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'Disruptive Innovation'

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# **‘AIRBNB’ IN WESTERN AUSTRALIA: NEW ISSUES FOR POLICY MAKERS ARISING FROM A ‘DISRUPTIVE INNOVATION’**

BERTUS DE VILLIERS\*

## ABSTRACT

The short terms rental market, colloquially referred to as ‘Airbnb’ accommodation, has proliferated the Australian (and international) accommodation market. The number of rooms being made available per nights in Australia via sort term rental websites runs into the hundreds of thousands. Policy makers have generally been slow to respond to this ‘disruptive innovation’. It is particularly in strata title schemes where the legality of short term rentals is being tested. In this article consideration is given to a recent judgement of the Supreme Court of Appeal in Western Australia to uphold a decision of the State Administrative Tribunal whereby a short term rental arrangement in a strata complex was held to be without approval and hence a breach of the by-laws of the strata scheme. The judgement raises far reaching questions for short term rentals in the strata schemes and highlights the importance for policy guidance and regulatory involvement by state and local authorities.

## I INTRODUCTION

In recent times two societal changes have caught up with policy makers in a manner arguably not experienced previously, namely the advent of ‘Uber’ hired taxi transport<sup>1</sup> and ‘Airbnb’

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1 ‘Uber’ has become a generic reference to private vehicle transport providers that operate outside the ambit of taxi-regulations; whereas ‘Airbnb’ has become the generic reference to private individuals who rent out accommodation on a short term basis. There are many similar service providers.

short term accommodation.<sup>2</sup> These services have been described as ‘disruptive innovations’<sup>3</sup> due to the unconventional, internet driven facilitation they offer.

Uber and Airbnb are more than commercial enterprises. They represent the ability of ordinary members of the community through what has become known as ‘sharing-economy’, to engage in private enterprise with the assistance of the internet and social media outside the traditional regulatory arrangements of governments. Uber and Airbnb have come from the blue and have turned regulatory schemes that deal with public taxi transport and public rental accommodation on its proverbial head. Policy makers are battling to get to grips with this new phenomenon in a world where policy and regulation lag so far behind societal developments that it is hard to play catch up.

The international response by policy makers in regard to Uber and Airbnb has been ambivalent. Policy makers are in effect caught between an unenviable situation: the complexity of intervention and enforcement versus the risk of unregulated and unsupervised services placing the public at risk. Little research has been done to ascertain the impact of Airbnb on the traditional hotel and motel markets, however a study in Texas revealed that the Airbnb-service has had a ‘quantifiable negative impact on local hotel revenues.’<sup>4</sup>

The public has, generally speaking, been beneficiaries of the hiatus of policy makers. In the case of Uber there has been downward pressure of the prices of taxi-type transport, while in the case of Airbnb there are thousands of rooms made available, which in turn has placed

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<sup>2</sup> Uber and Airbnb provide a public platform via the internet whereby service providers and potential clients interact with each other to access the service at an agreed price. Uber and Airbnb respectively receive a fee for providing the platform for bringing the two parties together, albeit that neither Uber nor Airbnb provide a transport or accommodation service to prospective clients. In this article ‘Airbnb’ is used as a general description of short term accommodation services being offered by private persons via the internet. There are also other similar services, but since its popularity, Airbnb has become the word of reference when it comes to short term rentals.

<sup>3</sup> See CM Christensen and ME Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth*, (Harvard Business School Press, 2003).

<sup>4</sup> G Zervas, D Proserpio and J Byers ‘The rise of the sharing economy: estimating the impact of Airbnb on the hotel industry’ *Boston School of Management Research Paper Series No. 2013-16* (12 February 2014) p.22 at [http://questromworld.bu.edu/platformstrategy/files/2014/07/platform2014\\_submission\\_2.pdf](http://questromworld.bu.edu/platformstrategy/files/2014/07/platform2014_submission_2.pdf).

downward pressure on established accommodation providers. This has been problematic. Licenced taxi drivers and regulated accommodation providers complain the playing field between them as licensees, and ‘unregulated’ Uber drivers and Airbnb providers, is not level. Regulated businesses say that they must comply with a raft of regulatory and licensing requirements which do not apply to Uber or Airbnb-type private rental schemes. Concerns have also been raised by members of the public that they may be put at risk from rogue Uber drivers or Airbnb hosts since those private enterprises fall outside the scope of scrutiny that apply to the regulated service providers. Local governments have complained that their regulatory schemes in regard to planning, zoning and parking are being disregarded, yet at the same time many local governments are likely to have benefitted from the increased tourism dollars in their commercial areas as a result of the Airbnb-factor. There is little doubt that Uber and Airbnb are an enigma that is yet to be properly harnessed.

