**The Search for a Long-term Solution to Short-term Rentals:**

**the Rise of Airbnb and the Sharing Economy**

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**The relatively recent phenomenon of short-term letting of residential properties has gifted home owners a potential goldmine, while providing regulators and planning authorities with a series of headaches. Debate has been amplified by the popularity of Airbnb and like services, which facilitate the sharing of residential accommodation, enabling visitors to rent all forms of residential properties across the globe*.* As this paper will address, attempts have been made in both Australia and abroad to legislate upon the matter, with the NSW Government currently undertaking its own Parliamentary Inquiry on how to best manage the issue. Short-term letting has raised a number of questions for both courts and planning authorities as to how the practice fits within existing land use definitions and development approval rules. As this paper will examine, it also raises a number of issues for third parties in the context of civil liability, as well as for landlord’s whose properties are rented without their approval. After considering the measures presently employed in other jurisdictions, this paper will advocate an approach which this author views as striking a balance between embracing the sharing economy, while also protecting the interests of relevant stakeholders.**

The so-called “sharing economy” presents a number of interesting dilemmas for regulators and lawyers alike. The introduction of services such as Airbnb and Uber has altered the landscape in the accommodation and transportation fields respectively, drawing the ire of established competitors while exciting consumers. Yet, while these services have rapidly expanded, the law is yet to catch up. This delay in the passing of a legal framework, particularly with respect to Airbnb, has created a regulatory blackhole, with users and planning authorities alike unclear of their legality. This question is not *if* regulation is required, but rather *which* form of regulation should be introduced to govern the short-term rental market. As short-term renting expands across the globe, a number of international, as well as local, jurisdictions have initiated measures to regulate the issue, ranging from laissez-faire responses to more stringent schemes.

This paper will begin by examining how jurisdictions in both Australia and abroad have defined short-term accommodation, and the flexibility of any development approval requirements in place. This paper will then turn to examine additional issues raised by short-term letting, particularly the need for planning councils and neighbouring property owners to be able to obtain redress in cases of damage to property or amenity. This paper will also look to other areas of law impacted upon by short-term rental agreements, such as tortious liability for injury and the rights of tenants under the various Residential Tenancy laws throughout Australia. Finally, this paper will conclude by examining the most appropriate means available to manage the issue, and whether any existing legal principles may exist that can be drawn upon by courts in the absence of an express legislative framework.

**I Short-term Letting and the Sharing Economy**

In a time where just about anything can be acquired with the mere tap of a finger, it is not surprising to see a shift occurring in the manner by which people consume goods and services. This altered commercial landscape has ushered in a new model of trade referred to interchangeably as the ‘sharing economy’, the ‘collaborative economy’ or the ‘peer-to-peer economy’.[[2]](#footnote-2) This model has been described as applying to any marketplace which brings together distributed networks of individuals to share or exchange otherwise underutilised assets; encompassing all manner of goods or services shared or exchanged for monetary or nonmonetary benefit.[[3]](#footnote-3) Along with the rise of Uber in the transport industry, the sharing economy has also expanded into the rental market, enabling home owners or renters to offer homes or spare rooms for a short period of time through services such as Airbnb and Stayz. According to a report from Deloitte Access Economics, commissioned by the NSW State Government, the sharing economy in NSW was worth around $504 million in 2015, with more than 50% of consumers using a digitally enabled shared product or service including accommodation, transport, education, employment and finance.[[4]](#footnote-4)At face value, the notion of an otherwise empty property being offered for use during a period of absence by the owner or tenant would seem a smart and cost-effective use of resources. However, issues can (and do) arise when short-term letting becomes the norm, turning residential properties into commercial enterprises or permanent tourist accommodation in violation of planning laws. Short-term letting can also cause problems for the owners of rental properties, when their tenants rent out rooms or entire apartments without their knowledge or approval.

Yet, far from a passing fad, it would appear the sharing economy and short-term rentals by extension are here to stay. News outlets such as the *Australian Financial Review* have noted the soaring popularity of the service, with over 40,000 listings on Airbnb in Australia in May 2015 - a 100% increase over the previous 12-month period.[[5]](#footnote-5) Given the rapid rise in popularity of these companies, some Australian States legislatures are yet to provide an answer on how best to regulate the issue. At present, there is a complex and confusing web of planning laws across NSW, with each Council given the ability to amend its own Local Environmental Plan. In response to the need for a unified approach to the issue, the NSW Government launched its own “Inquiry into the Adequacy of the Regulation of short-term holiday letting in NSW”.[[6]](#footnote-6) The Terms of Reference for the Inquiry are focused upon the current situation in NSW compared to other jurisdictions, the economic impact of the practice and its effects upon the market. The Inquiry is also concerned with the regulatory issues posed by short-term rentals, particularly with respect to land use planning, neighbourhood amenity, licensing and taxation.[[7]](#footnote-7) As the final report of the Inquiry is still in the drafting stages, it remains to be seen which regulatory approach is ultimately favoured by the NSW Government. As this paper will now turn to examine, there are numerous issues raised by short-term rentals that must be taken into consideration before any effective regulation can be passed.

