal right to exclusive possession of land or tenement for a determinate period, however short, is a lease'.

⁶⁴ (2016) 50 VR 74.

⁶⁵ The listing provided that the entire apartment would be available and noted that Ms Uecker would be 'leaving to allow [the guest] to have it all to yourself': *Swan v Uecker* (2016) 50 VR 74, 96 [53] ('Swan'); Ms Uecker also advertised the property in a 'present host' scenario, but Croft J did not consider this relevant to the issue at hand: *Swan*, 82 [19].

⁶⁶ His Honour also acknowledged the label of 'licence' given by the Airbnb contract and dismissed it as irrelevant to the distinction between lease and licence with reference to *Street*: *Swan* (2016) 50 VR 74, 96 [53], 100 [66].

guests.⁶⁷ After coming to this decision, Croft J qualified its application to future cases:

[This] is a case, on appeal, which raises for determination—directly or indirectly—the legal character of *this particular Airbnb arrangement* and any consequences this characterisation may have in the context of the terms of the lease of *the apartment concerned*.⁶⁸

This decision is certainly a good indicator of how a ‘temporarily absent host’ scenario (and perhaps also a ‘permanently absent host’ scenario) will be treated, but each case will still need to be considered individually.

The *Swan* decision therefore gives us a good indication of how Australian law will treat each of the home-sharing scenarios identified in Part II. First, the ‘temporarily absent host’ scenario, such as the one created by Ms Uecker, will almost certainly be seen as a lease. Secondly, the ‘permanently absent host’ scenario will likely be treated in the same way: although not expressly considered by Croft J, the ‘permanently absent host’ scenario is like the *Swan* scenario in that the guests in both scenarios are left alone with exclusive control of the property. Thirdly, the ‘present host’ scenario will likely be considered a licence. This scenario was not discussed in *Swan*, but given his Honour’s reliance on the traditional distinction between lease and licence, it is likely that Croft J would have considered it a licence due to the lack of conveyance of exclusive possession.⁶⁹

This stance appears to be similar to the approach taken in other common law jurisdictions. In the UK, it was recently decided that by hosting on Airbnb, a host breached a lease covenant to ‘not use the demised premises … for any purpose whatsoever other than as a private residence’.⁷⁰ Interestingly, the judge took for granted that ‘temporarily absent host’ Airbnb agreements are in fact ‘very short-term lettings’, and did not discuss the issue further.⁷¹

⁶⁷ Ibid, 93 [46].

⁶⁸ Ibid, 104 [80] (emphasis added).

⁶⁹ Writing extra-judicially, Croft J clarified his view that the scenario he considered in *Swan* is unlike that of a lodger or hotel guest. Lodgers and hotel guests can be likened to guests in a ‘present host’ scenario, in that they are not granted exclusive possession. This suggests that Croft J would have treated a ‘present host’ scenario as a licence: Justice Clyde Croft, ‘Short-Stay Accommodation Arrangements in Victoria: Implications for Owners Corporations, Landlords and Tenants’ (2016) 90 *Australian Law Journal* 866, 867. See also Peter Butt, ‘Does an Airbnb Arrangement Create a Lease?’ (2017) 91 *Australian Law Journal* 84, 84; Bill Swannie, ‘Trouble in Paradise: Are Home Sharing Arrangements “Subletting” under Residential Tenancies Legislation?’ (2016) 25 *Australian Property Law Journal* 183, 189.

⁷⁰ *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC), [6].

⁷¹ Ibid [56].

Meanwhile, commentators in the United States predict a similar outcome — that courts will continue to revisit each factual situation ‘on a case by case basis’.⁷²

B *Home-Sharing and the Residential Tenancies Act*

Residential leases in South Australia are governed by the *Residential Tenancies Act 1995* (SA) (‘RTA’), which imposes rules largely similar to the covenants imposed by the common law.⁷³ Having established that the two ‘absent host’ scenarios likely constitute leases, this section analyses the way they interact with the *RTA*, if at all.

Whether the *RTA* applies to a tenancy depends on whether it is an agreement under which ‘a person grants another person, for valuable consideration, a right (which may, but need not be, an exclusive right) to occupy premises for the purpose of residence’.⁷⁴ At face value, this definition encompasses both of the ‘absent host’ scenarios. The ‘present host’ scenario is a little more contentious because exclusive possession is not conveyed; however, the *RTA* makes it clear that even if an agreement does not confer ‘exclusive right to occupation’ by its terms, the *RTA* will ‘assimilate the right of occupation to the exclusive right conferred by a lease’.⁷⁵ On ordinary interpretation, this means that the ‘present host’ is included, and that the *RTA* will apply to all three home-sharing scenarios.