In Western Australia there has been a discrete, yet very important, difference in approach to the operations of Uber and Airbnb. While Uber has received extensive media attention and a coherent policy response from government is still being awaited,<sup>5</sup> in the case of Airbnb a public backlash started after the Supreme Court of Appeal ordered in 2017 an owner of a strata unit must refrain from letting the unit to persons who do not intend to reside on a permanent basis.<sup>6</sup> The full impact of the decision by the Supreme Court of Appeal is yet to be seen, although anecdotal evidence suggests that strata companies are taking steps to order proprietors in many schemes to cease making their lots available for short term accommodation purposes.

The action taken collectively by the owners of strata schemes to stop short term rentals is indicative of private citizens becoming disgruntled with the lack of policy development on the part of government. So far the government of Western Australia has been silent in its reply to the decision of the Court of Appeal.<sup>7</sup> For all practical purposes the Airbnb-short term letting industry remains operational at a level of informality, possibly without the required

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5 Australian Broadcasting Corporation (ABC), *Move to legalise Uber, reform taxi industry about finding the right balance in WA*, Colin Barnett says (19 May 2016) <<http://www.abc.net.au/news/2016-05-19/uber-legalised-in-wa-taxi-reforms-about-balance-colin-barnett/7428596>>.

6 *Byrne -v- The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104.

7 Opinion of the author at the time of writing 1 November 2017.

planning and zoning approvals, and potentially without adequate safeguards to members of the public who utilise the services.

This article aims to give a background to what can be called the Airbnb-phenomenon<sup>8</sup> in Western Australia and then to discuss the rulings handed down by at first instance the State Administrative Tribunal; the appeal to the Supreme Court of Western Australia; and the most recent ruling of the Supreme Court of Appeal of Western Australia. The significance of the current regulatory vacuum in regard to short-term accommodation rentals can potentially impact on proprietors of strata units; strata companies; local governments; and the public at large.

## II SHORT TERM RENTALS – TAKING THE MARKET BY STORM

The state of Western Australia is, pursuant to the federal system of Australia, responsible for policy and legislation in areas such as planning, zoning, public safety, traffic and strata title. The experiences of Western Australia are a microcosm of what is happening in many parts of the world in regard to the Airbnb-phenomenon. Airbnb has taken Western Australia rather unexpectedly and policy makers are struggling to come to terms with the implications of this new service. What complicates the situation is that private owners in strata schemes can commence action in the State Administrative Tribunal to stop Airbnb operations. This type of citizens-reaction in strata schemes is not available to users of Uber services since in the case of strata proprietors there is an ability to self-rule by way of strata by-laws.

The state government, in effect, faces a three-pronged challenge: firstly it welcomes the new initiatives and tourism opportunities associated with Airbnb; secondly, government faces frustration from individuals and businesses who experience the ‘disruptive innovation’ without government regulation; and thirdly, local governments complain that Airbnb is allowed to operate without the necessary planning, zoning, building and other requirements.

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<sup>8</sup> It has been estimated that Airbnb has facilitated accommodation to around 50 million persons worldwide since its inception in 2008. See Airbnb, *Airbnb Summer Travel Report: 2015* <<http://blog.Airbnb.com/wp-content/uploads/2015/09/Airbnb-Summer-Travel-Report-1.pdf>>.

Western Australia is not unique in the abundance of private rental accommodation that has suddenly become available via popular short term rental sites such as Airbnb. The international private rental market has also been taken by surprise by this new phenomenon where anything from a room to entire residences are being made available for short stay accommodation. Although the concept of owner-occupied bed-and-breakfast has been around for many years, the sheer scale of the Airbnb-phenomenon has caught policy makers off guard.

