

## 6. Family Agreements

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### Summary

6.1 A specific type of financial abuse of older people has been recognised in the context of family agreements. A 'family agreement', of the kind considered in this chapter, has a number of forms but is typically made between an older person and a family member. The older person transfers title to their real property, or proceeds from the sale of their real property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. As an exchange of property in return for long term care is at the centre of these family agreements, they are also known as 'assets for care' agreements or arrangements.

6.2 These agreements are typically not put in writing. Where they are written, family agreements may be prepared by one of the parties to the agreement, without legal advice, and the agreement generally does not provide for what happens if there is a breakdown of the relationship.

6.3 While such arrangements can fulfil an important social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled, or the relationship otherwise breaks down. It may be difficult to establish that a contract was intended, and what its terms were. The other party is likely to be the registered proprietor of the property, and it may be difficult to establish a specific

interest in the land. The older person may be left without money or even a place to live, a kind of financial abuse identified by many stakeholders as financial abuse.

6.4 The ALRC recommends that tribunals be given jurisdiction over disputes within families with respect to residential real property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal provides a low cost and less formal forum for dispute resolution—in addition to the existing avenues of seeking legal and equitable remedies through the courts.

6.5 Moreover, because social security laws and Centrelink processes relating to eligibility for the Age Pension may be driving entry into family agreements in ways that are disadvantageous to the older person if the agreement fails, the ALRC recommends that the *Social Security Act 1991* (Cth) be amended to require that assets for care agreements (known as a ‘granny flat interest’) be expressed in writing in order for the older person to continue to be entitled to the Age Pension.

6.6 In order to facilitate greater community awareness and understanding, the ALRC also suggests that the Department of Human Services should ensure that any elder abuse strategy developed by the Department, as recommended in Chapter 12, specifically addresses the potential connection between elder abuse and family agreements.

## **Challenges posed by family agreements**

6.7 The majority of older people either live with their partner or alone. Nevertheless, statistics prepared by the Australian Bureau of Statistics show that, in 2011, 8.2% of people aged 65 years and over were living with their children or other relatives (usually a sibling). Only 1.7% were living privately with non-relatives. Of those aged 85 years and over, 12.2% were living with their children or other relatives and 0.9% were living privately with one or more persons who were not a relative. Women across the three age groups of 65–74, 75–84 and 85+, were much more likely than men to live with children or other relatives. Of women aged over 85, 14.8% were living with their children or other relative.<sup>1</sup> The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.<sup>2</sup>

6.8 Family agreements can take many forms, but for this chapter, the kind considered involves a transfer of an older person’s home or other assets to a trusted family member in exchange for a promise of long-term care and support. The proceeds

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1 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where and How Do Australia’s Older People Live?* Cat No 2071.0 (2013).

2 Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Australian Research Network on Law and Ageing, *Submission 90*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Law Council of Australia, *Submission 61*.

may be used to reduce indebtedness, extend a house, or build a ‘granny flat’.<sup>3</sup> Alternatively, the trusted family member may use the proceeds from the sale of the older person’s home to purchase a new property for everyone to live in together. The Law Council of Australia described the nature of assets for care arrangements that have come to the attention of legal practitioners:

these arrangements usually arise in the context of an older person being unable to remain living in the family home. It is agreed, usually verbally, that the family home be sold, and the proceeds transferred to usually an adult child, who in turn uses the funds to pay off their mortgage, extend or renovate their home or build a granny flat on their property. The transfer is not a gift, but rather an exchange of assets for care for life.<sup>4</sup>

6.9 Seniors Rights Victoria also provided an example of a typical family agreement:

A grandmother took responsibility for the care of a grandson during his childhood after the death of his parents, and continued to provide a home for him as an adult. The grandmother owned her own home, but considered the possibility of downsizing after living on her own for a period. As her grandson and his family wanted to upgrade to a new and larger home with a swimming pool for the children, he suggested that his grandmother could sell her home and then live with the family ‘for the rest of her life’. These arrangements were made, but no definite understanding about the ownership of the property was reached. The new home was purchased in the names of the grandson and his wife.<sup>5</sup>

6.10 Family agreements are popular in Australia for many reasons including, as Brian Herd suggests:

- our general aversion to the ‘institutional’ care of aged care facilities, such as nursing homes and hostels;
- the lack of such facilities (where they become essential) or, at least, of any more sympathetic and empathetic alternatives;
- people are living longer and, as a result, living longer with disabilities;
- our fixation in later life to preserve assets (eg, the icon of the family home) for succeeding generations;
- our consequent reluctance to dissipate assets (especially the family home) to pay any premium for assisted care, such as an accommodation bond in a hostel; and
- our predilection for ‘impoverishing’ ourselves in order to obtain and maintain social security entitlements and to reduce the tax impact of ageing.<sup>6</sup>

6.11 Herd also noted that overlaying ‘these mores is our understandable preference to be cared for by family rather than some unconnected, albeit well-intentioned, professional care provider whenever this becomes necessary’.<sup>7</sup>

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3 The Macquarie Dictionary defines ‘granny flat’ as ‘a self-contained extension to or section of a house, designed either for a relative of the family, as a grandmother, to live in, or to be rented’.

4 Law Council of Australia, *Submission 61*.

5 Seniors Rights Victoria, *Submission 171*.

6 Brian Herd, ‘The Family Agreement: A Collision Between Love and the Law?’ (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 25.

7 *Ibid.*

6.12 The making of family agreements is, in many cases, highly beneficial for the older person and not inherently a form of elder abuse. Seniors Rights Victoria has suggested that making an association between family agreements and elder abuse may discourage older people from getting advice to formalise their agreement, on the basis that only those older people with abusive children need advice.<sup>8</sup>

### **When things go wrong**

6.13 A key issue with family agreements, as the Law Council of Australia noted,<sup>9</sup> is that they are often made orally. They are also often made without legal advice and without any consideration of what might happen if things go wrong.<sup>10</sup> Stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense.<sup>11</sup> The Older Persons Rights Service in Western Australia, for example, estimated that 70% of financial abuse matters it deals with involve the breakdown of family agreements.<sup>12</sup> The Federation of Ethnic Communities' Councils (FECCA) suggested further that older persons from culturally and linguistically diverse communities may be more likely to suffer from the breakdown of these agreements as intergenerational care is common in some communities.<sup>13</sup>

6.14 When things go wrong, a failure to clearly document the agreement may mean that the arrangement is unenforceable and the older person may find themselves homeless and having lost the proceeds of their home, which they invested under the family agreement.

6.15 A key problem with oral agreements identified in submissions was the failure of the parties to think through in detail their expectations under the agreement and what would happen if things go wrong.<sup>14</sup> Key issues that are often overlooked are:

- the nature and level of care anticipated;
- what should happen if the older person's care needs increase;
- what should happen if the carer enters into a new relationship, or if their current relationship ends;

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8 Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1.

9 Law Council of Australia, *Submission 61*.

10 Kyle, above n 8.

11 See, eg, Older Women's Network NSW, *Submission 136*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

12 Eileen Webb and Teresa Somes, 'What Role for the Law in Regulating Older Persons' Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements in Australia' in Ralph Ruebner, Teresa Do and Ann Taylor (eds), *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333.

13 FECCA, *Submission 21*.

14 See, eg, FMC Mediation and Counselling, *Submission 191*; Eastern Community Legal Centre, *Submission 177*; Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; State Trustees Victoria, *Submission 138*; Legal Aid NSW, *Submission 137*; Legal Aid ACT, *Submission 58*; National Seniors Australia, *Submission 57*.