⁷² See Marzen, Prum and Aalberts, above n 8, 303.

⁷³ See Part III, Section A: Lease or Licence?; The *RTA* also imposes various additional regulations. For example, it requires that notice be given before a relationship can be terminated: *RTA* pt 5.

⁷⁴ *RTA* s 3 (definition of ‘Residential Tenancy Agreement’).

⁷⁵ *Ibid* s 3 Note 1.

Section 5(1) makes exceptions, stating that the *RTA* will not apply to:

- (b) an agreement (other than a rooming house agreement) under which a person boards or lodges with another; or
- (c) an agreement genuinely entered into for the purpose of conferring on a person a right to occupy premises for a holiday.

Both of these exceptions limit the *RTA*'s application to the home-sharing scenarios. First, is a guest in the 'present host' scenario considered a 'lodger' for the purposes of s 5(1)(b)?⁷⁶ A 'lodger' is not defined in the *RTA*, but has been defined in South Australia as 'a person who resides with another who retains control of the premises as a whole'.⁷⁷ This definition corresponds with the 'present host' scenario: the host remains in control of the premises while the guest resides with them. However, the *RTA* explicitly states that 'rooming house agreements' (which the 'present host' scenario also resembles) are not excluded from its operation. 'Rooming houses' are defined in the *RTA* as residential premises with rooms available for occupation on a commercial basis for at least 3 residents.⁷⁸ Therefore, it appears the 'present host' scenario would not be governed by the *RTA* when there are one or two guests, but would still come under its operation if three or more guests are accommodated in exchange for 'charge which is more than a token'.⁷⁹ Secondly, s 5(1)(c) excludes holiday-house rentals shorter than sixty days.⁸⁰ This section may exclude each of the three home-sharing scenarios from the operation of the *RTA*, depending on the purpose of the guest's entry into the particular agreement.

The exceptions give no blanket rule; whether the *RTA* applies to home-sharing will depend on the individual agreement. It can be said that the 'present host' scenario is not covered by the *RTA* (unless more than three guests are accommodated at a time in exchange for payment), while the two

⁷⁶ A 'boarder' has been defined as 'a person who is provided with some service, normally meals, in conjunction with the accommodation': *Wilkes v Goodwin* [1923] 2 KB 86, 110–1. This definition would not likely apply to home-sharing scenarios, as there is usually no requirement to provide any service beyond the provision of accommodation.

⁷⁷ *Noblett v Manley* [1952] SASR 155 cited in *Sutherland v Irving* [2002] SARTT 9 (5 June 2002); see also *Street* [1985] AC 809, 818.

⁷⁸ *RTA* s 3 (definition of 'Rooming House').

⁷⁹ *Buckle v Carrington Cottages Management Inc* [2002] SARTT 11 (23 January 2002); *Hu v Sun* [2009] SARTT 19 (30 December 2009). However, 'rooming houses' are governed separately from ordinary residential tenancies, by a separate section of the Act: *RTA* pt 7. For what these provisions entail, see Part III, Section C: The Rights and Obligations of the Host and the Guest.

⁸⁰ *RTA* s 5(1b).

‘absent host’ scenarios are not covered by the *RTA* if the agreement is made for the purpose of a holiday.

C *The Rights and Obligations of the Host and the Guest*

Airbnb intends its agreements to operate in a regulation-free zone for the host and the guest, where Airbnb policies govern all things from the termination of agreement to the payment of ‘rent’.⁸¹ However, even though the Airbnb model connects its users in a unique way, the relationships that the parties create are not significantly different from those created by traditional methods, and they can be precisely stated.