In Western Australia Airbnb operates with minimum regulatory constraints. Although Airbnb offers a ‘double win’<sup>9</sup> for owners and consumers, it presents a headache for regulators at the local and state government levels. In particular, it appears hotels and motels at the lower end of the market are vulnerable, but newspaper reports also suggest that hotel operators at the upper market are concerned at luxury Airbnb facilities competing with the higher range hotels, particularly in the CBD and around popular sporting venues.<sup>10</sup>

Airbnb describes itself as ‘a trusted community marketplace for people to list, discover, and book unique accommodations around the world’.<sup>11</sup> The scope of the Airbnb activities is so vast and unregulated, that researchers and market analysis are struggling to keep track with it. Since the Airbnb-type accommodation service is not regulated in WA, disgruntled clients have nowhere to turn to other than to recommend to other potential users not to book particular accommodation. The success of the Airbnb industry is essentially based on trust, reviews (by clients of owners, and owners of clients via the Airbnb website), and word of

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9 ‘Hence, Airbnb offers a double win to both owners and renters; that is, owners can earn extra income by renting out their unused houses or rooms, while renters can book accommodations at lower costs’: B Fang, Q Ye and R Law, ‘Effect of sharing economy on tourism industry employment’ (2016) 57 *Annals of Tourism Research* 265-267.

10 See for example complaints in the French capitol Paris about the impact of Airbnb on the hotel industry: ‘Airbnb hit by unfair competition complaint from French hotels’ *Financial Times* (online) 24 June, 2016 <<https://www.ft.com/content/6ff2b192-3951-11e6-9a05-82a9b15a8ee7>> and ‘Australian hotel industry crying foul over Airbnb’ *ABC* (online) 17 March 2015 <<http://www.abc.net.au/radionational/programs/blueprintforliving/hotel-industry-cries-foul-over-airbnb/6323358>>.

11 See Airbnb, About Us <<https://www.airbnb.com.au/about/about-us>>.

mouth. Ratings are done informally and to a certain extent, Airbnb operates on the ultimate free market terms of self-regulated supply and demand.

The absence of regulations in WA for Airbnb is not unique. Few jurisdictions have been able to come to grips with the phenomenon. This is because disruptive business models ‘based on new technology often outpace their relevant legislation and consequently encounter issues associated with general legality.’<sup>12</sup> The regulatory framework that would usually be applicable to hotels and motels are absent when it comes to Airbnb, for example: zoning; planning approval; building, health, safety and emergency regulations; parking and road access requirements; registration and licensing requirements; public consultation; rates and taxes; and approval of a strata company (in the case of multiple dwelling accommodation).

Internationally, there has been some ad hoc efforts to regulate Airbnb and related short term accommodations, for example: limitations have been placed on unlicensed rentals for fewer than 30 consecutive nights; owners may be required to be present in the case of unlicensed rentals; certain areas have been excluded from unlicensed rentals; the number of units allowed for short term rental has been limited in certain areas; short term rentals are required to register and pay a local tax; and enforcement of laws that regulate the Airbnb industry have been sharpened. Airbnb has recently become proactive to engage governments at state level in Australia and abroad and to propose ways to improve the image of the industry and to secure its regulating footing.<sup>13</sup> Guttentag concludes as follows: ‘Broadly speaking, however, more fully legalizing peer-to-peer short-term rentals seems to be the most prudent and inevitable approach, as doing so will allow for greater regulatory oversight and taxation.’<sup>14</sup>

The exact scope of the Airbnb ‘industry’ in WA in general, and Perth in particular is only a guesstimate, but the following gives an indication of the popularity of the Airbnb-product:

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12 D Guttentag ‘Airbnb: disruptive innovation and the rise of an informal tourism accommodation sector’ (2013) 12 *Journal of Current Issues in Tourism* 1194.

13 See Andrew Leeson ‘NSW still firming up Airbnb regulations’ *News.com.au* (online) 20 April 2017 <<http://www.news.com.au/national/breaking-news/nsw-still-firming-up-airbnb-regulations/news-story/54a67c8f802df0d7979dad95b1d716b1>>.

