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AIRBNB AND RESIDENTIAL TENANCY LAW: DO 'HOME SHARING' ARRANGEMENTS CONSTITUTE A LICENCE OR A LEASE?

'Airbnb is to the residential tenancy market what Uber is to the taxi industry — unregulated and controversial'.[1]

I Introduction

In tenancy law, the distinction between a lease and a licence is fundamental. A lease confers an interest in land; it can be transferred, and confers rights enforceable against all the world. A licence, on the other hand, merely permits a person to enter onto land, or to do something in relation to it, without being sued. A licence can be withdrawn at any time, and it is not regulated by tenancy legislation or property law generally. Although the distinction is well established, characterising particular housing arrangements[2] as involving either a lease or a licence can be problematic. At common law, the existence of a lease depends on whether exclusive possession was conferred on the occupier. Primarily, this involves examining the terms of the agreement between the parties.[3] As leases can be created with little formality, a purely verbal agreement may give rise to a lease. On the other hand, a detailed written agreement may explicitly state that the arrangement is a licence and not a lease. A body of case law exists — in both Australia and the United Kingdom ("UK") — regarding the factors relevant to characterising an arrangement as either a licence or a lease. While these decisions state general principles, they also tend to focus on quite specific factual issues, and accordingly they are not easy to reconcile or apply.

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1 *Swan v Uecker* [2016] VCAT 483 (24 March 2016) [1].

2 Although there are many types of leases, such as pastoral, agricultural and mining leases, this article focuses on residential leases. The terms 'tenancy' and 'lease' are used interchangeably in this article.

3 Legally, a lease is both a contract and an interest in land. The dual nature of a lease is examined in Part IV of this article.

The legal consequences of characterising a particular arrangement as either a licence or a lease are, however, significant. Whereas a licence is merely a private agreement between parties, a lease automatically confers significant rights and duties on the tenant and the landlord. These rights and duties derive from the agreement, from common law, and from legislation. Perhaps most significantly, when an arrangement is characterised as a lease, it can be terminated only by following the strict process set out in residential tenancy legislation.[4]

The recent emergence of short-term 'home sharing', using online platforms such as Airbnb and Stayz, raises the issue of whether such arrangements should be characterised as either a licence or a lease. According to Airbnb's 'Terms of Service', home sharing constitutes a licence.[5] However, a recent decision of the Supreme Court of Victoria suggests that, in certain circumstances, a home sharing agreement may constitute a lease.[6] Whether home share arrangements constitute a licence or a lease has significant legal consequences for hosts and for guests.[7] These consequences —which may be unknown to most home share hosts — are examined later in this article.

So far, there has been little judicial or scholarly examination of the legal status of home share arrangements with regard to tenancy law. The focus of most of the literature has been on broader policy issues regarding the regulation of home sharing, and particularly on balancing a person's ability to make money from their property with minimising the negative effects of home sharing (particularly on neighbours).[8]

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4 Not all leases are regulated by residential tenancy legislation. The strict process for termination applies only to leases that are so regulated. Each state and territory has separate residential tenancy legislation: *Residential Tenancies Act 1997* (ACT) ('*Australian Capital Territory Act*'); *Residential Tenancies Act 2010* (NSW) ('*New South Wales Act*'); *Residential Tenancies Act 1999* (NT) ('*Northern Territory Act'*); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ('*Queensland Act*'); *Residential Tenancies Act 1995* (SA) ('*South Australian Act*'); *Residential Tenancy Act 1997* (Tas) ('*Tasmanian Act'*); *Residential Tenancies Act 1987* (WA) ('*Western Australian Act'*). This article focuses on the legislation in Victoria and New South Wales, as these states represent the two main approaches to coverage in Australia.

5 Airbnb, *Terms of Service* cl 8.2 (16 April 2018) <www.airbnb.com.au/terms>.

6 *Swan v Uecker* (2016) 50 VR 74 (Croft J) ('*Swan*').

7 This article uses the neutral terms 'host' and 'guest', rather than the conclusory terms 'landlord' and 'tenant'.

8 See, eg, Christopher Pearce, 'The Search for a Long-Term Solution to Short-Term Rentals: The Rise of Airbnb and the Sharing Economy' (2016) 35(2) *University of Tasmania Law Review* 58; Sharon Christensen and William Duncan, 'Sharing Your Home in Queensland: Host, Landlord or Innkeeper?' (2016) 6(2) *Property Law Review* 137; Michelle Maese, 'Rethinking "Host" and "Guest" Relations in the Advent of Airbnb and the Sharing Economy' (2015) 2 *Texas A&M Journal of Property Law* 481; David Kelly, 'A Licence to Lease? The Common Law Status of an Airbnb "Stay"' (2017) 39(2) *Bulletin (Law Society of South Australia)* 20; Russell Cocks, *To Be or Not To Airbnb* (2016) 90(8) *Law Institute Journal* 60.