The ‘present host’ scenario will likely be seen as a licence at common law and will not be subject to the *RTA* unless three or more guests are accommodated at a time. If there are fewer than three guests, therefore, the host maintains exclusive possession of the premises, and the guests hold a contractual licence, the terms of which are agreed through the Airbnb contract and listing. If more than three guests are accommodated, the *RTA* ‘rooming house’ provisions become applicable. These include provisions about rent, bonds, ‘house rules’, termination and general rights and obligations of the landlord and tenant;⁸² none of which are inconsistent with the obligations that a host or guest would otherwise have under an Airbnb contract.⁸³

The two ‘absent host’ scenarios likely create a landlord-tenant relationship at common law; however, the *RTA* will not apply unless the purpose of the occupation is something other than a ‘holiday’,⁸⁴ or the occupation exceeds 60 days. The covenants imposed by the common law and *Real Property Act*⁸⁵ are not unreasonable — they protect the rights that any host or guest would expect to be protected, whether their relationship is created through Airbnb or not.

It is difficult to conclude that these laws need overhauling to accommodate home-sharing, or even that any exceptions need to be made. This issue can be

⁸¹ See Airbnb, *Terms & Policies* <<https://www.airbnb.com.au/help/topic/250/terms---policies>>.

⁸² *RTA* pt 7.

⁸³ The terms of the Airbnb property listing could even form ‘House Rules’: *RTA* pt 7 div 3.

⁸⁴ In this context, when a trip is for multiple purposes, the occupation will likely not be considered as ‘for the purpose of a holiday’ and the *RTA* will apply: *Quinlan v Nottingham* [2000] SARTT 7 (1 March 2000).

⁸⁵ See Part III, Section A: Lease or Licence?; See also Edgeworth et al, above n 42, 725–49.

likened to the ‘substance over form’ principle from *Radaich v Smith*: why should home-sharing hosts and guests be exempt from the consequences of legal relationships that they create, simply because they did so with the help of a website? Like any landlord and tenant, the host and guest should be aware of local laws which govern the relationship they create. The laws which apply to all three home-sharing scenarios are not unreasonable. Ultimately, those who use home-sharing services like Airbnb must conform to the established domestic law, not the other way around.

IV THE NEIGHBOUR

From finding their hallways blood-smeared,⁸⁶ to having party-goers fall onto their balconies,⁸⁷ neighbours to home-sharing properties are often adversely affected by guests.⁸⁸ This Part considers, first, whether strata title legislation needs updating to protect neighbours from potential nuisances caused by the Airbnb home-sharing model; and secondly, whether the tort of private nuisance can adequately protect neighbours’ enjoyment of their land from disruptive home-sharing guests.

A Home-Sharing and Strata Title

The potential for guests to cause a nuisance to neighbours is highest in close-quarters living where transient guests continually share walls with permanent residents.⁸⁹ Strata corporations are corporate bodies set up to govern such

⁸⁶ Lara Williams, ‘When Airbnb Rentals Turn into Nuisance Neighbours’, *The Guardian* (online), 18 September 2016 <<https://www.theguardian.com/technology/2016/sep/17/airbnb-nuisance-neighbours-tribunal-ruling>>.

⁸⁷ Jessica Ware, ‘Airbnb Host Taken to Court by Neighbours after Riot Police Were Called to Their South London Penthouse Rented out through the Site when 150 Uninvited Guests Arrived for a Party Which Turned into “Chaos”’, *Daily Mail* (online), 14 May 2016 <<http://www.dailymail.co.uk/news/article-3590222/AirBnB-host-taken-court-neighbours-riot-police-Brixton-flat.html>>.

⁸⁸ In fact, an entire website has been dedicated to Airbnb horror stories: AirbnbHell, *AirbnbHELL – Uncensored Airbnb Stories from Hosts & Guests* <<http://www.airbnbhell.com/>>.

⁸⁹ See, eg, Tristan P Espinosa, ‘The Cost of Sharing and the Common Law: How to Address the Negative Externalities of Home-Sharing’ (2016) 19(2) *Chapman Law Review* 597, 601–3.

close-quarters housing communities: apartment blocks, townhouses, or units.⁹⁰

The powers of strata corporations are governed by the *Community Titles Act 1996* (SA) ('CTA').⁹¹ Under the CTA, strata corporations have a limited power to create and enforce by-laws against owners and occupiers of lots.⁹² The issue for home-sharing neighbours, namely whether the by-law making power extends to regulating residents' ability to home-share on Airbnb, is resolved by the CTA. Section 34 states that by-laws cannot completely prohibit owners from leasing their property (or granting a right to occupation),⁹³ but by-laws can prohibit leases shorter than two months.⁹⁴ Therefore, in South Australia, a strata corporation can effectively prohibit short-term letting by enacting by-laws to that effect.⁹⁵