14 Ibid 12 1203.

- It is estimated that in 2015-16 around 2.1 million persons used Airbnb in Australia and spent \$441 million on accommodation and \$1.6 billion on incidentals such as meals, and other tourism activities.<sup>15</sup>
- It is estimated that in 2015-16 Airbnb guests to Western Australia spent around \$99 million and supported around 780 full time positions of employment.<sup>16</sup>
- Airbnb has become a 'significant driver' of tourism in Australia and Western Australia.<sup>17</sup>
- Hotel vacancies in Perth have increased in parallel to the increase in available Airbnb rentals.<sup>18</sup>
- More than 4500 WA Airbnb rentals are available per night. The number has doubled since 2012 when Airbnb was launched.<sup>19</sup>
- Luxury apartments rooms are being listed as *de facto* hotels.<sup>20</sup>
- Airbnb users tend to spend more on non-accommodation items per day than users of standard forms of tourism accommodation.<sup>21</sup>
- Airbnb can play a crucial role to facilitate the objectives of the government of WA to increase its share in the Australian tourism market.<sup>22</sup>
- A substantial proportion of Airbnb's are located in strata schemes.
- The Airbnb industry within strata schemes in WA is in a legal 'no mans land'.<sup>23</sup>

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15 See Deloitte Access Economics, *Economic effects of Airbnb in Australia* (Sydney, 2017)

<<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-effect-airbnb-in-australia-240317.pdf>>.

16 Ibid 7.

17 Ibid 10.

18 V Kakulas 'WA industry leaders urge a crackdown on Perth properties "illegally" listing on Airbnb' *Perth Now* (online) 25 February 2016 <<http://www.perthnow.com.au/business/industry-leaders-urge-a-crackdown-on-properties-illegally-listing-on-homesharing-website-Airbnb/news-story/08a807a4ddd11753174585c8a52af954>>.

There is, as far as the author could ascertain, no definitive research yet to take into consideration all the factors that have given rise to lower occupancy in hotels, for example the economic downturn; changing needs of tourists; opening of additional hotels; and other factors that could have contributed to higher vacancies in hotels.

19 See Tomorrow Finance, *How is Airbnb affecting Australia's Property Landscape?* (6 October 2016)

<<https://www.tomorrowfinance.com.au/blog/how-is-airbnb-affecting-australias-property-landscape>>.

20 Joe Spagnolo 'Airbnb "hotels": concerns over Perth apartment leads to rule review' *News.com.au* (25 March 2017) <<http://www.news.com.au/national/western-australia/airbnb-hotels-concerns-over-perth-apartments-leads-to-rule-review/news-story/8c33d6fc5561061a159dcebcdb05efa1>>.

21 Ibid 15 44.

22 Ibid 15 45.

23 'Confusion surrounds WA's accommodation "Uber"' *The West Australian* (15 February 2017)

<<https://thewest.com.au/news/wa/confusion-surrounds-was-accomodation-uber-ng-b88378657z>>.



The Airbnb-phenomenon is indeed disrupting the established tourism market. But its impact is not only on tourism. Of interest for this article is the ongoing policy and legal uncertainty within which Airbnb operates. It is unheard of that such a massive economic activity takes place against the backdrop of a policy, legislative and regulatory vacuum. The situation is well summarised as follows:

In the absence of clear legislation around the country, Airbnb continues to disrupt the accommodation sector. As the ‘sharing economy’ continues to grow and become mainstream, government, local councils and strata organisations will be under increasing pressure to adopt a more progressive approach.<sup>24</sup>

### III STRATA TITLE AND AIRBNB: THE CASE OF BYRNE AND THE OWNERS OF CERESSEA RIVER APARTMENTS

Strata title disputes in Western Australia are generally dealt with by the State Administrative Tribunal (SAT) within its ‘original’ jurisdiction.<sup>25</sup> Appeals against decisions of SAT can be lodged with the leave of the Supreme Court of Western Australia. An appeal can only be brought on a question of law.<sup>26</sup> The Tribunal therefore makes findings of fact, unless of course it errs in its findings of fact so as to give rise to a question of law. The Supreme Court has in the matter *Real Estate and Business Supervisory Board v Carey*<sup>27</sup> succinctly explained the difference between questions of fact and law as follows:

Given that appeals from the Tribunal are limited to questions of law, it is essential that errors of law be distinguished from errors of fact. The Tribunal does not commit an error of law simply because it finds facts incorrectly or upon a doubtful basis: *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

Similarly, the Tribunal does not commit an error of law if its decision is against the evidence or against the weight of the evidence: *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407, 410. The Tribunal will err in law, however, if it makes an ultimate finding of fact for which there is no

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24 ‘How is Airbnb affecting Australia’s property landscape?’ *Tomorrow Finance* (6 October 2016)

<<https://www.tomorrowfinance.com.au/blog/how-is-airbnb-affecting-australias-property-landscape/>>.

