

EXCLUSIVE POSSESSION, ‘CONTRACTUALISATION’ AND THE LEASE-LICENCE DICHOTOMY: A RECONSIDERATION OF LEGAL CATEGORISATION IN THE AIRBNB ERA

ABSTRACT

Airbnb is one of the most disruptive companies in the ‘Sharing Economy’. Its business model is built upon a triangular structure of legal relationships that remains poorly understood and inadequately analysed in terms of legal classification. This article examines the issue of legal categorisation vis-à-vis the relationship between the Airbnb host and the Airbnb guest. Focusing on the common law distinction between leases and licences, this article re-evaluates the analysis of the lease-licence dichotomy in the context of Airbnb. It argues that the elements of possession — physical control (*factum possessionis*) and relevant intention (*animus possidendi*) — should be considered in the lease-licence analysis. With this normative claim, this article concludes that contrary to the decision in *Swan v Uecker*,¹ the contractual arrangement between the Airbnb host and the Airbnb guest should be categorised as a licence relationship, rather than a lease.

I INTRODUCTION

Airbnb is a benchmark of the new platform-based models that are often included under the umbrella concept of the ‘Sharing Economy’, and one of the most notorious and disruptive technology-based models in recent times.² From a small business challenging incumbent firms in 2008, to a \$30 billion firm in 2019 (pre COVID-19), to an undisputable corporate giant today, Airbnb has become

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¹ (2016) 50 VR 74.

² See Orly Lobel, ‘The Law of the Platform’ (2016) 101(1) *Minnesota Law Review* 87, 94.

an undeniable global market force in the accommodation industry.³ In the words of Member Campana of the Victorian Civil and Administrative Tribunal (“VCAT”), ‘Airbnb is to the residential tenancy market what Uber is to the taxi industry’.⁴

Since its creation, Airbnb has changed how people offer, search for, and find accommodation. It has created an alternative market where individuals provide lodging in private homes or investment properties to a semi-public audience comprised of those registered on the digital platform. This differs from the conventional accommodation paradigm in which incumbent firms rely on inns and hotel chains to offer accommodation to the general public. Airbnb has given guests broader accommodation options at competitive prices, while creating a new way for hosts to monetise private spaces. Additionally, Airbnb has reconfigured the dynamics between hosts and guests. Unlike the orthodox accommodation model where inns and hotels interact directly with guests, Airbnb intermediates the connection between hosts and guests through its digital platform. It plays an active role in the creation, execution, and termination of the model’s legal relationships,⁵ while reducing information asymmetries and transaction costs.⁶

One of the main legal issues of the Airbnb model that has bedevilled legislators, judges, and analysts is the legal categorisation of the relationship between the Airbnb host and the Airbnb guest.⁷ Specifically, it is unclear whether the relationship should

³ See: Bryan P Schwartz and Ellie Einarson, ‘The Disruptive Force of the Sharing Economy’ (2018) 18(1) *Asper Review of International Business and Trade Law* 221, 228; Harriet Sherwood, ‘How Airbnb Took Over the World’, *The Guardian* (online, 5 May 2019) <<https://www.theguardian.com/technology/2019/may/05/airbnb-homelessness-renting-housing-accommodation-social-policy-cities-travel-leisure>>; Airbnb, *2023 Annual Report* (Report, 16 February 2024) 68 <<https://d18rn0p25nwr6d.cloudfront.net/CIK-0001559720/312a8de0-4be0-4a09-a442-e5fa3ffea0a6.pdf>>.

⁴ *Swan v Uecker* [2016] VCAT 483, [1] (‘*Swan VCAT*’).

⁵ Juan Diaz-Granados and Benedict Sheehy, ‘The Sharing Economy & the Platform Operator-User-Provider “PUP Model”: Analytical Legal Frameworks’ (2021) 31(4) *Fordham Intellectual Property, Media and Entertainment Law Journal* 997, 1035.

⁶ See: Orly Lobel, ‘Coase and the Platform Economy’ in Nestor M Davidson, Michèle Finck and John J Infranca (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press, 2018) 67, 70; Roberta A Kaplan and Michael Nadler, ‘Airbnb: A Case Study in Occupancy Regulation and Taxation’ (2015) 82 *University of Chicago Law Review Dialogue* 103, 103; Rashmi Dyal-Chand, ‘Regulating Sharing: The Sharing Economy as an Alternative Capitalist System’ (2015) 90(2) *Tulane Law Review* 241, 258.

⁷ See, eg: *CAPREIT v Wagstaff* [2020] NSJ No 470, [25] (Nova Scotia Small Claims Court); *McGillis v Department of Economic Opportunity*, 210 So 3d 220, 223 (Fla 3d Dist App, 2017) (Logue J).

be categorised as a *lease* or a *licence*,⁸ a 'finely balanced'⁹ and 'slightly elusive' distinction.¹⁰ In Australia, the pivotal case on this issue is *Swan v Uecker*¹¹ ('*Swan*'). Sitting as a single judge in the Supreme Court of Victoria, Croft J categorised the relationship between an Airbnb host and an Airbnb guest as a lease. This decision has important implications. First, it is the leading case on the categorisation issue of the Airbnb model domestically, which 'potentially affects thousands of tenants; not only in Victoria, but Australia-wide'.¹² Second, the decision was surprising in that it departed from previous decisions on this issue.¹³ According to Bill Swannie, '[t]he decision is arguably inconsistent not only with established principles of tenancy laws, but also with previous Supreme Court decisions which seek to protect tenants from arbitrary eviction'.¹⁴ Third, the scope of the decision was limited to rental agreements of entire apartments,¹⁵ thus leaving uncertain the legal categorisation of agreements involving only parts of the premises, such as a bedroom.¹⁶ Finally, the High Court of Australia has not tested the approach adopted in *Swan*. Therefore, the legal categorisation of the Airbnb host-guest relationship remains uncertain at common law.¹⁷

This article proposes a reconsideration of the analysis of the lease-licence dichotomy in the context of platform-mediated models such as Airbnb. It argues that the elements

⁸ The terms 'lease' and 'tenancy' are used in this article interchangeably to refer to the same legal category: see *Re Negus* [1895] 1 Ch 73, 79. See also Juan Díaz-Granados, 'Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 2' (2022) 62 (Spring) *Jurimetrics* 241, 271–9.

⁹ *Living and Leisure Australia Ltd v Commissioner of State Revenue* (2018) 108 ATR 736, 738 [2], 742 [23] (Ferguson CJ and Whelan JA).

¹⁰ Kevin J Gray, 'Lease or Licence to Evade the Rent Act?' (1979) 38(1) *Cambridge Law Journal* 38, 41 ('Lease or Licence to Evade the Rent Act?').

¹¹ (2016) 50 VR 74 ('*Swan*').

¹² Bill Swannie, 'Trouble in Paradise: Are Home Sharing Arrangements "Subletting" under Residential Tenancies Legislation?' (2016) 25(3) *Australian Property Law Journal* 183, 184 ('Trouble in Paradise'). In *Li v Yang*, for instance, Member Boddison observed that although all the factors of the case suggested 'that the Airbnb arrangement did not create a tenancy agreement', she was 'bound to follow' *Swan* (n 11), leading to the categorisation of the relationship as a sublease: *Li v Yang* [2018] VCAT 293, [33], [36].