Victorian strata legislation does not give the same defined power, and this issue recently came before their Supreme Court. In *Owners Corporation PS 501391P v Balcombe*,⁹⁶ Riordan J held that prohibiting leases of less than 30 days was an impermissible use of the broad and undefined by-law making power⁹⁷ given to strata corporations at that time.⁹⁸ In doing so, Riordan J presented a compelling argument: he reasoned that the parliament could not have intended to allow for a curtailment of the freehold property owners' right to lease their land because this would limit the fundamental property

⁹⁰ Land Services Group, 'Strata & Community Titles' (Fact Sheet No 4, Government of South Australia, 2011); see also K Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13 *Australian Property Law Journal* 1, 2.

⁹¹ The *Strata Titles Act 1988* (SA) is still in existence; however, strata corporations may choose which Act they wish to be governed by, and no applications have been accepted under the *Strata Titles Act 1988* (SA) since 2002: Everton-Moore et al, above n 90, 17.

⁹² *Community Titles Act 1996* (SA) s 12, pt 5 ('CTA').

⁹³ *Ibid* s 37(1)(a).

⁹⁴ *Ibid* s 37(2)(a).

⁹⁵ Of course, by-laws may be enacted or amended only by a special resolution in accordance with proper procedure: CTA ss 12(2), 3.

⁹⁶ [2016] VSC 384 (22 July 2016).

⁹⁷ The applicable regulation stated: 'By special resolution, the body corporate may make rules in addition to the [standard] rules...': *Subdivision (Body Corporate) Regulations 2001* (Vic) reg 220(1); see also Cathy Sherry, 'Recent Developments in Strata Law: By-Law Making Power and Short-Term Letting' (2016) 90 *Australian Law Journal* 853, 853.

⁹⁸ *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 (22 July 2016), [110], [112]; The *Owners Corporations Act 2006* (Vic) is now the Act which governs strata title; however, the previous legislative scheme was applied to this case because it was in force at the time the owners' corporation enacted its by-laws.

right of alienability.⁹⁹ Although this view has been praised by lawyers as a ‘step forward in Australian strata law’,¹⁰⁰ the South Australian Parliament has already expressly done just the opposite and both New South Wales and Victoria appear to be moving in the same direction. In Victoria, the Owners Corporations Amendment (Short-Stay Accommodation) Bill 2016 (Vic) proposes to introduce an avenue for strata property corporations to prohibit short-term letting. The new system will allow strata occupiers to complain to their corporation about disturbances caused by home-sharing.¹⁰¹ The corporation can then apply to the Victorian Civil & Administrative Tribunal (‘VCAT’) for the offending owner to be banned from home-sharing, or even ordered to compensate complainants and pay civil penalties.¹⁰² In New South Wales, the recent parliamentary inquiry into the ‘adequacy of the regulation of short-term holiday letting’¹⁰³ recommended that the government should consider changing strata laws to give owners’ corporations more power in controlling short-term home-sharing.¹⁰⁴

B Is Private Nuisance a Solution?

If disgruntled neighbours who are not covered by strata housing become aware that they live near a home-sharing property, their options are limited. Their first point of call is Airbnb’s newly introduced ‘issue’ reporting system

⁹⁹ *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 (22 July 2016), [84]–[88], [119]–[124]; The right to alienability is said to be part of the ‘bundle of rights’ which attaches to a freehold estate: see, eg, Christina Sandefur, ‘Life, Liberty, and the Pursuit of Home Sharing’ (2016) (Fall) *Regulation* 12.

¹⁰⁰ Sherry, above n 97, 858.

¹⁰¹ Complaints can be made about noise, unruly behaviour, creation of dangerous hazards, or obstructing or damaging common property: Owners Corporations Amendment (Short-Stay Accommodation) Bill 2016 (Vic) cl 5.

¹⁰² Ibid; See also Croft, above n 69, 869. However, the Bill’s progress has been impeded by a recent Parliamentary inquiry: Environment and Planning Committee, Parliament of Victoria, *Inquiry into the Owners Corporations Amendment (Short-stay Accommodation) Bill 2016* (2017).

¹⁰³ NSW Legislative Assembly Committee on Short Term Holiday Letting, above n 9.