25 See *Strata Titles Act 1985 (WA)* Division 3.

26 *State Administrative Tribunal Act 2004 (WA)* s105(2).

27 [2010] WASCA 109 at [52-3].

material before the Tribunal upon which that finding could be based: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 355 – 356.

A ground of appeal which alleges that the Tribunal has failed to take into account a consideration which, in the circumstances, it was bound to take into account alleges an error of law: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 - 40. A Tribunal will not err in law, however, merely because it fails to take into account a particular piece of evidence which is relevant to a consideration which it is bound to take account: *Xie Mian Shen v Minister for Immigration and Ethnic Affairs* (Unreported, FCA, 9 August 1995), 15 - 16. Similarly, a Tribunal will not err in law merely because it fails to place 'adequate weight' upon a consideration which it is bound to take into account.

The dispute between Byrne and The Owners of Ceresa Apartments concerned the use of a strata lot for purposes of short term, Airbnb-type accommodation. The Owners (meaning the strata company acting on behalf of individual proprietors)<sup>28</sup> brought an application to the SAT to order Mr Byrne to cease the practice of renting out his lot for short term purposes. The SAT granted the order as sought. The decision of SAT was appealed to the Supreme Court, and leave was granted<sup>29</sup> but the appeal was dismissed. The decision of the Supreme Court was appealed to the Supreme Court of Appeal,<sup>30</sup> but the appeal was dismissed.

The main aspects of the case will be discussed below, on the basis of the following headings:

- Key facts
- Role of the Owners to enforce by-laws
- Principles for interpretation of by-laws of a strata scheme
- Does ‘residence’ refer to the *use* of the lot or the *intention* of the occupier?
- Finding
- Orders

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28 See *Strata Titles Act 1985* (WA) s32(1).

29 *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153 [41].

30 *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA [104].

### *A Facts*

The facts giving rise to the dispute were uncontested. In *The Owners of Cerena River Apartments and Haines*<sup>31</sup> the essential facts were set out as follows: the strata scheme comprises 113 lots. The lots are described according to By-law 16(1) as 'residential'. The By-law does not define the meaning of 'residential'.<sup>32</sup> The strata scheme is situated within a Mixed Use zone of the City of Belmont, which means that within the zone are buildings that may contain commercial and other non-residential uses in conjunction with residential dwellings in a multiple dwelling (tower) configuration. The City's Town Planning Scheme 15 (TPS 15) allows for a lot to be used as a 'serviced apartment'. A 'serviced apartment' is defined in Schedule 1 of LPS 15 to mean 'an independent living residential unit providing for short stay accommodation'. 'Short stay accommodation' is also defined in Schedule 1 of LPS 15 as accommodation 'where occupation by any person is limited to a maximum of three months in any 12 month period'.

Three lots were involved in the original application. The three owners (respondents) made available their lots for short stay accommodation purposes via internet advertising. The strata council acting on behalf of the Owners of Cerena River lodged an application with the State Administrative Tribunal to seek an order that the use of the lots for purposes of short term accommodation should cease.

The Owners did not make much of complaints at a practical level about the conduct of tenants who frequented the apartments of the respondents. The basis of the argument by the Owners was rather that any form of use of a lot that is not for purposes of a 'residence' should be discontinued regardless of the behaviour or conduct of the inhabitants.

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31 [2015] WASAT 72. The author was the Member who constituted the Tribunal.

32 The by-law merely states as follows: '16.1 Subject to the Schedule 1 bylaw 16 a proprietor of a residential lot may only use his lot as a residence.'

### *B Role of the Owners to enforce by-laws*

The Owners must act pursuant to the Strata Titles Act and 'enforce the by-laws' of a strata scheme.<sup>33</sup> Therefore, the Owners cannot turn a blind eye if lots are being used in a manner that breaches the by-laws of the strata scheme. Should the Owners fail to take action, an individual proprietor may lodge an application with the State Administrative Tribunal to require the Owners to act<sup>34</sup> or an individual proprietor may even seek the appointment of an Administrator for the strata scheme to ensure that by-laws are enforced.<sup>35</sup>

In contrast with the public debate in regard to the lack of action of the state government or the regulatory authority in response to Uber,<sup>36</sup> in strata schemes the Owners *must* enforce the by-laws and if they fail to do so any proprietor can take action in the State Administrative Tribunal. No proprietor can plead ignorance of a by-law, since the by-laws of strata scheme are registered against the title, which means that 'no injustice' can be pleaded on the basis of ignorance.<sup>37</sup>

The question in strata schemes is therefore not as much what the quality of behaviour of short stay tenants is, but rather whether the scheme allows at all for short stay rentals. It is therefore not surprising that in many strata schemes in Western Australia actions are under way at the time of writing by Owners to ensure that by-laws in regard to 'residency' are complied with.

