CUTTING THE GORDIAN KNOT OF FAILED FAMILY ACCOMMODATION AGREEMENTS: IDENTIFYING VULNERABILITY TO IMPROVE ACCESS TO JUSTICE FOR OLDER PEOPLE

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TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
BCLI	British Columbia Law Institute
CICT	Common Intention Constructive Trust
COTA	Council of the Aged
CALD	Culturally and Linguistically Diverse
FAA	Family Accommodation Arrangement
RCAC	Royal Commission into Aged Care Quality and Safety
RCFV	Royal Commission into Family Violence
SRV	Senior's Rights Victoria

ABSTRACT

Australia's rapidly ageing population has brought into focus the important question of where to live as one ages.[1] The desire to find accommodation solutions to enable living with dignity and independence, along with the appropriate level of care for one's circumstances has seen family accommodation (sometimes referred to as 'assets for care') arrangements becoming a popular housing alternative for older Australians and their close family members.

The arrangement, whereby money or property is transferred from the older party (usually a parent) to their adult child in exchange for accommodation, and oftentimes care, can be an ideal solution to a multitude of financial, housing and caring issues and provides reciprocal benefits for both the elderly person and their family. However, if these arrangements subsequently fail, the older party is left having to commence legal action to recover their property; this litigation is often costly, time consuming and emotionally fraught.

This thesis addresses the barriers to access to justice in the context of failed family accommodation disputes. It identifies and addresses the legal challenges faced by an older party in recovering property when money or property has been transferred pursuant to a family accommodation arrangement, and the arrangement either breaks down or terminates prematurely. In circumstances where negotiation has failed and the transferor is unable to have some or all the property returned to them, a legal solution may be sought. Yet, in light of what for many are insurmountable challenges, many older people eschew legal avenues of recovery and as a consequence, are deprived of their property. Accordingly, this thesis examines the challenges faced by the older party through the lens of vulnerability. The identification of the nature, source and effect of vulnerability provides evidence of the failure of the current law to meet the legal needs of the older party. Consequently, this thesis proposes law reform to address and ameliorate the vulnerabilities experienced by older people in these disputes. The reforms comprise two limbs; first, that tribunals are given jurisdiction to hear failed family accommodation disputes, and, secondly, the existing law be replaced with a simplified legislative framework enacted specifically for family accommodation agreements. Together,

[1] Australian Bureau of Statistics, *Twenty Years of Population Change*, 17 December 2020, <https://www.abs.gov.au/articles/twenty-years-population-change>

the dual reforms address the legal and personal vulnerabilities experience by the older person and modify the systemic issues that create access to justice challenges.

STATEMENT OF ORIGINAL AUTHORSHIP

I declare that:

This thesis presents work carried out by myself and does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; to the best of my knowledge it does not contain any materials previously published or written by another person except where due reference is made in the text; and all substantive contributions by others to the work presented, including jointly authored publications, is clearly acknowledged.

Material appearing in this thesis has been previously published in the following articles.

- Teresa Somes, 'The Devil's in the Detail: To What Extent Can a Written Agreement Protect an Older Person in an Asset for Care Arrangement with Their Children?' (2017) 19(7) *Retirement and Estate Planning Bulletin* 196.
- Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Agreements' (2020) 12(1) *Elder Law Journal* (e-journal).

In addition, I have also had published the following co-authored articles, with my contribution to authorship being 80%, 50% and 60% respectively. In this thesis I have only relied on material I have authored.

- Teresa Somes and Eileen Webb, 'What Role for Caveats in Protecting an Older Person's Interests Under a Failed Family Accommodation Arrangement? (2021) 29 *Australian Property Law Journal* 352**.**
- Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Elder Financial Abuse Through Assets for Care Arrangements?' (2016) 22 *Canterbury Law Review* 120.
- Teresa Somes and Eileen Webb 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) *Law in Context* 24.

Signed

Teresa Anne Somes

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Oh, and Mum – in answer to that question you keep asking – it's finished.

CHAPTER 1
INTRODUCTION

For Delphine, it was a simple arrangement that she entered into with her children to secure her life accommodation and care. However, she cannot understand why the law does not provide a simple resolution for the breach of promise her children made to her.[2]

'[r]eform is needed wherever the operation of the law shows itself to be unjust or undesirable in its consequences. Reform is needed wherever our institutions fail to enhance the freedom and self-respect of the individual'.[3]

I BACKGROUND

This thesis is about access to justice in the context of failed family accommodation disputes.[4] Family accommodation arrangements (FAAs) are becoming an increasingly popular housing option for older Australians. Under a FAA, an older person's 'family' receives some form of financial benefit from the older party in exchange for a promise from the family to provide long-term accommodation for life, thus ensuring security of tenure and the provision of care (if needed) and companionship by close family members.[5] In many cases the arrangement involves the transfer or sale of the older person's home, but equally it can involve contributions of savings, investments and other assets, often of substantial value.

This thesis first identifies and addresses the legal challenges faced by a parent in recovering assets when money or property has been transferred pursuant to a FAA, and the arrangement either breaks down or terminates prematurely, and, second, makes proposals for law reform to

[2] Fran Ottolini, 'Older People's Rights Service – A Specialist Elder Abuse Service in WA'. Paper presented at the Law Society of Western Australia, Elder Law Forum, 3 November 2017,13.
[3] Mr Malcolm Fraser, Address to Melbourne Rotary Club, 21 April 1976, cited in Michael Kirby, 'Law Reform, Why?' (1976) 50 *The Australian Law Journal* 459, 459.
[4] 'Family accommodation arrangement' are sometimes termed 'asset for care' agreements. The former phrase is the preferred term throughout this thesis, as the arrangements may occur without any agreement to provide care. The paramountcy of accommodation also aligns with the definition of a 'granny flat interest' in the *Social Security Act 1991* (Cth) s 12A. Here a granny flat interest is a life interest or right to accommodation where the older person 'pays' for a life interest or right to accommodation for life, and the life interest or right to accommodation for life is in a private residence that is to be the person's principal home: <https://guides.dss.gov.au/guide-social-security-law/4/6/4/50>. Under this definition, an arrangement where money or assets were transferred to a party for care, without the provision of accommodation, would not fall under the definition of family accommodation arrangement. They have also been referred to as 'private care arrangements': see Margaret Isabel Hall, 'Care for Life: Private Care Agreements Between Older Adults and Friends or Family Members' (2003) 2 *Elder Law Review* 24.
[5] See definition of 'family' Chapter 2 Part III C.

reduce or remove these challenges.[6] In circumstances where negotiation has failed and the transferor is unable to have some or all the property returned, a legal solution may be necessary. Yet, in light of what for many are insurmountable challenges, many older people eschew legal avenues of recovery and consequently are deprived of their property. The contribution of this thesis is to extend existing scholarship concerning the legal pitfalls faced by a parent in a failed FAA and to propose a practical solution to improve the parent's access to justice. In doing so, the thesis frames and situates the law within the personal and social contexts that give rise to FAAs.[7] This thesis uses the contextual framework of vulnerability to identify the challenges faced by the older person in a failed FAA. Identifying vulnerability in this sense means identifying those factors or circumstances that expose someone to risk or place them at a disadvantage – whether by being put at an increased risk of harm or a decreased capacity to protect oneself from harm. The recognition of the specific vulnerabilities experienced by the older person in the context of the failed FAA highlight the circumstances that result in people being unable to access the legal system. I argue that these factors, identified by using the framework of vulnerability, are poorly accounted for by the present law and legal processes. The thesis therefore makes an original contribution to the scholarship in this area by analysing the personal, legal and systemic circumstances of the older person who is deprived of assets in a failed FAA using the contextual framework of vulnerability.

Richard McCullough has stated that FAAs are 'the Gordian Knot of elder law, a tangled web of intricately connected legal issues where the apparent resolution of one may trigger another'.[8] The analogy in the context of this thesis is most apt. According to Greek mythology, when Alexander the Great marched through Anatolia and reached Gordium he encountered the chariot of the ancient King Gordius, which the latter had tied to a pillar in a temple using a Gordian Knot. The knot was made up of several complicated and tightly interwoven knots that appeared impossible to untangle, and it had been foretold that whoever could unravel the elaborate knot would become ruler of all of Asia. After attempting unsuccessfully to untie the knot, Alexander the Great finally used his sword to cut it in half. Consequently, throughout history and in contemporary settings, the expression 'cutting the Gordian Knot' has been commonly used to describe an innovative or decisive solution to what is thought to be an

[6] While these arrangements can be made between people other than those in a parent/child relationship, this thesis will refer to the participants as 'parent' and 'adult child', as FAAs are most commonly made between these parties.
[7] The primary focus of this thesis is the parent's access to justice *inter vivos*, rather than postmortem claims by executors on behalf of the estate.
[8] Richard McCullough, *Elder Law* (Lawbook Co, 2018) 129.

insurmountable problem. A primary aim of this thesis is, first, to 'unravel' the strands of the Gordian knot. The identification of the source, nature and effect of the older person's vulnerability allows us to understand when and why the older party's legal needs are typically not met by existing law. Second, I propose reform of the law consisting of two limbs: first, that tribunals be given jurisdiction to hear failed FAA disputes, and, second, that the existing law be replaced with a simplified legislative framework enacted specifically for FAAs. The dual reforms have the effect of 'cutting the Gordian knot' as they target and address the personal, legal and systemic issues that create access to justice challenges and ensure a simplified and accessible dispute resolution process designed meet the legal needs of the older party.

Australia's rapidly ageing population has brought into focus the important choice of where to live as one ages.[9] The desire to find accommodation solutions to enable living with dignity and independence, along with the appropriate level of care for one's particular circumstances, has seen FAAs become a popular housing alternative for older Australians and their close family members.[10] At first glance, the FAA appears to be the perfect solution to a plethora of interwoven factors surrounding ageing, accommodation and financial security. The arrangement confers reciprocal emotional, social and economic benefits on both parties. Understandably, many older people wish to avoid living alone and are reluctant to enter retirement or institutional care.[11] This latter concern has been reinforced by the disturbing findings of the Royal Commission into Aged Care Quality and Safety,[12] together with observing the social isolation imposed upon aged care residents during the COVID-19 pandemic.[13] Adult children gain the benefits of having their parents close, and grandparents are able to have close connections with grandchildren. Importantly, in an era of declining housing affordability, adult children also benefit from the financial contributions from their

[9] As at 30 June 2020 there were an estimated 4.2 million older Australians (aged 65 and over) with older people comprising 16% of the total Australian population. The number and percentage of older Australians is expected to continue to grow. By 2066, it is projected that older people in Australia will make up between 21% and 23% of the total population); For those aged 85 and over, the proportion has increased from 0.5% (63,200) in 1970, to 1.1% (190,400) in 1995, to 2.1% at 30 June 2020 (528,000). The proportion is expected to continue to rise to between 3.6% and 4.4% in 2066: Australian Institute of Health and Welfare, *Older Australians: Demographic Profile* (Web Report, 30 November 2021) <https://www.aihw.gov.au/reports/older-people/older-australians/contents/demographic-profile>; Australian Bureau of Statistics (n 1).

[10] The concept of family is broad and includes close relationships characterised by intimacy and personal trust. See eg the definition of 'family' in s 8 *Family Violence Protection Act 2008* (Vic). See Chapter 2 Part III(C) 'Participants in Family Accommodation Agreements'.

[11] Amity James et al, 'What Sort of Housing Do Older Australians Want and Where Do They Want to Live?', *The Conversation*, 7 August 2019, <https://theconversation.com/what-sort-of-housing-do-older-australians-want-and-where-do-they-want-to-live-120987>.

[12] *Royal Commission into Aged Care Quality and Safety* (Final Report, February 2021).

[13] It should be noted too that having elderly parents in multigenerational living arrangements can increase an elderly person's exposure to COVID-19.

parents (sometimes viewed as an 'early inheritance', which can take the form of either fully informed and voluntary gifts, or transactions that are subject to either undue influence or unconscionable conduct and therefore classified as elder abuse). Apart from these personal factors, policymakers are exploring ways to incentivise greater family involvement in caring for older family members to relieve the state from some of the considerable expense of caring for the aged.[14]

Yet, for a variety of reasons, a considerable number of FAAs fail. Despite these arrangements often involving the transfer of the parent's primary dwelling or of the proceeds from the sale of the home, the perceived sanctity of the family context and bonds of trust and confidence often result in people failing to seek legal advice or put in place measures to protect their respective financial positions.[15] Often, the parent is unaware of the inherent risks involved in entering transactions – there is clearly an element of 'bargain', but the arrangement is not perceived as an ordinary, arm's length contract requiring legal advice. They are therefore often unaware of their own precarious legal position should an arrangement fail.[16] The child holds legal title to the property and, in order to recover any contribution, the older party must look primarily to the complex area of equitable doctrines and remedies in order to gain relief. Therefore, in the event of the relationship breaking down, the status and terms of the agreement are critical. However, most often the agreements are informal and imprecise as to their terms, and the parties rarely make plans in anticipation of the arrangement concluding prematurely. There can be exacerbating factors, such as the possibility of the older party being subject to pressure, undue influence, or unconscionable conduct by their adult children. If asked to leave, the older party may find themselves without permanent accommodation, or having to move into aged care having transferred some or all of their wealth to the adult child.

The challenges faced by the parent in trying to recover property when a FAA fails are multilayered. The existing legal and equitable principles place a heavy onus on the older party

[14] In 2010, the then Department of Health and Aging determined that the aged care workforce would need to increase by between two and three times before 2050 to provide adequate aged care facilities. Marilyn Harrington and Rhonda Jolly, *The Crisis in the Caring Workforce*, Parliament of Australia <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/CaringWorkforce>. Incentives include allowing monetary transfers from parent to child without affecting social security entitlements (if part of a FAA) along with the removal of capital gains tax liabilities for the adult child when an equitable interest is created on the commencement of an FAA recorded in writing: see Chapter 2 Part III (D) 'Capital Gains Tax and Recent Amendments'.

[15] Teresa Somes, 'The Devil's in the Detail: To What Extent Can a Written Agreement Protect an Older Person in an Asset for Care Arrangement with Their Children?' (2017) 19(7) *Retirement and Estate Planning Bulletin* 196

[16] Reasons for failure are many and varied: relationship breakdown, unforeseen circumstances. See Chapter 2; Margaret Isabel Hall, 'Equitable Fraud: Material Exploitation in Domestic Settings' (2006) 4 *Elder Law Review* 7 (online).

to establish a claim and recover either compensation or claim a proprietary interest. The lack of formality characterising these agreements makes the evidentiary burden the elderly person would ultimately bear a difficult one to discharge, and the provision of evidence sufficient to satisfy a court may prove more challenging if the older party suffers from a cognitive impairment.[17] In most cases, the emotional and financial expense of bringing a claim is prohibitive and many older people refrain from commencing legal action. Additionally, many older people are reluctant to bring proceedings against their own family members for fear of permanently fracturing relationships. These factors, combined with the time involved in litigating a matter and the uncertainty of the outcome, are strong disincentives to commencing legal proceedings.[18] Disputes concerning failed FAAs are becoming more common, although it is difficult to say how many make their way to the Supreme Court.[19] As the Queensland based Elder Abuse Prevention Unit (EAPU) observes,

> [t]he older person who could have been funding their own retirement may find themselves thrown onto the welfare system with no ability to recover the money other than through an expensive civil action. In some calls the older person may not only find themselves without cash or assets but the 'gifts' have adversely affected their pension entitlements.[20]

Consequently, in many instances action against the adult child who has benefited under the arrangement is not commenced until after the elderly person has died and the estate has been executed.[21]

This thesis draws on, critiques and develops the recommendations made by the Australian Law Reform Commission (ALRC) in relation to FAAs.[22] In its report, the ALRC recommended that 'State and Territory Tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement'.[23] This thesis was commenced

[17] *Farrell v Stephenson* [2008] NSWSC 1350 [48]. In the event of incapacity, the older person would need to have appointed a substitute decision maker to access the legal system.
[18] Susannah Sage-Jacobson, 'Access to Justice for Older People in Australia' (2015) 33(2) *Law in Context* 142, 152
[19] Seniors Rights Victoria notes that the asset for care arrangement has become the most common form of financial abuse: *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, <http://www.seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf>. Similarly, the ALRC observes that 'stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing'. Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, 2017) ('ALRC Final Report') [6.10].
[20] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (Report, September 2007) (n 23) 143, citing EAPU, Submission No. 97, 4-5.
[21] For example, see *Hartley v Woods* [2017] NSWSC 1420; *Thorn v Boyd* [2014] NSWSC 1159; *Re Mahoney* [2015] VSC 600; *Karastamatis v Tzanavaras* [2013] SASC 163; *Scheps v Cobb: Estate of Dagobert Scheps deceased* [2005] NSWSC 455.
[22] ALRC Final Report (n 20).
[23] Ibid, Recommendation 6-1.

prior to the ALRC's inquiry, and I was fortunate to have the opportunity to make both oral and written submissions to the inquiry in support of the new jurisdiction ultimately proposed by the ALRC. This thesis therefore extends existing scholarship concerning FAAs by analysing the position of the older party through the lens of vulnerability and provides a detailed and structured justification for a new user-friendly jurisdiction over failed FAAs.

II THE PROBLEM: ACCESS TO JUSTICE

The fundamental problem this thesis addresses is the failure of the present law to meet the legal needs of the parent in a FAA dispute, which is characterised as an access to justice issue. The challenges to overcoming barriers caused by personal circumstances, and the complexity and multiplicity of the present law and the formal legal system, mean that older people are commonly unable to access the legal system and, therefore, are unable to achieve a resolution to their dispute. Access to justice is a fundamental element of the rule of law. While the concept of access to justice is broad, it involves, among other things, an appreciation of the needs of those who require assistance of the legal system.[24] The House of Representatives Standing Committee on Legal and Constitutional Affairs has found that the existing legal system is not well equipped to meet the legal needs of older people, who often have complex needs but require low-cost solutions that are targeted and delivered in a specific way.[25] Similarly, the Justice Project – the Law Council of Australia's national review of the state of access to justice – has stated that access to justice includes 'being able to deal with a legal problem, and understand the outcome.'[26] The report further states that '[e]quality before the law and access to justice are fundamental to the rule of law in Australia. People who experience significant disadvantage should not "fall through the cracks" of the system.'[27]

At present, the parent in a FAA dispute is at serious risk of 'falling through the cracks' of the system. Take, for example, the quotation provided by Fran Ottolini at the start of this chapter, describing the bewilderment of an elderly client who 'cannot understand why the law does not provide a simple resolution for the breach of promise her children made to her'.[28] Whether the appropriate cause of action is in contract or equity, the onus will always be on the parent to

[24] Attorney-General Robert McClelland, Foreword to the Report of the Access to Justice Taskforce (September 2009).
[25] Standing Committee on Legal and Constitutional Affairs (n 20) 157.
[26] Law Council of Australia, *The Justice Project* <https://www.lawcouncil.asn.au/justice-project/access-to-justice>.
[27] Law Council of Australia, *The Justice Project: Final Report* (August 2018) 2.
[28] Ottolini (n 2) 13.

commence the action and prove its elements. There are significant challenges in establishing the existence of a contract, and the law that currently applies to a failed FAA has developed favouring the rights of the property owner – in this case, the adult child.[29] It ignores the context in which these arrangements are made and the 'cocoon' of the familial environment, in which trust, confidence, and reliance rather than self-interest are the underlying context. As National Seniors states, 'the senior may be able to prove the existence of a bargain or agreement in court, the demands of the court process in terms of time, expense and personal conflict may be beyond the resources of many older people'.[30]

There has been an emerging body of literature exploring the legal pitfalls of FAAs and recognising the tenuous legal position of the older person in these arrangements.[31] Similarly, both Australian federal and state governments or agencies have published their own inquires resulting in similar findings, many acknowledging the need for further investigation into potential reforms or suggesting avenues for reform. It is worth noting the comparatively high interest in FAAs within both the academy and law reform or government bodies in Australia, an interest that is not replicated in other comparable jurisdictions. For instance, the report published by the British Columbia Law Institute (BCLI) in 2002 contained legislative recommendations to address issues surrounding FAAs, yet the recommendations for reform were not actioned and generated little academic interest.[32] It may be that the broader interest

[29] See further Chapter 4 Part IV 'The Legal Situational Vulnerability Raised by the doctrine of Indefeasibility'.
[30] National Seniors, *Submission No. 67*, 11, cited in Standing Committee on Legal and Constitutional Affairs (n 20) 141.
[31] Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse Through Assets for Care Arrangements?' (2016) 22 *Canterbury Law Review* 120; Teresa Somes and Eileen Webb, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33(3) *Law in Context* 24; Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (2019) 12 *Elder Law Review* (online); 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; Rosslyn Munro, 'Family Agreements: All with the Best of Intentions' (2002) 72(2) *Alternative Law Journal* 68; 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; Hall, 'Care for Life' (n 4); Susan Barkehall Thomas, 'Families Behaving Badly: What Happens When Grandma Gets Kicked Out of the Granny Flat?' (2008) 15(2) *Australian Property Law Journal* 154; Tina Cockburn, 'Equitable Relief to Enforce Family Agreements' (2008) 86 *Precedent* 41; Brian Herd, 'The Family Agreement – A Collision Between Love and the Law?' (2002) 81 *Reform* 23; Kate Galloway, 'Gifts: Conditional or Not? *Flourentzou v Spink*' (2020) 94 *Australian Law Journal* 1; Samuel Tyrer, 'Assets for Care Arrangements: The Current State of the Law (and Its Weaknesses) from the Perspective of Home' (2020) 28(3) *Australian Property Law Journal* 149; Teresa Somes and Eileen Webb, 'What Role for Caveats in Protecting an Older Person's Interests Under a Failed Family Accommodation Arrangement?' (2021) 29 *Australian Property Law Journal* 352; Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve "Asset for Care" Disputes' (2020) 46(3) *Monash University Law Review* 204.
[32] British Columbia Law Institute, *Private Care Agreements Between Older Adults and Friends or Family Members* (Report No. 18, 2002) ('BCLI Report').

in elder abuse in Australia and the contemplation of FAAs through the lens of elder abuse has focused attention elsewhere. Alternatively, exemptions to gifting rules under the *Social Security Act 1991* (Cth) have resulted in a greater number of FAAs and a correspondingly greater number of disputes being heard in courts. If the law is structured to encourage parties to enter FAAs, then there is a corresponding obligation to provide appropriate legal mechanisms for parties if the arrangements fail. Yet, despite calls to simplify the law and encourage greater access to justice, no proposals have been taken up by governments within, or outside of, Australia. In Australia, the response of legislatures has been disappointing despite repeated calls for law reform.[33] FAAs were considered in the *Older People and the Law* inquiry in 2007.[34] That report recommended 'that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements', including whether legislation be implemented (either at Commonwealth or state level, or as a cooperative scheme between the Commonwealth, states and territories).[35] Additionally, it recommended that there be an investigation 'of a mechanism to enable the courts to dissolve family agreements in cases of dispute and grant appropriate relief to the parties involved'.[36] However, rather than have the recommendations considered by the Standing Committee of Attorneys-General, the then Rudd Labor Government referred these recommendations for the investigation of any new legislation to the states, and recommended that the states be encouraged to refer the matter to their respective Law Reform Commissions 'to allow the issues to be better identified and options for possible legislative reform to be carefully considered and developed'.[37] This is unsurprising; the Commonwealth lacks jurisdiction to legislate regarding property disputes, which is the province of the state and territory legislatures. Both New South Wales and Western Australia have conducted parliamentary inquiries into elder abuse and touched on the issue of FAAs. The New South Wales report fell short of making specific recommendations for reform. While acknowledging that 'older people would benefit from greater protections with regard to such arrangements', the inquiry merely 'encourage[d] the NSW Department of Attorney

[33] Somes and Webb, 'What Role for the Law' (n 31) 45.
[34] Standing Committee on Legal and Constitutional Affairs (n 20).
[35] Ibid, 'Family Agreements' [4.45].
[36] Ibid.
[37] Standing Committee on Legal and Constitutional Affairs *Older People and the Law: Government Response* (26 November 2009) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/reports.htm>.

General and Justice to examine this issue in greater detail'.[38] The New South Wales Law Reform Commission has not, as yet conducted an inquiry into FAAs.

The Parliamentary report out of Western Australia recommended the Law Reform Commission of Western Australia inquire into the expansion of the jurisdiction of the State Administrative Tribunal to cover failed family accommodation disputes.[39] The report noted that '[a]ssets for care arrangements carry great potential for an older person to experience financial elder abuse and older people are often left vulnerable to abuse when such an arrangement exists within a family'.[40] To date, the Law Reform Commission of Western Australia has not conducted that inquiry.

Drawing on the 2007 'Older People and the Law' inquiry,[41] a report conducted by the Queensland Public Advocate and the Queensland Law Society stated, in the context of financial abuse, that 'in the absence of specific legislation to govern and regulate Family Agreements, a review of the law is necessary to adequately protect the rights of older persons who wish to enter into such agreements'.[42] In Queensland, the Parliamentary Inquiry into the Adequacy of Existing Financial Protections for Queensland Seniors recommended that the Queensland Government explore options to encourage the formalisation of family agreements.[43] The report stated that a paper had been delivered to the relevant Minister for consideration. However, no recommendations were made concerning access to justice or reforms concerning the resolution of existing disputes.

The issue of law reform in this area was revived by Australian Law Reform Commission's report in 2017.[44] Despite the report being framed to address 'elder abuse', FAAs were included as these arrangements can potentially give rise to elder abuse. The Commission received

[38] New South Wales Legislative Council, General Purpose Standing Committee No. 2, *Elder Abuse in New South Wales* (Report 44, 2016) [6.17].
[39] Western Australia Legislative Council, Select Committee into Elder Abuse, *I Never Thought It Would Happen to Me: When Trust Is Broken* (Final Report, September 2018) Recommendation 28.
[40] Ibid Finding 50, 104.
[41] Standing Committee on Legal and Constitutional Affairs (n 20).
[42] Queensland Office of the Public Advocate and Queensland Law Society, 'Elder Abuse: How Well Does the Law of Queensland Cope?' (June 2010) 6, <www.justice.qld.gov.au/__data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf>.
[43] Queensland Legislative Assembly, Communities, Disability Services and Domestic And Family Violence Prevention Committee, *Inquiry into the Adequacy of Existing Financial Protections for Queensland Seniors* (Final Report, 31 August 2015) Recommendation 16 <https://documents.parliament.qld.gov.au/tp/2015/5515T876.pdf>.
[44] ALRC Final Report (n 19).

submissions from a range of legal centres,[45] practitioners and representative bodies,[46] academics[47] and older persons' advocacy centres.[48] At the time the Commission was gathering evidence and receiving submissions, I had already commenced this thesis. Consequently, I was able to provide both oral and written submissions to the Commission, the latter as member of the Australian Research Network of Law and Ageing (ARNLA). Those who contributed expressed a common concern regarding the access to justice issues caused by legal and systemic vulnerability experienced by the older party in a FAA.

It was therefore very encouraging to see the ALRC recommending two reforms to address the issues concerning FAAs. The first was that a new 'assets for care' jurisdiction be introduced in state and territory tribunals to provide a more accessible forum for older persons to obtain a remedy.[49] Clearly, any expansion of a state tribunal's jurisdiction would require statutory enactment to establish the new jurisdiction. The report did explore in very general terms how the jurisdiction might work; however, much of the detail has been left to be determined.[50]

The second recommendation was that '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'.[51] At present, the *Social Security Act 1991* (Cth) exempts transfers of money or property undertaken in exchange for accommodation and care from gifting rules.[52] Therefore transfers that satisfy the statutory criteria will be deemed to have created a 'granny flat interest'. Having interests expressed in writing will not alter the nature of those interests, but it will provide critical evidence concerning intentions and contributions should the arrangement terminate prematurely.

To facilitate the implementation of the recommendations, the ALRC further recommended that '[t]he Australian Government, in cooperation with state and territory governments, should

[45] Eastern Community Legal Centre, Caxton Legal Centre, Justice Connect, Seniors Rights Victoria, Hervey Bay Seniors Legal and Support Service, University of Newcastle Legal Centre, Legal Aid ACT, Legal Aid NSW, Macarthur Legal Centre, Hervey Bay Seniors Legal and Support Service, Cairns Community Legal Centre Inc, Townsville Community Legal Service Inc.
[46] Brian Herd, Law Council of Australia, Federation of Ethnic Communities, Councils of Australia, State Trustees Office (NSW), Northern Territory Anti-Discrimination Commission, Australian Association of Social Workers, Queensland Law Society, National Older Persons Legal Services Network, Older Persons Advocacy Network.
[47] Australian Research Network of Law and Ageing (ARNLA).
[48] Older Women's Network NSW, Advocare Inc (WA), Seniors Rights Service, National Seniors Australia, Council of the Ageing,
[49] ALRC Final Report (n 19), Recommendation 6-1.
[50] Ibid [6.68] 'Defining the Tribunal's Jurisdiction'.
[51] Ibid.
[52] Gifting rules limit the amount of money that can be transferred to others, to prevent people impoverishing themselves to be eligible to receive social security payments: *Social Security Act 1991* (Cth) s 1118.

develop a National Plan to combat elder abuse'.[53] This recommendation translated into the 'National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023' ('National Plan') released by the Commonwealth Attorney-General in March 2019.[54] The framework identifies responses to be undertaken in five priority areas across short-, medium-, and long-term timeframes, as well as ongoing tasks. These include:

1. enhancing our understanding (of elder abuse);
2. improving community awareness and access to information;
3. strengthening service responses;
4. planning for future decision-making; and
5. strengthening safeguards for vulnerable older adults.

Of these five priority areas in the National Plan, any reforms concerning FAAs fall under priority area five. The National Plan was followed by the 'Implementation Plan to Support the National Plan to Respond to the Abuse of Older Australians 2019–2023' ('Implementation Plan').[55] The aim of the Implementation Plan was to identify specific goals to be prioritised by state and federal governments in line with the five priority areas set out in the National Plan. Under priority area five, the Implementation Plan states: '[t]he Victorian Government will consider options to implement recommendation 6.1 of the Australian Law Reform Commission's report, Elder Abuse – A National Legal Response, that a state tribunal should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement'.[56] The Victorian Department of Justice and Community Safety is the responsible body for investigating the feasibility of the recommendation. Those who had made submissions the ALRC Report concerning FAAs and the problems associated with them for the elderly had hoped the recommendations made by the Commission would be the inflection point after which positive changes would occur. Unfortunately, as at the time of writing no publications or recommendations have been released.

The Canadian Province of British Columbia is the only jurisdiction to investigate draft legislation regulating family accommodation disputes. In undertaking a comprehensive review of private care agreements, the British Columbia Law Institute (BCLI) aimed to provide

[53] ALRC Final Report (n 19), Recommendation 3-1.
[54] <https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>.
[55] <https://www.ag.gov.au/sites/default/files/2020-03/Implementation_Plan.pdf>.
[56] Council of Attorneys-General, *Implementation Plan to Support the National Plan to Respond to the Abuse of Older Australians 2019–2023*, 28 [5.1.8].

balanced solutions to 'protect seniors from potentially harmful outcomes in a way that is fair to caregivers'.[57] Its report identifies the social context that gives rise to the agreements, as well as reasons for their failure and the legal responses. These in large part mirror the Australian experience; hence, the BCLI Report provides invaluable insights for the purposes of examining new legislation in Australia. The recommendations of the BCLI are discussed in more detail in Chapter 8.

A simpler, more cost effective and informal dispute resolution process allows more people to access the legal system and consequently achieve, to some degree, the return of contributions made under a FAA. It provides the older person an opportunity to assert their legal rights, and the capacity to re-establish a home for themselves. Additionally, accessible dispute resolution arrangements allow the older person to maintain independence and may avoid further burdens on health and community welfare or housing services. The problem can therefore be summarised as the inaccessibility of the present law and legal systems, resulting in a failure of the law to meet the legal needs of the parent in a FAA dispute. This problem explicitly informs the research question, explained below.

III THE RESEARCH QUESTION

The research question that drives this thesis is, how might access to justice for an older person be improved when they have been deprived of their property owing to a failed FAA? The question is ultimately addressed and answered in Chapter 8 through the proposals for reform, that tribunals be given jurisdiction to hear failed FAA disputes, and that the existing law be replaced with a simplified legislative framework enacted specifically to for FAA's. The research question was examined largely through doctrinal research, examining primarily Australian case law, and further analysis of published articles and associated government reports. Cases were located through electronic databases such as AustLII, Westlaw, Lexis Pacific and Barnet Jade. The search function was assisted by the subject of FAAs being scrutinised by the Older People and the Law Inquiry undertaken in 2007.[58] As such, cases cited in that report and terminology used (for instance 'assets for care') formed the basis of subsequent searches, following where earlier cases had been cited. Additionally, I consistently reviewed cases decided in the equity division of the Supreme Court. The wider searches of matters heard concerning estoppel, failed joint ventures, resulting trusts and breach of fiduciary

[57] BCLI Report (n 32).
[58] Standing Committee on Legal and Constitutional Affairs (n 20).

duty revealed a number of disputes concerning failed FAAs. Recognition of FAAs by the courts is relatively recent, and the time frame for searches therefore only needed to span the last 30 years. The analysis is largely focused on New South Wales, except where differences in state legislation are specifically relevant to FAAs. I acknowledge there are some limitations to this analysis in that analysing decided cases only provides a 'snapshot' of disputes, and clearly those who have reached the courts have not experienced the barriers to accessing justice that are the primary concern of this thesis. Therefore, the instances of vulnerability this thesis aims to identify may not be fully recognised in the decided cases. This aspect of the research is further discussed in Chapter 9.[59]

Several sub-questions are addressed to support the position taken in this thesis, and are as follows.

A *Is a Legal Solution a Necessary Response to a Failed FAA Dispute?*

A FAA is by definition an arrangement between family members, or those in a familial type arrangement. There are several options available in society for handling the conflict brought on by interpersonal disagreements. These may range from simple agreement between parties, to more structured forms of alternative dispute resolution, through to litigation. Consequently, it may be asserted that legal proceedings are an inappropriate mechanism by which to settle disputes between family members, and if the agreement was reached consensually between parties in a close, trusting relationship, then those parties should be able to agree on how to settle their dispute. Most people will attempt to resolve the problems themselves through strategies such as negotiation, or perhaps they might look to informal avenues for help. However, family relationships fracture, and unforeseen events occur. In these circumstances, it can be challenging to determine entitlements when an arrangement has come to a premature end, because each party has different views, memories and expectations of the agreement and their role in it. For instance, it is common for adult children to contend that any money or property advanced to them was a gift, or part of an early inheritance.[60] Conversely, the nature of the relationship between the parties, that of trust and confidence, is the very characteristic of the arrangement that contributes to the vulnerability of the older party. By failing to consider or plan for any possible change or breakdown in the arrangement, the parent parts with their assets with often only an unenforceable promise of accommodation and sometimes care. Once assertions of promises, reliance and trust

[59] Chapter 9 Part III 'Further Research Possibilities'.
[60] *Spink v Flourentzou* [2019] NSWSC 256.

cannot be relied upon, the only recourse parties have is relying on a claim at law. When this occurs, the core of the rights of the parties lie in property law.

If we accept a legal solution is necessary, then we must address a second question.

B *Can a Parent in a Failed FAA Pursue a Legal Remedy to Recover Property?*

The response to this question is yes, and the present law available to the parent in a failed FAA is discussed at length in Chapter 6. Reported cases demonstrate that family accommodation disputes can be and have been decided on contractual or equitable principles, depending on the factual circumstances of the dispute. For example, remedies have been sought for breach of contract,[61] transactions have been set aside on the grounds of undue influence[62] or unconscionable conduct,[63] and remedies sought on the grounds of estoppel[64] or failed joint venture.[65] As the discussion in Chapter 6 demonstrates, law reform is *not* needed because the law 'provides no remedies to right plain wrongs, or provides remedies that are inadequate to do the job effectively'.[66] Rather, it is needed because 'the law is confused, inconsistent, difficult to find or otherwise in need of simplification'.[67] Further, the state Supreme Courts have jurisdiction to hear disputes in equity, a jurisdiction that has been described as 'arguably the most inaccessible jurisdiction in the country'.[68] The adversarial nature of the Supreme Court together with the formality, time and expense associated with litigation can be a disincentive to commencing litigation.[69]

This leads to the third question discussed by this thesis.

C *What Are the Pitfalls of the Present Law and Processes?*

First, on entering the FAA, the parent is placed in a precarious legal position, whereby money or property has essentially been 'given' to the adult child in exchange for accommodation and possibly care. There is a 'legal imbalance' against the parent; for instance, the presumption of

[61] *Marlow v Boyd* [2012] QSC 331.
[62] *Farrell v Stephenson* [2008] NSWSC 1350.
[63] *Meiners v Gunn* [2020] WASC 18
[64] *Jacqueline Pobjoy v Prudence Anne Reynolds* [2013] NSWSC 885.
[65] *Henderson v Miles (No 2)* [2005] NSWSC 867.
[66] Mr Justice M Kirby, 'Law Reform, Why?' (1976) 50 *The Australian Law Journal* 459, 463.
[67] Ibid, 466.
[68] Caxton Legal Centre, *Submission 67* in ALRC Final Report (n 19) 11.
[69] Sarah Ellison et al, *The Legal Needs of Older People in NSW: Access to Justice and Legal Needs, Vol 1* (Law & Justice Foundation of NSW, 2004) 365.

advancement puts the evidential burden on the parent to prove the transfer was not a gift to the child, while the adult child having indefeasible title means that the parent must establish an *in persona* exception to indefeasibility. The range of actions available to the parent in a failed FAA is dependent on sometimes minor factual variations, but predominantly lies in contract and equity. Bringing an action based on contract is difficult, as the parent must establish the existence of a contract, including intention and requisite formalities. Most litigation concerning failed FAAs relies on equitable principles; however, the law is complex and expensive to litigate. In other words, while the older person may have an identifiable equity, or right to bring an action, the existence of that right is ineffectual if it cannot be exercised. That the impenetrability of the law is a consequence of mostly equitable grounds for relief is a cruel irony, given that equity developed in response to the inadequacies of the common law, reacting to particular fact situations where the application of the common law would lead to injustice. In developing this approach, equity aims to protect people's reasonable expectations, respond to unconscionable conduct, and provide relief to the vulnerable.[70] Yet the evolution of the jurisdiction developed through its responsiveness to the inadequacies of the common law has led to a highly complex matrix of laws that, without specialised legal counsel, is impenetrable for the lay person. From a practical perspective, the present laws do not provide an accessible method of resolving FAA disputes. As Nathalie Des Rosiers states,

> [failure of a rights based approach] resulted from the fact that it was impossible for the very poor and the highly vulnerable to assert their rights, to gain access to the courts or even know which laws existed to help them … some social justice legislation seemed to have little impact on the people who needed it most. [71]

Des Rosiers was referring to law reform during the 1970s and 1980s aimed at creating rights to empower and give voice to the weaker members of society. In the context of family accommodation disputes, the parent has a 'right' in law to bring an action against their child. the current methods available under the law appear to be a very harsh tool to deal with a dispute between a parent and child, albeit one that may involve property or money of significant value. More importantly, the highly adversarial nature of litigation often means that older people will

[70] Patrick Parkinson, 'The Conscience of Equity' in P Parkinson (ed), *The Principles of Equity* (Law Book Company, 2nd ed, 2003) 29, [213] citing Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 39.
[71] Nathalie Des Rosiers, 'Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers' (2002) 18 *Touro Law Review* 443, 447.

not engage in legal proceedings because doing so would fracture or destroy the familial relationship.[72]

The scope of this thesis is primarily concerned with the remedial consequences of a failed FAA. Therefore, its focus is on the position of the parent in circumstances where the arrangement has failed and the older person has not put in place any measures to protect their legal position. It does not explore preventative measures, such as the prospects of education programs among seniors or legal practitioners, or the potential for encouraging contractualisation of FAAs. Education concerning the legal pitfalls and encouragement to seek legal advice and record arrangements in writing would both assist in reducing the legal vulnerability of the older person. However, this thesis proceeds on the basis that, owing to the many personal and familial circumstances of individuals, not everyone has access to or is willing to seek legal advice. Barriers faced by people from culturally and linguistically diverse (CALD) backgrounds, the diverse nature of family dynamics, and the fact that many arrangements are undertaken in an atmosphere of crisis all mean that there will always be people who enter such transactions without being aware of the precarious legal position created by the FAA. Additionally, while the role of cognitive impairment is discussed in relation to undue influence, it is beyond the scope of this thesis to fully interrogate the issues of dementia and capacity and how these might impact decision-making when entering into an FAA.[73]

IV THE ARGUMENT, INNOVATION, AND SIGNIFICANCE

As stated at the beginning of this chapter, this thesis explores and proposes a new jurisdiction to accommodate FAA disputes, whereby parties to a FAA dispute may commence an action in a state tribunal pursuant to a statutory scheme. The thesis incorporates and builds on the recommendations of the ALRC and provides context and justification for those recommendations by analysing the personal, legal and social circumstances of the older party through the lens of vulnerability. I argue that by identifying vulnerability through its source, and exploring its nature, effect and the interplay between the consequences of each type of vulnerability, we are better able to understand the complex socio-legal position of the older

[72] Munro (n 31); Seymour Moskowitz, 'Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect' (2003) 36 *Loyola LA Law Review* 589: Standing Committee on Legal and Constitutional Affairs (n 20) para 5.35; Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse in Australia' (2016) 98 *Family Matters* 64, 69; ALRC Final Report (n 19) [8.18]; Melanie B Leslie, 'Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract' (1999) 77(2) *North Carolina Law Review* 551, 557; *Jones v Jones* [2014] QDC 150.

[73] See Chapter 6 II(C)(3).

person and form a deeper understanding of why their legal needs are not met under the present legal framework. Consequently, the proposed reforms are informed by the framework and are designed to remove or ameliorate vulnerability, promoting access to justice.

The thesis makes an innovative and original contribution to scholarship by building on and extending the tripartite theory of vulnerability conceived by Rogers, Mackenzie and Dodds.[74] The approach taken by Rogers et al. draws itself from vulnerability theory proposed by Martha Fineman.[75] Rogers et al. refine vulnerability theory by characterising vulnerability as inherent, situational and pathogenic (or systemic). They describe pathogenic sources of vulnerability as the fresh risk of harm arising from the state's response to existing vulnerability. Where vulnerable populations are identified in order to channel resources to address these vulnerabilities, those members of the population are pathologised, and such pathologisation is itself a source of vulnerability. The legal system – in particular, equity's responses to vulnerable members of society (for example, those unduly influenced or subject to unconscionable conduct) – creates pathogenic vulnerability. Rogers et al. state that '[o]ther forms of pathogenic vulnerability arise when social policy intervention aimed to ameliorate inherent and situational vulnerability have the paradoxical effect of increasing vulnerability'.[76] In this thesis, rather than 'social policy' the source of this vulnerability is the legal framework, including the present law and the forum in which the disputes are heard. Therefore, the law's 'systems' are the source of vulnerability.

I apply this framework to the parent in a failed FAA, but further adapt the framework to identify both personal and legal situational vulnerability. The presence of an inherent vulnerability – for instance, mobility or cognitive impairment – may act as a motivating factor

[74] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 11; Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Introduction', in C Mackenzie, W Rogers and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014) 1, 7; Wendy Rogers, 'Vulnerability and Bioethics' in Mackenzie et al, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (supra) 61; Catriona Mackenzie and Wendy Rogers, 'Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act' (2013) 9 *International Journal of Law in Context* 37.

[75] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic – An Invitation to Future Exploration' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate (2013) 1; Martha Albertson Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2014) 13.

[76] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 11, 25.

to agree to the FAA. Personal situational vulnerability arises because of the parent/child relationship. It explains why a parent may consent to, or even actively pursue, a transaction that, on its face, is improvident but which benefits their adult child. It also identifies the vulnerable position of the parent arising from entry into an agreement without adequate legal protections because of the trust and confidence they have in their adult children. The reluctance of parents to take legal action against their children, particularly expensive, adversarial litigation, can also be characterised as personal situational vulnerability. Legal situational vulnerability occurs when legal presumptions, doctrines or formalities operate to create significant obstacles to a parent claiming either in contract or against the property, amounting to a 'legal imbalance' against the parent. This vulnerability arises owing to the present law that the parent must navigate in a failed FAA. The objective of this thesis is to draw these 'strands' together. By looking through the lens of vulnerability this thesis explains how the parent's inherent and personal situational vulnerability cannot be changed, but how by addressing the sources of legal situational vulnerability and the legal structures that are currently in place, we can reduce their impact and ameliorate the sources of vulnerability that act as barriers to achieving the resolution of the dispute.

The value and significance of this research lies in addressing both the private and public ramifications of the failure of the arrangement. First, the reforms allow for dispute resolution that emphasises mediation and the minimisation of family conflict, rather than the adversarial approach that is presently required. A statutory cause of action negates the need for reliance on complex equitable doctrines, and the change of forum allows for a less costly and more informal environment to resolve the dispute. The current legal pathways provide limited assistance for older people who find themselves needing to recover assets transferred under a FAA that has prematurely failed. In order to provide accessible solutions to meet the legal needs of the parent, the proposed jurisdiction should be developed with an appreciation of the specific needs of older people in FAAs and the complex and diverse range of variables. Legal reform aimed at addressing FAAs must do so with an understanding of the complex matrix of socio-legal issues, so that the jurisdiction provides a framework to enable older people to enforce rights and access remedies. These reforms address significant shortcomings of the present law and look to achieving substantive equality before the law.

Secondly, increasing access to justice for the older party renders restoration of assets or property more probable, which in turn decreases the burden on the public purse in the form of

housing and financial support. While governments have adjusted social security rules that implicitly encourage older people to enter FAAs, there is a notable absence of support for the older party when they fail. Therefore, it is imperative reforms are put in place to address the legal vulnerability of the older person in these circumstances.

V OUTLINE OF CHAPTERS

This thesis is composed of nine chapters.

Chapter 2: Family Accommodation Arrangements: Concepts and Context. This chapter provides an understanding of the key background concepts and contexts that frame the FAA. It provides the socio-legal background to the problem and details how arrangements are structured, motivations for entering agreements, why they break down, and the impact of the failure of the arrangement on the older person. Through its discussion of context, this chapter explains the personal situational vulnerabilities experienced by the parent. It provides insight into how the failed FAA impacts the older party's experience of 'home' and consequently how reforms may reduce the distress caused by the loss of home. This chapter further discusses the characterisation of FFAs and argues that the 'elder abuse' framework is not the appropriate lens through which to examine the issues stemming from the arrangement's failure. This provides a useful segue way for the conceptual framework of vulnerability, explored in Chapter 3.

Chapter 3: Vulnerability Theory as a Conceptual Framework and Methodology: Identifying and Responding to Vulnerability in the Context of Family Accommodation Arrangements. This chapter explains the conceptual framework of vulnerability. The theory is based on the work of Martha Fineman, and then the scholarship of Rogers, Mackenzie and Dodds that builds on that theory by identifying sources of vulnerability as being inherent, situational or pathogenic.[77] The chapter explains the methodology used in this thesis – that is, the analysis of the laws and structures that apply to a failed FAA – and analyses them through the lens of vulnerability. The sources of situational vulnerability are then further analysed as either personal-situational vulnerability or legal-situational vulnerability. This method of analysis is a useful lens for targeting and analysing the problems, and their sources, that arise in failed FAA. Applying the framework in subsequent chapters allows us to offer suggestions

[77] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 74); Rogers et al, 'Introduction' (n 74); Rogers, Vulnerability and Bioethics' (n 74); Mackenzie and Rogers, 'Autonomy, Vulnerability and Capacity' (n 74).

as to how law reform might address these vulnerabilities, either by closing off the sources or by providing realistic mechanisms to promote resilience.

Chapter 4: Sources of Legal -Situational Vulnerability: The Legal Imbalance against the Parent. This chapter examines various legal doctrines and presumptions that result in a 'legal imbalance' against the parent. It explores the challenges faced by a parent in trying to argue that the reciprocal arrangement of the FAA constitutes a contract, including rebutting the presumption against legal intention among family members and the requirements of certainty. Similarly, a parent wishing to claim an interest in property at law, or that there exists a contract to grant an interest in property, must comply with writing requirements. The chapter further explores the onus placed on the parent to rebut the presumption of advancement and how the presumption goes hand in hand with the claim put forward by many adult children that transfer of the money or property was a gift, or an 'early inheritance'. The last section of this chapter explores the fragile nature of the parent's right to the property to which they have contributed, as compared with the indefeasible title held by the adult child. Finally, this chapter examines the legal challenges that may be present in protecting any potential property claim by lodging a caveat.

Chapter 5: Sources of Systemic Vulnerability: The Supreme Court. Chapter 5 examines the characteristics of the Supreme Court's jurisdiction that contribute to the systemic vulnerability experienced by the parent. Drawing on literature that specifically considers older people and the law, it explores those aspects of the jurisdiction that may prevent a parent in a FAA from undertaking legal action to recover property, specifically time, cost and formality of proceedings. [78] This chapter, along with Chapter 6, demonstrates the cumulative effect of the present law and the jurisdictional issues, and the challenges they pose for the elderly person. It explains how the processes associated with the jurisdiction compound systemic vulnerability created by the present law.

Chapter 6: Sources of Systemic Vulnerability: The Present Law. This chapter covers in detail the causes of action and associated remedies presently available to a parent in a failed family accommodation dispute. It demonstrates both the breadth and complexity of the law, which, for the most part, is found in the equitable jurisdiction. The purpose of this chapter is to demonstrate that while the law does provide mechanisms for the resolution of disputes – and,

[78] For instance, Law Council of Australia, *The Justice Project, Final Report*, Part 1 (n 27); Ellison et al, *The Legal Needs of Older People in NSW* (n 69).

in fact, equity's jurisdiction evolved to respond to a range of fact situations and can accommodate the FAA – this very characteristic has created a jurisdiction that is burdensome and, in conjunction with the forum in which matters are heard, largely inaccessible to many participants.

Chapter 7: Responding to Legal Situational Vulnerability: Possibilities for Statutory and Doctrinal Reforms. Chapter Seven suggests doctrinal or statutory reforms that are separate to the primary reforms proposed in Chapter 8. In recognising that the parent is placed at a serious legal disadvantage having entered the FAA, these alternative reforms are designed to minimise the consequences of the parent's legal situational vulnerability by addressing the 'legal imbalance' they experience. They include expanding duties such as fiduciary or filial responsibility laws, redefining property rights to recognise and strengthen the proprietary interest of the parent, or reforming laws at a doctrinal level to 'rebalance' the parent's legal position. The last of these, for example, explores suggestions to remove the presumption of advancement, or to introduce a presumption of undue influence where the transaction involves transfer of property for less than full consideration. The suggested reforms occur either through judicial activism resulting in doctrinal changes or through statutory reform.

Chapter 8: Responding to Vulnerability: Legal Reforms. This chapter explores how the proposed reforms would address, ameliorate or extinguish those vulnerabilities that prevent the parent in a failed FAA from being able to obtain a legal resolution to their dispute. This chapter does not aim to cover all aspects of the new jurisdiction; rather, it focuses on those key features of the new jurisdiction that target the examples of situational and systemic vulnerability previously identified in this thesis. As already outlined in this introduction, the reforms comprise two limbs: first, that tribunals be given jurisdiction to hear failed family accommodation disputes; and, secondly, that the existing law be replaced with a simplified legislative framework enacted specifically for FAAs. Together, the dual reforms modify the personal, legal and systemic issues that create access to justice challenges.

Chapter 9: Conclusion. Chapter 9 summarises the arguments presented in each of the previous chapters. It considers the implications of the reforms suggested by the thesis, and briefly discusses the potential for the vulnerability framework to be used in future work involving other vulnerable individuals who are denied access to justice. Finally, it considers the implications of the proposed reforms for the individual and for society, concluding that, as a

society, we should not tolerate a specific section of society having unmet legal needs, and that consequently reform is overdue.

CHAPTER 2
FAMILY ACCOMMODATION ARRANGEMENTS: CONCEPTS AND CONTEXT

> [T]o treat the law as a discrete set of principles in a vacuum and without a context is to misconceive its dynamic and ubiquitous nature and, more importantly, to undervalue or even overlook the manner in which it contributes to the fundamental fabric of modern society.[79]
>
> Relationships themselves, and not specific rules of law, are the point of inquiry. The selected relationships will be examined not as passive social reflections of legal concepts, but as dynamic institutions that the law attempts, often clumsily, to apprehend and modulate.[80]

I INTRODUCTION

In the previous chapter, the family accommodation arrangement (FAA) was described as the 'Gordian knot' of elder law. The analogy captures the complexity of the legal issues that must be navigated when dealing with a failed FAA. While this thesis is concerned primarily with identifying the shortcomings of the present legal processes and offering proposals for reform, it is critical that an evaluation of the law be undertaken with an understanding of the key background concepts and contexts concerning these arrangements. As such, the purpose of this chapter is to provide the context to frame and situate the law so it can be understood through the lens of the unique social, financial and familial circumstances concerning these arrangements. In doing so it will demonstrate how the family unit poses unique problems when property, money, law, and family dynamics are involved.