**II The Regulatory Issues of Short-Term Letting**

The next portion of this paper will consider some of the primary problems raised by short-term rentals that must be taken into consideration by regulatory bodies. In particular, this paper will consider the question of whether planning instruments require a new definition to accommodate ‘short-term rentals’, and, in turn, whether such practices should be considered to amount to a change in a property’s use that would require the approval of a planning authority. In addition, it will be questioned whether measures need to be imposed to protect against unwanted damage to property or the amenity of neighbourhoods where short-term renting is occurring, and whether the users of sharing platforms such as Airbnb are adequately protected from liability for such actions. Finally, this paper will examine the need to protect the interests of landlords whose properties are sublet without their knowledge, and what steps could be taken to prohibit or manage unauthorized subletting.

**A *A New category for ‘Short-term accommodation’?***

At present a number of Australian jurisdictions are without an apt category of use to appropriately classify short-term rentals. This has proven problematic for both residents and courts, who must attempt either to fit short-term letting into ill-fitting existing categories of use, or to instead treat the practice as being automatically precluded.

**1 *No right fit***

One of the most problematic elements of the present regulatory system is the lack of an express definition for short-term rental arrangements. The NSW Land and Environment Court was confronted with this issue in determining whether or not a home rented out as a holiday home fell within the definition of a ‘dwelling’ or was a different type of use requiring development approval. In Dobrohotoff v Bennic,*[[8]](#footnote-8)* a home owner in Terrigal raised a complaint in relation to disturbances caused as a result of their neighbouring property being rented out for short-term periods. The property had been rented out on a number of occasions and used for parties and other events. The home owners argued that the use of the land as a short-term rental meant that it was not being used for its primary permitted purpose, namely, as a dwelling. The relevant Gosford Planning Scheme Ordinance classified the property as being in a 2(a) Residential Zone permitting it to be used as a ‘residential dwelling’, however the Ordinance made no reference to ‘holiday letting’ or ‘short-term accommodation’ as permissible land uses in the zone.[[9]](#footnote-9) The landlord who had purchased the home as an investment property and rented it out contended that his actions were perfectly lawful, as the classification of the property as a ‘dwelling house’ carried no requirement that the property be inhabited by any particular set of individuals.

Her Honour Justice Pepper found that the use of a dwelling for the purpose of short-term holiday rentals was effectively a separate and independent planning use, which required development consent under the Environmental Planning and Assessment Act (1979). Reference to both the relevant Ordinance and the meaning of the word ‘domicile’ as interpreted by King CJ in *Masters v Padley,[[10]](#footnote-10)* demonstrated that a ‘dwelling’ was defined 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".[[11]](#footnote-11) The Court accepted the argument of the neighbouring owners that a ‘dwelling’ involves occupation of the property in the same way that a family group in the ordinary way of life would occupy the property, and that such occupation requires, “at the very least, a significant degree of permanence of habitation or occupation”.[[12]](#footnote-12)

The Court then concluded that the renting of the property for short periods for the purposes of “bucks and hens nights, parties or for the use of escorts or strippers is not consistent with a use or occupation by a family or household group in the ordinary way of life and therefore not consistent with the use of the property as that of a ‘dwelling-house’”.[[13]](#footnote-13) Having concluded that the short-term rental of the property was unlawful the Court made a declaration of unlawfulness and granted an injunction to prohibit the owner from engaging in the practice in the future.

Interestingly, Justice Pepper also criticised the Gosford Council for its failure to address the issue earlier, describing its conduct as ‘unsatisfactory’ and “an abrogation by the Council of its fundamental duties and responsibilities”.[[14]](#footnote-14) The Council responded quickly, immediately proposing amendments to its Ordinance, resulting in the passing of an amended Local Environment Plan in February 2014.[[15]](#footnote-15) Relevantly, the Plan was amended to require development consent for the temporary use of dwellings containing five or six bedrooms as short-term rental accommodation.[[16]](#footnote-16) The Gosford Development Control Plan (‘DCP’) also amended its definition of ‘short-term rental accommodation’ to extend to any “dwelling that is commercially available for rent as short-term accommodation on a temporary basis for any period up to 3 months.[[17]](#footnote-17) The DCP now also includes provisions regarding the amenities of such properties, providing that if such a dwelling receives more than two written complaints from surrounding property occupants due to its manner of use in any 12 month period the Council may impose further conditions upon the property’s use.[[18]](#footnote-18)

