

HOME-SHARING, AIRBNB AND THE ROLE OF THE LAW IN A NEW MARKET PARADIGM

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This commentary responds to the primary article by Alex Lazar in this volume entitled 'Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours'. It provides some insights into the Airbnb home-sharing model from a property, rather than a legal, perspective and argues that the law should evolve to sustain the changing paradigm and embrace the benefits that it can bring to South Australia.

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Alex Lazar's primary article takes a very timely look at various aspects of technology based home-sharing services, such as Airbnb, through the lens of recognition and regulation under South Australian law.¹ The author contends that this new market paradigm of home-sharing is currently a legal activity and land use in most of South Australia; that the relationships between host and guest are capable of being recognised under residential tenancy and property law; and that, while current legislation protects home-sharing neighbours living in strata housing, the law of private nuisance is not capable of protecting neighbours of other residential properties. Consequently, he suggests that councils should set up home-sharing complaints systems to protect neighbours.

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¹ Alex Lazar, 'Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours' (2017–2018) 3 *University of South Australia Student Law Review* 49.

This response questions whether the role of law is to stifle this new market paradigm of home-sharing or to evolve to cope with the changing paradigm. It challenges the usefulness of relying on property law and argues instead that a greater reliance on contract law and the host/intermediary/guest relationship would better address any neighbour issues; and contends that council monitoring would better address regulatory, policy and property market issues.

I HOME-SHARING, THE HOST AND THE GUEST

As the primary article explains, home-sharing via Airbnb covers a range of familiar space-sharing models:

1. The ‘present host’ scenario, which has the characteristics of a licence.² This is the original Airbnb model and it adopts a familiar space-sharing approach that has been seen in Australia since 1788 and which has ranged from the renting of rooms to itinerant workers in the early days of the colonies to the renting of rooms to students in Adelaide today;
2. The ‘temporarily absent host’ scenario, which has the characteristics of a lease.³ This model, where an entire vacated home is shared for a short to medium term period, is often seen in the renting of holiday homes and has occurred in Australia for over a century; and
3. The ‘permanently absent host’ scenario, which has the characteristics of a lease.⁴ This model, where an investment property is shared for a short to medium term period (rather than a longer term rental), is a familiar pattern in the residential rental property market that has evolved in Australia over two centuries.

As Lazar observes, home-sharing is not new — the new part is the role of technology, where the online management of identifying, searching, booking, payment and resolving issues relating to space-sharing effectively replaces the older person-to-person relationship with a new person-to-business-to-person relationship or host/intermediary/guest relationship.

From a property viewpoint, this trend is significant because landlord/tenant law has traditionally relied on a direct relationship between the landlord and the tenant, rather than on two separate relationships with an interposed

² Lazar, above n 1, 53.

³ Ibid.

⁴ Ibid.

technological intermediary. To an extent, the role of landlord/tenant law is supplanted in the new home-sharing market paradigm by the role of contract law.

Interestingly, Lazar cites taxation of transactions, home insurance, confidentiality of user information and the allocation of liability for any indiscretions by guests as emerging issues being discussed around the world. Each of these issues potentially raises contract law issues rather than property law issues, and, significantly, they are issues that are commonly seen internationally. From a property viewpoint, contract law is generally more standardised in its provisions internationally than property law, where differences between countries (and indeed, between states and territories within Australia) can be substantial. This suggests that contract law can offer a better solution to the challenges of the Airbnb business model than traditional approaches grounded in property law.

From a property perspective, it is extremely disconcerting that the author states that:

Ultimately, those who use home-sharing services like Airbnb must conform to the established domestic law, not the other way around.⁵

It can be contended that this approach attempts to stifle or constrain the growth and development of commerce to the rate at which the law is willing to move (if it is willing to move at all). Essentially, in the case of home-sharing in the new market paradigm, the horse has bolted and the law is looking at an open stable gate. As Joe Gebbia, Airbnb co-founder, said in Sydney late in 2017: 'The genie is out of the bottle and it's not going back in'.⁶ State and territory legislatures have a simple choice: adapt their law to accommodate the new home-sharing market paradigm or see the economic benefits of such a paradigm move to be enjoyed by other states and territories that are willing to adapt. Given the current economic situation in South Australia, the local legislature effectively has no choice.