¹³ See, eg, *Alex Taxis Pty Ltd v Knight* [2016] VCAT 528, [27]–[31] ('*Alex Taxis*'). See also Bill Swannie, 'Airbnb and Residential Tenancy Law: Do "Home Sharing" Arrangements Constitute a Licence or a Lease?' (2018) 39(2) *Adelaide Law Review* 231, 245 ('Airbnb and Residential Tenancy Law').

¹⁴ Swannie, 'Trouble in Paradise' (n 12) 184.

¹⁵ For the purposes of this article, the legal category 'rental agreements' includes both leases and licences.

¹⁶ See Swannie, 'Trouble in Paradise' (n 12) 189.

¹⁷ Melissa Pocock, 'Blurred Lines or Stark Contrasts: Are By-Laws to Restrict Short-Term Holiday Letting Permissible in Queensland Community Titles Schemes?' (2021) 44(4) *University of New South Wales Law Journal* 1524, 1551.

of possession *should* be considered in the analysis. Given that the applicable common law test to differentiate a lease relationship from a licence is whether exclusive possession is granted,¹⁸ the determination should evaluate the elements of possession: physical control (*factum possessionis*), and relevant intention (*animus possidendi*). Possession is a property law artefact and, as such, its transfer and verification should consider property law doctrines, not exclusively contract law principles — as is the current approach. This approach reflects a phenomenon known as the ‘contractualisation’ of lease law, referring to ‘the favouring of the contractual nature of the lease and a subversion of the proprietary side’.¹⁹ According to Nicholas Shaw

[a]pplying modern contractual doctrines to leases might not just be extending contract law, as an initial step, it may also interfere with the operation of property law principles and, more profoundly, the accepted mode of settling inconsistency between the two systems.²⁰

Analysis of the elements of possession, thus, in the context of Airbnb, helps determine whether the host transfers possession of the property to the guest, and thus helps address the categorisation issue.

Taking the analysis of exclusive possession and the right to possess seriously, this article argues that the usual arrangement between the Airbnb host and Airbnb guest, unlike the conclusion reached in *Swan*, creates a licence relationship rather than a lease relationship. When the elements of possession are examined, it is possible to conclude that the Airbnb host does not transfer the right to possess the property but rather the right to use it. As a result, the Airbnb rental agreements between hosts and guests *should* be categorised as licences.

This article presents a normative argument developed around the common law distinction between leases and licences. Its primary focus is to provide an alternative approach for analysing this distinction in the Airbnb model and other similar platform-based models, rather than delving into the intricacies of state-level legislative and regulatory aspects operating in standard real property lease relationships, which vary across Australia.²¹ Thus, this article aims to contribute to a national-level

¹⁸ *Swan* (n 11) 85–6 [31]; *Street v Mountford* [1985] AC 809, 816 (*‘Street’*). See also Swannie, ‘Airbnb and Residential Tenancy Law’ (n 13) 231.

¹⁹ Nicholas Shaw, ‘Contractualisation and the Lease-Licence Distinction’ (1996) 18(2) *Adelaide Law Review* 213, 213. See also Jack Effron, ‘The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities’ (1988) 14(2) *Monash University Law Review* 83, 84.

²⁰ Shaw (n 19) 224.

²¹ Paul Latimer explains that examining the different Residential Tenancy Acts in Australia is problematic, ‘as there is no uniform and national approach to the regulation of residential tenancies and there are differences in detail in each state and territory’: see Paul Latimer, ‘A Flatmate in a Sharehouse — A Tenancy or a Licence to Occupy?’ (2020) 49(3) *Australian Bar Review* 506, 507. Latimer later notes that there is also an absence of uniform national approach to categorising and regulating short-term rental accommodations: at 524.

discussion of common law principles that should apply to the categorisation issue around platform-based, accommodation-focused legal models such as Airbnb.

This article is divided into three parts, besides the introductory and concluding remarks. Part II explores the article's theoretical framework, which frames the discussion within platform-mediated models like Airbnb and focuses the analysis and argument of this article. Part III conceptually analyses the elements of exclusive possession together with the rights to possess and use. Lastly, Part IV applies the analysis to the Airbnb host-guest relationship in developing the article's argument.

II THEORETICAL FRAMEWORK: THE TMP-PUP MODEL

The Airbnb model is often associated with the so-called 'Sharing Economy'.²² The Sharing Economy, however, is an obscure concept without technical legal meaning. It is an umbrella term that is used to describe multiple activities, businesses, and sectors without a clear conceptual delineation.²³ The multidisciplinary analysis of the phenomenon exacerbates this ambiguity. The Sharing Economy phenomenon has been examined and defined from various perspectives, narratives, and theoretical foundations across multiple disciplines.²⁴ Adopting a framework suitable for each area of analysis is, thus, necessary.

From a legal perspective, the term 'Sharing Economy' is a misnomer.²⁵ Transactions completed via the digital platforms frequently associated with this phenomenon, such as Airbnb, are not intended to 'share'. 'Sharing' refers to '*gratuitous transfer[s]* of one or more — but not all — property rights a person has in respect of a thing — an excludable resource'.²⁶ In contrast, the platform operator and the supplier of goods and services in the Sharing Economy transactions seek profit and expect payment for the services and goods provided. These actors are motivated by profit, not altruism. From a legal perspective, the Airbnb model is better described as a 'time-limited, monetary-consideration-based, profit-driven platform

²² See Michelle Maese, 'Rethinking Host and Guest Relations in the Advent of Airbnb and the Sharing Economy' (2015) 2(3) *Texas A&M Journal of Property Law* 481, 484.

²³ See Ryan Calo and Alex Rosenblat, 'The Taking Economy: Uber, Information and Power' (2017) 117(6) *Columbia Law Review* 1623, 1670.

²⁴ See Diaz-Granados and Sheehy (n 5) 1005–6.

²⁵ Abbey Stemler, 'The Myth of the Sharing Economy and Its Implications for Regulating Innovation' (2017) 67(2) *Emory Law Journal* 197, 207.

²⁶ Diaz-Granados and Sheehy (n 5) 1018 (emphasis added). This definition adopts Tony Honoré's incidents of ownership to define 'property rights': at 1010–12. According to Honoré, the standard incidents of ownership (or bundle of rights) include the rights to possess, use, income, capital, security, transmissibility, absence of term, and residuality: Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987) 166–79.

operator-user-provider' ('TMP-PUP') model.²⁷ The TMP-PUP model, a subcategory of the 'platform operator-user-provider' model ('PUP'), has been defined as

a for-profit, triangular legal structure where two parties (Providers and Users) enter into binding contracts for the provision of goods (partial transfer of the property-bundle of rights) or services (ad hoc or casual services) in exchange for monetary payment through an online platform operated by a third party (Platform Operator) with an active role in the definition and development of the legal conditions upon which the goods and services are provided.²⁸

The Airbnb model falls within this definition. Airbnb runs a for-profit enterprise in which hosts partially transfer the bundle of property rights to guests for accommodation purposes in exchange for monetary payment. The Airbnb platform enables this interaction, and Airbnb, a third party to the transaction with an active role in the definition of the legal conditions through which the accommodation takes place, operates the platform.