This article focuses instead on determining whether the relationship between home share hosts and guests is in fact currently regulated by residential tenancy law.[9] This issue will inevitably present itself to Australian courts. Therefore, the application of residential tenancy law to home share hosts and guests will soon need to be considered.

Ultimately, this article concludes that home share arrangements *may* constitute a lease, and residential tenancy legislation *may* apply to the arrangement, in certain circumstances. Characterising the arrangement depends primarily on examining the terms of the relevant agreement and surrounding circumstances. Many factors will be relevant, such as whether the host provides services (such as cleaning) to the guest, whether the host has access to the premises during the stay, and how the arrangement is described in the agreement. Ultimately, each case will depend on its particular facts and circumstances.

II Home Sharing in Australia

No single definition of 'home sharing' has been agreed on in the literature or by regulators.[10] However, several key features of home sharing can be identified. First, home sharing involves the provision of accommodation by means of an online platform, such as Airbnb or Stayz. The use of internet technology defines home sharing as part of the 'share economy'.[11] Second, home sharing arrangements are typically short-term and involve between one and seven night stays. Due to their short duration (compared to typical tenancy agreements), home shares are often referred to as 'short stay accommodation'. Third, home shares may involve the provision of an entire premises or merely part of the premises (such as a bedroom and shared use of other rooms). In many home shares, therefore, the host resides in the premises with the guest. Fourth, it is clear that tenants, as well as owners of premises, are making premises available for home sharing. That is, home share 'hosts' are not limited to owners of premises. Fifth, and significantly, home share arrangements have many similarities to hotel accommodation, lodging or boarding arrangements, and serviced apartments — each of which is excluded from coverage by residential tenancy legislation.[12] Home share arrangements usually involve not merely the provision of premises, but also the provision of significant services to guests. Often this involves cleaning of the premises and the provision of clean towels, sheets and even some food items. Also, a daily fee is usually charged, which is inclusive of utilities such as

9 'Residential tenancy law' in this context includes common law and statutory provisions. It is crucial to note that the issue of whether a particular arrangement constitutes a lease is separate from the issue of whether residential tenancy legislation applies to that arrangement.

10 Pearce, above n 8, 60.

11 Other descriptions are 'gig' economy, 'collaborative' economy and 'peer to peer' economy: see Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption* (HarperCollins, 2010).

12 See Part VI of this article.

electricity, gas, water and internet. Hosts can also stipulate 'House Rules' regulating issues such as 'Check In' and 'Check Out' times, the maximum number of guests, what parts of the premises can and cannot be used, and even acceptable noise levels and whether smoking is allowed. Arguably, many of these features are not consistent with a grant of exclusive possession to a guest.[13]

Home sharing arrangements are rapidly increasing in popularity in Australia, and globally. Melbourne and Sydney have the highest number of listed properties on Airbnb in Australia, with the number of listings in Melbourne recently doubling in the period from August 2015 to August 2016.[14] Capital cities such as Melbourne and Sydney also offer the highest returns for hosts, with daily rates for short-term accommodation often being significantly higher than the average daily rent for long-term rental accommodation in the same locality.[15]

The increasing popularity of home sharing has raised many difficult regulatory, social and legal issues. These issues include the income tax implications for hosts,[16] whether hosts are regulated by fair trading legislation,[17] whether an owners corporation[18] can make rules regulating short-term letting by apartment owners,[19] and whether short-term letting in residential apartment buildings is contrary to planning laws and the Building Code of Australia.[20] Victoria and New South Wales have passed legislation regulating short-term letting in CBD apartment buildings, in response to media reports of damage to common areas and nuisance caused by home share premises being used as weekend 'party houses'.[21]

As mentioned above, this article focuses on whether the relationship between home share hosts and guests is currently regulated by residential tenancy law. It also

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13 See Part VI of this article regarding the implications of significant services being provided to guests.

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 August 2016, 2971 (Ben Carroll).

15 Samantha Hutchinson, 'Share and Share Dislike: The Airbnb Divide', *The Australian* (Sydney), 17 December 2016.

16 See Australian Taxation Office, *Income Tax: Rental Properties — Non-Economic Rental, Holiday Home, Share of Residence, etc. Cases, Family Trust Cases*, TR 2167, 4 July 1985, which sets out the income tax implications of rental properties.

17 See Kate Tokeley, 'When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace' (2017) 39 *Sydney Law Review* 59.

18 An owners corporation (formerly called a body corporate) regulates common property where there is a strata title: see *Owners Corporations Act 2006* (Vic) for the Victorian legislation.

19 See *Owners Corporation PS501391P v Balcombe* (2016) 51 VR 299.

20 See *Genco v Salter* (2013) 46 VR 507.

21 See *Owners Corporation Amendment (Short-Stay Accommodation) Act 2018* (Vic), *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* (NSW). See also *Sustainable Planning Act 2009* (Qld). Chapter 9, part 7A.

examines the legal implications for guests and hosts if home share arrangements are characterised as leases. This analysis commences by examining a recent decision of the Victorian Supreme Court, which suggests that home sharing may constitute a lease.