The new paradigm in the home-sharing market is a seismic shift in commerce that suggests a parallel with the introduction of the railways in the UK in the 1800s. Just as the emergence of the railways ran ahead of the existing legal framework and led to a further evolution of the law in the UK in the late 1800s,

⁵ Lazar, above n 1, 6.

⁶ Michael Janda, 'Airbnb Denies Contributing to Australian Housing Affordability Problems', *ABC News* (online), 20 Nov 2017 <<http://www.abc.net.au/news/2017-11-21/airbnb-denies-contributing-to-housing-affordability-problems/9171362>> .

it can be contended now that the law in South Australia needs to evolve to facilitate commerce rather than be used to stifle or constrain commerce.

An example of the need for evolution is the *Residential Tenancies Act 1995* (SA), which Lazar notes may apply to a 'present host' scenario where three or more guests are accommodated, but not in the case of one or two guests. Given the negative perceptions by lessors of the various Residential Tenancy Tribunals in Australian states and territories, it can be contended that any potential role for such tribunals in the disintermediated home-sharing market would be so deleterious to the effective operation of the market that the government would be well advised to approach guest protection through other channels.

As will be considered further below, the primary article also refers to international debates about the effect of home-sharing on both the hotel industry and the wider economy; and in both cases, it can be argued that the evolution of the law is essential to safeguard vulnerable parts of the economy and vulnerable members of society.

II THE NEIGHBOUR

The distinction drawn in the primary article between neighbours of home-share strata title apartments and neighbours of other home-share residences is significant. While the ability to create by-laws affords the potential for protecting neighbours without any adverse impact on the host, the provisions of the *Community Titles Act 1996* (SA) permitting by-laws against leases shorter than two months provides a potentially unwelcome restraint of trade on hosts.

It is possible that, should a strata title apartment block adopt a by-law that prohibits leases shorter than two months, a pricing impact could occur. For example, in an expensive apartment building in an exclusive suburb, such a by-law could positively affect apartment prices because purchasers might attribute value to the decreased risk of having home-sharing neighbours. Conversely, such a by-law in a CBD block could significantly curtail the income generating capacity of the apartments and so have a negative effect on prices.

There is, therefore, the possibility for transparency in and control of home-sharing by the strata title apartment owners who comprise not only hosts but also neighbours. Such transparency and control may, however, not be available to neighbours of other home-share residences whose options Lazar describes

as 'limited'. The identification of an action in private nuisance as the only legal recourse for a disgruntled neighbour could be considered a further example of where the law needs to evolve to facilitate commerce but, given that the neighbour is external to the host/intermediary/guest relationship, this may be challenging to achieve.

As the source of nuisance is more likely to be a guest (with whom the neighbour might have no form of direct contact and who might be transient rather than resident in the area) rather than a host (who is both contactable and, to some extent, resident), an action in private nuisance might be difficult to bring. If the neighbour is successful in identifying a party to claim against, the need to prove that the nuisance is both substantial and unreasonable presents a significant hurdle to a successful action.

In the case of guests, neighbours and disruption, the law of contract may be unlikely to offer assistance unless the neighbour can be made party to the contract. As the primary article notes, Airbnb's issue reporting system for neighbours could offer the only practical source of redress to the extent that a duty of non-disruption can be placed upon the guest through their contract with Airbnb, which, if breached (and is reported by neighbours) may result in penalties to the host.⁷ However, Lazar states that 'domestic law cannot rely on this and must present a dependable solution',⁸ a claim giving rise, from a property viewpoint, to the question: 'Why?'. Presumably the domestic law in South Australia can rely on other aspects of the contract governing the new market paradigm process (searching, booking, payment, etc) within the framework of existing law — so why should disruption require a separate legal response outside of the host/intermediary/guest contract? Furthermore, Lazar's suggestion that governments should issue permits, revocable in the event of neighbour complaints, would appear to transfer the cost of managing a private dispute to the public purse, a cost which could be substantial given the vexed nature of other neighbour disputes over trees, views, etc where rationality departs early in the dispute process.