- what should happen if the carer predeceases the older person; and
- what should happen if the caregiver needs to relocate.<sup>15</sup>

6.16 Accordingly, getting legal advice and documenting the family agreement are important. The ALRC commends the work of a broad range of stakeholders including elder abuse helplines, community legal centres and other welfare groups, who provide encouragement, advice and support to older people to get legal advice and properly document their family agreement. Seniors Rights Victoria, for example, has produced *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, in recognition of the role that lawyers can play in helping to prevent the financial abuse of older Australians. The guide includes a checklist of points to consider when drafting an agreement. Seniors Rights Victoria also includes a sample family agreement on its website that lawyers are permitted to use.<sup>16</sup>

6.17 Notwithstanding this important work, because the arrangements are typically made within families, it is unlikely that all, or even a significant majority of older people, will get independent legal advice and assistance in putting in place an appropriate written agreement. As Herd has noted '[d]ocumenting, in a written agreement, a loving, caring or supportive personal relationship, for example, is probably anathema to many Australians'.<sup>17</sup>

6.18 Hervey Bay Seniors Legal and Support Service said that there are also many individuals who are likely to be deterred by the perceived cost of legal advice and the preparation of documentation.<sup>18</sup>

### Access to justice

6.19 The main form of redress when a family agreement goes wrong is currently by way of civil litigation. As the Law Council of Australia stated, where parties are able to access the courts, they are effective in resolving complex cases.<sup>19</sup> Doctrines and remedies, particularly in equity, have developed over many centuries to respond to the varied circumstances in which individuals may suffer loss.

6.20 Nevertheless, pursuing litigation in these cases can be prohibitively costly, unsatisfactorily lengthy, and stressful for the older person. Proof, presumptions and remedies pose significant issues in such cases. The access to justice issues were highlighted by the Australian Research Network on Law and Ageing (ARNLA):

Recovery of property via equitable action is rarely undertaken. The proceedings must commence in the Supreme Court (or sometimes District). They are expensive, time

15 Rosslyn Monro, 'Family Agreements: All with the Best of Intentions' (2002) 27(2) *Alternative Law Journal* 68, 70; Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 *Australian Law Reform Commission Reform Journal* 29, 31.

16 Louise Kyle, 'Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse' (Seniors Rights Victoria, 2012).

17 Herd, above n 6, 25.

18 Hervey Bay Seniors Legal and Support Service, *Submission* 75.

19 Law Council of Australia, *Submission* 61.

consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.<sup>20</sup>

6.21 As the Victorian Law Reform Commission (VLRC) reported, action in the superior courts of the states and territories costs tens of thousands of dollars in legal fees and, even if successful, only a fraction of those costs are recoverable.<sup>21</sup> A similar view was expressed by the Older Persons Rights Service in Western Australia, which noted that elder financial abuse involves largely civil actions in the Supreme Court.

The legal costs are notably quite high and anecdotal statements from lawyers who practise in this jurisdiction have advised us that this remedy is in reality only available to the very rich and/or to companies with access to considerable funds. We are in full agreement with this assessment and have witnessed many cases where older people have lost their family home or life savings with no chance for redress.<sup>22</sup>

6.22 In many of the examples of family agreements gone wrong set out in submissions, the older person had lost their principal asset—their home—and typically had limited other assets.<sup>23</sup> For example, Cairns Community Legal Centre noted that,

by their nature, family agreements under an ‘assets for care’ arrangement involve the older person making either significant contributions or transferring title in property to the other person. Accordingly, when the arrangement breaks down, the older person is not usually in a position to be able to finance proceedings in a higher court for the matter to be determined.<sup>24</sup>

6.23 For those unable to afford a lawyer, disputes involving family agreements do not generally fall into the type of matters for which there is public funding.<sup>25</sup> Specifically, Community Law Australia noted that older people ‘being financially abused by their carer or family, will often, find it extremely difficult to access free ongoing legal help if they can’t afford a lawyer’.<sup>26</sup> Given these challenges, Caxton Legal Centre referred to the Supreme Court as ‘arguably the most inaccessible jurisdiction in the country’.<sup>27</sup>

6.24 Another issue regarding action in the Supreme Court is that such actions are lengthy processes that may take many years to be resolved. Where an older person has lost their home and has limited funds, they need access to a remedy quickly. In addition, older people may be put off by the prospect of lengthy and protracted civil litigation.<sup>28</sup>

20 Australian Research Network on Law and Ageing, *Submission 102*.

21 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

22 Scott Johnson, ‘Elder Abuse: The Need for Law Reform—Enduring Power of Attorney & Family Agreements’ (27 April 2010) 25.

23 See, eg, Seniors Rights Victoria, *Submission 171*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

24 Cairns Community Legal Centre Inc, *Submission 305*.

25 Public funding for legal advice is limited to family law (restricted to matters under the *Family Law Act 1975* (Cth)) and criminal law: see Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (2012) 4.

26 *Ibid* 3.

27 Caxton Legal Centre, *Submission 67*.

28 Justice Connect, *Submission 182*.

6.25 Older people may also be fearful of the social and emotional costs of litigation, given the family context of the dispute. Litigation may exacerbate family breakdown, or lead to a loss of access to grandchildren, which may result in the older person being reluctant to take legal action.<sup>29</sup>

6.26 The ALRC received a number of case studies that highlighted the access to justice issues faced by older people when family agreements go wrong. The following was provided by Legal Aid ACT:

Barry, an eighty five year old man transferred his unencumbered home in the ACT to one of his adult children, Angela. Angela had promised to build a granny flat for Barry and take care of him until his death. There was no written agreement, however Barry had been living in his granny flat on Angela's property for approximately 5 years.

Angela remarried and advised Barry that the arrangement could not continue and demanded he leave his home. Barry was devastated by Angela's actions, however was able to go live with another child, Stephanie and did not want to seek any legal recourse against Angela as he was 'too old and it was too hard' and he felt so ashamed about what had happened to him.<sup>30</sup>

### Challenges in seeking an equitable remedy

6.27 Land law in Australia is defined by the Torrens system of title, the core principle of which is indefeasibility of title—once registered, title is conclusive. The objective of this system is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of the current proprietor's title, and satisfy themselves of its validity.<sup>31</sup> The creation or transfer of an interest in land must be in writing or evidenced in writing, and signed by the person creating or conveying the interest.<sup>32</sup>

6.28 While the Torrens system of title may protect purchasers from claims by non-registered individuals who assert an interest in the property,<sup>33</sup> the Torrens system maintains the right of plaintiffs to bring personal claims founded in law or equity against the registered proprietor.<sup>34</sup> Where there is an oral arrangement, the older person would have to rely on equitable doctrines to establish a proprietary interest and right to recompense. The older person also has the capacity to alert potential purchasers that they have an equitable interest or claim over the property by lodging what is known as a caveat, over the property.<sup>35</sup>

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29 Northern Territory Anti-Discrimination Commission, *Submission 93*.

30 Legal Aid ACT, *Submission 58*.

31 Brendan Edgeworth et al, *Australian Property Law* (LexisNexis Butterworths, 2013) vol 9, ch 5. See also Kelvin Low, 'Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205.

32 See, eg, *Conveyancing Act 1919* (NSW) s 23C.

33 Edgeworth et al, above n 31, ch 5.

34 The so called 'in personam' exception to indefeasibility: see *Ibid*.

35 *Ibid*.

6.29 The key problem underpinning many family agreements is that the older person is typically giving up the certainty of registered legal title in one property (usually their home) in exchange for rights in relation to a new property and/or expectations of care and support. Those rights and expectations are often not explicitly discussed and agreed precisely within the family. The older person's rights with respect to the new property are typically not recorded on the title. As a result, the situation is one where the older person has forgone registered legal title in one property and may or may not have certain rights in contract or equity in the new property.