The decision was also embraced by surrounding Councils in NSW. Although each Council’s particular planning scheme is unique and thus not subject to the particular findings of the Court, surrounding Councils had employed similar language in their own LEPs prior to Pepper J’s decision in Dobrohotoff v Bennic. For Councils that had already made express provision for terms such as ‘short-term accommodation’ or ‘holiday accommodation’ the decision provided the impetus to simply identify such uses as either permissible or prohibited as occurred in the case of Shoalhaven City and Byron Shire Councils.[[19]](#footnote-19)

**2 *One or the other?***

In addition to ill-fitting definitions, the lack of an express definition can also cause problems in situations where more than one type of land use may potentially apply under the terms of a planning instrument. In *Savage v Cairns,* the Queensland Court of Appeal confirmed a decision of the Planning and Environment Courtwhich concluded that the use of a property as both short-term holiday accommodation and permanent residential accommodation was permissible.[[20]](#footnote-20) The applicant, Mr Savage, owned a unit in II Centro Cairns, through which he operated a letting business. The other 38 units in the building were also used as such, and were classified as “Holiday Accommodation” under the relevant planning instrument. By 2014 a number of the units were being used as permanent residences, culminating in an application by 24 of the unit owners to the Cairns Regional Council to approve a material change in their use from “Holiday Accommodation” to “Holiday Accommodation/Multiple Dwelling”. Mr Savage sought to challenge the subsequent approval of this change of use, arguing that the decision was unlawful as the two types of use were fundamentally inconsistent. The application and subsequent appeal were both dismissed, with the Court of Appeal concluding that the two types of use were not inconsistent or incompatible, and were capable of being carried on together at the same time or separately at different times.[[21]](#footnote-21) Morrison JA held that there was nothing inconsistent or incompatible with an owner of one of the units using their property as a residence for part of the year, and renting it out for the balance.[[22]](#footnote-22) His Honour also noted that just because an owner permanently resides in a unit, does not mean that the same owner letting their unit on a short-term basis while temporarily absent would destroy such permanency.[[23]](#footnote-23)

Justice P McMurdo agreed, and also examined whether the phrase “for residential purposes” contained within the definition of ‘multiple dwelling’ ought to be read as importing a requirement that the dwelling be used “for *permanent* residential purposes”.[[24]](#footnote-24) His Honour examined the judicial interpretation of “residential purposes” by the Federal Court in *Marana Holdings Pty Ltd v Commission of Taxation*, and noted that the court saw the term as “including premises which are occupied as a residence or intended to be” and involves “a degree of permanent or long-term commitment to the occupation of the premises in question.”[[25]](#footnote-25) In Justice McMurdo’s opinion, interpreting “residential purposes” in a way that required permanent occupation would confine the expression to a narrower category than its ordinary meaning.[[26]](#footnote-26) Consequently, the appeal was dismissed, and the unit owners were permitted to use their properties as both permanent residences and holiday accommodation. Although this outcome avoided the need to classify the land use into either category, it nevertheless highlights the need for a discrete definition for short-term letting. As a relatively recent type of land use, it is unlikely that future short-term rental arrangements will readily fit within existing frameworks, and will require express provision to cover their own unique characteristics.

**3 *Finding the appropriate definition***

As the preceding discussion in this paper has looked to the presently problematic lack of definition for short-term rentals, it is only logical to consider those definitions adopted by other jurisdictions in considering potential options for Australian legislatures. A number of US states have introduced measures to deal with the issue of short-term letting, amending their local planning instruments to include dedicated definitions for such arrangements. For example, the Nashville Metro Council in the state of Tennessee recently approved a new definition for short-term rentals permitting their use under the revised terms of their Metropolitan Code.[[27]](#footnote-27) The newly inserted definition of a ‘Short Term Rental Property (STRP)’ applies to properties rented for periods of less than 30 days, and requires property owners to obtain an STRP permit which demonstrates that they have secured liability coverage for losses of at least $1,000,000.[[28]](#footnote-28) The San Jose City Council in California has passed similar measures, albeit with a much larger time period for letting permitted. The San Jose Municipal Code now provides that a host may share their home for the entire year if they themselves are physically present, or for a 180-day limit if they will be absent during the letting period. [[29]](#footnote-29)

