



Issues raised by the advent of Airbnb

What is the sharing economy?

Under the Turnbull government, Australian companies have been encouraged to be nimble and to innovate. Prior to this, Australia has seen the rapid growth of two foreign 'sharing economy' businesses that fulfil this brief, Airbnb and Uber. The sharing economy is based on the idea that people can use their existing resources, be it a spare room, home or car to provide services to strangers to make extra money. Airbnb and Uber stand in between as facilitators, taking a small cut of the tariff or fare. Under these business models, the consumer is promised cheaper and more relevant options to meet their needs, by operators who work in a grey area of apparent freedom from the regulatory and taxation burdens borne by the hotel and taxi industries.

Nevertheless, consumers have an expectation that those offering accommodation and car rides will be covered by insurance. For this reason, the advent of the sharing economy presents new opportunities for insurers, as well as potential pitfalls for those providing services.

This article discusses some of the issues around insurance for hosts providing accommodation on Airbnb:

- Risks for hosts when listing their property on Airbnb – property damage and liability for guests' injury or death;
- Insurance coverage and other protections offered by Airbnb itself, and the lack of transparency around these;
- Potential issues with hosts relying on their existing home and contents and landlords insurance;
- New products released by insurers, designed to address the novel situation posed by platforms like Airbnb; and
- Advertised exclusions from the new products, and how such exclusions may come into play given the regulatory patchwork governing short term holiday accommodation.

Airbnb

Airbnb allows 'hosts' to list their spare room or whole home on its website as accommodation for people who otherwise might have stayed at a hotel, bed and breakfast or backpackers hostel. There is no fee for hosts to list their property on Airbnb's website, but the company takes a percentage of the fee paid when the property is booked. The company does not conduct any safety or quality checks of the host's property. Instead, the company's website encourages hosts to take their own safety measures such as ensuring that they have working smoke alarms and carbon monoxide detectors, and it advises hosts to look up any permitting, zoning, safety and health regulations that may apply to them.¹ The company was founded in 2008 and is based in San Francisco, California. Since launching in Australia, take up of Airbnb's services has grown rapidly, and there are now more than 60,000 listings nationwide according to the company's Australian general manager.²

¹ Airbnb, *Responsible Hosting*.

² Jamie Freed, 'Airbnb could reap rewards from Stayz rebellion', *Sydney Morning Herald* (online), 17 January 2016.

Risks for hosts and guests

There have been a number of reported incidents in which guests staying at Airbnb properties have damaged property or stolen possessions. For instance, in Calgary, Canada, a couple offered their home to four adults who claimed to be visiting town for a wedding. The guests used the home for a party lasting several days in what was later described by police as a 'drug induced orgy', causing damage estimated at more than \$50,000.³

Guests staying at Airbnb properties have also suffered injury and death. A man who stayed at a cottage in Texas with his family on Thanksgiving is reported to have died when he sat on a rope swing and the trunk of the tree to which it was tied snapped and fell on him, causing a catastrophic head injury.⁴ In a second reported incident, a Canadian woman who stayed at an apartment in Taiwan with friends is reported to have died in 2013 when a leaking water heater filled the apartment with carbon monoxide.⁵

The liability of occupiers to guests who stay at their property on holiday was considered by the NSW Court of Appeal in *Panther v Pischedda* [2013] NSWCA 236. The Court of Appeal affirmed the primary judge's decision that the occupiers of a property in the Blue Mountains were liable for breach of duty of care, in relation to a guest who stayed at their self-contained flat for two nights and slipped on the property's steep driveway after it had been raining, breaking her ankle. The driveway was the only access to the flat from the street.

In finding that a risk existed that was 'not insignificant' within the meaning of the *Civil Liability Act 2002* (NSW), the primary judge considered it was relevant that the occupiers used the flat to provide accommodation to others for reward, so it could be inferred that the driveway, being the only access to the flat, would have been used not infrequently by persons unfamiliar with the driveway, sometimes at night and in wet weather.⁶

In finding that the occupiers acted unreasonably in failing to install a hand rail or create alternative access to the flat, one of the circumstances considered by the primary judge was the fact that the accommodation was provided for profit.⁷

Coverage provided by Airbnb itself

Host Guarantee Program

Airbnb offers a 'Host Guarantee Program', that provides protection of up to \$1,000,000 in relation to certain property loss and damage that occurs at a residence booked through the Airbnb website.⁸ Hosts who have listed a property they own or legally control may submit a request for payment under the program to Airbnb.