6.30 Where a family agreement breaks down, the equitable remedies available to an older party in an 'assets for care' dispute will depend on the nature and circumstances of the original arrangement, what evidence is available to confirm the nature of the arrangements, as well as the circumstances and facts of the breakdown of the agreement. Whether the older party is on the title for the relevant property and whether the family agreement was in any way reduced to writing will be important issues, not just in terms of the evidence of the arrangement, but the precise remedies that may be available. To be enforceable, a contract for the creation or transfer of an interest in land must be in writing or evidenced in writing, and signed by the person creating or conveying the interest.<sup>36</sup> Where there is an oral arrangement, the older person may be able to rely on equitable doctrines to establish a proprietary interest and right to recompense. However, this requires navigating

a confusing amalgam of legal issues including, but not limited to, contract law, land law, equity, trusts and family law ... [and] contrary legal presumptions about the nature of family arrangements and joint endeavours. It is dominated by the vagaries of equitable doctrine.<sup>37</sup>

6.31 The available equitable actions include:

- resulting trust;
- undue influence;
- unconscionable conduct;
- remedial constructive trusts; and
- equitable estoppel.

### ***Resulting trusts***

6.32 If an older person contributes money towards the purchase of a property and this is not reflected on the title, they may be able to claim that the property is held on 'resulting trust' for them in proportion to their contribution. However, where the arrangement is between a parent and their child, the law starts with the presumption that the contribution was a gift: the 'presumption of advancement'.<sup>38</sup> This presumption

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36 Ibid [4.16].

37 Webb and Somes, above n 12, 26.

38 Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) pt 2.



may be rebutted, but it places the evidentiary burden on the older person to prove that their payment was not a gift but a contribution to the property. Justice Connect observed that the ‘application of the presumption of advancement has the effect of imposing an evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented’.<sup>39</sup>

6.33 Accordingly, there may be difficulties for older persons in asserting that their contribution to the purchase of a property was not a gift but was to be held by their child on trust.<sup>40</sup> A resulting trust may not apply where the older person simply transfers their home into the name of their child.<sup>41</sup> In such cases, transactions involving voluntary transfers of land can only be set aside on the basis of other equitable doctrines.

### **Undue influence**

6.34 Where an older person has been pressured into a family agreement, another relevant equitable doctrine is the doctrine of undue influence.<sup>42</sup> However, this is likely to be of use only where the older person has not benefited from the family agreement and there was either a relationship of dependency when the agreement was made or actual undue pressure was applied on the older person to agree to the arrangement.

6.35 In the case studies provided by stakeholders, the family agreement was often, at least initially, mutually beneficial and there was no pressure applied on the older person to enter into it. Instead, problems arose subsequently when relationships broke down or unforeseen events changed the dynamics, as in the example provided by Legal Aid ACT above.<sup>43</sup> In these cases, the equitable doctrine of undue influence would not apply.

39 Justice Connect, *Submission 182*. Internationally, there are jurisdictions that do not apply the presumption of advancement to adult children. See, eg, the Canadian decisions of *McLear v McLear Estate* (2000) 33 ETR (2d) 272 (Ont SCJ); *Cooper v Cooper Estate* (1999) 27 ETR (2d) 170 (Sask QB). See also Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis, 3rd ed, 2015), 632–633.

40 Susan Barkehall-Thomas, ‘Parent to Child Transfers: Gift or Resulting Trust?’ (2010) 18 *Australian Property Law Journal* 75, 3.

41 In most Australian jurisdictions, this transaction will be treated as a gift and there will be no legal possibility of asserting the existence of a resulting trust: *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6; *Property Law Act 1974* (Qld) s 7; *Property Law Act 1958* (Vic) s 19A; *Property Law Act 1969* (WA) ss 38, 39. See also: *Smith v Glegg* [2005] 1 Qd R 561; *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 NSWLR 273; *Bhana v Bhana* [2002] NSWSC 117; *Singh v Singh* [2004] NSWSC 109, [34]–[35]; *Daher v Doulaveras* [2008] NSWSC 583; *Drayson v Drayson* [2011] NSWSC 965, [59]. There are Victorian authorities that support a resulting trust being imposed on gifts of land: *Schweitzer v Schweitzer* [2010] VSC 543, [24]; *Re Association for Visual Impairment the Homeless and the Destitute Inc (in liq) (No 2)* [2014] VSC 183. The Victorian Court of Appeal left the question open in *Xiao Hui Ying v Perpetual Trustees Victoria Ltd* [2015] VSCA 124, [39].

42 Heydon, Leeming and Turner, above n 38, ch 15. See also Fiona Burns, ‘Undue Influence Inter Vivos and the Elderly’ (2002) 26(3) *Melbourne University Law Review* 499, 514. Undue influence in the probate context is considered in ch 8.

43 See also, Relationships Australia, Victoria, *Submission 125*.

***Unconscionable conduct***

6.36 Where an older person is denied promised care and support, or is excluded from their home, another ground for seeking to uphold the family agreement in equity is on the basis that the older person was in a position of ‘special disadvantage’ and that the other person knew of this. In such a case, it may be ‘unconscionable’ for the other person to deny the agreement.<sup>44</sup>

6.37 In many family agreement situations, there is no dependency or special disadvantage at the time the agreement was made.<sup>45</sup> In addition, at the time the agreement breaks down, it may be that neither party contemplated what would happen if things went wrong, rather than any intent by the other family member to deceive or take advantage of the older person. Accordingly, unconscionable conduct may be relevant only in a small number of cases.

***Remedial constructive trusts***

6.38 There are two kinds of constructive trusts that may be imposed by courts in disputes concerning property agreements that were created in the absence of writing. The first is the common intention constructive trust and the second is the constructive trust imposed for unconscionability or unconscientiousness.

6.39 The common intention constructive trust has three elements:

- (a) the parties must have formed a common intention as to how property will be shared;
- (b) the party claiming a beneficial interest must show that they have acted to their detriment; and
- (c) it would be a fraud on the claimant for the legal owner to assert that the claimant had no beneficial interest in the property.<sup>46</sup>

6.40 The unconscionability, or unconscientiousness-based, constructive trust has four elements:

- (a) the existence of a joint endeavour between the plaintiff and the defendant for the object or purpose of providing permanent financial security and benefits;
- (b) valuable contributions by the plaintiff to the joint endeavour;
- (c) an increment in wealth having accrued to the defendant as a result of the joint endeavour; and

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44 Fiona R Burns, ‘The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia’ (2003) 29 *Monash University Law Review* 336, 351–352.

45 Webb and Simes, above n 12, 34.

46 *Evans v Braddock* [2015] NSWSC 249, [260]; *Sobey v Sobey* [2014] VSC 373, [44]; *Taleb v DPP* [2014] VSC 285, [64]; *Gabini & Gabini* [2014] FamCAFC 18; *Grant v Grant* [2013] VSC 329, [146]–[147]; *Shepherd v Doolan* [2005] NSWSC 42; *Hohol v Hohol* [1981] VR 221, 225. See Radan and Stewart, above n 39, 945.

(d) the unconscionability of the retention of that wealth by the defendant to the exclusion of the plaintiff.<sup>47</sup>

6.41 Webb and Somes have noted that a constructive trust imposed on a failed joint endeavour is the most common equitable doctrine relied on in assets for care arrangements.<sup>48</sup>

6.42 The primary disadvantage of remedial constructive trusts, from the perspective of the older person, is that, if successful, the available remedy is ordinarily the imposition of an equitable lien to the value of the contribution, rather than compensation for the loss of expectation of care and support.<sup>49</sup> Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.

### ***Equitable estoppel***

6.43 A claim of estoppel can result in the enforcement of an expectation in equity.<sup>50</sup> This may be the most suitable remedy in family agreement cases.