III REGULATORY, POLICY AND PROPERTY MARKET ISSUES

From a property regulatory viewpoint, it now appears that gaps exist in occupational health and safety and in fire safety following the increasing

⁷ Lazar, above n 1, 66–7.

⁸ Lazar, above n 1, 71.

popularity of this new home-sharing market paradigm.⁹ Conventional hotels and motels are designed to accommodate a transient resident usage, with both occupational health and safety and fire safety regulations developed to suit the nature of the use. While strata title apartment buildings incorporate some similar design features, other forms of residential property are generally designed, from an occupational health and safety and fire safety perspective, on the basis of long term accommodation for static residents.

Accordingly, gaps can arise in the effective level of occupational health and safety and fire safety for both strata title apartment buildings and other forms of residential property, which may require regulation by councils (as the relevant government bodies). While the introduction of such regulation may be expected to be slow and to differ between councils, it is common that councils usually start to move more quickly and consistently after a series of incidents, with fatalities significantly accelerating council responses.

From a property policy viewpoint, the new home-sharing market paradigm also has the potential to significantly reduce the availability of affordable housing, with implications for the vulnerable in society and for key workers. This may be particularly acute in strata title apartment buildings in the inner suburbs and CBDs of Australian capital cities, where entry staircases adorned with a large number of key safes are already apparent. The new home-sharing paradigm offers the prospect of vastly enhanced returns from such property compared to traditional leasing and the very attractive prospect for owners of being outside the jurisdiction of residential tenancies legislation and tribunals in the relevant state or territory. Removing such accommodation stock from the residential leasing market could significantly reduce the pool of available affordable accommodation to the vulnerable in society and to key workers, both of which will impact the councils and state governments who have responsibility for affordable housing policy and the provision of emergency services such as police, ambulance and fire services within inner suburbs and CBDs.

Overseas evidence, from locations such as Montreal, suggests that this new home-sharing market can not only remove affordable accommodation from the total housing stock but can also lead to the gentrification of an area, further

⁹ Safety and Health Practitioner, *Airbnb: Where Does Fire Safety Come into Play?* (14 September 2015) <<https://www.shponline.co.uk/airbnb-where-does-fire-safety-come-into-play/>>.

reducing the availability of affordable accommodation.¹⁰ Similarly, the advent of this new home-sharing market paradigm in tourist areas from Byron Bay in Australia to Venice Beach in the USA has resulted in affordable accommodation being transferred to tourist accommodation.¹¹ Ironically, on the converse side, Brookfield Property Partners (one of the world's largest property owners and developers) is entering into a joint venture with Niido (the multifamily development partner of Airbnb) to develop six apartment communities in Florida where tenants can rent out their apartments through Airbnb for half the year.¹²

From a property market perspective, much has been made of the impact of the new home-sharing paradigm on the hotel, motel and serviced apartment property markets.¹³ As with the arrival of Amazon in Australia for shopping centres, there will be an impact at the macro level. While the total amount of consumer spending may increase with the introduction of Amazon, the total amount received by shopping centres can be expected to decrease — probably marginally. Some shopping centres (high fashion based, food based, etc) could be marginally affected, others (electronics based, mid-level fashion based, etc) could be more significantly affected, with each adopting strategies to counter the impact.

A similar response to the introduction of the new home-sharing market paradigm can be expected from hotels, motels and serviced apartments. The high-end business hotel market might be marginally affected, if at all, whereas the motel and serviced apartment market might be more significantly affected.

¹⁰ Jesse Feith, 'The Long-term Problems of Short-term Rentals in Montreal' *Montreal Gazette* (online), 15 July 2017 <<http://montrealgazette.com/news/local-news/the-long-term-problems-of-short-term-rentals-in-montreal>>.