These provisions present a stark contrast to the measures adopted by the Victorian and Queensland Governments. Under the Victorian provisions discussed in Part 1 above, the Act presents a strict definition of “short-stay accommodation arrangement(s)”, to include any lease or licence granted for a maximum period of 7 days and 6 nights.[[30]](#footnote-30) Similarly, the Queensland Government passed amendments to its *Sustainable Planning Act 2009* (Qld), to introduce measures targeting so-called ‘party houses’. The new Pt 7A to the *Sustainable Planning Act 2009* (Qld), defines a ‘party house’ as any premise not occupied by the owner, which is ‘regularly used by guests for parties, including, for example, bucks’ nights, hens’ nights, raves, wedding receptions or similar parties’,[[31]](#footnote-31) which are provided for a period of less than 10 days and for a fee.[[32]](#footnote-32) The new laws require an owner of a ‘party house’ to first obtain the approval of their local council before providing their property for use in such a way. Interestingly, these provisions operate on an opt-in basis, whereby the relevant local council has the option to amend their planning scheme under ‘statutory guideline 04/14: Making and amending local planning instruments’ (MALPI) to include such provisions. Alternatively, a Local Council can elect to make a temporary local planning instrument under the MALPI, providing for such provisions with an option for the Council to engage in a public consultation process.[[33]](#footnote-33)

The classification that is ultimately adopted for the purposes of planning laws is crucial to the effective regulation of short-term letting. A poorly defined term, or inappropriate parameters are of little to no assistance to planning authorities and home owners seeking clarity on the legality their of rental arrangements. Furthermore, as this paper will turn to consider, the scope of definition that is adopted will also impact upon the extent to which planning authorities may require or consent to development approval applications.

**B *A need for Development Approval?***

A key concern raised by the rapid expansion of the short-term rental market is how to best regulate a practice which can have the effect of changing a property’s use and character. As this paper will discuss, solutions adopted in some foreign jurisdictions have taken a flexible approach, providing a clear regulatory framework as a comfort to existing businesses and home owners, while also allowing consumers a greater freedom of choice in how to monetise an otherwise underutilized asset.

**1 *A flexible approach?***

In 2015 the UK Parliament passed the *Deregulation Act 2015* (UK)in response to the need for clarity on the question of short-term letting.[[34]](#footnote-34) The Act amends the *Greater London Council (General Powers) Act 1973* (UK)which, at present, requires permissionfor any ‘material change of use’ of a property.[[35]](#footnote-35) The newly inserted s 25A provides that the use of residential properties for short-term letting or holiday accommodation will not automatically require permission as a ‘material change of use’.[[36]](#footnote-36) This exception will allow for any residential property to be used as a short-term rental for a period of up to 90 days before the need for approval will arise.

The French Government has enacted provisions which extend a tenant or home owner’s right to let their property for an even longer period than that provided for by the UK Government. The *Access to Housing and Renovated Town Planning law* was passed by the French Government on 24 May 2014.[[37]](#footnote-37) The law clarified the scope of the *Law of 1989* (Art 2), [[38]](#footnote-38) which had previously only applied to the ‘main residential use’ of a property. The new law has modified its operation to provide that it will regulate the use of any relevant property so long as it is the owner or lessee’s main residence – a factor which requires a residence of at least 8 months per year. The effect of this change is to permit the shared use of such properties for the remaining four months of the year without any need for authorisation from the relevant planning authority.

**2 *A need for greater clarity***

The absence of a clear statutory definition applicable to short-term letting arrangements can cause great problems for local planning authorities in attempting to approve the use of properties in such a way. For example, a submission received in response to the NSW Parliament’s Inquiry from the City of Sydney Council highlighted a key concern amongst Councils generally that, although it would be ideal for development approval to be required for properties to be utilised in such a way, there is at present no way to classify this type of use.[[39]](#footnote-39) Alternatively, the submission noted that even if such use were to be placed under an existing category of use such as ‘tourist and visitor accommodation’ that would not resolve the question adequately. Such a result arises because Sydney’s residential zones do not permit owner’s to modify their property’s use to that of tourist and visitor accommodation, so even though Local Councils would prefer and encourage transparency and openness amongst their residents, such consent could not in fact be provided.[[40]](#footnote-40)

Issues have also arisen in relation to residents obtaining approvals under the *Building Code of Australia* and owners corporation rules, with a Victorian court ruling that short-term rentals should be considered to constitute a permissible use of residential units under the relevant rules.In *Genco v Salter*,[[41]](#footnote-41) the Victorian Court of Appeal, agreeing with the Supreme Court of Victoria, held that a building order issued by the City of Melbourne Council requiring the practice of short-term letting to cease within an apartment block was unlawful.[[42]](#footnote-42) The initial decision before the Building Appeals Board had determined that the use of the properties in such a way amounted to an unauthorised change in the their use.[[43]](#footnote-43) The dispute turned on two classes of building under the *Building Code of Australia*: classes 2 and 3.[[44]](#footnote-44) Class 2 was defined as a building containing two or more units each of which were separate dwellings; while Class 3 applied to residential buildings which were a common place for long term or transient living for a number of people such as boarding houses, hostels, hotels or motels. The Board concluded that the apartments were being used in a manner similar to a motel under Class 3, which was not a permitted use for a Class 2 residential dwelling.