III The *Swan* Decision and its Implications

In June 2016, the Supreme Court of Victoria held that a tenant who had offered the rented premises on Airbnb had thereby breached their tenancy agreement by subletting the premises without the landlord's consent.[22] The significance of this decision is that the Court focused on whether exclusive possession had been conferred by the tenant/host on the Airbnb guest. Although the proceeding was brought by the landlord to evict the tenant for breaching the agreement, the Court focused on the nature of the relationship between the tenant/host and the Airbnb guest. Significantly, the Court determined that exclusive possession had been conferred on the Airbnb guest. Therefore, the arrangement between the host and the guest constituted a lease at common law.

With regard to the legal consequences of home sharing, this decision has two important implications.[23] First, it means that a tenant who offers the rented premises to guests on Airbnb may be evicted.[24] Therefore, a tenant who wishes to do so should seek clear written authorisation from the landlord. Second, and far more significantly, the decision suggests that *any person* who offers premises on Airbnb or a like platform may be entering a lease with the guest. This is because the legal test for creating a lease is essentially the same as that for creating a sublease.[25] A sublease is simply a subsequent lease, entered into by the tenant and another party over the same premises (or part of the premises). The legal test, in relation to creating a lease and creating a sublease, is exclusive possession.

The implication — not articulated explicitly in the Court's reasoning in *Swan* — is that all home sharing arrangements may be leases. As the Court emphasised in *Swan*, whether or not a lease is created depends on the correct characterisation of the relationship between the host and the guest.[26] There is no reason why the character of the relationship between a home share host and guest should depend on whether the host is a tenant or an owner of the premises.

22 *Swan* (2016) 50 VR 74.

23 The *Swan* decision will be examined in more detail in Part VII of this article.

24 Besides constituting unauthorised subletting, offering the premises on Airbnb may also breach other terms of the tenancy agreement. That is, it may provide a landlord with several grounds for evicting the tenant.

25 There are technical requirements relating to creating a sublease that are not relevant to the present discussion.

26 *Swan* (2016) 50 VR 74, 87 [32], 91 [40]–[41].

IV Legal Consequences of Home Sharing Constituting a Lease

In Victoria, residential tenancy legislation applies, subject to certain exceptions,[27] where an arrangement meets the common law definition of a lease.[28] When the *Victorian Act* applies to an arrangement, the nature of the relationship between the parties — now defined as 'landlord' and 'tenant' — fundamentally changes. The relationship is no longer purely contractual, but is regulated by common law and statutory provisions, imposing certain rights and duties on both parties.

One of the most significant legal consequences of residential tenancy legislation applying to an arrangement is that the process for removing a tenant from the premises is lengthy, complex and strictly regulated. The process involves giving the tenant a valid notice to vacate, applying to the relevant tribunal for a possession order, and obtaining a warrant of possession.[29] If a home share arrangement constitutes a lease, and residential tenancy legislation applies, then strict compliance with this process is required — for example, if a home share guest overstays and refuses to leave. It may be thought that this scenario would be unlikely to arise. However, it did occur in San Francisco in 2014.[30] An Airbnb guest who refused to leave the premises — or to pay rent — was found to be covered by Californian tenancy law and the host had to follow a lengthy and expensive eviction process.[31]

Another significant consequence is that the relevant tribunal has jurisdiction over certain disputes involving the tenancy. In Victoria, this is the Victorian Civil and Administrative Tribunal, and in New South Wales, it is the New South Wales Civil and Administrative Tribunal. These tribunals have jurisdiction under the relevant residential tenancy legislation.[32] This includes power to order a landlord or a tenant to comply with their duties under the legislation, or to pay compensation for breaching these duties.[33] In the home sharing context, a landlord may seek an order, for example, that a home sharing 'guest' pay compensation for damage they have caused to the premises.

One of the most common issues in relation to home share arrangements is when the premises are used as a 'party house' and damage is caused to the premises. Airbnb provides a guarantee to hosts, which promises to reimburse them for damages up to

27 These exceptions are examined in Part VI of this article.

28 See *Residential Tenancies Act 1997* (Vic) s 3 ('*Victorian Act*'), which provides that the Act applies where premises are 'let' under a tenancy agreement. The application of residential tenancy legislation varies across Australian jurisdictions: see Part V of this article.

29 See *Victorian Act* s 330.

30 Maese, above n 8, 482–3.

31 Ibid.

32 *Victorian Act* s 446; *New South Wales Act* ss 187–9.

33 *Victorian Act* s 446; *New South Wales Act* ss 187–9.