Part II of this chapter will explore the importance of 'home' in the context of ageing. The discussion provides important background context to the legal problems discussed in the thesis. As Lorna Fox Mahoney has observed, '[c]onventional property law has traditionally focused on the competing claims of individuals; with the "object" of property represented as "space" rather than "place"'.[81] In the event of a failed FAA, the challenges created by the existing legal processes necessary to recover property can be addressed through doctrinal or statutory

[79] Sir Anthony Mason, 19 February 1991. Inauguration of the Faculty of Law at the University of Wollongong, cited in Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 2012).
[80] Roderick A MacDonald, 'Law Reform and its Agencies' (2000) 79 *Canadian Bar Review* 99, 109.
[81] Lorna Fox O'Mahoney, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 157.

reforms. However, addressing such challenges should be undertaken with an understanding of the personal consequences behind a dispute of this nature.[82] The desire to maintain a 'home' surrounded by family could be a strong motivating factor to enter a FAA. Consequently, the loss of one's 'home' (as opposed to merely property) through a failed FAA is one such consequence. As the concept of 'home' takes on greater importance as we age, this distress can adversely affect the parent and compound their vulnerability.[83] Consequently, the legal reforms proposed in this thesis are aimed at, among other things, ameliorating this distress.

In Part III, the framework of the arrangement will be examined in more detail. While the prevalence of FAAs can only be estimated, reported cases and publications such as the Australian Law Reform Commission (ALRC) report are critical sources providing insight into the various ways in which they are structured.[84] Drawing on these sources, the chapter will detail the characteristics of the arrangements to demonstrate the diversity of circumstances giving rise to the agreements, as well as any commonalities. It will further investigate the motivations for entering into the arrangements and offer explanations as to the reasons behind those that fail. An understanding of this contextual background is critical as it enables a more comprehensive understanding of the social and legal consequences of the failure of the arrangement.

Lastly, Part IV offers a critique of the dominant 'elder abuse' framework that has evolved from the literature. The discussion of context and subsequent evaluation of the literature, together with an analysis of the dominant 'abuse' paradigm that has emerged, provides a solid basis for the following chapter which develops and justifies a new conceptual framework based on vulnerability. In turn, the identification of discreet classifications of vulnerability experienced by the older person serve to pinpoint the need for law reform and inform the nature of and composition of those reform proposals.

[82] This discussion is premised on the assumption that the failure the arrangement is because of a breakdown in the relationship, and the parent is asked to leave. It is acknowledged that while this is the most common reason for failure, there may be other explanations and indeed the older person may choose to leave. See below fn 88.
[83] See Chapter 3 Part IV(B)(2)(a) 'Consequences of the Failure of the Arrangement', which explains how the loss of home is an example of personal-situational vulnerability.
[84] ALRC Final Report (n 19).

II THE OVERARCHING DESIRE FOR 'HOME': THE FAILED FAA AND ITS IMPACT ON THE ELDERLY PERSON

> The home to everyone is to him his castle and fortress, as well for his defence against injury and violence, and for his repose.
>
> — Sir Edward Coke[85]

> Ah! there is nothing like staying at home for real comfort.
>
> — Mrs Elton[86]

This part examines the impact of the loss of the home on the older person. This discussion is relevant to those circumstances where the failure of the FAA results in the older person having to leave the accommodation owing to a dispute. It is, however, important to recognise that a failed accommodation arrangement is not always a result of the older person being 'kicked out' of their home, nor is the conduct of the adult child necessarily a form of elder abuse.[87]

When a FAA fails, the legal analysis is focused on arguments concerning the relative proprietary rights of each party. In addition to the vulnerability experienced because of the pitfalls of the legal system, the change in living arrangements brought about by the failure of the agreement can have profound consequences for the older person. The loss of home can occur at two points in time. The first is when the living arrangements are no longer tenable, and the older person is required to leave. Secondly, the challenges presented by the legal mechanisms for the recovery of property may deprive the older person of the means to establish a new home. On occasion the parent elects to leave, or circumstances such as the necessity of specialised care require a change in accommodation.[88] Yet in many cases, the dispute between the parties results in the parent being told to vacate the very property that was their home, and where they anticipated they would live and be cared for.[89] In these situations, the loss of home can be damaging to an older person's health and emotional wellbeing beyond the loss of money or property.[90]

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[85] *Semayne's Case* (1604) 77 ER 195.
[86] Jane Austen, *Emma* (Pan Books Ltd, 1969) 219.
[87] This is discussed in detail, below. See Part V 'Does the Failure of the Arrangement Amount to Elder Abuse? Determining the Right Framework'.
[88] See eg *Richardson v Lindsay* [2019] NSWCA 148.
[89] Margaret Isabel Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 *Reform* 29, 31: 'Anecdotal and case law evidence indicates that most cases agreements fail because of relationship breakdowns.'
[90] Thomas L Hafemeister, 'Financial Abuse of the Elderly in a Domestic Setting' in RJ Bonnie and RG Wallace (eds), *Elder Mistreatment Abuse, Neglect, and Exploitation in an Aging America* (National Academies Press, 2003) 1.

A *HOME AND THE ELDERLY*

At any stage of our lives, housing is fundamental to our wellbeing and is a basic human right.[91] The concept of home extends beyond the physicality of the property; a home is a place that reflects individuality and our social, psychological, and cultural values. This is recognised by the United Nations, which states that 'housing' encompasses not only shelter, but the right to live somewhere in security, peace, and dignity'.[92]Throughout the course of our lives, the type of housing we need and the significance we place on the various characteristics that constitute 'home' will change. As we age, physical changes associated with ageing, such as limited mobility, illness, or cognitive changes, may dictate the need for more specialised housing.[93] Further, our personal, economic, or social circumstances can affect accommodation choices. For example, transitional changes such as widowhood, retirement, or the need or desire to be closer to family (and, in particular, grandchildren) can strongly influence the choice of accommodation.[94] Ease of access to amenities such as health care, recreational facilities, meals, and transport can take on a greater significance.[95] For many older people, ageing can decrease mobility, and consequently more time is spent at home.[96] Our changing needs will shape the qualities of 'home' and determine the characteristics perceived to be more valuable.[97] Therefore, home – as a place that offers security, permanence and continuity and connections with family and community – may be more important than a place reflecting one's ideas and values, or as an indicator of social status.[98]

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[91] See Part IV (A) below as to why the vulnerability framework was chosen as the preferred methodology rather than a human rights framework.

[92] UN Committee on Economic, Social and Cultural Rights, CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant, adopted at the Sixth Session, 13 December 1991, E/199/23, 8(e) in relation to Art 11 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[93] Shirley L O'Bryant, 'The Value of Home to Older Persons: Relationship to Housing Satisfaction' (1982) 4(3) *Research on Ageing* 349, 350; Philippa Howden-Chapman, Louise Signal and Julian Crane, 'Housing and Health of Older People: Ageing in Place' (1999) 13 *Social Policy Journal of New Zealand* 14.

[94] Robert F Wiseman, **'**Why Older People Move' (1980) 2 *Research on Aging* 141 cited in Eileen Webb, 'Housing and Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse' (2018) 18 *Macquarie Law Journal* 57, 59; Lori E Weeks, Janice Keefe and Dany J Macdonald, 'Factors Predicting Relocation Among Older Adults' (2012) 26 *Journal of Housing for the Elderly* 355.

[95] Mary Ann Erickson, John Krout, Heidi Ewen and Julie Robison, 'Should I Stay or Should I Go? Moving Plans of Older Adults' (2006) 20(3) *Journal of Housing for the Elderly* 5.

[96] Eigil Boll Hansen and Georg Gottschalk, 'What Makes Older People Consider Moving House and What Makes Them Move?' (2006) 23 *Housing, Theory and Society* 34.

[97] Shirley L O'Bryant, 'The Subjective Value of "Home" to Older Homeowners' (1983) 1 *Journal of Housing for the Elderly* 29, 30; Gillian S Windle, Vanessa Burholt and Rhiannon T Edwards, 'Housing Related Difficulties, Housing Tenure and Variations in Health Status: Evidence from Older People in Wales (2006) 12(3) *Health & Place* 267

[98] Janine L Wiles et al, 'The Meaning of Aging in Place to Older People' (2012) 52(3) *The Gerontologist* 357, 361.

As Webb explains, ontological security, which amounts to the confidence that most human beings have in the continuity of their self-identity and the constancy of their social and material environments, is essential to general well-being.[99] As older people place more value on the security and constancy of their home, circumstances that threaten a person's security of tenure will adversely impact their wellbeing. Several studies have drawn links between poor housing stability and declining health in later life. [100] One study focusing on the impact of the loss of one's home in later life states that '[h]ome has become so integral to life itself and such an intimate part of the older adult's being that when older adults lose their home, they also lose the place closest to their heart, the place where they are at home and can maintain their identity, integrity and way of living'.[101]

B *The Failed Family Accommodation Arrangement and the Impact on the Experience of Home*

For many older people, entering a FAA is a long-term accommodation option that promises security of tenure and the provision of care. These goals, along with the desire to be cared for and remain close to family, reflect many of the characteristics of home that are given greater priority in older age. The establishment and retention of home (both for oneself, and possibly for one's adult child) is therefore a motivation to enter a FAA. If, however, the arrangement fails and the older person is required to leave the home, their resulting tenuous legal and financial position threatens these very goals and, consequently, undermines the experience of home. Along with the financial impact of the older person obtaining alternative accommodation, support formerly provided by friends or family within a community is likely to be affected and must be provided in some other way.[102]

In these circumstances, a failed FAA can lead to the parent's experience of home being threatened in two instances. The first is when the arrangement fails, and the parent can no longer remain in the property. Given the older party rarely holds legal title, the absence of an interest in the dwelling creates a legal environment in which it is possible for the adult child to

[99] Webb (n 94) 59.
[100] Sheelah Connolly, 'Housing Tenure and Older People' (2012) 22(4) *Reviews in Clinical Gerontology* 286, 288.
[101] Catharina Gillsjö, Donna Schwartz-Barcott and Iréne von Post, 'Home: The Place the Older Adult Cannot Imagine Living Without' (2011) 11(1) *BMC Geriatrics* 10, 10.
[102] Webb (n 94) 60.

request the parent to vacate, thus depriving them of home.[103] In some instances, the request to leave has left older people homeless or reliant on public housing.[104]

The second instance concerns the challenges associated with claiming back property through commencing legal action. Navigating the existing law is fraught owing to its inaccessibility and complexity.[105] The older party must possess the emotional and financial resources to commence proceedings, and then be willing to invest time in litigating a dispute against a member of their own family, or a close acquaintance.[106] If the arrangement fails and the parent is required to leave the dwelling, from a financial perspective there is a risk that parent will be unable to recoup their losses and re-establish a home.[107]

The consequences of the loss of home through an unanticipated and unplanned change in an older person's living conditions and the inability to re-establish oneself can have a detrimental effect on the health and wellbeing of an older person.[108] Indeed, the Australian Institute of Criminology notes that in the context of the effect of fraud and financial crime, the impact on the older person can be profound. It observes that

> [n]ot only can a comfortable lifestyle collapse, but [the parent or older person] may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement ... it has also been found that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons.[109]

As noted earlier, the failure of the arrangement may not necessarily be a consequence of fraud or elder abuse. Circumstances leading to the parent donor leaving the home are many and varied, as discussed below.[110] Nonetheless, the unanticipated failure of a FAA causing personal distress and financial harm, coupled with the loss of home and difficulty in re-establishing

[103] In some instances, a person residing can argue they have a right to remain; however, if a relationship has broken down, cohabiting may be untenable. See Richard McCullagh, 'Beware the Lonesome Lodger' (2019) 61 *Law Society Journal (NSW)* 88.
[104] See *Spink v Flourentzou* [2019] NSWSC 256*; Flourentzou v Spink* [2019] NSWCA 315.
[105] See generally Chapter 6.
[106] Somes and Webb, 'What Role for Real Property' (n 32) 127; John Boersig and Dominic Illidge, 'Addressing Elder Abuse – Perspectives from the Community Legal Sector in the ACT' (2018) 18 *Macquarie Law Journal* 93.
[107] Hafemeister (n 90).
[108] O'Mahoney (n 81) 157.
[109] Australian Institute of Criminology (AIC), Submission No. 40, cited in Standing Committee on Legal and Constitutional Affairs (n 20) 2.4.
[110] See Part III (D) 'Reasons for Failure of Family Accommodation Agreements.

oneself, can have profound and long-lasting effects on an older person. This is a catalyst for exploring law reform in this area.

III THE FAMILY ACCOMMODATION AGREEMENT

A *PREVALENCE – THE ABSENCE OF RELIABLE DATA DOCUMENTING THE EXTENT OF FAMILY ACCOMMODATION ARRANGEMENTS IN AUSTRALIA*

At present, there is an absence of comprehensive national data documenting and analysing the extent to which people are entering into FAAs throughout Australia, and the corresponding number that do not succeed.[111] It has been noted that this is a significant shortcoming in light of statistics that indicate 15.4% of people aged 65 and over live in family households with children, relatives, or friends.[112]

A report published by the Australian Institute of Family Studies (AIFS) found only 3% of participating older people reported they were a party to a FAA.[113] This statistic is surprising given the evidence from community legal centres and practitioners provided to the ALRC for the report into Elder Abuse, which suggested that disputes concerning accommodation arrangements were increasing and that access to affordable and prompt dispute resolution was critical.[114]

Although they can only provide a snapshot of the problem, reports based on interviews with older people who have experienced failed FAAs have been tabled by organisations such as Seniors Rights Victoria (SRV)[115] and the Council of the Aged (COTA) in Western Australia[116] and provide a valuable source of empirical information. The insights provided by COTA are

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[111] ALRC Final Report (n 19) 204 [6.7]: 'The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known.' At the time of writing, the author has successfully applied for funding to conduct a pilot study within a defined area to assess prevalence of failed family accommodation arrangements. See also Hall, 'Care for Life' (n 4) 9: 'One challenge for a Canadian research is the paucity of hard evidence about care agreements.'

[112] Queensland Office of the Public Advocate, Submission No. 76, cited in Standing Committee on Legal and Constitutional Affairs (n 20) 4.7.

[113] L Qu et al, *National Elder Abuse Prevalence Study: Final Report* (Australian Institute of Family Studies, 2021) 100.

[114] See eg submissions on elder abuse to the Australian Law Reform Commission at <https://www.alrc.gov.au/inquiry/elder-abuse-2/elder-abuse-submissions/>, in particular 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.

[115] Seniors Rights Victoria, *Assets for Care* (n 19).

[116] A Freilich et al, 'Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?' (Research Paper, COTA, 2014) ch 9, 115, available from <https://www.oldertenants.org.au/content/security-tenure-for-the-ageing-population-western-australia-does-current-housing-1>.

significant. While the report cannot speak to the prevalence of arrangements throughout Australia, the information obtained through interviews of twenty seniors who had experienced various forms of family accommodation arrangements provide valuable data.

A common theme throughout the tabled reports is the acknowledgement of the increase in disputes concerning accommodation arrangements. SRV, while framing the problem as a form of elder abuse, noted that the asset for care arrangement has become the most common source of financial abuse.[117] Somes and Webb state that '[f]amily accommodation arrangements, where older members of a family live on, or in, the same property as younger members, are increasing in popularity and in kind'.[118] Similarly, the ALRC observes, based on the aforementioned submissions, that 'stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing'.[119]

Reported cases provide substantial information concerning the details and history of the parties involved and their arrangements; however, owing to the barriers faced by older people commencing litigation, few cases are litigated and therefore case law cannot provide a reliable indication of the breadth of the problem. Failed FAAs are indeed 'in the shadows, hidden by fear and shame'.[120] Nonetheless, while the prevalence of the arrangements and their rate of failure can only be estimated, community legal centres, legal aid practices and aged advocacy groups throughout Australia continue to report rising numbers of older people losing property through failed arrangements. These groups work at the coalface of elder law and their experiences with clients are well documented.[121] These reports have led to a heightened awareness of the legal pitfalls associated with FAAs, and a recognition that legal, social and political responses are far overdue.

B *The Structure of the Family Accommodation Agreement*

FAA scenarios take many forms: a direct transfer of property to a child, using proceeds of the sale of a property to build a 'granny flat' at the back of a son's or daughter's property, use of sale proceeds to discharge the mortgage of a child's property or to buy another property in their

[117] Seniors Rights Victoria, *Assets for Care* (n 19) 5.
[118] Somes and Webb, 'What Role for the Law' (n 28) 25.
[119] ALRC Final Report (n 19) [6.10].
[120] Kyle (n 31) 4, citing Kevin McCormally, 'Protect Yourself, Loved Ones from Financial Abuse of the Elderly' *Kiplinger Personal Finance Magazine* (November 2011) <http://www.kiplinger.com/magazine/archives/protect-yourself-loved-ones-from-financial-abuse.html>.
[121] See n 46, above.

name. A loose agreement to care for the older person is the usual accompaniment to these transactions.[122]

The basic structure of an FAA is that an older person's 'family' receives financial benefit in exchange for a promise to provide accommodation for, and in some cases care of, the older person as he or she ages.[123] In many cases the arrangement involves the transfer or sale of the older person's home. Although not all older people own their own home, they can still access FAAs through contributions of savings, investments and other assets. Of those interviewed by COTA, a number of participants sold their home and financed renovations of an existing property, or a lump sum payment of some kind was made to the adult child. In one case, the older person's house was sold, and she moved into a single room at the rear of the child's house. In 'exchange' she paid off the money owing on the child's mortgage and made a fortnightly contribution from her pension towards expenses. In another, the purchase of a new home was funded totally by the older person, but the property was placed in the names of the older party's son and his spouse.[124]

The types of accommodation 'solutions' are wide-ranging and are largely dependent on the needs and resources of the parties involved. In *Jacqueline Pobjoy v Prudence Anne Reynolds* the plaintiff, a 79-year-old pensioner, agreed to sell her property on the understanding that the proceeds would be applied to a new property which the defendants would purchase in their name, and that the new property would either have a granny flat or one would be constructed for her. [125] She was to contribute to the utilities, and her daughter and son-in law would look after her.[126] Similarly, in *Djemal v Cemal*[127] a mother agreed with her son and daughter-in-law that the mother would sell her home and that the proceeds of sale would be used to purchase a vacant block of land upon which a house would be built as a home for the mother, her son and her daughter-in-law. Other arrangements involve the construction of the traditional 'granny flat' where an older member or members of a family live in a self-contained dwelling,[128] the construction of an additional storey or some other form of renovation on an existing home,

[122] Seniors Rights Victoria, *Assets for Care* (n 19) 9.
[123] See discussion below concerning what constitutes a 'family' member.
[124] Freilich et al (n 116) ch 9, 118.
[125] *Jacqueline Pobjoy v Prudence Anne Reynolds* [2013] NSWSC 885.
[126] See also *Richardson v Lindsay* [2019] NSWCA 148 where 76-year-old Mrs Richardson sold her home and contributed $220,000 for the purchase of a home with her daughter and son-in-law, where she would live and be cared for by them.
[127] *Djemal v Cemal* [2015] NSWSC 1125. See also *Mainieri v Cirillo* [2014] VSCA 227, *Joan Phyllis Quinn v Susan Bryant* [2011] NSWSC 1153
[128] *Bennett v Horgan* (1994) (unreported, Supreme Court, NSW, Bryson J, 3 June 1994); *Henderson v Miles (No 2)* [2005] NSWSC 867 (Young CJ)

such as a garage conversion,[129] or the older person may simply occupy a room in an existing house.[130] Alternatively, the adult child may move into their parents' home and title in that dwelling may be subsequently transferred to the adult child.[131] In *Anderson v McPherson*[132] the parents contributed most of the purchase price for the property, and an agreement between the couple's son and daughter-in-law anticipated them living in the property together (along with the son and daughter-in-law's two children). It was agreed that the couple's son and his wife would make all the mortgage repayments, including payments for a loan, which was to be used to build a residence at the rear of the property in which the parents would live. COTA's interviews revealed that

> [i]n most cases, the older person made the sole, or very significant, contribution to the accommodation. In relation to granny flats, in most interviews the granny flat was a separate structure built onto an existing house and paid for by the older person or persons. In one case, a separate house was built on a larger property owned by a family member. Where the property was 'purpose built' such features could be incorporated in the planning but, invariably, the older person made a contribution to the purchase/construction that was arguably greater than the space occupied. In cases where the older person lived within the house itself, renovations were performed, at the older person's expense, for example the construction of an en suite bathroom and in one case a separate entry.[133]

Although the primary requirement under the arrangement is that accommodation is provided for the older party and there is a corresponding transfer of property, there are invariably a multitude of secondary agreements regarding the terms and how the arrangement will operate. These are generally informal and may change from time to time depending upon the circumstances of each family. They could include arrangements concerning household chores such as shopping, cooking, and cleaning, day-to-day activities such as the provision of transport, administration of medication, the provision of child-minding, the organisation of financial and living arrangements covering common and exclusive areas of occupancy of the premises, or the payment of utilities. While seemingly prosaic in nature, these 'sub agreements' play an important role in determining the intentions and expectations of each party. They reinforce the concept of reciprocity and play a significant role in assessing the character of the agreement, which is only partly concerned with money and property. Frequently, there is simply no 'plan' concerning the respective obligations. COTA reports that

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[129] *Terry v O'Connell* [2010] NSWSC 255.
[130] *Jones v Jones* [2014] QDC 150.
[131] *Thelma Langford v Deva and Diane Reddy* [2012] NSWSC 289; *Stoklasa v Stoklasa* [2004] NSWSC 518.
[132] *Anderson v McPherson (No 2)* [2012] WASC 19.
[133] Freilich et al (n 116).

> [t]he interviews emphasised the infinite variety of potential family accommodation arrangements. Accommodation varied from occupation in a single room through to the purchase of a new, larger home to the construction of a separate 'granny flat' on a family member's property. In most cases, a sum of money was provided to a family member upon or soon after moving into the property. This was in the form of a contribution to the household or towards renovations or additions to the property. In all cases money was provided regularly to the family member for household expenses. The structure of the arrangements was confusing with an array of informal arrangements. Indeed, in most cases nothing was written down to record the terms of the agreement. Several had different recollections from their families as to what had been agreed to. Where there was some record of the agreement in writing it covered few contingencies and contained insufficient detail. If legal advice was sought it was regarded as unsatisfactory; indeed some interviewees said they felt 'ignored' by the solicitor. In only one case was a formal family agreement akin to the guidelines in the Department of Communities brochure utilised. While there seemed to be awareness that, as they aged, the older persons might become more of a 'burden' on the family, there seemed to be some naivety or vagueness about what was anticipated. Some seemed to believe this was part of the 'deal' but generally it seemed people 'hadn't thought that far ahead'.[134]

Given the parties commonly neglect to define the terms of the relationship themselves, it is therefore not surprising that few contemplate the legal obligations borne by each party.

C *Participants in Family Accommodation Agreements*

This part identifies the participants in the family accommodation agreement and concludes that, owing to the relationship of trust that characterises the arrangements, they are commonly undertaken between a parent and their adult child.

A FAA could conceivably be entered into between any two parties, irrespective of their age or familial relationship, provided one person was willing to exchange assets or property for the promise of care. However, it is the undertaking of the agreement in the context of a relationship that is characterised by intimacy and personal trust that generates many of the problems associated with these arrangements. This explains why the discussion in this chapter is premised on the parent/child relationship as the dominant paradigm. Data provided by the Australian Bureau of Statistics reveals that older people are ten times more likely to be living with a child or family member than a non-family member.[135] In addition, case studies and interviews conducted by organisations such as COTA (WA),[136] the Northern Suburbs

[134] Ibid 116–17.
[135] Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia's Older People Live?, Cat No 2071.0* (2013) cited in ALRC Final Report (n 19) 8.56.
[136] Freilich et al (n 116). See also ALRC Final Report (n 19) Chapter 6.

Community Legal Centre (WA)[137] and SRV,[138] as well as anecdotal support from the legal profession,[139] corroborate the view that the vast majority of FAAs occur between a parent and their adult child. The transfer of property or assets within a relationship of trust, or where there is an expectation of trust places the parent in a vulnerable legal position.[140] Owing to a belief in the integrity of the relationship, parents often fail to consider outcomes should the arrangement fail, nor do they take precautions to protect their financial or proprietorial interests.[141] It is more likely that an arrangement with a person not coming within the definition of family or close personal relationship would be subject to more scrutiny and formality than those made with a family member.

Even assuming that FAAs are predominantly undertaken between parents and their adult children, there is no requirement that the donor be 'elderly' – a parent could conceivably be in their forties. The analysis undertaken in this chapter therefore does not target a group because they are 'elderly'; that is, there is no prerequisite that the donor falls within a certain age range. The observations of MacKenzie are pertinent here when she says:

> Interventions that target specific groups identified as vulnerable and subject them to restrictions or forms of surveillance not applied to the rest of the community, that treat persons who are so targeted as incompetent … and that are primarily focussed on reducing perceived risks to society rather than concerned with fostering autonomy count as objectionably paternalistic.[142]

However, one must acknowledge that the combination of factors that motivate people to enter these arrangements is closely linked to the age and associated circumstances of the donor party, and that the vulnerabilities discussed within this thesis create barriers to the elderly having their legal needs met For instance, inherent vulnerabilities such as cognitive impairment and physical frailty may arise in elderly people, resulting in increased dependence and reliance on others. Similarly, the donor is more likely to be 'elderly' and there are particular consequences that flow from that position; as such, some of the problems identified concerning access to the legal system are analysed with reference to the advancing age of the donor – for example, the impact of the loss of home as discussed above, and limited opportunities to rebuild and 'start

[137] Ottolini (n 2).
[138] Seniors Rights Victoria, *Assets for Care* (n 19).
[139] Patricia Lane, 'Reform in Elder Law: Granny Flats' (2018) 92 *Australian Law Journal* 413; Kyle (n 31).
[140] As to what constitutes a 'relationship of trust' or an expectation of trust see Rae Kaspiew et al, *Elder Abuse National Research – Strengthening the Evidence Base: Research Definition Background Paper* (Australian Institute of Family Studies, 2019).
[141] Hence the personal-situational vulnerability gives rise to legal-situational vulnerability.
[142] Catriona MacKenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in MacKenzie et al, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 74) 47.

over'. These consequences are a key connection to the elder abuse discourse and intersect with the 'resilience' aspect of vulnerability discussed in Chapter 3. ,

Despite the parent/adult child relationship being the typical example, not all accommodation arrangements are necessarily made with adult children. In some cases, such arrangements can be made with other family members, friends, carers or even acquaintances. This was addressed specifically in the ALRC's final report on elder abuse ('Final Report').[143] The Commission considered the breadth of the definition of family and family-type relationships, where the core elements of the relationship involve the qualities of trust that characterise relationships between family members.[144] It is the degree of trust inherent in the relationship that inhibits people from protecting their legal position. Therefore, the 'family type' relationship could extend to other individuals should that association become close and characterised by trust over time. The ALRC proposed that a broader definition of 'family' as defined in the *Family Violence Protection Act 2008* (Vic) s 8 should be used as a template. The section is set out below:

> **Meaning of family member**
>
> S 8(1) For the purposes of this Act, a 'family member', in relation to a person (a 'relevant person'), means—
>
> (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;

[143] ALRC Final Report (n 19).
[144] Ibid [6.73-80].

(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.[145]

This definition includes not only the traditional conception of a family member but also contextual factors that indicate a position of trust – for instance, the reputation or recognition within the community that the relationship is familial relationship (ss 8(3)(c), (d)) and financial dependence or interdependence (s 8(3)(f)).

D *Motivations for Entering the Family Accommodation Agreement*

At first glance, the FAA appears to be the perfect solution to a plethora of interwoven factors surrounding ageing, accommodation and financial security. The reasons for entering such an arrangement will be determined by the individual circumstances peculiar to each family and may be complex and multifaceted but can be loosely described as either 'pushing' (coercive) factors, such as an inability to manage by oneself, or 'pulling' (attracting factors) such as the desire to live with family or be close to grandchildren.[146] In some cases the categories will overlap. In addition to those circumstances particular to individual families are broader social and economic contexts, such as declining housing affordability and concerns over moving into aged care. The latter concern is heightened in light of the disturbing findings of the Royal Commission into Aged Care (RCAC).[147] Further, it is in the interests of governments to provide

[145] *Family Violence Protection Act 2008* (Vic) s 8.
[146] This division is taken from Abir K Bekhet, Jaclene A Zauszniewski and Wagdy E Nakhla, 'Reasons for Relocation to Retirement Communities: A Qualitative Study' (2009) 31 *Western Journal of Nursing Research* 462.
[147] *Royal Commission into Aged Care Quality and Safety* (n 12).

incentives for people to enter family accommodation arrangements, to direct the responsibility for care of the aged back to families and away from the health sector.

1 *Personal Motivations*

As people age, they are more likely to require assistance with everyday activities such as household chores and transport, regardless of whether they have a disability or not. According to the Australian Bureau of Statistics, in 2018, among all older Australians (65 and over), 38% (1.5 million people) needed assistance with everyday activities. The following chart illustrates the activities for which assistance was needed.[148] The activities that predominantly require assistance are those involving some sort of physical activity: mobility, household chores, property maintenance and health care. The primary health conditions experienced include arthritis (15.6%), hypertension (9.1%) and back problems (8.7%).[149]

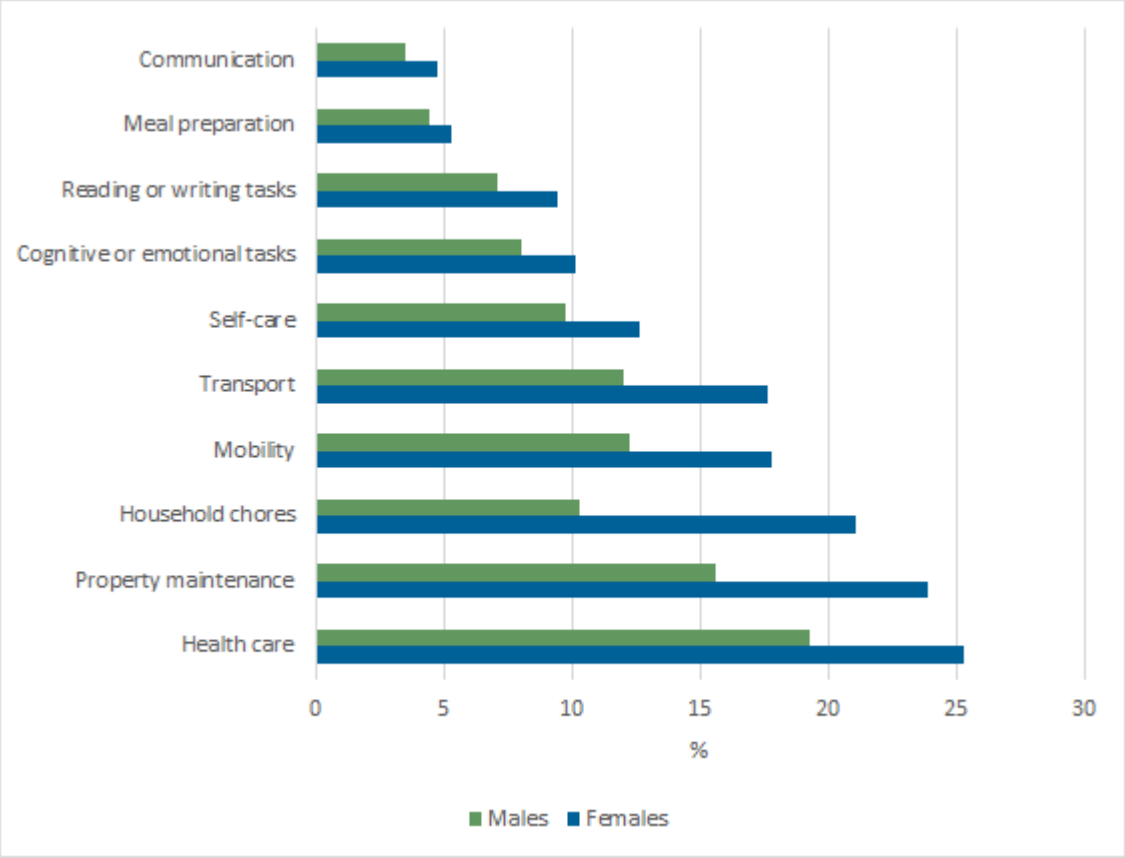


Figure 1. Assisted activities, Australians aged 65 and over (Source: ABS, Ageing and Carers, Australia: Summary of Findings, 2018).

[148] Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features152018?OpenDocument>.
[149] Ibid.

The need for assistance across a range of activities acts as a 'pushing' factor encouraging older people to enter accommodation agreements.[150] Additionally, factors such as concerns over one's own or one's spouse's health, the death of a spouse, limited access to residential aged care places, loneliness or insecurity associated with living alone may also contribute to a decision to move in with an adult child. The norms of familial responsibility and security provided by family will play a large part in the decision of parents and their adult children to co-habit. Children will often act out of genuine concern for a parent's well-being and wish to provide support when they need assistance, and many are reluctant to place parents in an aged care facility. The FAA might be the continuation of an existing caregiving relationship evolving from a minor caring role to something more substantial and time consuming, which in turn could mean the adult child is unable to undertake full-time. As such, the reciprocal 'asset for care' arrangement represents a mutual arrangement wherein the economic advantages gained by the transfer of assets compensates the caregiving role.

Similarly, 'pulling' factors are broadly seen as more positive or attractive motives. These include remaining close to family and grandchildren or being able to establish a 'home' (for instance, in a granny flat as opposed to an aged care facility) as many older people express a reluctance to move into institutional care, preferring to stay within the community.

Some of these factors can be mutually beneficial to both the older person and the adult child, such as the provision of child-minding of grandchildren, coupled with a desire on the part of grandparents to spend time with their grandchildren. Both parties may find that, faced with the prospect of a sale of the elderly person's home (or dissipation of assets), families may wish to undertake an asset-for-care arrangement in order to keep wealth or property 'within the family', rather than have funds expended on in-home or residential care.

2 *Financially Assisting Children*

Adult children experiencing difficulties entering the housing market because of rising house prices, or struggling with high levels of mortgage debt, may encourage parents to 'step in' to assist. The accommodation arrangement is one method parents are able to transfer money or property to their children while securing accommodation and benefits for themselves. In *Chaudhary v Chaudhary* Justice Sackville observed:

[150] Boersig and Illidge (n 106).

> There has been discussion in recent times about the affordability of housing, particularly for young people in many parts of Australia. One consequence of declining housing affordability is that young adults very often need and sometimes receive assistance from parents (or other benefactors) to enter the housing market.[151]

Inter vivos transfers by parents to their children tend to be motivated by exchange and reciprocity or based on the needs of the child.[152] Consequently, an adult child experiencing financial stress may be more likely to enter an arrangement, and a parent may be more willing to take up the arrangement to assist them.[153]

The exchange of assets for the provision of care, or rewards received by an adult child for the care provided during the life of the parent, may remove a potential Family Provision claim by the adult child on the death of the older person because the child is in possession of assets under the arrangement. Commonly, an adult child will provide care for an older person in exchange for a *promise* that assets will be transferred. For instance, an adult child could move in with an elderly parent on the basis that the house will be transferred into the child's name, or the promise of property to be bequeathed in a will. If the transfer does not occur during the life of the older person, and the adult child believes they have not received what they were entitled to under the will, a claim may be made under the Family Provision Act in the relevant state.[154] The aim of the legislation is to qualify the common law principle of testamentary freedom and allow an 'eligible person' to make a claim to the estate of a deceased person.

Where motives are primarily to provide financial assistance or support to a child, some older people may act out of a sense of obligation, being encouraged to 'sell up' and transfer assets in circumstances that are not in their best interests in order to relieve financial pressure experienced by the adult child.[155] For instance, in *Bennett v Horgan*[156] the plaintiff parents had loaned money to the defendants – their daughter and her husband – to purchase property and later agreed to build a granny flat on that property. The arrangement allowed the parents to

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[151] *Chaudhary v Chaudhary* [2017] NSWCA 222 [7] (Sackville J).
[152] Carolyn Sappideen, 'Families and Intergenerational Transfers: Changing the Old Order' (2008) 31(3) *University of New South Wales Law Journal* 738, 745.
[153] This was certainly the motivation for the arrangement in *Mainieri v Cirillo* [2014] VSCA 227; see also Dr Rebecca Valenzuela, 'Why Some Kids Get More than Their Siblings from Their Parents', *Sydney Morning Herald* (5 October 2017) <http://www.smh.com.au/money/planning/why-some-kids-get-more-than-their-siblings-from-their-parents-20170922-gyn3v4.html>. Testamentary dispositions, however, tend to be divided equally between children: Sappideen (n 152) 756.
[154] *Succession Act 2006* (NSW) Pt 3.2; *Administration and Probate Act 1958* (Vic) Pt IV; *Succession Act 1981* (Qld) Pt IV; *Inheritance (Family Provision) Act 1972* (SA); *Family Provision Act 1972* (WA); *Testator's Family Maintenance Act 1912* (Tas); *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).
[155] See eg *Mainieri v Cirillo* [2014] VSCA 227.
[156] *Bennett v Horgan* (1994) (unreported, Supreme Court, NSW, Bryson J, 3 June 1994)

assist in paying utility and other bills as well as to supervise their child's financial health more closely.

In this sense, the FAA effectively taps into anticipated inheritances, a practice that has been termed 'inheritance impatience' on behalf of the adult child. The Victorian Royal Commission into Family Violence (RCFV) recognised inheritance impatience in the following terms:

> Financial elder abuse may begin with the best intentions – with a child acting as their mother's financial power of attorney thereby managing her finances. This can quickly progress to a sense of entitlement, particularly when adult children have mortgages or debts ... The children may justify their actions by saying: 'Mum doesn't need money now, and it's going to be mine anyway'.[157]

The motive of the adult child can be relevant in identifying conduct as fraudulent or amounting to undue influence or unconscionable conduct, and these causes of action, if proven, will ground specific relief.[158] In some cases it has been shown that asset for care arrangements are the result of calculated deception in order to obtain the property of the older person.[159] In other cases the parties may commence the arrangement with the best of intentions, but opportunism or a sense of entitlement can distort original motives.

3 *The 'Granny Flat' Interest and Centrelink*

The regulatory framework that determines whether people over the age of 65 are entitled to an age pension may influence the decision to enter a FAA. Ownership of property, or an interest in property, may affect entitlement to payments.[160] People may therefore seek to impoverish themselves to establish an entitlement to or maintain social security payments.[161] In response, where the government determines an older person has 'gifted' money or assets or sold assets at an undervalue, they will be treated as still owning the asset, which thus will be included in any calculation determining entitlements. [162] However, a transfer of assets or money pursuant to an FAA may give the older person, for the purposes of their social security payments, a 'granny flat interest' and, if so, transfers under this scheme would not be subject to the restrictions on amounts that can be 'gifted'.

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[157] *Royal Commission into Family Violence in Victoria* (Report, 2015) volume V, ch 27, 71.
[158] See Chapter 6, 'Present Law'.
[159] See eg *Jones v Jones* [2014] QDC 150
[160] Although property that is the principal place of residence is exempt: <https://www.humanservices.gov.au/individuals/enablers/assets>.
[161] Herd (n 31).
[162] This is only applicable to transfers over the allowable amount: For any single person or couple, $10,000 in one financial year, or $30,000 in 5 financial years, however no more than $10,000 in any given year.

The term 'granny flat' does not refer to the form of the dwelling. Rather, it is an umbrella term to describe an interest that is created when an older person pays for the right to live in accommodation in a private residence for the duration of their life. This accommodation must be their principal home. Hence, the arrangements described above under 'Types of Family Accommodation Arrangements' would most likely come within the definition. The circumstances include: (1) the person transfers their property's title to another person and retains a lifetime right to live in that home or in another home (provided the home was or would have been totally exempt from the asset test); (2) the person paid the cost of building the granny flat on someone else's property or converting another person's property to meet their needs and to establish a lifetime right to live there; or (3) the person purchases property in another's name and establishes a lifetime right to live there. Therefore, the granny flat interest can be paid for either by money or by the transfer of assets. The recognised interest that arises protects Centrelink benefits that may otherwise be lost if an older person otherwise sells their home. As mentioned above, that Centrelink recognises the interest for the purpose of assessing an older person's right to social security payments provides a strong incentive for parties to enter into these agreements.[163] However, many older people may be unaware that giving up their legal title to property will be disadvantageous should the relationship fail. Despite the recognition of an interest for the purposes of social security, the granny flat interest does not translate to a recognised proprietary interest at law, or indeed in equity.[164] Nor, at present, is it necessary for a granny flat agreement to be reduced to writing.[165] Consequently, the interest will not of itself be sufficient to support an exception to the indefeasible title of the adult child.[166] There may, however, be advantages in that there is some record of the arrangement should the arrangement deteriorate over time, and this could provide evidence to support either a failed joint venture or estoppel claim.

As noted above, the concession under the Social Security legislation to the 'granny flat' interest provides a considerable incentive for families to enter a FAA, along with reducing the pressing

[163] Under the *Social Security Act 1991* (Cth) s 12A. The Department of Veterans Affairs also recognises granny flat interests with respect to pension entitlements: <https://www.dva.gov.au/factsheet-is73-granny-flats-retirement-villages-and-sale-leaseback-agreements>.
[164] However, see below for the impact on Capital Gains Tax.
[165] Although the ALRC has recommended that the *Social Security Act 1991* (Cth) be amended to require that a granny flat interest be filed in writing before Centrelink benefits are able to be accessed: ALRC Final Report (n 19) Recommendation 6-2.
[166] In Victoria, if the older party can establish they have a life interest rather than a personal right to reside in the property, s 42(2)(e) of the *Transfer of Land Act 1958* (Vic) confers a proprietary right in the property that as such is enforceable against third parties and may allow the older party to remain in the property: see *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 [19].

demand for aged care places.[167] SRV, however, has noted that people have been known to create a granny flat agreement and then shortly afterwards place their parent in an aged care facility, with the aim of depleting the assets of the older person so as to be eligible for Centrelink payments and to affect the assessment of the accommodation bond in the aged care facility.[168] To counter this practice, if an older person leaves the home that is the subject of the granny flat interest within five years of the creation of the interest, and the reason for leaving was something that could have been 'expected', the gifting rules will apply. While this proviso is in place to counter people taking advantage of the financial benefits that come with the creation of the interest, an unintended result may be to make it difficult for an older person to leave an abusive environment.[169]

4 *Capital Gains Tax and Recent Amendments*

The reluctance of parties to formally record the family accommodation agreement in writing creates significant difficulties for the parent should the arrangement break down. Without a record of an intention, at minimum, of a conditional gift, the parent will bear the onus of arguing against the presumption of advancement and will need to establish an equitable interest pursuant to a recognised equitable cause of action.[170] One reason for the reluctance to formally record the transfer of property is that, pursuant to s 104.35(1) *Income Tax Assessment Act 1997* (Cth), the writing triggers a 'D1' event on the basis that an equitable right (now held by the parent) is created under the Act.[171] To illustrate, take a situation where elderly parents A&B transfer $200,000 to C&D, their adult son and his spouse. A document specifying the terms of the transfer under a family accommodation arrangement would strengthen A&B's legal position by providing evidence of each party's mutual intentions, and the document would arguably have contractual force. However, pursuant to s 104.35 of the Act, the writing has now created a 'contractual right or other legal or equitable right' in A&B's favour. C&D would now be obliged under the legislation to add the $200,000 to their assessable income as a capital gain. This creates a situation where formalising the agreement advantages the parent/donor but

[167] Other incentives may be present, such as transferring assets to maximise social security benefits: see *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133 (illegality).
[168] Senior's Rights Victoria (n 19).
[169] ALRC Final Report (n 19) 229.
[170] Explained in greater detail in see Chapter 4. For recognised equitable causes of action see Chapter 6.
[171] *Income Tax Assessment Act 1997* (Cth) s 104.35(1) *CGT event D1* happens if you create a contractual right or other legal or equitable right in another entity. While for the purposes of the *Income Tax Assessment Act* (1997) (Cth) an equitable interest is created, strictly speaking equity would recognise this as a mere equity, rather than an equitable proprietary interest. See Chapter 4.

disadvantages the adult child. Conversely, an absence of writing gives rise to significant challenges for the elderly parent if they wish to have either property or assets returned but eliminates a significant tax liability for the adult child. The situation is unsatisfactory because, as a matter of policy, there is a clear inconsistency between the Capital Gains Tax legislation and the Social Security gifting provisions discussed above.

In response to these concerns, in 2018 the Australian Government requested the Board of Taxation to undertake a review of the tax treatment of granny flat arrangements and recommend any potential changes. This review considered ALRC Report 131, which identified the development of formal and legally enforceable family agreements as a measure to prevent elder abuse. The review considered and made recommendations on the appropriate tax treatment of these arrangements, while considering the interactions between the current tax laws and treatment of 'granny flat interests' under the social security rules. As a result of this report, the Federal Government has acknowledged that '[w]hen faced with a potentially significant CGT liability, families may opt for informal arrangements which can leave open the risk of financial abuse and exploitation, for example following a family or relationship breakdown'.[172] Accordingly it has removed the capital gains tax liability on the creation, variation or termination of a written granny flat arrangement. The measure commenced in July 2021.[173]

While this measure demonstrates a willingness on the part of the Federal Government to take action to encourage the uptake of formal written agreements, it is suggested it may not be a panacea for the challenges faced by older people, and there will still be a marked reluctance within families to formalise arrangements. Formalising agreements may raise and challenge trust between family members and may be contrary to normative family behaviour, particularly in some ethnic communities. The cost of legal advice can be a financial disincentive, along with many arrangements being undertaken in response to a crisis such as sudden illness, a fall or death of a spouse. Even with these reforms in place, without far-reaching community education many people will still be unaware of the precarious legal position they place themselves in, and the potential vulnerability of the older party may still not be addressed. Without addressing these barriers, it is suggested the proposed reforms will only impact a small

[172] The Hon Josh Frydenberg MP, 'Removing Capital Gains Tax for Granny Flats' (media release, 5 October 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/removing-capital-gains-tax-granny-flats>.
[173] <https://www.ato.gov.au/individuals/capital-gains-tax/property-and-capital-gains-tax/granny-flat-arrangements-and-cgt/>.

number of participants who are aware of the dangers and further are prepared to undertake this extra step to protect their legal position.

E *Reasons for Failure of the Family Accommodation Agreement*

> As is unfortunately not uncommon, parents and children make arrangements which at the time appear to favour all of their interests but ultimately those arrangements become the source of disagreements. The instant proceedings throw up a number of heavily contested parameters concerning the precise arrangements made by the current parties and allegations that neither the plaintiff nor her late husband had been properly advised either by her son or by her son's solicitors.[174]

As noted above, many arrangements are entered into hastily, with little thought given to a range of possible outcomes. For instance, if an adult child of 50 were to enter into a FAA with a parent aged 70, the child could conceivably reach an age at which they are no longer physically able to care for the parent, or the parent may reach an age at which the level of care necessary is beyond that which can be provided in the home. In this scenario, there is a question of who would be responsible for paying for the extra care.

Similarly, an adult child may pre-decease their parent. In that case, their estate will be distributed either in accordance with their will, or devise to their next of kin. This could potentially leave the elderly parent without any assets,[175] or living with a person who has not agreed to undertake their care.[176]

In the case of *Marlow v Boyd*[177] the remarriage of the parent caused a complete breakdown in the relationship of the mother and daughter. While the parties had a comprehensive written agreement, they simply had not anticipated the events that transpired, or the complete breakdown of their relationship.

Divorce of the adult child and subsequent property settlements may also deprive the elderly person of assets and, consequently, their home. Although the older party can be joined as a party in family law proceedings, the likelihood of being able to recoup their contributions is small. Bankruptcy, unemployment or failure of a business may require the property to be sold, and the capacity to care and/or house the elderly person may be negatively impacted. There

[174] *Menka Tasevska v Vlado (Larry) Tasevski* [2011] NSWSC 174, [2] (Einstein J).
[175] Although presumably they could bring a claim under the relevant state family provision legislation.
[176] For instance, A, an elderly parent, enters a FAA with her son B and his wife C. B then pre-deceases his mother and the property passes to C. C then marries D, C then dies. This would leave the property with D, and D looking after A.
[177] *Marlow v Boyd* [2012] QSC 331.

are, of course, almost unlimited scenarios that could lead to the disruption of the arrangement. The older party may desire to leave; the adult child may be unable to service the mortgage and subsequently lose their home and be unable to house themselves or their parent; or either party may wish to relocate due to changing work or family circumstances.

The reported cases reveal the primary cause of failure of FAAs is a breakdown in the relationship between the parties. The breakdown is often described as having 'no attributable blame'; however, there are some cases where the elderly person has had to leave to escape an abusive relationship.[178] An example is *Menka Tasevska v Vlado (Larry) Tasevski*.[179] In this case an elderly Macedonian woman who spoke limited English, 'with little schooling or commercial sophistication', brought an action against her son claiming an interest in the property after $110,000 had been transferred by she and her husband to her son and his wife, with the intention that a house would be constructed for them all to live in together. A further $30,000 was provided by the parents to buy furniture. The parties agreed the parents would be registered as co-owners and that care would be provided for their lives. The parties signed a Deed of Agreement, which inaccurately set out the oral agreement. The document stated that while the parents could continue to occupy for the rest of their lives, they 'acknowledge that they have no interest in the property'. They were not provided with an interpreter, nor were they encouraged to seek independent legal advice. The document was not properly explained to them. Their lack of comprehension meant they were not sure what they were signing but trusted their son. Over the years they cohabited, repeated requests were made by the parents to have their name on the title deeds, and at one point a letter was prepared by a solicitor demanding the return of the $110,000. The plaintiff's husband died, and sometime after the plaintiff refused to hand over her pension to her son. She alleged she was then refused access to amenities in the home and was physically and verbally assaulted. Several causes of action and corresponding claims for relief were relied on by the plaintiff. These included setting aside the document under the *Contracts Review Act 1980* (NSW), unconscionable conduct, estoppel and a remedial constructive trust based on the value of contributions to the property. The court found that neither party were reliable witnesses. The final relief granted was an equitable lien over the disputed property, reflecting both the contributions made to the property and the care

[178] *Jones v Jones* [2014] QDC 150.
[179] *Menka Tasevska v Vlado (Larry) Tasevski* [2011] NSWSC 174 (Einstein J).

that was in fact provided to the plaintiff's husband while he was alive, along with the plaintiff's life expectancy.[180]

Similarly, in *Doris Irene Taylor v Marian Streicher* an elderly couple had contributed to substantial improvements to their daughter and son-in-law's property, but the relationship between mother and daughter broke down 'without attributable blame' and the mother moved to an aged care facility. McDougall J observed that:

> These proceedings concern an arrangement, made with the best of intentions, for an elderly couple to live out their lives with a daughter and her husband. They provide a salutary warning as to the need to think through such arrangements with care, and to document them with precision. Those things were not done in this case. The result is a family divided.[181]

The reasons for the failure of the arrangements may have some bearing on the remedy granted, particularly if the court is required to consider whether there is 'attributable blame' for the purposes of awarding a remedy in equity. In the above case, Einstein J, citing Austin J in *Palinkas v Palinkas*,[182] found there was not 'clear wrongdoing on one side while the other is manifestly faultless'. Rather, he found it was a case of the relationship 'gradually turning sour through incremental events where thoughtless conduct appears to have been matched by undue sensitivity'.[183]

One consequence of the informal nature of the arrangement and a lack of competent legal advice, is the failure to predict and plan for future contingencies. In most cases parties simply do not anticipate the demise of the relationship, or any unforeseen events occurring. As Bryson J observed, 'It is a sadly recurring judicial experience to see that family relationships do deteriorate and become intolerable, and that the persons involved did not foresee that this might happen'.[184]

Agreements between families, even those involving the transfer of significant assets, are often not reduced to writing or recorded in such a way as to give the arrangement contractual force. Reluctance on the part of families to formalise agreements or seek legal advice may stem largely from the circumstances giving rise to the agreement. As Munro suggests, many arrangements are formulated in times of heightened stress – for instance, after an accident or

[180] *Menka Tasevska v Vlado (Larry) Tasevski* [2011] NSWSC 174 (Einstein J) [84]-[113].
[181] *Doris Irene Taylor v Marian Streicher* [2007] NSWSC 1006 [1] (McDougall J).
[182] *Palinkas v Palinkas* [2009] NSWSC 92.
[183] *Menka Tasevska v Vlado (Larry) Tasevski* [2011] NSWSC 174 (Einstein J) [74].
[184] *Bennett v Horgan* (1994) (unreported, Supreme Court, NSW, Bryson J, 3 June 1994), 11.

sickness, after the death of a spouse, or as a response to a crisis either personal or financial.[185] Another reason formal legal arrangements may be avoided, to draw an analogy with pre-nuptial agreements, is that the act of seeking legal advice could be perceived as indicating a lack of trust in the other family member, which in itself may cause conflict and tension within families.[186] For others, consulting a lawyer is an added cost that is easily avoided.