This conclusion was successfully challenged by Mr Salter, an owner of one of the units within the building. The Supreme Court found that the definition of a Class 2 building had been misinterpreted by “importing into the word ‘dwelling’…. temporal requirements”.[[45]](#footnote-45) Following from this conclusion, it was also held that such an interpretation would create an inconsistency with other definitions within the Building Code, particularly Class 1(b) buildings which extend to short-term rentals, and that there was “no rational basis for giving the word ‘dwelling’ a more limited meaning in the Class 2 definition.”[[46]](#footnote-46) Consequently there had been no relevant change of use by the residents, and thus, no breach of the Building Code. This conclusion was upheld upon appeal, where their Honours noted that a dwelling “will remain a dwelling whether or not it is occupied only sporadically…It will remain a dwelling even if it is let for short-term use. There is nothing in the fundamental concept contained in Building Code of Australia clause A3.1 or the ordinary meaning of dwelling which requires that a dwelling be occupied for extended periods of time by the same person.”[[47]](#footnote-47) The Court’s decision demonstrates the need for a clear definition of short-term rental arrangements within all relevant planning documents. While the decision may have proven favourable to Mr Salter, the inclusion of an express category of use to cover short-term rentals of apartments within the complex would have obviated the need for litigation on the matter, and would have given residents certainty as to whether they were unknowingly breaching the applicable planning rules.

**3 *The power to prohibit such use***

The Victorian Civil and Administrative Tribunal also considered the effect of Owners Corporations rules which impacted upon the ability of residents to engage in short-term rentals. In *Owners Corporation PS501391P v Balcombe,* the Applicants, on behalf of a majority of apartment owners, had sought to prevent one of the apartment owners from renting their properties for periods of less than 30 days.[[48]](#footnote-48) That apartment owner was the aforementioned Mr Salter, the operator of Docklands Executive Apartments, who had rented out his own apartments for periods of time varying between two and seven nights. The Applicants relied upon Rule 34 of the Additional Rules of the Owners Corporation, which provided an owner or occupier was not to use a lot for any trade, profession or business, other than letting the lot for residential accommodation to the same party for periods in excess of one month. [[49]](#footnote-49) The Tribunal concluded that Rule 34 was invalid, as there was no specific function or power conferred on body corporates to regulate the use of a private lot.[[50]](#footnote-50) In the Tribunal’s view, the rule was invalid as it was not sufficiently connected to the Standard Rules to fall within the body corporate’s regulatory powers. Further, rather than attempting to regulate the use of the lot, it was seeking to prohibit certain types of uses altogether, contrary to the High Court’s rule in *Swan Hill Corporation v Bradbury*.[[51]](#footnote-51) Importantly, the Tribunal noted that, “if Parliament had intended that owners corporations could make rules which effectively place them in the role of a town planner I would have expected that the conferment of power to be unequivocal… That task is best left to local Councils.”[[52]](#footnote-52)

Once again, the decision demonstrates the need for legislative direction as to how such a use is to be regulated. The absence of provisions clarifying whether or not short-term renting amounts to a change in the use of the property, and therefore, requires development approval is unsatisfactory. Each of the aforementioned decisions illustrate that planning bodies assume that such uses are capable of being controlled, and that they certainly desire to regulate them accordingly. Irrespective of the degree to which they choose to embrace the sharing economy, it is clear that those jurisdictions yet to legislate upon the matter must make a clear and conclusive statement as to whether development approval should be required, so as to provide affected stakeholders with certainty that such practices are being carried out lawfully.

**C *Consequences for Damage to Property or Loss of Amenity***

So far this paper has focused upon the interests of property owners and planning authorities in securing a transparent regulatory framework. Aside from their compliance with planning or other regulatory instruments, short-term rental arrangements also raise additional legal issues.

**1 *Property Damage***

In particular, the practice of short-term can create problems for the owners of neighbouring properties damaged by lodgers staying on a short-term basis. The Victorian Government’s recently announced legislative provisions have chosen to take a tough stance against short-term renters that occasion damage to neighbouring properties. In her Second Reading speech for the Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 (Vic), the Minister for Consumer Affairs, Jane Garret noted the difficulties faced by aggrieved neighbours and owner corporations who are unable to locate transient short-stay occupants in cases of damage to property or disturbance to an owner’s right to quiet enjoyment. Prior to the enactment of the legislation, short-term accommodation providers were not liable for the conduct of their occupants, particularly in cases where such damage had been occasioned.[[53]](#footnote-53)