An obvious question that remains to be determined in Western Australia is what would be the status of short-term rentals if there are no by-laws in a strata scheme that specifically restricts use of a lot to 'residential' purposes?

### *C Principles for interpretation of strata title by-laws*

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<sup>33</sup> See *Strata Titles Act 1985* (WA) s35(1)(a).

<sup>34</sup> *Ibid* s83.

<sup>35</sup> *Ibid* s102.

<sup>36</sup> See for example E Laschon 'Uber Ruling: WA court dismissed action by taxi drivers against ride-blocking service' *ABC News* (3 May 2016) <<http://www.abc.net.au/news/2016-05-03/wa-supreme-court-dismisses-taxi-drivers-action-against-uber/7378904>>.

<sup>37</sup> *Mackie v Henderson* [2011] WASC 197 [41].

The question arose during the hearing of what principles should guide the interpretation of the by-laws of a strata scheme? In order to answer this question the by-laws had to be characterised as being ‘subsidiary legislation’<sup>38</sup> or ‘statutory contracts’. The parties were of the view that whichever principles were followed would not make a material difference to the outcome, however as is noted by Prichard J this is not correct; different outcomes may arise depending on the characterisation of by-laws.

The Tribunal did not expressly characterise the by-laws, but in general it adopted an approach consistent with by-laws being statutory contracts. In the matter of *Owners of Pearl Beach Survey Strata Plan 49019 and Heyns*<sup>39</sup> the Tribunal said that ‘although the Tribunal is not a court and its procedures are more informal than what is expected in court proceedings, it must adhere to general accepted principles when constructing statutes and contracts, for example, evidence should not be permitted which contradicts or varies the written agreement or in this case, a bylaw or use restriction.’ The following principles for interpreting by-laws were adopted by the Tribunal: an interpretation should be favoured which gives the bylaw lawful effect; bylaws should therefore be interpreted so as to be given their grammatical and ordinary meaning; any use restriction of a lot must take place in an holistic, integrated manner against the backdrop of all the bylaws; use restriction should be interpreted objectively by what meaning they would convey to a reasonable person and caution should be exercised before taking into account extrinsic material or surrounding circumstances when constructing Bylaws 16(1) and (3) and the use restriction since members of the public may not have access to such extrinsic material to enable them to discern the proper meaning of the By-laws.<sup>40</sup>

Prichard J of the Supreme Court considered at length the principles that ought to be applied when by-laws of strata schemes are constructed. It was noted that although the NSW Court of Appeal had previously considered in some detail the authorities in regard to the construction

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38 s5 of the *Interpretation Act 1984* (WA) defines ‘subsidiary legislation’ as ‘any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.’

39 [2011] WASAT 66 [43].

40 Ibid [27].

of by-laws, the court did not conclude whether by-laws are to be categorised as subsidiary legislation or a statutory contract.<sup>41</sup> Although the proper characterisation of by-laws had not yet been determined in WA, it has been suggested in obiter that it is a statutory contract.<sup>42</sup> Prichard J said that the proposition that by-laws are subsidiary legislation is not without merit,<sup>43</sup> but that in her view by-laws ought to be properly characterised as ‘statutory contracts’ rather than ‘subsidiary legislation’. The reasons for this finding are that by-laws are ‘mutual covenants’ between the strata company and proprietors; the by-laws do not have the effect of legislation that are made under a written law; and the amendment of by-laws are not regulated by ‘legislative drafting convention’.<sup>44</sup>

Once her Honour established how by-laws should be characterised, the next question was what principles of interpretation should be applied to ascertain the meaning of by-laws? She concluded that the ‘ordinary principles of contractual construction’<sup>45</sup> should be applied, namely the objective meaning of the entire text; consistency with the Strata Titles Act; caution should be used before referring to extrinsic materials; the statutory context of by-laws and what they seek to achieve; and what the parties had intended by taking into consideration the language, circumstances and purpose of the by-laws. The Court concluded that the approach taken by the Tribunal was generally consistent with by-laws being characterised as a statutory contract, but that the Tribunal nevertheless erred by also referring to aspects of statutory interpretation. However, the error was not of such nature that the appeal ought to be allowed.