More often though, neither party has thought to formalise the agreement. Brian Herd has observed that '[d]ocumenting, in a written agreement, a loving, caring or supportive personal relationship … is probably an anathema to many Australians'.[187] As such, there is often no record of an agreement other than the often inaccurate (or sometimes self-serving) recollections of each party, which are frequently provided many years after the agreement was made. The lack of specificity in the oral agreement can lead to misunderstandings and conflicting expectations. In *Keremelevski v Keremelevski*,[188] the elderly parents in that case transferred their house to their children for essentially nominal consideration.[189] In what was a complicated arrangement between an extended family concerning money and property, the son had looked after his parents, and some time after the death of his father his mother was placed in an aged care facility. Hamilton J found that while the elderly mother clearly had an expectation that the defendants would look after her in her own home until her death, he concluded that although it was promised that the plaintiff would be cared for, the promise was not made that the care would be in her own home or until death. As such, the level of care had not been clearly stated and caused considerable tension between the parties. Consequently, the claim by the mother for a constructive trust over the property was dismissed.

The informality of the agreement may also disadvantage the elderly person because transfers from parent to child are presumed to be gifts.[190] While the presumption of advancement can be rebutted by evidence to the contrary, the onus lies with the older person to do so and the intention of the parties is ascertained at the time the transfer is made.[191] What may appear to be a gift may actually be an exchange or have some expectation attached to it, but be poorly

[185] Munro (n 31) 68–9.
[186] see Heather Mahar, 'Why Are There So Few Prenuptial Agreements?' (Paper 436, John M Olin Center for Law, Economics and Business Discussion Paper Series, 2003) <http://lsr.nellco.org/harvard_olin/436>; Renata Grossi, 'The Discomfort of Thorne v Kennedy: Law, Love and Money' (2019) 44(1) *Alternative Law Journal* 281, 281; Belinda Fehlberg and Bruce Smyth, 'Binding Pre-marital Agreements: Will They Help?' (1999) 53 *Family Matters* 55.
[187] Herd (n 31) 23.
[188] *Keremelevski v Keremelevski* [2008] NSWSC 1290, [32].
[189] Although it was not disputed that the son in question had originally bought the property for his parents.
[190] *Nelson v Nelson* (1995) 184 CLR 538. The presumption of advancement is explored further in Chapter 4.
[191] *Buffrey v Buffrey* [2006] NSWSC 1349 [14]; *Spink v Flourentzou* [2019] NSWSC 256

documented.[192] The absence of any formal record of the agreement can be challenging for a court to determine the terms of the agreement, particularly when faced with contradictory evidence. COTA's interviews revealed that there was disparity between how each party characterised the agreement. Some respondents seemed surprised that their children thought the arrangement amounted to a gift. Others regarded the contribution on more contractual terms, in that the money or assets 'paid their way as compensation for care.[193]

Despite perceptions, it is uncommon for parties in an asset for care arrangement to be contractually bound.[194] Traditionally, agreements between families have been subject to a presumption against the intention to create a legally binding agreement,[195] as they have been characterised as private arrangements. In *Ashton v Pratt*, Justice Brereton drew on comments made by Justice Ward in *Darmanin v Cowan* when he commented that:

> There is a rebuttable presumption of fact that arrangements made in a family are not intended to have legal force, the rationale being that, at the time of making the alleged promise, the parties would not have regarded their arrangements in terms of legal consequences.[196]

Although the evidence of reciprocity of obligation may be sufficient to rebut the presumption of a gift in favour of the adult child, as noted above, often the terms of the arrangement are too vague and lack the necessary certainty of terms to have any binding contractual force.

In the event that parties do reduce their agreement to contractual terms, questions can arise concerning the interpretation of the contract. In cases where there is a formal record, the parties are unlikely to contemplate the outcome if the arrangement does not succeed and the court can be required to give a 'reasonable' interpretation to the contract as it stood.

IV DOES THE FAILURE OF THE ARRANGEMENT AMOUNT TO ELDER ABUSE? DETERMINING THE RIGHT FRAMEWORK

'Elder abuse' is an umbrella term that encompasses a broad range of behaviours, including psychological, physical, sexual, financial and chemical abuse as well as neglect.[197] The term 'elder abuse' is contested and does not have a fixed meaning, although deliberate exploitation

[192] See for example *Hayes v Hayes* [2015] QSC 88.
[193] Freilich (n 116) ch 9, 118.
[194] This is discussed in more detail in Chapters 4 and 6.
[195] *Balfour v Balfour* [1919] 2 KB 571.
[196] *Aston v Pratt (No 2)* [2012] NSWSC 3 [32] (Brereton J) citing *Darmanin v Cowan* [2010] NSWSC 1118 [206] (Ward J).
[197] Melanie Joosten, Freda Vrantsdis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (University of Melbourne and the National Ageing Research Institute, 2017) 6.

is not a necessary requirement.[198] The recent public dialogue and media attention given to elder abuse has brought the issue to the forefront of our social conscience, and it is now regarded by the Australian public as a significant problem demanding urgent solutions.[199] FAAs have featured in this ongoing commentary and have been characterised as an example of elder abuse and, more specifically, financial elder abuse.[200] This is not surprising; when we hear accounts of older people who have transferred assets in return for care and accommodation that has not been forthcoming, we intuitively respond by judging the outcome as wrong. The phrase 'financial abuse' reflects the dominant narrative associated with failed FAAs. It captures condemnation of what we assume to be exploitative conduct on behalf of the perpetrator, as well as our alarm concerning the financial suffering experienced by the older person. Consequently, commentary on failed FAA has commonly been included within the broader normative framework of elder abuse.[201] There is a distinction to be drawn between those arrangements that could be termed 'true' bargains, in terms of property exchanged for care and accommodation, and those that come within the legal definition of unconscionable conduct or undue influence, which are closer to elder abuse from their inception. The argument made here is that these distinctions do not carry weight in relation to access to the legal system to resolve the dispute. Rather, their relevance could impact on the remedy granted by the court.

[198] The scope of the term 'elder abuse' is discussed more fully below.

[199] See eg LJ Charleston, 'The Shocking Rise of Financial Abuse Involving Wills', *news.com* (15 January 20178) <http://www.news.com.au/finance/money/wealth/the-shocking-rise-of-financial-abuse-involving-wills/news-story/66539c4ed7dc78e90829e3f76133aff6>; Jessica Howard, 'Nursing Home Case Prompts Elder Abuse Probe', *Hobart Mercury* (3 October 2015) <http://www.themercury.com.au/news/tasmania/nursing-home-case-prompts-elder-abuse-probe/news-story/8ebcff15288c981dda17801b29420828>; Alexandra Beck, 'Australia's "Hidden Issue": Call Out for People Who Have Experienced Elder Abuse', *The Canberra Times* (24 April 2018) <http://www.canberratimes.com.au/act-news/australias-hidden-issue-call-out-for-people-who-have-experienced-elder-abuse-20160609-gpf8hc html>; Andrea Petrie, 'Warning to Elderly on Financial Abuse', *The Age* (1 September 2013) <https://www.theage.com.au/national/victoria/warning-to-elderly-on-financial-abuse-20130831-2sxps.html>; Peggy Giakoumelos and Evan Young, 'National Plan to Tackle Elder Abuse "Long Overdue": Senior Rights Advocates', *SBS News* (20 February 2018) <https://www.sbs.com.au/news/national-plan-to-tackle-elder-abuse-long-overdue-senior-rights-advocates>; Rebecca Turner, 'The Shocking Tales of Western Australia's Elder Abuse Victims', *ABC News* (4 March 2018) <http://www.abc.net.au/news/2018-03-04/the-shocking-tales-of-elder-abuse-victims/9504798>.

[200] Eg ALRC Final Report (n 19). Chapter 6 of the ALRC report was devoted entirely to 'Family Agreements'. Similarly, Seniors Rights Service CEO Russell Westacott in an interview leading up to the 5th National Conference on Elder abuse refers to failed family accommodation arrangements as an example of financial abuse. See also Somes and Webb, 'What Role for the Law' (n 28) 26; Somes and Webb, 'What Role for Real Property' (n 31); Seniors Right Victoria (n 19); Kyle (n 31); Munro (n 31); Hafemeister (n 90).

[201] Ibid. For instance, access to justice solutions proposed by the Australian Law Reform Commission were framed within the context of the older person having suffered financial abuse: ALRC Final Report (n 19) [6.1].

A *Advantages of Characterising Failed Family Accommodation Agreements as Elder Abuse*

This part discusses the arguments for and against using an alternative framework of elder abuse to analyse FAAs. One advantage of adopting an abuse framework is that it would further engage arguments concerning human rights and the older person's fundamental values and principles. Given the discussion of the importance of 'home' and the acceptance of housing as a fundamental human right, the human rights framework would be an appropriate alternative lens through which to view these issues of housing.[202] Elder abuse sits within the human rights frameworks and, as such, any interference with rights must be reasonably and demonstrably justified. The limitations of the human rights framework lie in the observation that not all instances of failed FAAs can be said to occur because of 'abuse'. Hence, the vulnerability framework allows us to more specifically identify and target those areas where there is tension between the socio-legal position of the older person and the current law, and where there is potential for reform – for instance, where the transfer of property to an adult child in return for accommodation and care results in the child obtaining indefeasible title to property, and challenging that title requires the parent to commence action in the Supreme Court.

There are advantages in using the context of abuse when problematising the family accommodation arrangement. 'Abuse' locates the phenomena within the wider field of familial abuse (for instance, domestic abuse and child abuse), and the theories developed in these fields can be drawn upon and assist in delineating the appropriate scope of elder abuse for legal analysis.[203] Increased attention given to elder abuse has focused society's – and, importantly, political – attention on FAAs. Consequently, the topic is placed within the broader political aims of addressing abuse, such as the need for a coordinated national response to the problem.[204] More

[202] See eg Bridget Lewis, Kelly Purser and Kirsty Mackie, 'Accommodation' in Lewis et al. *The Human Rights of Older Persons: A Human Rights -Based Approach to Elder Law* (Springer, 2020) Chapter 9.

[203] Although, it has been observed that analogies between child abuse and elder abuse are seen as problematic in some respects, as 'making comparisons between elder abuse and child abuse, and drawing on responses used in child protection, is ageist and generally not appropriate': Australian Association of Gerontology, Submission No 23 to Legislative Council Inquiry Into Elder Abuse in New South Wales (n 38).

[204] There is general consensus from both government and non-government sources that the legal position of the older party in family accommodation arrangements warrants review. See eg ALRC Final Report (n 19) 203–30; Select Committee into Elder Abuse (n 39) 1025; Seniors Rights Victoria, *Assets for Care* (n 19); Barbara Blundell et al, *Review into the Prevalence and Characteristics of Elder Abuse in Queensland* (Curtin University and Murdoch University, 2017) 104–6. Regarding the need for a national response to elder abuse, see Wendy Lacey, 'Neglectful to the Point of Cruelty?' (2014) 36 *Sydney Law Review* 99, 104. On 20 February 2018 the Attorney General, in response to the recommendations of the Australian Law Reform Commission, announced the Council of Attorneys-General (CAG) had agreed a National Plan to address Elder Abuse be developed. To assist the development of the National Plan the federal government established a working body (Elder Abuse Action Australia or EEAA) to investigate policy initiatives across Federal and State governments and assist with system design.

recently, a report tabled by the Royal Commission into Aged Care Quality and Safety ('RCAC') has sustained the momentum of interest in issues related to the treatment of older people,[205] and FAAs continue to attract critical attention.[206] Such attention can achieve a greater awareness of the pitfalls associated with transferring assets for a promise of care. Parties may be encouraged to exercise greater caution before entering into the arrangements and look to obtaining legal advice to protect them against future disputes. In addition, aligning the topic with elder abuse can act as a deterrent to those whose aim is to take unfair advantage of an older party.

B *Disadvantages of Characterising Failed Family Accommodation Agreements as Elder Abuse*

Despite the positive consequences achieved through characterising the arrangement as an instance of elder abuse, there are compelling reasons why evaluating the problem as one of vulnerability is more constructive, both in determining the rationale and scope of law reform and in the wider social context.

First, there is no consensus on what behaviour constitutes elder abuse. The varied conceptualisations are informed by the different frameworks and contexts through which the phenomenon is analysed.[207] Recent attempts to define the parameters of the term suggest it is given a broad meaning encompassing behaviour that is outside of what is caught by criminal or tortious liability but that involves harm to the older person by someone with whom they are in a relationship of trust.[208] This broad definition captures a wide range of conduct, bringing it

[205] *Royal Commission into Aged Care Quality and Safety* (n 12).
[206] Patricia Lane, 'When Granny Flats go Wrong: Perils for Parents Highlight the Need for Law Reform', *The Conversation* (online, 22 February 2019) <https://www.domain.com.au/news/when-granny-flats-go-wrong-perils-for-parents-highlight-need-for-law-reform-803578/>.
[207] Rae Kaspiew, Rachael Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, 2016); Briony Dow and Melanie Joosten, 'Understanding Elder Abuse: A Social Rights Perspective' (2012) 24(6) *International Psychogeriatrics* 853.
[208] The World Health Organization describes elder abuse as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person': *Abuse of Older People: Key Facts* (13 June 2022) <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>. This approach is consistent with the definition adopted by the authors of a report commissioned by the Victorian Government, which defines elder abuse as '[a]ny act occurring within a relationship where there is an implication of trust, which results in harm to an older person': Department of Human Services Victoria, *With Respect to Age – 2009: Victorian Government Practice Guidelines for Health Services and Community Agencies for the Prevention of Elder Abuse* (Government of Victoria, 2009) 5. In Scotland, the *Adult Support and Protection (Scotland) Act* 2007 avoids the use of the term 'abuse' and prefers the use of the term 'harm'. 'Harm' is defined as including all harmful conduct and, in particular, conduct which causes physical or psychological harm, unlawful conduct which appropriates or adversely affects property, rights or interests (eg theft, fraud, embezzlement or extortion), or conduct which causes self-harm. It should be noted that 'conduct' is also defined in this section as including neglect and other failures to act. See also Kaspiew et al, *Elder Abuse National Research – Strengthening the Evidence Base* (n 140) 22 where it is stated that: '[i]n broad terms, the

within the scope of scrutiny as abuse. In everyday discourse, however, the term 'abuse' carries serious negative connotations. It suggests that, within a particular scenario, there is a perpetrator, and a victim, and a need for intervention to address the abusive behaviour.

Hugman observes that a definition of 'elder abuse' is vital for the establishment of policies and practices in response to violence towards older people. Hugman explains that

> [a] concern with definition is not simply an exercise in semantics. That certain acts come to be defined as 'abuse' establishes the basis for interventions by professional experts, usually in health and welfare fields. The discourse of 'abuse' establishes the legitimacy of a clinical focus to social responses, in which the needs of both the older person and of 'the abuser' are addressed as necessary targets of intervention.[209]

Hugman argues that labelling very harmful acts, such as rape or extreme neglect, as 'abuse' can diminish the criminality of those behaviours. Conversely, broadening the definition to acts that would not otherwise come within the meaning of abuse may unjustly label people as abusers where it is not warranted. Additionally, we risk labelling people 'victims' of abuse, which counterintuitively may prevent them from coming forward because of the stigma attached to that label.[210] This is not to deny that there have been examples of behaviour on the part of adult children which are consciously harmful, or where arrangements that commence on an amicable footing have degenerated into abuse or exploitation of an older person over time.[211] In these circumstances, the behaviour may give rise to a specific cause of action.[212]

Using a pejorative term to describe all manner of family conflict fails to account for the multitude of circumstances that give rise to the breakdown of the family accommodation arrangement. The abuser/victim paradigm perpetuates the narrative, to the exclusion of counter-narratives, of the aged as weak and open to manipulation, and the adult child as

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working definition is consistent with the WHO definition but is more specific in some areas and is extended in others. The key area of extension is in the addition of the term "power imbalance" to the term "expectation of trust" in the context of the circumstances in which abuse of an older person occurs.' The *Office for the Ageing (Adult Safeguarding) Amendment Act 2018* (SA) provides a definition of 'abuse' and 'vulnerable adult'. For instance, the new s3 defines 'vulnerable adult' as a person who is vulnerable to abuse by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage. Section 4(1)(b) states that 'abuse' incudes 'financial abuse or exploitation of the vulnerable adult'. Some circumstances encountered in a failed FAA would not come within this definition of abuse.

[209] Richard Hugman, 'The Implications of the Term "Elder Abuse" for Problem Definition and Response in Health and Social Welfare' (1995) 24(4) *Journal of Social Policy* 493, 495.

[210] Fran Ottolini has observed that '[t]he term "abuse" is also not well received by older people. One of the OPRS clients blackened out the word because she didn't want her family to know that she was being abused': Ottolini, 'Older People's Rights Service' (n 2) 2. See also Barbara Cottrell and Peter Monk, 'Adolescent to Parent Abuse: A Qualitative Overview of Common Themes' (2004) 25 *Journal of Family Issues* 1072, 1089.

[211] Hall, 'Care for Life' (n 4).

[212] For instance, undue influence or unconscionable conduct, or in extreme circumstances the behaviour may come within the fraud exception under *Real Property Act 1900* (NSW) s 42 or its state equivalents.

uncaring and grasping.[213] It fails to distinguish between inter-personal violence and exploitation, which rests on the abuse of a position of trust or power, and family conflict or disputes that arise because of complex, intra-familial obligations and expectations. The abuse framework is a 'blunt instrument' to characterise all family accommodation failures. For instance, the arrangement may fail because the adult child is no longer able to provide the level of care required, or the parent may voluntarily leave the home. If this occurs after a period of time, how are parties to calculate the return of contributions, and who is to bear the hardship?[214] As each circumstance raises issues of vulnerability, characterising the parties as victim and abuser is inappropriate. While each circumstance is legitimately within the scope of the law, they differ in the need for either regulation or the provision of mechanisms for resolution. Therefore, they are distinct from historical, theoretical and culpability perspectives.

Lastly, law reform focused on the elimination of elder abuse may lead to paternalistic or ageist responses. To demonstrate using an extreme example, the potential of abuse within FAAs could be removed entirely by disallowing these arrangements. The removal would ensure the elimination of exploitation or abuse. However, such an extreme measure would impact the freedom for people to transfer property as they wish. Hall observes that,

> [d]espite our concerns about the vulnerability of older people when care agreements break down, it is important not to infantalise older adults but to respect their ability to freely contract; '[t]he law has never treated an old person as an infant'. If the senior chooses to go forward with the agreement, it is his or her right to do so – unless, of course, there are issues about the capacity, or undue influence, or the unconscionability of the bargain. [215]

Regulatory measures can (and arguably should) be introduced to protect a parent prior to entering the agreement. Additionally, changes to existing doctrine can be made to address the legal-situational vulnerability of the parent.[216] Yet at present, once the arrangement has failed, the aim of the law is to provide mechanisms for parties to resolve the *consequences* of failure and is therefore not reliant on, or indeed helped by, establishing the *existence* of abuse. For instance, in a situation where an adult child has misused an enduring power of attorney to gain a financial benefit, determining the existence of the wrongful behaviour is critical to how the

[213] Hall, 'Equitable Fraud' (n 16). The language also draws parallels with the language of victim/survivor used in the context of child sexual abuse.
[214] For instance, the return of contributions may require the adult child to sell the home.
[215] Hall, 'Equitable Fraud' (n 16) citing *O'Neill v O'Neill* [1952] OR 742.
[216] In the United States, the State of Maine has enacted legislation reversing the onus of proof of undue influence so that a presumption of undue influence will arise when an elderly dependant person has transferred assets (either real or personal property, or money) for less than full consideration to either a family member, or a person in a fiduciary position: 33 ME REV STAT ANN (West) § 1022(1) (2001).

misuse of the power of attorney is rectified. In this situation, it is the minimisation of the risk of wrongful behaviour that is the focus of reform proposals.[217] In contrast, the failure of a FAA is problematic for the parent because of the necessity for a legal determination based on equitable or property law principles to enable the recovery of any assets that have been transferred. While the existence of abuse or exploitation is a possibility within the context of the family and could potentially influence the manner in which a hearing is conducted,[218] law reform should be aimed at increasing the older person's access to justice to enable the resolution of a dispute. If a parent is subject to abuse or exploitation, this contributes to their situational vulnerability. Situational vulnerability highlights the critical need to review the legal structures in place to expedite the resolution of the dispute in a manner that is accessible and provides mechanisms for a fair and just outcome.[219]

Despite being given a wide definition, elder financial abuse will not be present in all failed FAAs.[220] If it were, it would necessitate every failure to resolve a dispute in favour of the parent being characterised as abuse. This would perpetuate a narrative that does not reflect the entirety of experiences or circumstances. Even if the behaviour giving rise to the failed arrangement does constitute abuse within a wider definition, some victims would not be prepared to acknowledge they had suffered abuse due to the complexity of the relationship and the feeling of parental failure associated with being a victim of one's own child.[221] While an abuse-based framework assists in raising awareness of the pitfalls of failed family accommodation arrangements, it is of limited value when determining the demand and scope for law reform. It is proposed that a vulnerability framework provides greater clarity to identify areas for law reform for failed family care arrangements.

V CONCLUSION

This chapter has explained the salient features of an asset for care or family accommodation agreement. The explanation is critical for understanding the background and context which gives rise to the legal analysis that follows in the thesis. The discussion concerning 'home' has revealed the way the failed arrangement impacts the older party far beyond the legal

[217] ALRC Final Report (n 19) [5.3].
[218] For instance, it may necessitate the need for legal representation.
[219] See Chapter 7 'Sources of Legal-Situational Vulnerability.
[220] It is still acknowledged that elder abuse will be present in cases of unconscionable or intentional deprivation of property or money.
[221] Submission by Northern Suburbs Community Legal Centre Inc. to the Select Committee into Elder Abuse (n 35) 11, 18.

consequences and adds to their vulnerability. The chapter has then defined the scope of the arrangement for the purposes of the thesis, and discussed the parties' motivations for entering the agreement, as well as their reasons for failure. Lastly, the chapter has explored why elder abuse has been the dominant framework employed in much of the literature to date and argued that abuse should not be the context in which to analyse failed FAAs. This discussion segues to the following chapter, which explores vulnerability as the appropriate conceptual framework to assess why law reform is necessary to enhance the older party's access to justice.

CHAPTER 3
VULERABILITY AS A CONCEPTUAL FRAMEWORK AND METHODOLOGY: IDENTIFYING AND RESPONDING TO VULNERABILITY IN THE CONTEXT OF FAMILY ACCOMMODATION ARRANGEMENTS

> The identification of a social problem as a legal need rather than as some other sort of problem altogether is dependent on the place that law occupies in the society concerned, and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgement about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.[222]

I INTRODUCTION

The purpose of this chapter is to establish the need for law reform in family accommodation arrangements (FAAs). It does so by examining the nature, source and effect of vulnerability experienced by a parent when a FAA fails. The chosen methodology consists of applying the theoretical framework – here an adaptation of the framework proposed by Rogers, Mackenzie and Dodds – to the various circumstances (including laws and social circumstances) to the factual situation of a FAA. This framework provides a useful lens for analysing the sources and effect of the problems faced by older parties in a failed FAA.[223]

To identify vulnerability is to identify those factors that cause risk, or factors that result in disadvantageous treatment.[224] This chapter therefore demonstrates how theorising the legal issues faced by the parent through the lens of vulnerability can assist in identifying why law reform in this area is both necessary and justified. In particular, this chapter introduces a new and unique method of interpreting the vulnerability framework developed by Rogers,

[222] Pat O'Malley, *Law, Capitalism and Democracy* (Allen & Unwin, 1983) 104, cited in Bottomley and Bronitt (n 79) 162.
[223] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 11; Rogers et al, 'Introduction' (n 71); Rogers, 'Vulnerability and Bioethics' (n 71); Mackenzie and Rogers, 'Autonomy, Vulnerability and Capacity' (n 74).
[224] For example, those factors that might amount to a special disability for the purposes of unconscionable conduct, or factors that give rise to undue influence: see Chapter 6 Part II.

Mackenzie and Dodds[225] by identifying elements of situational vulnerability that are personal and legal, and then demonstrates how these vulnerabilities are linked to and exacerbated by systemic vulnerability.

When FAAs are carried out successfully, the parties to the agreement can enjoy the reciprocal social and financial benefits the arrangement brings, as well as the societal advantages gained by reducing the demand for state provided aged care. Yet, like most agreements, the arrangement becomes 'problematic' when obligations agreed upon are unfulfilled. As this chapter will demonstrate, the scope and impact of the failure of the agreement is exacerbated by the familial context. As the quotation by O'Malley (above) suggests, a social or political problem can be characterised as a legal problem, only if one accepts the law has a role in resolving the particular problem.[226] While strategies can be adopted to educate parties concerning the pitfalls of entering such arrangements, or to anticipate and provide for the distribution of property should the arrangement continue,[227] inevitably people will enter such arrangements without planning for a range of contingencies.[228] Unsuccessful accommodation arrangements between families can be theorised as a social and political problem, but when the accommodation arrangement has broken down and the avenues for non-legal dispute resolution have been exhausted, the issue takes on a legal dimension.[229] The nature of Australian property law allows a court to either adjust proprietary interests or, if appropriate, order a compensatory monetary sum.[230] Yet older people faced with this dilemma too often eschew any legal action

[225] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 11; Rogers et al, 'Introduction' (n 71); Rogers, Vulnerability and Bioethics' (n 71); Mackenzie and Rogers, 'Autonomy, Vulnerability and Capacity' (n 74).
[226] O'Malley (n 222) 104.
[227] For instance, seeking legal advice or the drafting of a contract specifying the allocation of property on the discontinuing of the arrangement.
[228] One objective of vulnerability theory is to enable governments to devise systems and institutions that increase resilience across vulnerable groups. The provision of education and greater awareness concerning the potential legal problems an older person may face on the breakdown of the relationship is a way governments could assist. By doing so, the state empowers the donor of property to protect themselves and have agreements in place to deal with a range of contingencies. The focus of this thesis, however, is the circumstances when this has not occurred.
[229] FAAs can be theorised through the lens of many distinct, albeit interrelated, contextual frameworks that can come under the umbrella of 'social and political issues'. These contexts include, but are not limited to, social policy and responsibilities of the state, housing, economic security, taxation and social security, health, filial responsibility, family conflict, gerontology, cultural norms, care of the aged, elder abuse and gender, as well as the legal context.
[230] Legal action is most commonly an equitable claim for adjustment of ownership by way of resulting or constructive trust, failed joint venture, estoppel and/or compensation for the value of contributions made. See eg *Spink v Flourentzou* [2019] NSWSC 256. While parties may pursue alternative dispute resolution avenues, such as mediation, any property adjustment must occur by consent.

owing to the combination of personal circumstances[231] and the inaccessibility of the legal system.

The analysis engages with vulnerability theory and, in particular, the tripartite theory of vulnerability conceived by Rogers, Mackenzie and Dodds.[232] Vulnerability theory recognises that, as human beings, we all experience vulnerability at various stages of our lives, and being vulnerable is a fundamental characteristic of human experience.[233] The approach taken by Rogers et al. develops the theory suggested by Fineman and enables the position of the parent to be analysed from the perspective of their inherent, situational, and systemic (described by Rogers et al as 'pathogenic') vulnerabilities and the manner in which these impact one another. Applying this theoretical framework in the context of FAAs demonstrates the interconnectedness of these vulnerabilities. The means available to the parent to resolve the dispute – most commonly a contested equitable claim lodged in the Supreme Court – act to exacerbate the vulnerabilities created by the personal and legal situation of the parent. Hence the present system of dispute resolution is a source of vulnerability in itself. It is in this systemic vulnerability caused by the shortfalls in legal structures that the opportunity for state intervention and law reform lies.

Part II of this chapter introduces vulnerability theory. Under this heading there is a discussion of the basis of Fineman's vulnerability theory, and a recognition of how that theory has been adapted and applied in various contexts, including to justice concerns. It then explains how Fineman's approach has been adapted by Rogers, Mackenzie and Dodds to create their tripartite theoretical framework. Part III then offers an original adaptation and interpretation of the theory by identifying the legal and personal situational vulnerabilities experienced by the parent as applied to a FAA. This unique adaptation of vulnerability theory creates the framework for the analysis undertaken in this thesis.

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[231] Personal circumstances such as a lack of financial resources, a reluctance to undertake complex, lengthy litigation, particularly involving one's own children, see many claims not being made by the parent themselves but after death as part of the administration of the estate: see eg *Karastamatis v Tzanavaras* [2013] SASC 163; *Scheps v Cobb: Estate of Dagobert Scheps deceased* [2005] NSWSC 455.

[232] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71); Rogers et al, 'Introduction' (n 71); Rogers, 'Vulnerability and Bioethics' (n 71); Mackenzie and Rogers, 'Autonomy, Vulnerability and Capacity' (n 74).

[233] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 69); Onora O'Neill, *Towards Justice and Virtue* (Cambridge University Press, 1996) 191–2; MH Kottow, 'The Vulnerable and the Susceptible' (2003) 17 *Bioethics* 460, 461–2 cited in Katrina George, 'Autonomy and Vulnerability at the Death Bed' (2006) 10 *University of Western Sydney Law Review* 139, 142.

II VULNERABILITY THEORY

In order to apply vulnerability theory to FAAs, it is necessary to identify the theory of vulnerability as conceptualised by Martha Albertson Fineman, and how that theory has been interpreted and utilised. Vulnerability has been a consistent theme across several disciplines in recent times, and in particular has been applied to a broad range of legal problems.[234] The versatility of the term means it does not lend itself to a single definition or theory. 'Vulnerability theory' is an umbrella term under which different interpretations of its operation and functions sit. Moreover, the meaning of the term 'vulnerability' relies heavily on the particular context in which it is being used and, as such, it is both relative and dynamic.[235] Clearly there are a range of interpretations of the term in common usage and, used in its broadest sense, no one is impervious to vulnerability. In this thesis, the term is used to describe the condition of being put at an increased risk of harm or a decreased capacity to protect oneself from harm. Vulnerability has also been associated with a sense of loss of agency or powerlessness.[236] Depending on our stage of life there are a multitude of variables that may expose us to potential harm. Similarly, the actions of others, over which we have limited or no control, means that even the most independent among us will never be immune to experiencing vulnerability in some form.[237] As Hoffmaster states, the recognition of our vulnerability affirms our humanity.[238] It is this universal vulnerability that is the central tenet of Fineman's theory. Where a more nuanced approach to vulnerability is adopted,[239] vulnerability theory provides a

[234] See eg Frank Rudy Cooper, 'Always Already Suspect: Revising Vulnerability Theory' (2015) 93 *North Carolina Law Review* 1339 (racial profiling); Margaret Isabel Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability' (2012) 58(1) *McGill Law Journal* 61 (guardianship); Ani B Satz, 'Disability, Vulnerability, and the Limits of Anti-Discrimination (2008) 83 *Washington Law Review* 513 (discrimination); Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267 (conduct of lawyers in assessing capacity); George (n 233) (voluntary euthanasia); Shireen Daft, 'Complex Victim-Perpetrators: Examining Child Soldiers Through a Vulnerability Lens', paper presented at *Victims, Survivors, Innocents? Exploring the Mobilisation of Vulnerability in Policy and Law*, Macquarie Law School Conference, 23 November 2018 (children participating in armed conflict).

[235] Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 6. See also Fiona Parley, 'What Does Vulnerability Mean?' (2010) 39 *British Journal of Learning Disabilities* 266; Joel Anderson, 'Autonomy and Vulnerability Entwined' in Mackenzie et al, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 74) 135 who offers the following definition: 'Vulnerability is thus a matter of effective control, understood as a function of the relative balance of power between the person in question and the forces that can influence her. Vulnerability can be increased by those forces becoming more powerful or the effects more probable but also by the person becoming less able to counter these forces and effects.'

[236] Barry Hoffmaster, 'What Does Vulnerability Mean?' (2006) 36(2) *The Hastings Centre Report* 38.

[237] See eg the observations of Justice Beech-Jones: '[A]ll clients of a solicitor are vulnerable if the solicitor acts improperly': *Berger v Council of the Law Society (NSW)* [2013] NSWSC 1080 [138] (Beech –Jones J). See also Titti Mattsson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed), *Elder Law: Evolving Human Perspectives* (Edward Elgar Publishing, 2017) 118.

[238] Barry Hoffmaster, 'What Does Vulnerability Mean?' (2006) 36(2) *The Hastings Centre Report* 38, 44.

[239] Here I refer to the tripartite approach taken by Rodgers, MacKenzie, and Dodds.

method of theorising the obligations we owe, either individually[240] or as a society, towards those who are exposed to risk but lack the mechanisms to cope with those risks without external support or intervention.[241]

A *Martha Fineman's Vulnerability Theory*

The work of Martha Fineman has been pivotal in establishing a theory of vulnerability.[242] Her theories have provided the basis for an emerging body of literature where social structures and approaches to state intervention are assessed. While Fineman's theory is fashioned in the context of the American social and legal system, the central ideas can be applied universally. At the centre of her theory are a number of key principles; these include the universality and constancy of vulnerability, the primacy of the vulnerable subject over the liberal subject,[243] the movement from formal equality to substantive equality, and the role institutions play in mitigating vulnerability by creating resilience through a more active state. All these key principles have relevance for the parent dealing with a failed FAA. In particular, the recognition of the specific vulnerabilities they experience highlights the conditions that result in a lack of equal access to the law. The conception of formal equality, relying on people being equal before the law, fails to account for the particular characteristics of individuals who, because of these characteristics, are denied access to justice. State intervention, in the form of legal reform, is therefore necessary to address the source of substantive equality and to ensure equal access.

Fineman argues that the autonomous subject is the starting point for our western legal systems, which assumes a person is a free, independent adult.[244] The binary perception of the

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[240] See in particular the approach of Goodin, who argues that, in recognising vulnerability, we are obliged to not only protect people but it also may be within our gift to reduce or eliminate the vulnerability: Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985).

[241] Jacob Dahl Rendtorff, 'Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability – Towards and Foundation of Bioethics and Biolaw' (2002) 5 *Medicine, Healthcare and Philosophy* 235, cited in Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 12; Herring, *Vulnerable Adults and the Law* (235) 2.

[242] Fineman, 'The Vulnerable Subject and the Responsive State' (n 75); Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 75); Fineman and Grear, 'Introduction' (n 69); Fineman, 'Equality, Autonomy and the Vulnerable Subject' (n 75).

[243] While a detailed examination of liberalism is beyond the scope of this chapter, it is worth noting that the term 'liberal' or 'liberalism' encompasses different meanings. Fineman uses the term as derived from John Locke, essentially stating that the liberal model is based on equality of individuals and that 'all human beings are by nature free and endowed with the same inalienable rights'. She observes that 'we have come to understand "equality" narrowly as the requirement of sameness of treatment, a formal anti-discrimination mandate, primarily enforced through the courts': Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 69) 2. See also Martha Albertson Fineman, *The Illusion of Equality: Rhetoric and Reality of Divorce Reform* (University of Chicago Press, 1991) 46.

[244] Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's *The Autonomy Myth* (2005) 93(4) *California Law Review* 1285, 1288.

autonomous and the vulnerable leads to a stigmatising of certain groups, separating them and casting the vulnerable as weak or dependent. She argues that 'the creation of individual stigma has profound implications for both the scope and nature of social policy, and the ability of individuals to address their biological, spiritual, economic and social needs'.[245] Those who are not considered to conform to the autonomous ideal are separated and deemed in need of special treatment, which can lead to paternalism and negative judgement.[246] In Fineman's view, the 'autonomy myth' has created institutional arrangements (including legal frameworks) that fail to take into account the fragility of the human condition. For Fineman, vulnerability is 'the primal human condition'. The constancy of vulnerability through one's life means that humans are not autonomous, self-sufficient or independent. Rather, we are fundamentally dependent beings, and no individual is invulnerable. Vulnerability, Fineman posits, results from the fact that humans are both embodied and embedded: '[A]s embodied beings, individual humans find themselves dependent upon, and embedded within, social relationships and institutions throughout the life-course'.[247] This dissociates vulnerability from negative notions of victimhood, deprivation or pathology that afflict only certain stigmatised populations.[248] This is in contrast to previous binary interpretations of vulnerability based on categories of people being vulnerable, and positing those standing outside of these 'constructed vulnerability populations' as invulnerable.[249]

A recognition of this vulnerability, and the role the state should play in assuming responsibility for dependency is at the heart of Fineman's vulnerability theory. As such, people should not be judged on the degree of vulnerability they suffer but according to the way the state or relevant institutions respond to and provide us with resilience to our shared vulnerability.[250]

The concept of resilience and the obligation upon the state to have structures and policies in place to create or strengthen resilience is a critical point of vulnerability theory. It is important to note at the outset that Fineman articulates her concept of resilience as a challenge to neoliberalism; she claims that resilience avoids appeals to personal achievement and instead

[245] Martha Albertson Fineman. '"Elderly as Vulnerable": Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(2) *Elder Law Journal* 71, 87.
[246] See eg ibid, 84–6. For a critique of Fineman's approach see Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale Journal of Law and Feminism* 1.
[247] Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 141.
[248] Daniel Bedford, 'Introduction: Vulnerability Refigured' in Bedford & Herring, *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020) 10.
[249] Martha Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics', in M A Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), 16.
[250] Mattsson and Katzin (n 237).

places the burden on social institutions.[251] Resilience is the ability to recover from harm or setbacks.[252] Vulnerability theory's primary method of fostering resilience is to promote a responsive state. While we are all vulnerable, our differences lie in our changing, unequal levels of resilience. People are reliant and dependent upon institutions, and it is through these institutions that people gain autonomy. The state creates inequality because the state is responsible for distributing assets unequally, thus leaving some people vulnerable. Therefore, when an individual does not succeed in society, the cause is the role of society's institutions (including arguably, in the context of FAAs, the law), not the individual. Vulnerability theory responds to this concern by arguing government must ensure a more just distribution of assets through its institutions. As such, vulnerability theory would help us determine what changes to public policy must occur to achieve this. In the context of FAAs and the older litigant, the failure of society's institutions, including the law, are revealed through identifying 'pain points' where the older litigant is at a risk of harm because of the lack of support provided by the operation of the current law and associated forums. The identification of the barriers to access to justice therefore inform areas where the law can be reformed to increase the resilience of the older party.

While Fineman poses a powerful argument for the universality of vulnerability, there are tensions between different theorists' interpretations of vulnerability theory and not all agree with her theories concerning the vulnerable subject, nor with the binary conception of autonomy and vulnerability. Carse observes there is a need to evaluate the diverse ways in which vulnerability can be lived in different relational and social contexts and allow us to flourish as human beings.[253] She observes that the experience of vulnerability may contribute to, rather than undermine, the well-being of the individual.[254] Further, recognition of universal vulnerability does not assume that everyone is equally vulnerable, which could result in genuine disadvantage, such as cognitive impairment, being overlooked. In the context of nursing care, Sellman distinguishes our universal vulnerability from those who are 'more than ordinarily' vulnerable.[255] Herring observes that we are able to claim everyone is vulnerable,

[251] Martha Fineman, 'Vulnerability, Resilience and LGBT Youth' (2014) 23(2) *Temple Political & Civil Rights Law Review* 101.
[252] Ibid, 113.
[253] Alisa Carse, 'Vulnerability, Agency, and Human Flourishing' in, C Taylor and R Dell'Oro (eds), *Health and Human Flourishing: Religion, Medicine, and Moral Anthropology* (Georgetown University Press 2006) 35.
[254] Ibid.
[255] Derek Sellman, 'Towards an Understanding of Nursing as a Response to Human Vulnerability' (2005) 6 *Nursing Philosophy* 2, 4.

while recognising that there are people who experience particular vulnerabilities – not because they are inherently vulnerable, but because there is an absence of state support or an unequal allocation of resources.[256] These views may be said to diverge from Fineman's 'universal' vulnerability; however, these observations are critical with respect to how we view the vulnerabilities experienced by the parent in a failed FAA. It demonstrates that the cause of – and, therefore, the response to – the vulnerability needs to be focused on the social, or in some cases, legal support. MacKenzie develops this theory in order to separate the 'unavoidable human vulnerabilities' from those that exist because of 'social injustices, oppression, domination and inequality'.[257]

While Fineman's theories are intended to have broad application in proposing a theoretical framework for the allocation of resources, the ideas embodied in the theory can be applied to the narrower context of the ability of individuals to access the legal system to enable disputes to be resolved. The considerations of formal and substantive equality feed directly into questions of whether people experiencing vulnerabilities are entitled to special treatment by the law to counter the lack of access to justice. If these justifications exist, the impact of the systemic failure leading to the lack of justice is borne not only by those individuals but by society generally. This sentiment was expressed by His Honour Justice French AC, when he observed that

> [c]hronic and institutionalised lack of access to justice is not just a problem of fairness. It is a problem that goes to societal order and stability. It is also a problem that ends up, if not addressed, generating far more costs, economic and non-economic, to society than ought to be the case.[258]

While Fineman's vulnerability theory highlights the role of the state in addressing inequality and building resilience, the theory as advanced by her has drawn criticism for failing to address questions concerning the allocation of resources by the state to achieve that outcome. In a powerful article, Nina Kohn explores the shortcomings of a theory that operates at such a high level of abstraction. She argues that '[v]ulnerability theory provides little guidance as to how to prioritise among vulnerable subjects when allocating limited financial resources and political capital'.[259] Kohn observes that governments are unlikely to have the resources necessary to meet vulnerability theory's goal of achieving universal substantive equality. Because of the

[256] Herring, *Vulnerable Adults and the Law* (n 235) 23.
[257] Mackenzie, 'The Importance of Relational Autonomy' (n 142) 35.
[258] The Law Council of Australia, 'The Hon. Robert French AC Speaks on Access to Justice and the Justice Project' (Media Release, 17 October 2018) <https://www.lawcouncil.asn.au/media/news/the-hon-robert-french-ac-speaks-on-access-to-justice-and-the-justice-project>.
[259] Kohn (n 246) 13.

inevitability of limited resources, the government must prioritise certain issues. The failure to clarify the way resources should be apportioned is seen by Kohn as a shortcoming of the theory. More particularly, Kohn criticises Fineman's own application of the theory to the elderly.[260] Kohn suggests that rather than creating a new crime for 'elder fraud', vulnerability theory would better deployed in support of efforts to address the particular conditions that allow such behaviour to flourish such as social isolation and lack of access to legal resources for victims of fraud.[261] This observation aligns with the position taken in this chapter. Vulnerability theory suggests that governments responding to the needs of their populations should do so by creating legal institutions and systems that increase resilience across populations.[262] Applying this reasoning to FAAs, vulnerability theory can help us identify the areas where legal frameworks can be reformed allowing greater access to justice.[263] Yet, rather than being a drain on government resources, as the observation by Justice French AC makes clear, there are greater costs to society in *not* addressing the problem. A person who, because of systemic failures in the legal system, has been unable to achieve some degree of restitution of assets or property could be required to look to the government for welfare and support for housing. In extreme cases, the parent could be left homeless.[264] Not only does this outcome clearly have implications in relation to the demand for government housing, but the process under the current adversarial system can also have a detrimental effect on both the physical and mental health of parties to the dispute.[265] Hence, the assigning of resources to ameliorate this form of vulnerability would, in the long term, conserve state resources rather than contribute to their depletion.

Vulnerability and Access to Justice

In addressing the question of the extent to which vulnerability theory can be applied to improve access to justice in the context of FAAs, a consideration of the relationship between concepts, vulnerability, equality before the law and access to justice is appropriate. Equality before the

[260] Fineman, 'Elderly as Vulnerable' (n 245).
[261] Kohn (n 228) 13.
[262] Ibid.
[263] Kohn's suggestions are more aligned with addressing the situational vulnerability of the elderly. This highlights the essential difference between behaviour that is inherently wrong and should be eliminated (such as fraud), and family accommodation agreements, which of themselves are not problematic. Proposals for addressing the legal situational vulnerability of the older person in family accommodation arrangements are explored in Somes and Webb, 'What Role for Real Property Law' (n 28).
[264] Legal Aid (ACT) Submission No 115, in Law Council of Australia, *The Justice Report*: *Older Persons* (n 25) 10.
[265] Hafemeister (n 90).

law and access to justice are considered fundamental principles of our legal system and to the rule of law. Their value underpins the quality of our economy and society.

Nonetheless, 'access to justice' is a complex and elusive concept. As Bottomley and Bronitt observe, 'despite the volumes that have been written under the terms "access to justice", it remains a vague concept within which many assumptions and perspectives are buried'.[266] At the very least, the concept involves the assurance that people should have access to courts or effective dispute resolution mechanisms to protect their rights and interests; that legal services should be available to people regardless of their place of residence, and that people should be entitled to equality before the law.[267]

Therefore, access to justice can be said to be inextricably linked to the aim that all people should be equal before the law.[268] There are few that would challenge Fineman's views on the limitations of formal equality as she describes it. It is recognised that although the goal of equality appears to be a positive aim, it may also promote discrimination. Therefore '[d]ifferences of race, ethnicity, religion, sex and economic and cultural circumstances can mean that "one law for all" protects the values and interests of a majority of citizens at the expense of minorities. It does so by privileging unity and formal equality over cultural diversity and substantive equality.'[269]

However, Fineman's conception of equality before the law assumes that equal treatment under the law involves the formal model of equality under which everyone is assessed and treated without regard to their distinctive circumstances. Substantive equality requires that individual circumstances and disadvantages are compensated for so that the law has equal outcomes for everyone.[270] Equality can therefore refer to equal or uniform treatment under the law, or it may import notions of substantial equality. This aspect of challenging the notion of 'equality before the law' is particularly relevant to more practical questions of access to justice. The limitations of formal equality are well recognised, but the scope of 'substantive equality' is less

[266] Bottomley and Bronitt (n 79) 162. See also Hughes and Mosher, who describe access to justice as a concept with 'elasticity' representing a number of ideas often changing with context: Patricia Hughes and Janet Mosher, 'Foreword' (2008) 46 *Osgoode Hall Law Journal* xxix, xxix.
[267] Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (AGPS, 1994) xxx.
[268] Davison M Douglas and Neal Devins, 'Introduction' in Neal Devins and Davison M Douglas (eds), *Redefining Equality* (Oxford University Press, 1998) 4.
[269] The Hon John von Doussa, President, Human Rights & Equal Opportunity Commission Speech delivered at ALTA NZ 2005 (Australasian Law Teachers Association Conference, 6 July 2005) <https://www.humanrights.gov.au/news/speeches/one-law-al>.
[270] For a detailed thesis on the proposed scope of substantive equality, see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

understood. For instance, the aim of reducing barriers to accessing the law for certain groups or individuals and achieving equality necessarily involves ideas of substantive equality. The Productivity Commission has stated that

> [t]he goal of equality before the law is that all Australians have equal access to legal advice and representation and to the courts and tribunals that decide disputes. Essentially this means that any barriers which prevent people from enforcing their rights should be removed. It also implies that the institutions that define and uphold the law are not biased against particular groups within the community.[271]

Fineman's observations concerning formal and substantive equality are pertinent when considering the problems of access to justice experienced by the parent in a failed FAA. Underpinning the entire discussion of vulnerability and the appropriate response of the law is the question of whether there is a need to distinguish people experiencing particular vulnerabilities that should attract special attention. This poses unique and challenging concerns in the context of FAAs. Binding transactions are undertaken every day, and the law has well-developed mechanisms for dealing with circumstances where it is recognised that a transaction should be rescinded, or where some form of relief ought to be granted to a wronged party. In other words, the present law, primarily through the development of equitable doctrine, exists to aid the vulnerable and 'soften the harshness of the common law' by recognising unconscionability, unconscionable conduct or undue influence.[272] However, the analysis of the arrangement through the lens of vulnerability theory as proposed by Rogers et al. reveals that, while the law should not prevent people from entering into financial arrangements of their choosing – that is, it should allow people to expose themselves to situational vulnerability – those experiencing these vulnerabilities find the current legal avenues and responses inadequate.[273] Similarly, if the parent has entered the arrangement pursuant to undue influence, unconscionable conduct or an exploitation of a lack of capacity, the same access to justice issues are present. Both the 'access' to justice, and the 'justice' itself, are compromised, and law reform is required to achieve substantive equality before the law. As such, the theories proposed by Rogers et al. do acknowledge that some bodies and social locations are more vulnerable than others , which is a departure from Fineman's universal vulnerability. However,

[271] Productivity Commission, *Access to Justice Arrangements* (Australian Government, 2014) 77, citing Access to Justice Advisory Committee (n 267) 27.
[272] '[Equity] qualifies, moderates and reforms the rigour, harshness and edge of the law. [T]he office of equity [is] to support and protect the common law from shifts and crafty contrivances against the justice and the law. Equity therefore does not destroy the law, nor create it, but assist it': *Dudley v Dudley* (1705) 24 ER 118, 119 (Lord Cowper).
[273] Ottolini (n 2) 13.

isolating social or legal situations that are sources of vulnerability to some people, or create fresh vulnerabilities, does not deny our shared human vulnerability.

B *Adapting Fineman's Vulnerability Theory*

The emerging literature on vulnerability emphasises the contextual and situational factors impacting all individuals, as well as the way in which legal, policy and societal responses can either entrench vulnerability, or foster resilience. Rogers, Mackenzie, and Dodds built upon Fineman's work to elucidate more clearly the multi-variant sources of vulnerability. Using an adapted taxonomy of vulnerability, they propose that the ontological human condition and external contexts are individualised under the three headings of inherent, situational and pathogenic vulnerability.[274] Although the authors agree with Fineman concerning our universal vulnerability, their reasoning helps us to distinguish and identify more specifically the nature, source and effect of specific vulnerabilities. By building upon Fineman's concept of universal vulnerability, Rogers et al. focus on sources of vulnerability that enable a more specified response by the state in order to build resilience. This provides a more nuanced approach to vulnerability, one that is sensitive to the need to balance concerns around providing protection, with concerns to foster agency and resilience. While building on Fineman's theories, it can be argued that the approach taken by Rogers et al. (and consequently in this thesis) promotes a recognition of 'greater vulnerability', as opposed to universal vulnerability in some people, for the purposes of channelling resources. Yet while we are all vulnerable, we are not vulnerable in the same way in the same circumstances. The approach taken by this thesis is that by looking at the FAA and the parties involved, we can determine that due to a range of circumstances (i.e., the parent/child dynamic) the older person will experience vulnerability in a manner that someone entering the transaction at arm's length would not. Therefore, in the context of FAAs, the approach enables a more thorough appreciation of the complex causes that prevent the parent from accessing the legal system when faced with a failed FAA. This, in turn, allows a focus on those shortcomings of the legal system that can be addressed by legal reform. While each category bears its own characteristics, there are no bright lines between them. The characteristics identified in each category will invariably overlap to some extent and, as demonstrated in the case of FAAs, will influence and impact each other.

[274] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71).

Inherent vulnerability refers to those vulnerabilities that are an underlying consequence of our human condition. It may lead to, but should not be seen as amounting to, dependency.[275] The extent of our inherent vulnerability will depend on a range of factors including age, gender, health status and disability, and the extent to which we are impacted by inherent vulnerability may vary throughout one's life depending on one's own resilience and available social or institutional support.[276] The elderly are not a homogeneous group, so advancing age of itself is not indicative of vulnerability. However, there are certain conditions that are associated with ageing, including both cognitive and physical decline.[277] Suffering the effects of a stroke, or diminishing hearing or cognitive impairment, would constitute an example of inherent vulnerability, which in turn could provide an incentive to enter a disadvantageous FAA.

Situational vulnerability is context-specific and develops from the social, political, economic legal or environmental situation of a person. Situational vulnerability can be short-term, intermittent or permanent.[278] It arises from factors operating outside of the person – for instance, unemployment, housing issues or family conflict. Situational vulnerability can be exacerbated by inherent vulnerability, and vice versa. For instance, existing health issues can be worsened by poor or inappropriate housing, or situational vulnerability could cause or exacerbate a health condition. Moreover, our capability to deal with any of these vulnerabilities is closely aligned with our own singular circumstances and ability to cope.[279] If my car broke down in a remote location, I would be situationally vulnerable; however, the negative impact of that event would be reduced if I had been able to afford roadside assistance, or if I was able to call on family for help at the time.