¹⁰⁴ Ibid 10–11 [1.51]–[1.62]. The Privy Council recently interpreted a Caribbean strata law which was copied verbatim from NSW’s strata laws, and decided that corporations can enforce by-laws banning short-term letting: *O’Connor v Proprietors, Strata Plan No 51* [2017] UKPC 45. However, it appears that the NSW Government has refrained from expressly acting on the Parliamentary recommendations: Jimmy Thomson, ‘NSW Government Steps back from Parliamentary Report into Airbnb-Type Rentals’, *Domain* (online), 19 April 2017 <<https://www.domain.com.au/news/nsw-government-backs-away-from-making-hurried-decision-on-airbnby-type-rentals-20170419-gvo1ag/>>; Jimmy Thomson and Sue Williams, ‘Why a Court Ruling on Airbnb in the Caribbean Could Affect Australian Bylaws’, *Domain* (online), 23 December 2017 <<https://www.domain.com.au/news/why-a-court-ruling-on-airbnb-in-the-caribbean-could-affect-australian-bylaws-20171223-h090y5/>>.

for neighbours.¹⁰⁵ However, if this ‘in house’ system does not provide a solution,¹⁰⁶ the neighbour must turn to domestic law. Given that current local council or planning laws do not effectively address home-sharing,¹⁰⁷ an action in private nuisance may be the only legal recourse.

The first hurdle for neighbours wishing to bring an action in private nuisance to stop disruptive home-sharing is determining whom to sue. In traditional private nuisance actions, the suit is brought against the person who created the interference, almost always the occupier of the land. When guests are licensees (‘present host’), it is probable that the hosts, as present occupiers, can be sued for their guests’ conduct.¹⁰⁸ However, these arrangements are not so much of a problem; guests are far more likely to behave when under the watchful eye of the person who actually lives at the property. The home-sharing nuisance problem arises when the guests are left alone because they are transients with no need or desire to maintain long-term relationships with neighbours.¹⁰⁹ In these ‘absent host’ scenarios, identifying the defendant may be more difficult.

1 Action against the Guest

As the creator of the interference and temporary occupier of the land, an individual guest can certainly be sued in nuisance. If the nuisance caused by the guest is one which causes material physical damage to the neighbour’s land, there should not be much trouble in suing them directly.¹¹⁰ However, the nuisance will more likely be one that interferes with the neighbour’s

¹⁰⁵ Airbnb, *Airbnb and Your Neighbourhood* <<https://www.airbnb.com.au/neighbours>>; The system has recently received positive feedback: see Helen Merkell, ‘Airbnb Gives Neighbours Avenue to Make Complaints against “Party Houses”’, *ABC News* (online), 6 March 2017 <<http://www.abc.net.au/news/2017-03-06/airbnb-gives-neighbours-avenue-to-complain/8328238>>.

¹⁰⁶ Airbnb’s response to such complaints has been criticised in the past: Tom Snowdon, ‘Rogue Airbnb Operators Allow Party Houses to Disrupt Neighbourhoods’, *The Courier Mail* (online), 12 February 2017 <<http://www.couriermail.com.au/news/queensland/rogue-airbnb-operators-allow-party-houses-to-disrupt-neighbourhoods/news-story/7979374f0ed8dc27f7c1559213958283>>.

¹⁰⁷ Note, however, that if the Planning and Design Code introduces home-sharing prohibitions in some regions, a neighbour may bring civil proceedings to enforce the prohibition: See, eg, *Dobrohotoff v Bennic* (2013) 194 LGERA 17.

¹⁰⁸ See, eg, *Laugher v Pointer* (1826) 108 ER 204; *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 897; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478. This is especially so when the relationship comes under the *RTA*; that Act provides that tenants are vicariously liable for the actions of their licensees: *RTA* s 75.

¹⁰⁹ See Espinosa, above n 89, 601–3.

¹¹⁰ See, eg, *Lester-Travers v City of Frankston* [1970] VR 2.

enjoyment of land through noise. The problem with suing the guest is that often, it is the continuing flow of guests collectively, which causes a noise nuisance to the neighbour; any short-term nuisance caused by an individual guest may not in itself be significant enough to be actionable. Australian law makes it clear that not every interference with enjoyment of land will be actionable; the interference must be both substantial and unreasonable.¹¹¹

First, therefore, it must be considered whether a short-term noise interference can be considered ‘substantial’. In *Walter v Selfe*,¹¹² it was decided that a ‘material interference with the physical comfort of human existence’ in line with ‘plain and sober and simple notions’ of ordinary residents will be enough. In *Munro v Southern Dairies Ltd*,¹¹³ Scholl J interpreted this to mean that ‘the loss of even one night’s sleep’ may be substantial enough to constitute a nuisance.¹¹⁴ In the South Australian case of *McKenzie v Powley*, it was noted that ‘there is no better test of nuisance by noise than the fact that the noise interferes with conversation’.¹¹⁵ It seems likely, therefore, that proving a short-term guest’s nuisance to be substantial is possible. It can be proven if it is shown that the noise interferes with sleep or ordinary conversation.