6.44 In order to succeed in an equitable claim, the older person must show that:

- the defendant made a representation, either by conduct or acquiescence, creating the expectation that the older person would gain an interest in property;
- the older person relied on this representation to their detriment; and
- the defendant knew that the older person was relying on the representation.<sup>51</sup>

6.45 Many of the cases highlighted in submissions give rise to potential claims of estoppel.<sup>52</sup> In many cases, there is a promise—whether explicit or based on acquiescence—that the older person will be able to live in the property for the duration of their life. The older person has made a financial contribution to the property in reliance on that representation, which, if the relationship breaks down and the older person is no longer able to live in the property, is to their detriment. By conduct, it should be possible to establish that the defendant knew of this reliance by the older person.

47 *Lloyd v Tedesco* (2002) 25 WAR 360, [27]. The first decision to postulate this type of constructive trust was the decision of Deane J in *Muschinski v Dodds* (1985) 160 CLR 583. See also *Baumgartner v Baumgartner* (1987) 164 CLR 137, where Deane J's thesis was accepted by the High Court.

48 Webb and Somes, above n 12. See also *Muschinski v Dodds* (1985) 160 CLR 583.

49 Barkehall-Thomas, above n 40, 155.

50 Note that some members of the High Court have considered that there is one unified form of estoppel: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

51 Barkehall-Thomas, above n 40, 168. *Sullivan v Sullivan* (2006) ANZ ConvR 54, [2]–[3] (Handley JA).

52 *Advocare Inc (WA)*, *Submission 86*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

6.46 The available remedy in an equitable estoppel action is likely to be compensation to the full value of the promise forgone, particularly in family agreement arrangements where the breach of promise has significant consequences for the older person.<sup>53</sup>

### **Summary**

6.47 Accordingly, there are a range of potential legal actions available to an older person who has suffered financial loss on the breakdown of a family agreement and their success will depend on the extent to which the facts of the particular situation can meet the required tests in law and equity. The fact that the older person has suffered significant financial loss may not be sufficient of itself. An older person has to weigh up the strength of their case in the context of unwritten agreements and conduct that may be evidence of a range of intentions. This assessment must be made with an understanding of the considerable costs of equity litigation.

## **Low cost options to resolve disputes**

**Recommendation 6–1** State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

6.48 Tribunals should be given jurisdiction over disputes with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal offers a low cost and less formal forum for dispute resolution, in addition to the existing avenues of seeking legal and equitable remedies through the courts. Tribunals are able to resolve disputes in a non-legalistic fashion without regard to formal pleadings and affidavits. This recommendation seeks to provide an alternative avenue for dispute resolution and would otherwise not disturb existing legal and equitable doctrines.

6.49 The tribunal, consistent with the approach in Victoria (see below), would consider the general law of property, but would have a broader jurisdiction to award compensation having regard to contributions of both parties made under the assets for care arrangement. In particular, the tribunal would consider the care and support provided by all parties under an assets for care arrangement as well as the financial contribution to the property.

6.50 Where the tribunal is satisfied that a party has suffered loss as a consequence of a breakdown of a family agreement, the tribunal should award the appropriate remedy that is just and fair having regard to the financial and non-financial contributions of the parties.

6.51 Consistent with the tribunal’s role to provide a quick, simple and informal forum for dispute resolution, the recommendation is limited to disputes over residential

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53 Barkehall-Thomas, above n 40, 155.

property. Recommendation 6–1 excludes disputes involving family businesses and farms, and focuses on domestic disputes involving residential property under assets for care arrangements. More commercial arrangements are better suited to formal adjudication through the courts.

6.52 Often a failed family agreement may involve an older person, their child and their child’s partner. Where the child and their partner are separated and seeking to resolve a property dispute under the *Family Law Act 1975* (Cth), the older person may seek to protect their interest in the property by joining proceedings under the *Family Law Act 1975* (Cth).<sup>54</sup> This recommendation does not seek to interfere with this jurisdiction.

### The role of tribunals in dispute resolution

6.53 Victoria was the first state to establish a combined civil and administrative tribunal—the Victorian Civil and Administrative Tribunal (VCAT).<sup>55</sup> Following the establishment of VCAT in 1998, there is now a civil and administrative tribunal in each state and territory, except Tasmania.<sup>56</sup> By volume of cases, VCAT is the largest tribunal in Australia and has a broader jurisdiction with respect to property matters and civil claims than any other tribunal.<sup>57</sup>

6.54 These civil and administrative tribunals are often referred to as ‘super tribunals’—a single tribunal with broad jurisdiction for administrative review and to resolve civil and commercial disputes replacing dozens of smaller tribunals, boards and panels that had discrete, specialist and narrow remits.<sup>58</sup> The development of these super tribunals has been described as ‘one of the most successful examples of creativity in the area of dispensing of justice that states have embarked upon’.<sup>59</sup>

54 *Family Law Act 1975* (Cth) s 79F.

55 The Victorian Civil and Administrative Tribunal (VCAT) was established by *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

56 The Victorian Civil and Administrative Tribunal (VCAT) was established by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the State Administrative Tribunal (SAT) was established by the *State Administrative Tribunal Act 2004* (WA), the ACT Civil and Administrative Tribunal (ACAT) was established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT), the Queensland Civil and Administrative Tribunal (QCAT) was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the NSW Civil and Administrative Tribunal (NCAT) was established by the *Civil and Administrative Tribunal Act 2013* (NSW), the South Australian Civil and Administrative Tribunal (SACAT) was established by the *South Australian Civil and Administrative Tribunal Act 2013* (SA), and the Northern Territory Civil and Administrative Tribunal (NTCAT) was established by the *Northern Territory Civil And Administrative Tribunal Act 2014* (NT). Tasmania is considering establishing a super tribunal: Department of Justice (Tas), *A single tribunal for Tasmania*, Discussion Paper (September 2015).

57 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2015–16*, 3.

58 Justice Kevin Bell (President, VCAT), ‘The role of VCAT in a changing world: the President’s review of VCAT’, Speech delivered to the Law Institute of Victoria, 4 September 2008.

59 Bertus De Villiers, ‘Accessibility to the Law—the Contribution of Super-Tribunals to Fairness and Simplicity in the Australian Legal Landscape’ (2015) 39(2) *University of Western Australia Law Review* 239, 240.

6.55 Key defining features of these tribunals are that they are able to operate flexibly and with a greater degree of informality than a court.<sup>60</sup> The enabling statutes for the tribunals specifically require them to conduct proceedings with as little formality and technicality and as much speed as the circumstances of the case permit.<sup>61</sup> The tribunals are expressly not bound by the rules of evidence, and have a broad power to inform themselves as they think fit.<sup>62</sup> Nevertheless, the tribunals are bound by the rules of procedural fairness (previously ‘natural justice’) and must act fairly. This flexibility and informality can greatly assist an unrepresented litigant run their legal action when compared to navigating formal court processes.<sup>63</sup>

6.56 Byrne J noted that the enabling statute for VCAT requires the tribunal to act differently from the courts:

This necessarily involves the Tribunal taking a more active role and identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on the issues. It may be, too, that in a given case the Tribunal will itself interrogate witnesses in a manner and to an extent which would not be expected in a court.<sup>64</sup>

6.57 Notwithstanding this, ‘in matters that are complex, or where expert evidence is heard, or where parties are legally represented, the proceedings [in the tribunal] are less informal and often resemble a hearing in a court’.<sup>65</sup> Typically, appeals from the tribunal to the courts are only possible on questions of law.<sup>66</sup> The state and territory tribunals differ in the extent to which there is an internal review or appeals process within the tribunal on matters of fact.<sup>67</sup>

### Victorian approach

6.58 While the civil and administrative tribunals have broadly similar processes and procedures, their jurisdiction does differ across states and territories. The civil dispute resolution jurisdiction of these tribunals has even been described as resembling ‘a smorgasbord of jurisdictions with little intra-state consistency’.<sup>68</sup>

6.59 Recommendation 6–1 builds on VCAT’s jurisdiction to resolve disputes between co-owners of land and goods. This jurisdiction is unique to Victoria and was

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60 Jason Pizer, ‘The VCAT—Recent Developments of Interest to Administrative Lawyers’ [2004] (43) *AIAL Forum* 40.