Pathogenic or systemic vulnerability occurs when the institutional responses to inherent or situational vulnerability either exacerbate or create new vulnerabilities. Rogers et al. refer to this as a subset of situational vulnerability, and it arises when social policy interventions aimed at addressing either inherent or situational vulnerability have the paradoxical effect of creating or becoming the source vulnerability itself.[280] As well as policy intervention, legal structures

[275] Susan Dodds, 'Dependence, Care and Vulnerability', in Mackenzie et al, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 74) 181,183.
[276] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 25.
[277] Nina A Kohn, Maria T Brown and Israel Doron, 'Identifying Connections between Elder Law and Gerontology: Implications for Teaching, Research and Practice' (2017) 25 *Elder Law Journal* 69, 80.
[278] Mackenzie et al, 'Introduction: What is Vulnerability, and Why Does it Matter for Moral Theory?' in Mackenzie et al, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 74) 1, 8.
[279] These circumstances cover a range of variables such as economic status, cultural factors, geographical location, etc.
[280] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 26.

can also contribute to pathogenic vulnerability by failing to address the legal needs of a particular group, and act as barriers to certain groups accessing justice. Common to these categories of vulnerability is the potential for each to create a loss of control, or loss of agency. The aim of identifying the sources of each form of vulnerability in the context of failed FAAs is to restore agency, and thereby promote the capacity to access the justice system.

III IDENTIFYING VULNERABILTY IN THE CONTEXT OF FAMILY ACCOMMODATION ARRANGEMENTS

This section draws together the previous discussions concerning vulnerability and access to justice. It examines the legal and personal challenges encountered by the parent as a participant in the arrangement, and when the arrangement comes to a premature end. The analysis focuses on the position of the parent. It does not deny the possible existence of vulnerability on the part of the adult child. However, the critical features of the legal and familial position of the parent, (identified as legal and personal situational vulnerability) mean that it is *their* vulnerability, and its manifestation in systemic vulnerability, that creates the lack of access to justice.

Systemic vulnerability occurs when the mechanisms put in place to address inherent and situational vulnerability have the counteracting effect of triggering further vulnerability. By adapting and applying the tripartite lens of vulnerability as theorised by Rodgers et al., this analysis aims to demonstrate that factors such as the precarious legal position of the parent brought about by the family accommodation arrangement, or the reluctance to engage in legal proceedings against a child, adversely impact upon the ability to utilise the legal system. While the factors outlined under systemic vulnerability – such as time, expense, complexity and formality of proceeding – apply to all litigants bringing actions concerning property and/equitable causes of action (or, in rarer cases, breach of contract or unjust enrichment), the particular situational vulnerabilities of the parent can exacerbate the legal structural problems. In terms of substantive justice, the particular vulnerabilities highlight the lack of equality before the law and the need for adjustments addressing the structural vulnerabilities. Therefore, recognising vulnerabilities may require special measures in the way of law reform, to enable substantive equality to be achieved. The following provides an explanation of the adapted theory of Rogers et al., as applied to FAAs. In particular, it identifies elements of situational vulnerability that are personal and legal and demonstrates how these vulnerabilities are linked to and exacerbated by systemic vulnerability.

A *Inherent Vulnerability*

Inherent vulnerability is related to 'sources of vulnerability that are inherent to the human condition that arise from our corporeality, our neediness, our dependence on others, and our affective and social natures'.[281] Any inherent vulnerability experienced by the parent may be a key factor in deciding to enter into a FAA, as these conditions can generate a need for help and support from others to mitigate their impact. The need for support may also create a dependency on the adult child that potentially can be exploited. Inherent vulnerability may be exacerbated by situational vulnerability such as family conflict, arising through either the breakdown of the relationship, or the legal dispute that ensues. The impact of legal proceedings does not only cause financial stress; the uncertainty surrounding outcomes and housing options can potentially affect the psychological and physical health of those involved.[282] A person experiencing some form of inherent vulnerability may also be disadvantaged by the lack of institutional support provided by the legal system. While the negative impact of legal proceedings is not limited to the parent, the legal position of the parent as transferor of the assets necessitates legal action to be instigated by them to recover property. The potential deleterious effect of this may prove to be a significant deterrent, particularly if the claimant is already suffering some form of inherent vulnerability.[283]

B *Situational Vulnerability*

As explained above, situational vulnerability refers to those vulnerabilities we experience that are referrable to a particular context or environment. Situational vulnerability creates a risk of harm or disadvantage because of the circumstances created by the transaction between parties in a close personal relationship, and the application of existing laws to a new circumstance – the FAA. The identification of 'specific' vulnerabilities attaching to particular people in particular circumstances builds on Fineman's broad 'universal' vulnerability. It identifies circumstances outside broad vulnerability and recognises that people vary in their exposure to risk and in the resources to counter such risks. As such, we owe specific obligations and greater duties of justice to those identified as being at greater risk. As many vulnerabilities are context-dependent, they require specific responses. Inherent and situational vulnerability give rise to

[281] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 24.
[282] Legal Aid ACT, Submission No 115 in Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 10.
[283] Standing Committee on Legal and Constitutional Affairs (n 20) para 5.41-44; Sage-Jacobson (n 18) 146.

specific moral and political (and, this I would add, legal) obligations to support those who are vulnerable and to reduce the risks of avoidable vulnerability among certain individuals, groups and populations through targeted interventions aimed at ameliorating specific vulnerabilities.[284] Entering into a FAA of itself exposes the parent to vulnerability. These vulnerabilities arise owing to both the legal and personal contexts of the FAA. While the proposals for law reform in this thesis target features of the legal system that give rise to systemic vulnerability, these reforms in turn seek to ameliorate both personal and situational vulnerabilities. Additionally, there is scope for reforms individual doctrinal and statutory that address the situational vulnerability that arise owing to the nature of the accommodation agreement.[285]

1 *Entering into the Accommodation Agreement – Legal Situational Vulnerability*

Outside the family context, transactions involving significant assets or money are generally undertaken only after seeking legal advice and putting in place measures to protect financial positions. Conversely, within the family context, where trust and familial bonds are assumed to eliminate the need for protective measures, the parent is often unaware of the inherent risks involved in entering transactions and their own precarious legal position should an arrangement fail. In examining the legal position of the parent in a FAA, two related but distinct sources of vulnerability emerge. The first is described here as 'legal-situational vulnerability'. It is related to, but can be distinguished from, the vulnerability caused by systemic features of the law when a cause of action is pursued and a remedy sought. Legal-situational vulnerability arises when legal presumptions, doctrines or formalities operate to create significant obstacles to a parent claiming either in contract or against the property, and amount to a 'legal imbalance' against the parent.[286]

Most sources of legal situational vulnerability in FAAs are causally related to the familial setting and the informality that characterises such arrangements. For instance, the presumption against intention to create legal relations within a family accords with the traditional conception that the family is private and families do not intend that their private arrangements have legal consequences.[287] Additionally, formal contractual requirements concerning certainty of terms, conditions and time of performance create significant obstacles for a party to establish that a

[284] Rogers et al 'Introduction' (n 68) 12.
[285] These reforms include doctrinal or statutory adjustments aimed at strengthening the parent's legal position. These are discussed in Chapter 7.
[286] Legal situational vulnerability is explored in detail in Chapter 4.
[287] *Balfour v Balfour* [1919] 2 KB 571; *Waldock v Waldock* [2012] NSWSC 258.

contract was intended, when often terms are 'far too vague and uncertain to satisfy the common law requirements'.[288] Similarly, compliance with statutory formalities requiring dealings in land to be in writing may not be met in assets for care cases owing to arrangements being made orally, and a reluctance to formalise transactions within the family.[289]

Legally embedded normative assumptions concerning the intentions of parents to financially benefit their children create a further challenge in the form of the presumption of advancement. When there is a transfer of property for no consideration from one person to another, equity presumes the recipient holds the property on resulting trust for the donor.[290] Similarly, if two or more persons contribute to the purchase of property, and that property is put into the names of one of the parties, then equity will presume a resulting trust in favour of the other party proportionate to their contribution.[291] Equity 'presumes' the legal title holder holds the property wholly or partially on trust, as a default rule and in the absence of any contrary explanation.[292] However, when transfers have occurred in certain prescribed relationships, including parent to child, equity presumes the transfer was a gift and a resulting trust will not arise.[293] As is the case with the presumption against legal relations, the presumption of advancement can be rebutted by contrary evidence. Yet the onus rests with the parent to rebut the presumption, and the requirement that the parent discharge the evidentiary burden operates to further the 'legal imbalance'.

The primary characteristic of the FAA is the transfer by the older person of money or assets to the adult child, in exchange for accommodation and/or care. As such, the adult child obtains indefeasible title to the property, and any exceptions to indefeasibility must be challenged

[288] *Jones v Padavatton* [1969] 1 WLR 328.
[289] Writing requirements for contracts for the sale or disposition of land or interests in land are found in various State legislative provisions: *Civil Law (Property) Act 2006* (ACT) s 204(1); *Conveyancing Act 1919* (NSW) s 54A(1); *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (Tas) s 36(1); *Instruments Act 1958* (Vic) s 126(1) and *Property Law Act 1958* (Vic) s 53(1)(a); *Law Reform (Statute of Frauds) Act 1962* (WA) s 2 (applying the *Statute of Frauds 1677* (Imp) s 4. If the parent alleges the adult child voluntarily intended to create an interest in the property in the parent's favour, or the adult child held all or part of the property on express trust for the parent, this would need to be evidenced by writing: *Civil Law (Property) Act 2006* (ACT) s 201; *Conveyancing Act 1919* (NSW) s 23C(1); *Law of Property Act 2000* (NT) s 10*; Property Law Act 1974* (Qld) ss 10, 11; *Law of Property Act 1936* (SA) s 29; *Conveyancing and Law of Property Act 1884* (Tas) s 60(2); *Property Law Act 1958* (Vic) s 53(1); *Property Law Act 1969* (WA) s 34(1).
[290] Except in some States where a voluntary transfers of Torrens title land will not be treated as held on 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 1969* (WA) s 38.
[291] *Calverley v Green* (1984) 155 CLR 242, 245–7 (Gibbs CJ).
[292] Charles Rickett and Ross Grantham, 'Resulting Trusts – The True Nature of the Failing Trust Cases' (2000) 116 *Law Quarterly Review* 15, 19.
[293] Joe Campbell, 'The Consequences of Rebutting a Presumption of Advancement' (2018) 46(3) *Australian Bar Review* 229, 233–4.

through *in personam* exceptions to indefeasibility.[294] While equity traditionally responded to the personal situational vulnerability of the plaintiff, these exceptions are for the most part complex and expensive to pursue. As the parent rarely has any proprietary interest in the property, the property may be dealt with by the legal title holder, the adult child, to the detriment of the parent. Until the matter is heard and determined by a court, any caveat lodged to prevent subsequent dealings with the property may be challenged.[295]

2 *Entering into the Accommodation Agreement – Personal Situational Vulnerability*

(a) The Parent/Child Relationship

The motive of each party in entering the agreement will vary with each family circumstance. The parent may act out of self interest in that the accommodation arrangement may allow them to avoid institutionalised care or keep wealth within the family. However, a decision may be driven by considerations other than self-interest when undertaken in the familial environment. This, of itself, is not problematic. Communality is seen as an important feature of family life, and the trust and reciprocity implicit in family arrangements aim to achieve more than financial gain; the happiness of family members is often contingent on the happiness of others.[296] Therefore, improvident transactions must be seen in the light of the 'private ordering' of family financial arrangements.[297] As such, Hall's observations in the context of Canadian law are relevant here:

> In transactions that involve property, donor autonomy is central. The idea of unfettered individual liberty to dispose of one's property as one wishes, whether wisely or foolishly, is a fundamental – even sacred – tenet of Anglo Canadian law.[298]

However, transactions that are influenced by a mixture of obligation, affection, familial responsibility or even guilt, rather than commercial or personal gain, expose the parent to personal situational vulnerability. For instance, a parent can be encouraged to 'sell up' and transfer assets in order to relieve financial pressure experienced by an adult child.[299] Brian Bix observes that family members who enter into financial agreements with another family member are 'less likely than non-family members to be motivated by their own interests, and less able

[294] *Frazer v Walker* [1967] 1 AC 569.
[295] Somes and Webb, 'What Role for Caveats' (n 31).
[296] Michael J Trebilcock and Steven Elliot, 'The Scope and Limits of Legal Paternalism' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 51.
[297] Ibid.
[298] Margaret Isabel Hall, 'Mental Capacity' (n 234) 67.
[299] See eg *Mainieri v Cirillo* [2014] VSCA 227.

to protect those interests, because of the greater likelihood in the family context of altruism and coercion'.[300] While any measures aimed at curbing the autonomy to undertake that transaction might be viewed as paternalistic, there exists a need to have appropriate legal mechanisms in place to address a situation when the reciprocal arrangement breaks down.

The dynamic of the parent/child relationship potentially gives rise to a form of 'special disability' on the part of the parents, whose altruism can be exploited.[301] The sense of obligation that parents experience towards their children can be explained by not only the natural parental bond, but also by the societal and legal obligations imposed on them to care for children as minors. These obligations are entrenched and, despite generational changes, commonly continue through to adulthood. While there has been considerable analysis of the balance of power and influence in intimate family relationships, the law has been slow to recognise the relationship between parent and child as one in which the parent is at a disadvantage owing to this sense of obligation towards their children. And, while there is no legal obligation on a parent towards an adult child, our law has embedded within it a strong confirmation of the moral and financial obligations flowing 'downwards'; for instance, testator's family maintenance, and the presumption of advancement.[302] Within the context of disputed arrangements, courts have explicitly entrenched those societal norms that embody those obligations. For instance, Justice Orminston stated that

> [i]t would be a sad state of affairs if courts interfered as of course with gifts and beneficial transactions effected in favour of children in circumstances where it could truly be said that they were entered into 'in consideration of the natural love and affection' that parents have for their offspring. Every day of the week, indeed far more frequently, parents make gifts to children

[300] Brian Bix, 'The Public and Private Ordering of Marriage' (2004) *University of Chicago Legal Forum* 295, 308-309, cited in Denise Meyerson, 'Rethinking Marriage and its Privileges' (2013) 23(1) *Acta Juridica* 385, 400–1.

[301] In the context of family accommodation arrangements, a parent's 'love and affection' has not been explored as a special disability along the lines of *Louth v Diprose* (1992) 175 CLR 621. However, in *Bridgewater v Leahy* (1998) 194 CLR 457 a transaction between an elderly man and his nephew was set aside on the basis it was an unconscionable bargain. The elderly man was found to be under a special disability owing to his emotional dependence on his nephew.

[302] Blackstone felt the obligations by children to their parents existed by virtue of 'natural justice'. He said that: 'The duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws': Sir William Blackstone, *Commentaries on the Laws of England* (1765–69) Book I Chapter VI Of Parent and Child. However, unlike the United States of America, some parts of Canada and China, there are no laws demanding filial responsibility by children to their parents in Australia: Donna Harkness, 'What Are Families For: Re-evaluating Return To Filial Responsibility Laws' (2013) 21 *Elder Law Journal* 305; David De Vaus, *Children's Responsibilities to Elderly Parents* (Family Matters No 45, Australian Institute of Family Studies, 1996).

> though they might be disadvantageous to themselves. On other occasions, as was the case here, children and their parents arrange to employ their funds, primarily the parents' funds, to build 'granny flats' and the like attached to new and old houses, in circumstances where it is more than apparent that the principal benefit will be received by the children either in the short or in the long term. Such demonstrations of natural generosity are not to be discouraged by the law.[303]

This form of vulnerability often arises in cases where parents have agreed to be guarantor for their children. In the absence of any unconscionability of behalf of the bank, a parent's vulnerability is recognised, but not enough to have the transaction set aside. In *Watt v State Bank of NSW t/as State Bank of NSW*, Higgins CJ and Crispin J observed that

> the real vulnerability of parents usually stems not from a failure to comprehend the nature of the transactions in which they have been asked to participate or from insufficient information concerning their implications. It stems from their love of their children. Their desire to help and protect them, to advance their interests, to maintain a close relationship, to avoid causing disappointment, hurt or distress, to maintain the relationship may all make it difficult to say 'no'.[304]

In a similar case involving parents acting as guarantors, Crispin J again alluded to the vulnerability experienced by parents arising from the sense of obligation parents feel towards their children. He describes how the parents proceeded with a transaction 'because of their affection for their children, a perception that a refusal might be damaging to the relationship with them, and/or a conviction that they deserve the chance to make good'.[305] In the context of the family accommodation agreement, this personal situational vulnerability creates an environment where arrangements are often undertaken as a means of assisting children. As Justice Orminston has stated, the law should not discourage altruism on behalf of the parent. However, a recognition of the specific vulnerability explains the conduct of the parent, and the absence of caution in placing themselves in a position of legal vulnerability.

(b) *Reluctance to Commence Proceedings Against Own Children*

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[303] *Mitchell v 700 Young Street Pty Ltd* [2003] VSCA 42, 42 (Orminston JA)

[304] *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7. See also *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10; *Good Relations, High Risks: Financial Transactions within Families and Between Friends,* Report of the Expert Group on Financial Vulnerability (Cth) February 1996; Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press, 1997); Juliet Lucy Cummins, 'Relationship Debt and the Aged: Welfare vs Commerce in the Law of Guarantees' (2002) 27(2) *Alternative Law Journal* 63. The lengths to which a parent will go in order to look after an adult child can be seen in a recent decision from the High Court in the UK. Here, an elderly, blind man endured physical and emotional abuse from his son but felt obliged to look after him. The court found that 'the essence of [the parent's] vulnerability is, in fact, his entirely dysfunctional relationship with his son': *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) (20 February 2019) [34].

[305] *Janesland Holdings Pty Ltd v Francisc Simon & Ors* [2000] ANZ ConvR 112 [120] (Crispin J).

A further source of personal situational vulnerability connected with the parent/child relationship arises from a reluctance by parents to commence proceedings against their children.[306] In its comprehensive 2018 Report, the Law Council of Australia identified certain barriers to elderly people taking part in legal proceedings, outside of the familial dimension to a dispute.[307] These include a reluctance to complain about legal issues affecting them and a lack of confidence in accessing legal resources.[308] This can be attributed to a lack of capacity, a lack of familiarity with technological resources, and dependency on others (in some cases incorporating a history of dependency on the adult child with whom they are engaged in a dispute).[309] These barriers can be further exacerbated by the inherent vulnerability of the parent if they are from a non-English speaking background, are in the later stages of life, are from remote communities, have a level of physical or cognitive impairment and are reliant on the adult child, or are from a low socio-economic background.[310] Further to these general barriers, there are several reasons why, in the context of a family accommodation arrangement, parents may be reluctant to commence proceedings against their children.

First, parents may be reluctant to pursue the legal recovery of property on the failure of the family accommodation arrangements as they may prioritise the relationship with their children, and possibly grandchildren, over and above obtaining any proprietorial or financial recompense.[311] In some cases, pursuing a legal remedy may extinguish any possibility of saving the relationship with their family and the associated support network. Secondly, parents may be ashamed when finding themselves in conflict with their children, as they feel a responsibility for raising them and hence for their behaviour.[312] As well as feeling pride in their accomplishments, there is empathetic distress over their weakness and failures. Parents see

[306] Carolyn L Dessin, 'Financial Abuse of the Elderly' (2000) 36(2) *Idaho Law Review* 203, 211.
[307] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 17–22.
[308] Ibid 15–16.
[309] Bonnie Brandl and Tess Meuer, 'Domestic Abuse in Later Life' (2000) 8 *Elder Law Journal* 297, 303.
[310] Law Council of Australia, *The Justice Project: Final Report,* Part 1 (n 27) 9.
[311] Munro (n 31); Moskowitz, 'Golden Age in the Golden State' (n 72); Standing Committee on Legal and Constitutional Affairs (n 20) para 5.35; Kaspiew et al, 'Elder Abuse in Australia' (n 72) 69; ALRC Final Report (n 19) [8.18].
[312] Shelly L Jackson and Thomas L Hafmeister, 'Detection and Reporting of Elder Abuse Occurring in a Domestic Setting' (2015) 27(2) *Journal of Elder Abuse* 121; Kaspiew et al, *Elder Abuse: Understanding Issues, Frameworks and Responses* (n 207);Ames Owen Ames and John Harley, 'Elder Abuse: Being Part of the Solution, Not Part of the Problem' (2001) 23(3) *Law Society Bulletin (SA)* 34; Briony Dow, *Why Are We Abusing Our Parents? The Ugly Facts of Family Violence and Ageism* (Australian Institute of Family Studies, 2016) <https://aifs.gov.au/cfca/2015/12/08/why-are-we-abusing-our-parents-ugly-facts-family-violence-and-ageism>; Amanda Holt, 'Responding to Parent Abuse' (2011) 24 *The Psychologist* 186; Cottrell and Monk (n 97); Carolyn Hunter, Judy Nixon and Sadie Parr, 'Mother Abuse: A Matter of Youth Justice, Child Welfare or Domestic Violence' (2010) 37 *Journal of Law and Society* 264, 270; Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 19–20.

their children as a type of extension of themselves, and hence experience shame if their children 'rip them off'.[313] As such many older people believe, and may prefer, that disputes arising within families should be kept private.[314] Thirdly, if the property arrangement has been undertaken because of undue influence or pressure, the parent may not feel empowered to secure their legal position even on the breakdown of the relationship.[315] Having been subject to pressure by the dominant party, in many cases the instigation of legal proceedings against that party requires significant resilience.[316] The position of the parent is exacerbated if they have been heavily reliant on the adult child for care and support.

(c) Consequences of the Failure of the Arrangement

Assuming the paradigm arrangement whereby the parent is subject to the indefeasible title of the adult child, on the failure of the arrangement the parent has no claim to the property or assets they have transferred until determined by a court.[317] The consequences of the failure, and the impact on the parent, will vary widely according to the individual circumstances of those involved and the reasons for the breakdown.[318] If the behaviour of the adult child is particularly egregious, the parent may suffer forms of abuse including financial, physical, emotional or verbal abuse. As outlined above, situational vulnerability can potentially create, or add to, the parties' existing inherent vulnerability. However, the discontinuing of the arrangement will, at the least, lead to an adjustment to the accommodation and care arrangements for the parent. This could mean having to secure accommodation in an aged care facility,[319] or alternative accommodation if the relationship between parent and child has broken down, or the relationship of the child and their partner has broken down. An example of the consequences of the failure of an arrangement was seen in the New South Wales case of *Spink v Flourentzou.*[320] In that case, an elderly woman sold a unit in Sydney and used the proceeds to buy a property with her daughter and son-in-law. There was an arrangement

[313] Eleanor E Maccoby, 'The Uniqueness of the Parent-Child Relationship' in W Andrew Collins and Brett Laursen (eds), *Relationships as Developmental Contexts: The Minnesota Symposia on Child Psychology*, (Lawrence Erlbaum Associates, 1999) 164; Suzanne J Levitt and Rebecca J O'Neill, 'Essay: A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience' (1997) 5 *Elder Law Journal* 195, 196.
[314] Lisae Jordan, 'Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies' (2001) 15 *American Journal of Family Law* 147, 149.
[315] See *McFarlane v McFarlane* [2021] VSC 197.
[316] Somes and Webb, 'What Role for the Law' (n 28) 26.
[317] See eg *Swettenham v Wild* [2005] QCA 264.
[318] As explained above, not all failed accommodation agreements are a consequence of relationship breakdown, or poor behaviour on the part of the adult child.
[319] If the reasons for the failure of the arrangement arose because of the inability of the adult child to provide appropriate care.
[320] *Spink v Flourentzou* [2019] NSWSC 256.

between the parties that Mrs Spink would be able to live at the property indefinitely. However, the relationship broke down and she was asked to leave the property by her daughter. At the time of the hearing Mrs Spink was essentially homeless and 'dependent upon the pension and the goodwill of friends and acquaintances for accommodation, as well as being on a waiting list for public housing'.[321] Without being able to recover any contribution made to the FAA, the depletion of assets can have significant practical and psychological consequences.[322] Moreover, the parent, simply by virtue of their age will have less opportunity to 'start again' and recoup any losses. Potentially, the effect of the fracturing of family relationships (assuming the FAA fails owing to a dispute) and the loss of 'home', explained in Chapter 2, can be an especially devastating example of personal situational vulnerability.

Mrs Spink's circumstances highlight the precarious position of the parent once money or assets have been transferred. The transfer of wealth in exchange for accommodation impoverishes the parent and leaves them financially vulnerable. The expense of proceedings to recover money or property is a contributing factor to the pathogenic vulnerability they suffer, as legal proceedings are often too expensive to commence. This is discussed below.

C *Systemic (Pathogenic) Vulnerability*

The primary sources of vulnerability are summarised below for the purposes of explanation of systemic vulnerability. A more detailed discussion of systemic vulnerability arising from the forum of the Supreme Court and the present law is detailed in Chapters 5 and 6 respectively.

Jerod Auerbach has observed that '[t]he legal process can be threatening, inaccessible, and exorbitant – usually it is all of these for the least powerful people in society'.[323] This accurately describes the law that is applicable to family accommodation arrangements and, it is substantive and procedural aspects of the law, designed to resolve the dispute, which counterintuitively create another source of vulnerability experienced by the parent.

Needless to say, the law that applies to FAAs does not distinguish the position of the parent from other litigants, such as people or entities in commercial disputes, or in non-familial relationships. The law is applied 'equally'; hence, formal equality before the law is achieved by equal application. Yet, recognising the particular inherent and situational vulnerabilities of

[321] Ibid [5].
[322] Dessin (n 306) 221.
[323] Jerold S Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (Oxford University Press, 1983) Preface.

the parent demonstrates the existence of substantial inequalities which in turn lead to problems in access to justice. It is this source of vulnerability, arising through the legal frameworks that are put in place to achieve legal outcomes, that need reforms to improve access to justice.

1 *Complexity of the Law and Diversity of Outcomes*

Although intergenerational accommodation arrangements have been a social feature for some time, attempts to address breakdowns in these arrangements through the law have been a relatively recent phenomenon. Therefore, in order to resolve disputes, judges have analogised legal principles arising from areas such as equity, property and contract law. Along with the issues concerning doctrinal complexity, there may also be matters arising relating to tax law and Centrelink provisions. This has led to the criticism that the current law being applied is uncertain, exceptionally complicated and, from a practical perspective, largely ineffective.[324]

For the most part, it has been necessary to argue equitable causes of action to enable the parent to establish a right either to property (through *in personam* exceptions to indefeasibility) or relief based on contributions through the transfer of assets or money. Traditionally, the equitable jurisdiction evolved to deal with the harshness of the common law and to assist the vulnerable. Its jurisdictional basis lies firmly in the principles of curing the rigours of the common law and looking to the conscience of parties, rather than the application of strict legal rules.[325] Equity theory, drawing on the doctrines of equitable fraud, allows us to see vulnerability as a source of inequity or unfairness, justifying a legal response directed to the nature and source of that unfairness.[326] In turn, the method of equity has been to adapt to particular circumstances according to contemporary circumstances. Hence, Ashburner stated that

[324] Somes and Webb, 'What Role for Real Property' (n 31) 124.
[325] Michael Levenstein, *Maxims of Equity, A Juridical Critique of the Ethics of Chancery Law* (Algora Publishing, 2014) 43, cited in Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (3rd ed, LexisNexis Butterworths, 2016) 3; *Dudley v Dudley* (1705) 24 ER 118, 119. As to the language of unconscionable conduct and its meanings, see Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37.
[326] Margaret Isabel Hall, 'Material Exploitation and the Autonomy Ideal: The Role of Equity Theory in Adult Protection Legislation' (2008) 5 *Elder Law Review* 9, 26. See also the comments of Justice Somers: 'I think it likely that over the years words such as unconscionable and inequitable have drawn closer to more objective concepts such as fair, reasonable and just': *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 186, 193 (Somers J), but see comments of the plurality in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 301, 'the relevant principles of equity do not operate at large in an idiosyncratic fashion'.

> [e]quity has developed … not by clinging to antiquated principle and stretching the facts until they suited the principle, but by enlarging the principle until it harmonised with the moral conceptions of the time.[327]

Equity is therefore, at least in principle, the appropriate theoretical framework to resolve the disputes arising from the FAA. Paradoxically, though, it is this very nature of equity and the use of equitable principles that contributes to the structural vulnerability of the parent. Although equitable remedies are discretionary, the reasoning of the court and the outcome may be dependent on seemingly insignificant facts or conversations. Informal conversations referring to 'our house' could indicate a common intention constructive trust,[328] whether the term 'gift' was used in conversation could determine whether the presumption of advancement should be upheld.[329] The court may find a resulting trust (an implied trust in the amount of the gift or contribution), a constructive trust (arising either from what the court considers to be the common intention of both parties, or because of the unconscionable nature of the arrangement), an equitable lien (using property as security for the payment of a sum of money) or equitable compensation. Calculation of the relief is based on specific doctrinal reasoning and the outcome may therefore differ greatly.[330] As well as these remedies, the court may make any orders it thinks fit in order to achieve a 'just and equitable' outcome. The reluctance of people to put pressure on family relationships by seeking legal advice prior to the commencement of the arrangement[331] means that, in most cases, a family accommodation 'agreement' lacks any legal force and claimants are rarely able to turn to contract law, which denies that many of the promises evince an intent to create legal relations and, consequently, any proprietary remedies.

Complexity relates not only to substantive law, but also to court processes. Both procedurally and evidentially, rules, forms and procedures can make the legal process incomprehensible and inaccessible to the public.[332] The complexity and inaccessibility of the present law is a major disincentive to anyone wanting to resolve a dispute that has arisen pursuant a FAA This,

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[327] W Ashburner, *Principles of Equity* (2nd ed, 1933) 62, cited in PW Young, C Croft and M Smith, *On Equity* (Lawbook Company, 2009) [1.100].
[328] *Hohol v Hohol* [1981] VR 221; *Zaborskis v Zaborskis* (1982) 8 Fam LR 622.
[329] *Spink v Flourentzou* [2019] NSWSC 256 [92] (Robb J).
[330] Compare eg the differences between the calculating remedies for estoppel, breach of fiduciary duty, failed joint venture and resulting trusts. For further analysis see Susan Barkehall Thomas, 'Shared Homes, Broken Promises and Constructive Trusts: Why Older Generation Plaintiffs are Frequently Worse Off' (2015) 9(3) *Journal of Equity* 239.
[331] Victorian Government, *Submission Inquiry into Older People and the Law*, 3, cited in Cockburn, 'Equitable Relief' (n 31) 44.
[332] Productivity Commission (n 271) 132.

coupled with the considerations below, means that very few parents have the time, money or personal resilience to proceed with a legal action to resolve the dispute.

2 *Expense of Proceedings*

In most Australian jurisdictions, a FAA dispute would be heard by the State Supreme Court or, in some circumstances, the District Court. Litigation in either of these jurisdictions is commonly beyond the resources of many people.[333] Conversely, many older people would be ineligible for legal aid assistance owing to the stringent asset limits and lack of legal aid funding.

3 *Nature of Proceedings (Formality)*

The adversarial nature of the Supreme and District Courts together with the formality of proceedings can be a disincentive to commencing litigation.[334] Along with costs, the formality associated with the current forum was an important motivation behind the Australian Law Reform Commission's (ALRC) recommendation that disputes involving FAAs be heard in tribunals.[335] Formal and highly complex procedures are difficult for a lay person to manage and consequently require legal expertise to navigate. Equally, self-representation for most people is an unrealistic option owing to unfamiliarity with complex procedures and the quantity of information.

4 *Time for Matters to be Resolved*

The inability of the present legal system to provide expeditious solutions to legal problems may discourage older persons from taking action and pursuing matters through the formal legal system. The Productivity Commission Report on Access to Justice also noted that '[c]oncerns about delays can contribute to unmet legal needs', and it was estimated that one third of individuals who chose not to take legal action cited delays as the reason for their decision.[336] Having matters drawn out over a long period of time not only contributes to the expense, but prolongs the emotional distress that people suffer when involved in disputes, especially interfamilial disputes. The parent in a family accommodation dispute is, simply by virtue of

[333] Standing Committee on Legal and Constitutional Affairs (n 20) para 5.21.
[334] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 365.
[335] ALRC Final Report (n 19) 6-1.
[336] Productivity Commission (n 271) 127.

the nature of the arrangement, likely to be an older party, and therefore reluctant to spend time tied up in lengthy adversarial litigation.[337]

IV CONCLUSION

This chapter has sought to establish the need for law reform in FAAs. It has done so by applying an adapted conceptual framework of vulnerability to the position of the older party in a failed FAA. In doing so, it has identified the methodology of applying this framework to the position of the older party in a failed FAA, and has demonstrated the interconnectedness of inherent, situational and systemic vulnerability, and pinpointed those characteristics of the legal system that create fresh sources of vulnerability through the inaccessibility of the legal system.

On entering the agreement, the parent does so pursuant to legal principles that assume equality before the law and autonomy of the parties to an agreement. Within well-defined doctrines, equity does recognise some of the issues raised by personal situational vulnerability, such as emotional dependence, undue influence and reliance on non-contractual promises. Nonetheless, in responding to the vulnerability of the parent by allowing challenges to the title through *in personam* exceptions, the processes involved in bringing these actions counterintuitively create further vulnerability for the parent in the form of systemic vulnerability. In some cases, as with the presumption of advancement, equitable principles add to the legal vulnerability experienced by the parent by embedding normative assumptions concerning the nature of the relationship between parents and children. The parent is also subject to the vulnerabilities that arise owing to the familial context of the arrangement. The increased likelihood of agreeing to an improvident transaction to financially assist children, the reduced likelihood of ensuring they have had legal advice, and a reluctance to sue their own children all amount to personal situational vulnerability. The combination of these vulnerabilities makes achieving the resolution of any dispute under the framework of the present law an often insurmountable task.

Fineman's vulnerability theory, further refined by Rogers et al., provides a powerful argument for increased state intervention through law reform to address and reduce systemic, and with it personal and legal, vulnerability. Applying these theories to the position of the parent in a failed FAA enables the identification of the barriers to accessing justice. While this chapter has demonstrated why intervention is needed, Chapter 8 will examine how a new jurisdiction

[337] Sage-Jacobson (n 18); ALRC Final Report (n 19) [8.17].

would address these vulnerabilities. The proposed reforms avoid the complexities associated with the current law, placing greater emphasis on alternative dispute resolution and a move to a tribunal forum rather than the Supreme or District Court. Law reform is therefore seen as a state response to the recognition of the particular vulnerability of a specific group and should be undertaken as a form of social responsibility.[338]

[338] Robert E Goodin, 'Vulnerabilities and Responsibilities: An Ethical Defense of the Welfare State' (1985) 79 *The American Political Science Review* 775.

CHAPTER 4
SOURCES OF LEGAL-SITUATIONAL VULNERABILITY: THE LEGAL IMBALANCE AGAINST THE PARENT

> The transaction which is impugned by the plaintiff is a very significant transaction. The family home was by far the most significant asset which Mrs Roma Anderson owned. By the transfer she gave it away. There was no protection for her – she retained no right to reside in what had been her home for most of her life.[339]

I INTRODUCTION

The purpose of this chapter is to examine in more detail the sources of legal situational vulnerability of the parent, a concept introduced in Chapter 3 as part of the vulnerability framework adopted in this thesis.[340] Adopting the taxonomy of vulnerability proposed by Rogers et al. and outlined in the previous chapter, this chapter will explain how various doctrines and presumptions, with disparate origins, converge at the point of failure of the family accommodation agreement (FAA) resulting in a 'legal imbalance' against the parent, and creating significant obstacles to a parent bringing an action to recover contributions made pursuant to a FAA, and are as such a source of vulnerability The matters raised here will then be addressed in Chapter 8 to demonstrate how the proposed reforms would promote resilience and eliminate or ameliorate the legal situational vulnerability that the parent currently experiences.

A number of sources of legal situational vulnerability in FAAs are causally related to the FAAs familial setting. The informality of the familial context sits awkwardly with the requirement to comply with legal formalities. For example, Part II of this chapter will explore formalities concerning the creation of contracts and writing requirements concerning land. First, there exists a presumption against an intention to create legal relations within a family. If wishing to establish a binding contract (and the award of damages for breach) the parent would bear the onus of rebutting the presumption and establishing that the parties had a contractual intent. Further, this chapter will explore the stringent requirements necessary to establish the existence

[339] *Anderson v Anderson* [2013] QSC 8 [61] (Dalton J).
[340] See Chapter 3 III(B)(1).

of a contract. FAAs at their most basic level display the indicia of a contract; both parties make offerings with respect to assets and accommodation that confer reciprocal benefits. Yet, along with the presumption against intention to create legal relations, familial and undocumented agreements commonly fail to comply with the requirements of certainty of terms. Similarly, a parent wishing to claim an interest in property at law, or that there exists a contract to grant an interest in property, must comply with writing requirements.[341] While proprietary interest may still be achieved through equitable doctrines such as proprietary estoppel, estoppel amounts to the enforcement of a non-contractual promise and the plaintiff is therefore required to prove that the parent expected an interest in property would be granted, detrimental reliance on that representation and knowledge on the part of the representor that the plaintiff was relying on the representation. [342]

Other sources of legal situational vulnerability derive from legally embedded normative assumptions concerning the intentions of parents to financially benefit their children, and Part III explores how the presumption of advancement contributes to the 'legal imbalance' against the parent. Under this assumption, equity presumes the transfer of assets from parent to child is a gift.[343] As is the case with the presumption against legal relations within families, while the presumption is rebuttable the onus lies on the parent to adduce evidence the transfer was not intended as a gift. In response to such arguments many adult children will argue the intention of the transfer was a gift and that the property forms part of an 'early inheritance'.

Lastly, Part IV of this chapter will explore the challenges associated with property law principles, in particular indefeasibility and its exceptions, as well as the requirements necessary to lodge a caveat. The aim of this section is to highlight the uncertainty and fragility of the parent's interest in property to which they have made a financial contribution. In most instances, a parent will not have a legal interest in the property. This may be for several reasons: it may not have been contemplated; it may be too expensive or time-consuming to undertake the transaction; or, if the house is subject to a mortgage, the parent may not wish to be liable for the mortgage, or the bank may not agree to the change in ownership depending on the parent's financial situation. Therefore, most commonly, the adult child maintains indefeasible title to the property. Unless and until a successful challenge is made pursuant to a statutory or

[341] See below, 'The Requirement of Writing for Dealings in Land'.
[342] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[343] *Nelson v Nelson* (1995) 184 CLR 538; *Flourentzou v Spink* [2019] NSWCA 315; *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 (Edelman J). See also Campbell (n 293); Jamie Glister, 'The Presumption of Advancement' (2011) 33(1) *Sydney Law Review* 39.

equitable cause of action, the parent's legal position is acutely vulnerable to the title holder dealing with the property, or the intrusion of third-party interests. This section discusses the various ways in which the parent's interest may be characterised, and the fragility of those interests in light of indefeasibility. Lastly, this Part discusses the questions surrounding whether the parent can protect their interest by lodging a caveat.

II CONTRACT LAW, THE PRESUMPTION AGAINST LEGAL INTENTION, AND THE REQUIREMENT OF CERTAINTY OF TERMS AND WRITING

A *FAMILIES, CONTRACTS AND INFORMAL CARE ARRANGEMENTS*

In this section we are not concerned with arrangements where the parties have satisfied the formal requirements of a contract by reducing their agreement to writing with clear, defined and enforceable terms.[344] There is no reason why this cannot be done, leaving parties able to pursue a civil action for damages if the terms are breached. Yet, despite the arrangements bearing many hallmarks of a contract, very few FAAs satisfy the formal requirements. At the heart of a contract is a promise made which is supported by consideration.[345] Similarly, reciprocity forms the basis of the accommodation agreement – the exchange of assets for a promise to provide accommodation and in some instances, care. Indeed, the requirement that accommodation and/or care be provided is an essential element in rebutting the presumption that the transfer of money or property was a gift from the parent to the child, as many parents would not dispose of their primary asset and place of residence without an assurance of getting accommodation and care in return.[346] A crucial element in the factual matrix of the FAA is that at the time the agreement breaks down, the parent may have already fulfilled their side of the agreement.[347] Nevertheless, there are numerous obstacles preventing recognition of the agreement as a contract, and these obstacles largely stem from the informal, familial contexts

[344] Although even promises made in writing between family members may not be considered legally enforceable: see Andrew Kull, 'Reconsidering Gratuitous Promises' (1992) 21(1) *Journal of Legal Studies* 39, 45.
[345] For a detailed analysis of the jurisprudential basis of the promise, see Martin Hogg, *Promises and Contract Law* (Cambridge University Press, 2011); TM Scanlon, 'Promises and Contracts' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 86; Carol M Rose, 'Giving, Trading, Thieving, and Trusting: How and Why Gifts become Exchanges, and (More Importantly) Vice Versa' (1992) 44 *Florida Law Review* 295.
[346] See the Presumption of Advancement, at IV.
[347] This is commonly but not always the case. For instance, in *Riches v Hogben* the son had moved from the UK to care for his mother on the basis she would purchase a house and put it in his and his wife's name. The mother then purchased the house in her own name. McPherson J found the son had discharged the onus of establishing legal enforceability based on the seriousness of the undertakings: *Riches v Hogben* [1985] 1 Qd R 292, 296 (McPherson J).

in which the agreements are formed. As was outlined in Chapter 2, FAAs are often undertaken in an atmosphere of stress – for instance, if a parent becomes ill or is widowed. Consequently, arrangements are made 'ad hoc' and without due diligence, let alone with the advice of a legal practitioner. Additionally, requiring the arrangement to be documented can be interpreted as a sign of mistrust and therefore avoided to prevent offending loved ones.[348] It has been suggested that the unarticulated nature of reciprocal relationships within families maximises the value of the family, and a system based on express agreements would destroy the value of the trusting relationship.[349] Similarly, Brian Herd observes that 'documenting, in a written agreement, a loving, caring or supportive personal relationship … is probably an anathema to many Australians'.[350] Therefore, in most circumstances, family accommodation agreements are not reduced to writing and remain informal, private concerns.

Equally contentious is the expectation that care for an elderly parent should be compensated in some way. Until recently, 'intergenerational reciprocity' – whereby adults who have looked after young children are in turn cared for by in older age by their children, has been considered a norm in some societies.[351] Yet this model of unpaid or uncompensated care is becoming less sustainable. Shifting trends in family structures and practices are challenging the normative position, and children are increasingly unable to gratuitously care for ageing parents.[352] While there is an increasing number of women entering the workforce and more gender balance in care – particularly parenting – roles, women are still overwhelmingly responsible for care.[353] At the same time, demand for care is likely to increase with an ageing population.[354] Consequently, the transformative shift in family structures more readily supports a contractual

[348] See Chapter 3 VI(A).
[349] Leslie (n 72) 583.
[350] Herd (n 31) 23.
[351] Carol T Kulik et al, 'Aging Populations and Management: From the Editors' (2014) 57(4) *Academy of Management Journal* 929, 929; Herd (n 31). See also Chapter 7 'Filial Responsibility Laws' and the discussion therein.
[352] Linda Pickard, 'A Growing Care Gap? The Supply of Unpaid Care of Older People by Their Adult Children in England to 2032' (2015) 35(1) *Ageing and Society* 96, 114; SO Daatland, 'Adapting the "Scandinavian Model" of Care for Elderly People' in Organisation for Economic Co-operation and Development, *Caring for Frail Elderly People: Policies in Evolution* (OECD, 1996) 247; Linda Pickard et al, 'Care by Spouses, Care by Children: Projections of Informal Care for Older People in England to 2031' (2007) 6(3) *Social Policy and Society* 353, 353; Ellen Grootegoed, Trudie Knijn and Barbara Da Roit, 'Relatives as Paid Care-Givers: How Family Carers Experience Payments for Care' (2010) 30 *Ageing and Society* 467, 471; Matthew Gray and Ben Edwards, 'Determinants of the Labour Force Status of Female Carers' (2009) 12(1) *Australian Journal of Labour Economics* 5, 5; National Centre for Social and Economic Modelling, *Who's Going to Care? Informal Care and an Ageing Population* (University of Canberra, 2004) <http://library.bsl.org.au/bsljspui/bitstream/1/6028/1/informal_care_NATSEM.pdf>, 10.
[353] Department of Prime Minister and Cabinet, (2023) *National Strategy to Achieve Gender Equality – Discussion Paper*, 10.
[354] Pickard et al (n 352) 362.

model wherein parties derive a mutual benefit and undertake mutual obligations. Despite this, the common law of contract has yet to adapt and move from the traditional model of viewing FAAs within the realm of the 'private'. To a large extent, the exclusion of family arrangements from contract is achieved through the determination of whether parties 'intended' to create legal relations. Determining intention, although assessed objectively, is challenging when the agreement is typically informal and undocumented.

B *Contractual Intention, Domestic Arrangements and Family Accommodation Agreements*

1 *The Genesis of the Presumption*

Broadly stated, a contract is a promise, or a set of promises, which the law will enforce. There are three essential requirements:

> [F]or there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations, and (c) consideration.[355]

The first two of these requirements can prove problematic for parties to a FAA. Consideration is less so, as the reciprocal agreement confers 'some right, interest, profit or benefit accruing to one party, or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other'[356] on both parties. Domestic or family arrangements, however, have traditionally been subject to the presumption that agreements of this type do not give rise to enforceable obligations.[357] The delineation between the commercial functions of a contract and the private nature of the family has developed from an historical aversion to legal enforcement of arrangements between family members, with the party wishing to establish the legal intention bearing the onus of proof that such intention exists.[358] The presumption can be rebutted by referring to contrary evidence but intention is assessed objectively as at the time of the agreement is made. This can be problematic; parents may not have contemplated the

[355] *Modahl v British Athletic Federation Ltd* [2002] WLR 1192, 1221 (Mance LJ). However, there has been some debate whether intention exists as a separate requirement: see Raphael Tuck, 'Intent to Contract and Mutuality of Assent' (1943) 21 *Canadian Bar Review* 123, 123; J Unger, 'Intent to Create Legal Relations, Mutuality and Consideration' (1956) 19(1) *The Modern Law Review* 96, both cited in Ilija Vickovich, 'The Modern Animus Contrahendi: Focusing on Intention Through a Contemporary Lens' (2011) 13 *Flinders Law Journal* 95; Bhawna Gulati, 'Intention to Create Legal Relations: A Contractual Necessity or an Illusory Concept' (2011) 2 *Beijing Law Review* 127.
[356] *Balfour v Balfour* [1919] 2 KB 571, 578 (Atkin LJ)
[357] Ibid; *Chidiac v Maatouk* [2010] NSWSC 386 [177] (Ward J).
[358] *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 [25]–[26] (Gaudron, McHugh, Hayne and Callinan JJ); *Reitano v Reitano* [2012] NSWSC 1127 [38].

breakdown of the arrangement, nor sought legal advice. It is only when the arrangement fails that the impact of not intending a legally enforceable agreement is realised, and most parties to a family accommodation agreement are unaware of the precarious legal situation to which they are exposing themselves.

The rules of contract were largely developed during the industrial revolution, and their operation presupposes transactions are undertaken at arm's length and parties are acting autonomously. Hence the 'will theory' of contract sprang from the nineteenth century ideas of individualism and freedom, and the contract functioned to protect the will of parties.[359] In this way, commercial activity could proceed unhindered in accordance with the freely expressed will of the contracting parties,[360] and intention to be legally bound was inferred from the objective assessment of the circumstances of the formation of the contract.[361] However, the objective assessment allowed courts to limit the reach of contractual liability based on policy and the public interest.[362] As Hedley observes:

> When the court purports to find an intention as to legal relations, it can only be because the court thinks legal liability should be present, and imposes it on the parties. Moreover, when there are indications whether the parties intended liability, it is all too easy for the courts to ignore them. Two main techniques are used … Firstly, the court can arbitrarily narrow the issue to make the in indications appear irrelevant … [Secondly, by] the 'principle of objectivity', which states that if the parties have to all outward appearances contracted, then neither can escape by proving a subjective lack of intention.[363]

In contrast to commercial arrangements, traditionally the common law treated arrangements between married couples as private, and it was inferred that in the context of a marriage the parties did not assume legal obligations.[364] This view was supported by the Church.[365] Inferences, developed as a matter of convenience, thus led to two fundamental presumptions,

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[359] Duncan Kennedy, 'From Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 *Columbia Law Review* 94, 115.
[360] WR Cornish and G de N Clark, *Law and Society in England 1750–1950* (Hart Publishing, 1989) 201.
[361] Jeannie Paterson, Andrew Robinson and Arlen Duke, *Contract: Cases and Materials* (13th ed, Thompson Reuters, 2016) 113.
[362] Stephen Hedley, 'Keeping Contract in its Place – *Balfour v Balfour* and the Enforceability of Informal Agreements' (1985) 5 *Oxford Journal of Legal Studies* 391, 395; BA Hepple, 'Intention to Create Legal Relations' (1970) 28 *Cambridge Law Journal* 122, 134;
[363] Hedley, 'Keeping Contract in its Place' (n 362) 395. See also Sally Wheeler and Jo Shaw, *Contract Law: Cases, Material and Commentary* (Clarendon, 1994) 165; Margaret Thornton, 'Intention to Contract: Public Act or Private Sentiment?' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate/Dartmouth, 2001) 217.
[364] *Baird v Smee* [2000] NSWCA 253 [24] (Handley JA), referring specifically to arrangements between spouses.
[365] Vickovich (n 355).

one in favour of intention to contract in business transactions, and the other against intention in domestic and social cases.[366]

Insofar as contract was concerned, special circumstances had to exist before the law could intervene.[367] Keyes and Byrnes describe the presumption as serving a 'formidable gatekeeper role' and 'perform[ing] a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, privileging the former over the latter'.[368] Indeed feminist scholars have written extensively on the public/private divide and argued that the private realm, as an area where 'the law will not intrude',[369] remains a 'source of women's oppression, not only because the private realm is exempt from liberal principles and political accountability, but also because activity and work in the private realm are not valued like that in civil society'.[370]

2 *Justifications for the Presumption: Atkin LJ in Balfour v Balfour*

In *Balfour v Balfour*, Atkin LJ expresses justifications for the presumption against legal intention in domestic settings, and in doing so reveals the normative policy concerns relating to legal enforcement of domestic agreements.[371] In *Balfour*, a wife brought an action in contract against her husband for his failure to honour a promise to pay her a monthly allowance while he was abroad. Atkin LJ found that even though the wife had provided consideration,[372] the domestic context rendered the agreement unenforceable by the courts due to the 'private' nature of the relationship and a lack of intention by the parties to be legally bound. Although *Balfour* was a case regarding husband and wife, the same principles have been applied to dealings between an adult child and their older parent.[373]

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[366] Ibid 109.
[367] Ronnie Cohen and Shannon O'Byrne, '"Can you Hear Me Now… Good!" Feminism(s), The Public/Private Divide, and Citizens United v FEC' (2013) 20(1) *UCLA Women's Law Journal* 39, 43.
[368] Mary Keyes and Kylie Burns, 'Contract and the Family: Whither Intention' (2002) 26(3) *Melbourne University Law Review* 577, 577–8.
[369] Katherine O'Donovan, *Sexual Divisions and the Law* (Weidenfeld & Nicholson, 1985) 3.
[370] Raia Prokhovnik, 'Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness' (1998) 60 *Feminist Review* 84, 87, cited in Cohen and O'Byrne (n 367) 39. See also Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1992) 12 *Australian Yearbook of International Law* 190, 190–4; Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Stanley Benn and Gerard Gaus (eds), *Public and Private in Social Life* (St Martin's Press, 1983) 281.
[371] *Balfour v Balfour* [1919] 2 KB 571.
[372] Ibid, 578–9.
[373] *Jones v Padavatton* [1969] 1 WLR 328; *Petronijevic v Milojkovic* [2014] NSWSC 1337 [15] (White J); *Smilevska v Smilevska (No 2)* [2016] NSWCA 397 [151]–[156] (Slattery J). The latter case involved an adult daughter-in-law who failed to discharge the onus of showing the promise made gave rise to contractual relations. She had cared for her parents-in-law over a considerable period and was promised 'everything is for you'.