¹¹ Amy Bainbridge and Rebecca Armitage, 'Airbnb in Australia Shows the Sharing Economy Has a "Dark Side"', *ABC News* (online), 18 June 2017 <<http://www.abc.net.au/news/2017-06-18/airbnb-in-australia-the-sharing-economy-has-a-dark-side/8624122>>; Robin Abcarian, 'Venice Has Become an Epicentre of Los Angeles' Struggle over Short-term Rentals. Call it the Airbnb Problem', *Los Angeles Times* (online) 9 August 2017 <<http://www.latimes.com/local/abcarian/la-me-abcarian-venice-housing-20170809-story.html>>.

¹² Oshrat Carmiel, 'Brookfield Makes \$260 Million Airbnb Investment for Multi Family', *Financial Review* (Australia), 19 December 2017, 33.

¹³ Ahmed Mahmoud, *The Impact of AirBnb on Hotels and Hospitality Industry* (30 March 2017) *Hospitality Net* <<https://www.hospitalitynet.org/opinion/4081839.html>>; Deanna Ting, *6 Takeaways about Airbnb's Potential Impact on the Hotel Industry* (23 January 2017) *Skift* <<https://skift.com/2017/01/23/6-takeaways-about-airbnbs-potential-impact-on-the-hotel-industry/>>.

The conventional touch points of price and service can be expected to remain crucial for the consumer who is deciding between new market paradigm home-sharing as opposed to a motel or a serviced apartment. However, it can be anticipated that a generational impact might have increasing influence over the next 30 years as today's 20-30-year-old consumers, with their greater affinity and preference for new market paradigm products, become a larger portion of the consumer market.

In his discussion of home-sharing as an activity, Lazar usefully distinguishes between home-sharing as a private arrangement and as a commercial service; he points out that the use of this new home-sharing market paradigm on a recurrent basis begins to resemble a commercial service. Lazar notes that the City of Adelaide, City of Burnside and City of Port Adelaide Enfield have enacted by-laws requiring hosts to obtain permits before they can lawfully operate 'lodging houses'. A significant challenge to a major change, like the increasing use of this new home-sharing market paradigm, lies in achieving a clear understanding of its extent and nature within local government areas. An excellent starting point in measuring the extent of this new home-sharing paradigm within a council area and in discovering the nature of properties being used for that purpose would be the issuing of such permits. This would provide a transparent database of actual activity that could inform a policy and regulatory response to the issues of occupational health and safety and fire safety, the availability of affordable housing, and the potential impact on hotels, motels and serviced apartments.

IV CONCLUSION

A threshold issue raised by the new home-sharing market paradigm is the extent to which the law should seek either to stifle and constrain such commerce or to evolve to facilitate such commerce. The reality for cities such as New York,¹⁴ which prohibits this form of home-sharing for transient rentals of fewer than 30 days in buildings containing three or more units (unless the owner is present and there are only one or two guests),¹⁵ is the significance of the risk to the local economy through those consumers who wish to use such a

¹⁴ Andrew J Hawkins, 'Airbnb Is now Banned from Listing Short-term Rentals in New York', *The Verge* (online), 21 October 2016 <<https://www.theverge.com/2016/10/21/13361536/airbnb-new-york-cuomo-bill-ban-short-term>>. See also James Dobbins 'How To Host on Airbnb Legally' *New York Times* (online), 7 April 2017.

¹⁵ New York would, therefore, allow the original Airbnb model described in the primary article as a 'present host' scenario: Lazar, above n 1, 53.

service taking their disposable dollars and spending them in another city. Given the current economic situation in South Australia, using the law to stifle or constrain this new home-sharing market paradigm would appear unwise and evolution of the law far preferable.

The host/intermediary/guest relationship in contract law provides a potentially simpler and more effective way of managing the new home-sharing market than property law. This would appear most evident in the management of neighbour disputes, where extending the host/intermediary/guest contractual relationship to address such disputes has the potential to manage and resolve issues more effectively than seeking to address them through property law.

The need to address gaps in occupational health and safety and in fire safety for the new home-sharing paradigm is a pressing matter of consumer protection; however, the policy issues and property market issues surrounding affordable accommodation and the impact on hotels, motels and serviced apartments are currently more speculative and lack an evidence base for a policy response. In this respect, a council permit system for the operation of 'lodging houses' would provide a transparent database to inform a policy response, which is to be commended.