$1,000,000.[34] However, this guarantee is subject to strict terms and conditions, and may not cover all instances of damage caused by guests and their visitors. Furthermore, a host's private home insurance may not cover such damage either, as it may be regarded as commercial use of the premises, rather than private residential use.[35] Therefore, a home share host may need to claim directly against a guest for compensation. Residential tenancy legislation, and the tribunal through which claims are made, may provide a less expensive and more accessible forum for such claims compared to litigation in court.

As mentioned above, it is commonly assumed that the most serious issues raised by the practice of home sharing involve the effects on third parties, and in particular, neighbours. However, this article argues that it is inevitable that disputes and litigation between home share hosts and guests will eventuate. In this light, it is important to determine whether the relationship between the parties is purely contractual (based on a licence), or whether it is regulated by the existing body of residential tenancy law (including residential tenancy legislation).[36]

V Does *Swan* Apply in Other Jurisdictions?

As mentioned above, Victorian residential tenancy law is unique in Australia in that the common law definition of a lease is also the basic test for coverage by Victoria's residential tenancy legislation. All the other jurisdictions in Australia require merely a 'tenancy agreement' in order for the relevant residential tenancy legislation to apply.[37] Furthermore, the relevant legislation in these jurisdictions provides that exclusive possession is *not* required for the legislation to apply. Therefore, in these jurisdictions, the question of whether an arrangement constitutes a lease is separate from the question of whether the relevant legislation applies.[38]

The relevant provision dispensing with the requirement of exclusive possession in Western Australia[39] was considered in *Commissioner for Fair Trading v Voulon*.[40] In that case, the Supreme Court of Western Australia noted that the provision 'appears

34 Airbnb, *Host Guarantee Terms and Conditions* (19 June 2017) <http:/airbnb.com/terms/host_guarantee>.

35 Pearce, above n 8, 70–3.

36 The significance of this issue is highlighted in Pearce, above n 8; Christensen and Duncan, above n 8 and Maese, above n 8. See also Kelly, above n 8 and Cocks, above n 8.

37 *Australian Capital Territory Act* s 6A(3); *New South Wales Act* s 13(1); *Northern Territory Act* s 4; *Queensland Act* s 12(2); *South Australian Act* s 3; *Tasmanian Act* s 10(1); *Western Australian Act* s 3.

38 There is also the issue of whether an exception contained in the legislation applies to a particular arrangement. This issue, relevant to all jurisdictions, is addressed in Part VI of this article.

39 *Western Australian Act* s 3.

40 [2005] WASC 229 (Hasluck J) ('*Voulon*').

to effect a significant change to the position at common law.'[41] The Court noted that, unlike the common law test for a lease, the statutory provision did not require exclusive possession in order for the Act to apply.[42] Significantly, the Court held that certain arrangements — such as those between hosts and boarders or lodgers — that are regarded as licences (rather than leases), may be covered by the statutory definition.[43] This statement is of course subject to any exceptions contained in the relevant legislation.

VI Statutory and Other Exceptions to Coverage

This article now briefly examines the nature and scope of four key exceptions contained in residential tenancy legislation that are relevant to home sharing. Consideration of these exceptions is necessary in order to determine whether home sharing arrangements are covered by residential tenancy legislation in each jurisdiction in Australia. As mentioned above, considering whether an exception applies is the second stage in determining whether residential tenancy legislation applies to a particular arrangement. The main statutory exceptions that will be examined here are for boarders and lodgers, business premises, and holiday premises. This section will also briefly consider common law exceptions to coverage; in the United Kingdom, as discussed below, courts have identified circumstances in which an arrangement confers exclusive possession but will not be considered a lease.

This article outlines, in broad terms, these exceptions and their relevance to home sharing. It does not seek to precisely define their scope. This is not possible due to the wording of the relevant provisions differing from jurisdiction to jurisdiction. There are also relatively few reported decisions concerning these provisions.

A *Boarders and Lodgers*

The most significant exception, in relation to home sharing, is that relating to boarding and lodging arrangements. All Australian jurisdictions exempt such arrangements from coverage by the relevant legislation. In Victoria, such arrangements are exempted because they constitute licences and not leases. In other jurisdictions, these arrangements are exempted by express legislative provisions.[44]

The words 'boarder' and 'lodger' have been considered in many decisions, and many definitions have been offered. In *Voulon,*[45] the Supreme Court of Western Australia considered a number of these decisions. The Court held that a 'lodger' is a person who 'resides … in another person's house, paying a certain sum periodically for the

41 Ibid [38].

42 Ibid [78]–[79], [82].

43 Ibid [38].

44 See, eg, *New South Wales Act* s 8(c); *Queensland Act* s 29(2); *South Australian Act* s 5(1)(b); *Tasmanian Act* s 6.