No Intention by Parties to Make Agreements Legally Enforceable

Owing to the intimate nature of the relationship, Atkin J suggests it is incongruous that either party would contemplate litigation as a way of resolving any disputes that arose between them.[374] He states:

> They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the *inception* of the arrangement, *never intended* that they should be sued upon.[375]

Keyes and Burns observe that this can be attributed to an 'overoptimism regarding the future of [the] contracting relationship' and that this approach is not peculiar to families.[376] It may be true that many contemporary commercial relationships do not assume litigation as the primary dispute resolution technique. It is certainly a characteristic of the family accommodation agreement, and particularly true between parent and child. The party's relative social and cultural background may also impact on the assessment of intention. In *Tadrous v Tadrous*, Pembroke J found no intention to contract between two brothers despite the sums involved being in the vicinity of $500,000.[377] His Honour referred to evidence that made clear the 'brothers had a close relationship, that each trusted the other implicitly and that the social customs and cultural characteristics to which they adhered included a strong ethic of mutual assistance between family members'.[378]

Emmett JA in *Sion v NSW Trustee and Guardian* commented that intention is imputed by the court examining what parties said and did in the circumstances, and whether reasonable people would regard the arrangement made in those circumstances as binding.[379] When the circumstances are informal and terms are vague, it would be more likely that the objective observer would find parties did not intend to be legally bound. He also noted that '[t]he presumption applies with diminishing force the more remote the familial connection', so presumably the presumption remains strong between a parent and child.[380] In *Berghan v Berghan*, the court at first instance found that money advanced to a son by his parents gave rise only to a moral obligation to repay it, despite the parties consistently stating the money was a

[374] Keyes and Burns (n 368) 582.
[375] *Balfour v Balfour* [1919] 2 KB 571, 579 (emphasis added).
[376] Keyes and Burns (n 368) 582.
[377] *Tadrous v Tadrous* [2010] NSWSC 1388.
[378] Ibid [4].
[379] *Sion v NSW Trustee and Guardian* [2013] NSWCA 337 [37].
[380] Ibid [40].

loan.[381] The decision was later reversed on appeal. The Queensland Court of Appeal found the express intention that the money was to be repaid was sufficient to indicate an intention to create legal relations. That the motivation to advance the money was to help their son did not impact their intention that the loan agreement be legally binding.[382]

The cases suggest the stronger the trust and confidence between the parties, the less likely it is that the court will find an intention to be legally bound. The particular challenge for the parent wishing to argue breach of contract in a family accommodation context is clear: in order to enter the arrangement, there would be, at the time of the agreement, trust and confidence that the arrangement would proceed. A key issue is that intention is assessed at the time the agreement is made.[383] Atkin LJ specifically refers to the 'inception' of the arrangement. The requisite intention may not exist, not because the parties did not want to be bound to the agreement, but because they *never considered the possibility* they would need to enforce an agreement, or seek a remedy for non-fulfilment or failure of the agreement. Even when assessed objectively, intention may not be found because at the time the agreement is made, the relationship is amicable and parties simply have not turned their mind to contingencies. Extending the test to 'would you have intended to be contractually bound if you had turned your mind to the possibility that the arrangement would break down' would arguably introduce an element of constructive notice of adverse outcomes and push the boundaries of an objective test.

Despite the challenges of discharging the onus of establishing intention, the arrangement can still give rise to legal consequences. While contract prefers to distance itself from creating enforceable obligations within the family context, equity makes no distinction between the public commercial and the private family spheres. The issue of whether there was an intention to create legal relations therefore becomes irrelevant.[384] This point was raised by Lord Diplock in *Pettit v Pettit*:

> [M]any of the ordinary domestic arrangements between man and wife do not possess the legal characteristics of a contract. So long as they are executory they do not give rise to any chose in action for neither party intended that non- performance of their mutual promises should be the

[381] *Berghan v Berghan* [2017] QDC 47.
[382] *Berghan v Berghan* [2017] QCA 236.
[383] *Smith v Hughes* (1871) LR 6 QB 597, 607; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179; JM Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 *Fordham Law Review* 427; The Hon Sir Anthony Mason and Stephen J Gageler, 'The Contract' in Paul Finn (ed), *Essays on Contract* (The Law Book Company, 1987) 1.
[384] The statement must be qualified on the basis that when applying equitable doctrine such as estoppel, courts have made distinctions between experienced commercial operators and private individual: see *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

> subject of sanctions in any court (see *Balfour v Balfour* [1919] 2 K.B. 571). But this is relevant to non-performance only. If spouses do perform their mutual promises the fact that they could not have been compelled to do so while the promises were executory cannot deprive the acts done by them of all legal consequences upon proprietary rights; for these are within the field of the law of property rather than of the law of contract. It would, in my view be erroneous to extend the presumption accepted in *Balfour v Balfour* that mutual promises between man and wife in relation to their domestic arrangements are *prima facie* not intended by either to be legally enforceable to a presumption of a common intention of both spouses that *no* legal consequences should flow from acts done by them in performance of mutual promises with respect to the acquisition, improvement or addition to real or personal property – for this would be to intend what is impossible in law.[385]

The reluctance of contract to recognise agreements between families as having legal force is therefore undermined somewhat by equity being willing to do so.[386] Seddon and Ellinghous observe that '[t]the cases on constructive trust and proprietary estoppel show that rights over property may be generated by agreements that may well not meet the requirements of contract but which are nevertheless enforceable through equitable principles', hence the dividing line between domestic property and contract is becoming increasingly blurred.[387] The doctrines of estoppel, resulting trusts, and constructive trusts offer remedial outcomes broadly based on the substantive unconscionability of the title holder, making the inquiry into intention to be legally bound irrelevant. For the most part these doctrines will have proprietary outcomes, but the discretionary nature of the equitable jurisdiction may see the most appropriate remedy being equitable compensation or an equitable lien.[388] However, in pursuing an equitable cause of action the parent can avoid having to discharge the onus of proving intention to be legally bound, and an equitable remedy may be more generous.[389] A claim based on estoppel (or any other equitable basis) raises the likelihood of the claimant being subject to systemic vulnerability owing to the complexity of the claim and the expense and length of proceedings.[390]

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[385] *Pettit v Pettit* [1970] AS 777, 822.
[386] Andrew Burrows, 'We Do This in Common Law But That In Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1, 1–3.
[387] NC Seddon and MP Ellinghous, *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis Butterworths, 2008) 219. In *Tadrous v Tadrous* [2010] NSWSC 1388, the plaintiff sought specific performance of a contract, but also sought relief based on estoppel, constructive trust, equitable charge and restitution.
[388] See *Dillwyn v Llewelyn* [1862] All ER 384 (conveyance of land); *Giumelli v Giumelli* (1999) 196 CLR 101(equitable compensation); *Morris v Morris* [1982] 1 NSWLR 61 (equitable charge).
[389] The remedies for estoppel are discretionary but can range from enforcement of the promise or the performance of the expectation generated by the promise: *Giumelli v Giumelli* (1999) 196 CLR 101; *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; *Sidhu v Van Dyke* (2014) 251 CLR 505.
[390] See Chapter 5 and 6, and the discussion in Chapter 8 of how the reforms proposed by this thesis address systemic vulnerability.

Courts Should Not Have Jurisdiction Over Private Family Arrangements

Secondly, Atkin LJ holds that, as a matter of policy, it is not appropriate that courts should have jurisdiction over domestic disputes. Referring to arrangements between a husband and wife, Atkin LJ states that '[a]greements such as these are outside the realm of contracts altogether'. Further he states that 'each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted'.[391]

Yet the private nature of the marital or familial relationship is diminished if the relationship is no longer amicable, and when this occurs the courts are willing to allow more contractual freedom. This is borne out by Denning MR's judgement in *Merritt v Merritt*.[392] Unfortunately for those who have entered FAAs consensually, only to have them fail at a later stage, the decision in *Merritt v Merritt*[393] offers little support for their position. In *Merritt,* after a married couple had separated, the husband agreed to transfer the marital home into his wife's name, '[i]n consideration of the fact that you will pay all charges in connection with the house … until such time as the mortgage repayment has been completed … when the mortgage has been completed I will agree to transfer the property into your sole ownership'.[394] When the mortgage had been discharged the husband refused to transfer the property in accordance with the agreement, arguing the agreement was not intended to be legally binding. In a brief judgment, Denning MR distinguished the facts from the arrangements in *Balfour v Balfour*[395] and *Jones v Padavatton*,[396] insofar as in these cases the parties were not estranged. Denning MR stated:

> I do not think those cases have any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

Denning MR suggests that parties who are no longer 'living in amity' negotiate their positions more akin to those to a commercial agreement: they 'bargain keenly', and do not rely on the mutual trust and confidence that exits in an ongoing relationship. However, there seems little to distinguish the position in either situation when the mutual arrangement fails. The primary distinguishing element to whether there exists contractual intention appears to be the parties'

[391] *Balfour v Balfour* [1919] 2 KB 571, 579.
[392] *Merritt v Meritt* [1970] EWCA Civ 6.
[393] Ibid.
[394] Ibid.
[395] *Balfour v Balfour* [1919] 2 KB 571.
[396] *Jones v Padavatton* [1969] 1 WLR 328.

awareness at the time of the agreement, that there is a risk that the promise would not be fulfilled, and therefore there is the possibility of relief. In FAAs, there exists an environment of 'trust and confidence' with little thought given to the failure of the arrangement. Unfortunately, there is very real risk of failure for many reasons, including that children underestimate the level of effort required to provide appropriate care to their parents.

Trivial Matters Risk Opening the 'Floodgates'

The third justification can be described as the 'floodgates' argument. Atkin LJ stated:

> All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations.[397]

Atkin LJ perpetuates the narrative that disputes between families are trivial and inconsequential, and courts are not designed to deal with 'spats' between families over domestic chores or minor arrangements. However, the FAA is characterised by the transfer of significant sums of money or assets between family members. Lucke, writing over 40 years ago and using the FAA as an example, suggests that courts will be more inclined to enforce such undertakings, especially where the promisee has altered their position substantially in reliance on the undertaking.[398] Similarly, in *Price v Southern Cross Television (TNT9) Pty Ltd*, Porter J affirms that in assessing intention, regard must be had to the weight of consideration and the form of detriment experienced by the plaintiff.[399] In any case, the *de minimis* rules exist to separate minor matters from those that are justiciable, and there appears no justification for singling out arrangements made between family members.[400] As Keyes and Burns explain, costs of litigation act as a deterrent to many claims, and courts have processes to deal with numerically small claims via the small claims courts.[401] In any case, FAAs nearly always involve substantial assets.

While the presumption against an intention to create legal relations within the family context is not an impossible onus to discharge, it does place a heavy burden on the plaintiff parent in situations where consideration is paid in the form of assets transferred, and the arrangement breaks down prematurely.

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[397] *Balfour v Balfour* [1919] 2 KB 571, 579.
[398] HK Lucke, 'The Intention to Create Legal Relations' (1970) 4 *The Adelaide Law Review* 419, 423–4.
[399] *Price v Southern Cross Television (TNT9) Pty Ltd* [2014] TASSC 70 [51] (Porter J); see also *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237, 242.
[400] *De minimis non curat lex*: 'the law does not concern itself with trifles'*: Farnell Electronic Components Pty Ltd v Collector of Customs* [1996] FCA 1135.
[401] Keyes and Burns (n 368) 582, 585.

C *The Challenge of Establishing Completeness and Certainty of Contractual Terms*

A lack of clarity of terms can contribute to the finding there was no intention to create legal relations, and therefore no contract. Additionally, for a contract to be enforceable the agreement must contain the essential terms, and those terms must be sufficiently certain.[402] In the commercial context, courts are less likely to find an agreement either incomplete or uncertain when it has been executed in part or full,[403] and the detriment or disadvantage suffered may compensate for the lack of clarity in the arrangements.[404] However, this approach has not been applied as readily to family agreements, and establishing completeness and certainty can prove challenging.[405] A general reluctance to formalise arrangements means the terms of the arrangement remain vague and can fluctuate according to changing circumstances.[406] In *Waldock v Waldock*, Ball J found there was no contract. The case concerned an alleged contract between two brothers (that one brother should care for their parents in exchange for $400,000). Ball J found the absence of clear terms and lack of 'formality' surrounding the conversation between the brothers, meant that no contractual intent could be established.[407] Nonetheless, the courts have not been entirely unwilling to find certainty of terms to establish a binding contract. In *Scheps v Cobb*, an agreement between a father and son that the son retain a life interest in his fathers' house after the father died was challenged by the son's siblings. Burchett J found that, taking into consideration the context of the agreement, the terms were expressed and understood by the parties. He said:

> The language used by Mr Scheps senior is not very precise, but it is of course to be understood against the background of the circumstances that were certainly known to both parties, and in particular their respective situations as they then existed and were in prospect. The father needed and would increasingly need the son's assistance in the home and the son was already facing employment difficulties and would continue to face increasing difficulty with employment and, as a consequence, in putting himself in a position to provide for his own accommodation. In my opinion, Mr Scheps senior meant and was reasonably understood to mean that his son, in return for continuing to provide the care he had provided, would have a right to occupy for his lifetime the house and land at Caringbah free of any rent or occupation fee, and this right was offered and accepted in terms intended to be legally binding. [408]

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[402] *Thorby v Goldberg* (1964) 112 CLR 597, 607; Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co, 2012) [8.12].
[403] *Taluja v Shree Shirdi Sai Sansthan Sydney Ltd* [2016] NSWCA 158 [52].
[404] *Price v Southern Cross Television (TNT9) Pty Ltd* [2014] TASSC 70 [51] (Porter J).
[405] Despite the comments by Lucke above (n 398), this has not been borne out in the cases.
[406] Although, as explained above, supporters of relational contract theory would propose this behaviour is common in commercial contracts as well: *Keremelevski v Keremelevski* [2008] NSWSC 1290.
[407] *Waldock v Waldock* [2012] NSWSC 258. See also *Welch v Welch* [2012] NSWSC 1128.
[408] *Scheps v Cobb* [2005] NSWSC 455 [30] (Burchett AJ).

In *Scheps*, the lack of objective clarity did not prevent the finding of a contract. Burchett J's wholistic approach saw an assessment of understanding in the context of the particular family environment.

D *The Requirement of Writing for Dealings in Land*

A parent may wish to establish a contractual undertaking over property will give rise to an interest in the land, or that the adult child has intended to create an interest in the property in favour of the parent. In these circumstances, the formalities concerning writing requirement and land come into play. In *Smilevska v Smilevska (No 2,)* these issues were raised but with respect to a promise has been made to an adult child by a parent to give the child an interest in land, in exchange for care provided by the adult child.[409] In a FAA, there are no writing requirements if the action brought is for breach of a promise to care, or for the return of *money*.[410] However, if the remedy sought is a proprietary one based on a promise, an undertaking or guarantee that the parent would gain interest in real property will not be enforceable if the requirements of writing are not observed.[411] The parent in these circumstances faces two hurdles; first, alleging a contract actually exists and, secondly, that the necessary writing requirements have been satisfied. Writing requirements are soundly based in policies to prevent fraudulent dealings in land; however, non-compliance with statutory formalities is another consequence of the informality characterising family accommodation agreements, and a further contributor to the parent's legal-situational vulnerability. The second circumstance where writing requirements are relevant is where the parent alleges there is a voluntary disposition or creation of an interest in land. In these circumstances writing requirements do not preclude an argument based on part performance or the operation of a proprietary interest being recognised by equity through either a constructive, resulting or implied trust.[412] Yet in being required to do so, we are forced to 'loop back' into equitable claims, meaning the parent is subject to the various strains of vulnerability associated with these claims.

1 *Background to the Writing Requirements*

[409] See eg *Smilevska v Smilevska (No 2)* [2016] NSWSC 397.
[410] Depending on circumstances, the remedy sought could be damages, restitution, rescission or specific performance.
[411] See eg *Riches v Hogben* [1996] 1 Qd R 315 (although this unusually involved the plaintiff son alleging a contract existed between him and his mother).
[412] *Conveyancing Act 1919* (NSW) s 23C(2).

Historically, land ownership has been the primary indicia of wealth, and consequently much of our legal and social developments stem from the regulation and use of land.[413] Prior to the enactment of the *Statute of Frauds and Perjury 1677* (Imp), land transactions were publicised through public ceremonies, and ownership evidenced through court rolls and rules of inheritance, but evidencing ownership was problematic.[414] The statute was enacted to prevent the fraudulent enforcement of oral promises,[415] and strove to address the need for certainty within contractual relationships, the importance of the parties giving serious deliberation to a decision to enter a land transaction and the need to memorialise the agreement for later reference.[416] From a governmental perspective, accurate land holding records assisted in the imposition and administration of land taxes and charges, making avoidance more difficult.

2 *Writing Requirements for Contracts Relating to Land*

As a general proposition, a contract may be oral, in writing or partly written and partly oral.[417] However, contracts for either the sale or disposition of land, or interests in land, must be in writing and signed by the party or parties to be bound.[418] The writing does not have to be in the form of a formal contract; a letter, note or memorandum will suffice,[419] including electronic forms of correspondence such as email or electronic contracts.[420] The writing requirement may also be satisfied if the terms are set out across a number of documents.[421]

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[413] Whereas now wealth is spread across other forms of moveable property such as shares; Bernard Rudden, 'Things as Thing and Things as Wealth' (1994) 14(1) *Oxford Journal of Legal Studies* 81, 82; See also Andro Linklater, *Owning the Earth, The Transforming History of Land Ownership* (Bloomsbury, 2014).

[414] For instance, the 'livery of seisin': see Philip Hamburger, 'The Conveyancing Purposes of the Statute of Frauds' (1983) 24(4) *The American Journal of Legal History* 354, 355.

[415] See generally Lionel Morgan Summers, 'The Doctrine of Estoppel Applied to the Statute of Frauds' (1931) 79(4) *University of Pennsylvania Law Review* 440, 440–5; George N Stepaniuk, 'The Statute of Frauds as a Bar to an Action in Tort for Fraud' (1985) 53(5) *Fordham Law Review* 1231,

[416] Sharon Christensen, William Duncan and Rouhshi Low, 'The Requirements of Writing for Electronic Land Contracts – The Queensland Experience Compared with Other Jurisdictions' (2003) 10(3) *Murdoch University Electronic Journal of Law* [4]–[5]; See also *Actionstrength Limited v International Glass Engineering In.Gl.En.SpA* [2003] UKHL 17 [19]–[20] (Lord Hoffman).

[417] Peter Radan, John Gooley and Ilija Vickovich, *Principles of Australian Contract Law* (4th ed, Lexis Nexis Butterworths, 2017) [8.1].

[418] *Civil Law (Property) Act 2006* (ACT) s 204(1); *Conveyancing Act 1919* (NSW) s 54A(1); *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (Tas) s 36(1); *Instruments Act 1958* (Vic) s 126(1) and *Property Law Act 1958* (Vic) s 53(1)(a); *Law Reform (Statute of Frauds) Act 1962* (WA) s 2 (applying the *Statute of Frauds 1677* (Imp) s 4.

[419] *Thirkell v Cambi* [1919] 2 KB 590; *Dinian v Harper* [1922] VLR 49.

[420] See generally Christensen et al (n 416) and citations within.

[421] *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110, 130 (Jenkins LJ).

Non-compliance with statutory writing requirements may rise to an equitable interest through the doctrine of specific performance.[422] While the equitable interest can be protected by a caveat, only registration of the interest will confer legal title. If the land is old system, in most states there must be delivery of a deed of conveyance from the adult child to the parent.[423]

Many parents having contributed to the purchase of property or having made significant financial contributions may be surprised (and dismayed) to discover the challenges they face to gain recognition of an interest in property they believed they held or were entitled. Misleading information provided by Centrelink can contribute to this mistaken belief, as the website states that if the property is sold, 'the owner can't take away your granny flat interest'.[424] The website does not explain the fragile nature of the interest,[425] or significant legal challenges that face a parent wishing to enforce that interest.

Although the formalities requirements are generally designed to prevent fraud, in the context of a FAA strict adherence to these requirements might themselves allow an adult child to deny the existence of a contract to avoid obligations or undertakings made during the agreement. The equitable doctrine of part performance may provide some assistance; it provides that where the plaintiff has partly carried out the contract in reliance on the defendant's promise, equity may enforce the contract despite non-compliance with formalities. The plaintiff does, however, bear the onus of establishing that acts of part performance are unequivocally referable to some such contract as alleged.[426] The onus can prove difficult to discharge when, as in the context of family arrangements, there can be a multitude of explanations as to why parties undertook obligations.

3 *Writing Requirements for the Disposition, Devolution or Acquisition of Land or Evidence to Title of Land*

Putting aside a contractual agreement, the parent may allege the adult child voluntarily intended to create an interest in the property in the parent's favour, or the adult child held all or part of

[422] *Maddison v Alderson* (1883) 8 App Cas 467 (Lord Selbourne LC); *Khoury v Khouri* (2006) 66 NSWLR 241 (Bryson JA).
[423] *Conveyancing Act 1919* (NSW) s 23B(1); *Law of Property Act 2000* (NT) s 9(1); *Law of Property Act 1936* (SA) s 28(1); *Conveyancing and Law of Property Act 1884* (Tas) s 60(1); *Property Law Act 1958* (Vic) s 52(1); *Property Law Act 1969* (WA) s 33(1). In Queensland, the written document need not be a deed: *Property Law Act 1974* (Qld) s 10(1).
[424] <https://www humanservices.gov.au/individuals/topics/granny-flat-interest/27756#a5>.
[425] See Part III below.
[426] *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Maddison v Alderson* (1883) 8 App Cas 467, affirmed in Australia in *Pipikos v Trayans* [2018] HCA 39.

the property on express trust for the parent. Once again, the writing requirements would pose some difficulty as in all Australian jurisdictions a written document signed by the person (or their agent) is required to create or dispose of an interest in land.[427] The parent may wish to argue the adult child declared themselves trustee of part of the property in favour of the parent. In these circumstances the trust would exist from the time of declaration; however, the trust must be 'manifested and proven' by writing.[428] Again, the parent bears the onus of proving such a trust.[429] This requirement, while less stringent than the writing requirements concerning contracts for the sale of land, also derived from the *Statute of Frauds 1677* (Imp).[430] Non-compliance with these requirements would not prevent raising an argument based on implied, resulting or constructive trusts, but the complexity associated with these actions may be a deterrent.[431] Additionally, an express trust of land may be proved by oral evidence where the statutory writing requirements are used as an instrument of fraud. In *Rouchefoucauld v Boustead*, Lindley LJ stated that a trustee who knows the land is conveyed on the basis it should be held on trust, cannot deny the trust by pointing to the lack of written evidence proving the trust.[432] In these circumstances, oral evidence can be relied upon that the conveyance was made pursuant to a trust. If, however, the parent claims a trust exists, it would have to comply with the requirements of an express trust – namely, certainty of intention, subject matter and object.[433] Given the uncertainty characterising these arrangements, establishing the requisite degree of certainty, particularly of intention and subject matter will be difficult.

III THE PRESUMPTION OF ADVANCEMENT

[427] *Civil Law (Property) Act 2006* (ACT) s 201; *Conveyancing Act 1919* (NSW) s 23C(1*); Law of Property Act 2000* (NT) s 10; *Property Law Act 1974* (Qld) ss 10, 11; *Law of Property Act 1936* (SA) s 29; *Conveyancing and Law of Property Act 1884* (Tas) s 60(2); *Property Law Act 1958* (Vic) s 53(1); *Property Law Act 1969* (WA) s 34(1).
[428] Ibid.
[429] *Chase v Chase* [2020] NSWSC 1689.
[430] The relevant provisions of the *Statute of Frauds* were: s 7. All declarations or creations of trusts or confidences of any lands tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of no effect: s 8: 'Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made. Anything herein before contained to the contrary notwithstanding.'
[431] *Conveyancing Act 1919* (NSW) s 23C(2); *Civil Law (Property) Act 2006* (ACT) s 201*; Law of Property Act 2000* (NT) s 10; *Property Law Act 1974* (Qld) s 11*; Law of Property Act 1936* (SA) s 29; *Conveyancing and Law of Property Act 1884* (Tas) s 60(2); *Property Law Act 1958* (Vic) s 53; *Property Law Act 1969* (WA) s 34.
[432] *Rouchefoucauld v Boustead* [1897] 1 Ch 196, 206; William Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 95.
[433] *Knight v Knight* (1840) 49 ER 58.

A *The Presumption of Advancement and the Resulting Trust*

The presumption of a resulting trust, and the counter-presumption of advancement are particularly relevant to FAAs. When there is a transfer of property for no consideration from one person to another, equity presumes the recipient holds the property in resulting trust for the donor.[434] Similarly, if two or more persons contribute to the purchase of property, and that property is put into the names of one of the parties, then equity will presume a resulting trust in favour of the other party proportionate to their contribution.[435] Equity 'presumes' the legal title holder holds the property wholly or partly on trust, as a default rule and in the absence of any contrary explanation.[436] However, when transfers have occurred in certain prescribed relationships, including parent to child, equity presumes the transfer was a gift and a resulting trust will not arise.[437] In other words, when a parent transfers property to an adult – for instance, to contribute to the building of a house where they will all cohabit – and the property is in the name of the adult child, equity presumes the transfer of money to be a gift.

In *Xiao Hui Ying v Perpetual Trustees Victoria Ltd*, the court observed that both the presumption of resulting trust and advancement operate as aids in deciding the transferor's intention.[438] Glister, however, contends that the presumption of advancement is not a presumption at all; rather, it constitutes an absence of any reason why a resulting trust should arise.[439] He explains:

> [T]he presumption of advancement is not, if viewed in isolation, strictly a presumption at all. It is simply that there are certain relationships in which equity infers that any benefit which was provided for one party at the cost of the other has been so provided by way of 'advancement' with the result that the prima facie position remains that the equitable interest is presumed to follow the legal estate and to be at home with the legal title or, in the words of Dixon CJ, McTiernan, Fullagar and Windeyer JJ in *Martin v Martin* (1959) 110 CLR 297, that there is an 'absence of any reason for assuming that a [resulting] trust arose'.[440]

[434] Except in the case of voluntary transfers of Torrens title land: see below.
[435] *Calverley v Green* (1984) 155 CLR 242, 245–7 (Gibbs CJ).
[436] Rickett and Grantham (n 292) 19.
[437] Campbell (n 267) 233–4.
[438] *Xiao Hui Ying v Perpetual Trustees Victoria Ltd* [2015] VSCA 124, [39]–[40] (Beach, McLeish JJA and Dixon AJA). See also *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 [390]–[395] (McMillan J); *Australian Building & Technical Solutions Pty Ltd v Boumelhem* [2009] NSWSC 460 [119]–[124] (Ward J).
[439] For an analysis concerning the foundations of the presumption of advancement, contrasting the 'absence' approach and the 'sub-rule' model. See Glister, 'The Presumption of Advancement' (n 343).
[440] *Calverley v Green* (1984) 155 CLR 242, 267 (Deane J) cited in *La Housse v Counsel* [2008] WASCA 207 [34]. See also *Anderson v McPherson (No 2)* [2012] WASC 19 [134] (Edelman J)

The presumption applies to transfers from parents to children,[441] husbands to wives, and fiancés to fiancées.[442] To rebut the presumption, the parent is required to establish that the transfer of money to a child is causally connected to a reciprocal arrangement involving accommodation, and therefore should not be regarded as a voluntary gift. The parent's position is further challenged, in some jurisdictions at least, where statute provides that voluntary transfers of general law *land* do not give rise to a resulting trust, unless the transferor expresses an intention to create a trust.[443] This is relevant where the parent has transferred real property under the FAA. The position for Torrens title land is less clear, except in NSW where the statute has been found to apply to Torrens title land.[444] Therefore, for old system land, NSW Torrens title and, arguably, Torrens title in Queensland, Western Australia and the Northern Territory, these types of transfers are treated as gifts and a parent would have to rely on equitable doctrines such as undue influence or unconscionable conduct to reverse the transaction. In Victoria, legislation specifically provides that it does not limit or effect any principles relating to the implication of resulting trusts.[445] In South Australia, Tasmania and the Australian Capital Territory, voluntary transfers of land are presumed to be held by the donee on resulting trust unless they are made to a child, in which case the presumption of advancement applies and they are presumed to be gifts.[446] The question of whether the property or assets was advanced by a parent to an adult child is a commonly raised in failed FAAs[447] but has also been an issue in bankruptcy proceedings[448] and family law disputes.[449]

B *The Basis of the Presumption of Advancement*[450]

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[441] Including those *in loco parentis patris*: *Amit Laundry Pty Ltd v Jain* [2017] NSWSC 1495 [248] (Ward CJ); *Shephard v Cartright* [1955] AC 431, 445.

[442] The presumption applies to a mother with respect to her daughter: *Nelson v Nelson* [1995] HCA 25; but not to a son-in-law: *Yoshino v Niddrie* [2003] NSWSC 57, or between uncle and nephew: *Tjen v Bilic* [2017] NSWSC 364; cited in Richard McCullagh, *Australian Elder Law: Accommodation, Agency and Remedies* (Thompson Reuters, 2018) [22.190]. See also *McGregor v Nicol* [2003] NSWSC 332 (presumption not applied between siblings) and *Z & Z* (2005) 34 Fam LR 296 (no presumption of advancement between parents and children-in-law).

[443] *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6(3); *Property Law Act 1974* (Qld) s 7(3); *Property Law Act 1969* (WA) s 38.

[444] *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 NSWLR 273, 281 (Windeyer J); *Bhana v Bhana* [2002] NSWSC 117; *Drayson v Drayson* [2011] NSWSC 965; *Voukidis v C & O Voukidis Pty Ltd (in liq)* [2018] VSC 267; cf *Ryan v Hopkinson* (1990) 14 Fam LR 151 (Bryson J).

[445] *Property Law Act 1958* (Vic) s 19A(3),(4).

[446] In these jurisdictions the presumption of resulting trust still applies: see *Wirth v Wirth* (1956) 98 CLR 228, 236-7 (Dixon CJ).

[447] See eg *Swettenham v Wild* [2005] QCA 264; *Mainieri v Cirillo* [2014] VSCA 227; *Spink v Flourentzou* [2019] NSWSC 256.

[448] *Aravanis (Trustee), in the matter of Gillespie (Bankrupt) v Gillespie* (2014) FCA 630.

[449] *Vadisanis v Vadisanis* [2014] FamCAFC 97.

[450] See generally Jamie Glister, 'The Presumption of Advancement' (n 343) 289.

Glister observes that the cases have provided a range of justifications for the presumption of advancement, without any identification of a singular cause. He identifies 'an equitable obligation to advance the recipient, [the] recognition of legal duties to maintain, natural love and affection between the parties, and simple probability of intention'.[451] More recently, Edelman J reviewed the authorities and concluded that 'at this stage of development of the law in relation to the "presumption of advancement", all that can be said is that it provides for a list of relationships where the presumption of resulting trust does not apply'.[452] Sir George Jessel MR in *Bennet v Bennet* found that the presumption arises out of a 'moral obligation to give'.[453] Yet, as Susan Barkehall Thomas points out, there may be a multitude of reasons beyond those outlined by Glister that parents would transfer assets to their adult children. These include, among others, to minimise tax liabilities,[454] to maintain a pension entitlement,[455] to obtain financial or government benefits[456] or as a result of pressure from family members.[457] As the donee in the FAA is an adult child, there seems little scope for the justification being an obligation to maintain the child.[458] The English Court of Appeal found the presumption to be weak when the child was an adult and able to manage her own affairs.[459] The Canadian case of *Pecore v Pecore* affirmed the existence of the presumptions of advancement but severely curtailed its scope.[460] First, the majority found that the presumption is based on the obligation to support, and therefore expires once the child reaches eighteen.[461] Secondly, the majority expressed the view that in cases where elderly parents have transferred property to adult children, 'there should be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs'.[462] In Australia, most cases do not distinguish circumstances where the donee has

[451] Glister, 'The Presumption of Advancement' (n 343) 41 citing *Bennet v Bennet* (1879) 10 Ch D 474; *Pecore v Pecore* [2007] 1 SCR 795; *Sayre v Hughes* (1868) LR 5 Eq 376; *Wirth v Wirth* (1956) 98 CLR 228.
[452] *Anderson v McPherson (No 2)* [2012] WASC 19, [132] (Edelman J).
[453] *Bennet v Bennet* (1879) 10 Ch D 474, 478.
[454] *Wilkins v Wilkins* [2007] VSC 100.
[455] *Allen v Allen* [1994] FamCA 101, [64].
[456] *Nelson v Nelson* (1995) 184 CLR 538.
[457] *Gillian Fisher-Pollard by her tutor Miles Fisher-Pollard v Piers Fisher-Pollard* [2018] NSWSC 500; Susan Barkehall Thomas, 'Parent to Child Transfers: Gifts or Resulting Trusts?' (2010) 18(1) *Australian Property Law Journal* 75, 75–6.
[458] Cf *Paulet v Stewart* [2009] VSC 60.
[459] *Laskar v Laskar* [2008] 1 WLR 2695 [20] (Lord Neuberger).
[460] *Pecore v Pecore* [2007] 1 SCR 795.
[461] Ibid [35]–[36]. However, Abella J (diss) found the presumption was based on love and affection, therefore extended beyond minors: at [89]–[102].
[462] Ibid [34].

reached independence[463] or was an adult when the property was bought.[464] However, in *Wong v Wong* it was acknowledged that the presumption was 'weaker' where the party advanced was an educated adult son, and the parent 'illiterate and uneducated'.[465] For the most part, Australian cases confirm normative assumptions of the existence of an overarching benevolent intention of parents to financially benefit their children. The following statement by Ormiston JA bears this out:

> Every day of the week, indeed far more frequently, parents make gifts to children though they might be disadvantageous to themselves. On other occasions, as was the case here, children and their parents arrange to employ their funds, primarily the parents' funds, to build 'granny flats' and the like attached to new and old houses, in circumstances where it is more than apparent that the principal benefit will be received by the children either in the short or in the long term. Such demonstrations of natural generosity are not to be discouraged by the law: indeed the presumption of advancement in certain defined circumstances has been well known to courts of equity for hundreds of years. If there was some disadvantage to the appellant in the present case, and that is by no means obvious … at least to the extent that the countervailing advantages and disadvantages produced no overwhelming benefit, that would not call for interference by the courts, unless there were some factor which showed that such natural generosity was out of character with the parties' preceding relationship.[466]

In some cases, a benevolent intention by a parent toward their child may well play a part in a decision to enter a FAA.[467] However, as discussed below, the arrangement is characterised by the exchange of benefit. When the 'principal benefit [is] received by the children',[468] it is evidence of a dual source of situational vulnerability for the parent. First, the operation of the presumption itself is a source of legal-situational vulnerability. Secondly, a parent's willingness to undertake an improvident transaction based on obligations of 'natural love and affection' (rather than purely self-interest), which largely benefits their child, amounts to personal-situational vulnerability. While legal-situational vulnerability may be addressed through law reform,[469] personal-situational vulnerability only falls within the reach of legal

[463] *Nelson v Nelson* (1995) 184 CLR 538; *Callaghan v Callaghan* (1995) 64 SASR 396; *Duong v Duong* [2018] NSWSC 1696; *Siemianowski v Sellers* [2009] NSWCA 245; *Smith v Smith* [2007] NTSC 31 [29]
[464] *Sleboda v Sleboda* [2008] NSWCA 112.
[465] Although acknowledging it was weak, the presumption was not rebutted: *Wong v Wong* [2008] NSWSC 330, [27]–[28] (White J).
[466] *Mitchell v 700 Young Street Pty Ltd* [2003] VSCA 42, [2] (Ormiston JA).
[467] Even if a benevolent intention can be identified, gifts rarely exist without an element of reciprocity. There is an intriguing body of literature dealing with normative behaviour and gifts; however, it is beyond the scope of this thesis to discuss it in detail: see eg Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Society* (Cohen & West, 1969); Jane B Baron, 'Gifts, Bargains and Form' (1989) 64 *Indiana Law Journal* 155; Rose (n 345); Kull (n 344) 21 *Journal of Legal Studies* 39; Leslie (n 72).
[468] *Mitchell v 700 Young Street Pty Ltd* [2003] VSCA 42, [2] (Ormiston JA).
[469] See Chapter 7 'Doctrinal Reforms'.

regulation when the behaviour of the parties gives rise to undue influence or unconscionable conduct.[470]

C *Rebutting the Presumption of Advancement*

While it is true that the parent bears the onus of rebutting the presumption of advancement,[471] in many cases the evidence of reciprocity characterising the arrangement works in the parent's favour. In *Bosanac v Commissioner of Taxation*, the High Court of Australia reaffirmed the existence of the presumption of advancement, finding that the principles were too enshrined in Australia's law to be abolished.[472] However, they did state that the presumption only arises in limited circumstances where there is a paucity of evidence as to an intention to declare a trust. Chief Justice Kiefel and Gleeson J explained that 'the presumption cannot prevail over the actual intention of the party paying the purchase price as established by the overall evidence'.[473]

Therefore, the facts and intentions of the parties are to carry more weight than presumptions of advancement or resulting trusts. Nonetheless, the parent still bears the onus of adducing evidence of actual intention at the time of transfer, that is inconsistent with the making a gift.[474] The challenge for the parent is to establish a causal connection between the transfer made and the arrangement for accommodation and care. When money is transferred but there is no understanding that it will be put towards the property (either to improve it or contribute to mortgage payment), or that the transfer was causally connected to an obligation to care, it may be harder to rebut the presumption that it was a gift. Therefore, rebutting the presumption is crucial when the parent wishes to establish a proprietary interest pursuant to an equitable cause of action.[475] If the property transferred is not 'linked' to the property in dispute, there is nothing to support the cause of action. A threshold question to investigate is whether the parent would have transferred the property without the assurances of accommodation. It is very unlikely that

[470] Although law reforms aimed at introducing a presumption of undue influence for parent to child transfers may address this.
[471] *Vadisanis v Vadisanis* [2014] FamCAFC 97 [42]–[43]; *Calverley v Green* (1984) 155 CLR 242, 252, 262, 269–70.
[472] *Bosanac v Commissioner of Taxation* (2022) 405 ALR 424.
[473] Ibid [13] (Kiefel CJ and Gleeson J).
[474] *Jagoda & Jagoda and Anor* [2017] FamCA 1037, [384]; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364–5; *Nelson v Nelson* (1995) 184 CLR 538, 547; *Martin v Martin* (1959) 110 CLR 297, 304; Gino Dal Pont, *Equity and Trusts in Australia* (6th ed, Lawbook Co, 2015) [26.145].
[475] For instance, a constructive trust. In *Mainieri v Cirillo* [2014] VSCA 227, money was transferred by the mother to her son and a written agreement stated it was in consideration for accommodation and care. In an action by the mother claiming a constructive trust over the property proportionate to her contribution, the son argued there was nothing in the agreement stating the money would be used towards the mortgage.

an elderly person would deprive themselves of their primary place of residence without some assurance of security of tenure with the child. Several cases bear this out.

In *Djmal v Cemal*,[476] the plaintiff mother was the owner of a house in Auburn. Her son (the first defendant) suggested that she sell her property and use the proceeds to buy a vacant block of land on which he would build a house where she, her daughter and the first defendant and his wife could live. She sold her property and the money was used to purchase a block of land, as well as for costs associated with the purchase. Excess funds from the sale of her house were deposited in a bank account in the name of her son and his wife. The Court found that while the relationship was one that gave rise to the presumption of advancement, it was rebutted by evidence that the plaintiff's intention to advance funds was conditional on the property being acquired in joint names, and the funds being used for the construction of a house or houses in which she and her daughter could live. The failure of that condition was enough evidence to rebut the presumption. Similarly, in *Cirillo v Maneiri* Randall AsJ observed that had Mrs Cirillo's transfer of $240,000 to her son been a gift there would have been discussion about the consequences of making such a gift and, in particular, discussions about where she would reside given another property owned by her son was leased.[477] This was above all so given the amount transferred substantially depleted her own resources.

Whether other siblings would be effectively disinherited may also demonstrate the transfer was not an outright gift. In *Spink v Flourentzou*, Mrs Spink, a 68-year-old pensioner with three adult children, advanced approximately $150,000 from the sale of her property to her daughter and son-in-law on the understanding they would purchase a house together.[478] A house was purchased, but after approximately three years the relationship deteriorated, and Mrs Spink was asked to leave. Her daughter and son-in law alleged the money advanced was an unconditional gift representing her daughter's 'inheritance conferred prematurely'.[479] Robb J observed that

> as between the members of a family the choice may not be limited to the binary one of a payment being a gift on the one hand, or a loan on the other. It is possible that Mrs Spink may have understood that the proposal was that she would pay the money to Dianne and Mario, and that she would not have a right to demand it back if she wished to do so, but that she retained some rights that meant that the payment was not entirely a gift.[480]

[476] *Djmal v Cemal & Ors* [2015] NSWSC 1125.
[477] *Cirillo v Mainieri* [2013] VSC 399 [35] (Randall AsJ). See also *Spink v Flourentzou* [2019] NSWSC 256 [78]; *Dearing v Dearing* [2009] NSWSC 1394 [35].
[478] *Spink v Flourentzou* [2019] NSWSC 256.
[479] Ibid [13].
[480] Ibid [111]. See also *Allen v Allen* [1994] FamCA 101 [48]–[49].

Robb J looked to evidence indicating Mrs Spink anticipated that on her death her daughter who had received the payment (Dianne) would be under a personal obligation to pay an amount to her other daughter (Denise.) Although the arrangement did not amount to a legal interest in the property, it did go towards evidencing the transfer was not an outright gift:

> More significantly, the statement made by Mrs Spink to Denise is, on the evidence, telling as to what she understood the arrangement with Dianne and Mario to be. Dianne was to have a personal obligation, on Mrs Spink's death, to pay half of Mrs Spink's contribution to the purchase of the Casula property to Denise. That personal obligation would be inconsistent with an arrangement entitling Mrs Spink to call for the sale of the property at any time, and would contemplate that the property would remain Dianne's and Mario's. Assuming that Mrs Spink was able to live at the property for the remainder of her lifetime, the only obligation on Dianne on her death would be to pay half of Mrs Spink's share to Denise. Although Mrs Spink's share was not specifically identified, it probably was intended by Mrs Spink as referring to the amount that Mrs Spink gave to Dianne and Mario.[481]

As Robb J has explained, the circumstances in which the advancement is made may not be an outright gift, nor amount to a loan that requires repayment. In *Spink*, the arrangement was premised on Mrs Spink's understanding that she retained some interest that would result in an obligation by one daughter to pay out the other on Mrs Spink's death, so as not to disinherit one child. The conditional gift was therefore inconsistent with the interpretation that the money was an unqualified gift.[482] An appeal of the decision *Spink v Flourentzou* was dismissed by the New South Wales Court of Appeal,[483] which determined that the payment by Mrs Spink to her daughter was a conditional gift made with the intention of obtaining a right of residence in the property. As such, she had an interest in the land that manifested as an equitable charge over the property.

The Queensland Court of Appeal's judgment in *Swettenham v Wild* also viewed the transfer as something less than an outright gift and looked to the conditions by which the gift would continue.[484] Whether the presumption will be rebutted will depend on how the court interprets the parent's intention at the time of the transfer and the understanding between the parties concerning continued accommodation and care. In *Swettenham v Wild*, the Court at first instance found the presumption of advancement was not rebutted.[485] Here the plaintiff father entered into an arrangement with his daughter that he would contribute the majority of purchase

[481] Ibid [204].
[482] Ibid [6].
[483] *Flourentzou v Spink* [2019] NSWCA 315.
[484] *Swettenham v Wild* [2005] QCA 264.
[485] *Swettenham v Wild* [2004] QSC 420 (Mullins J).

price for a house with granny flat on condition that he could reside in granny flat for remainder of his life. The property was originally purchased in the father's name, but the property was subsequently transferred to his daughter and the consideration expressed as 'natural love and affection'.[486] On the breakdown of the relationship, the father moved out of the granny flat and sought an equitable interest in the property in proportion to his contribution. The defendant daughter argued the transfer was a gift and conceded only that her father should be entitled to compensation equal to the value of his right to reside in the granny flat for the remainder of his life. The Court found that the agreement concerning the plaintiff's right to reside did not rebut the intention to advance a gift to his daughter.[487] On appeal, the Court took a different view.[488] Williams JA determined that the parties understood that a gift was made, but that understanding was 'dependent on a continuing state of affairs or relationship or common endeavour'.[489] He found that '[w]here that common endeavour breaks down, the presumption of advancement may no longer apply' and that on the failure of the joint endeavour, a constructive trust arose.[490]

IV THE LEGAL-SITUATIONAL VULNERABILITY RAISED BY THE DOCTRINE OF INDEFEASIBILITY

Contested FAAs commonly involve the parent arguing they have an interest in the property that is the subject of the arrangement.[491] In some instances, a parent may arrange to be registered on the title as either a joint tenant or tenant in common, but this is exceptional.[492] Typically, a FAA would see legal title to the property being in the name of the adult child.[493] As such, the adult child has indefeasible title to the property and the parent faces numerous challenges if they seek to challenge that title. The failure to anticipate contingencies, coupled with unfamiliarity with the law, means parties are often unaware of the nature of these challenges or hold a mistaken belief that they in fact have some manner of interest in the property. In *Spink v Flourentzou*, evidence given by Mrs Spink revealed that she thought that by providing the money to her son-in-law Mario and her daughter Dianne she 'would become

[486] Ibid [16].
[487] Ibid [29].
[488] *Swettenham v Wild* [2005] QCA 264.
[489] Ibid [35] (Williams JA).
[490] Ibid.
[491] In contrast to alleging a breach of contract.
[492] See eg *Kriezis v Kriezis* [2004] NSWSC 167 where an elderly couple held the property as joint tenants with their son and daughter-in-law; *Duong v Duong* [2018] NSWSC 1696 where property was purchased by mother and son as joint tenants.
[493] Or the child and their spouse.

a co-owner of some type' in the property that was eventually.[494] Her entry into the arrangement, despite concerns expressed by some of her family and friends and her unwillingness to formally document the arrangement, was motivated by her full trust in all her children, including Dianne and by extension Mario.[495]

The goals of the Torrens system are based soundly on transparency, efficiency and certainty, but the security of title that indefeasibility ensures for the titleholder leaves a parent in a legally vulnerable position because of the fragility, or in some cases the absence, of any interest in the property. The challenges created by the doctrine of indefeasibility for a parent can be divided into four separate but interconnected issues.

First, the transfer of assets or the financial contribution to a property, does not give rise to any *legal* interest in that property, as any legal interest would need to be registered.[496] The interest may amount to a bare licence to reside for life, but these are personal interests and do not entitle the licence holder to any proprietary right to the property. Neither will they support a caveat.[497] If equity determines, however, that revoking the licence amounts to unconscionable conduct, the licence may amount to a proprietary interest.[498]

Secondly, by virtue of their contribution a parent may claim an equitable interest in the property. However, establishing the existence and nature of the equitable interest requires undertaking proceedings to prove circumstances that would amount to an *in personam* exception to indefeasibility.[499] If the cause of action potentially gives rise to a remedial constructive trust, the proprietary interest will not 'exist' until declared by the court.[500] Even so, the constructive trust is a remedy of last resort, and in the exercise of its discretion a court

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[494] *Spink v Flourentzou* [2019] NSWSC 256.
[495] Plaintiff's outline of closing submissions [36]. See also *Lawrence v Branch* [2002] WASCA 292 where the plaintiff mother believed her financial contributions to property held by her daughter would give her an interest in the land.
[496] Unless it was a short term lease: *Real Property Act 1900* (NSW) s 42(1)(d); *Real Property Act 1886* (SA) ss 69(h), 119; *Land Title Act 1994* (Qld) s 185(1)(b); *Land Title Act 2000* (NT) s 189(1)(b); *Transfer of Land Act 1893* (WA) s 68; *Land Titles Act 1980* (Tas) s 40(3); *Land Titles Act 1925* (ACT) s 58(d).
[497] *La Martina v Penney* [1968] SASR 411, cited in *Irons v Irons* [2007] SADC 54 [26] (Millsteed J).
[498] See *Irons v Irons* [2007] SADC 54.
[499] For instance pursuant to an estoppel or a failed joint venture: *Muschinski v Dodds* (1985) 160 CLR 583; *Giumelli v Giumelli* (1999) 196 CLR 101. A finding of fraud is also a statutory exception to indefeasibility: *Land Titles Act 1925* (ACT) s 58(1); *Real Property Act 1900* (NSW) s 42(1*); Land Title Act 2000* (NT) s 188(3)(b); *Land Title Act 1994* (Qld) s 184(3); *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) s 40(3); *Transfer of Land Act 1958* (Vic) s 42; *Transfer of Land Act 1893* (WA) s 68. See also Chapter 6 Part II(A).
[500] *Fortex Group Ltd (In Receivership and Liquidation) v Macintosh* (1998) 3 NZLR 171, 172–3; *Korkontzilas v Soulos* (1997) 146 DLR (4th) 214, 227–8. Cf Common intention constructive trust: *Allen v Snyder* [1977] 2 NSWLR 685; *Shepherd v Doolan* [2005] NSWSC 42; *Jin v Yang* [2008] NSWSC 754; *Bannister v Bannister* [1948] 2 All ER 133.

can award a lesser in order to 'quell the controversy'.[501] Therefore, the plaintiff may not be awarded a proprietary remedy but instead be awarded some other remedy, such as equitable compensation.[502]

Thirdly, the parent's capacity to protect any interest arising in the property by lodging a caveat is determined by how the interest is characterised. For example, it may be characterised as a personal equity, mere equity or an equitable proprietary interest. Only an equitable proprietary interest will support a caveat. Unless and until a caveat is lodged, the parent's claim is vulnerable to third party interests arising through, for example, sale, mortgage or lease. If the third party's interest is equitable (for instance an equitable mortgage), a priorities dispute will arise concerning who has the 'better equity'.[503] If it is legal, the parent's interest will be defeated by the legal interest of the third party.

A *Background to the Torrens System*

Torrens title is by far the most common form of landholding in urban Australia, and almost all residential lots are held under this form of title. Registration of land under the Torrens system was introduced in Australia in response to the serious shortcomings of the English common law system, or old system title. These included the difficulty and expense of searching and proving title, the lack of purchaser security even after exhaustive searches and investigations, the possibility of a latent defect in title either because of a void instrument or removal of documents from the chain of title, and the impossibility of ascertaining the existence of interests created other than by deed, for instance, interests created by adverse possession.[504] The Torrens system was designed to

> give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered.[505]

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[501] *Bathurst City Council v PWC Properties* [1998] HCA 59, [42]. For instance, if a constructive trust is sought pursuant to an estoppel, the remedy is discretionary, and the proprietary remedy will be a last resort: see *Giumelli v Giumelli* (1999) 196 CLR 101 cf a common intention constructive trust or resulting trust: see Chapter 6 III(D)(4).
[502] The burden on the parent to establish an *in personam* exception amounts to systemic vulnerability: see Chapter 6.
[503] *Rice v Rice* (1853) 161 ER 646; *Heid v Reliance Finance Corporation Ltd* (1983) 154 CLR 326.
[504] See generally Brendan Edgeworth, Chris Rossiter and Pamela O'Connor, *Sackville & Neave Australian Property Law* (10th ed, LexisNexis Butterworths, 2016) [5.1]–[5.13].
[505] Parliament of South Australia, *Report from the Real Property Law Commission* (SA Parliamentary Paper No 192 (1861) opening statement, cited in Lynden Griggs, 'In Personam, *Garcia v NAB* and the Torrens System – Are They Reconcilable?' (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 76, 77; See

Torrens' vision was based on the idea of a state-guaranteed title with interests created and transferred by the act of registration, rather than by the acts of the parties in executing deeds and other instruments. Interests in land were to be plainly ascertainable by searching a single source – that is, the register. Torrens' aim was to make title independent of its history by making the register conclusive. The system is based on maintaining the integrity of land title through registration, and hence has been described as 'not a system of registration of title but a system of title by registration'.[506]

The principle of indefeasibility of title is the foundation of the Torrens system of title.[507] In *Frazer v Walker*, the Privy Council stated that the term was a 'convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys'.[508] Provisions in each of the State Acts incorporate the indefeasibility provisions.[509] In NSW these are ss 42 and 43 *Real Property Act 1900*:

> 42 Estate of registered proprietor paramount
>
> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded…
>
> s43 Purchaser from registered proprietor not to be affected by notice
>
> (1) Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

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also *Black v Garnock* (2007) 230 CLR 438, 461, where Callinan J observed: 'The purposes and objects of the Torrens system of title were to simplify conveyancing, to introduce a greater assurance, indeed certainty, of title and in consequence to reduce the expense of establishing and protecting title under the old land titles system.'

[506] *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

[507] *Bahr v Nicolay* [No2] (1988) 164 CLR 604, 613 (Mason CJ and Dawson J).

[508] *Frazer v Walker* [1967] 1 AC 569, 580.

[509] The wording of the provisions are similar: *Transfer of Land Act 1958* (Vic) ss 42, 43*; Real Property Act 1900* (NSW) ss 42, 43; *Land Title Act 1994* (Qld) s 184, 184(2)(a); *Real Property Act 1886* (SA) ss 69, 70, 72, 186, 187; *Transfer of Land Act 1983* (WA) ss 68, 134; *Land Titles Act 1980* (Tas) ss 40, 41; *Land Titles Act 1925*(ACT) s 58; *Land Title Act 2000* (NT) s 188.

These two sections are referred to as the 'paramountcy' and 'notice' provisions.[510] In short, except in the case of fraud, the registered title holder is subject only to those dealings that appear on the register, and title will not be affected by, or take subject to, any prior equitable (i.e., unregistered) interest that they may, or 'ought to' have known about. The provisions therefore relieve a purchaser of being subject to any interest or dealings that may exist, save those that are on the register.