61 *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(3)(d).

62 *Civil and Administrative Tribunal Act 2013* (NSW) s 38(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1); *State Administrative Tribunal Act 2004* (WA) ss 32(2), (4); *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3).

63 De Villiers, above n 59, 47.

64 *Winn v Blueprint Instant Printing Pty Ltd* [2002] VSC 295 (2 August 2002) [9].

65 De Villiers, above n 59, 247.

66 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148; *State Administrative Tribunal Act 2004* (WA) s 105.

67 *ACT Civil and Administrative Tribunal Act 2008* s 79(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 32; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

68 De Villiers, above n 59, 247.

established by amendments to the *Property Law Act 1958 (Vic) (PLA)* in 2006. VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.<sup>69</sup> The tribunal's jurisdiction over property disputes between co-owners has an uncapped monetary value.

6.60 Notwithstanding the flexibility to make any order that the tribunal considers 'just and fair,' VCAT does not ignore the general law of property. As Senior Member Riegler explained:

Although the Act does not expressly state that the Tribunal's discretion is to be applied in accordance with the general law, I am of the opinion that to simply determine the issues based on what the Tribunal may, from time to time, consider to be just and fair without having regard to the general law is not an outcome that I consider to be just and fair. The public expect decisions of the Tribunal to be consistent, in terms of applying the law to the facts as found. To disregard the general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.<sup>70</sup>

6.61 VCAT has confirmed that the *PLA* gives it jurisdiction to make orders with respect to equitable, as well as legal, co-owners.<sup>71</sup> The broad statutory mandate gives VCAT considerable flexibility to arrive at a just and fair sale of the land and a division of the proceeds and/or division of land. Justice Connect observed that

VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owner's individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.<sup>72</sup>

6.62 One of the particular advantages of VCAT having this jurisdiction is that it gives the parties access to alternative dispute resolution (ADR) without going through a number of pre-trial steps, which may be required in the Supreme Courts. VCAT may seek to resolve disputes through mediation or compulsory conferences.<sup>73</sup> Compulsory conferences are similar to mediation in that they are pre-trial, confidential, and 'without prejudice' facilitated discussions, designed to assist the parties to resolve their dispute.<sup>74</sup> Unlike mediation, compulsory conferences are only conducted by tribunal members and the role of the tribunal member is to actively assist the parties to reach settlement. As set out in a VCAT Practice Note:

at a compulsory conference the Tribunal Member may express an opinion on the parties' prospects in the case, or on the relative strengths and weaknesses of a party's

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69 *Property Law Act 1958 (Vic)* s 228.

70 *Davies v Johnston (Revised)* (Real Property) [2014] VCAT 512 (5 May 2014), [27].

71 *Garnett v Jessop (Real Property)* [2012] VCAT 156 (13 February 2012).

72 Justice Connect, *Submission 182*.

73 *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ss 83, 88.

74 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 4—Alternative Dispute Resolution* (2014) 3.

case. The Member will exercise this power if the Member considers it to be of assistance in promoting settlement.<sup>75</sup>

6.63 This more interventionist approach may be better suited to disputes regarding family agreements, where there is often a significant power imbalance between the parties.<sup>76</sup> Seniors Rights Victoria stressed the value of the tribunal's ADR processes in providing a forum in which family members are required to sit down and resolve disputes. Seniors Rights Victoria highlighted the extent to which these disputes may be resolved through ADR, without needing to be adjudicated by the tribunal.<sup>77</sup>

### **Support for dispute resolution by a tribunal**

6.64 Community Legal Centres and elder abuse advice services, including those with experience of the Victorian approach, supported tribunals having jurisdiction over disputes following the breakdown of family agreements.<sup>78</sup> ARNLA, for example, noted that a 'tribunal may be a preferable forum to hear and determine disputes about family agreements as tribunals are considered to be less expensive, more expedient, and less formal than courts'.<sup>79</sup>

6.65 Similarly, Seniors Rights Service suggested that

[i]t would be beneficial to have a forum other than the Supreme Court, such as the NSW Civil and Administrative Tribunal, for property orders to be made in relation to family agreements to reduce time, cost, and stress for older people in bringing proceedings against family members.<sup>80</sup>

6.66 Seniors Rights Victoria highlighted the value of a tribunal process in assisting older people to resolve failed family agreements:

This jurisdictional change [in Victoria] has provided 'co-owners' with a much greater ability to institute proceedings to resolve disputes though less expensive and onerous processes than previously existed for Supreme Court matters. This has also provided a significant benefit to older people where Assets for Care situations have failed, and they seek to recover their financial contribution to the purchase of a property in conjunction with other family members.<sup>81</sup>

6.67 Justice Connect also noted that tribunal processes offer a number of benefits, including that 'the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse'.<sup>82</sup>

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75 Ibid 5.

76 Caxton Legal Centre, *Submission 67*.

77 Seniors Rights Victoria, *Submission 171*.

78 See, eg. Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Australian Association of Social Workers, *Submission 153*; Older Women's Network NSW, *Submission 136*; Australian Research Network on Law and Ageing, *Submission 102*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Legal Aid ACT, *Submission 58*; University of Newcastle Legal Centre, *Submission 44*.

79 Australian Research Network on Law and Ageing, *Submission 90*.

80 Seniors Rights Service, *Submission 169*.

81 Seniors Rights Victoria, *Submission 171*.

82 Justice Connect, *Submission 182*.



### Defining the tribunal's jurisdiction

6.68 One of the key limitations of the Victorian model is that it is restricted to co-owners of land in law and equity. However, it may well be that, in a majority of family agreement disputes, the older person has no property interest as co-owner unless established through, for example, equitable estoppel. If they do have an interest in property, that interest may be a life interest, an equitable lien or licence to reside in the property.<sup>83</sup> The ALRC recommends that the tribunal's jurisdiction encompass any type of legal or equitable interest an older person may have in their current or former principal place of residence. The tribunal's jurisdiction should allow the tribunal to consider the respective contributions, financial and non-financial, under the family agreement. This approach is consistent with the recommendation from the Seniors Legal and Support Service Hervey Bay, that

[t]here be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.<sup>84</sup>

6.69 By focusing on contributions, the tribunal would be able to fully consider the care and support provided by the parties to each other. This addresses a principal criticism that the law of equity in relation to family agreements only considers the asset side of 'assets for care', and not the care side.<sup>85</sup> That is, the law of equity as applied to family agreements is focused on financial contributions towards the purchase of property or renovations to property and not the non-financial contribution of care and support provided.

6.70 The Law Council of Australia supported a tribunal jurisdiction to resolve disputes involving assets for care arrangements and suggested the jurisdiction should be

defined in a way that ensures parties to assets for care arrangements have a forum to resolve their dispute and that there are appropriate remedies available, including, non-monetary, monetary and real property. Further, the Law Council supports the proposition that general principles of property law should apply in all cases. Where a former property or principal place of residence of the older person in an assets for care arrangement has been disposed of to a third party bona fide purchaser for value without notice, property law principles will ensure an innocent third party purchaser is not unfairly disadvantaged where assets for care arrangements fail. Nonetheless, the victim should still be able to claim compensation from the perpetrator.<sup>86</sup>

6.71 The ALRC agrees that the tribunal should be able to award equitable remedies as suggested by the Law Council of Australia and that their availability and amount be calculated in accordance with equitable principles. The ALRC also agrees that the general laws of property should protect third party purchasers from claims in relation to failed assets for care arrangements.