The TMP-PUP model is crucial to frame the discussion. It makes it possible to explain that the Airbnb model has three different actors with three distinct legal relationships. The actors are: (1) the platform operator, in this case Airbnb, 'which using technology provides aggregation and interactivity to create a legal environment by setting the terms and conditions for all the actors';²⁹ (2) the provider, the Airbnb host, 'who provides a good or service also abiding by the Platform Operator's terms and conditions';³⁰ and (3) the user, the Airbnb guest, 'who consumes the good or service on the terms and conditions set by the Platform Operator'.³¹ In this triangular structure, Airbnb (the platform operator) plays a crucial role in the creation, execution, and termination of the legal relationships comprising the structure.³² It creates the internal legal environment of the model. Using the Airbnb terms of service,³³ Airbnb establishes the rights and duties of the actors involved. It also aggregates information on listings, profiles and payment mechanisms, facilitates interactions between hosts and guests, provides customer support, and resolves disputes.³⁴

The TMP-PUP model also explains the three legal relationships that are part of platform-based models such as Airbnb: (1) the platform operator-provider

²⁷ See generally Diaz-Granados and Sheehy (n 5) 1032.

²⁸ Ibid 1038.

²⁹ Ibid 1028.

³⁰ Ibid.

³¹ Ibid.

³² Ibid 1029–30.

³³ See 'Terms of Service', *Airbnb* (Web Page, 25 January 2024) <<https://www.airbnb.com.au/help/article/2908>>.

³⁴ See Dyal-Chand (n 6) 258, 297.

relationship; (2) the platform operator-user relationship; and (3) the provider-user relationship.³⁵ Taking the TMP-PUP framework, the Airbnb model involves: Airbnb as the platform operator; the host as the provider; and the guest as the user.

The transaction between the provider and the user is essential because the whole TMP-PUP model is designed to support this transaction.³⁶ It provides the revenue required to run the model and make a profit.³⁷ In the Airbnb model, this transaction refers to the partial transfer of the bundle of rights — notably the right to possess or the right to use — from the host to the guest ('core transaction').³⁸ For this transaction to occur, the host lists the property on the Airbnb platform and the interested guest must submit a request via the platform, the digital environment where the transaction occurs. Upon acceptance of the host and payment of the agreed price, the parties enter into a binding contract which defines the rights and duties of the core transaction.³⁹

Importantly, apart from the specific conditions identified by the Airbnb host in the listing, Airbnb dictates the primary contractual conditions of the core transaction via the terms of service. In these terms, Airbnb defines the legal nature of the core transaction and the different rights and duties of the parties involved. The terms of service take the legal form of an electronic standard form contract (or electronic adhesion contract) and are usually incorporated in a browse-wrap agreement — those 'where the online host dictates that assent is given merely by using the site'⁴⁰ — or a click-wrap agreement — those where the user 'must click "I agree," but not necessarily view the contract to which she is assenting'.⁴¹

The TMP-PUP model, therefore, frames the discussion and focuses the analysis of this article. The issue this article addresses refers to the potential legal categorisation of the relationship between the Airbnb host (provider) and the Airbnb guest (user). This relationship involves correlative contractual rights and duties between the Airbnb host and the Airbnb guest, and a potential transfer of the right to possess the Airbnb property.

³⁵ Diaz-Granados and Sheehy (n 5) 1028.

³⁶ Juan Diaz-Granados, 'Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 1' (2022) 62 (Winter) *Jurimetrics* 197, 211.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ '[I]n the TMP-PUP the goods and services are provided exclusively on a contract-basis': see Diaz-Granados and Sheehy (n 5) 1035.

⁴⁰ *Berkson v Gogo LLC*, 97 F Supp 3d 359, 394 (EDNY, 2015).

⁴¹ *Ibid* 395.

III CONCEPTUAL ANALYSIS: EXCLUSIVE POSSESSION AND THE RIGHT TO POSSESSION

Apart from being contract-based, the Airbnb core transaction involves a proprietary element.⁴² As discussed above, the Airbnb host transfers to the Airbnb guest part of their bundle of rights in respect of the Airbnb property.⁴³ Primarily, these rights are: (1) the right to possess, which involves a substantial concentration of power; or (2) the right to use, where the concentration of power is weaker.⁴⁴ The transfer of one of these rights is central to the analysis. It defines the application of one of the legal categories comprising the lease-licence dichotomy.

It has been accepted that the central factor determining the application of one of these mutually exclusive categories — lease or licence — is whether the transferor gives the transferee the right to possess, resulting in exclusive possession of the property, or the right to use, allowing its use and enjoyment.⁴⁵ In *Swan*, Croft J explained that '[i]t is well accepted that, as a matter of law, the test to be applied to distinguish between a lease and a licence is whether or not what is granted is exclusive possession'.⁴⁶ While the transfer of the right to possess creates a lease, transferring the right to use creates a licence. Exclusive possession is therefore 'the *sine qua non* of any tenancy'.⁴⁷ A lease creates a proprietary interest and a right in rem on the transferee, whereas a licence creates a non-proprietary legal relationship, usually contractual, and a right in personam.⁴⁸ In *Radaich v Smith*, Windeyer J opined:

⁴² Diaz-Granados and Sheehy (n 5) 1010, 1037.

⁴³ See above Part II. For a discussion of the 'bundle of rights' perception of property, see: Shane Nicholas Glackin, 'Back to Bundles: Deflating Property Rights, Again' (2014) 20(1) *Legal Theory* 1, 9; JE Penner, 'The Bundle of Rights Picture of Property' (1996) 43(3) *UCLA Law Review* 711, 712; Juan Diaz-Granados, "'Standard Jural Relations of Ownership": A Novel Theoretical Framework Informed by Wesley Hohfeld and Tony Honoré' (2023) 49(2) *Monash University Law Review* 134, 134–6.

⁴⁴ Brendan Edgeworth et al explain that substantial concentration of power over a thing is one of the factors differentiating property rights and contractual rights: Brendan Edgeworth et al, *Sackville and Neave Australian Property Law* (LexisNexis Butterworths, 10th ed, 2016) 9.

⁴⁵ *Radaich v Smith* (1959) 101 CLR 209, 222 ('*Radaich*'); *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1, 8; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, 408; *Landale v Menzies* (1909) 9 CLR 89, 99–100 (Griffith CJ), 111–12 (Barton J); *Swan* (n 11) 85 [31].

⁴⁶ *Ibid.*

⁴⁷ Gray, 'Lease or Licence to Evade the Rent Act?' (n 10) 40.

⁴⁸ Unless the licence is coupled with a grant or interest: see Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 154, 1288. Wesley Hohfeld explains that rights in personam avail against a determinate person or persons, while rights in rem avail against persons in general: Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 718.

What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant.⁴⁹

In his influential and generally accepted work on the 'standard incident of ownership', Tony Honoré provides valuable insights into the delineation of the right to possess and the right to use.⁵⁰ He argues that the 'standard incidents of ownership' are required to categorise a person as the 'owner' of the thing, as they refer to 'those legal rights, duties, and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system'.⁵¹ The right to possess and the right to use are part of these incidents. Honoré defines the right to possess as the right to exclusive control of the thing,⁵² which is consistent with the view that the right to possess is a right to exclude others from the thing.⁵³ He further explains that the right to use 'refers to the owner's personal use and enjoyment of the thing owned'.⁵⁴ Although conceptually accurate and taxonomically useful, further analysis is required to define the conceptual foundations to identify whether possession and the right to possess the Airbnb property are transferred in the Airbnb core transaction.