The title held by the adult child is, therefore, secure unless the parent is able to establish an exception to indefeasibility.[511] It is accepted that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant'.[512] While the scope of the *in personam* exception remains a subject of judicial and academic debate,[513] it is true to say that the actions commonly undertaken by a parent/donor fall within the *in personam* exceptions.[514]

In keeping with the aim of providing security of title, establishing an exception to indefeasibility of Torrens land is not straightforward. Exceptions must be brought pursuant to a claim founded in law or in equity.[515] Hence, those causes of action that are characterised by complexity and expense will be relied on. The concept of indefeasible title is closely guarded in property circles, and there is reluctance by many to allow any erosion of the fundamental principles that underpin the system. Commentators have cautioned against expanding the principles in response to situations that appear 'unfair'. Robert Chambers has warned:

> There is a strong desire to turn to the *in personam* exception when there is no real exception to indefeasibility and the outcome seems unfair. However hardship and perceived unfairness do not

[510] *Real Property Act 1900* (NSW) ss 42, 43.
[511] There are a number of categories of exceptions to indefeasibility, including express exceptions in the Torrens legislation (ie fraud); the Registrar's power to correct the register; statutory exceptions, eg the compulsory acquisition of land; overriding statutes (ie exceptions for liability concerning rates and taxes) and the *in personam* exception: see Brendan Edgeworth et al, *Sackville and Neave: Australian Property Law* (LexisNexis Butterworths, 2016) [5.75]. Here we are only concerned with the last-named exception.
[512] *Frazer v Walker* [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce, Sir Garfield Barwick).
[513] See Kelvin SK Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 206; Rosalind Croucher, 'Inspired Law Reform or Quick Fix? Or "Well Mr Torrens, What Do Reckon Now?" A Reflection on Voluntary Transactions and Forgeries in the Torrens System' (2009) 30 *Adelaide Law Review* 291: '[t]he concept of indefeasibility is tested best at the margins' referring to forgeries and volunteers (293), but see generally 293–6.
[514] The most common being adjustment of title by way of imposition of a constructive or resulting trust, pursuant to a claim of estoppel or failed joint endeavour, or rescission based on undue influence or unconscionable conduct.
[515] *Frazer v Walker* [1967] 1 AC 569, 585.

> give the courts authority to create new rights in new ways to overcome perceived deficiencies of a Torrens system.[516]

In the absence, therefore, of either doctrinal reform in the area (which is considered unlikely) or legislative reform, a parent wishing to challenge the adult child's indefeasible title must pursue a claim as stated above, which is the source of systemic vulnerability.

B *Establishing the Nature of the Interest held by the Parent*

This section explores the various ways in which a parent's interest in the property subject to the FAA might be classified. Its purpose is to explain under the present law, the 'situation' of the parent is vulnerable because the nature of their interest in any property is the ambiguous and often fragile. Without a robust interest in the property, the parent is required to establish an equitable interest in the property. The challenges associated with that alternative are also discussed in this section.

1 *Joint Tenancy/Tenant in Common*

One difficulty arising when a FAA fails is how to characterise the nature of the parent's interest, if any, in the property. The nature of the interest will be determined largely by the factual matrix of the agreement itself, but under our present law can have a significant impact on the nature of any remedy granted. The clearest way to protect an interest in property when entering into a FAA is for the older party to ensure they are included on the title as either a joint tenant or a tenant in common. As mentioned above, the parent being registered on the title is rare. Alternatively, if money is advanced as a contribution to property or a mortgage or to assist the adult child financially in some other way, the money advanced could be documented as a loan. However, the existence of a loan to the parent may impact the bank's lending if the property is to be financed by a mortgage. A joint tenancy agreement has the advantage of the older party maintaining an interest in the property while alive, while allowing the interest to pass to the other joint tenant upon their death. In a successful FAA, this would be a mutually beneficial outcome. However, this arrangement can lead to difficulties related to ascertaining the nature of the interest held by the parent where the relationship between the surviving joint tenants

[516] Robert Chambers, *An Introduction to Property Law in Australia* (3rd ed, Thomson Reuters, 2013) 578. In a similar vein, Jonathon Moore states: 'A vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. This is precisely the reason why the courts have insisted that a personal equity must be founded upon a recognised legal or equitable cause of action': 'Equity, Restitution and In Personam Claims under the Torrens System' (1998) 72 *Australian Law Journal* 258, 260.

breaks down. For example, in *Kriezis v Kriezis*, an elderly couple sold their home and contributed the proceeds towards a larger house, which was purchased with their son and daughter-in-law as joint tenants. The arrangement was that the older couple would live rent-free and be cared for, and, on their death, the property would pass by survivorship to their son and his wife. The father died, and then the son died prematurely, leaving the mother and daughter-in-law holding the property as joint tenants. This relationship broke down, and the Court was required to calculate the equitable interest held by each party based on contributions to the purchase price and amounts subsequently expended on the property. In such a case, ensuring an interest as a tenant in common would have the advantage of the parties deciding from the outset the proportion to which each is entitled, and would allow the older party to bequeath their interest in the property according to their will rather than the interest passing to the joint tenant. On the other hand, tenancy in common can add complications as the proportion of the deceased party's interest passes to their estate – which introduces a number of other parties/interests to the property that may not have been intended. The divergent nature of the interests may not be consistent with the arrangements between the original parent and child.[517]

2 *Licence to Reside*

On entering the FAA, typically the parent would have a bare licence to reside on the property. A licence is a personal right and arises when permission is granted by one person to another to be on the land.[518] Prima facie, as a mere personal right, a licence does not lead to a proprietary interest in the land and is therefore not an exception to indefeasibility, nor can it be the subject of a caveat.[519] As such, a licence to reside appears to be a fragile interest and arguably of limited advantage in a failed FAA, as the failure of the arrangement most commonly results in the parties intending or having to live apart. However, *Irons v Irons* found that where it would be unconscionable to revoke a licence, equity would prevent the revocation and that equity (not to revoke) constitutes an interest in land.[520] In the context of an FAA, the finding of an irrevocable licence to reside is a Pyrrhic victory. In *Irons*, the plaintiff's daughter had exclusive possession of the property. However, the FAA is characterised by the parties living together.

[517] See eg Chapter 8 Part III (2) 'Application to Deceased Estates'.
[518] *Thomas v Sorrell* (1673) 124 ER 1098.
[519] *National Provincial Bank v Ainsworth* [1965] AC 1175; *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *La Martina v Penney* [1968] SASR 411.
[520] *Irons v Irons* [2007] SADC 54.

If the relationship has faltered, as it often does, remaining in the property is unlikely to be a realistic option.

3 *Tenancies*

It is open to the parties to create a lease provided the substantive requirements for creating a lease are satisfied. Leases require the elements of exclusive possession and certainly of term.[521] To acquire indefeasibility, the lease must be registered.[522]

In the absence of a formal lease, there could be some difficulty in establishing that a FAA is a lease. Exclusive possession may be established in, for example, a separate granny flat, but is unlikely in an arrangement where the older person shares the house.[523] Furthermore, the undefined duration of the arrangement may give rise to concerns regarding certainty of term.[524] If there was found to be a lease, each jurisdiction provides for an exception to indefeasibility with respect to short leases.[525] Such leases do not have to be registered to create a legal interest in land and the terms of the statutory protection range between one and five years.[526] In Victoria, however, s 42(2)(e) *Transfer of Land Act 1958* (Vic) provides that all tenancies are exceptions to indefeasibility and does not stipulate a time limitation.[527] There has been a series of decisions that suggest that s 42(2)(e) will encompass the interest of a life tenant in possession of land.[528] If the older party can establish they have a life interest rather than a personal right to reside in the property, s 42(2)(e) confers a proprietary right in the property and is thus enforceable against third parties, and may allow the older party to remain in the property. On

[521] *Radaich v Smith* (1959) 101 CLR 209; *Lace v Chantler* [1944] KB 368; *Lewis v Bell* (1985) 1 NSWLR 731, 734–5 (Mahoney JA).
[522] *Real Property Act 1900* (NSW) s 53.
[523] Note however that in some jurisdictions exclusive possession is not required for the relevant tenancy laws to apply. Hence the question of whether an arrangement constitutes a lease is separate from the question of whether the relevant legislation applies: *Residential Tenancies Act 1997* (ACT) s 6A(3); *Residential Tenancies Act 2010* (NSW) s 13(1); *Residential Tenancies Act 1999* (NT) s 4; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 12(2); *Residential Tenancies Act 1995* (SA) s 3; *Residential Tenancy Act 1997* (Tas) s 10(1); *Residential Tenancies Act 1987* (WA) s 3.
[524] *Berrisford v Maxfield Housing Cooperative Ltd* [2012] 1 AC 955.
[525] See eg *Real Property Act 1900* (NSW) s 42(1)(d).
[526] *Real Property Act 1900* (NSW) s 42(1)(d); *Real Property Act 1886* (SA) ss 69(h), 119; *Land Title Act 1994* (Qld) s 185(1)(b); *Land Title Act 2000* (NT) s 189(1)(b); *Transfer of Land Act 1893* (WA) s 68*; Land Titles Act 1980* (Tas) s 40(3); *Land Titles Act 1925* (ACT) s 58(d).
[527] *Transfer of Land Act 1958* (Vic) s 42(2)(e); see the discussion of Gibbs ACJ in *Barba v Gas and Fuel Corporation* (1976) 136 CLR 120, 140 and cases cited therein, particularly *Black v Poole* (1895) 16 ALT 155. See too *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 [18]–[20]. An effort to utilise these principles was recently pursued in *Phillips v Southage Pty Ltd* [2014] VSCA 17; see generally Seniors Rights Victoria, *Assets for Care* (n 19).
[528] Ibid.

the basis of such decisions, if a family accommodation arrangement was found to be a lease for life it would withstand a third-party interest.

4 *Equitable Interest*[529]

In *Barry v Heider*, the High Court confirmed that registration will not extinguish the personal obligations created by the registered proprietor.[530] These obligations, arising from claims 'founded in law or equity', may give rise to an equitable interest.[531] The relevant issue for the parent is determining the nature of the equitable interest that arises in context of FAAs and what remedial outcomes will apply to that interest.

A 'mere equity' was described by Kitto J in *Latec Investments v Hotel Terrigal* as a right ancillary to the recognition of an equitable interest.[532] Put another way, a mere equity is recognised where a person is in a position to make a claim to a court of equity which, if successful, *may* entitle the person to an equitable proprietary interest. The consequences for the parent in this situation are that the circumstances that give rise to the arrangement may affect the type of interest. For instance, a purchase money resulting trust[533] will, in the absence of any contrary intention,[534] give rise to a proprietary interest. However, if the cause of action is based on estoppel, the interest is characterised as a mere equity until the court makes a remedial order. This raises issues regarding the ability to place a caveat on the property. Without the protection of a caveat, notice of the parent's equitable interest will not prevent a third party registering an interest defeating the parent's interest.[535] If a priority dispute arises between competing equitable interests then, pursuant to the rule in *Rice v Rice*,[536] if the equities are equal the first in time prevails. In determining whether the interests are equal, the nature of the equities and, if necessary, the conduct of the parties is considered.[537] If the older person's interest is not an

[529] see generally Somes and Webb, 'What Role for Caveats' (n 31).
[530] *Barry v Heider* (1914) 19 CLR 197.
[531] *Frazer v Walker* [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce, Sir Garfield Barwick).
[532] *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277–8 (Kitto J), although the categorisation is not always consistent: ibid 290–1 (Menzies J); *Commissioner of State Taxation of the State of South Australia v Cyril Henschke Pty Ltd* [2010] HCA 43.
[533] *Calverley v Green* (1984) 155 CLR 242.
[534] And assuming that the presumption of advancement has been rebutted.
[535] Somes and Webb, 'What Role for Caveats' (n 31).
[536] *Rice v Rice* (1853) 61 ER 646.
[537] *Heid v Reliance Finance Corporation Ltd* (1983) 154 CLR 326, 339.

equitable proprietary interest and only a mere or personal equity, it will be defeated in a priorities dispute against the third party holding an equitable proprietary interest.[538]

C *The Need to Establish An in Personam Exception to Indefeasibility*[539]

The burden of establishing an *in personam* exception to indefeasibility goes hand in hand with the nature of the equitable interest that arises. The causes of action giving rise to the exceptions are discussed in detail in the following chapter, so the discussion here will be brief.

In order to come under one of the exceptions to indefeasibility,[540] the parent would need to either allege fraud or come within one of the recognised exceptions.[541] Equitable causes of action – for instance a resulting trust, undue influence, unconscionable conduct, estoppel and failed joint ventures – may constitute an *in personam* exception. The burden lies with the plaintiff to establish that the exception exists.[542] Once the court has found the cause of action proven, it may order that the property be transferred to the parent or be held in constructive trust. However, these actions do not always alter the registered proprietor's title, as the remedies are discretionary. Therefore, a proprietary remedy may not always be awarded, and the courts may order an alternative remedy, primarily when third party interests are affected.[543] Therefore, whether these actions amount to an *in personam* exception to indefeasibility largely depends upon the relief granted by the court. If granted, the remedy of a constructive trust may allow for the plaintiff to call for the property to be transferred to them. Alternatively, a constructive trust may only impose a life interest in the property or a joint interest, which still impeaches the title of the registered proprietor. However, unless supported by a caveat, the award of a constructive trust would not survive or be enforceable against a bona fide purchaser of that property, leaving the plaintiff only with a personal claim against the constructive

[538] *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265. For instance, a parent with prior mere equity will lose a priority dispute with someone with, for example, an equitable mortgage unless there has been postponing conduct on the part of the equitable mortgage holder: *Heid v Reliance Finance Corporation Ltd* (1983) 154 CLR 326.
[539] See Somes and Webb, 'What Role for Real Property' (n 31).
[540] Various commentators have discussed the theoretical underpinnings of exceptions to indefeasibility, commenting that they are not 'true' exceptions at all: see Low (n 513) 210; Lyria Bennett Moses and Brendan Edgeworth, 'Taking It Personally; Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility' (2013) 1 *Sydney Law Review* 107.
[541] *Barry v Heider* (1914) CLR 197, 213.
[542] The elements of establishing the cause of action are discussed in Chapter 6.
[543] See *Giumelli v Giumelli* (1998) 196 CLR 101; *Sidhu v Van Dyke* [2014] HCA 19; *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810, [98]; *Hart v Burbidge* [2013] EWHC 1628 [141]–[144]; See also Penny Carruthers and Natalie Skead, 'Exploring the Fundamentals: Indefeasibility, In Personam, Proprietary Estoppel and *Van Dyke v Sidhu*' (2014) 22 *Australian Property Law Journal* 187; Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 201.

trustee.[544] In other words, until the register has been amended in accordance with any orders made by the court, the register stands as a conclusive statement of title.[545] In any case, each of the equitable causes of action set a high bar for proof, and the onus placed on the parent – along with the complexity of the claims and coupled with the time and expense – acts as a significant disincentive to an older party to commence action. There is continued disquiet concerning the ambiguity surrounding how the law determines the nature of any interest, with some commentators arguing for the abandonment of the categories and a system of determination of the interest on a case-by-case basis.[546] Conversely, others support the retention of the categories as they provide certainty.[547] This aside, the weight of authority suggests that an action to claim an interest in property pursuant to one of the *in personam* exceptions is a mere equity. This conclusion has ramification for the discussion below concerning caveats.

D *Lodging a Caveat to Protect an Equitable Proprietary Interest*

The above analysis demonstrates the legal imbalance experienced by the parent in a FAA, and the fragility of the interest they possess in contrast with the indefeasible title of the adult child. A caveat is one mechanism that may allow a parent to protect their interest in a property. As mentioned previously, the courts have acknowledged the existence of equitable interest within the Torrens system, and statutes in all States and Territories contain provisions that allow people to lodge caveats to protect any equitable interest prior to any legal proceedings.[548] A caveat therefore operates as a statutory injunction. Many disputes commence when relationships begin to falter, and the parent takes steps to protect their interest (however perceived) by lodging a caveat. In practice, it is common for caveats that are procedurally correct to be accepted by the Registrar. However, if the child seeks to remove the caveat[549] the

[544] If a constructive trust of the entire property has been declared, the claimant's equitable title would still be vulnerable to a claim by a bona fide purchaser until the property is called for and registered in the name of the claimant.
[545] Radan and Stewart (n 325) [8.89].
[546] David Wright, 'The Continued Relevance of Divisions in Equitable Interests to Real Property' (1995) 3(3) *Australian Property Law Journal* 1.
[547] Samantha Hepburn, 'Reconsidering the Benefits of Equitable Classification' (2005) 12(2) *Australian Property Law Journal* 157. See also Diane Skapinker, 'Equitable Interests, Mere Equities and "Personal Equities" – Distinction with a Difference' (1994) 68 *Australian Law Journal* 593.
[548] *Butler v Fairclough* (1917) 23 CLR 78, 91: *Transfer of Land Act 1958* (Vic) ss 89–91; *Real Property Act 1900* (NSW) ss 74F–74R; *Land Title Act 1994* (Qld) ss 121–31; *Real Property Act 1886* (SA) s 191; *Transfer of Land Act 1983* (WA) ss 136K–142; *Land Titles Act 1980* (Tas) ss 133–8; *Land Titles Act 1925*(ACT) ss 104–8; *Land Title Act 2000* (NT) ss 137–47.
[549] *Transfer of Land Act 1958* (Vic) s 89(1); *Real Property Act 1900* (NSW) s 74F(5); *Land Title Act 1994* (Qld) s 121; *Real Property Act 1886* (SA) s 191(a); *Transfer of Land Act 1983* (WA) s 137; *Land Titles Act 1980* (Tas) s 133(1); *Land Titles Act 1925* (ACT) s 104(2); *Land Title Act 2000* (NT) s 137.

lapsing notice requires the parent to take immediate steps to assert any claim. If they lack the resources to pursue the claim, the parent's case can fall at the first hurdle.[550] If the parent applies to extend the caveat as a response to the application to lapse, the nature of the interest held will be scrutinised.

A threshold question is, therefore, whether the parent has a caveatable interest. To support a caveat, the applicant need not have a registerable interest, so long as it is one that equity will give specific relief against the land.[551] Nevertheless, the applicant must have a *proprietary* interest or estate in the land. A purely personal or contractual right, such as a mere licence to use or occupy land that can be revoked is insufficient.[552]

The status of an interest being a mere equity can prove problematic for the parent. If the right is only a right to a claim, there is no certainty the outcome of the claim will result in a proprietary interest.[553] An interest under an institutional constructive trust, a common intention constructive trust or implied trust has been held sufficient to support a caveat.[554] Presumably this is because the proprietary interest is not contingent on the discretion of the court.[555] In *LJ Carroll v LT Carroll*, Black J, citing White J in *Choi v Kim*, observed that a remedial constructive trust would not be imposed until the date of the court order, and therefore no proprietary interest exists to support a caveat.[556] The same reasoning would apply to a claim made under estoppel. Nonetheless a court can allow a caveat if it is satisfied there is sufficient evidence demonstrating there is a serious question to be tried.[557]

An interest in the proceeds of the sale of a house will not give rise to a caveatable interest, despite a financial contribution made to improvements. In *Terry v O'Connell*, a mother spent $60,000 converting a garage attached to her daughter's house into a granny flat.[558] After a period of time the daughter stated she wanted to sell the property, and shortly after that the

[550] Lane, 'Reform in Elder Law – Granny Flats' (n 139) 419.
[551] *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286, 287; Sandra Boyle, 'Caveatable Interests – The Common Lore Distinguished (1993) *Murdoch University E-Journal* 8.
[552] *Irons v Irons* [2007] SADC 54 [26].
[553] *Jedhar Pty Ltd v Grosse* [2003] QSC 330 [5] (McMurdo J); *Lee v Mavaddat* [2007] WASC 18 [58] (Hasluck J).
[554] *McMahon v McMahon* [1979] VR 239; *Riverview Project Pty Ltd v Elleray* [2007] VSC 150; *Jerambak Holdings Pty Ltd v Austral-Asean Pty Ltd* (2005) 147 NTR 1; *Edmonds v Donovan* (2005) 12 VR 513 [90]–[97] (Phillips JA).
[555] This argument raises the differences between an institution constructive trust and a remedial constructive trust, the former arising independent of any curial declaration: *Westdeutche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714–15 (Lord Browne-Wilkinson); *Re Polly Peck International plc (in administration) (No. 2)* [1998] 3 All ER 812; *Lydon v Ryding* [2002] WASC 308 [19] (McLure J).
[556] *LJ Carroll v LT Carroll* [2016] NSWSC 390 [26]; *Choi v Kim* [2013] NSWSC 1774 [5].
[557] *Hooper v Australia and New Zealand Banking Group Ltd* [1996] ANZ Conv R 400.
[558] *Terry v O'Connell* [2010] NSWSC 255.

relationship deteriorated. The mother lodged a caveat and the matter concerned an application by the daughter to lapse the caveat. However, the interest was held not to be in the property but in the proceeds of sale. White J stated:

> The plaintiff's evidence does not establish that the plaintiff was to have any right to deal with the land itself in order to satisfy her claim for $40,000. Nor does it suggest that she was to have the right to approach the court for an order for judicial sale or the appointment of a receiver. That is not to say that if the plaintiff's evidence is accepted she would not be entitled to a charge over the proceeds of sale to secure payment of $40,000. But an interest in the proceeds of sale is not an interest in the land, at least where the chargee of the proceeds of sale does not have a right to have the land sold.[559]

However, in *Tremills v Tremills* the interest arising by reason of financial contributions towards the cost of erecting a granny flat or other form of accommodation was held sufficient to support a caveat.[560]

Once exception has been found where a court of equity would find it unconscionable for a dependant to evict a person with a mere right to occupy, a proprietary interest capable of supporting a caveat has been upheld. *Irons v Irons* concerned a claim by plaintiff daughter-in-law against property owned by her parents-in-law.[561] The husband/son, who was deceased, owed $360,000 in child maintenance. The defendants purchased a unit for the plaintiff and granted her a right to reside for life, but specifically denied granting her a proprietary interest as they did not want to benefit any prospective partner. The plaintiff lived in the property rent-free and contributed approximately $15,000–20,000 on improvements.

Sometime later, the defendants experienced financial difficulties and needed to sell the property. The plaintiff lodged a caveat, and this matter was an application by the plaintiff to extend the time for removal. In determining whether the plaintiff had a caveatable interest, Millsteed J stated:

> It would be unconscionable conduct on the part of the defendants to evict the plaintiff in circumstances where she had expended moneys on improvements to the unit on the basis of a belief induced by the first defendant's representations that she had sole occupation of the unit for life. Even if she were not entitled to a share of the beneficial ownership of the property, and merely had a licence to occupy the premises for life, equity would prevent the defendants revoking the licence. The equity created constitutes an interest in the land.[562]

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[559] Ibid [6].
[560] *Tremills v Tremills* (Unreported, WASC, Library No 5540, 5 October 1984).
[561] *Irons v Irons* [2007] SADC 54.
[562] *Irons v Irons* [2007] SADC 54 [67]. See also *Milton v Proctor* (1989) NSW ConvR 55-450 cited in *Irons v Irons* [60]. In that case, the licensee of land moved into a cottage on the land on the understanding that if she paid

Lastly, even where the court finds there is a seriously arguable case to be heard, or a clear caveatable interest, the court retains a discretion, based on the balance of convenience, as to whether it will maintain the caveat or require its withdrawal. Therefore, if the parent establishes that they have a caveatable interest, it is still not conclusive that the caveat will not be removed if the court is satisfied on the balance of convenience that caveat should be removed.[563]

V CONCLUSION

This chapter has examined the sources of law that give rise to legal-situational vulnerability. Legal-situational vulnerability arises when legal presumptions, doctrines or formalities operate to create significant obstacles to a parent/donor claiming either in contract or against the property. The results for plaintiffs in reported cases demonstrate that the legal hurdles examined in this chapter are not insurmountable. However, the parent is on the 'back foot' from a legal perspective. Some of these challenges could be ameliorated through piecemeal reform, but this would not address the systemic vulnerability created by the complexity of both the law and the forum having jurisdiction.[564] The presumptions are largely outdated and, with respect to the presumption of advancement at least, Australia appears to be lagging behind other jurisdictions such as the United Kingdom and Canada.

In most cases it seems that the parent's cause of action will amount only to a mere equity, thus raising ambiguity concerning the ability to lodge a caveat. The uncertainties surrounding this area of the law, together with the legal burden placed on the parent to establish grounds to lodge a caveat, create significant challenges that could result in the loss of the parent's often considerable monetary contributions to a disputed property. Consequently, the proposed reforms examined in Chapter 8 will address these sources of legal situational vulnerability.

rates, she could reside on the premises for her life. In reliance on that understanding, the licensee did a substantial amount of work to the property. Clarke JA, with whom Mahoney JA agreed, observed that it may not be accurate to say that a licensee can never hold an interest in land and that a proprietary interest may be created under a constructive trust or by way of proprietary estoppel.

[563] *Tadrous v Tadrous* [2009] NSWSC 407 [6] (Brereton J).

[564] Suggestions for reform that fall outside of the primary reforms suggested by this thesis are contained in Chapter 7.

CHAPTER 5
SOURCES OF SYSTEMIC VULNERABILITY: THE SUPREME COURT

> The existing jurisdiction in the case of many family disputes lies in the Supreme Court which is arguably the most inaccessible jurisdiction in the country. This is particularly problematic for older people facing the urgency of requiring money to move into aged care.[565]
>
> Depending on the nature of the legal problem, its impact on the older person's life and individual circumstances, some older people may make the assessment that any positive outcome or legal remedy achieved is outweighed by the anxiety, stress and costs associated with the dispute resolution process.[566]

I INTRODUCTION

The purpose of this chapter is to expand on the features of the Supreme Court jurisdiction identified earlier in Chapter 3 that contribute to systemic vulnerability. Vulnerability here means the exposure to a risk of harm. This thesis advances the argument that theorising the legal issues faced by the parent in a failed family accommodation arrangement (FAA) through the lens of vulnerability can assist in identifying why law reform in this area is both necessary and justified. The type of vulnerability examined in this chapter is characterised as systemic or pathogenic vulnerability. Rogers et al.'s theory of pathogenic or institutional sources of vulnerability refers to a risk of fresh harm or exacerbation of existing vulnerabilities generated by the state's response to those existing vulnerabilities.[567] More specifically, this category of vulnerability arises when social policy or legal interventions aimed at addressing either inherent or situational vulnerability have the paradoxical effect of creating or themselves becoming the source of vulnerability or exposure to a risk of harm. In the context of FAAs, where a dispute becomes intractable a parent who must resort to the law in order to effect the return of property or assets transferred under the agreement is faced with a complex array of potential legal actions, heard primarily in a jurisdiction characterised by its adversarial structure

[565] Caxton Legal Centre, Submission 67 in ALRC Final Report (n 19) 11.
[566] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 21.
[567] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71) 26.

and expensive and time-consuming processes. Hence, the method of resolving the dispute (and the issues raising legal and personal vulnerability) is in fact a source of vulnerability itself.

The objective of this analysis is to demonstrate the cumulative effect of the present law and the jurisdictional issues, and the challenges they pose to the parent in determination of disputes. It explains how the processes associated with the jurisdiction compound systemic vulnerability created by the present law.

Part II of this chapter will explain why the Supreme Court is the typical jurisdiction to hear family accommodation disputes and discuss whether innovations such as active case management or compulsory ADR can mitigate some of the issues experienced by older applicants. The analysis will use the New South Wales Supreme Court and District Court as an example of the issues raised by the forum, but the arguments raised apply regardless of the state. Part III examines in detail the barriers to access to justice that have been identified as specifically affecting older people. While recognising that there are a multitude of factors contributing to the problem of access to justice for older people, this chapter will focus specifically on those features associated with the jurisdiction that have been identified as the primary barriers for older people seeking a resolution of a family accommodation dispute through the courts. These include delays commonly experienced in litigation, the expense of both legal representation and court proceedings, and the formality of the court, in both its processes and adversarial nature. This chapter will explain these factors in more detail and provide evidence of how they can cause older people to eschew legal redress, with the consequence that the parent's access to justice is compromised. The discussion provides a key rationale for the first of the two limbs of proposed reforms enabling greater access to justice, discussed in Chapter 8 of this thesis. Moving the jurisdiction to hear FAA disputes to State tribunals aims to provide a more user friendly and accessible avenue to resolving the dispute.

II THE SUPREME COURT

A *THE SUPREME COURT IS THE APPROPRIATE JURISDICTION*

Although the law regulating civil dispute resolution and civil procedure largely comes under State jurisdiction, the key concerns that form the focus of this chapter are common to all jurisdictions across Australia. This chapter will focus primarily on the New South Wales jurisdiction but at times will also draw from sources across Australia.

Determining the appropriate forum for where a matter should be heard requires consideration of the subject matter of the issue, the amount being claimed (as limits on monetary claims will exclude certain courts), territorial issues and what is the 'appropriate' or 'natural forum' to hear a matter.[568] A dispute concerning a failed FAA can raise a multitude of legal issues concerning, among other things, title to land, indefeasibility and exceptions to indefeasibility of title, and appropriate remedies. The causes of action, along with the remedies sought by the plaintiff are primarily equitable.[569] As family accommodation cases often involve title to land, and sometimes substantial sums of money, the Supreme Court is the appropriate jurisdiction. Similarly, subject to the qualifications explained below, the Supreme Court has the necessary jurisdiction to award equitable remedies.

In rare situations, a matter may be brought in the District Court; however, its jurisdiction is limited. The District Court of New South Wales is a statutory court and therefore has no powers beyond those that the Parliament conferred on it, or which can be necessarily inferred from those powers. Under the *District Court Act 1973* (NSW) the District Court has the same jurisdiction in equity as the Supreme Court in matters listed under s 134(1). However, under s 133 the District Court cannot determine title to land with value over $100,000 and can only issue an injunction as ancillary relief.[570] Similarly, the District Court has a specific power in relation to the declaration of trusts and the execution of trusts where the trust fund does not exceed the $100,000 limit.[571] The District Court does have jurisdiction under s 134(1)(g) of the Act concerning claims pursuant to the *Property (Relationships) Act 1984* (NSW).[572] Yet there are restrictions on the court's ability to order constructive trusts in accordance with the principles set out in *Muschinski v Dodds*[573] and *Baumgartner v Baumgartner*.[574] Under the general equitable power, the District Court lacks jurisdiction to grant the order if the trust property exceeds $20,000 in value.[575] However, once jurisdiction is established under the *Property (Relationships) Act 1984* (NSW), the District Court has the power to make any declaration as to rights and can give orders in the nature of a constructive trust up to the limit of $250,000.[576]Nonetheless, this legislation is rarely used in claims by either parents or

[568] David Bamford and Mark Rankin, *Principles of Civil Litigation* (4th ed, Lawbook Co, 2021) [2.10]–[2.100]; Sonya Willis, *Civil Procedure* (Palgrave Macmillan, 2012) [3.3]–[3.3.4].
[569] The applicable law is examined in detail in Chapter 6.
[570] *District Court Act 1973* (NSW) ss 46, 133, 134, as amended by the *District Court Act 2022* (NSW) (Schedule1).
[571] Ibid s 134(1)(e); *Clayton v Renton* (1867) LR 4 Eq 158, 161; *Daniels v Purcell* (unrep, 2/3/05, NSWDC).
[572] *Property (Relationships) Act 1984* (NSW) s 134(3).
[573] *Muschinski v Dodds* (1985) 160 CLR 583.
[574] *Baumgartner v Baumgartner* (1987) 164 CLR 137 [32]–[33].
[575] *Deves v Porter* [2003] NSWSC 625 [70].
[576] *Property (Relationships) Act 1984* (NSW) s 134(3).; *Bourdon v Outridge* [2006] NSWSC 49 [20].

carers.[577] Barkehall Thomas explains that there are marked inconsistencies throughout equivalent State legislation concerning definitions and standing, and argues that the legislation is not 'fit for purpose', and not 'assisting those it was designed to benefit'.[578] Reported cases demonstrate that very few family accommodation disputes are resolved pursuant to the *Property (Relationships) Act 1984* (NSW) or its State equivalents.[579]

Family accommodation disputes are commonly dealt with in the general equity list in the Supreme Court. The Supreme Court derives its power to hear disputes in both common law and equity from *Supreme Court Act 1970* (NSW) and *Law Reform (Law and Equity) Act) 1972* (NSW).[580] The Supreme Court also has 'all jurisdiction necessary for the administration of justice in New South Wales'.[581] Additionally, as a superior court of record, the Supreme Court derives its jurisdiction from the rules and practices of the English equity jurisdiction, insofar as those laws were applicable to the colony, and the courts 'powers and procedures were often modelled closely on those of England'.[582]

B *Ameliorating Access to Justice Issues in the Supreme Court: Active Case Management*

In response to the major challenges of time and delay facing the civil justice system, most jurisdictions have enacted legislation or introduced rules enabling the courts to play a more prominent role to supervise, or control the pre-trial processes of individual cases as well as the manage the overall caseload of the court.[583] Although the schemes vary across jurisdictions, the statutory enactments embody a common overriding philosophy that courts are obliged to manage litigation with speed and efficiency, consistent with the needs of justice.[584] For example, the South Australian legislation states that '[t]he object of these Rules is to facilitate

[577] Susan Barkehall Thomas, 'Care-givers and Property Claims: An Underutilised Statutory Jurisdiction' (2018) 27 *Australian Property Law Journal* 42.
[578] Ibid 43.
[579] The role and scope of this legislation is discussed further in Chapter 8.
[580] *Supreme Court Act 1970* (NSW) ss 57–63 and the *Law Reform (Law and Equity) Act) 1972* (NSW) s 5.
[581] *Supreme Court Act 1970* (NSW) s 23.
[582] Alex Castles, *An Australian Legal History* (The Law Book Company, 1982) 17.
[583] Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008) 297; Justice PA Bergin, 'Case Management', *National Judicial Orientation Program* (3–8 August 2008) [3]; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System* (AGPS, 2000) [1.14]; Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211.
[584] *Court Procedures Act 2004* (ACT) s 5A; *Civil Procedure Act 2005* (NSW) ss 56–8; *Supreme Court Rules 1987* (NT) r 1.10; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Uniform Civil Rules 2020* (SA) r 1.5; *Supreme Court Rules 2000* (Tas) r 414A; *Civil Procedure Act 2010* (Vic) s 7; *Rules of the Supreme Court 1971* (WA) Order 1 rr 4A & 4B. See generally Bernard Cairns, *Australian Civil Procedure* (11th ed, Lawbook Co, 2016) [2.60]–[2.920].

the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings governed by these Rules'.[585] In New South Wales, matters heard in the Equity Division of the Supreme Court (where family accommodation disputes are mostly heard) must comply with case management principles set out in the practice note.[586] Willis argues that case management legislation reflects existing court practices (presumably through the court's inherent jurisdiction to control its own processes) but as Chief Justice Bathurst observes, the legislation provides 'a legitimacy which gave a needed priority, consistency and emphasis on the issue of management'.[587] To reduce delay, the Court is able to set a timetable for the progress of cases and supervise their management to distil issues. Costs are kept under review in schemes for the court control of litigation.[588] Management schemes also ensure parties are aware, and are sometimes obliged, to undertake alternative dispute resolution.[589]

In the context of the statutes, 'justice' is generally accepted to refer to 'natural justice' or procedural fairness' and the 'right to be heard' as well as the right to achieve a just outcome.[590] The difficulty that emerges is balancing the goals of 'justice' and efficiency'; civil procedure has evolved to ensure compliance with the right of parties to a full and proper hearing. However, the reforms emerged from a growing recognition that, as a matter of public policy, 'resolution of disputes serves the public as a whole, not merely the parties to the proceedings'.[591] This reflected the earlier view expressed in *Sali v SPC* Ltd where it was recognised that

> [w]hat might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.[592]

The question of balancing efficiency and justice is critical when weighing the advantages and disadvantages of transferring family accommodation disputes out of the Supreme Court to

[585] *Uniform Civil Rules 2020* (SA) r 1.5.
[586] Supreme Court Practice Note SC EQ 1 <http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/662eb5283a803ed3ca2582fa001847bb/$FILE/2018_08_31_Practice%20Note%20SC%20EQ%201.pdf>.
[587] Sonya Willis, 'Should Uniform Civil Case Management Principles "Overarch" or "Override"? Comparing Victorian and NSW Active Case Management after a Decade of the Victorian Civil Procedure Act 2010' (2021) 9(4) *Journal of Civil Litigation and Practice* 55, 58 citing Chief Justice T Bathurst, 'After the Civil Procedure Act' in Miiko Kumar and Michael Legg (eds), *Ten Years of the Civil Procedure Act 2005 (NSW)* (Lawbook Co, 2015) 19, 20.
[588] Cairns (n 584) [2.20].
[589] Ibid.
[590] Willis, *Civil Procedure* (n 568) [2.2.3].
[591] *Aon Risk Services Ltd v Australian National University* (2009) 239 CLR 175, 217.
[592] *Sali v SPC* (1993) 67 ALJR 841, 844, quoted in *Aon Risk Services Ltd v Australian National University* (2009) 239 CLR 175, 190 (French CJ).

tribunals. Despite the reforms outlined above, Supreme Court litigation continues to be expensive and time-consuming for both litigants and the courts.[593] There are persuasive arguments for allowing these disputes to be heard in a less formal environment that has significantly fewer barriers to access. However, there are risks that quicker and cheaper processes offered by tribunals could come at the expense of procedures that exist to protect the individual and achieve just outcomes.[594] These issues will be raised in Chapter 8 under the discussion of tribunals as the appropriate forum.

C *The Role of Alternative Dispute Resolution in the Supreme Court*

The availability of alternative dispute resolution (ADR) has long been considered an integral step to enable parties to resolve disputes prior to commencing litigation, thereby allowing a more flexible, quicker, less formal, and cheaper path to determining a dispute. Requiring parties to engage in ADR is one aspect of active case management. Chief Justice Tom Bathurst recently commented that

> alternative dispute resolution ('ADR') mechanisms serve an increasingly important role in facilitating access to dispute resolution services for all citizens and reducing the time and cost spent on litigation. ADR is now regularly seen as a first port of call for the resolution of civil and commercial disputes, and the implications of this trend are the subject of debate about what role the judiciary should play in encouraging or ordering parties to attempt ADR.[595]

Mediation is a consensual settlement of a dispute.[596] The power to order mediation without consent is now entrenched in legislation in every Australian jurisdiction.[597] Family mediation in the Supreme Court enables parties to explore a broader range of options to resolve the dispute than may be available to a judge, as the parties are not constrained by admissibility rules, legal

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[593] *Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors* (2011) 32 VR 495, 500 [10] (Vickery J): 'Nevertheless, and in spite of these reforms, the present applications before the court starkly illustrate that our legal system continues to be challenged by the ancient maladies which have always confronted it — delay and cost.'

[594] See eg Les Arthur, 'Does Case Management Undermine the Rule of Law in the Pursuit of Access to Justice?' (2011) 20(4) *Journal of Judicial Administration* 240; Justice Steven Rares, 'Is Access to Justice a Right or a Service?' [2015] *Federal Judicial Scholarship* 11.

[595] Chief Justice Tom Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *University of New South Wales Law Journal* 870, 870.

[596] *Civil Procedure Act 2005* (NSW) s 25: 'mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute'.

[597] *Civil Procedure Act 2005* (NSW) s 26; *Federal Court of Australia Act 1976* (Cth) s 53A; *Civil Procedure Act 2010* (Vic) s 48(2)(c) and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50.07; *Supreme Court Act 1935* (SA) s 65(1); *Local Court Act 1989* (NT) s 16 and *Local Court Rules* (NT) r 32.07; *Supreme Court Act 1935* (WA) s 167(1)(q)(i) and *Rules of the Supreme Court 1971* (WA) O 8; *Alternative Dispute Resolution Act 2001* (Tas) s 5(1); *Court Procedures Rules 2006* (ACT) reg 1179 and *Civil Law (Wrongs) Act 2002* (ACT) s 195; *Civil Proceedings Act 2011* (Qld) s 43. See generally Philip McNamara, 'Mandatory and Quasi-mandatory Mediation' (2019) 47 *Australian Bar Review* 215; Angela Bowne. 'Reforms to Civil Justice: Alternative Dispute Resolution and the Courts' (2015) 39 *Australian Bar Review* 275.

doctrine, or precedent. Another advantage is that mediation is private, whereas court proceedings are public. Owing to the close relationships between the parties and the benefits of avoiding adversarial proceedings between family members, these types of matters are usually not listed for hearing unless the court is satisfied that the parties have made attempts to resolve the matter through mediation. Mostly the mediation is a 'court-annexed mediation', meaning the Supreme Court has its own trained registrars to conduct the process. Private mediation is less common, as parties, including legally aided parties, want to keep the costs as low as possible and there is no charge for court annexed mediation.[598]

An obstacle to a successfully mediated outcome in a family accommodation dispute is that often the adult children lack the financial capacity to repay the amount provided by the parent in the first place. Frequently, one of the reasons for the contribution by the parent is the adult child is unable to afford the cost of accommodating the parent without the injection of funds. Consequently, mediation is often unsuccessful because the adult child has insufficient resources to retain their property as well as provide enough money to enable the parent to start over.[599] Refinancing is a possibility, but this rarely provides enough to give the parent the independent residence they used to have. More importantly, under the present conditions the adult child may feel little incentive to come to a mediated settlement, given the legal onus of commencing and proving a claim is with the parent.

There is also evidence that owing to the lack of formality in mediation or conciliation conferencing, there is little attention given to objective fairness or the legal soundness of agreements between parties.[600] Ellison argues that this form of complaint handling scheme compounds older people's vulnerability rather than making adjustments for their individual needs. The Law and Justice Foundation has noted that face-to-face mediation with a party with whom one is engaged in conflict requires a level of self-confidence and an ability to negotiate that can prove daunting.[601] Therefore, mediation may also be inappropriate where clear power

[598] Supreme Court of New South Wales, *Practice and Procedure, Mediation* <https://www.supremecourt.justice nsw.gov.au/Pages/sco2_practiceprocedure/sco2_mediationinthesc/sco2_mediationinthesc.aspx#mediation_costs>.
[599] Correspondence with Ms Pat Lane, Barrister, Level 22 Chambers, 52 Martin Place Sydney NSW 2000 (7 April 2021).
[600] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 264.
[601] Ibid 365.

imbalances exist, where an older person suffers some cognitive impairment or where there is a risk of undue influence.[602]

III BARRIERS TO ACCESS TO JUSTICE IN THE SUPREME COURT

A *OLDER PERSONS AND ACCESS TO JUSTICE*

As stated in the introduction to this thesis, access to justice involves, among other things, an appreciation of the needs of those who require assistance of the legal system.[603] Examining access to justice issues concerning elderly Australians requires a comprehensive assessment of the needs of a 'diverse demographic group with different needs, experiences and intersectional identities'.[604] Numerous reports published over the last two decades, and the submissions they contain, identify factors that contribute to the unmet legal needs of older people and the impediments to older people's access to justice.[605] The Law Council of Australia, in its Final Report, observed that there are many variables within the class that will shape an individual's legal needs and their interaction with, or reluctance to engage in, the legal system.[606] Personal barriers including the age and background of the individual can contribute to lack of engagement in legal processes. For instance, an unwillingness to engage in conflict, particularly involving family members can contribute to a reluctance to engage in legal proceedings, or the failure to conceptualise a problem as a legal one. As a consequence, older persons are frequently reluctant to openly discuss their dispute, and may downplay it or deny its existence.[607] The Law Council of Australia also notes that a mistrust of lawyers, and psychological barriers such as fear of retribution, disempowerment and shame, can make

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[602] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 20, citing Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2009) and Douglas Knowlton and Tara Lea Mulhauser, 'Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?' (1994) 70 *North Dakota Law Review* 255.

[603] McClelland (n 24). Other aspects of access to justice involve equal access to legal services, correcting structural inequalities, improving non-adversarial alternatives to dispute resolution, and reviewing allocation of resources: Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 31.

[604] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) Executive summary, 3.

[605] 'Older persons' being identified as aged 65 or over, or in the case of Aboriginal and Torres Strait Islander peoples, 50 or 55 years and over: Law Council of Australia, *The Justice Project: Consultation Paper 'Older Persons'* (August 2017) 2.

[606] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 6.

[607] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 257 citing the National Alternative Dispute Resolution Advisory Council; Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 20, citing Aged and Disability Advocacy Australia, Submission No 59. This observation is not, however, universal. Professor Carolyn Sappideen is quoted in the same report as saying of older people '[a]s a group, they are better organised, better educated and better funded, and they are working longer than earlier older populations … You now have a very articulate, educated group who are not going to sit by and let their retirement disappear.'

victims of elder abuse reluctant to utilise the legal system.[608] Systemic failings of the justice system – such as a shortage of specialised legal services for older people, particularly in regional and rural areas, a lack of practitioner expertise in elder law areas, lack of understanding of the law, unavailability of interpreter services for culturally and linguistically diverse (CALD) older people, and difficulties accessing technology – pose further barriers to access to justice.[609] Therefore the topic of access to justice for older people raises issues that are significantly broader than just the problems associated with Supreme Court proceedings addressed here.

Outside of the elder law space, Australia has seen a series of reforms leading to the growth of non-court bodies and the development of tribunals, and many cases have been diverted from the civil courts to these bodies.[610] However, while the family accommodation dispute is one that would be ideally heard by a tribunal, at present the applicable law means it sits squarely within the jurisdiction of the Supreme Court.

The reforms proposed in this thesis focusing on the Supreme Court will not eliminate every aspect of barriers to access for justice for older people. Nonetheless, the focus on the tripartite impediments of time, expense and formality are those specific matters that render the Supreme Court ill-fitted to property disputes that arise in the context of FAAs and are factors that could be ameliorated by moving the jurisdiction from the Supreme Court to a tribunal.

B *Specific Barriers to Access to Justice in the Supreme Court*

1 *Time*

'The law's delay' has long been considered an 'evil' that compromises the administration of justice.[611] Many people would be familiar with the scathing depiction of the Court of Chancery

[608] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 16.
[609] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 362–7; Standing Committee on Legal and Constitutional Affairs (n 20) ch 5; Judicial Commission of New South Wales, *Equality before the Law Bench Book*, Section 11 (Older People) 11.4.1; COTA Australia, 'The Justice Project Consultation: Submission to the Law Council of Australia' (6 October 2017); Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27); Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12(1) *Elder Law Review* 1; Catrina Denvir, Nigel Balmer and Pascoe Pleasence, 'Portal or Pothole? Exploring How Older People Use the "Information Superhighway" for Advice Relating to Problems with a Legal Dimension' (2014) 34 *Ageing & Society* 670; National Seniors Australia, *Older Australians and the Internet: Bridging the Digital Divide* (Productive Ageing Centre, September 2011) 21; Sage-Jacobson (n 18).
[610] For example, tribunals in New South Wales include the Guardianship Tribunal, the Mental Health Review Tribunal, the Dust Diseases Tribunal, Civil and Administrative Tribunal.
[611] Moorfield Storey, *The Reform of Legal Procedure* (Yale University Press, 1912) 21–2.

in Charles Dickens's *Bleak House*, where litigation is beset by delays and the protagonist's inheritance is consumed by legal costs.[612] More recently in the Australian Capital Territory Court of Appeal, Justice Burns referred to delay and expense as the 'twin evils besetting our system of civil justice'. He went on to say that '[t]hey are not entirely unconnected: delay begets expense'.[613] The Productivity Commission Report on Access to Justice also noted that '[c]oncerns about delays can contribute to unmet legal needs', and it has been estimated that one third of individuals who chose not to take legal action cited delays as the reason for their decision.[614] The Commission observed that frustrations with delays may force parties to either accept an unsatisfactory settlement or withdraw entirely.

> The frustrations associated with delay can force some parties to withdraw from the civil justice system. This was illustrated in the Commission's study of court users in South Australia – over a quarter of parties that settled or withdrew their cases reported frustration with the legal process as the reason for doing so. Two thirds of these parties had disputes which had been in the court system for at least 12 months before ultimately settling or withdrawing. Very few of these parties reported being satisfied with the settlement offer they received.[615]

Litigation involves several steps, and each can contribute to the length of time taken for a dispute to be resolved.[616] Litigation is time-consuming, and more so in complex cases. Family accommodation disputes may not involve as much complexity as some commercial disputes and therefore would not run the risk of taking years to hear evidence and argument;[617] however, while there is no statistical data available specifically for FAAs, they commonly involve arguments concerning property and related equitable principles that it may be surmised will contribute to both preparation and hearing times. Having litigation drawn out over a long period

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[612] "The lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. It's about a will and the trusts under a will – or it was once. It's about nothing but costs now. We are always appearing, and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death, about costs. That's the great question. All the rest, by some extraordinary means, has melted away.' Charles Dickens, *Bleak House* (Penguin Classics, 2011) 118.

[613] *Davis Samuel Pty Ltd v Commonwealth of Australia* [2016] ACTCA 22 [141] (Burns J).

[614] Productivity Commission (n 271) 127.

[615] Ibid 128.

[616] Along with the initial task of instructing solicitors, pre-trial procedures such as filing pleadings and defences, directions hearings, discovery (if necessary), and taking affidavit evidence and issuing subpoenas are time consuming. Once a trial date has been secured, the trial process takes place. In family accommodation cases this would generally be concluded in a matter of days; however, there are variables that could prevent a speedy conclusion. For instance, matters may need to be adjourned if one or more participants become unavailable due to illness or infirmary. Depending on the complexity of the case judgement is either delivered *ex tempore* or reserved.

[617] See eg *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239, where proceedings were commenced by the liquidator of Bell in 1995 and, after 13 years of preparation, the matter was heard by Owen J over 404 hearing days, between 2003 and 2006; cited in Willis, *Civil Procedure* (n 568) [2.3.3].

of time not only contributes to the expense but also prolongs the emotional distress people suffer. As arrangements are often informal, recollections may fade or be distorted. Boersig observes that '[f]or a court, examining family arrangements many years after the fact with a view to determining a legal or equitable interest is challenging, even when there is a level of agreement as to the wishes of the elderly person'.[618] Emotional distress is exacerbated by the familial context of such disputes, and there would be an understandable reluctance to spend the later years of one's life tied up in litigation.

Delayed proceedings can also have a financial impact – for instance, if the parent has money tied up in the property and only limited access to money until the conclusion of the dispute, it may prevent them from obtaining alternative permanent accommodation. Although parties can apply for expedited hearings, the decision is discretionary and dependent on other matters before the court.[619] Even if granted, an expedited matter in the Supreme Court can take up to eight months (in New South Wales) to be heard.[620] The parent in a family accommodation dispute is, simply by virtue of the nature of the arrangement, likely to be an older party and therefore less inclined to engage in lengthy litigation.[621]

2 *Cost*

> For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now.[622]

The issue of the prohibitive nature of legal costs is seen as one of the primary barriers to access to justice in most societies. The findings of Lord Woolf tabled twenty-five years ago are still applicable:

> The defects I identified in our present system were that it is too expensive and that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful wealthy litigant and the under resourced litigant. It is

[618] Boersig and Illidge (n 106).
[619] Practice Note SC Eq 8 – Urgent Matters in the Equity Division (19/10/2009). Reasons for an expedited hearing include a party or essential witness being of advancing years, or a party or essential witness is frail or in declining health.
[620] See further Rachel Callinan, *Court Delays in NSW: Issues and Developments* (NSW Parliamentary Library Research Service, 2002) <https://www.parliament nsw.gov.au/researchpapers/Documents/court-delays-in-nsw-issues-and-developments/01-02.pdf>.
[621] Sage-Jacobson (n 18); ALRC Final Report (n 19) [8.17].
[622] *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As v Cengiz Aytacli* [2020] EWHC 2542 (QB) [1] (Coulson LJ).

> too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induce the fear of the unknown and it is incomprehensible to many litigants.[623]

More recently, submissions made by the Queensland Public Interest Law Clearing House to the Productivity Commission inquiry observed that:

> The issue of costs is a clear barrier to effective access, particularly to access the courts ... Failure to access the courts is not limited to the very poor but is also difficult for many wage earners. The increasing cost of litigating a dispute, including the cost of legal assistance and any potential cost orders made against unsuccessful parties, creates a significant barrier to access to justice, particularly at the superior court level.[624]

The Productivity Commission found that litigation in courts is generally the most expensive way for private parties to resolve their disputes. Costs incurred in litigation can include fees paid to solicitors, court fees and disbursements (such as fees to barristers and expert witnesses).[625] In most failed FAAs, the parent will have a justiciable matter and the right to bring an action to recover either money or property. However, legal rights are illusory and the principle of equality before the law is meaningless if legal costs prevent access to justice and effectively prevent people from enforcing or protecting their rights. Older people generally have less access to earned income and a higher rate of means-tested income support.[626] While they are also found to have higher rates of home ownership, the transfer of property or assets under the agreement means that they can be less able to draw on personal income sources to finance litigation.[627]

With the exception of Victoria, all Australian jurisdictions would hear the above matters in the State Supreme Court.[628] Litigation in this jurisdiction is commonly beyond the resources of many people.[629] For example, in a submission to the Productivity Commission's Inquiry into Access to Justice, the Chief Justice of Western Australia commented that

> [t]he hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.[630]

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[623] Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (Lord Chancellor's Department, UK 1996) [1.2].
[624] Queensland Public Interest Law Clearing House, Submission 58 in Productivity Commission (n 271) 114.
[625] Productivity Commission (n 271) 118.
[626] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 5.
[627] ALRC Final Report (n 19) [6.22]
[628] Or in the District Court, subject to the jurisdictional qualifications explained above at p128.
[629] Standing Committee on Legal and Constitutional Affairs (n 20) para 5.21.
[630] Productivity Commission (n 271) 6.

