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The Executive Director

Australian Law Reform Commission

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SYDNEY NSW 2001

**PROTECTING THE RIGHTS OF OLDER AUSTRALIANS FROM ABUSE: SUBMISSION IN RESPECT TO QUESTION 28**

**Introduction**

My name is Kathleen Temmen and I am currently studying Law at Murdoch University and at the same time work within a small law office that deals partially with families and succession planning within the rural farming community.

I am addressing question 28 of the Issue Paper for *Protecting the rights of older Australians from abuse* which asks the question, “what changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down”.

I am addressing this question by narrowing it to a specific group of elders within the rural farming community; parents who retire and transfer the land to their adult child and/or children in return they are provided care for life with a house and/or financial support.

**Contractual issues**

Family Agreements tend to form an arrangement between parties and are often entered into with failing to take into account any possible repercussions if a breakdown in the relationship was to occur. Most of these agreements are not documented outlining clear intentions and terms of such arrangements leaving the elder unprotected.

These agreements written or orally, help support the intentions of the parties involved. However, Bryson J in the case of Schmutz stated:

“Although Courts have frequently concluded that agreements and arrangements among family members are not intended to be binding and hence do not give rise to contractual or other legal obligations, the key to the question whether they give rise to contractual obligations is the intention of the parties… when arrangements are made among family members, the nature of the arrangements, the value of the property affected by them or the extent and nature of the participation required and the period over which it is required may indicate an intention to create obligations.”[[1]](#footnote-1)

The Alzheimer’s Australia in its submission suggested:

“that there is nothing in theory to prevent a family agreement being enforced as a contract… if all the relevant requirements of a contract are met’ including’… the intention to create legal relations, capacity, offer and acceptance, consideration, and certainty’, but that the confusion has arisen because there is a presumption that where family or social arrangements are concerned, the law presumes that there is no intention to create legal relations, thus one crucial requirement for a contract is missing.”[[2]](#footnote-2)

Issues tend to arise where the agreements are informal or ambiguous, the Victorian Government stated that such:

“Informality and familial nature of these agreements may make it difficult for the law to recognise and/or enforce them as contract, and common law presumptions may assume that the transfer of property is a gift with no obligations attached.”[[3]](#footnote-3)

Carers Queensland found that when these agreements are documented with the intentions of the parties, these intentions can still be inadequate to such a degree as to:

“Such contract can oversimplify arrangements and fail to acknowledge the complexities involved in providing care, the uncertainty often inherent to care situations and the fact that other factors in a person’s life also change and may have implications for care.”[[4]](#footnote-4)

**Submission**

These Family Agreements are not currently governed or regulated under the Commonwealth, state or territory legislation . The Victorian State Government suggested the Canadian approach to a proposal legislating courts to dissolve family agreements and restore property could have some merit:

“It is difficult to see how legislation can specifically address many of the issues raised by family agreements. However, the British Columbia Law Institute has proposed a legislative provision to deal with situations where the relationship between parties breaks down that would allow courts to dissolve the agreement, restore property and compensate caregivers. Such reform would not prevent the problems that arise with the use of care agreements but it would assist with providing a resolution after the problems have arisen.”[[5]](#footnote-5)

There needs to be some form of legislation drafted to set out model arrangements for solicitors in the preparing such Family Agreements. The uncertainty and potential devastating disputes that arise can cause the family dynamic to break down, with long-term implications often leading to the poor health of the older person which may then lead to providing a greater level of care.

**Conclusion**

The harsh reality is that families do not confront vagaries and uncertainties within these agreements and failure to do so leads to conflicting expectations that surface after the event.

Having legislation enacted would create greater transparency, clarity and certainty of what is required in order to protect the interests of the parties and would go to such lengths as to reducing any ambiguity between the parties, as well as, raise our awareness of the significances of the failure of formal/informal agreements.

1. Ruta Ona Schmutz and Ricardo Schmutz v Vytantas Aras and Galina Aras [1996] NSWSC 340 (7 August 1996). [↑](#footnote-ref-1)
2. The Parliament of the Commonwealth of Australia, Older People and the Law, House of Representatives, Standing Committee and Constitutional Affairs, September 2007, Canberra, Chapter 4 page 138; Alzheimer’s Australia, Submission No 55, p. 22 and 23. [↑](#footnote-ref-2)
3. Ibid at 141; Alzheimer’s Australia, *Submission* No 55, p 23. The Aged Rights Advocacy Service Inc (ARAS) also identified a lack of documentary evidence as an issue: Ms Marilyn Crabtree, ARAS, Transcript of Evidence, 31 July 2007, p 21. [↑](#footnote-ref-3)
4. Ibid 141-142; Cares Queensland, Submission No. 81, p 6. [↑](#footnote-ref-4)
5. Ibid 145; Victorian Government, Submission No. 121, pp 29-30. [↑](#footnote-ref-5)