The new provisions which have been adopted not only identify the conduct of lodgers which will now be capable of redress; such as excessive noise, obstruction of common property and property damage, but also establish a means by which compensation may be recovered. Under the provisions, the Victorian Civil and Administrative Tribunal (VCAT) will be empowered to award loss of amenity compensation for up to $2000 to any resident whose amenity has been affected by such inappropriate conduct.[[54]](#footnote-54) Short-stay accommodation providers will also be made jointly and severally liable with their short-stay occupants for such compensation, but will have the ability to defend a claim if they can establish that they took all reasonable steps to prevent the conduct from occurring.[[55]](#footnote-55) The provisions also import a three-strike rule, with VCAT empowered to make orders prohibiting the use of an apartment for short-stay accommodation, for a certain period, if short-stay occupants of that apartment have, on at least three separate occasions within 24 months, been guilty of inappropriate conduct.[[56]](#footnote-56)

**2 *The need for adequate insurance***

An additional concern associated with the practice of renting properties for short-term periods is the risk that lodgers will be injured during their stay. As a recent NSW case illustrates, the risk of injury occurring is not simply some fictional worst case scenario, but poses a real possibility with tremendous consequences for those inadequately insured. In *Panther v Pischedda*, the New South Wales Court of Appeal held that a home owner who had rented out their property in the Blue Mountains for two nights, was liable under the *Civil Liability Act 2002* (NSW) for damages sustained by a lodger who broke her ankle slipping down their driveway.[[57]](#footnote-57) In the District Court, Curtis DCJ had found that a reasonable person in the defendants’ position would have known or ought to have known of the risk, and would have taken reasonable preventative measures, namely, installing a handrail or removing a portion of the adjacent hedge to provide an alternate point of access to the property.[[58]](#footnote-58) The Court of Appeal agreed, noting that any cost or unsightliness arising from the installation of such measures would not have been disproportionate to the identified risk.[[59]](#footnote-59) The Court’s decision reinforces the need for those engaging in the practice of short-term letting to take steps to identify potential risks, and make necessary modifications to their property to eliminate those dangers.

More crucially, the decision highlights the need for owners to acquire adequate insurance to cover against any injuries sustained by their lodgers. This particular concern was identified by the Insurance Australia Group, in its submission to the NSW Parliamentary Inquiry into short-term holiday letting.[[60]](#footnote-60) A key issue raised by the Group related to the present scope of most home insurance policies. While such policies would normally cover theft, damage or other types of loss, most policies do not extend to circumstances where the property is being used commercially. Similarly, although they may cover the actions of tenants to a rental agreement, those generally apply to much longer tenancies documented by a formal, written tenancy agreement.[[61]](#footnote-61) In addition, the Group expressed concern over the current form of the ‘Host Guarantee’ provided for by Airbnb. Far from providing a substitute to an insurance policy, the ‘Host Guarantee’ specifies that it is “not insurance and should not be considered as a replacement or stand-in for homeowners or renters insurance.”[[62]](#footnote-62) Reference to the present terms and conditions provided by Airbnb confirm that it will not protect users in the instance that loss is incurred, providing that its users, “release, defend, indemnify and hold Airbnb… harmless from and against any claims, liabilities, damages, losses and expenses, including reasonable legal fees.”[[63]](#footnote-63) Given the genuine risk that lodgers may injure themselves during a short-term stay upon an owner’s property, it is clear that measures must be put in place to inform or even obligate owners to obtain adequate insurance. The so-called ‘Host Guarantee’, when considered in isolation from the lengthy Terms of Service, are likely to lull users into a false sense of security. Accordingly, any legislative framework adopted must ensure that steps are taken to alert residents to the possible risks and consequences arising from a failure to obtain adequate protection.

**D *Protecting the Interests of Landlords***

Up to this point, this paper has largely focused upon the interests of home owners seeking to place their properties upon the short-term rental market. However, additional concerns arise in connection with rental properties which are listed by tenants for short-term lease without the approval of their landlord. This issue recently came before the Victorian Supreme Court, with the court examining whether short-term rental arrangements constituted licences or, alternatively, unauthorised subleases granted without the approval of the property’s landlord. Relevantly, section 81 of the Residential Tenancies Act 1997(Vic) provides that a tenant must not assign or sublet either the whole or any part of their rented premises without their landlord’s written consent.[[64]](#footnote-64) Thus, if a tenant were to list their property upon a service such as Airbnb, and the use of their premises was to constitute a lease of the property, they would be in breach of s 81 by having sublet the property without permission, providing the landlord with a basis upon which to issue the tenant a notice to vacate.