For example, the standard fee to file an originating process in the common law or equity division of the NSW Supreme Court is $1,160, and the fee for an allocation of hearing date is $2,314.[631] Unless the court orders otherwise, the plaintiff usually pays these fees.[632] In addition to court costs, the legal fees associated with retaining a private lawyer and briefing a barrister are, for many people, prohibitive. Solicitors charge on a time basis, and hourly rates vary depending on seniority. The Productivity Commission suggests that law firm partners charge approximately $600 an hour and associates around $300 an hour.[633] It is estimated that a three-day trial in the Supreme Court of NSW would cost in the vicinity of $90,000 to $130,000.[634] If money is tied up in the property itself, the older party is in a 'catch-22' situation, in that they are unable to access funds to seek legal advice. Many applicants may find that the costs of accessing the civil justice system are simply disproportionate to the sum being sought. Additionally, the ability to recover costs through an adverse costs order is subject to uncertainty. As well as the litigation outcome being uncertain, a favourable costs order does not necessarily provide full cost recovery.

Community-based legal services such as Justice Connect,[635] Seniors Rights Services[636] and the Older Persons' Legal and Education Program[637] (a specialist service of Legal Aid NSW) can provide legal advice and representation either for those eligible for legal aid or through pro-bono schemes. These services are means-tested and, therefore, only available to those who satisfy the eligibility criteria. However, access to legal aid is limited. As the Law and Justice Foundation observes:

> Reductions in funding to Legal Aid over the years has created more stringent policies limiting its application, both on financial grounds and to various areas of the law. This can impact harshly on older people particularly, as they can be more vulnerable than other groups.[638]

A submission to the Productivity Commission from National Legal Aid remarked that continued funding restraints have meant many people who are unable to afford a private legal practitioner will be unable to receive a grant of legal aid, or the level of assistance they need.[639]

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631 *Civil Procedure Regulation 2017* (NSW), sch 1.
632 Ibid cl 9(2)(c), 10(2)9(c). However, a party may apply to have these fees waived: see Part 4.
633 Productivity Commission (n 271) 115–16.
634 Email correspondence with Patricia Lane, Barrister, Level 22 Chambers, Sydney (6 March 2019).
635 <https://www.justiceconnect.org.au>.
636 <http://seniorsrightsservice.org.au>.
637 <https://www.legalaid nsw.gov.au/what-we-do/civil-law/a-service-for-older-people>.
638 Ellison et al, *The Legal Needs of Older People* (n 63) 79.
639 Productivity Commission (n 271) 716.

Therefore, costs are a particular barrier to obtaining legal assistance for people in the middle-income range, who are neither eligible for legal aid nor able to afford costly legal fees.[640]

One suggestion is to take advantage of 'no win no fee' arrangements. Although this would certainly prevent a substantial legal bill, there are some drawbacks. First, the 'no fee' element may only apply to the lawyers' fees, and not disbursements. Secondly, if the claim is unsuccessful, the plaintiff may be liable to pay the defendant's cost of the proceedings.

In its 2017 Report on Elder Abuse, the Australian Law Reform Commission responded to the problem of prohibitive costs by recommending FAA matters be heard by tribunals, based on the current Victorian practice.[641] Tribunals are certainly a lower-cost alternative, and many litigants are self-represented, thus eliminating the costs associated with legal representation. However, if the present law is to continue to be applied without reform, it is difficult to see how matters could be argued in the absence of legal representation, and the Productivity Commission has acknowledged that the more complex the matter, the greater the costs.[642] In any case, the absence of legal representation can prove to be a disadvantage to the parent, owing to potential inherent and situational vulnerabilities, and thus prevent them from effectively participating in proceedings.[643] As a consequence, some cases are brought post-mortem by siblings or other interested parties as a part of succession litigation.[644]

3 *Formality*

Formality and the intimidating nature of court processes were aspects specifically identified by the Law and Justice Foundation as disincentives to older people seeking court-based resolutions.[645] Formality associated with the Supreme Court involves two features; first, the formality associated with procedure, and, secondly, the nature of the court itself and its adversarial process. The question of formality of procedure is closely tied to the issues relating to delay and cost. Formal and highly complex procedures are difficult for a lay person to manage, and consequently require legal expertise to navigate. Therefore, it is highly unlikely

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[640] Christine Coumarelos et al, *Access to Justice and Legal Needs* (Law and Justice Foundation of NSW, 2012).
[641] ALRC Final Report (n 19) Recommendation 6.4.
[642] Productivity Commission (n 271) 117. Additionally, there are jurisdictional problems with equitable principles being applied in Tribunals.
[643] Ellison et al, *The Legal Needs of Older People* (n 63) 365; see also Elizabeth Richardson, Genevieve Grant, and Janina Boughey, *The Impacts of Self-represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Australasian Institute of Judicial Administration, 2018).
[644] See eg *Duong v Duong* [2018] NSWSC 1696; *Grant v Smith* [2019] NSWSC 843; *Gillespie v Gillespie* [2012] QDC 212.
[645] Ellison et al, *The Legal Needs of Older People* (n 63) 365.

that parties would choose to self-represent, requiring them to engage legal representation.[646] The Productivity Commission observed that legal complexity can prevent people with legal issues from acting or seeking assistance.

> Complexity makes it less likely that individuals will take action to resolve legal problems when they arise. When faced with a complex system to navigate, people often exhibit behaviours and decisions which may ultimately not be in their best interest, such as:
>
> - putting things off and leaving their problem unresolved
> - sticking with the default option, even if it is not the best
> - avoiding making a decision altogether
> - being readily confused and prone to misleading advice.[647]

Once proceedings commence these processes make it difficult, except for the extremely robust, to cope with the quantity of information, constant adjournments, and procedures such as examination in chief and cross-examination. These barriers can be exacerbated among the older population. As people age, they are likely to experience disability, either physical or cognitive, or ill-health, and thus require more assistance.[648] However, legal assistance bodies have limited funding and few resources dedicated to civil law assistance.[649]

The adversarial nature of the Supreme Court, together with the formality of proceedings, can be a disincentive to commencing litigation.[650] The Law and Justice Foundation's Report on the Legal Needs of Older People observed an apprehension among some older people regarding engaging in and coping with conflict. Quoting the National Dispute Resolution Advisory Council, they explained:

> A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved, elderly people have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant [to] openly to discuss their dispute, downplay it or deny its existence. They tolerate discomfort

[646] See in particular Queensland Public Interest Law Clearing House (n 627) 3, 12: 'Many of our clients struggle with court forms and timelines. Many of our clients also experience difficulty in understanding the law ... Court forms are often not simple or useable. Knowing the correct form to use is half the battle. The use of legal terminology can confuse, especially those from non-English speaking backgrounds. While these forms do contain guidance notes, a person would have to be legally trained to source and interpret the rules to which they refer.'
[647] Productivity Commission (n 271); see also Sage-Jacobson (n 18) 151.
[648] ALRC Final Report (n 19) [2.8].
[649] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 16.
[650] Ellison et al, *The Legal Needs of Older People* (n 63) 365.

> and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.[651]

Additionally, submissions provided by the legal firm Slater and Gordon observed that older people with an inherent vulnerability in the form of age-related disability experience challenges instructing solicitors in litigious matters.

> It is often also the case that older persons have difficulty in collating relevant documents to instruct our solicitors due to physical impairment or declining physical health. Such physical barriers can impact on our older clients, making it challenging for them to provide instructions in a timely manner particularly where a litigious matter is on foot.[652]

This difficulty is compounded where the older person has lost capacity through declining cognitive impairment and can no longer provide instructions themselves.

The basis of the adversarial process is for opposing parties to present their cases to an impartial arbiter in order to achieve the best possible outcome, with the decision-maker taking a passive rather than an inquisitorial role.[653] The system emerged from the practice of resolving disputes through 'trial by combat', where land disputes were resolved by ordering disputants legal representatives to 'bludgeon one another before an arena of spectating citizens'.[654] Once the victor emerged (either by one party being killed, submitting or pushing a 'stalemate') the presiding judges would complete the trial by ordering the combatant's principal to take possession of the property, and declaring publicly the principal's good title.[655] Over time the process evolved and the 'battle' was removed, but the adversarial nature of the trial remains.[656] The nature of the adversarial system in turn shaped the formal procedures associated with the litigation process.[657] The notion of the parties being adversaries sits uncomfortably with many older people in disputes involving family members, particularly adult children. Many are concerned about the impact of such proceedings on familial cohesion, and in particular the

[651] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution* (Discussion Paper, November1997) para 5.82 cited by Ellison et al, *The Legal Needs of Older People* (n 63) 30.
[652] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 19.
[653] Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135, 138.
[654] Peter T Leeson, 'Trial by Battle' (2011) 3(1) *Journal of Legal Analysis* 341, 365. According to Leeson, the weapons used were short clubs rather than swords or lances.
[655] Ibid 347.
[656] Trial by battle was replaced by trial by jury: John Baker, *Introduction to English Legal History* (5th ed, Oxford University Press, 2019) 80–3.
[657] Ibid 89–103. For instance, filing of claim and defences, obtaining witness evidence etc.

possibility of compromising contact with grandchildren.[658] The Law Council noted that feelings of shame or embarrassment can prevent older people commencing action, and this is heightened by the public forum of the courts.[659]

Along with highly formalised civil litigation procedures, attending court itself can be an overwhelming experience. The court is a formal environment with rules concerning language, conduct and appearance, all of which are designed to reinforce the solemnity of the proceedings. Parties unfamiliar with the norms of court procedure, etiquette and ceremony may be unprepared for what is at times an esoteric legal culture.[660] While demonstrating the gravity of the proceedings, these characteristics, and the associated formal procedures, can be intimidating and 'anchored in the past'.[661]

Coupled with the issue of costs, the formality associated with the current forum was an important motivation behind the ALRC's recommendation that disputes involving asset for care arrangements be heard in tribunals.[662] Tribunals, in contrast to courts, operate under a statutory mandate to deal with matters informally and quickly, proportionate to the complexity of the matter. Although they are required to apply the law (and not make decisions based on unfettered discretion and loose notions of justice and fairness), they are given a broad discretion in conducting proceedings, which is often seen as moving tribunal processes from an adversarial approach to a more inquisitorial model. For instance, the New South Wales Civil and Administrative Tribunal has a duty to 'resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible'.[663] Therefore, they are not required to adhere to strict rules of evidence or comply with the same procedural rules as a court. They are required, however, to achieve procedural fairness between parties.[664]

IV CONCLUSION

Unless a family accommodation dispute is resolved through non-legal means such as mutual agreement or a negotiated settlement, the legal issues concerning property and equitable

[658] Law Council of Australia, *The Justice Project: Final Report*, Part 1 (n 27) 19. In the context of the theoretical framework adopted in this thesis, the reluctance to engage in litigation against children is an example of personal-situational vulnerability.
[659] Ibid 20.
[660] Justice Robert French, 'Speaking in Tongues Courts and Cultures' [2007] *Federal Judicial Scholarship* 18 [24] citing Kathy Laster, *Law as Culture* (2nd ed, Federation Press, 2001) 10.
[661] Bertus de Villiers, 'Accessibility to Law: Adjusting Court Proceedings to the Modern Era – Novel Practices and Procedures from Down Under' (2016) 14 *New Zealand Journal of Public and International Law* 229.
[662] ALRC Final Report (n 19) Recommendation 6-1.
[663] *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d). See also ss 36(1), 38(4).
[664] *Amad El Ahmad v Imelda Reyes* [2015] NSWCATAP 50 at [32]. Tribunals are examined in detail in Chapter 9.

principles dictate that the dispute will generally be heard in the Supreme Court. The institutional framework of the civil justice system that regulates and informs litigation has long been beset by problems that have the potential to frustrate access to justice for litigants. However, these problems raise more acute challenges for the elderly participant. This chapter has focused on three of the issues associated with the Supreme Court jurisdiction identified as creating specific barriers for a parent; the delays commonly experienced in litigation, the expense of both legal representation and court proceedings, and the formality of the court in both its processes and its adversarial nature. Any or all of these factors not only act as disincentives for older people to have their matters resolved, but also make it difficult to obtain a successful outcome even when proceedings are undertaken. These procedural barriers necessarily overlap with issues created by the complexity of the substantive law, detailed in Chapter 6. Combined, they create systemic vulnerability, whereby the available law and processes aimed at assisting the resolution of a dispute have the paradoxical effect of creating or becoming the cause of avoiding legal action. Practices have been introduced to ameliorate some of the issues identified as affecting access to justice. Active case management has had some success in streamlining hearings and reducing time and costs, but older person's advocacy groups have still identified costs and delay as being instrumental factors in eschewing legal action. Compulsory ADR aims to expedite settlements and reduce cost, as well as avoid formal, adversarial hearing. However, there is evidence that mediated settlements also exacerbate the vulnerabilities of the elderly applicant.

In response to the identification of these barriers to access to justice and their impact on the elderly litigant, the proposal that tribunals be granted jurisdiction to hear family accommodation disputes will be explored in Chapter 8. This chapter will address the degree to which the issues of time, cost and formality could be ameliorated and assess whether the change of jurisdiction is a worthwhile alternative.

CHAPTER 6
SOURCES OF SYSTEMIC VULNERABILITY: THE COMPLEXITY OF THE PRESENT LAW

> Various legal principles may provide the means for properly resolving disputes of this kind, which essentially involve the existence of trusts, but the principles subtly overlap and slight differences in factual findings may have significant consequences to the selection of the principles that are properly to be applied.[665]
>
> But before the reform of the law can be done, it is essential that its doctrines should be understood and that may mean an investigation of the foundation of those that are to be reformed.[666]

I INTRODUCTION

Chapter 4 of this thesis examined how legal rules and doctrines applicable to the failed FAA operate to create a 'legal imbalance' against the older party and are themselves a source of vulnerability, termed 'legal situational vulnerability'. Chapter 5 examined how the method and structure of the legal forum that the parent must presently access to resolve a family accommodation dispute are themselves a source of vulnerability. This chapter continues the analysis of systemic vulnerability by exploring the causes of action and potential grounds for relief presently available in a failed family accommodation arrangement (FAA). It will demonstrate how and why the legal pathways presently available to resolve a dispute are so complex and inaccessible to many people that they are a source of vulnerability in themselves. The law's inaccessibility derives from several factors. First, there exist a wide variety of overlapping causes of action which make it difficult to determine which ones to pursue. As Justice Robb has observed, these principles overlap and sometimes the slightest differences in the facts may mean different principles, often with different outcomes, can be applied.[667] Secondly, the causes of action themselves are difficult to plead, as the parent must prove each element of the action. Difficulty in proving each element may stem from the third consideration: that in many circumstances, particularly where problems arise not because of abusive intent but

[665] *Spink v Flourentzou* [2019] NSWSC 256 [18] (Robb J).
[666] Sir Owen Dixon, 'Response to KO Shatwell, "Some Reflections on the Problems of Law Reform"' (1957) 31 *Australian Law Journal* 340.
[667] *Spink v Flourentzou* [2019] NSWSC 256 [18] (Robb J).

because of failed expectations, evidence to prove the various elements of the cause of action is often lacking. The lack of evidence is commonly a result of the informality that characterises FAAs owing to the familial setting. Along with the inaccessibility of the current forum explored in Chapter 5, this thesis has characterised the dilemma as 'systemic vulnerability'.

Failed FAAs are more accurately characterised as family disputes involving property rather than property disputes between family members. The difference between the two is nuanced but significant. It signals the difficulties of applying a legal framework to disputes amongst family members where a successful litigated outcome and the preservation of personal relationships are often competing goals; the success of one is often at the expense of the other. As touched on in the introduction to this thesis, ideally, the parties would achieve a conciliatory outcome that preserves existing relationships as well as reaching mutually acceptable financial terms without having to resort to the principles covered by this chapter.[668] This is not to say parties on entering an agreement would not wish their undertakings to have legal force, but, rather, that owing to the polarising effect of legal proceedings, they should be a last resort.[669] Nonetheless, in some cases it will be necessary for property and financial disputes to be resolved using a legal framework. Despite the grounds for relief relied upon being primarily equitable, many claimants may be surprised to discover that redistribution will not be based on principles of 'fairness'.[670] The courts draw a distinction between 'random notions of what is fair and just as a matter of abstract morality' and a decision according to equitable principle.[671] Therefore, once parties choose to pursue a legal outcome the resolution of the dispute must accord with 'principle and precedent'.[672] The following analysis seeks to demonstrate the challenges the parent faces in pursuing a legal outcome.

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[668] The role of alternative dispute resolution plays a significant role in the resolution of disputes in FAAs, but its operation is considered by some to be problematic: see Chapter 5 Part II C.

[669] See eg the evidence of the second appellant in *Flourentzou v Spink* [2019] NSWCA 315 [36], where Mrs Spink's son-in-law stated he had not considered asking her to leave the property until she 'got legal', referring to the respondent's lodging a caveat over the disputed property.

[670] Granted, the equitable principles have 'a distinctive ethical quality, reflecting … the prevention of unconscionable conduct': ICF Spry, *The Principles of Equitable Remedies* (9th ed, Law Book Company, 2014) 1. However, a perceived unfair situation or outcome will not suffice to be granted an equitable remedy.

[671] *Muschinski v Dodds* (1985) 160 CLR 583, 621 (Deane J); *Lawrence v Branch* [2002] WASCA 292 [28] (Burchett AUJ).

[672] *Muschinski v Dodds* (1985) 160 CLR 583, 621 (Deane J). See also *Louth v Diprose* (1992) 175 CLR 621, 654 cited in *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10 [228]; see also the observations of Sir Anthony Mason in 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1, 12 cited by Debelle and Wicks JJ in *Micarone v Perpetual Trustees Australia Ltd* [1999] SASC 265 [648].

In this chapter, the available grounds for relief are organised according to the factual matrix of the agreement, and the conduct forming the basis of the dispute.[673] To further contextualise the law, short fact scenarios are used to explain the scope of the possible actions that may be brought, the requirements to establish liability and the remedial outcome. In doing so, the scope and complexity of the law, as well as doctrinal overlap and interconnectivity, are exposed.

Part II concerns actions that respond to the wrongful behaviour of the defendant, or the exploitation of the plaintiff. These include actions against the defendant for statutory and equitable fraud (undue influence and unconscionable conduct), breach of fiduciary duty, claims under the *Contracts Review Act 1980* (NSW) and claims to set aside contracts relying on the doctrine of *non est factum*. Part III focuses on grounds for relief based on a breach of promise or acts by the defendant that are contrary to initially declared intention. These include claims for breach of contract, breach of an express trust, a common intention constructive trust and claims in estoppel. Part IV deals with those actions that provide relief for the unexpected breakdown of the arrangement where there is a lack of any clear undertakings concerning property or asset distribution. These include a claim under the *Muschinki v Dodds* 'failed joint venture' principles,[674] resulting trusts and distribution under the *Family Law Act 1975* (Cth) or the *Property (Relationships) Act 1984* (NSW) or state equivalents.

This taxonomy is adopted as it more clearly demonstrates how, in the context of FAAs, the law and equity respond to what Robb J describes as 'slight differences in factual findings'.[675] Hence, the choice of which grounds to pursue will depend on the facts and how those facts are 'framed'. Invariably there will be competing narratives, and courts are often left relying on the assessment of witnesses to determine the strength of competing evidence.[676]

The facts of a specific case may well give rise to grounds for relief emerging from each of the three categories, and claims may be pleaded in the alternative. As Leeming J has observed, '[c]auses of action commonly overlap, and the same facts can give rise to multiple grounds being argued concurrently or in the alternative'.[677] For example, a plaintiff may argue a transaction should be set aside on the grounds of undue influence, with alternative grounds

[673] In contrast to the more traditional method of organisation according to their statutory, common law or equitable origins.
[674] *Muschinski v Dodds* (1985) 160 CLR 583.
[675] *Spink v Flourentzou* [2019] NSWSC 256 [18] (Robb J); see also *Melbourne Orthopaedic Group Pty Ltd v Stamford Aus-Trade & Press Pty Ltd* [2015] VSCA 150, [135] (Santamaria JA).
[676] *MacKenzie v Storer* [2007] ACTSC 88 [2].
[677] *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81, [49] (Leeming J).

being a resulting trust or a failed joint venture. Consequently, there are no bright lines between each group; however, the approach does provide a useful taxonomy to appreciate both the distinctions and commonalities between various doctrines and the consequences for remedial outcomes.

The available remedies are examined in the context of the cause of action. This chapter will use recent decisions to explain approaches adopted by the courts.[678] In some instances, specific doctrinal rules determine the remedial outcome. For example, if the facts give rise to a common intention constructive trust, the claimant will most likely be awarded a proprietary remedy. However, equitable remedies are discretionary and can be adjusted and moulded to achieve the most appropriate result given the particular facts and competing interests.[679] For example, while transactional relief such as reversing property transfers, or awarding a proprietary interest based on a failed joint venture, may apply, there are circumstances that could influence the exercise of the remedial discretion. Whether the remedy would cause undue hardship to the defendant or a third party, whether there is a need for a clean break between the parties or whether subsequent events will affect the plaintiff's equity can all influence the court's determination of the appropriate remedy.[680]

II ACTIONS CONCERNING WRONGFUL BEHAVIOUR OF THE DEFENDANT, OR VULNERABILITY OR EXPLOITATION OF THE PLAINTIFF[681]

This category examines grounds for challenging the adult child's title to the disputed property where the emphasis of the cause of action is either the wrongful behaviour of the defendant or, where the plaintiff suffers some form of vulnerability, whether that vulnerability has been (intentionally or not) exploited by the defendant. Statutory fraud, unconscionable conduct and duress specifically target the conscious wrongful behaviour of the defendant. Breach of fiduciary duty also forms part of this category because of the existence of a duty and subsequent breach, despite conscious wrongdoing not being a necessary requirement to establish liability. A person may be liable for breach of fiduciary duty even if they are well-intentioned and acting

[678] See Chapter 1 Part II concerning methodology.
[679] *Bridgewater v Leahy* (1998) 194 CLR 457, 494.
[680] *Sullivan v Sullivan* [2006] NSWCA 312 [24]–[26] (Handley AJA).
[681] This section does not cover criminal offences relating to property, for instance misappropriation of property, theft or fraud under various state criminal legislation. This is because actions under the criminal statutes are not pursued by the victims themselves, and as such do not fall within the scope of systemic vulnerability as discussed in this thesis. See also Teresa Somes and Eileen Webb, 'Financial Abuse' in C Sappideen, K Williams and S Field (eds), *Elder Law: A Guide to Working with Older Australians* (Federation Press, 2018) 230.

in good faith.[682] It is the existence of a duty of loyalty, and the reliance of the principal on the fiduciary to act in the principal's best interests in a 'legal or practical sense', that attracts liability.[683] Nonetheless, breach of fiduciary duty will commonly involve wrongful behaviour on the part of the fiduciary. Doctrinally, undue influence and duress can be distinguished from the other grounds for relief by virtue of being 'plaintiff sided' (a question of 'impaired consent' as opposed to 'wicked exploitation').[684] Birks and Chin explain that undue influence turns on the experience of the plaintiff as opposed to the conduct of the defendant.[685] Similarly, Deane J in *Commercial Bank of Australia v Amadio* stated that undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party.[686] It is included in this category as it is often pleaded in tandem with unconscionable conduct, and as the parent/child relationship is not a presumptive relationship.[687] The onus therefore lies with the parent to prove facts that support a finding that the relationship is one where one party has exerted influence over the other, so as to give rise to a presumption of undue influence, or there is evidence of actual undue influence.[688] Therefore, the behaviour of the adult child is scrutinised. Lastly, the *Contracts Review Act 1980* (NSW) is relevant to circumstances where the existence of a contract can be established but the contract can either wholly or in part be set aside if the terms are found to be unjust or unconscionable.

Hypothetical Case Study

> Anna was the registered proprietor of a house in Sydney and suffers some age-related physical and cognitive disabilities, but still has not lost capacity. Her daughter Bea lives with her and looks after her day to day needs and helps Anna to manage her finances. Anna's house has been transferred to Bea, who is now the registered proprietor. Anna and Bea continue to live together, but Anna feels she is not being looked after. Anna now wants her property returned to her.

The facts reveal that Anna's property has been transferred into her daughter's name. However, the circumstances of that transfer will determine the actions available to Anna. Potentially, the exchange occurred under an agreement whereby Bea provided Anna with accommodation and care. Depending on the surrounding facts and context, there are several grounds for relief Anna

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[682] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, 721 (Young J) cited in Dal Pont (n 474) 107.
[683] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J).
[684] Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford Academic, 1995) 57.
[685] Ibid 59.
[686] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474–5. See also *Bridgewater v Leahy* (1998) 194 CLR 457, [74]–[76]; Mason, 'The Impact of Equitable Doctrine' (n 672) 6–8.
[687] *Brown v NSW Trustee & Guardian* [2011] NSWSC 1203 [46].
[688] *Johnson v Buttress* (1936) 56 CLR 113.

could pursue. As Bea is now the registered proprietor, she has immediate indefeasible title to the property in question.[689] In order to come under one of the 'exceptions' to indefeasibility, Anna would need to either allege fraud or come within one of the recognised *in personam* exceptions.[690]

A *Statutory Fraud*

1 *Setting Aside Bea's Title*

Fraud is a recognised exception to the registered proprietor's indefeasible title.[691] If Bea is found to have caused the transfer to occur through her (or her agent's) fraud, Anna will be entitled to a remedy; either to have the transfer rescinded and the property returned to her or, if the property is no longer extant, compensation for her loss. An example of the fraud exception can be found in section 42 (1) *Real Property Act 1900* (NSW), which states:

> Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded ...

Fraud is not defined in the legislation. However, courts have found that the action by the defendant in becoming the registered proprietor must amount to 'personal dishonesty or moral turpitude'.[692] Further, it has been described as 'dishonesty of some sort, not what is called constructive or equitable fraud'.[693] Failure to make inquiries on the part of the registered proprietor will not amount to fraud, but 'wilful blindness' may be sufficient to impeach title.[694] Fraud must be 'brought home' to the registered proprietor.[695] Fortunately, the introduction of e-conveyancing and the removal of paper certificates of title have eliminated the risk of

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[689] *Frazer v Walker* [1967] 1 AC 569.
[690] Various commentators have discussed the theoretical underpinnings of so-called exceptions to indefeasibility, commenting that they are not 'true' exceptions at all: see Low (n 485) 210; Moses and Edgeworth (n 540).
[691] *Real Property Act 1900* (NSW) ss 42, 43*; Land Titles Act 1994* (Qld) s 185(1)(a); *Real Property Act 1886* (SA) s 69(a); *Land Titles Act 1980* (Tas) s 40(3)(a); *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) ss 68(1), 134; *Land Titles Act 1925* (ACT) s 58(1); *Land Title Act 2000* (NT) s 188(3)(b).
[692] *Butler v Fairclough* (1917) 23 CLR 80, 90 (Griffith CJ).
[693] *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210.
[694] *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *Grgic v Australia & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.
[695] *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210. If Bea were to then transfer the property to another, for instance a spouse, and they were a volunteer, then pursuant to s 118(1)(d)(ii) *Real Property Act 1900* (NSW) the spouse's title, as a volunteer would have been obtained 'through fraud' and would also be defeasible: *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425.

fraudulent transfers through the use of duplicate certificates of title. However, if it was determined that Bea caused the transfer to occur – for example, by forging Anna's signature on the relevant documents, or deceiving Anna as to the nature of the documents[696] or misusing an enduring power of attorney – this would clearly amount to fraud and be caught by the section.[697] Yet conduct that is morally ambiguous is more difficult to bring within the definition of fraud. In the context of a FAA, an adult child accepting the transfer of property and subsequently failing to undertake care or accommodate their parent owing to a breakdown in the relationship, while arguably morally wrong, would not, without specific evidence of dishonesty or moral turpitude, constitute fraud.[698] Nonetheless, it is arguable that an application of the fraud exception would apply where it could be shown that Bea conducted the transfer of the property with knowledge of her mother's expectation of care *and* that the promise for care was never intended. In *Loke Yew v Port Swettenham Rubber Co Ltd*, statements of present intention (that an unregistered interest would be preserved) made to induce a transfer and subsequently not honoured were found to amount to fraud.[699] Anna's position is more tenuous if the circumstances were that Bea became the registered proprietor on the basis that she agreed to recognise Anna's interest in the property, and *subsequently* refused to recognise the interest. In *Bahr v Nicolay (No 2)*, although Mason CJ and Dawson J were prepared to find fraud the approach was not supported by the majority, nor has it been endorsed since.[700] Regardless, in both these scenarios Anna would face significant evidential challenges in proving the existence of such a deception, as she would still need to establish dishonesty or moral turpitude.[701]

2 *Setting Aside a Third-Party Transaction*

Anna would face further challenges should Bea deal further with the property, either by selling it to a third party or by creating an encumbrance through mortgaging the property. To have a mortgage or transfer set aside, Anna would need to establish that there has been actual fraud

[696] For example, by pretending the documents were something more innocuous. See Sharon Rodrick, 'Forgeries, False Attestations and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility' (2002) 7(1) *Deakin Law Review* 97.
[697] Where the registration has occurred because of forgery by the registered proprietor, the remedy would be rectification of the register as the transfer would be *void ab initio*, the registrant having never acquired an interest. Where the transfer is not *void ab initio*, the remedy would be an order that the defendant execute a transfer of the property to the plaintiff. The misuse of a power of attorney would also amount to breach of fiduciary duty, and in Qld, A will be presumed to have been unduly influenced: s87 *Power of Attorney Act 1998* (Qld).
[698] Discussed further in Chapter 7 at Part II(C).
[699] *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491.
[700] *Bahr v Nicolay (No 2)* [1988] HCA 16 [15] (Mason CJ, Dawson J).
[701] *Grgic v Australia & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 514 (Powell JA, Meagher and Handley JJA agreeing).

attributed to the third party, or his or her agent. Mere notice of Anna's possible interest – for example, during a valuation or inspection – will not amount to fraud.[702] The only exception to this is if the third party was party to Bea's fraudulent scheme. In such a case, if the third party was tainted with Bea's fraud, the transaction could be set aside.[703]

It is not considered fraudulent for a third party to take with notice of Anna's unregistered interest (even presuming she has one). Without more, it is 'morally, and therefore legally neutral'.[704] Furthermore, the mere fact that a third party may have discovered fraud perpetrated by Bea if they had made further inquiries does not, of itself, establish fraud on the part of the third party.[705]

Statutory fraud is not a commonly argued cause of action in the context of FAAs, as fraud is a notoriously difficult action to pursue. The onus on the plaintiff to prove dishonesty and moral turpitude on the part of the defendant is challenging to discharge when the plaintiff's and the defendant's lives are intertwined and there may be a significant power imbalance within the relationship. Unconscionable conduct or undue influence may provide a (relatively) more accessible means to challenge a transaction where there is the exploitation by one party of another within a relationship.

B *Duress (Illegitimate Pressure)*

The case study states that 'Anna's house has been transferred to Bea, who is now recorded on the title documentation as the registered proprietor'. At common law, transactions are presumed to occur between parties of equal bargaining power. However, equity will intervene to set aside a transaction if the facts demonstrate the transaction was unconscionable.[706] Therefore, if the transfer has occurred because Bea has exerted illegitimate pressure, undue influence or taken unconscionable advantage of a special disability suffered by Anna, the transaction can be set aside.[707] Unconscionable conduct and undue influence are more commonly argued when there is evidence of wrongful behaviour, as duress remains limited in

[702] *Munro v Stuart* (1924) 41 SR (NSW) 203, 206.
[703] *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.
[704] *Todd v Jingalong Pty Ltd* [2014] NSWSC 362 [88] (Kunc J).
[705] *Assets Co Ltd v Mere Roihi* [1905] AC 176; *Pyramid Building Society (in liq) v Scorpion Hotel* [1998] 1 VR 188, 196; *Young v Hoger* [2001] QCA 453; *AGC v De Jager* [1984] VR 483, 485; cf *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.
[706] *Commercial Bank Australia Ltd v Amadio* (1983) 151 CLR 447; Radan and Stewart, *Principles of Australian Equity and Trusts* (n 299) [11.1].
[707] For a UK perspective see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2021).

its scope.[708] While duress has been described as a 'form of unconscionable conduct', the term is used in the substantive rather than procedural sense and can be distinguished from the specific cause of action requiring proof of special disability and unconscionable exploitation.[709] The basic elements of duress are that the plaintiff must have been (1) subjected to illegitimate pressure which (2) induced the plaintiff to enter a contract or make a payment.[710]

1 *Establishing Duress*

The most difficult aspect in establishing duress lies in determining when the pressure is illegitimate. Threats to carry out unlawful behaviour will be deemed illegitimate. Nonetheless, threatened behaviour need not be unlawful for it to be illegitimate.[711] In *Thorne v Kennedy*, the court noted that duress focuses on the effect of pressure on a person who seeks to set aside a transaction and does not require that the person's will be overborne, or that their free will or agency was lost.[712] Quoting Holmes J in *Union Pacific Railroad Co v Public Service Commission of Missouri*, the plurality observed:

> It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.[713]

In many cases the doctrines of undue pressure and undue influence overlap.[714] Undue influence, however, can arise through a variety of behaviours, one of which is the use of excessive pressure. Yet to establish undue influence, the pressure need not be proven to be illegitimate.[715]

2 *Examples of Duress*

Examples of behaviour that might support an action in duress would include a threat by Bea to deprive Anna of food or care unless Anna transferred the house. Such a threat would be considered illegitimate pressure (an unlawful act), as would Bea indicating she would prevent

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[708] Young et al (n 327) [5.570].
[709] *Thorne v Kennedy* [2015] FCCA 484 [85].
[710] *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45–6 (McHugh JA)
[711] *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 [25] (McLure P, Newnes JA concurring); cf *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344 where the court held duress should be limited to threatened or actual unlawful conduct. See also Rick Bigwood, 'Throwing the Baby out with the Bathwater? Four Questions on the Demise of Law-Act Duress in New South Wales' (2008) 27(2) *University of Queensland Law Journal* 41
[712] *Thorne v Kennedy* (2017) 263 CLR 85 [26].
[713] Ibid citing *Union Pacific Railroad Co v Public Service Commission of Missouri* (1918) 248 US 67, 70.
[714] Ibid [30] citing *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 290 (Keifel J)
[715] Ibid.

Anna contacting grandchildren or suggesting the failure to undertake the transfer would sabotage Anna's relationship with Bea. Whether illegitimate pressure – or, indeed, undue influence or unconscionable conduct – exists is largely dependent on the court's assessment of the relationship between the parties involved. In *Thorne v Kennedy*, the plurality observed that 'proof of the interplay of a dominant and subordinate position in a personal relationship depends, in large part, on inferences drawn from other facts and on an assessment of the character of each of the parties'.[716] The court further noted that the application of equitable principles requires

> a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [other party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition.[717]

This observation adds further support to the statement made by Justice Robb J cited above.[718] The approach taken and grounds for relief pleaded are particularly fact-sensitive, yet there still exists a considerable overlap between potential causes of action. Ultimately, the choice of which to pursue will depend on the strength of the supporting evidence and the desired remedy.

C *Undue Influence*

It is worth noting that pleading unconscionable conduct and/or undue influence is common in situations where the older party is reliant on the adult child or family member for care.[719] Alternatively, disinherited family members may bring such an action against the adult child holding property after the death of the parent. If pleading these actions, the parent (or family member) is alleging the arrangement was tainted from the outset. However, in many cases the parties have entered into the arrangement voluntarily, anticipating that the arrangement will be for their mutual benefit. Consequently, the parent would need to look to those actions providing relief when there is an unanticipated failure of the arrangement.[720]

1 *Establishing Undue Influence*

[716] Ibid [42] citing *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.
[717] Ibid [43] citing *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.
[718] See fn 637.
[719] Eg *McFarlane v McFarlane* [2021] VSC 197.
[720] See below Part IV.

If the facts reveal that Bea had an 'undue' degree of influence or dominance over Anna, and Bea has exploited that dominance causing Anna to transfer the property, Anna could look to the doctrines of unconscionable conduct and/or undue influence to have the transaction set aside.[721] Deane J in *Commercial Bank Australia Ltd v Amadio* commented on the close relationship between the two doctrines.[722] He explained that although the same fact scenario can support a finding that a person has been subject to undue influence and that they were also in a position of special disadvantage, there are subtle but critical distinctions between the two doctrines.[723] As explained by Mason J in *Amadio*:

> In [undue influence] the will of the innocent party is not independent and voluntary because it is overborne. In [unconscionable conduct] the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.[724]

With respect to undue influence, the purpose of equity's intervention is not to relieve the plaintiff from the consequences of their own 'folly, imprudence or want of foresight'.[725] Rather, it exists to prevent vulnerable people from being victimised.[726]

Several categories of undue influence exist depending on the relationship between the parties.[727] The law recognises that transactions occurring within certain relationships that are characterised by ascendancy and/or trust, reliance and confidence are presumed to be made pursuant to the undue influence.[728] While there is no presumption that a parent is subject to the

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[721] Transactions involving either real or personal property may be set aside. The transfer may be a gift or for consideration, but if consideration is paid the adequacy of that consideration will be assessed: *Johnson v Buttress* (1936) 56 CLR 113, 135–6. For a comprehensive analysis of this area see Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26 *Melbourne University Law Review* 499.

[722] *Commercial Bank Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J).

[723] The two grounds for relief are often argued in tandem: see *Urane v Whipper* [2001] NSWSC 796; *Fisher-Pollard v Piers Fisher Pollard* [2018] NSWSC 500.

[724] *Commercial Bank Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J); See also *Johnson v Smith* [2010] NSWCA 306 [2] (Allsop P); *Bridgewater v Leahy* (1998) 194 CLR 457, 477–8 (Gummow, Gaudron & Kirby JJ); Mason, 'The Impact of Equitable Doctrine' (n 672) 6–8. However, concerning relational undue influence, Bigwood argues that this ground is based on the defendant's conduct: Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16 *Oxford Journal of Legal Studies* 503. Joachim Dietrich argues in favour of a unified doctrine owing to the significance of the defendant's wrongful conduct in undue influence: Joachim Dietrich, '*Bridgewater v Leahy*: Unconscionability and the Flexibility of the Equitable Remedies in the High Court' (1999) 73 *Australian Law Journal* 112, 118–19.

[725] *Allcard v Skinner* (1887) 36 Ch D 145, 182–3 (Lindley LJ).

[726] *Louth v Diprose* (1992) 175 CLR 621, 638 (Deane J).

[727] See *Permanent Mortgages Pty Ltd v Vendenbergh* [2010] WASC 10, [166]–[168] (Muphy JA); *Christodoulou v Christodoulou* [2009] VCS 583 [70] (Kaye J).

[728] *Barclays Bank v O'Brien* [1994] 1 AC 180, 189–90 (Lord Browne-Wilkinson); *Johnson v Buttress* (1936) 56 CLR 113, 134–6 (Dixon J); *Allcard v Skinner* (1887) 36 Ch D 145, 185; *Whereat v Duff* [1972] 2 NSWLR 147, 168; *Quek v Beggs* (1990) 5 BPR 11, 761; *Goldsworthy v Brickell* [1987] Ch 378, 400–1; Young et al (n 327) [5.400]. These include relationships of parent/child (when the parent is the stronger party), guardian and ward, lawyer and client, priest and penitent, doctor and patient.

undue influence of an adult child, it has been observed that a presumption of undue influence could arise where 'the alleged victim is an elderly parent [who] is living alone and is no longer in good health [and] that the child alleged to have influence is one who, in large part, is responsible for his care'.[729] Presumably, influence could more readily be assumed if the parties were under one roof. Therefore, in the scenario above Anna would need to prove, as a matter of fact, that a special relationship existed between Bea and herself that gave rise to a relationship of influence.[730] These relationships arise 'where it is proved that the party benefitting from the transaction occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or dependency or trust on the latter's part'.[731] To establish this ground, Anna would need to prove that the relationship of trust was such that she was unable to exercise her free will, and that the transaction was either manifestly disadvantageous for Anna or afforded a significant benefit to Bea.[732] In *Jenyns v Public Curator (Q)* the matter involved a gift of shares in a business by a mother to her adult son, who managed the business. The court said:

> We are not here dealing with any of the traditional relations of influence or confidence – solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.[733]

In *Barclay's Bank v O'Brien*, Lord Browne Wilkinson looked with more specificity at the court's approach to undue influence in the context of close personal relationships.[734] While rejecting the need for a 'special equity', a doctrine affording special protection to a limited class in relation to one type of transaction, he suggested that the court approach transactions where a wife has gone surety for a husband's debt with a 'tender treatment' as 'the informality of business dealings between spouses raises a substantial risk that the husband has not accurately stated to the wife the nature of the liability she is undertaking'. He further suggested this approach be adopted in other close personal relationships, and, citing *Avon v Bridger*, included the relationship of adult child and elderly parents. As he explained, '[t]he "tenderness"

[729] *Hogg v Hogg* [2007] EWHC 2240 (Ch) [43] (Lindsay J) cited in Brian Sloan, 'Due Rewards or Undue Influence – Property Transfers Benefitting Informal Carers' (2011) 19 *Restitution Law Review* 37, 42. See also *McFarlane v McFarlane* [2021] VSC 197 (Richards J).
[730] *Barclays Bank v O'Brien* [1993] UKHL 6; [1994] 1 AC 180, 189 (Lord Browne-Wilkinson).
[731] *Janson v Janson* [2007] NSWSC 1344 [72].
[732] *Tulloch (dec'd) v Braybon (No 2)* [2010] NSWSC 650 [51] and [81] (Brereton J). For an explanation of what constitutes one's free will being overborne, see *Thorne v Kennedy* (2017) 263 CLR 85 [32]–[33].
[733] *Jenyns v Public Curator (Q.)* (1953) 90 CLR 113, 133.
[734] *Barclay's Bank v O'Brien* [1993] UKHL 6; [1994] 1 AC 180.

… reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other'.[735] While Australia formally recognises the vulnerability of the wife when agreeing to act as guarantor for a husband in the form of the 'special wives' equity', there is no legal recognition of the vulnerability of the aged parent vis-à-vis their adult child.[736] The possibility of such recognition is raised in Chapter 7, 'Responding to Legal Situational Vulnerability: Possibilities for Statutory and Doctrinal Reforms'.

2 *The Onus of Proof and Rebutting the Presumption*

Burns observes that 'courts in Australia and New Zealand have set a high standard for proof of an antecedent relationship of trust and confidence where elders are concerned'.[737] Hence, the onus rests on Anna to prove the existence of a relationship of influence. If successful, the onus would shift to Bea to rebut the presumption and establish that the transaction was a result of Anna exercising her own free will.[738] In order to rebut the presumption, Bea might seek to establish that Anna received independent advice or that the transaction was not improvident for Anna.[739] In *Badman v Drake*, Chief Justice Young took the opportunity to warn practitioners of the need to exercise caution when acting in a transaction involving an elderly 'at risk' person and noted it was 'impermissible for any solicitor to take the view that because monies are going to flow [to their] client, they can close their eyes to fraud that may be being perpetrated on the vulnerable person'.[740] Rebutting the presumption would prove more challenging for Bea if there was no payment made to enable the court to assess adequacy of consideration. As such, the doctrine provides a degree of protection against exploitation. However, the onus still rests with the parent plaintiff to establish the existence of a relationship of influence.[741]

3 *Undue Influence and Cognitive Impairment*

[735] Ibid 198, citing *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 28.
[736] *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.
[737] Burns, 'Undue Influence' (n 721) 518.
[738] *Johnson v Buttress* (1936) 56 CLR 113, 134; *Thorne v Kennedy* [2017] HCA 49 [34].
[739] *Badman v Drake* [2008] NSWSC 1366 [84] (Young CJ); *Pinter v Pinter* [2016] QSC 314; *Michaletos v Stivactas* [1991] NSWSC BC9101807; *Anderson v Anderson* [2013] QSC 8; *Hewitt v Gardner* [2009] NSWSC 1107; *Johnson v Smith* [2010] NSWCA 306; *Christodoulou v Christodoulou* [2009] VCS 583 [76]–[77] (Kaye J).
[740] *Badman v Drake* [2008] NSWSC 1366 [84] (Young CJ) [56].
[741] Burns, 'Undue Influence' (n 721) 518. Note however in Queensland the existence of statutory undue influence when one party to a transaction holds a power of attorney: *Powers of Attorney Act 1998* (Qld) s 87; see also *Pinter v Pinter* [2016] QSC 314; *Birch v Birch* [2020] QCA 31; *Gillespie v Gillespie* [2012] QDC 212.

Accordingly, not all transactions that occur because of the influence one party has over another will be captured by the doctrine. Anna must establish the influence was 'undue' or unconscientious. In other words, it must be 'so substantial or improvident as not to be reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary persons act'.[742] Herein lies much of the difficulty for the older party with proving the elements of the doctrine, and more so in the context of FAAs. In many cases older people being cared for in a domestic setting are reliant on their carers. They are not necessarily autonomous, yet nor do they necessarily lack capacity.[743] In the case of Anna and Bea, Anna is said to have some degree of cognitive impairment, but this does not mean she lacks capacity.[744] The power dynamic in a relationship may have developed over time, where dependency and influence have evolved and the dividing line between influence as opposed to undue influence is difficult to pinpoint. While the danger of exploitation exists, so too does the risk of overriding of a decision of competent adult.[745] This can be particularly difficult to assess in circumstances where the stronger party lacks any conscious intention to influence.[746] Further, Margaret Hall observes how the binary conception of autonomous versus incapable individual can be blurred by gender-based norms:

> The autonomy ideal is particularly inadequate when applied to the current generation of older women, whose understanding and experience of personal choice will have been deeply informed by the cultural expectation that women's self-interests should be subordinated to others (children, husbands) in traditional family relationships. Refusal of services by older women living in this kind of relationship context may have little to do with either autonomous free choice or diminished mental capacity.[747]

Nonetheless, case law in this area reveals numerous examples involving older adults in which undue influence is alleged and demonstrates that elderly people may be placed in a vulnerable position when they become dependent on others, and that the relationship of dependency has the potential to be misused. This is particularly acute in instances where the plaintiff suffers

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[742] *Quek v Beggs* (1990) 5 BPR 11, 761, 11,764 (McLelland J); *Courtney v Powell* [2012] NSWSC 460 [38] (Ball J). However, even transactions that are not manifestly disadvantageous may still be voidable through undue influence if it can be shown the weaker party lacked an independent and voluntary will: *Baburin v Baburin* [1990] 2 Qd R 101.

[743] Generally, when a person has capacity to make a particular decision they can understand the facts and the choices involved, weigh up the consequences, and communicate the decision. See eg *NFM* [2018] NSWCATGD 14.

[744] Lise Barry, '"He Was Wearing Street Clothes, Not Pyjamas": Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients' (2018) 21(1) *Legal Ethics* 3; Barry, 'Capacity and Vulnerability' (n 234).

[745] Brian Sloan warns against overriding an older persons' wishes, particularly when the actions are brought by heirs on behalf of the estate: Sloan (n 729) 48.

[746] See eg *Darmanin v Cowan* [2010] NSWSC 1118.

[747] Hall, 'Material Exploitation and the Autonomy Ideal' (n 300).

some degree of cognitive impairment, as Anna does in the fact scenario.[748] For instance, in *Farrell v Stephenson*[749] an elderly widow was left property worth $1.5 million. In the absence of independent legal advice, she transferred all her property to the second and third defendants for consideration of one dollar, ostensibly for a larger house to be purchased for the widow and the two defendants to ultimately reside together. At the time of the transfer, she was suffering from the early stages of Alzheimer's dementia, was easily manipulated and suggestible and had reduced capacity to manage her own affairs and protect her own interests.[750] When the matter was heard, the widow was residing in an aged care facility and in danger of defaulting on her fees. Chief Justice Young referred to this as a 'classic elder law case'.[751] The money was used by the defendants to undertake property speculation, which was disastrously unsuccessful. Just over $106,000 was left from the sale of the 'developed' property and held in a solicitor's trust account. The court declared the initial transfers from the widow to the defendants were voidable by reason of equitable fraud, and therefore the money traced from these transactions to the trust account belonged in equity to the widow.[752]

Similarly, the decision of *Fisher-Pollard v Piers Fisher Pollard* demonstrates the interplay of cognitive impairment in the elderly person, dependency, and undue influence.[753] In this case an elderly widowed mother had inherited two properties from her late husband. These were later mortgaged and the proceeds then used to purchase a property at Bondi Junction, which was then registered in her son's name. This property was subsequently sold and a block of land at Tyagarah was purchased, also registered in the son's name. Although the son held a power of attorney, the transactions were completed by Mrs Fisher-Pollard. Evidence given at the trial by expert medical practitioners found that at the time the transactions took place the plaintiff was vulnerable after her husband's death and suffered from cognitive impairment and memory loss.[754] She had, however, signed statutory declarations stating, 'I am of sound mind and body, except for some osteopathic problems relating to both knees and my right hip'. The son gave evidence that the property transactions were his mother's decision, that she had signed the paperwork and he 'had nothing to do with any of those sales'. The Court found the transactions were a result of both unconscionable conduct and undue influence. On the evidence, the Court

[748] One in every ten persons aged 65 years or older live with dementia. The figure rises to three in ten by 80 years: <https://www.dementia.org.au/statistics>.
[749] *Farrell v Stephenson* [2008] NSWSC 1350.
[750] Ibid [48].
[751] Ibid [61].
[752] Ibid [68]–[69].
[753] *Fisher-Pollard v Piers Fisher Pollard* [2018] NSWSC 500.
[754] Ibid [452].

found that the plaintiff's will was so subordinated to the defendant that the presumption of undue influence was raised. This shifted the onus onto the defendant, who was unable to rebut the presumption of undue influence. In a recent article exploring the interplay of cognitive impairment and elder abuse and commenting on this case, Jane Lonie, a clinical neuropsychologist, observes:

> The above statement from the defendant son raises the complicating factor of the failure of family and professionals who do not have specialist training and knowledge in brain-behaviour relationships, to recognise the manner in which dementia related cognitive impairment may impact upon decision-making. As a result, we end up with situations in which both parties believe that they have acted in accordance with the elderly person's wishes. The often-ill-informed steadfast viewpoints in turn fuel the veracity of the legal battle that ensues.[755]

4 *The Role of Obtaining Independent Legal Advice*

Thorne v Kennedy demonstrated that even obtaining legal advice will not prevent a successful claim of undue influence. Nevertheless, the absence of any legal advice is a contributing factor in finding undue influence.[756] In *Jansen v Jansen*, an elderly (92-year-old) deaf, almost blind, childless bachelor gifted his interest in a house to his nephew.[757] The house, valued at $660,000, was his only asset and was owned by him and his two younger brothers in equal shares as tenants in common. The nephew had looked after the claimant and a power of attorney had been executed while the claimant was hospitalised. The claimant had subsequently signed the transfer papers but was clearly confused about the nature of the documents. No independent legal advice was given to the claimant. The court observed:

> No independent solicitor or other professional person was present when the transfer was executed. The only relatively independent person whom Eric saw was Ms Benson, who was present to witness his signature. She was not entirely independent because she had a family bond with Richard through her friendship with his father which brought about her attendance … There was no advice as to whether he should enter into the transaction at all, the propriety of the transaction or discussing alternative means of arranging his affairs. Nor was Ms Benson an independent solicitor, or someone in a similar professional position.[758]

The Court found that the claimant had not signed the transfer by virtue of his free will, although he had repeatedly stated he wanted his nephew to have the property when he died. Rather the

[755] Jane Lonie, 'The Cognitive Mechanics of Elder Abuse' [2019] 12(1) *Elder Law Review* (online) <https://www.westernsydney.edu.au/__data/assets/pdf_file/0003/1633035/JANUARY_2020_LONIE_The_Cognitive_Mechanics_of_Elder_Abuse.pdf>.
[756] *Thorne v Kennedy* (2017) 263 CLR 85
[757] *Jansen v Jansen* [2007] NSWSC 1344.
[758] Ibid [106].

claimant fell within the category of presumed undue influence, in that he reposed trust and confidence in his nephew and the nephew was in a position of influence owing to that trust and confidence. As such the transfer was set aside.[759]

These cases highlight the complex interplay of family dynamics where, at best, parties are unaware of the existence or impact of cognitive impairment on decision-making abilities, or at worst exploit the dependency and lack of free will on the part of the older person. In the context of a FAA, the challenges for the parent are cumulative. Not only must they (or someone acting on their behalf) have the fortitude, money and will to bring these actions, but they bear the onus of proving the elements of the cause of action. In many cases, the matters are not brought by the older person themselves but by family members who have been disinherited and commence proceedings after the parent has died.[760] In other cases, proceedings are brought by a party acting on behalf of the older person. In *McFarlane v McFarlane*, proceedings to recover a house that had been transferred by a mother to her son on the basis of undue influence and unconscionable conduct were commenced by the State Trustee (Vic).[761] The State Trustee only became aware of the circumstances concerning the transfer after being appointed as her administrator under the *Guardianship and Administration Act 1986* (Vic).