Secondly, to determine whether the interference is unreasonable, courts will consider the time of day,¹¹⁶ duration, frequency,¹¹⁷ and locality¹¹⁸ of the interference. So, the later at night that the interference occurs, the longer it lasts, the more frequent it is, and the more out of character with the area that it is, will determine how likely it is that the interference will be found to be unreasonable. If the interference is trivial enough to be considered a part of everyday life under the principle of ‘give and take’, it will be excused.¹¹⁹ Whether unreasonableness can be proven against an individual guest will therefore depend on all of the circumstances. Perhaps an interference on a

¹¹¹ *McKenzie v Powley* [1916] SALR 1, 15; *Walter v Selfe* (1851) 64 ER 849, 852.

¹¹² (1851) 64 ER 849, 852.

¹¹³ [1955] VLR 332.

¹¹⁴ *Ibid* 335.

¹¹⁵ *McKenzie v Powley* [1916] SALR 1, 31.

¹¹⁶ *Halsey v Esso Petroleum* [1961] 1 WLR 683, 696–7; *Wherry v KB Hutcherson Pty Ltd* [1987] Aust Torts Reports 80–107.

¹¹⁷ *Sedleigh-Denfield v O’Callaghan* [1940] AC 880; *Gartner v Kidman* (1962) 108 CLR 12.

¹¹⁸ *St Helen’s Smelting Co v Tipping* [1865] 11 ER 1483, 1486; *Halsey v Esso Petroleum* [1961] 1 WLR 683, 691–2.

¹¹⁹ *Bamford v Turnley* (1862) 122 ER 27, 33; *Southwark London Borough Council v Tanner* [2001] 1 AC 1, 20; *Stormer v Ingram* (1978) 21 SASR 93.

Saturday night during the guest's two-night stay would not be unreasonable,¹²⁰ but a continuing two-week noise disturbance would be enough to break the threshold. However, even if suing a series of individual guests has a chance of success, it may not be the neighbour's most feasible option. Going after transient guests has practical drawbacks: the guests may be difficult to identify and locate, especially if they are tourists visiting from interstate or overseas. When the property is continually used for home-sharing and the individual guest's actions are a small part of a continuing problem, the neighbour's best option may be suing the host.

2 Action against the Host

If the combined activities of several short-term guests are amounting to an actionable nuisance, the neighbour could consider suing the landlord, the 'absent' host. Under Australian law, a landlord is not responsible for a nuisance created by their tenant unless they expressly authorise the nuisance or let the property for purposes that are certain to result in a nuisance being caused.¹²¹ This is illustrated by the South Australian case of *De Jager v Payneham and Magill Lodges Hall Incorporated*.¹²² In that case, the owner of a function hall was held responsible for noise nuisance caused by many occupiers, because it rented the hall out for the purpose of hosting weddings and parties — 'a particular purpose which involves a special danger of nuisance'.¹²³ A recent persuasive authority from the UK Supreme Court, however, set a somewhat higher threshold for when the landlord will be liable. In *Lawrence v Fen Tigers (No 2)*,¹²⁴ a majority of the Court found that a landlord had not authorised a noise nuisance caused by his tenants, even though he rented the property for the purpose of car and motorbike racing.¹²⁵ The tenant was liable because it was found that the racing could have been conducted without causing a nuisance.¹²⁶

¹²⁰ See *Halsey v Esso Petroleum* [1961] 1 WLR 683, where Veale J completely disregarded complaints of noise caused by installations, because 'although no doubt they are annoying to local residents, such noise is of a temporary character': at 691–2.

¹²¹ See, eg, *Peden Pty Ltd v Bortolazzo* [2006] 2 Qd R 574, [29]–[30]; *Smith v Scott* [1973] Ch 314, 32; Allan Beever, *The Law of Private Nuisance* (Hart Publishing, 2013) 128.