In the landmark case *Mabo v Queensland (No 2)*,⁵⁵ possession was defined as 'a conclusion of law defining the nature and status of a particular relationship of control by a person over land'.⁵⁶ In their leading work on possession, Frederick Pollock and Robert Samuel Wright add:

possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law, whether necessary or not, that a possessor should be able to deal with his apparent interest in the fashion of an owner not only by physical acts but by acts in the law, and that as regards every one not having a better title those acts should be valid.⁵⁷

⁴⁹ *Radaich* (n 45) 222 (Windeyer J) (emphasis in original).

⁵⁰ Honoré (n 26) 166–8.

⁵¹ *Ibid* 161. This article adopts Honoré's approach to define the elusive concept of 'ownership' and 'owner'.

⁵² *Ibid* 166.

⁵³ *Lewis v Bell* (1985) 1 NSWLR 731, 734 (Mahoney JA) ('*Lewis*').

⁵⁴ Honoré (n 26) 168.

⁵⁵ (1992) 175 CLR 1 ('*Mabo*').

⁵⁶ *Ibid* 207 (Toohey J).

⁵⁷ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 19.

However, physical possession does not necessarily imply a right to possess (possession in law).⁵⁸ The physical relation is distinct from the legal relation.⁵⁹ Pollock and Wright differentiate three concepts of possession. One is the physical possession of the thing, another is its legal possession, and another is the right to possess.⁶⁰ The first concept — also known as custody or detention — refers to possession ‘as an actual relation between a person and a thing, is matter of fact’.⁶¹ Physical possession is prima facie evidence of legal possession and the right to possess.⁶² The second concept applies to those situations where a person devoid of the right to possess is entitled ‘for the time being to repel and to claim redress for all and any acts of interference done otherwise than on behalf of the true owner’.⁶³ An instance of this concept is when B steals A’s coat. Once B has physical control of the coat, B has legal possession, even if it is wrongful.⁶⁴ Lastly, the right to possess refers to the incident of ownership.⁶⁵ In Pollock’s and Wright’s opinion, the right to possess ‘is a normal incident of ownership’, which ‘can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed’.⁶⁶ Thus, following the previous example, after B has physical control of the coat, A will retain the right to possess, not so the physical possession.

This article assumes that the potential transfer of the right to possess as a result of the Airbnb core transaction includes physical possession of the property; namely, that guests acquire possession in law in all instances in which they receive possession in fact from hosts.⁶⁷ If the right to possess — an incident of ownership — is transferred in the Airbnb model, it is accompanied by the physical and legal possession of the property. The term possessor(s), thus, is used in this article to refer to the TMP-PUP actors possessing the Airbnb property with an immediate right of possession.

⁵⁸ See ‘it is the legal right to possession, not the physical fact of exclusive “possession” or occupation, that is decisive’: *Western Australia v Ward* (2002) 213 CLR 1, 223 [503] (McHugh J) (*‘Ward’*). See also *Kamidian v Holt* [2008] EWHC 1483 (Comm) [75].

⁵⁹ Hohfeld (n 48) 721.

⁶⁰ Pollock and Wright (n 57) 26–7.

⁶¹ *Ibid* 26.

⁶² See: *NRMA Insurance Ltd v B&B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273, 279; *Mabo* (n 55) 163 (Dawson J).

⁶³ Pollock and Wright (n 57) 17.

⁶⁴ *Ibid* 26–7. See also: *Newington v Windeyer* (1985) 3 NSWLR 555, 563 (McHugh JA); *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1015 [87] (Lord Millett).

⁶⁵ See above n 50 and accompanying text.

⁶⁶ Pollock and Wright (n 57) 27.

⁶⁷ ‘When the fact of control is coupled with a legal claim and right to exercise it in one’s own name against the world at large, we have possession in law as well as in fact’: Pollock and Wright (n 57) 16.

Possession and the right to possess are intrinsically related.⁶⁸ Possession can be the cause or the consequence of the right to possess.⁶⁹ The law, first, may recognise a right to possess in favour of a person acquiring physical possession, even wrongfully (possession as *cause*).⁷⁰ Alternatively, a transfer of the right to possess between two contractual parties entitles the transferee to possess the property (possession as consequence). The Airbnb core transaction falls into the latter.

The crux of the analysis in both situations, possession as cause and possession as consequence, is exclusive possession.⁷¹ The difference lies in the subsequent test to determine exclusive possession. For one thing, the analysis of possession as cause, usually conducted in cases of adverse possession and possessory title, has traditionally examined the elements of possession: factual or physical control (*factum possessionis*), and relevant intention (*animus possidendi*).⁷² These elements are discussed below. For another thing, following the 'contractualisation' of lease law, the analysis of possession as consequence requires verifying the parties' intention to transfer exclusive possession.⁷³ Intention prevails when it is clear and, as a result, no categorisation issue arises in this situation.⁷⁴ The problem emerges when the intention of the contractual parties, in this case the Airbnb host and the Airbnb guest, is unclear.⁷⁵ It has been established that when the parties' intention is disputed, it is not decisive whether the contract classifies the relationship as a lease or a licence, or whether the right transferred is categorised as a right to possess or a right to use.⁷⁶ In this situation, the courts must follow contract law principles of

⁶⁸ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co, 1881) 214:

Every right is a consequence attached by the law to one or more facts which the law defines ... [w]hen a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights ... [t]he word 'possession' denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation.

For an in-depth discussion of the intrinsic relation between possession and the right to possess see Albert S Thayer, 'Possession and Ownership' (1907) 23(2) *Law Quarterly Review* 175.

⁶⁹ Thayer (n 68) 187.

⁷⁰ See above n 64 and accompanying text.

⁷¹ See: *Bayport Industries Pty Ltd v Watson* (2006) V ConvR 54-709 [39] ('*Bayport*'), quoting *Powell v McFarlane* (1977) 38 P & CR 45, 470-2 (Slade J) ('*Powell*'); *Swan* (n 11) 85-6 [31], quoting *Lewis* (n 53) 734-5 (Mahoney JA).

⁷² See *Bayport* (n 71) [39].

⁷³ *Swan* (n 11) 85-6 [31], quoting *Radaich* (n 45) 221-3; *Street* (n 18) 827.

⁷⁴ *Swan* (n 11) 85-7 [31]-[32].