Airbnb warns that the Host Guarantee Program is not an insurance policy for hosts, and the program does not make the host an insured or other third party beneficiary. Rather, under the program, Airbnb agrees to pay hosts to repair or replace certain 'covered property' that is damaged or destroyed by a guest or the guest's invitee, subject to the extensive limitations, exclusions and conditions listed on Airbnb's website.⁹

The Host Guarantee Program does not apply to damage caused by a guest to a neighbouring property, such as in a scenario where a bathtub in an apartment overflows and causes flooding that flows through a floor to damage a neighbour's apartment. Nor does the Host Guarantee Program apply in relation to injury or death to a guest.¹⁰

³ Danielle Nerman, 'Airbnb nightmare renters leave Calgary home trashed', *CBS News* (online), 29 April 2015.

⁴ Monique Ross, 'What happens if you die in an Airbnb Rental? Zac Stone's account of father's death prompts legal questions', *ABC News* (online), 10 November 2015.

⁵ *Ibid.*

⁶ *Panther v Pischedda* [2013] NSWCA 236 per Macfarlan JA at [17].

⁷ *Ibid* at [21]-[22].

⁸ Airbnb, *The \$1,000,000 AUD Host Guarantee*.

⁹ Airbnb, *Host Guarantee Terms and Conditions* (7 April 2014).

¹⁰ Airbnb, *What's the difference between Host Protection Insurance and the Host Guarantee?*

Host Protection Insurance Program

In October 2015, Airbnb introduced a 'Host Protection Insurance Program' for hosts in a number of countries. The company describes this insurance program as providing liability coverage to hosts and, where applicable, their landlords,¹¹ for property damage and bodily injury to others arising during a stay at the host's Airbnb accommodation. There is no additional cost to hosts for coverage under the policy, which provides coverage through Apollo, a Lloyd's of London participating insurer. In Australia, the policy provides primary cover, with a coverage limit of \$1,000,000 per occurrence per policy year, subject to a per location limit of \$1,000,000 and a policy aggregate limit of \$10,000,000.¹²

Airbnb's Australian website provides a three page document described as a 'good faith summary' of the insurance program, but does not make the policy itself available. The summary lists a number of 'key exclusions' from the policy, which include intentional acts, loss of earnings, and 'personal and advertising injury'.¹³

Traditional insurance policies may not respond

Given the limited information provided by Airbnb about the Host Protection Insurance Program, hosts may consider it necessary to organise their own insurance in relation to property loss or damage and liability for guests' injury or death.

In this regard, hosts offering accommodation on Airbnb may assume that their existing home and contents policy covers them in the event that a guest damages their property or steals their possessions, or if a guest is injured or killed in an accident.

However, many home and contents policies do not, for instance, provide cover for theft in the absence of clear evidence of break and enter (which, for obvious reasons, would not be present where a host had invited the guest into their home and provided them with keys).¹⁴

Further, as warned by the Insurance Council of Australia, using a property for short term holiday accommodation may be considered a commercial or business use which is excluded under many home and contents policies.¹⁵

Landlords traditionally have purchased landlords insurance to protect properties which are rented out. However, landlords insurance policies are typically geared toward long term arrangements where there is a residential tenancy agreement in place.

Offering a private property as holiday accommodation may also be a circumstance which an insured is obliged to notify to their insurer under their disclosure obligations.

There have been a variety of responses among insurers to the advent of Airbnb and other holiday accommodation websites.

For instance, a spokesperson for QBE Insurance stated that where a whole property is offered as accommodation on a peer-to-peer basis (such as occurs with Airbnb), then the insured would not be covered by a QBE home and contents policy and would need to obtain landlords insurance to ensure appropriate cover. On the other hand, the spokesperson indicated, if the person offered a spare room in their home as accommodation, rather than the whole house or apartment, the policy would not be voided by that arrangement.¹⁶

Conversely, a spokesperson for NRMA Insurance is reported to have suggested that in a 'house swap' scenario, where a guest stays in a person's home for a small number of weeks, the normal terms of the home insurance policy would still apply, including public liability terms.¹⁷

¹¹ Airbnb, *How does homeowner's insurance work with Airbnb?*

¹² Airbnb, *Host Protection Insurance Summary* (22 October 2015).