¹²² (1984) 36 SASR 498.

¹²³ *Ibid* 502.

¹²⁴ [2014] AC 822.

¹²⁵ *Ibid* [30].

¹²⁶ *Ibid* [15].

The host's liability, therefore, will depend on the individual circumstances of the home-sharing arrangement. If they expressly authorise or lease the property to be used for the nuisance-causing activity, they will be liable. Generally speaking, however, hosts let their property solely for the purpose of accommodation. Rarely do hosts knowingly agree for their property to be used for a wild party or other nuisance-causing activity. This is shown by numerous 'Airbnb horror stories': the host is usually stunned by the behaviour of their seemingly timid guest.¹²⁷ In an ordinary home-sharing agreement, it seems that the neighbour will have difficulty proving that the 'absent' host was liable for their guest's nuisance.

3 Is Private Nuisance a Realistic Solution?

In theory, an action in private nuisance against a home-sharing guest or host can be successful in certain circumstances. The guest could successfully be sued if their interference is substantial and unreasonable enough to be considered actionable, and the host can be sued if they are seen to have expressly authorised the nuisance or have let the property for purposes that are certain to result in a nuisance being caused. However, in practice, an action in private nuisance is not a convenient solution. Litigation is expensive, time consuming, and beyond the means of most ordinary people.¹²⁸ While success is not guaranteed, litigation costs certainly are. Although private nuisance could have some success in protecting the neighbour's rights, a more convenient system is needed.

C Is the Neighbour Adequately Protected?

Does current South Australian law adequately protect home-sharing neighbours? Two comments can be made. First, the CTA already protects neighbours in strata corporations by permitting by-laws that limit lease length. Although this system is seen by some (probably quite rightly) as an infringement on property rights,¹²⁹ it is nevertheless a practical and elegant solution to the problem. The system is balanced; it does not prohibit short-term leasing outright, but gives strata corporations the ability to prohibit it if necessary.

¹²⁷ Julie Bort, 'Photos: An Airbnb Guest Held a Huge Party in This New York Penthouse and Trashed It', *Business Insider* (online), 19 March 2014 <<https://www.businessinsider.com.au/how-an-airbnb-guest-trashed-a-penthouse-2014-3#this-is-a-photo-of-how-bassinis-new-york-penthouse-usually-looks-1>>.

¹²⁸ See generally Community Law Australia, 'Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System' (Report, Community Law Australia, July 2012).

¹²⁹ *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384; Sherry, above n 97, 858.

Secondly, the law of private nuisance does not provide a complete solution for neighbours who are not covered by strata legislation. Drawn out private nuisance litigation is not a viable avenue for most ordinary property owners who seek a quick and inexpensive resolution. Although Airbnb has now introduced an internal avenue of recourse for neighbours, domestic law cannot rely on this third party response and must present a dependable solution. This solution could be created as part of the new South Australian planning laws and the incoming Planning and Design Code. A system in the mould of the one proposed by the Victorian Owners Corporations Amendment (Short-Stay Accommodation) Bill should be adapted for all regions that choose to accept home-sharing, the Code should create a complaints system that allows neighbours to report any nuisance caused by short-term letting. The system could automatically grant all residents a permit to participate in home-sharing, but provide that if a host receives a specified amount of substantiated complaints, their permit would be revoked or suspended. This would allow for responsible letting, but also provide a simple resolution when neighbours are substantially disturbed.

V CONCLUSION

The new way of sharing accommodation pioneered by services like Airbnb has challenged the flexibility of existing laws governing property and accommodation in South Australia. However, this article has argued that South Australian law does not need widespread reform to effectively protect the rights of the host, guest, and neighbour to home-sharing agreements. It has argued that each of the three home-sharing scenarios can be classified as either a lease or a licence between the host and the guest, and that the parties should become aware of their rights and obligations under common law and statute before entering into an agreement. Neighbours to strata home-sharing properties are protected by current law, but the law of private nuisance is not an effective solution for other residents and so the new Planning and Design Code should introduce a system which gives local councils the power to grant and revoke hosting permits.

This article has shown that South Australia's current laws governing residential tenancies, strata, and property are still largely capable of protecting the rights of people using modern methods of sharing accommodation. However, technology moves a lot faster than the law. It cannot be doubted, and perhaps can even be anticipated, that eventually the home-sharing model may evolve further and be the catalyst for specific and targeted reform.