This very scenario arose in the matter of *Swan v Uecker*, where the Applicant had leased their property in St Kilda to the Respondents under a one-year residential tenancy agreement.[[65]](#footnote-65) The Respondents had then successfully listed the property as a short-term rental on the Airbnb website, with lodgers subsequently staying in the property. The Applicant sought an order for possession which was resisted by VCAT on the basis that the arrangement between the Respondents and the lodgers amounted to a licence, not a lease. The basis for the Tribunal’s conclusion was founded upon a view that there was no grant of exclusion possession of the property, but a licence to occupy the property subject to conditions specified by the tenants.[[66]](#footnote-66) However, the matter was then appealed to the Supreme Court, where Justice Croft took an alternative view of the matter.[[67]](#footnote-67) Although the AirbnB terms to which the Respondents and lodgers had agreed were subject to conditions that repeatedly used the word ‘licence’, Justice Croft stressed the well-established principle that the substance of the agreement prevails over its form.[[68]](#footnote-68) He held that the effect of the agreement, in substance, was that the lodgers enjoyed a right of exclusive possession. Accordingly, Justice Croft concluded that the agreement was to be properly characterised as a lease.[[69]](#footnote-69) In handing down the decision, Justice Croft said there were already ways to amend rental agreements to prevent similar cases. “Many commercial leases restrict the tenant from sub-leasing ... granting any licence to occupy all or part of the leased premises ... without the landlord's consent….Broad terms such as this would prevent ... sub-letting or licensing without the landlord's consent."[[70]](#footnote-70) Accordingly, provided rental agreements are drafted clearly, landlords wanting to protect against any unwanted short-term leases should be able to adequately exclude such practices.

Yet, while the decision may be satisfying for the owners of rental properties, it will amount to little more than a pyrrhic victory unless additional compliance obligations can be placed upon services such as Airbnb. At present, the terms of service provide that the user “acknowledges that the listing… will not breach any agreements entered into with any third parties, such as… lease or rental agreements.”[[71]](#footnote-71) Aside from this reference, there is no requirement for a user to provide evidence they have in fact obtained such approvals. However, rather than a need for further legislative reform, it may be possible to exercise powers currently recognised in state planning laws. The City of Sydney Council’s submission to the NSW Parliamentary Inquiry drew attention to the recently expanded powers of Local Council regulatory officers under the *Environmental Planning and Assessment Amendment Act 2014* (NSW).[[72]](#footnote-72) Under s 119J of that Act, officers are able to request that residents produce records that would identify them as the lawful inhabitant of the property during a relevant period. This mechanism could be utilised by landlords who suspect their property is being listed upon services such as Airbnb, who could then notify the relevant Planning Authority to investigate the matter. This type of recourse would also be likely to encourage greater transparency and honesty from tenants, who would arguably be more reticent to list their property for rent without approval when faced with the genuine possibility that their actions may be subject to investigation and ultimately eviction.

**III The Way Forward**

It is apparent that the practice of short-term rentals raises a number of regulatory and legal issues which require a clear legislative framework. Ultimately, the approach taken to manage these arrangements will hinge upon the willingness of the relevant state legislature to embrace the sharing economy. This was echoed by the comments of Tasmanian Premier, Will Hodgman in his 2015 State of Address. Mr Hodgman indicated that the Tasmanian Government would take the path of least resistance to the shared economy and short-term letting.[[73]](#footnote-73) In discussing his Government’s approach to the shared economy, Mr Hodgman noted that in the choice between rejecting or accepting the shared economy model, “my government has chosen to embrace it. And we are the first Australian state to do so. We will not go down the path that other places have taken; trying to kill off the sharing economy by heavy regulation, through legal action, or even to try to ban it - all with limited success.” At present, the Tasmanian Government has yet to pass legislation on the issue, and no Bill is presently before its Parliament. Nevertheless, Mr Hodgman’s remarks would appear to suggest the introduction of a regulatory model starkly different to those introduced in the other Australian states.

The preceding discussion of this paper has highlighted some of the primary concerns raised by short-term letting, and the number of stakeholders that would be impacted by a decision on the matter. In this author’s view, the short-term rental market presents a valuable economic contribution that should not be unduly regulated. An Economic Impact Study prepared by BIS Shrapnel estimated that the short-term letting industry produced approximately $1.3 billion in economic activity throughout NSW in 2014, much of which amounted to a significant source of income for property owners.[[74]](#footnote-74) However, although the practice does produce positive results, it is clear that it cannot be exploited and sufficient controls must be established. Accordingly, in this author’s view, an approach akin to that advocated by Mr Hodgman would be able to adequately deal with the issues raised by short-term letting.

**1 *The right definition and approval process***

Crucial to any legislative framework will be the definition adopted, and the time frame within which owners will be permitted to rent their property without a requirement for approval. The various legislative models examined throughout this paper have adopted a number of contrasting approaches, with jurisdictions such as Queensland and Victoria favouring very strict parameters for what conduct will require approval, while others, such as Nashville and San Jose in the United States, have provided far more liberal timeframes for home owners.[[75]](#footnote-75) While tighter timeframes may provide planning authorities and surrounding property owners with some comfort that letting practices will not spiral out of control, they all necessitate a strict system of monitoring and authorisation.