⁷⁵ *Ibid.*

⁷⁶ *Radaich* (n 45) 214 (McTiernan J), 221-3 (Windeyer J); *Swan* (n 11) 85-6 [31]; *Western Australia v Brown* (2014) 253 CLR 507, 524 [43].

construction to determine the substance and effect of the instrument, ‘having regard to relevant surrounding circumstances’⁷⁷ (the test of possession as consequence).⁷⁸

The test of possession as consequence, however, falls short in the Airbnb context and, therefore, is insufficient to identify exclusive possession accurately. First, the application of the test of possession as *consequence* independently considered has been uncertain in the Airbnb context. Using the same test, Croft J in *Swan* took a different approach from relevant precedents that existed at the moment of the decision.⁷⁹ For instance, in *Alex Taxis Pty Ltd v Knight*,⁸⁰ Member Kirmos concluded: ‘I do not accept that offering rooms on Airbnb constitutes assigning or sub-letting, or purporting to assign or sub-let, the whole or part of the premises.’⁸¹ This situation illustrates what Member Proctor accurately noted in *Pettit v Murray Valley Aboriginal Cooperative*: ‘[t]he Court’s decision [in *Swan*] that the agreement between the parties in the context of an AirBnB arrangement was a residential tenancy agreement is an example of broad application of the “exclusive possession test”’.⁸² Similarly, legal scholars have flagged the inherent uncertainty of the test.⁸³

Second, *Swan* showed that even when the parties’ intention is not contested, the courts can still question the legal categorisation of the agreement. As explained below,⁸⁴ in this case, the Airbnb host and the Airbnb guest agreed that the accommodation arrangement was a licence, following the terms of service established by Airbnb. Ignoring this factor, the Court questioned and ultimately modified the legal categorisation agreed upon by the host and the guest. Consequently, the situations in which the courts can construe the rental agreement to determine intention for categorisation purposes are also uncertain.

Finally, the application of the test is problematic in TMP-PUP models like Airbnb. As discussed above, these models are structured as a tripartite set of contractual relationships, where the platform operator dictates the main conditions of the agreements through the terms of service.⁸⁵ This situation adds complexity to

⁷⁷ *Swan* (n 11) 91 [40].

⁷⁸ See: *Radaich* (n 45) 214 (McTiernan J), 220–1 (Menzies J); *Rial v Gray* [2023] VSC 302 [49]–[51], quoting Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources — The Laws of Australia* (Thomas Reuters, 2013) 545 [25.3.620].

⁷⁹ See Swannie, ‘Airbnb and Residential Tenancy Law’ (n 13) 245.

⁸⁰ [2016] VCAT 528. In this case, factually similar to *Swan* (n 11), the tenant advertised rooms on the rented premises for accommodation purposes on Airbnb and the landlord applied for an order of possession on the basis that the respondent had sublet the premises without the landlord’s consent: at [1]–[6].

⁸¹ *Ibid* [31].

⁸² [2022] VCAT 85 [64].

⁸³ See, eg, Swannie, ‘Airbnb and Residential Tenancy Law’ (n 13) 242.

⁸⁴ See below n 126 and accompanying text.

⁸⁵ See above Part II.

the determination of the parties' intention which does not exist in traditional rental agreements.

As a result, solutions must be found elsewhere. Property law arises as a clear alternative, considering exclusive possession is an artefact of property law. The proprietary dimension of the analysis can be observed, this article argues, through the incorporation of the test of possession as cause; that is, via the introduction of the elements of possession into the analysis. This approach reconsiders the proprietary nature of possession and the role of the 'contractualisation' of lease law underpinning the test of possession as consequence.⁸⁶

It is argued that the elements of possession — the test of possession as cause — can effectively supplement the test of possession as consequence in the context of TMP-PUP models, such as Airbnb. The common law has recognised these elements as essential factors to determine exclusive possession — the final aim of the lease-licence dichotomy analysis — in cases of adverse possession and possessory title.⁸⁷ The elements of possession are twofold: factual or physical control (*factum possessionis*), and relevant intention (*animus possidendi*).⁸⁸ These elements were explained in detail in *JA Pye (Oxford) Ltd v Graham* ('JA Pye'):

there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). ... [T]here has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession.

⁸⁶ See above n 19 and accompanying text.

⁸⁷ See, eg: *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56 ('Whittlesea'); *Forrester v Bataille* (2003) 175 FLR 41 ('Forrester'); *Bayport* (n 71).

⁸⁸ These elements resemble the work and thinking of Friedrich Savigny, one of the most influential figures of legal thinking of the nineteenth century: Richard A Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 *Virginia Law Review* 535, 535. Savigny considered that '*possessio* consisted of a physical element called "*corpus possessionis*", namely, effective control, and a mental element, which he called "*animus domini*" or "*animus sibi habendi*," the intention to hold as owner': RMW Dias, 'A Reconsideration of Possessio' (1956) 14(2) *Cambridge Law Journal* 235, 236 (emphasis in original).

It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.⁸⁹

The first element of possession, factual control or *factum possessionis*, refers to the exercise of an appropriate degree of physical control.⁹⁰ To satisfy this requirement, it is necessary ‘that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.’⁹¹ Factual control, thus, depends on the specific circumstances of each case.⁹² Examples of factual control include building a fence,⁹³ enclosing and cultivating strips of land,⁹⁴ closing a fishing net to obtain possession of the fish caught,⁹⁵ and using salvage work vessels while keeping position through means of buoys to obtain control of a shipwreck.⁹⁶ Possession does not require immediate physical custody, provided the possessor ‘enjoys both the means and the mentality of some immediate control.’⁹⁷ Charles Harpum, Stuart Bridge and Martin Dixon explain:

Even if the grantee is exclusively entitled to occupy the premises, in the sense that no one else is entitled to live there, he may not have exclusive possession because the grantor may retain control of the premises. Conversely, a grantee may have exclusive possession although he does not occupy the property himself but is in receipt of the rents and profits as a result of subletting it.⁹⁸

If this element is applied to the analysis, the Airbnb guest must have a level of physical control comparable to that exercised by the owner, the Airbnb host, while interacting with or occupying the property to confirm that the Airbnb host has transferred the right to possess the property.

⁸⁹ [2003] 1 AC 419, 435–6 (*JA Pye*). This case was applied in *Whittlesea* (n 87) 78 [91] and *Forrester* (n 87) 419 [36].

⁹⁰ *Powell* (n 71) 471.

⁹¹ *Ibid.* See generally Albert S Thayer, ‘Possession’ (1905) 18(3) *Harvard Law Review* 196.

⁹² *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, 288; *Powell* (n 71) 470–1. See also Comment, ‘Tenant, Lodger, and Guest: Questionable Categories for Modern Rental Occupants’ (1955) 64(3) *Yale Law Journal* 391, 393–4 (‘Tenant, Lodger, and Guest’).

⁹³ *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464.

⁹⁴ *Marshall v Taylor* [1895] 1 Ch 641.

⁹⁵ *Young v Hichens* (1844) 6 QB 606.

⁹⁶ *The Tubantia* [1924] P 78.

⁹⁷ Norman Palmer, *Palmer on Bailment* (Sweet and Maxwell, 3rd ed, 2009) 136. See generally *Burnett v Randwick City Council* [2006] NSWCA 196.

⁹⁸ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Sweet and Maxwell, 8th ed, 2012) 753. See also: *Mabo* (n 55) 166; *Ward* (n 58) 228–9 [519]; *Allan v Liverpool Overseers* (1874) LR 9 QB 180, 191–2 (Blackburn J) (*Allan*); *R v The Assessment Committee of St Pancras* (1877) 2 QBD 581, 588; *Elwes v Brigg Gas Company* (1886) 33 Ch D 562, 568–9.