¹³ Ibid.

¹⁴ Jimmy Thomson, 'Holiday homewreckers expose hole in home insurance', *Domain* (online), 27 May 2015.

¹⁵ Insurance Council of Australia, *Media Release: Warning over Holiday E-Leasing* (10 November 2014).

¹⁶ John Collett, 'Check cover before e-leasing', *Sydney Morning Herald* (online), 9 November 2014.

¹⁷ Ibid.

New products designed for Airbnb hosts

The insurance market has also responded to the advent of Airbnb and similar services by creating new insurance products. Insurance Australia Group have advertised a new product, described as being the first to market, called 'ShareCover', to provide insurance for some of the additional property damage and public liability risks that can come with offering your home or part of it as accommodation on Airbnb or its competitor, the holiday accommodation website Stayz.

IAG advertises the product as providing coverage, subject to certain limits, for loss and damage relating to theft or attempted theft, malicious damage, accidental damage, strata property damage, personal liability and identity theft, in relation to properties listed on Airbnb or Stayz.¹⁸ The product is described as being:

- An add-on, not a replacement, to a standard home and contents policy, to cover hosts for some additional risks associated with having a paying guest in their home;
- Designed so that the host only pays for the nights when they need insurance, essentially being the nights that they actually have guests staying; and
- Projected to cost about \$5.00-\$10.00 per night, depending upon the level of cover required, number of guests staying, length of stay and other variables.¹⁹

Exclusions and limitations

IAG's product disclosure statement for ShareCover lists a number of situations in which exclusions or limitations apply. For instance:

- The policy will not insure property that is being offered as accommodation without the written consent of the owner;
- The policy will not insure property that the relevant local government, council or government authority does not permit to be used as tourist, visitor or other short term or temporary accommodation; and
- While the policy does provide cover for certain loss or damage to a host's home caused by a deliberate, intentional or malicious act (including vandalism), the most that the insurer will pay is \$10,000 for damage to the home and \$10,000 for damage to home contents.²⁰

Some of the advertised exclusions and limitations to the ShareCover policy raise interesting issues given the past experience of Airbnb hosts and existing Australian case law concerning holiday accommodation.

For instance, a \$20,000 limit on cover for intentional or malicious damage to a host's home and contents would not have been sufficient in the case of the Calgary couple discussed above.

Other issues are raised by any insurance product that does not provide coverage for property 'not permitted to be used' as tourist accommodation by a council or other government authority.

Whether a property is 'permitted to be used' as short term tourist accommodation

There is an absence of uniformity in Australian law, both at the state and local government level, regarding when a property may be used for short term tourist accommodation such as through Airbnb.

In New South Wales for instance, there is no single planning regime that determines whether it is permissible to use a residence as tourist accommodation, and local councils are left to

¹⁸ Insurance Australia Group, *ShareCover – How it Works*.

¹⁹ NRMA Insurance, *Protect your Property on Airbnb & Stayz* (26 October 2015).

²⁰ Insurance Australia Limited, *ShareCover Product Disclosure Statement* (27 August 2015).

regulate the use of properties through planning instruments such as Local Environmental Plans (LEPs).²¹

There have been a number of enforcement actions by councils and others concerning people offering residences as holiday accommodation, each decided on the basis of the planning instruments applicable to the local government area. Some of these cases are mentioned below.

Local council planning instruments

The NSW Land and Environment Court's decision in *Dobrohotoff v Bennic*,²² in relation to a property in Terrigal NSW demonstrates how a council's planning instruments may not permit a property to be used for short term holiday accommodation.

In that case, the Dobrohotoffs brought a claim against their neighbour, the owner of a six bedroom house in suburban Terrigal after making a series of unheeded complaints about noise and antisocial behaviour. The owner advertised the house as holiday accommodation online, including on Stayz, and it was often used for parties, hens and bucks nights. The property was in a part of Terrigal zoned as residential under the applicable planning ordinance, and the applicants felt that their amenity had been severely affected by the neighbouring holiday let.