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83 Kyle, above n 16, 42.

84 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

85 Webb and Somes, above n 12; Justice Connect, *Submission 182*.

86 Law Council of Australia, *Submission 351*.

6.72 Some stakeholders suggested that the presumption of advancement should not apply in the case of older persons and their adult children.<sup>87</sup> Given the breadth of the tribunal's jurisdiction as proposed, the ALRC considers that this change is not necessary. Moreover, the ALRC is concerned that altering equitable doctrines may have broader ramifications outside the context of elder financial abuse.

### Defining family

6.73 The tribunal's jurisdiction should be defined by the relationship of the parties, that is, a familial or 'familial like' relationship. This would enable a tribunal to easily confirm its jurisdiction by ascertaining the nature of the relationship between the parties to the proceedings.

6.74 Defining the jurisdiction of the tribunal on the basis of family relationship may be considered novel, given that this has previously only been done in relation to married couples and, more recently, de-facto relationships under the *Family Law Act 1975* (Cth).

6.75 A key issue explored in the Discussion Paper was how widely 'family' should be defined for the purposes of the tribunal's jurisdiction.<sup>88</sup> The ALRC was concerned to ensure that individuals living in non-traditional families would be included.<sup>89</sup>

6.76 There was significant support for a definition of family that was broad and recognised the diverse range of relationships that may exist in assets for care type arrangements. For example, Disabled People's Organisations Australia suggested that

[u]nderstandings of 'family' must be flexible enough to consider a wide range of non-traditional family and family-type arrangements, including cultural understandings of extended family and kinship arrangements, and how these may differ between various groups and communities.<sup>90</sup>

6.77 Such an approach was supported by stakeholders such as FECCA, the Victorian Multicultural Commission and State Trustees (Vic).<sup>91</sup>

6.78 The Law Council of Australia, Eastern Community Legal Centre, and the Office of the Public Advocate (Vic) also suggested the definition of family in the *Family Violence Protection Act 2008* (Vic) be adopted when implementing Recommendation 6-1.<sup>92</sup> In that Act, family is defined broadly:

#### Meaning of family member

- (1) For the purposes of this Act, a 'family member', in relation to a person (a 'relevant person'), means—

87 See, eg, Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*; Webb and Some, above n 12.

88 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 8-1.

89 Ibid ch 8.

90 Disabled People's Organisations Australia, *Submission 360*.

91 State Trustees (Vic), *Submission 367*; Victorian Multicultural Commission, *Submission 364*; FECCA, *Submission 292*.

92 Eastern Community Legal Centre, *Submission 357*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (Vic), *Submission 246*.

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- (a) a person who is, or has been, the relevant person's spouse or domestic partner; or
  - (b) a person who has, or has had, an intimate personal relationship with the relevant person; or
  - (c) a person who is, or has been, a relative of the relevant person; or
  - (d) a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
  - (e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.
- (2) For the purposes of subsections (1)(b) and (1)(e), a relationship may be an intimate personal relationship whether or not it is sexual in nature.
- (3) For the purposes of this Act, a 'family member' of a person (the 'relevant person') also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following—
- (a) the nature of the social and emotional ties between the relevant person and the other person;
  - (b) whether the relevant person and the other person live together or relate together in a home environment;
  - (c) the reputation of the relationship as being like family in the relevant person's and the other person's community;
  - (d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;
  - (e) the duration of the relationship between the relevant person and the other person and the frequency of contact;
  - (f) any financial dependence or interdependence between the relevant person or other person;
  - (g) any other form of dependence or interdependence between the relevant person and the other person;
  - (h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;
  - (i) the provision of sustenance or support between the relevant person and the other person.

#### Example

A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members.

- (4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.<sup>93</sup>

6.79 The ALRC considers that such a definition may be a useful template as it includes both family relationships and ‘family-like’ relationships, including relationships between a carer and care recipient in certain circumstances. It would enable sufficient flexibility to address a range of concerns expressed by stakeholders’ such as:

Not only do we have a limited understanding of caring relationships with our current ageing population, it is also difficult to project what types of relationships may be formed in the future, as the idea of ‘family’ evolves over time. There are many factors that may challenge the traditional role of the adult child caring for their ageing parents, including: pressure on children to remain in the workforce as their parents age; ageing adults who decided not to have children; older people who have become estranged from their ‘family’, for example some members of the LGBTI community, and have ‘family members of choice’.<sup>94</sup>

6.80 Nevertheless, when implementing Recommendations 6–1 some refinement of the definition of family may be required, given the intergenerational nature of elder abuse when compared to family violence. For example the definition of family in the *Family Violence Protection Act 2008* (Vic) starts with domestic partners and persons in intimate personal relationships, whereas when defining family for the purposes of Recommendation 6–1 it may be appropriate to start with familial relationships such as the child/parent relationship and relationships between grandparents and grandchildren.

## Centrelink requirements and family agreements

**Recommendation 6–2** The *Social Security Act 1991* (Cth) should be amended to require that a ‘granny flat interest’ is expressed in writing for the purposes of calculating entitlement to the Age Pension.

6.81 Approximately 80% of all persons over Age Pension age receive either a full or part pension.<sup>95</sup> When deciding to enter into an assets for care arrangement, an important consideration for most older Australians is, therefore, how that arrangement may affect their entitlement to the pension.

6.82 The principal place of residence for an older person is an exempt asset for the purposes of the Age Pension. As outlined above, a typical ‘assets for care’ arrangement

93 *Family Violence Protection Act 2008* (Vic) s 8.

94 Justice Connect Seniors Law, *Submission 362*.

95 National Commission of Audit, ‘Age Pension’ in *The Report of the National Commission of Audit* [9.1]. Fewer than 20% of people aged 65 years receive no pension. This figure applies only to older Australians who meet the residency requirements for social security. The Australian Bureau of Statistics reported that, in 2012, 2,278,215 people received income through the Age Pension, which was an increase of 57,831 people from the same point in time in 2011: Australian Bureau of Statistics, *National Regional Profile, 2008 to 2012, Cat 1379.0.555.001*.

involves an older person transferring title to their property, or proceeds from the sale of their property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. Exceptions under social security law operate to ensure that older persons who enter into this type of arrangement will not lose their pension. This exception is framed as the ‘granny flat interest’. Accordingly, a key incentive for older people may be to ensure that their assets for care arrangement is deemed to be a ‘granny flat interest’ for the purposes of social security law.<sup>96</sup>

6.83 Recommendation 6–2 seeks to assist the earlier Recommendation 6–1 by making it more likely that there will be some evidence of the assets for care agreement in writing in the event that a dispute is brought before a tribunal such as the Administrative Appeals Tribunal (AAT) (for social security) or the proposed state and territory tribunals. This would reduce some of the complexity and evidentiary issues that need to be addressed by an older person making a claim in the tribunal.

6.84 Recommendation 6–2 also seeks to address specific concerns raised by stakeholders that Centrelink policy is encouraging older people to enter into assets for care arrangements in a manner that may be disadvantageous. For example, the Law Council of Australia raised concerns that by ‘requiring older people to ensure that they are not registered on title when entering into these arrangements, the Department of Human Services policy can currently prevent older people from protecting themselves against elder abuse’.<sup>97</sup>

6.85 The Older Persons Advocacy Network provided an example of the interactions between Centrelink’s pension rules and assets for care arrangements:

In 2010 Mr and Mrs P (P) then aged 75 and 73 respectively, received the age pension which was their only income. They owned their own home valued at \$800K but found they could not afford to service the mortgage over their home. Balance owing to the Bank was about \$230K. P entered into an oral agreement with their daughter and son in law (SIL) whereby P would contribute \$500K from the sale proceeds of their home to the purchase of a new larger house, the title of which was to be put into the names of the daughter/SIL. In return for their financial contribution P would acquire a right of residence in the new house for life. The financial arrangement was never reduced to writing nor did P obtain any independent legal advice. Moreover P did not lodge a caveat on the title to protect their equitable interest in the house. P did, however, later on notify Centrelink of the financial arrangement they had entered into. Centrelink determined that their contribution of \$500K in return for a right of residence for life was allowable in accordance with Centrelink’s granny flat rules. ...