The second element of possession, relevant intention or *animus possidendi*, 'involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor'.⁹⁹ *Animus possidendi* has, in turn, two additional elements: subjective intention to possess, and an outward manifestation indicating the subjective intention.¹⁰⁰ As a result of the second element, following Lord Hope in *JA Pye*, 'the best evidence of intention is frequently found in the acts which have taken place'.¹⁰¹ The application of this element to the Airbnb analysis means that an Airbnb guest should have relevant intention to exclude the world at large, including the Airbnb host, and show an outward manifestation of this intention.

To sum up, the existence of possession in the Airbnb model can be further determined by the factual control of the property and the intention of the putative possessor, the Airbnb guest, to exclude others, including the Airbnb host.

Relevantly, the right to use, independently considered, is typically regarded as a licence.¹⁰² Like Honoré's right to use, a licence is considered a permission, usually contractual, to enjoy personal or real property within the limits of an authorisation.¹⁰³ Unless the licence is coupled with a grant of an interest, the permission does not create a proprietary interest.¹⁰⁴ The right to use is a right in personam, often contractual in nature, rather than a right in rem in the form of a proprietary interest, such as the right to possess.¹⁰⁵ Considering its contractual nature, the essential elements for the formation of contracts constitute the elements required for the creation of a contractual licence; that is, the licensor and the licensee must have legal capacity and agree on the transfer of the right to use for consideration.

⁹⁹ *Powell* (n 71) 471–2.

¹⁰⁰ *Smith v Waterman* [2003] All ER (D) 72 [19]; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, 87.

¹⁰¹ *JA Pye* (n 89) 446. According to Kevin Gray and Susan Gray, this statement in *JA Pye* (n 89) means that 'possession is necessarily reinforced by a demonstrable state of mind (or animus) which encapsulates the possessor's own perception of the permanence and defensibility of his rights in relation to the land': Gray and Gray (n 48) 154.

¹⁰² See *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 5 ('King').

¹⁰³ Yet not all licences are strictly related to the use or enjoyment of the thing. For example, some real estate licences also allow to enter, traverse, or occupy the land of another person. Further, not all licences are contractual in nature: see Gray and Gray (n 48) 1288.

¹⁰⁴ *Street* (n 18) 814.

¹⁰⁵ See generally: *King* (n 102) 61–3; *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483.

IV AIRBNB CORE TRANSACTION: ANALYSIS

Analysing the Airbnb core transaction for categorisation purposes, which has been identified and explained above,¹⁰⁶ requires first an examination of the *Swan* decision, the leading precedent on the categorisation issue that this article examines. This article later evaluates the core transaction through the lens of the elements of possession, showing that typical Airbnb accommodation arrangements create a licence relationship between the host and the guest.

A Swan v Uecker

As noted earlier, *Swan* constitutes the leading common law analysis on the legal categorisation of the Airbnb host-guest relationship in Australia.¹⁰⁷ In this single-judge case, with Croft J exercising the jurisdiction of the Supreme Court of Victoria, the Court categorised the legal relationship between the Airbnb host and the Airbnb guest as a lease — specifically, a sublease.¹⁰⁸

In this case, the respondents leased an apartment which they later listed on the Airbnb platform as a short-term rental. The apartment owners, the lessors, sought an order for possession, asserting that the respondents breached the terms of the lease by subletting the apartment.¹⁰⁹ VCAT heard the case first and found that the respondents did not grant exclusive possession to the Airbnb guests and, consequently, did not sublet the apartment but granted a licence. The Tribunal found that several factors contributed to characterising the agreement as a licence, including the intention of the parties — which was correctly incorporated in the Airbnb agreement as a ‘licence’ — the short-term nature of the Airbnb guests’ stay, the payment method, the respondents’ power to access the premises during the stay and force overstaying guests to leave, and the fact that the apartment continued to serve as the respondents’ primary residence.¹¹⁰ As a result, VCAT found that there was no basis for a possession order.¹¹¹

On appeal, the Supreme Court of Victoria overruled VCAT’s decision, finding the arrangement between the respondents and the guests to rent the entire apartment through Airbnb¹¹² was a lease and not a licence.¹¹³ First, the Court did not find evidence to prove that the respondents could access the apartment during the Airbnb

¹⁰⁶ See above n 38 and accompanying text.

¹⁰⁷ See above n 11 and accompanying text.

¹⁰⁸ *Swan* (n 11) 103 [75]. ‘The legal test for creating a lease is essentially the same as that for creating a sublease’: Swannie, ‘Airbnb and Residential Tenancy Law’ (n 13) 235.

¹⁰⁹ *Swan* (n 11) 75–6 [2].

¹¹⁰ *Swan VCAT* (n 4) [41]–[46].

¹¹¹ *Ibid* [48]–[49].

¹¹² *Ibid* 82 [19].

¹¹³ *Ibid* 103 [75].

stay, a factor that would have supported the licence categorisation.¹¹⁴ Second, the Court noted that the respondents' power to make an overstaying guest vacate the property is a power that arises from both leases and licences. Accordingly, this factor could not serve as a basis for classifying the short-rental agreement as a licence, as decided by VCAT.¹¹⁵ Third, the Court observed that — contrary to VCAT's reasoning¹¹⁶ — '[w]hether the tenants retained the rented premises as their principal residence is not relevant to the question whether an Airbnb guest had exclusive possession of that premises'.¹¹⁷ Lastly, in contrast to VCAT's decision, Croft J found that retention of the apartment keys by the respondents was, in itself, 'not decisive in terms of the characterisation of the nature of the Airbnb guests' occupation'.¹¹⁸ Therefore, according to the Court, the substance of the agreement reflected that the Airbnb guests enjoyed a right of exclusive possession.¹¹⁹ In this respect, Croft J held:

The evidence and the provisions of the Airbnb Agreement indicate, in my view, that although the occupancy granted to the Airbnb guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a 'lodger' or an hotel guest. Rather, it was the possession — exclusive possession — that would be expected of residential accommodation generally. In the present circumstances, it is no different from the nature of the occupancy — the exclusive possession — granted to the tenants, the Respondents, under the Lease from the Applicant. They have, by means of the Airbnb Agreement, effectively and practically passed that occupation, with all its qualities, to their Airbnb guests for the agreed period under the Airbnb Agreement.¹²⁰

The Court ultimately found that the respondents sublet the apartment when they rented the property through the Airbnb platform and, as a result, were in breach of the lease agreement they had concluded with the lessor, the property owner.¹²¹

B Application of the Elements of Possession to the Airbnb Core Transaction

If the Court had considered and analysed the elements of possession — that is, the proprietary dimension of the transaction — rather than focusing exclusively on its contractual analysis, it could have arrived at a different conclusion: that the Airbnb core transaction creates a licence relationship and not a lease.

¹¹⁴ Ibid 96 [53], 98–9 [56], [59].

¹¹⁵ Ibid 80 [17], 95–6 [51], 101 [68].

¹¹⁶ Ibid 102 [73].

¹¹⁷ Ibid 80–1 [17].

¹¹⁸ Ibid 98 [57].

¹¹⁹ Ibid 93 [46].

¹²⁰ Ibid.

¹²¹ Ibid 103 [75].