Her Honour Justice Pepper considered the planning ordinance and existing case law and determined that using the property as short term holiday rental accommodation was prohibited because that use was not sufficiently permanent to comprise a 'dwelling house' for the purposes of the relevant zone under the planning ordinance.²³ As using the property in that way was not otherwise permitted under the planning ordinance, it constituted development in breach of the NSW *Environmental Planning and Assessment Act 1999*.²⁴

Since the Land and Environment Court's decision, Gosford Council have introduced a new LEP to explicitly permit short term rental accommodation of up to four bedrooms in certain zones of the shire, by making such accommodation 'exempt development' that, providing it complies with certain requirements, does not require development consent.²⁵

In other shires in NSW, Councils have challenged property owners thought to be offering their rooms or houses as holiday accommodation, often in response to complaints by neighbours. For instance, Randwick City Council is reported to have issued warnings of potential \$1 million fines to a woman who the Council suspected of conducting an unauthorised bed and breakfast. The Council eventually accepted after further inquiries that the short term stays were a 'lawful ancillary use' of the woman's home.²⁶

Given the lack of uniformity within the state, there have been calls from both councils and industry for the NSW Government to consider developing a planning and approval process for holiday accommodation to provide certainty to providers,²⁷ and a parliamentary inquiry on the subject is currently underway.²⁸

Compliance with building codes

A second potential issue with using a private residence as short term tourist accommodation concerns compliance with building codes.

One fiercely fought battle has taken place in the Watergate Apartments in Melbourne's docklands, where businessman Paul Salter advertises apartments he owns or manages online as short term accommodation. Interestingly, like in *Dobrohotoff v Bennic* this litigation

²¹ Andrew Haylen, 'Uber and Airbnb: the legal and policy debate in NSW', (E-Brief No 6/2015, Parliamentary Research Service, NSW Parliament, 2015), 8.

²² [2013] NSWLEC 61.

²³ Ibid at [17].

²⁴ Ibid at [60].

²⁵ *Gosford Local Environmental Plan 2014*, Schedule 2.

²⁶ Leesha McKenny, 'Councils threaten home owners with \$1 million fine for renting rooms', *Sydney Morning Herald* (online), 26 September 2014.

²⁷ General Purpose Standing Committee No. 3, NSW Parliament, *Tourism in Local Communities* (2014) 5.32-5.37.

²⁸ NSW Legislative Assembly Committee on Environment and Planning, 'Inquiry into short term holiday letting underway' (Media Release, 13 October 2015).

involved judicial interpretation of the term 'dwelling', albeit in a different legislative context, and with a different outcome, this time in favour of the accommodation provider.²⁹

Despite Mr Salter's success in the building code litigation, there is nothing in the resulting court decisions to guarantee that in different circumstances, using a property as short term holiday accommodation will not change the building class, or justify enforcement action under the relevant building act because the new use results in a danger to life and safety.³⁰

The upshot is that it may not be immediately apparent whether, in any particular place and circumstance, offering accommodation on Airbnb is 'not permitted' by the relevant local council or other government authority, so as to engage an exclusion like that in the ShareCover policy.

Conclusion

The growth of businesses like Airbnb has been lauded as a timely disruption to the established hotel and taxi industries. However, alongside recognition of the social and economic benefits of the sharing economy, there is an expectation that those providing accommodation or driving people around in their cars will be covered by insurance, in the same way as a hotel or taxi would be. This development creates interesting opportunities for insurers, some of whom have responded by reassuring Airbnb hosts that they will be covered by their existing products, or offering new products tailored to the new platform. How these new products will operate, and how courts will adjudicate on any disputes that arise is as yet unsettled, and it remains to be seen whether providers and consumers can be confident that they are covered when enjoying the fruits of the sharing economy.

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²⁹ *Salter v Building Appeals Board & Ors* [2013] VSC 279.

³⁰ See, for instance, the remarks of Osborne JA in *Genco & Anor v Salter & Anor* [2013] VSCA 365 at [79]-[82].