Some years later there was a falling out in the relationship between P and their daughter/SIL. P were told to vacate the house and that none of their contribution to the purchase price would be refunded. P’s daughter/SIL alleged that the contribution had been a gift.<sup>98</sup>

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96 Seniors Rights Victoria, *Submission 383*; R McCullagh, *Submission 24*.

97 Law Council of Australia, *Submission 61*.

98 Older Persons Advocacy Network, *Submission 43*.

6.86 In this example, had there been evidence in writing of the agreement between the parties, it would have been much more difficult for the daughter and son-in-law to have asserted that the money was a gift rather than an exchange as part of an assets for care arrangement.

### Granny flat interests

6.87 Under the *Social Security Act 1991* (Cth), a single person or couple can make gifts of up to \$30,000 over a period of five years without it affecting the amount of government benefits they can receive.<sup>99</sup> Any amount over the allowable amount will be assessed as a ‘deprived asset’ for five years from the date of the gift, which means it will be counted as the person’s asset. These are also known as ‘gifting’ rules.<sup>100</sup> Therefore if an older person was to sell their home and give the proceeds to their children, the value of that gift would be counted as an asset of the older person for the purposes of calculating the older person’s entitlement to the Age Pension.

6.88 However, where a gift creates a ‘granny flat interest’ for the older person, the asset deprivation rules do not apply. A ‘granny flat interest’ is defined in the following terms:

- (2) A person has a *granny flat interest* in the person’s principal home if:
  - (a) the residence that is the person’s principal home is a private residence; and
  - (b) the person has acquired for valuable consideration or has retained:
    - (i) a right to accommodation for life in the residence; or
    - (ii) a life interest in the residence.<sup>101</sup>

6.89 Thus, a granny flat interest is created when a person pays for (or retains) a life interest or right to use certain accommodation for life in a residence that will be the person’s principal home. The use of the term ‘granny flat’ does not describe the type of dwelling—it describes the living arrangement. Family agreements or assets for care agreements are granny flat interests for the purposes of social security.<sup>102</sup> Where a person establishes a granny flat interest, the value of it is generally the same as the amount paid for acquiring the property interest.<sup>103</sup>

6.90 A key criterion of the granny flat interest is that the older person is not on the legal title to the property the subject of the assets for care arrangement. Seniors Rights Victoria expressed concern that the requirement was encouraging older persons to give

99 With a maximum of \$10,000 in any single year. *Social Security Act 1991* (Cth) s 1118.

100 See, eg, Department of Human Services, *Gifting* <www.humanservices.gov.au>.

101 *Social Security Act 1991* (Cth) ss 12C(2), (3).

102 See ch 12.

103 *Social Security Act 1991* (Cth) ss 1118(1)(c)(i)–(iii). Where there is a ‘special reason’, the granny flat interest can be valued at a different amount from that which was paid. Examples of special reasons include circumstances where the older person transfers the title to their home as well as additional assets, or where an older person pays for the construction of premises as well as additional interests. In these circumstances a reasonableness test is applied. Department of Social Services, *Guide to Social Security Law* (2014) [4.6.4.50].

up their right to be registered on title as a proprietor in order to access the ‘granny flat exemption’.<sup>104</sup> A similar view was expressed by the Law Council of Australia.<sup>105</sup>

6.91 The ALRC notes that the granny flat interest is not the only option for co-living recognised under social security law. For example, it is possible for an older person to invest in a property that will become their principal place of residence with their family and stay on title without losing their pension.<sup>106</sup> However, these options are less well known and understood and the criteria for valuing the older person’s interest are not as generous or certain as the granny flat interest.

6.92 Accordingly, the ALRC agrees with stakeholders that the rules relating to the ‘granny flat interest’ may be encouraging older people to enter assets for care arrangements that result in the older person giving up legal title to property. Given this, the ALRC considers that the terms and conditions of the granny flat interest should be reformed.

### ***Importance of reducing the interest to writing***

6.93 Currently, there is no requirement for the ‘granny flat interest’ to be in writing. Nevertheless, Centrelink recommends that a legal document be drawn up by a solicitor and that the document should:

- confirm you have security of tenure<sup>107</sup>
- state whether you are liable for any upkeep of the property or payment of rent, and
- outline how you are to be compensated if the property owner cannot maintain your life interest.<sup>108</sup>

6.94 Notwithstanding this advice, as discussed above, older people may be reluctant to enter into formal, written family agreements because they trust their family, and expect that they will have no problems.<sup>109</sup>

6.95 Accordingly, Centrelink may have a role in encouraging greater documentation of assets for care arrangements. This could be done in one of two ways:

- developing a standard form to be executed to meet Centrelink eligibility for the granny flat interest; or
- requiring written evidence of an agreement to enter into an assets for care in order to meet Centrelink eligibility for the granny flat interest.

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104 Seniors Rights Victoria, *Submission 383*.

105 Law Council of Australia, *Submission 61*.

106 For example, it is possible for a person receiving the age pension to undertake the following transaction without affecting their entitlement to the pension: the Age Pension recipient could sell their house for \$500,000 and contribute those funds towards the purchase of a \$1,000,000 home with another person provided that they have a 50% interest as tenants in common registered on the legal title to the property.

107 ‘Security of tenure’ here refers to the existence of a right to accommodation for life or a life interest.

108 Department of Human Services, *Granny Flat Right or Interest* <[www.humanservices.gov.au](http://www.humanservices.gov.au)>.

109 See also British Columbia Law Institute et al, *Private Care Agreements between Older Adults and Friends or Family Members* (The Institute, 2002) 9.

The Law Council of Australia supported the former approach.<sup>110</sup> COTA supported the latter.<sup>111</sup>

6.96 A standard form signed by both the older person and the party to whom funds are provided or property transferred serves as evidence of the existence of a family agreement. Existing forms and templates for wills or appointing an enduring power of attorney in states such as New South Wales provide one model. Under this approach, the form could provide guidance to the parties to record the nature of the transaction and interest, as well as the obligations of the parties, but leave space for the parties to record the detail. This approach potentially accommodates the variety of ways in which a transfer of resources can be effected and the wide variance in the specific obligations agreed to by the parties.

6.97 However, as outlined above, the law of property is complex and in the absence of advice it would be relatively difficult for most families to fill in such a form in a manner that reflects not just the present intention of the parties but also what they would want or expect to happen if the arrangement broke down. The experience with will kits and standard forms for the appointment of enduring powers of attorney or guardians is illustrative of these problems. However, poorly completed forms could exacerbate the risks associated with a failed assets for care arrangement. Moreover, it imposes a significant hurdle to access an existing exemption from the gifting rules.