The Airbnb terms of service in Australia categorise the core transaction as a ‘limited license to enter, occupy, and use the Accommodation’.¹²² If this provision represents the intention of the Airbnb host and the Airbnb guest, the licence categorisation should prevail. This accords with the VCAT’s findings.¹²³ However, and as *Swan* exemplifies,¹²⁴ the characterisation of the agreement itself is not determinative.¹²⁵ If the provision does not reflect the parties’ intention, or if their intention is unclear as to what right is transferred and what legal relationship is created, then the licence categorisation is not conclusive and further analysis is required. Problematically, *Swan* also showed that even in those cases where the intention of the Airbnb host and the Airbnb guest is not disputed, the Court could question and ultimately modify the legal categorisation agreed upon by the contractual parties. As Swannie explains:

it appears clear that neither the tenant in the *Swan* decision, nor any Airbnb guests, intended (or expected) to create a tenancy relationship, with all the statutory rights and duties this would entail. ... The parties were not seeking to ‘escape the legal consequence of a [tenancy] relationship’ — because neither of them intended this relationship.¹²⁶

This test of possession as consequence, traditionally used to determine whether exclusive possession has been transferred, only examines the contractual dimension of the transaction, and is, therefore, insufficient to address the issue of categorisation in the Airbnb context. As a result, a reconsideration of the contractual analysis of the transaction vis-à-vis its proprietary components is required. The test of possession as cause arises as an additional test that helps address the issue for TMP-PUP models by supplementing the determination of possession and the associated transfer of the right to possess. It introduces the elements of possession into the analysis and, consequently, the proprietary dimension of the transaction, refocusing the ‘contractualisation’ of lease law.

As discussed above, the first element of possession, *factum possessionis*, refers to a degree of physical control comparable to the control the owner has while interacting with and occupying the property.¹²⁷ It amounts to a control of the ‘premises as against all the world, including the owner’.¹²⁸ The holder of the right to possess

¹²² ‘Terms of Service’, *Airbnb* (Web Page, 25 January 2024) [1.3] <<https://www.airbnb.com.au/help/article/2908>>.

¹²³ *Swan VCAT* (n 4) [45].

¹²⁴ See *Swan* (n 11) 95–6 [51]–[53].

¹²⁵ See above nn 76–77. According to Denning LJ, ‘the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it’: *Facchini v Bryson* [1952] 1 TLR 1386, 1389–90, quoted in *Radaich* (n 45) 214 (McTiernan J).

¹²⁶ Swannie ‘Trouble in Paradise’ (n 12) 187.

¹²⁷ See above nn 90–92.

¹²⁸ *BA Oil Co & Halpert* [1960] OR 71, 77.

is considered an owner pro tempore.¹²⁹ The second element, *animus possidendi*, indicates the intention 'to exclude the world at large',¹³⁰ which requires subjective intention and an outward manifestation of this intention.¹³¹ It follows that the Airbnb guest should control, and intend to control, the Airbnb property as if he or she owned the property in order to correctly categorise the Airbnb host-guest relationship as a lease.¹³²

The Airbnb guest, however, does not act as the property owner or intend to exclude the world at large as an owner would. The Airbnb guest is just that, a guest, who behaves and interacts with the property and the world at large as such. *Factum possessionis* remains with the Airbnb host, the party in control of the Airbnb property. Airbnb hosts, for instance, establish the conditions of use, define the amenities of the property, and instruct on the arrival and departure times. Conversely, Airbnb guests use a furnished, rent-adapted place for short-term stays according to the instructions and conditions established by hosts. Airbnb guests do not have the sufficient concentration of power necessary to have a right of possession, even if they exercise physical custody of the property. Although Airbnb hosts' factual control is more apparent in cases of co-occupation — namely, 'shared room' or 'private room' rental arrangements¹³³ — it is irrelevant that they do not occupy the premises.¹³⁴ Exclusive occupation is not synonymous with the right to possess.¹³⁵ Airbnb guests keep acting in law as guests and Airbnb hosts as owners even when an entire property is the object of the core transaction. Airbnb guests, therefore, fail to meet the first element of exclusive possession.

Additionally, Airbnb guests lack *animus possidendi*. Airbnb guests do not intend to act as property owners but as visitors. Similar to guests at inns or hotels, Airbnb guests know and agree to have temporary access to someone else's property.

¹²⁹ Gray and Gray (n 48) 334.

¹³⁰ *Powell* (n 71) 471.

¹³¹ See above nn 99–101.

¹³² In *Street* (n 18) 816, referred to in *Swan* (n 11) 87–89 [33]–[35], the Court explained that

[t]he tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. ... A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land.

¹³³ For an explanation of the different types of listings in Airbnb, see Tom Slee, 'Airbnb's Business and Arguments about Data: Address to the Asper Review of International Business and Trade Law' (2018) 18(1) *Asper Review of International Business and Trade Law* 293, 299:

One type is the "shared room" ... A second listing type is the "private room," which is what many people think of when they think of Airbnb: it corresponds to renting out a spare room. The third type is the "entire home/apartment," which means that a guest has sole use of a complete living space.

¹³⁴ See above n 98 and accompanying text.

¹³⁵ *Ibid.*

They rent the Airbnb property accepting that a reasonable degree of intervention by the Airbnb host is possible.¹³⁶ Airbnb guests do not intend to exclude the world at large, including the host, but to peacefully enjoy the property for a short time. As Nettle JA opined in *Genco v Salter*

I doubt that a paying guest in short term hotel style serviced apartment accommodation of two or three days' duration would be a "lessee" or "tenant" within the meaning of the definition. ... Usually, the owner of an hotel retains dominion over a hotel room or suite with right to enter for cleaning and other purposes and power to forbid the guest from allowing others to stay there. Depending on the facts, the same considerations would apply to a guest taking short term hotel style accommodation for a period of a few days in a serviced apartment.¹³⁷

Even if the Airbnb guest's subjective intention differs, its outward manifestation is that of a non-owner. Airbnb hosts, Airbnb guests, and the world in general, supported by the Airbnb terms of service, acknowledge that a limited licence characterises the Airbnb core transaction. Airbnb's business model and legal structure revolve around the idea of short-term accommodation, similar to hotels and inns, which explains why Airbnb is a direct competitor of hotels and has disrupted the short-term accommodation market.

Further, the Airbnb host does not intend to create a proprietary interest or an estate on the Airbnb guest but to grant a contractual right to use the property for a limited period. Correspondingly, Airbnb guests have no intention to acquire an interest of a proprietary nature, just like hotel guests. They attempt to gain access to a property owned and controlled by someone else and use it temporarily without trespassing. The Airbnb host's permission to use the Airbnb property 'only makes an act lawful which would otherwise be unlawful'.¹³⁸ The intention of the Airbnb host and the Airbnb guest is, therefore, to transfer and acquire, respectively, a contractual right to use the Airbnb property on a temporary basis. Airbnb guests, thus, fail to satisfy the second element of exclusive possession.

Considering the analysis must be conducted on a case-by-case basis,¹³⁹ courts may conclude that an Airbnb guest acts as an owner in terms of control and intention in particular cases.¹⁴⁰ However, multiple factors that have been recognised as indicative of the transferor's general control of the property are usually found in the Airbnb core transaction. These factors are as follows: (1) the property owner resides in the

¹³⁶ The Airbnb guest is legally comparable to a lodger, who 'has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation': *Allan* (n 98) 192 (Blackburn J).