It is too early to tell whether such problems will be experienced in Queensland or Victoria, but in this author’s view a more sensible option would be to measure the requirement for approval by the number of days per year that the property will be let, rather than the length of individual stay. Akin to the models adopted in the UK and France, this would permit owners to lease their property for a specified total number of days out of the year before a requirement for permission arises, and would maximize a home owner’s ability to more readily engage in repeated rentals of their property. Similarly, a flexible timeframe would remove the need for councils and owners corporations to aggressively monitor their residents’ property use. If an owner anticipated that they were going to exceed the statutory timeframe, they could apply for a development approval in advance to cover the entirety of their letting practices for the year. This would obviate the need for parties to examine each and every short-term rental’s compliance with planning rules, and would ensure that letting was not practiced without appropriate approvals being obtained.

**2 *Qualifying approvals***

However, approvals should not be given without conditions imposed, such as a revocation of permission if damage is occasioned to surrounding properties or the neighbourhood’s amenity. The procedure for redress identified in the Victorian provisions presents an ideal method for affected parties to resolve issues. As those provisions note, a key component of any such process’ effectiveness will depend upon making owners and their lodgers jointly and severally liable for all damage incurred, subject to any reasonable defence that may be raised.[[76]](#footnote-76) The introduction of such measures would not amount to any kind of reinvention of the wheel, but merely an express recognition that the actions of lodgers will no escape the reach of the law. While maximising the effectiveness of the sharing economy is key, that cannot come at the expense of other relevant stakeholders.

In addition to qualified approvals, there would appear to be a pressing need that those wishing to engage in short-term renting have obtained sufficient insurance. As such, any application for a property to be used for a certain number of days each year as ‘short-term accommodation’ should be accompanied with proof that the owner of the property has obtained an insurance policy with sufficient coverage to protect against any loss that might result. As this paper has noted, the Terms of Service provided for by Airbnb create a false sense of security for users, who interpret their ‘Host Guarantee’ as tantamount to an insurance policy. An express requirement that an adequate policy has been obtained would, hopefully, assist in correcting any user’s with the erroneously held belief of that Airbnb and like services are adequately indemnifying them. Further, the adoption of a remedial model such as that introduced in Victoria, would serve not only to protect stakeholders against loss suffered from lodgers in surrounding properties, but also encourage greater awareness amongst property owners who offer their property for rent of the potential risks involved.

**3 *Investigative powers***

On a related note, it would appear that any legislative measures adopted must place greater obligations upon service providers such as Airbnb for transparency in their terms and conditions. This could take the form of requiring those service providers to undertake additional checks to ensure that listings have been made with the approval of all relevant parties, in particular, a landlord in the case of a rented property. While requiring the services themselves to introduce such measures would be the most effective solution, this author recognizes the difficulties that could be faced by a legislature if it were to attempt to regulate the business practices of an international corporation. Consequently, a more realistic alternative may be to empower Local Councils with investigative powers to determine whether properties are being used in an unauthorised manner. The expansion of powers provided to council officers in NSW under s 119J of the *Environmental Planning and Assessment Amendment Act 2014* (NSW) would provide a suitable means of enforcing compliance. Local Councils could be given the authority to investigate claims brought by landlords, body corporate or other entities with a well-founded belief that their property is being used in an unauthorised way. The introduction of this type of power would go a long way towards overcoming one of the key problems currently surrounding short-term rentals, namely, the lack of consequence. By extending the powers of local planning authorities, a tangible risk would be posed to those users who list their properties without permission, and would, ideally, foster greater openness between tenants and landlords.[[77]](#footnote-77)

**Conclusion**

The many varying approaches adopted across Australia and abroad demonstrate the difficulties with regulating short-term letting in a way which balances the needs of planning authorities against the expectations of property owners. While owners make rightly feel entitled to make the most out of their own property, it is clear that such a goal cannot come at the expense of other interested parties. As this paper has addressed, there are a number of competing considerations when it comes to regulating short-term letting. First and foremost, it is clear that the practice must be clearly and expressly defined or categorized within planning legislation, so that planning bodies are able to readily identify which practices fall within their control. Connected to this question, is a determination of the appropriate parameters that should be set for identifying when such practices will amount to a change in use of a property, and therefore require development approval. As this paper has discussed, issues also arise with how to best protect the interests of third parties affected by the conduct of short-term lodgers. With the risk of personal injury to lodgers, and damage to third party property, it is apparent that a requirement for sufficient liability coverage be imposed upon users of these services. Above all, it must be recognised that while the growth of the sharing economy can bring many benefits, it also poses real challenges that must be overcome if we are to maximise its positive impact.

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30. Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 (Vic), s 4. [↑](#footnote-ref-30)
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