The Court of Appeal agreed with the approach adopted by the Supreme Court.<sup>46</sup>

*D Does ‘residence’ refer to the use of the lot or the intention of the occupier?*

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41 *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; (2007) 70 NSWLR 344.

42 See *Re Carey; Ex Parte Exclude Holdings Pty Ltd* [2006] WASCA 219; (2006) 32 WAR 501. It was observed that – ‘The jurisdiction invoked was therefore an alternative means of enforcing the statutory contract created by the making of by-laws and the provisions of s 42 of the [ST Act], which obligations could otherwise have been enforced in any Court with jurisdiction over contractual disputes.’

43 *Ibid* 28 [59].

44 *Ibid* 28 [70].

45 *Ibid* 28 [75].

46 *Ibid* 29 [139].

The Tribunal was presented with two divergent arguments: on the one hand it was said that ‘residence’ refers to the essential physical characteristics and zoning of the lot, for example the way in which it is designed; furnished and decorated and how it contrasted with uses such as industrial or commercial. According to this proposition the motivation of the occupier was not relevant, but rather the make-up of the lot and whether it is zoned as ‘residential’, commercial, industrial, etc. On the other hand the argument is that it is the intention of the occupier that determined the meaning of ‘residential’. The occupier must objectively intend to reside permanently or for a substantial period of time.

The Tribunal referred to several cases and dictionaries and identified the following principles:

- ‘residence’ is not a term of art with a consistent meaning in all possible circumstances;
- the meaning of ‘residence’ must be ascertained within the context of the relevant statute in which it appears;
- whether a place is the residence of a person is a question of fact and degree; and
- in general, the meaning that attaches to the word ‘residence’ is closely associated with: an intention of permanency; long term; place of abode; place of address; home for a considerable period.<sup>47</sup>

The Supreme Court agreed with the Tribunal that the question whether a person intends to stay on a permanent basis is to be established objectively with consideration of all circumstances. The word ‘resident’ should be interpreted within its ordinary meaning, namely that ‘it refers to a person who makes a lot his or her permanent place of abode.’<sup>48</sup> Prichard J emphasised that when a statutory contract is interpreted, the principle of *in pari materia* (taking account of the same word used in another statute or similar context) does not apply, meaning that the by-law cannot be interpreted with reference to other statutes.<sup>49</sup> Importantly,

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<sup>47</sup> Ibid 30 [37].

<sup>48</sup> Ibid 28 [112].

<sup>49</sup> Ibid 28 [133].

the by-law is not to be construed with reference to similar terms used in the Town Planning Scheme.

The Court of Appeal observed that the word ‘residential’ is not used to contrast the possible uses of the lot between different options, e.g. residential, commercial or industrial. The meaning of the word had to be ascertained with reference to the by-laws, the strata plan, and the Strata Titles.<sup>50</sup> Having adopted this approach, the Court of Appeal concluded that a ‘a lot may only be used as a ‘residence’ by the proprietor or by anyone to whom the proprietor grants ‘occupancy rights’.’<sup>51</sup> The word must therefore be read within the context of the scheme being described as a ‘luxury residential complex’, with those residing using it as a ‘residence’. This in turn means a person’s used or settled abode. The Court of Appeal noted, however, that it was not required for purposes of this appeal to determine whether this approach to the word ‘residence’ would also apply in the case of strata where ‘some lesser degree of continuity of living at the place’ may apply in the case of a holiday maker.<sup>52</sup> Ultimately, the meaning of the word ‘residence’ is ‘very flexible’ and depending on surrounding circumstances. The Court of Appeal emphasised that the meaning of the word residence cannot be ascertained with reference to the Local Planning Scheme since the legal context within which the bylaws refer to residence is different to the context of the Planning Scheme. The proprietors enter into a contract with each other through the by-laws and hence the Court of Appeal agreed with the approach adopted by the Tribunal. The same applies in regard to the use of the word ‘residence’ in the *Residential Tenancies Act*. No assistance can be found in considering how the word is interpreted in that Act.