¹³⁷ *Genco v Salter* (2013) 46 VR 507, 514 [28].

¹³⁸ *Street* (n 18) 816. See also *Thomas v Sorrell* (1673) 89 ER 100, 101.

¹³⁹ See above nn 92, 101 and accompanying text. For instance, the decision in *Swan* was limited to the facts of that case. According to Croft J, the case addressed the legal character of that particular Airbnb arrangement: *Swan* (n 11) 104 [80].

¹⁴⁰ See, eg, *Swan* (n 11).

same premises as the occupant; (2) both the owner and the occupant co-occupy the premises; (3) the owner retains a key to the rented property; (4) the parties intend to create a limited licence; (5) the premises are furnished; (6) towels and linens are supplied; (7) public utilities are provided; and (8) the host has the power to accept new guests.¹⁴¹ Each of these factors often characterises the Airbnb core transaction, rejecting, again, the idea that the Airbnb guest has exclusive possession of the Airbnb property.

If the *Swan* decision is analysed through the lens of the elements of possession, it can be argued that, first, the respondents' power to make an overstaying guest leave the property, contrary to Croft J's position,¹⁴² is indicative of a sufficient degree of physical control comparable to that of the owner to exclude the world at large (*factum possessionis*). Further, the respondents defined the conditions of use of the property, including restrictions on noise, rules about the use of the apartment amenities, and a stringent non-smoking policy.¹⁴³ They also established the services and facilities offered, including the possibility to provide tourist information to guests.¹⁴⁴ These factors, again, evince that the *factum possessionis* remained with the respondents.

Second, the fact that the respondents retained the property as their principal residence is a relevant question to determine whether the Airbnb guest had exclusive possession of the premises. This factor suggests that the Airbnb guests did not have the intention required to have exclusive possession (*animus possidendi*) but, instead, intended to act as visitors rather than owners. A lease usually involves the use of the property as 'usual residence' with an expectation of 'continued occupation'.¹⁴⁵ Similarly, '[t]he threshold physical requirement for possession is complete and absolute dominion rather than a temporary or fleeting control'.¹⁴⁶ These characteristics are absent in short-term rental agreements, especially those 'for days or even hours', which Croft J deemed had the potential of creating a lease.¹⁴⁷

Third, the occupation of the entire apartment by the Airbnb guests, which allows them to stay on the premises without the physical presence of the respondents, is not indicative of exclusive possession, as Croft J accepted.¹⁴⁸ As explained above, exclusive possession — particularly its element, *factum possessionis* — does not require immediate physical custody.¹⁴⁹ Lastly, the fact that the respondents retained the keys to the apartment indicates factual control and relevant intention and, as

¹⁴¹ See: *Parkins v Westminster City Council* [1998] 1 EGLR 22; 'Tenant, Lodger, and Guest' (n 92) 393–4.

¹⁴² *Swan* (n 11) 95–6 [51].

¹⁴³ *Swan VCAT* (n 4) [23]–[24]; *Swan* (n 11) 82 [20]–[21].

¹⁴⁴ *Swan* (n 11) 82 [21].

¹⁴⁵ *Alex Taxis* (n 13) [30].

¹⁴⁶ Samantha Hepburn, *Australian Property Law* (LexisNexis, 4th ed, 2018) 67.

¹⁴⁷ *Swan* (n 11) 92 [42].

¹⁴⁸ *Ibid* 96 [53].

¹⁴⁹ See above n 97.

a result, *does* suggest that the respondents retained exclusive possession of the apartment.

If these factors, which represent the proprietary dimension of the transaction, are considered together with the characterisation of the relationship as a licence by the Airbnb Terms of Service — the contractual dimension that *prima facie* reflects the intention of the respondents and the Airbnb guests — it can be concluded that these parties created a licence relationship rather than a lease.

The preceding analysis suggests that, as a general rule, an Airbnb host does not transfer the right to possess the Airbnb property to the Airbnb guest and so prevents the creation of a lease. Instead, the Airbnb host transfers a right to use the Airbnb property, creating a licence relationship in which the Airbnb host acts as a licensor and the Airbnb guest as a licensee.

V CONCLUSION

The Airbnb model — a type of TMP-PUP model — has disrupted the accommodation industry. It has significantly affected the traditional short-term rental business and the legal arrangements necessary for its success. The influx of Airbnb rentals has created an alternative market in which individuals offer their homes or private investment properties via a digital platform for accommodation purposes. A technology-based triangular legal model supports this new accommodation option. Unlike the traditional interaction between inns/hotels and guests, a third actor, Airbnb, intermediates the host-guest relationship. Airbnb operates the platform through which hosts and guests connect and interact, playing an essential role in the creation, execution, and termination of the legal relationships that comprise the model. It aggregates supply and demand, facilitates the interaction — including dispute resolution mechanisms — between the parties, provides customer support, and dictates the terms and conditions that create the internal legal environment of the model.

The disruptive nature of the Airbnb model has also created significant issues in law. One of the most critical issues is the legal categorisation of the relationship between the Airbnb host and the Airbnb guest as a lease or a licence. This article reconsiders the analysis and determination of the lease-licence dichotomy in the context of the Airbnb model. It argues that the analysis of exclusive possession, the common law test to differentiate a lease relationship from a licence, should consider the elements of possession: physical control (*factum possessionis*) and relevant intention (*animus possidendi*). These elements represent the proprietary dimension of an analysis that has been focused on the contractual aspects of the transaction, a reflection of the ‘contractualisation’ of leases.

Taking the leading precedent in *Swan*, this article argues that Airbnb guests, in general, and the Airbnb guests in *Swan*, in particular, do not satisfy these elements. Airbnb guests do not control the Airbnb property as owners, nor intend to exclude the world at large as owners would. The interaction these actors have with the property,

the hosts, and the world at large is fundamentally different; it is that of persons with the level of control and intention of visitors, similar to hotel guests. Airbnb guests do not have the concentration of power required to demonstrate exclusive possession, even when they have sole custody of the property. The absence of these elements prevents the transfer of exclusive possession of the Airbnb property and, consequently, precludes the existence of a lease.

Contrary to Croft J's findings in *Swan*, this article finds that the Airbnb core transaction usually grants a right to use the Airbnb property, thereby creating a licence relationship between the Airbnb host and the Airbnb guest. The scope and substantive content of this categorisation differ significantly from the scope and content of a lease. It makes the Airbnb host-guest relationship purely contractual, rather than proprietary, and creates rights and duties in personam, not jural relations in rem. Consequently, the rights and duties applicable to licence relationships, not those characterising lease arrangements, *should* define the interaction between hosts and guests in the Airbnb model.

Taking the analysis of exclusive possession and the right to possess seriously, this article provides a fundamental, albeit overlooked, analysis to address the categorisation issue in the context of Airbnb and similar TMP-PUP models. Such is especially useful in the current state of affairs, where the High Court has yet to test the approach set out in *Swan*. It offers judges and adjudicators an analytical framework that advances the common law understanding of platform-based models that, like Airbnb, are increasingly dominant in the Australian accommodation market.