45 [2005] WASC 229 (Hasluck J).

accommodation'.[46] A 'boarder' is a person who has their food and lodgings provided at the house of another for compensation.[47] As mentioned above, both boarders and lodgers are regarded as licensees at common law.[48]

The distinction between the two types of arrangements is, however, significant. As the quotes above suggest, a 'lodger' shares the premises with the host. A lodger does not have exclusive possession of the premises because the host lives in and shares the use of the premises with the guest. A 'boarder', however, has services provided to them by the host, in addition to the provision of accommodation, though the host usually does not live in the premises with the guest. Generally, the provision of services — such as meals, clean linen and housekeeping — involves the host accessing the guest's room.[49] Therefore, a boarder does not have exclusive possession of the premises, including their own room.[50]

When a host provides services to guests — particularly when this involves the host accessing the guest's room — the arrangement will not be covered by residential tenancy legislation.[51] When parts of the premises are shared with the host, this type of arrangement also would not be covered by residential tenancy legislation in Australia.[52] Similarly, hotel, motel, backpacker accommodation, and serviced apartments are expressly excluded from residential tenancy legislation in every Australian jurisdiction.[53] Due to the host accessing the guest's room during the stay, for example, to provide cleaning, such arrangements would generally constitute licences at common law.

B *Premises Used for Commercial Purposes*

Residential tenancy legislation excludes from its coverage premises that are used 'primarily for the purposes of a trade, profession or business', rather than for

46 Ibid [59] citing *Noblett & Mansfield v Manley* [1952] SASR 155, 158 (Mayo J). See also Allan Anforth, Peter Christensen and Bill Taylor, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017) 28–37, [2.3.8].

47 *Voulon* [2005] WASC 229.

48 Ibid.

49 Ibid [62]–[64]. See also *Street v Mountford* [1985] 2 AC 809, 817–8 (Lord Templeman).

50 *Voulon* [2005] WASC 229, [81]–[82].

51 *Queensland Act* s 433 lists a number of matters relevant to determining whether a person is a boarder or a lodger. This list includes whether services are provided to the person, and whether the person shares facilities in the premises, including the bathroom and kitchen facilities.

52 The significance of the provision of services to guests is examined further in Part VIID of this article, in the context of examining the correctness of the *Swan* decision.

53 *Victorian Act* s 20; *New South Wales Act* ss 7(c)–(e).

residential purposes.[54] These provisions distinguish between premises that are used for residential, as opposed to commercial, purposes. However, the extent to which premises may be used for a professional or business purpose before residential legislation ceases to apply seems to be one of degree.

This exception may apply where particular premises are used for a business purpose, for example, where the premises are made available for profit on a home sharing platform. Commonly, it is assumed that home share hosts are home owners seeking to earn some extra income from an underutilised asset.[55] However, for many hosts, home sharing has many features of a business: they offer several premises for home sharing (often through an agent), they have never lived in the premises, and their income is largely derived from this source.[56]

According to the few reported Canadian decisions,[57] whether premises are used 'primarily' or 'predominantly' for a business purpose depends on several factors. This includes the nature and extent of the business activities being carried on at the premises, the proportions of floor space used for private residential and commercial purposes respectively, and the frequency and duration of such commercial use.[58] To determine whether the exception applies, courts examine the terms of the written agreement, and the actual use of the premises.[59] Whether this exception applies to a particular home sharing arrangement would depend on the particular circumstances, but it is more likely to apply when the premises are used primarily for commercial, rather than residential, purposes.

C *Holiday Premises*

Premises that are 'ordinarily used for holiday purposes' are excluded from coverage by residential tenancy legislation.[60] The precise scope and nature of these exceptions is unclear, particularly regarding how a 'holiday purpose' is determined. In *Re Glynn; Ex Parte Royle*,[61] the Full Court of the Supreme Court of Western Australia considered

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54 *Victorian Act* s 7; *New South Wales Act* s 7(h). The *New South Wales Act* uses the term 'predominant', whereas the *Victorian Act* uses 'primarily'. Although the wording is different, the effect of these provisions seems to be the same. The test of 'predominant' purpose was developed in *Re Hanh* (1979) 23 OR (2d) 689 (Ontario Divisional Court).

55 See Pearce, above n 8.

56 Hutchinson, above n 15.

57 There are no reported decisions in Australia.

58 *Re Hanh* (1979) 23 OR (2d) 689 (Ontario Divisional Court).

59 *Gardiner v 857 Beatty Street Project* (2008) 290 DLR (4th) 267 (Court of Appeal of British Columbia).

60 *Victorian Act* s 10. See also the *New South Wales Act* s 8(1)(h), which excludes premises that are let for holiday purposes for a period of not more than three months.

61 [2003] WASCA 122.

an equivalent provision in the *Western Australian Act*.[62] The Court held that the exception does not depend on the 'holiday' being of short duration or one-off.[63] As a result, a long-term holiday home could potentially be exempt.[64] The Court suggested that, for the exception to apply, the 'exclusive purpose' of the arrangement must be making the premises available for a holiday,[65] and it is the purpose of entry into the particular agreement, rather than the nature of the premises itself, which is relevant.[66]

Home sharing is often used as a form of holiday accommodation. That is, the premises are used for recreational purposes. However, home sharing is also used by many guests for business purposes. It is difficult to determine whether the exception for holiday premises would apply to home sharing arrangements generally.