### *E Finding*

The Tribunal found that ‘residence’ should be constructed in the context of its ordinary meaning and that it entails ‘a degree of permanence and intent to reside for a substantial period of time that is not consistent with shortstay accommodation.’ This interpretation was supported by the particular nature of strata title arrangements, for example the resolution of

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50 Ibid 29 [142].

51 Ibid 29 [146].

52 Ibid 29 [149].



disputes pursuant to the Strata Titles Act; the responsibilities of the proprietor for the conduct of tenants; the termination of the tenancy of a tenant; and the description of the strata scheme.

The Supreme Court dismissed the appeal.

The Court of Appeal also observed that although the words ‘short term accommodation’ were used by the Tribunal, there was no definition given thereof. The Court of Appeal accepted that the Tribunal intended to give a meaning whereby a lot may not be made available for a period shorter than 3 months in any 12 month period.<sup>53</sup> The Court of Appeal agreed that ‘residence’ when properly constructed, means that a lot must be used as a settled or usual abode.<sup>54</sup> The Court of Appeal noted the difficulty the Tribunal had to find appropriate wording for defining ‘residence’. The Court concluded that ultimately permanence or place of abode is a question of fact that depends on each case.<sup>55</sup> The Court of Appeal was critical of the use of a three month or less period by the Tribunal as an indication of what length of stay would be required under the by-law. The Court of Appeal emphasised that the proper construction of the by-law does not depend on a period of stay, but rather the type of use. In other words, someone could use a lot for a relatively short period of time as an abode or place of residence. The Court therefore found that the word residence should be interpreted in a manner that confirms that the lot is used as a settled or usual place of abode.

#### *F Orders made*

The Tribunal ordered that the respondents shall not utilise their respective lots for shortstay accommodation since such a use is inconsistent with and unauthorised by Bylaw 16 of the strata scheme.<sup>56</sup>

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<sup>53</sup> Ibid 29 [27].

<sup>54</sup> Ibid 29 [151].

<sup>55</sup> Ibid: 29 [51]: ‘On the other hand, some uses will necessarily fall outside the phrase ‘use his lot as a residence’. Thus, a lot occupied by persons who merely use the lot as tourist accommodation, or as accommodation for holidays or other breaks away from their settled or usual abode, is not being occupied by persons who use the lot as a ‘residence’ within the meaning of by-law 16, and such persons are not residential tenants within the meaning of by-law 16.2.1.’

<sup>56</sup> Ibid [32] 21.

The Supreme Court noted that the Tribunal did not define what was meant by 'short stay accommodation'. The Supreme Court did not, however, propose different orders to those made by the Tribunal.

The Court of Appeal revoked the Tribunal's order and substituted it with an order that the lot may only be used as a settled or usual abode and not otherwise.<sup>57</sup>

The decision has not been appealed to the High Court.

#### IV SUMMARY

These rulings in regard to the making available of a lot in a strata scheme for purposes of short term, non-residential accommodation present a potential watershed for the regulators and proprietors. The complexity of regulating disruptive innovations is well illustrated by these decisions. Several questions remain unanswered, for example what happens if a proprietor uses a lot for purposes of holiday and not as a 'settled or usual place of abode'; what happens if there is no bylaw in a strata scheme in regard to 'residence'; what happens if the strata bylaws are silent but the local planning scheme refers to the strata scheme as for purposes of residence; and how will government respond to these rulings? The potential confusion within the Airbnb-industry may be further exacerbated if unsuspecting proprietors buy strata units without knowing that in the particular scheme short-term rentals may not be lawful, even if in practice the strata company has turned a blind eye to it. The question also arises whether there is any obligation on real estate agents to bring limitations to short term renting, if any, to the attention of prospective buyers. Although the decision under discussion was limited to a specific situation, a broader question is whether the ramifications may reach as far as ordinary residential houses that are made available for short term rental.

Airbnb has disrupted the accommodation scene; regulators are battling to catch up; and private citizens may resort to self-initiated litigation to bring some certainty to what appears a very tumultuous situation within strata schemes and beyond. It seems imperative on policy

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<sup>57</sup> Ibid [29] 176.

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makers to address the regulatory vacuum and undertake public education about the scope, if any, for short term rentals in residential areas.