6.98 Alternatively, evidence of a written agreement might be required to demonstrate the existence of a granny flat interest. This approach is supported in academic writing,<sup>112</sup> and by stakeholders.<sup>113</sup> This option is less onerous—it simply requires some evidence in writing that both parties have agreed to put in place an assets for care arrangement. It would provide evidence that an arrangement was in place and that there was not simply a gift of a property (or proceeds) by the older person to the trusted party. As outlined above, the current construction of property law means that the argument by a trusted party that there was no assets for care arrangement but a simple gift creates significant evidentiary hurdles that may inhibit an older person from asserting their rights through civil litigation. These concerns were a significant feature of the problems of assets for care arrangements gone wrong outlined in submissions.<sup>114</sup>

6.99 This approach would not, however, result in complete legal agreements in writing that set out clearly the rights and responsibilities of the parties and what specifically happens in the event of the arrangement ceasing to work for one or more of the parties. Accordingly, it would not be a panacea, but would reduce some of the risk

110 Law Council of Australia, *Submission 351*.

111 COTA, *Submission 354*. They also suggested this be introduced with a requirement for legal advice.

112 Webb and Somes, above n 12, 47; Aviva Freilich, Pnina Levine, Ben Travia, Eileen Webb, *Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?* (November 2014) 134 <[www.cotawa.org.au](http://www.cotawa.org.au)>.

113 See, eg, COTA, *Submission 354*; WA Police, *Submission 190*; Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Office of the Public Guardian (Qld), *Submission 173*; Townsville Community Legal Service Inc, *Submission 141*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; National Seniors Australia, *Submission 57*.

114 See, eg, Seniors Rights Service, *Submission 169*; Queensland Law Society, *Submission 159*; TASC National, *Submission 91*; Advocare Inc (WA), *Submission 86*.



of the arrangements without burdening the parties with a requirement to enter into formal contracts in order to access the granny flat interest under social security law. This can be complemented with education campaigns particularly around the availability of a model agreement prepared by Seniors Rights Victoria.

6.100 The ALRC notes that a requirement that there be written support of an assets for care agreement in order to be eligible as a granny flat interest would be a departure from other Centrelink practices. Centrelink recognises a variety of legal and equitable interests which are not supported by writing for the purposes of determining eligibility for government payments.<sup>115</sup> The ALRC considers that such arrangements should not change as a consequence of Recommendation 6–2 and that, apart from granny flat interests, it should be possible for equitable interests that are not supported by writing to be recognised for the purposes of social security law. The recommendation is a specific and targeted requirement for some expression in writing because the breakdown of family agreements is a common form of financial elder abuse experienced and Centrelink’s granny flat interest exemptions appear to be driving the making of such agreements. In this context, the ALRC considers it appropriate to require additional formality before a granny flat interest can be established for the purposes of calculating social security entitlements. Submissions to the ALRC’s Discussion Paper were supportive of this approach.<sup>116</sup>

6.101 The ALRC acknowledges that Recommendation 6–2 will require careful implementation to ensure that unintended consequences do not undermine the specific purpose of the recommendation. For example, allowances for verbal arrangements should be made where enforcing a requirement for evidence in writing would cause undue hardship to the Age Pension recipient. The interaction between ‘granny flat interests’ and other situations where equitable interests may arise will need to be carefully managed to ensure that the recommendation is not applied more broadly than is strictly necessary.

### **Centrelink elder abuse strategy for family agreements**

6.102 The ALRC suggests that the elder abuse strategy in Recommendation 12–1 should specifically address the risk of elder abuse in the context of family agreements. In particular, the elder abuse strategy might include a number of initiatives such as:

- producing informational material about family agreements, including a discussion of the legal and financial risks of entering into family agreements;

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115 For example, in determining the rate of income support payment entitlement, Centrelink will take into account a person’s involvement in a private trust or company and their share of income and assets: Department of Human Services (Cth), *Private Trusts and Private Companies* <[www.humanservices.gov.au](http://www.humanservices.gov.au)>. For the purposes of determining whether a private trust exists, Centrelink will take into account non-express trusts where the usual documents setting up a trust are absent: Department of Social Services, *Guide to Social Security Law* (2014) [4.12.3.50].

116 See, eg, National Older Persons Legal Services Network, *Submission 363*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; L Barratt, *Submission 325*.

- preparing and disseminating easy-to-understand guidance materials such as checklists setting out matters to consider when putting in place an assets for care agreement;
- ensuring publicly available material relating to family agreements consistently, explicitly and prominently urges older people to seek independent legal advice prior to entering into family agreements;
- ensuring all communications with older people relating to family agreements include information about the risks of such arrangements, checklists and a strongly worded statement urging the older person to seek independent legal and financial advice prior to entering into them;
- additional community awareness raising; and
- a review of Centrelink requirements and related messaging to reduce the risk of older persons remaining in abusive situations for fear of losing access to their pension entitlements.

***An older person's right to be on title***

6.103 The law regarding assets for care arrangements is complex and it is important that information provided by Centrelink and the Department of Human Services is accurate and does not overstate the certainty of legal arrangements where the older person is not recorded on the legal title. All existing public material prepared by Centrelink and the Department of Human Services should be reviewed for accuracy as part of the elder abuse strategy.

6.104 In addition, the Department of Human Services should ensure that guidance material, such as the *Guide to Social Security Law*, clarifies that, while the 'granny flat interest' exemption only applies if the older person is not listed on title as a registered proprietor, there are other options. Those options should be specifically explained alongside the granny flat interest so that it is clear that there are alternatives for putting in place an intergenerational assets for care arrangement that enables the older person to be listed on title and continue to be eligible for the Age Pension.

***Independent legal and financial advice and the elder abuse strategy***

6.105 In an ideal world, older people would routinely access independent legal advice before entering into an assets for care arrangement. The ALRC suggests that Centrelink could strongly encourage older people to seek independent legal advice prior to entering into a family agreement. In particular, Centrelink should prominently incorporate this message both in direct communications and in publicly available material relating to granny flat exemptions.

***Requirement to stay in the arrangement for at least five years***

6.106 Social security law requires that the granny flat interest be maintained for at least five years. If the reason for leaving the assets for care arrangement before five years could have been anticipated at the time of making the arrangement, the funds used to establish the abandoned granny flat interest will retrospectively be considered

an asset affecting the older person's eligibility for the Age Pension.<sup>117</sup> The ALRC understands that, where elder abuse occurs after a granny flat arrangement has commenced, it is likely to be viewed by Centrelink as an 'unforeseen circumstance', so the pension would not be affected.<sup>118</sup> Caxton Legal Centre pointed out, however, that the five-year requirement could still be inadvertently forcing victims of elder abuse to endure 'intolerable family dynamics'.<sup>119</sup> A case study supplied by the Older Persons Advocacy Network is illustrative:

Marina is an 80-year old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina's son has four daughters who are now getting too old to share bedrooms and was looking to upsize his house and move to a 'better' area but needed additional finance to purchase such a property.

Marina's recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son's new property.

The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS [ACT Disability, Aged and Carers Advocacy Service] became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. ... The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.<sup>120</sup>

6.107 As part of a broader elder abuse strategy, Centrelink should consider specifically listing elder abuse as a circumstance which would allow an older person to leave a granny flat arrangement within five years.<sup>121</sup> This could be supported by greater

117 Department of Human Services, above n 108. Thus, where a person leaves an assets for care arrangement due to 'unforeseen circumstances' within 5 years, the exemption would continue to apply.

118 Department of Human Services (Cth), Advice Correspondence (11 November 2016).

119 Caxton Legal Centre, *Submission 174*.

120 Older Persons Advocacy Network, *Submission 43*.

121 This approach was supported by stakeholders. See, eg, Justice Connect Seniors Law, *Submission 362*.

awareness raising and community education about what constitutes ‘unforeseen circumstances’ for the purposes of the application of the ‘gifting rules’ and granny flat exemption.

6.108 The direct contact principle discussed in Chapter 12 could also apply to granny flat arrangements. The requirement to advise Centrelink staff of the existence of a granny flat arrangement provides an opportunity to have contact with the older person. Direct contact could enable Centrelink to confirm that the person is entering the arrangement willingly; is aware of the criteria required to show a granny flat interest and the exceptions where elder abuse arises; and advise the older person of the free financial counselling service offered by Centrelink.