D *Common Law Exceptions*

In the UK, certain court decisions suggest that there are certain circumstances where, despite the fact that exclusive possession is granted, a lease does not exist. These circumstances (so-called 'common law' exceptions) will be briefly outlined. It is important to note that these exceptions are not part of Australian common law.

First, in *Street v Mountford*[67] the House of Lords suggested that there are circumstances where a person who is given exclusive possession will not have a lease. This occurs where there is another, pre-existing relationship between the parties, such as a family relationship, or that of master and servant. In these circumstances, the pre-existing relationship is regarded as the dominant one, making the imposition of a landlord-tenant relationship unsuitable or inappropriate.[68]

The second scenario includes circumstances where there is said to be no intention by the parties to create a legal relationship.[69] Commonly, this would be based on the nature of the relationship between the parties, and the most common examples are familial relationships. Relationships of 'charity' are also included, particularly where little or no rent is paid for the accommodation.[70]

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62 *Western Australian Act* s 5(2)(c).

63 *Re Glynn; Ex Parte Royle* [2003] WASCA 122 (per Wheeler J, Murray J agreeing).

64 Ibid.

65 Ibid [33].

66 Ibid [64].

67 [1985] AC 809.

68 Ibid 817–8 (Lord Templeman).

69 Ibid.

70 Ibid. This decision illustrates the overlap between the contractual and the property aspects of a lease: see Nicholas Shaw, 'Contractualisation and the Lease-Licence Distinction' (1996) 18 *Adelaide Law Review* 213.

As mentioned above, exclusive possession is the test for a lease in Australia, and there are no common law exceptions such as those recognised in the UK.[71]

VII Is *Swan* Correct?

This section examines the correctness of the Court's decision in *Swan*. If the decision is not correct according to legal precedent, then the implication from the decision which has been made in this article — that all home sharing arrangements may constitute a lease — cannot stand. As mentioned above, the Court's decision in *Swan* was based on the concept of exclusive possession. This section will briefly outline this concept, before examining three aspects that were raised in argument. These aspects are: the relevance of the arrangement being described as a 'licence' in the agreement; the short duration of each guest's stay; the provision of services; and access to the premises by the host during each stay.

A *Exclusive Possession*

Exclusive possession is the 'right to exclude others, including the lessor, from the premises'.[72] However, the right to exclude 'all others' (particularly the landlord), is never absolute. This is because, at common law and under legislation, a landlord retains the power to enter the rented premises and to inspect it for various purposes, including the right to carry out necessary repairs.[73]

Exclusive possession is not only a circular test for the existence of a lease,[74] it is also an amorphous concept to identify. That is, the factors relevant to determining its existence will vary from one situation to another. It is therefore difficult to predict with any certainty how a particular arrangement will be characterised by a particular court.

What is settled, however, is that courts determine whether exclusive possession has been granted by examining the terms of the lease agreement.[75] It should also be

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71 *Radaich v Smith* (1959) 101 CLR 209, 221–3 (Windeyer J) ('*Radaich*'). However, there are statutory exceptions that may apply in similar circumstances (such as the exceptions for employee tenants). Also, where the nature of the relationship between the parties (such as a family relationship) may negate an intention to create a legal relationship, it may be argued that there is no tenancy agreement (rather than there being no lease).

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

73 See, eg, *Victorian Act* ss 85–6, which regulates a landlord's right of inspection and right of entry.

74 A tenant has a legal right to exclude others from the premises. However, the defining feature of a tenancy is the ability to exclude others. The test for a lease is therefore indistinguishable from its legal consequences: See Pearce, above n 8.

75 *Street* [1985] AC 809, 826–7 (Lord Templeman). See also *Radaich* (1959) 101 CLR 209, 221–3 (Windeyer J).

noted that a lease agreement may be created with very little formality. A lease may be oral or in writing, and its terms may be express or implied.[76] Courts examine the parties' words and actions, and any written documents, to determine the terms and nature of the arrangement.

B *The Relevance of Descriptions Used by the Parties*

One of the most difficult issues in tenancy law is determining the relevance of the words used in the agreement describing the arrangement. Generally speaking, it is in the interests of a host to try to characterise the relationship as a licence, rather than a lease. This is because a licensee has fewer rights. For example, the licensee can be removed immediately when the licence is revoked. Also, as mentioned above, courts base their characterisation of the arrangement on the terms of the agreement. Therefore, it is common for an accommodation agreement to expressly provide that it is a licence, not a lease, and to expressly deny that exclusive possession is granted.

In *Swan*, the Court examined the language used in the agreement entered by individual guests, which was provided on the Airbnb website. The agreement described Airbnb visitors as 'guests' (rather than 'tenants') and described the arrangement as a 'licence' (rather than a 'lease').[77] In relation to these descriptions, the Court stated that the agreement must be considered as a matter of 'substance', rather than mere 'form', and that the surrounding circumstances must be considered.[78] The Court held that it was not bound by 'self-serving subjective statements'[79] and that the parties could not 'escape the legal consequences of one relationship by professing that it is another'.[80]

It is a well-established doctrine that courts are not bound by the labels or descriptions that parties give to a particular agreement or arrangement.[81] On the contrary, a court must determine objectively whether a particular arrangement confers exclusive possession.[82] The leading case on this topic is *Street v Mountford*,[83] which the Victorian Supreme Court referred to in *Swan*. In this case, the landlord argued that the applicable tenancy legislation did not apply to the arrangement, as it was titled a 'licence agreement'.[84] However, the House of Lords determined that the arrangement conferred exclusive possession. Therefore, despite being labelled as a licence, the

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76 See, eg, *Victorian Act* s 3; *New South Wales Act* s 13. Both of these provisions state that a tenancy agreement may be oral or in writing.

77 *Swan v Uecker (Residential Tenancies)* [2016] VCAT 483 (24 March 2016) [41]. See Airbnb, above n 5, cl 8.2.

78 *Swan* (2016) 50 VR 74, 91 [40], 93–4 [47], 100 [66]. Justice Croft cited the statement of Tadgell JA in *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174,177 [6] of the need for a court to determine the 'true nature of the grant' at 90 [37].

79 *Swan* (2016) 50 VR 74, 87 [32].

80 Ibid 86 [31] quoting *Radaich* (1959) 101 CLR 209, 222 (Windeyer J).

81 *Radaich* (1959) 101 CLR 209, 221–3 (Windeyer J).

82 Ibid.

83 [1985] AC 809.

84 Ibid 816 (Lord Templeman).

arrangement was characterised as a lease and the protections of tenancy legislation consequently applied.

The approach, and conclusion, of the Court in *Swan* on this issue is arguably correct. Whether the parties describe the arrangement as a licence or a lease in the written agreement is simply a label of their intention. According to the two cardinal principles outlined above (first, that an objective approach is taken to characterising the relationship, and second, that the agreement is examined as a matter of substance and not mere form), the form the parties use to categorise the arrangement is irrelevant. As the courts have repeatedly affirmed, 'the only intention which is relevant is the intention demonstrated by the agreement [as interpreted by the court]'.[85]

Home sharing arrangements are different to traditional types of landlord-tenant relationships, such as the one in *Street*. It is also true that the approach developed by courts in relation to the descriptions used in the agreement have typically worked to protect tenants from unscrupulous landlords, who were seeking to avoid the application of residential tenancy legislation to particular arrangements. This approach, when applied in the circumstances in *Swan*, actually worked to the disadvantage of the tenants who were evicted for breaching their tenancy agreement. However, the Court's application of these principles in *Swan* seems hard to fault.

C *The Short Duration of Each Guest's Stay*

The second issue considered by the Court was the short duration of the accommodation provided to each Airbnb guest. In *Swan*, the Court simply stated that 'short term leases are…not eschewed by the common law',[86] and that a lease could be 'for days or even hours'.[87] This statement of principle, although technically correct, is open to a number of criticisms. First, none of the dicta relied on by the Court in support of this proposition were from residential tenancies decisions.[88] Further, it is arguable that residential tenancies create a distinct type of lease agreement, and principles developed in relation to general commercial leases, such as those relied on by the Court in *Swan*, do not necessarily apply to them.[89] Second, the distinguishing feature

85 Ibid 809, 826 (Lord Templeman).

86 *Swan* (2016) 50 VR 74, 92 [42].

87 Ibid citing *Genco v Salter* (2013) 46 VR 507, 514 [29] (Nettle JA).

88 The decisions referred to were *Genco v Salter* (2013) 46 VR 507 and *Western Australia v Ward* (2002) 213 CLR 1. The former case concerned the classification of particular premises under the Building Code of Australia. The latter case concerned native title and involved consideration of pastoral leases.

89 See Adrian Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Australian Government Publishing Service, 1975). Moore notes that a major purpose for the enactment of the Residential Tenancy Acts was that 'the body of landlord-tenant law concerning commercial premises would diverge from that concerning residential premises': Anthony Moore, 'Adrian Bradbrook and Residential Tenancy Reform' in Paul Babie and Paul Leadbeter (eds), *Law As Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 139, 141.

of a residential tenancy (as opposed to a pastoral or commercial lease) is that the premises are used 'primarily for residential purposes'.[90] Although the premises need not be the tenants' only or even primary residence, taking up 'residence' would, as a practical matter, usually involve the connection of utilities such as gas, electricity and water, and moving in a substantial amount of furniture and other belongings.[91] Obviously, this is not consistent with the notion of a tenancy lasting for a few 'days or even hours'.

In *Swan*, the Court referred to decisions of the 'highest level in the House of Lords'[92] on the general meaning of exclusive possession. The Court need not, however, have looked so far afield. At the time of the Court's decision, Australian tenancy tribunals had considered the issue of home sharing on two previous occasions (not including the decision under review in that case). In both of these decisions, the tribunal had determined that short stay accommodation such as Airbnb did not constitute a lease.[93] In *Knight*, the Victorian Civil and Administrative Tribunal Member emphasised that a lease would usually involve the premises becoming a person's 'usual residence' and an 'expectation [by the parties] of…continuing occupation'.[94] It is arguable that these decisions, by tribunal members who are experienced in the specialised field of residential tenancy law, are worthy of serious consideration, and should have at least been referred to by the Court in *Swan*.

D *The Relevance of Services Provided by the Host*

The least convincing aspect of the Court's decision in *Swan* was its rejection of the similarity between home sharing arrangements, on one hand, and boarding or lodging arrangements, on the other.[95] As mentioned above, boarding and lodging arrangements have always been regarded as a licence, rather than a lease, because the guest does not have exclusive possession of the premises. On the contrary, the host would usually access the guest's room, to provide services such as room cleaning, room service and laundry service. Indeed, the Court accepted that a hotel guest or lodger would usually be regarded as a licensee, rather than a tenant.[96] Also, in *Street v Mountford*, Lord Templeman emphasised the distinction between a lease and a situation where 'attendance or services' are provided with the accommodation.[97]

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90 See *Victorian Act* s 7.

91 It is notable that the Court cautioned against conflating 'practicalities with the actual legal position': *Swan* (2016) 50 VR 74, 91 [41].

92 *Swan* (2016) 50 VR 74, 89 [35].

93 *Wong & Shih v Doney* [2016] NTCAT 57 (3 February 2016) (Buxner P); *Alex Taxis Pty Ltd v Knight (Residential Tenancies)* [2016] VCAT 528 (30 March 2016) (Member Kirmos) ('*Knight*').

94 *Knight* [2016] VCAT 528 (30 March 2016) (Member Kirmos) [30].

95 In this context, boarding and lodging arrangements include hotel-like accommodation (which was referred to synonymously by the Court).

96 *Swan* (2016) 50 VR 74, 91 [40].

97 *Street v Mountford* [1985] AC 809, 818.

In *Swan*, the Court simply stated that the 'hotel room analogy is not appropriate in the present circumstances'[98], and that the occupancy granted to Airbnb guests was 'not akin to that of a "lodger" or hotel guest'.[99] It is clear, however, that the arrangement in *Swan* had many similarities to that of a hotel guest, and was unlike a conventional tenancy arrangement. First, Airbnb guests had limited use of the premises, such as strict Check In and Check Out times, and were subject to strict House Rules (including restrictions on noise and smoking). These restrictions on the use of the premises are not consistent with the general right to undisturbed use of the premises that a tenant ordinarily enjoys. Second, guests were provided significant services by the host, such as tourist information, clean linen and towels, house cleaning and basic food items such as tea and coffee. In summary, the arrangement appeared to be a lodging or boarding arrangement, which has traditionally been characterised as a licence rather than a lease.[100]

VIII Conclusion

The decision of the Supreme Court of Victoria in *Swan* is a mixed result for home sharing in Australia. On the one hand, the decision may protect landlords from unauthorised subletting of rented premises by tenants offering the premises online. On the other hand, the decision may impose significant obligations under tenancy law on all those who offer premises on Airbnb and similar platforms. This is due to the central holding in *Swan*: the relationship between a home share host and guest may constitute a lease at common law.

This article has examined some significant issues arising from this decision. First, it outlined some legal consequences of home share arrangements constituting a lease, such as the strict process for evicting a tenant under residential tenancy legislation. Second, it examined whether home share arrangements would be covered by residential tenancy legislation in jurisdictions other than Victoria. It concluded that the exclusion of boarding and lodging arrangements in other jurisdictions may apply to home share arrangements. The article also examined some other exclusions from coverage, such as business premises, holiday premises, and common law exceptions recognised in the UK. Finally, this article examined the correctness of the *Swan* decision, particularly in relation to the similarities between boarding and lodging arrangements, and home share arrangements. It is notable that the *Swan* decision has not yet been followed or approved by another court, but neither has it been disapproved at the time of writing.

The *Swan* decision highlighted that home share arrangements may constitute a lease, and may be covered by residential tenancy legislation. However, as the Court emphasised, each home sharing arrangement will depend on its particular facts and circumstances. It seems clear, for example, that those arrangements where the host

98 *Swan* (2016) 50 VR 74, 93 [46].

99 Ibid.

100 See Part VIA of this article.

resides in the premises with the guest constitute a licence, and not a lease, and so are outside the scope of residential tenancy law. Much will depend on the terms of the agreement, the nature of the premises, and the surrounding circumstances. As highlighted above, a significant factor will be the nature and extent of any services provided by the host, and any access the host has to the premises during the stay.