D *Unconscionable Conduct*

1 *Establishing Unconscionable Conduct*

The doctrine of unconscionable conduct is another example of equity denying transactions on proof of specific fraudulent conduct of the defendant.[762] Anna would plead unconscionable conduct if she suffered from a special disability[763] and would have to establish that Bea was aware of that disability and took unconscientious advantage of it.[764] While equity's jurisdiction to strike down transactions tainted by unconscionability has existed for some time, the 1983

[759] In *McFarlane v McFarlane* [2021] VSC 197, an elderly woman who suffered anxiety and psychological illness transferred her property to her son without ever having spoken to the solicitors in her son's absence. The transfer was found to have been procured through both undue influence and unconscionable conduct.
[760] Barbara Hamilton and Tina Cockburn, 'Equity in Australian Estate Litigation' (2014) 20(5) *Trusts & Trustees* 437.
[761] *McFarlane v McFarlane* [2021] VSC 197.
[762] Fraud' in equity has a much broader meaning that at common law. It need not amount to actual dishonesty, but when [the conduct] 'appears to a judicial conscience as being so unconscientious that it should not be allowed to stand': *Logue v Shoalhaven Shire Council* (1979) 1 NSWLR 537, 555.
[763] *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 297.
[764] *Johnson v Smith* [2010] NSWCA 306 [5] (Allsop J).

High Court case of *Amadio* provided the modern Australian conception of the doctrine.[765] In *Amadio*, it was held that unconscionable dealing required the existence of three elements, and the onus of proving these elements would fall on Anna, the party alleging unconscionable conduct.[766] First, Anna would need to establish she was suffering from a special disadvantage.[767] The requirement of a 'special' disadvantage suggests that mere inequality of bargaining power does not suffice.[768] Instead, the disadvantage must be one which inhibits the weaker party's ability to make a rational judgment in their own best interests.[769] Second, Anna would have to establish that Bea had actual or constructive knowledge of the special disability.[770] Third, Bea must have taken unconscientious advantage of Anna's special disadvantage.[771] This element is said to require a finding of victimisation, exploitation or unconscientious conduct.[772]Thus, Anna would need to prove that in exploiting Anna's special disadvantage, Bea had a 'predatory state of mind'.[773] Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.[774] If Anna is able to prove these three elements, the onus shifts to Bea to show that the transaction was nevertheless fair, just and reasonable.[775] If Bea is unable to discharge that onus, the transfer can be set aside by the court in whole or in part.

2 *Special Disadvantage*

Establishing a special disadvantage is a threshold issue[776] and the High Court has observed that it is not possible to identify exhaustively what amounts to special disadvantage.[777] In Anna's

[765] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. See also *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 621; *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Thorne v Kennedy* (2017) 263 CLR 85.
[766] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462.
[767] See eg *Blomley v Ryan* (1956) 99 CLR 362.
[768] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 [11], [14]. On how 'special' the 'special disadvantage' must be, see Anne Finlay, 'Can We See the Chancellor's Footprint? *Bridgewater v Leahy*' (1999) 14(2) *Journal of Contract Law* 265
[769] *Blomley v Ryan* (1956) 99 CLR 362, 381, 415 (Kitto J), 405 (Fullagar J).
[770] See generally *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.
[771] See generally *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Thorne v Kennedy* (2017) 263 CLR 85.
[772] *Thorne v Kennedy* (2017) 263 CLR 85 [38]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239; (2008) 225 FLR 1 [4924] (Owen J).
[773] *Richardson v Wagner* [2021] QDC 24 [52] (Barlow QC DCJ).
[774] Ibid.
[775] *Anderson v McPherson (No 2)* [2012] WASC 19 [259].
[776] *Turner v Windever* [2003] NSWSC 1147 [105], [110] (Austin J); *Christodoulou v Christodoulou* [2009] VCS 583 [79] (Kaye J).
[777] *ASIC v Kobelt* (2019) 368 ALR 1 [147] (Nettle and Gordon JJ).

case, her special disadvantage may derive from 'constitutional' sources or be 'situational'. In *ACCC v Samton Holdings Pty Ltd* the court explained that

> [t]he special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education. Or it may be situational, deriving from particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other.[778]

While evidence of illness, lack of education and other examples of constitutional disadvantage may be commonly pleaded as evidence of special disadvantage,[779] old age of itself will not be considered a special disability.[780] It may, however, in combination with other factors, contribute to the condition of being under a special disadvantage.[781] Therefore, Anna would have to point to some characteristic that made her unable to assess the transaction for herself.[782] In the context of a FAA, this special disability could manifest in the form of emotional dependence, although determining what actually constitutes emotional dependence presents challenges.[783] In the notorious case of *Louth v Diprose*, emotional dependence in the form of 'utter infatuation' was determined to be a special disability and the female recipient of the gift (a house) was found to have exploited the disability by 'dishonestly manufacturing an atmosphere of crisis'.[784] In *Bridgewater v Leahy*, a transaction that effectively meant land was purchased under value by the deceased's nephew was challenged by the wife and daughters of the deceased.[785] The majority found that

> [t]he position of disadvantage which renders one party subject to exploitation by another such that the benefit of an improvident disposition by the disadvantaged party may not in good conscience be retained may stem from a strong emotional dependence or attachment.[786]

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[778] *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 318. See also *Bridgewater v Leahy* (1998) 194 CLR 457.
[779] See eg *Wilton v Farnworth* (1948) 76 CLR 646 (an elderly man rather unkindly described as 'dull witted and stupid', as well as being hearing impaired); *Blomley v Ryan* (1956) 99 CLR 362 (alcoholic); *Freeman v Brown* [2001] NSWSC 1028 (alcoholic with a brain disorder).
[780] *Australia & New Zealand Banking Group Ltd v Dzienciol* [2001] WASC 305 [289].
[781] *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10 [234], citing *Australia & New Zealand Banking Group Ltd v Dzienciol* [2001] WASC 305 [289]–[290]
[782] *Commercial Bank of Australia Ltd v Amadio* (1983)151 CLR 447, 477 (Deane J).
[783] Finlay (n 768).
[784] *Louth v Diprose* (1992) 175 CLR 621, 626. This decision is not without its critics; see Samantha Hepburn, 'Equity and Infatuation' (1993) 18 *Alternative Law Journal* 208; Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19(3) *Melbourne University Law Review* 701; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, The Federation Press 2002) 74–5; Dilan Thampapillai, 'What Becomes of the Broken-Hearted? Unconscionable Conduct, Emotional Dependence, and the "Clouded Judgement" Cases' (2016) 34(1) *Law in Context* 76.
[785] *Bridgewater v Leahy* (1998) 194 CLR 457. Land was sold to the respondent ('Neil') for $696,811 with a deed forgiving the amount between the full sale price and the $150,000 actually paid.
[786] Ibid [115].

Despite the absence of an 'active pursuit of a benefit' and there being no lack of understanding on the part of the deceased concerning the transaction, the majority still found that the deceased's emotional dependence on his nephew amounted to a special disability.[787]

The result in *Bridgewater* has been described as one that stretched the law of unconscionable bargain to breaking point, and in many ways the decision is problematic.[788] Much of the Court's reasoning rested on the improvidence of the bargain while failing to balance that fact with the clear intention of the deceased and the freedom to deal with his property as he saw fit.[789] In the context of FAAs, the transaction may not be considered improvident if the exchange occurred in return for care and accommodation. Many accommodation arrangements are undertaken willingly, as the arrangement provides financial advantages along with social and emotional support for the older person. A withdrawal of a promise to provide accommodation and care arguably would not assist a plea for unconscionable conduct, but it would provide evidence that the property was not intended to be a gift.[790] While an improvident transaction is not conclusive evidence, nonetheless it may 'put the court on notice that all is not right'.[791]

A more instructive example of an assessment of special disability is found in *Meiners v Gunn*.[792] Here the plaintiff, an elderly woman, was encouraged by her daughter to sell her property on the understanding the funds from the sale would be used for the two of them to purchase a property together. However, once the property was sold, the elderly woman was then convinced to purchase a retirement village unit lease. The daughter then used the balance of the funds to purchase a property in her own name. Acting Justice Strk meticulously examined the characteristics of the plaintiff and circumstances of the relationship that lead to the finding of a special disability. While no one factor was determinative, special disadvantage in Ms Meiners' dealings with Ms Gunn was established on the evidence as a whole.[793] She was widowed, elderly, lonely and socially isolated. Her age, grief over the death of her husband and need to be closer to her family and maintain and build her relationship with her daughter, along

[787] The majority did, however, find the facts involved 'more than a passive acceptance by Neil of Bill's bounty, and that at a crucial juncture, the initiative came from Neil: Tina Cockburn, 'The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court' (2000) 8 *Australian Property Law Journal* 1, 6.
[788] Charles Rickett, 'Bridgewater v Leahy – A Bridge Too Far?' (2012) 31(2) *University of Queensland Law Journal* 233, 233.
[789] Ibid 240; Cockburn, 'The Boundaries of Unconscionability' (n 787) 8.
[790] *Spink v Flourentzou* [2019] NSWSC 256; *Flourentzou v Spink* [2019] NSWCA 315, [32]. See also Galloway (n 31) 2.
[791] Rickett (n 788) 240.
[792] *Meiners v Gunn* [2020] WASC 18.
[793] Ibid [343].

with a need to have the financial ramifications of the transaction explained to her, all contributed to a finding of special disability. In particular, these circumstances 'fuelled her emotional dependence on Ms Gunn and contributed to her vulnerability and susceptibility to the influence of Ms Gunn'.[794] The conditions giving rise to the special disadvantage were sufficiently evident to her daughter, making it unconscionable for her to accept the benefit of the transaction.[795] In finding the transactions were not fair, just and reasonable, the Court considered the fact that the plaintiff gained no benefit from the transactions despite transferring the majority of her wealth to her daughter. No documentation evidencing intention was available, and the elderly plaintiff did not receive any independent legal advice.[796]

What can be observed from decided cases is that the natural affection towards and desire of a parent to help an adult child is not of itself enough to establish a 'special disability'. In *Louth v Diprose* the court was prepared to recognise infatuation as an example of emotional dependence.[797] Arguably there is potential for this argument to be raised, particularly in the context of the 'clouded judgement' cases, as the special disability must seriously affect the disabled party's capacity to judge or protect their own interests.[798]

3 *Remedies for Unconscionable Conduct and Undue Influence*

Remedies flowing from a finding of unconscionable conduct or undue influence are discretionary and will depend on the election of the plaintiff but are ultimately at the discretion of the court As Anna wants the return of her property, she would most likely request an order for the reconveyance of the property back to her, at Bea's cost.[799] However, if a proprietary remedy was not appropriate, a non-proprietary remedy could be awarded, such as equitable compensation along with an equitable lien over the property.[800] In *Sleboda v Sleboda*, on finding in favour of the father Gzell J declared the son held one half of the property on constructive trust for his father as tenants in common in equal shares, along with an order for

[794] Ibid [359].
[795] Ibid [389].
[796] Ibid [391]–[395].
[797] *Louth v Diprose* (1992) 175 CLR 621.
[798] See *Louth v Diprose* and cases cited in article. The potential for the 'clouded judgement' argument to be used in a failed asset for care dispute is discussed further in Chapter 5. In *Jones v Jones* [2014] QDC 150 the plaintiff sought to characterise her special disability in terms of obligation to care for her granddaughter in terms of a need to be accepted and valued by her son [14]. However, the court found for the plaintiff on different grounds: [30].
[799] *Bridgewater v Leahy* (1998) 194 CLR 457.
[800] See eg *Jones v Jones* [2014] QDC 150.

the son to execute documents to transfer a one half interest in the land in question to his father.[801]

E *Breach of Fiduciary Duty*

There are certain relationships where a fiduciary relationship is presumed to exist.[802] In these circumstances, the onus of proof rests with the person alleging that no fiduciary duty exists.[803] As the parent/child relationship does not fall within these presumptive categories, in the present scenario Anna would need to prove as a threshold issue that the facts gave rise to Bea owing Anna a fiduciary duty.

Fiduciary duties are imposed on those who are in a position of trust and confidence to ensure that position is not exploited for personal gain. The primary duties of a fiduciary are to not place themselves in a position where their duty and interest conflict, and not to make any unauthorised profit from the position.[804] The characteristics of a fiduciary duty were outlined by Mason J in *Hospital Products Ltd v United States Surgical Corporation*:

> [T]he fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility.[805]

This undertaking can occur in the context of a relationship of ascendency or influence by one party over another, or dependence or trust on the part of that other.[806] Nonetheless, in Australia the undertaking is generally confined to protecting the legal or financial best interests of the principal. In the hypothetical, for Anna to argue there has been a breach of fiduciary duty the facts must reflect an undertaking complying with the description offered by Justice Mason rather than just a promise to provide accommodation and care.[807] This can explain why breach of fiduciary duty is not a commonly pleaded (but not unknown) cause of action in the context of failed FAAs unless there has been a specific undertaking to act on behalf of the elderly

[801] *Sleboda v Sleboda* [2007] NSWSC 361 [54] (Gzell J).
[802] These include trustee/beneficiary, director/company, lawyer/client, partners, agent/principal.
[803] *Chan v Zacharia* (1984) 154 CLR 178; Dal Pont (n 474) [4.75].
[804] *Bray v Ford* [1896] AC 44, 51–2.
[805] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).
[806] *Breen v Williams* (1995) 186 CLR 71 [14].
[807] *Collard v State of Western Australia* (No 4) (2013) 47 WAR 1, 227. But see *Giller v Procopets* (2008) 24 VR 1.

parent, or the adult child holds an enduring power of attorney (EPOA). Using the EPOA contrary to the known wishes and direction of the donor is a breach of trust,[808] but more fundamentally a breach of fiduciary duty. Additionally, there may be other grounds for relief offering greater chances of success that do not require the plaintiff to prove a duty exists. As such, breach of fiduciary duty will be dealt with only briefly.[809]

In the hypothetical case study, if the facts reveal that Bea's responsibilities in helping to manage her mother's financial affairs are sufficient to give rise to a fiduciary duty, and if her dealing with property is within the scope of her fiduciary duties, her conduct will be scrutinised according to the standards imposed by equity on a fiduciary vis-à-vis their principal.[810] If found to owe a fiduciary duty, Bea would be prohibited from placing herself in a position where her interests conflict with those owed to Anna ('no conflict rule'), and she would be prohibited from making a profit arising from her fiduciary position ('no profit rule').[811] Bea would not be liable for breach if she can establish Anna gave her informed consent to either act in her own best interests or profit from her position. The following case is an example of a successful fiduciary argument in the context of a FAA.

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[808] *Watson v Watson* [2002] NSWSC 919 [49]; *Klotz v Neubauer* [2001] SASC 454.

[809] A significant body of literature exists exploring the nature and scope of the fiduciary duty. See eg Paul Finn, *Fiduciary Obligations* (Law Book Co, 1977), reprinted Paul Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart, 2010); Richard Nolan and Matthew Conaglen, 'Good Faith: What Does It Mean for Fiduciaries, and What Does it Tell Us About Them?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 319; Charles Harpum, 'Fiduciary Obligations and Fiduciary Powers – Where Are We Going?' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 145; Lionel Smith, 'Prescriptive Fiduciary Duties' (2018) 37(2) *University of Queensland Law Journal* 261; Hon Dyson Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20 *Trusts & Trustees* 1006; James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302; Matthew Harding, 'Trusts and Fiduciary Law' (2013) 33(1) *Oxford Journal of Legal Studies* 81; D Gordon Smith and Andrew S Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar, 2018); Ernest Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1; JC Shepherd, 'Toward A Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51; PB Miller, 'The Fiduciary Relationship' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63; Patrick Parkinson, 'Fiduciary Obligations' in Parkinson, *The Principles of Equity* (n 70) 339; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 *Law Quarterly Review* 608; Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62 *McGill Law Journal* 1; John Glover, 'The Identification of Fiduciaries' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 269; Leonard Rotman, 'Understanding Fiduciary Duties and Relationship Fiduciarity' (2017) 62(4) *McGill Law Journal* 975.

[810] Concerning the scope of the fiduciary duty see *Breen v Williams* (1995) 186 CLR 71, 82 (Brennan CJ) quoting Dixon J in *Birchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384, 409; *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15 (Bryson J).

[811] *Miller v Begeda* [2009] QDC 122 [7], citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 67 (Gibbs CJ). See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557.

In *Miller v Begeda* the plaintiff, an 88-year-old woman, sold her home and moved in with her daughter, who cared for her.[812] The funds from the sale of the plaintiff's house were deposited in a credit union account, on the understanding the daughter had authority to access and operate the account.[813] The parties agreed the daughter and her partner would construct a home for the plaintiff on their property. The accommodation was not built, and the mother left the home they shared. She brought an action for breach of fiduciary duty, claiming equitable compensation for her loss. While some expenditure had been undertaken with authority, considerable sums of money were withdrawn from the mother's account by the daughter and paid into her partner's account for items seemingly unrelated to the care of the plaintiff or to building her accommodation.[814] Dodds DJC found that:

> Even if it were to be accepted, that the plaintiff, in the early days of going to live with the defendant, in expectation a house was to be built for her on the defendant's property, agreed to, for instance, $30,000 being transferred to Mr Koplick on 1 March 2006, there is no accounting for its use for that purpose. There has been no adequate accounting with respect to the use of the bulk of the money. Plainly much of it was used for purposes which would benefit the defendant and/or Mr Koplick. I do not accept this was done with the full informed consent of the elderly plaintiff.[815]

The court found the existence of a fiduciary duty, and subsequent breach by failing to avoid a conflict between her own duty and that to her mother. The obligation fell on the daughter to restore the sum of money to her mother. As the money had been spent, the order was for equitable compensation in the sum of $153,827.30, with interest.[816]

F *Contracts Review Act 1980 (NSW)*[817]

1 *An 'Unjust Contract'*

The *Contracts Review Act 1980* (NSW) provides for the setting aside of a contract if it is found by the court to be 'unjust'. 'Unjust' is described in s 4 to mean 'harsh, oppressive or

[812] *Miller v Begeda* [2009] QDC 122.
[813] See also *Crossingham v Crossingham* [2012] NSWSC 2012 [14].
[814] For example, $15,000 was withdrawn for the purpose of purchasing a towing business to allow the defendant's partner more time to work on building the house, and the transfer of $12,000 to a sawmill, said to be for the purchase of a portable sawmill. However, the only building appeared to be a galvanised shed on the property that was to be the plaintiff's accommodation while the house was built for her.
[815] *Miller v Begeda* [2009] QDC 122 [27].
[816] Relying on *Maguire v Makaronis* (1997) 188 CLR 449 and *Target Holdings Ltd v Redferns* [1996] 1 AC 421.
[817] See generally Fiona Burns, 'Statutory "Unconscionability": The Application of the Contracts Review Act 1980 (NSW) to the Elderly' (2005) 21(1) *Journal of Contract Law* 51; Radan et al (n 417) ch 20; Jeannie Paterson, *Unfair Contract Terms in Australia* (Thompson Reuters, 2012).

unconscionable'.[818] In determining whether the contract is unjust, s 9 sets out the matters to be considered by the court. The Act allows contracts to be set aside if contract is substantially unjust because its terms, consequences or effects are unjust. Under s 9(2)(e)(i), the court may have regard to whether 'any part to the contract … was not reasonably able to protect his or her interests … because of his or her age'.[819] Conversely, it may be procedurally unjust because of the unfairness of the methods used to make it.[820] In either case, the court will have regard to the circumstances of the case; however, it will not give any regard to injustice that arises that was not reasonably foreseeable at the time the contract was made.[821] Once it is established that the contract is unjust, the relief available is the same as that available under the common law claim of unconscionable conduct.[822]

2 *Relief*

On finding the contract unjust, a court has the power to make appropriate orders pursuant to section 7. Section 7 reads as follows:

> **7 Principal relief**
>
> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,
> (b) it may make an order declaring the contract void, in whole or in part,
> (c) it may make an order varying, in whole or in part, any provision of the contract,
> (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
>
> (i) varies, or has the effect of varying, the provisions of the land instrument, or
> (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.
>
> (2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

[818] *Contracts Review Act 1980* (NSW) s 4.
[819] Ibid s 9(2)(e)(i).
[820] *Thelma Langford v Deva and Diane Reddy* [2012] NSWSC 289 [161] (Sackar J).
[821] *Contracts Review Act 1980* (NSW) s 9(4).
[822] *Raoul v Hanna* [2017] NSWSC 728 [132] (Lindsay J). Appeal dismissed in *Hanna v Raoul* [2018] NSWCA 201 (Beazley P, MacFarlane JA and White JA).

3 *Is There a 'Contract'?*

In the context of FAAs, one significant hurdle facing the parent is establishing that a contract is on foot.[823] The term 'contract' is not defined in the legislation. As many family agreements are characterised by their informality, this diminishes the opportunity to argue this form of statutory relief. In the hypothetical case study, there is nothing to indicate a contract between Anna and Bea. However, in *Irvine v Irvine* Barrett J found that a transfer under the *Real Property Act 1900* (NSW) fell within the definition of a 'contract'.[824] Noting that the *Contracts Review Act 1980* (NSW) contemplates a wider meaning than the common law definition, he found that a transfer by a very elderly woman to her nephew and his sons for nominal consideration constituted a contract for the purposes of the legislation.[825] Having regard to the criteria set out in s 9, the court found that the transfer was oppressive because 'its effect was to take away from the aunt virtually her only asset, with nothing but the unenforceable oral assurance given in return, so that she was deprived of security of tenure and of the ability to resort to the asset to meet future financial needs'.[826] Consequently, the transfer was set aside.[827] There is, however, some ambiguity surrounding this interpretation. In *Simmons v Simmons* the approach taken by Barrett J was not followed.[828] The uncertainty surrounding whether a transfer under the *Real Property Act 1900* (NSW) constitutes a contract would cast some doubt upon whether Anna could successfully argue this ground for relief.

The decision in *Thelma Langford v Deva and Diane Reddy*[829] referred to the potential to grant relief pursuant to the *Contracts Review Act 1980* (NSW). Here, the claimant transferred her property to her daughter and her son-in-law for consideration of $20,000 (the property being valued at $440,000), on the understanding they would build a granny flat for her. Alleging undue influence and unconscionable conduct, the claimant argued she was tricked into transferring her property to the defendant. Although the grounds of undue influence and

[823] The challenge of establishing a contractual relationship in the absence of a written document is discussed in detail in Chapter 4 'Legal-Situational Vulnerability' and below at III (A) 'Breach of Contract'. See also *Darmanin v Cowan* [2010] NSWSC 1118 [204]–[228] where the court found there was no common intention to be legally bound. The plaintiff also failed on the non-statutory grounds of undue influence and unconscionable conduct.
[824] *Irvine v Irvine* [2008] NSWSC 592
[825] Ibid [31]–[33] (Barrett J). Although, relief was ultimately granted based on a finding of unconscionable conduct, 'if the view be taken … that the statutory remedy is denied because the transfer was not a 'contract' strictly so called': at [65].
[826] Ibid [58]. See also *Spina v Permanent Custodians* [2009] NSWCA 206 [131] (Young JA, Tobias and Campbell JJA agreeing).
[827] *Irvine v Irvine* [2008] NSWSC 592 [66].
[828] *Simmons v Simmons* [2019] NSWSC 1050 [113]–[116] (Slattery J); *Ryan v Aboody* [2012] NSWSC 136 [7] (Slattery J).
[829] *Thelma Langford v Deva and Diane Reddy* [2012] NSWSC 289.

unconscionability were not substantiated, the claimant was still entitled to an equitable life interest in the property based on the failure of the consensual joint endeavour. The court declared a constructive trust of a life estate in the property in favour of the plaintiff. Sackar J indicated he would also have been open to finding relief based on s 7(1)(d) *Contracts Review Act*, which would have achieved the same result. He found that the failure to formally document the plaintiff's acknowledged life estate – which would have would have relieved her of having to approach a court to enforce her personal equity – was grounds for varying the provision of the land instrument to include the constructive trust of the life interest.[830]

G *Non est Factum*

The doctrine of *non est factum* ('it is not my deed') is 'an essential instrument of justice for the protection of the weak, powerless and preyed upon'.[831] In circumstances where Anna was unaware of the nature of the transfer of property, she may wish use the doctrine to establish she was mistaken concerning the fundamental nature of the document, that it was substantially different to what she thought it was or that she lacked capacity to understand the document. In *Petelin v Cullen*, the High Court outlined the scope of the doctrine. The court noted that

> [t]he class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document.[832]

The doctrine can be relied upon where the signatory of the document lacks the mental capacity to enter the contract.[833] *Ford v Perpetual Trustees Victoria Ltd* involved a 59-year-old man with cognitive impairment who, owing to his son's manipulation, entered into a loan agreement using his house (his only asset) as security. The purpose of the loan was to finance the son's purchase of a cleaning business. The business failed and the mortgagee commenced proceedings for possession of the property. The Court of Appeal upheld the trial judge's finding that the father did not understand what he was signing. The father knew he held a pen in his hand and moved it across the paper and this resulted in his name being upon the paper.

[830] Ibid [187].
[831] *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 [71] (Allsop P, Young JA, Sackville AJA).
[832] *Petelin v Cullen* (1975) 132 CLR 355, 359 (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ).
[833] *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 [71] (Allsop P, Young JA, Sackville AJA) citing *Gibbons v Wright* (1954) 91 CLR 423.

However, no amount of written or verbal explanation would have led him to understand the meaning of the words on the paper he was signing or the effect it would have on him.[834]

III AVOIDING UNDERTAKINGS: BREACH OF PROMISE OR ACTING CONTRARY TO INTENTION OR DUTY

This category examines grounds for relief based broadly on the intention manifested by the parties when they entered the agreement. It covers those grounds that focus on expressed intentions, or representations made and subsequently relied upon. The basis of the actions lies in the avoidance or denial by the defendant of the undertakings associated with the agreement. Included under this heading are actions for breach of contract, the existence of an express or common intention constructive trust and actions based on equitable estoppel.

Hypothetical Case Study

> Anna and Bea lived together in Anna's house. Bea encouraged her elderly mother Anna to transfer her home to her for nominal consideration, and in return Bea agreed to pay for the construction of a granny flat on the property for Anna to live in and that Bea would look after her. The transfer took place, but the granny flat was never built. After 12 months the relationship failed, and Anna was told to leave.

A *BREACH OF CONTRACT*

1 *Establishing the Existence of a Contract*

A detailed discussion of the law relating to contracts and FAAs, and the problems raised by applying a contractual framework are discussed in Chapter 4, and they will not be repeated here. Briefly, the matters covered include the challenges of establishing an intention to be contractually bound and an absence of contractual formality, such as certainty of terms and writing.[835]

Claims for breach contract will arise from the existence of a written agreement, an oral contract or a successful claim of part performance.[836] Each of these raise specific challenges for the person alleging a contract exists, not in small part because the 'accommodation and care' is not deemed consideration. This explains why the contribution attracts the presumption of advancement. In other circumstances, where consideration is paid, the transferee may seek to have the contract set

[834] As no contract existed at law, there was nothing to engage the *Contracts Review Act 1980* (NSW).
[835] see Chapter 4 Part II(A–C).
[836] The doctrine of part performance is an equitable doctrine allowing a plaintiff to rely on acts of part performance of a contract to prove the existence of a contract, where it would be unconscionable for the defendant to rely on the requirement of writing to deny the contract: *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382, 392

aside for fraud,[837] in equity[838] or under the *Contracts Review Act 1980* (NSW)[839] or seek to have the contract declared void *ab initio* through a plea of *non est factum.*[840]

Therefore, in the hypothetical scenario, Anna would first need to overcome these challenges to establish a contract exists before looking to either enforce the contract or for remedies for breach of contract.

2 *Contracts in Writing*

If Anna and Bea do reduce their agreement to writing and the agreement satisfies the requirements of a valid contract, the parties will look to the terms of the contract to determine their rights and liabilities. While a contract lends more certainty to the legal position of each party, questions can arise concerning the interpretation of the contract itself. The two cases below exemplify the difficulties that may arise in the context of familial arrangements. In *Mainieri v Cirillo*, it was argued by the plaintiff that the contract did not reflect the entirety of the parties' intentions.[841] In *Marlow v Boyd*, the parties had not anticipated the events that unfolded and the court was required to give a 'reasonable' interpretation to the contract as it stood.[842]

In *Mainieri v Cirillo*, the parties entered into an oral agreement whereby Mrs Cirillo provided $240,000 from the sale of her home to reduce her son's mortgage in exchange for accommodation with her son and his partner indefinitely.[843]At a later stage, a written agreement was entered into where it was stated that the parties agreed that in consideration of the gift of $240,000 Mrs Cirillo would be allowed to reside in the home and be looked after 'for the rest of her life in a manner that is just and appropriate in all the circumstances'.[844] The relationship subsequently broke down, and Mrs Cirillo was unable to remain in the home. Her son alleged the money provided to him was a gift and that there was no obligation on him to repay it. Mrs Cirillo commenced proceedings, arguing she was entitled to a constructive trust over the property proportionate to her contribution or an equitable lien.[845] Her son, however, alleged that the intention of the parties was that the written document was to encompass the entirety of

[837] See Part II(A) above.
[838] See Part II(B–D) above.
[839] See Part II(F) above.
[840] See Part II(G) above.
[841] *Mainieri v Cirillo* [2014] VSCA 227. See Somes (n 15).
[842] *Marlow v Boyd* [2012] QSC 331.
[843] *Mainieri v Cirillo* [2014] VSCA 227.
[844] Ibid [5].
[845] Mrs Cirillo could not argue breach of contract as she had left the property of her own accord, and her son had not repudiated the agreement.

their agreement, and that document made no reference to an obligation to apply the money to reduce the mortgage. In doing so he relied on the parol evidence rule, which provides that oral evidence will not be admitted which seeks to add, vary or contradict the terms of a written contract. Therefore, it was alleged by her son that Mrs Cirillo could not rely on the conversations between the parties agreeing that the money would be used to reduce the mortgage, and thus was unable to claim a proprietary interest in the property. Fortunately for Mrs Cirillo, both the court at first instance and the Court of Appeal were prepared to find that the agreement was partly oral and partly written, the Court of Appeal awarding an equitable lien over the property. However, ordinarily the admission of oral evidence is determined objectively on the facts of the case,[846] and parties entering into a formal FAA would need to be advised that, prima facie, the document encompasses the whole agreement and does not include informal conversations that 'supplement' the written agreement.[847]

In *Marlow v Boyd*, the parties entered a contract whereby the amount contributed by the parents, Robert and Jacqueline Boyd, amounted to 50% of the purchase price of a new property and gave the parents a lifetime tenancy of a dwelling known as the 'White House' on their daughter's property.[848] The contract anticipated the financial consequences should the property ever be sold (the agreement would be transferred to the new property) or if the agreement was terminated, in which case 50% of the sale price less solicitors' fees and real estate commissions would be paid to the parents. The agreement made further provision for adjustments for improvements to the land, with the aim that Robert and Jacqueline would be able to 'purchase another property should the agreement be dissolved'. The death of the parents would have the effect of terminating the agreement and no claim for reimbursement would be made from their estate.

This agreement was unusual in that it anticipated future events, and explicitly recognised the nature of the parent's interest in the property (the lifetime tenancy or licence not amounting to a proprietary interest). Unfortunately, Mr Boyd died and, some time afterwards, Mrs Boyd began

[846] *Mainieri v Cirillo* [2014] VSCA 227 [13].
[847] Somes and Webb, 'What Role for Real Property' (n 31) 130–31. It is interesting to note that this case was conducted under a pro bono scheme, and Mrs Cirillo's liability to pay her solicitors was contingent on there being either a settlement which included payment of costs, or a costs order being made in her favour. It can be assumed, therefore, that in the absence of this scheme the plaintiff may have been unable to finance the litigation.
[848] *Marlow v Boyd* [2012] QSC 331.

internet dating, causing tension between Mrs Boyd and her daughter.[849] Mrs Boyd's eventual remarriage caused the complete disintegration of the relationship between mother and daughter.

The contract had not anticipated the breakdown of the relationship. Mrs Boyd wanted the return of her contributions and claimed she could no longer live near her daughter. Her daughter argued that the contract only anticipated the 50% contribution being paid to Mrs Boyd in the event that the daughter agreed to sell the property. In awarding Mrs Boyd an equitable interest in the property to the value of 50%, Boddice J stated:

> The meaning of a contractual document is to be determined against what a reasonable person would have understood it to mean, having regard to its text, to the surrounding circumstances known to the parties, and to the purpose and object of the transaction. Where, as here, the agreement is drafted by a person who is not a legal practitioner, it is important not to adopt a narrow or pedantic approach. Regard should be had to the substance of the agreement, not its form. The proper approach is 'sympathetic not hyper-critical; understanding not pedantic; sensible but not overly fastidious'.[850]

While contracts do eliminate much of the uncertainty surrounding intention and obligations of each party, they are not a panacea for all issues created by a failed FAA. Nonetheless, a well-drafted contract where each party has been given independent advice concerning the legal consequences of the arrangement is a significant step in minimising the legal-situational vulnerability of the parent. As the above cases demonstrate, the necessity to enforce the contract will, depending on the values involved, still necessitate the party wishing to enforce the contract commencing legal action to do so.

3 *Remedies for Breach of Contract*

If the primary obligations under the contract are not performed, then damages will be awarded to compensate the plaintiff.[851] In circumstances where the court determines that damages were not adequate, alternative remedies can be identified.[852] In the context of a failed FAA, it is unlikely that Anna would want specific performance of the contract to provide her with

[849] Mrs Boyd's daughter expressed concern at her mother bringing men back to the property, as she was concerned for the safety of her own young children. Unfortunately, Mrs Boyd was assaulted by one man and hospitalised, and a restraining order was taken out against him.
[850] *Marlow v Boyd* [2012] QSC 331 [103].
[851] *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 504 (Windeyer J). In *Marlow v Boyd* [2012] QSC 331 the court enforced the primary obligation under the contract, albeit under conditions that were not anticipated in the contract.
[852] Damages may be inadequate because there is no 'market substitute (often in the case of land); damages would be difficult to quantify; the defendant is insolvent; or only nominal damages would be recoverable.

accommodation and care. In any case, if the contact was one for 'personal services' this would not be enforced as a matter of public policy.[853]

Should they be awarded, damages are calculated on the basis of the non-breaching party's expectation and act as a substitute for the primary right of performance.[854] Clearly these are more readily assessable in commercial disputes, where the court is able to put the plaintiff in the financial position they would be in had the defendant performed the contract.[855] The role of expectation is more commonly found when estoppel forms the ground for relief, and will be discussed further below.[856] That being said, the timing of the assessment of damages varies in that at common law they are assessed as at the time the action accrued, whereas equitable compensation will be assessed as at the date of the trial.[857]

B *Express/Common intention constructive trust*

1. Express Trust

Establishing Bea holds the property on express trust for Anna would give Anna equitable title in the property as a beneficiary under the express trust. As the sole beneficiary, Anna would have the power to dissolve the trust and have the property conveyed to her.[858] The challenge for Anna is to establish she possessed the requisite intention to create a trust when she transferred legal title to the property to Bea, and that Bea undertook to hold the property on trust.[859] If a trust is established, Bea would owe fiduciary duties to Anna and any contrary dealing with the property would constitute a breach. Discretionary remedies for breach of trust would flow from any breach and could include both proprietary and monetary remedies.[860]

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[853] *JC Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282, 298 (Dixon J).
[854] *Robinson v Harman* (1848) 154 ER 363*; Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80–1.
[855] Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (2nd ed, Cambridge University Press, 2018) [5.3].
[856] See Part III(D) and *Sidhu v Van Dyke* (2014) 251 CLR 505 where the plaintiff received equitable compensation in accordance with her expectation loss.
[857] *Re Dawson (deceased)* [1966] 2 NSWR 211; *Reilly v Reilly* [2017] NSWSC 1419 [355] (Lyndsay J)
[858] *Saunders v Vautier* (1841) 49 ER 382.
[859] *Knight v Knight* (1840) 3 Beav 148; 49 ER 58; *Byrnes v Kendle* (2011) 243 CLR 253; *Schweitzer v Schweitzer* [2010] VSC 543; upheld on appeal in *Schweitzer v Schweitzer* [2012] VSCA 260.
[860] The nature of the remedy would be dependent on the breach that has occurred and could include either gain-based remedies or compensation for loss – for instance, if Bea obtained rent from the property or failed to keep it in good repair. See Barnett and Harder (n 855).

Although express words may not have been used, the court would look at whether, on an objective assessment, a trust was intended.[861]

FAAs rarely give rise to a finding of an express trust.[862] First, as mentioned above, there exist difficulties in establishing the requisite intention to create a trust. For the most part, if the property is transferred a parent is willing to part with legal title of property to adult children and not retain an interest in the property.[863] Similarly, FAAs consisting of financial contributions to property are rarely constituted in such a way so the adult child holds legal title on an express trust for the parent. It is more likely that the parent will allege a resulting, implied or constructive trust should the arrangement fail.[864] The latter would, of course, avoid the second challenge – that is, compliance with the statutory writing requirements under the relevant state legislation.[865]

2. Common Intention Constructive Trust (CICT)

A trust may be imposed over the property in circumstances where it can be established that the parties expressed a common intention to share the property and the plaintiff acted to their detriment in reliance on that understanding.[866] If established, as with an express trust, any dealings with the property by the trustee that were contrary to the interests of the beneficial owner would amount to a breach of trust and give rise to appropriate remedies.[867] The advantages to finding a CICT lie in the recognition of a proprietary interest in the property, an interest that will take priority over creditors and which is caveatable. However, the CITC has limited scope in family accommodation situations. The parent must point to evidence of the actual intention of the parties, rather than imputing intention by concluding what fair and reasonable persons in the position of the parties would have intended. Intention may be inferred

[861] *Byrnes v Kendle* (2011) 243 CLR 253 [114]; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 [3] (French CJ); *Nguyen v Phan (No 2)* [2015] VSC 634 [237] (Elliot J): *Dunphy v Russell* [2018] NSWSC 721 (Sackville AJA).
[862] But see *Ewart Martin and Martin* [2018] QDC 176, where the court found property was held on express trust where money was advanced by a mother to her daughter for the purchase of property, which was held in the daughter's name.
[863] Although, it is not uncommon for parents to believe they have some 'form' of interest in the property: see *Spink v Flourentzou* [2019] NSWSC 256 [204].
[864] A constructive trust could be established through common intention or as a remedy in response to an equitable cause of action.
[865] See Chapter 3 'Legal Situational Vulnerability' Part II(D) (3) 'Writing Requirements for the Disposition, Devolution or Acquisition of Land or Evidence to Title of Land'.
[866] *Jin v Yang* [2008] NSWSC 754; *Green v Green* (1989) 17 NSWLR 343.
[867] This would depend on the nature of the breach, but could amount to gain-based remedies (ie if the property was sold), allowing the property to be traced or equitable compensation (for instance, if loss occurred as a result of the trustee's mismanagement).

from the actions or behaviour of the parties.[868] Nonetheless, there are evidential difficulties associated with establishing intention where conversations may have occurred in haste and remain undocumented or poorly recalled. Despite these difficulties, a CICT was found to exist in *Dimitrijevic v Dimitrijevic*.[869] Here, an elderly father and his son bought property together on the basis they would live together and the son would be the father's carer. The father paid the bulk of the purchase price and the son borrowed the balance, and the property was placed in the son's name. There was no written agreement that provided evidence of the intentions of the parties. On the breakdown of the relationship, the father claimed a beneficial interest in the property, while the son argued the money advanced was a gift. Lindsay J declined to make any finding of respective interests based on 'arithmetic calculation'.[870] Rather, the reciprocal arrangements concerning the provision of property and the promise of care translated to a common intention that the property be purchased for the benefit of both parties equally, and neither could deny the other's entitlement to a half-share in the property.[871]

As explained above under the heading 'express trusts', an intention to have title held on trust is uncommon, as the parent rarely expects to retain a proprietary interest at the time the arrangement is made.[872] In many cases the intention is that the interest lies solely with the child, as the mutual arrangement benefits the financial position of the younger party in return for the benefits of care and accommodation for the rest of the older person's life. In *Morris v Morris*[873] an elderly man paid for an extension to a home jointly owned by his son and daughter-in-law and, in exchange, they agreed to provide accommodation for him indefinitely. On the breakdown of the marriage, the son left the home. The relationship between the plaintiff and his daughter-in-law soured, and he left. There was no basis from which it could be inferred that there was any intention to create a trust, nor anything from which a trust could be implied.[874] It was held, however, that it would be unconscionable and inequitable for the son and the daughter-in-law to retain the benefit of the plaintiff's expenditure free from any obligation of recoupment, and the appropriate remedy was an equitable charge to secure the amount of that expenditure and interest.[875]

[868] *Shephard v Doolan* [2005] NSWSC 42, [34] (White J); *Hohol v Hohol* [1981] VR 221.
[869] *Dimitrijevic v Dimitrijevic* [2014] NSWSC 863.
[870] Ibid [34] Lindsay J.
[871] Ibid [41] Lindsay J.
[872] In contrast to establishing a proprietary interest based on estoppel or a failed joint venture.
[873] *Morris v Morris* [1982] 1 NSWLR 61.
[874] Ibid 64.
[875] *Morris v Morris* [1982] 1 NSWLR 61.

If evidentiary hurdles associated with finding common intention can be overcome, there are advantages to establishing a CITC over a plea of estoppel, or those based on unconscionable retention of title under *Muschinski v Dodds*[876] or *Baumgartner v Baumgartner*.[877] Assuming common intention is found, the CICT will arise 'simultaneously with the conduct that gives rise to its imposition'.[878] As such, the trust will exist from the time the plaintiff has acted to their detriment on the assumption of shared ownership; the equitable interest not only exists without the need for judicial creation (cf. a remedial constructive trust), its status as an equitable proprietary interest will support the application of a caveat.[879] Additionally, the equitable interest created under the CICT would give the beneficiary priority in the event of the title-holder's bankruptcy.[880] If a common intention constructive trust is imposed, the quantum of interest held by each party will reflect their intentions; otherwise, the court will determine what best gives effect to those intentions.[881]

C *Estoppel*

In a limited number of cases, equitable estoppel has been raised in failed family accommodation disputes to prevent an adult child from denying a parent's proprietary interest in the disputed property. It is more likely that in the familial context, it will be the adult child as plaintiff alleging that they have performed duties on the basis of a promise they will be granted a proprietary interest.[882] In 2008, Barkehall Thomas noted that pleas of estoppel occur far less frequently that claims under the *Muschinski v Dodds* principle, and that trend has continued.[883] If the facts permit, the two actions can be run at the same time.[884]

1 *Establishing a Claim in Estoppel*

[876] *Muschinski v Dodds* (1985) 160 CLR 583.
[877] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 167.
[878] *In de Braekt v Powell* (2007) 33 WAR 389 [26] (Buss JA) cited in Dal Pont (n 474) [38.255].
[879] See the discussion in Chapter 4 (IV)(D) 'Lodging a Caveat to Protect and Equitable Proprietary Interest'.
[880] *Parsons v McBain* (2001) 109 FCR 120; GE Dal Pont, 'Timing, Insolvency and the Constructive Trusts' (2004) 24 *Australian Bar Review* 262.
[881] *Dimitrijevic v Dimitrijevic* [2014] NSWSC 863.
[882] See eg *Giumelli v Giumelli* (1999) 196 CLR 101; *Priestly v Priestly* [2017] NSWCA 155; *Christodoulou v Christodoulou* [2009] VSC 583; *Flinn v Flinn* [1999] VSCA 109; *Riches v Hogben* [1985] 2 Qd R 292; *Estephan v Estephan* [2012] NSWSC 52; *Milling v Hardie* [2014] NSWCA 163; *Guest v Guest* [2020] EWCA Civ 387.
[883] Barkehall Thomas, 'Families Behaving Badly' (n 31) 165.
[884] See eg *Clementi v Rossi* [2019] VSC 725.

At the heart of equitable estoppel is the encouragement or promise by one party (A) that another (B)will acquire an interest in A's property, and the reliance by B on that promise to their detriment. [885] This principle of was explained by Nettle JA in *Donis v Donis*:

> [C]onduct of the promisor in engaging the complainant to change his or her position to their detriment on the footing that the promised property will be theirs, when acted upon by the complainant, creates an equity which binds the promisor to make good the expectation. Hence, the detrimental reliance which supports the estoppel need not constitute consideration in any sense.[886]

While Nettle JA in the quotation refers to estoppel by encouragement, a claim in estoppel can exist if the defendant has 'acquiesced' to the expenditure of the plaintiff.[887]

2 *Estoppel in the Context of Family Accommodation Agreements*

It has been suggested by Barkehall Thomas that there is less reliance on this doctrine that the 'failed joint venture' doctrine, owing to the difficulty in proving reliance by the claimant on an assumption created or encouraged by the defendant.[888] This may well be true, as the particular elements of the cause of action must be proven, and in the context of the family either the criterion regarding the scope of the arrangement is not explicitly expressed or there is vastly conflicting evidence from family members as to expressions of intention and entitlement. Another difficulty is establishing the nature of the expected interest fuelled by the representation. In most FAAs, the expectation relating to property is to be provided with accommodation for life. Rarely is there an express promise that a proprietary interest will emerge from the arrangement, and the expectation only emerges on once the arrangement has broken down.[889] This interest is more likely to take the form of a life interest, or a licence to reside in the property.[890]

Although rare, in *Jacqueline Pobjoy v Prudence Anne Reynolds* the court did find for the plaintiff based on an estoppel. In this case the plaintiff, a 79-year-old pensioner, brought an action against her daughter (the first defendant) and her son-in-law (the second defendant). She claimed she agreed to sell her property on the understanding that the proceeds would be applied to a new property which the defendants would purchase in their name, and the new property

[885] *McNab v Graham* [2017] VSCA 352, [97] (Tate and Santamaria JJA and Keogh AJA agreeing)
[886] *Donis v Donis* (2007) 19 VR 577, 589 (Nettle JA, Maxwell ACJ and Ashley JA agreeing). See also *Giumelli v Giumelli* (1998) 196 CLR 101; *Delaforce v Simpson Cook* [2010] NSWCA 84.
[887] *Ramsden v Dyson* (1886) LR 1.
[888] Barkehall Thomas, 'Families Behaving Badly' (n 31) 165.
[889] Contrast this with actions brought by children, where promises of title or a share in property are the motive for the detrimental reliance. Indeed, there may be financial justifications as to why the parent would not expect an interest in the property.
[890] See Chapter IV(B) 'Establishing the Nature of the Interest held by the Parent'.

would either have a granny flat or one would be constructed for her. She agreed to contribute to the utilities and the defendant agreed to care for her. A total of $121,437.80 was provided by the plaintiff to the defendants. Relationships between the mother and daughter, and the son-in-law, deteriorated and the parties moved out. The property was sold pursuant to Family Court orders, and the daughter purchased another property. The court found that

> [t]he plaintiff was encouraged by the first defendant to contribute to the property on the representation made by, and an expectation created by, the first defendant, that the plaintiff would be entitled to reside there. The first defendant now seeks unconscientiously to depart from the representation and to deny the plaintiff fulfillment of the expectation which she created, and upon which the plaintiff acted to her detriment. In these circumstances, the Court will compel the first defendant to give effect to the expectation.

The court awarded the amount of $121,437.80 in the form of a charge over the property. Although this was an amount equal to her contribution, the amount was expressed as the amount equal to her denied expectation of moving into a granny flat.

3 *Remedies*

Once an estoppel is established, the most appropriate remedy will be granted to compensate for the disappointed expectation. Therefore, in estoppel cases

> [t]here is no governing principle that requires that the relief granted be that which is the minimum necessary to do justice. To the extent that there is a prima facie entitlement to relief on the basis that the adopted expectation is to be made good, that entitlement must be weighed against any injustice to the estopped party in doing so and the detriment suffered by the party who has acted upon the induced expectation Consideration should be given to whether the proposed relief has any adverse effects on the interests of third parties.[891]

In *Sidhu v Van Dyke*, the High Court of Australia noted that 'the fundamental purpose of equitable estoppel is to protect the plaintiff from the detriment which would flow from the defendant's change of position if the defendant were to be permitted to resile from his or her promise'.[892] While there has been tension in discerning which circumstances require the 'minimum equity' approach, as opposed to fulfilling the plaintiff's expectation loss, the High Court found that in cases where the detriment suffered was 'of a kind and extent that involve[d] life-changing decisions with irreversible consequences of a profoundly personal nature' – in contrast to detriment that amounted to 'a relatively small, readily quantifiable monetary outlay'[893] – the appropriate measure of relief was the value of fulfilment of the appellant's

[891] *Walsh v Walsh* [2012] NSWCA 57 (Meagher JA).
[892] *Sidhu v Van Dyke* (2014) 251 CLR 505 [82].
[893] Ibid [84] citing *Donis v Donis* (2007) 19 VR 577 [34] (Nettle JA).

promises. In the context of FAA disputes, this could mean an estoppel claim may be a more attractive option for the older party; however, it remains to be seen exactly how the courts will assess the notion of the 'value' of the fulfilment of the promise, particularly when an important aspect of the arrangements commonly involves care and an expectation of familial closeness.[894] In such situations, the court would need to assess the impact of expectation relief on the other party to ensure the result would not cause undue hardship. Therefore, the court will strive to find the most appropriate remedy, and a constructive trust will be considered a remedy of last resort.[895] Commonly, courts will order equitable compensation covering expectation loss, coupled with a charge over the property held by the defendant. *Morris v Morris*, discussed above, was also analysed based on estoppel.[896] McLelland J drew analogies with those cases in which it was held that it was unconscionable to encourage a person to expend funds on land in the expectation of an interest and then resile from the obligation created. In finding that 'it would be unconscionable and inequitable that the defendants should now retain the benefit of the expenditure by the plaintiff of his money on their property free of any obligation of recoupment to him', McLelland J determined an equitable lien appropriate to secure the moneys owing to the plaintiff and to 'satisfy the demands of justice and good conscience'.[897]

IV UNEXPECTED BREAKDOWN: LACK OF ANY CLEAR UNDERTAKINGS

The third and final category looks to those circumstances where there is an absence of any clear undertakings on entering the agreement. These grounds for relief are based around agreements that are made with the best intentions at the outset but fail due to relationship breakdowns or other events that were not foreseen or anticipated. The primary ground for relief under this heading is the failed joint venture under *Muschinki v Dodds* principles.[898] Resulting trusts are examined as an example of equity's presumptive mechanisms when contributions are not reflected in the legal title; however, the limitations of the doctrine mean it is only of limited use in the context of FAAs. Distribution under the *Family Law Act 1975* (Cth) is mentioned for completeness, but the mechanisms of property distribution under the Act is beyond the scope of this thesis. The *Property (Relationships) Act 1984* (NSW) is also included, and the Act and its utility as a model for new legislation will be considered in more detail in Chapter 8.

[894] See eg *Stoklasa v Stoklasa* [2004] NSWSC 518.
[895] *Jacqueline Pobjoy v Prudence Anne Reynolds* [2013] NSWSC 885 [14] (Hammerschlag J).
[896] *Morris v Morris* [1982] 1 NSWLR 61: see facts at Part III (B) 'Express Trust'.
[897] Ibid 64.
[898] *Muschinski v Dodds* (1985) 160 CLR 583.

Hypothetical Case Study

> Anna was recently widowed. With the help of her son she sold her house and used the proceeds to build a granny flat attached to a house he was building on his property. Her son agreed she would be able to stay with him and his wife for the rest of Anna's life. She lived with her son and daughter-in-law for two years. Her son predeceased her, and her daughter-in-law was required to sell the property to pay outstanding debts.

This hypothetical case study demonstrates how an arrangement made in good faith can break down without blame. Here the daughter-in-law has indefeasible title to the property and is entitled to sell her property to satisfy debts. There may be contributions made by the parties beyond those made to the property that must be taken into consideration when considering the appropriate remedy.

A *Failed Joint Venture*

The 'first windfall equity case'[899] has generated a large body of law and the principles are now deeply enshrined in the Australian legal system. It is beyond the scope of this thesis to delve into each aspect of the doctrine; rather, the discussion will serve to illustrate the difficulties the doctrine poses when applied to FAAs. To the extent there is any inconsistency in approaches in applying the failed joint venture equity, the diversity of judicial approaches can be attributed at least in part to the sheer range of individual circumstances that give rise to FAAs, and the interpretation by the court of those arrangements. The reform proposals put forward in this thesis aim to ameliorate much of the interpretive work undertaken by the court in determining whether matters fall within this, or indeed any other doctrine. By creating a separate cause of action specific to FAAs, questions such as whether the arrangement is in fact a joint venture, and the associated threshold requirements to prove the cause of action, would be replaced by a single determination of whether the arrangement entered is, in fact, a FAA as defined by the legislation.

1 *Establishing the 'Failed Joint Venture' Equity*

When argued successfully, the failed joint venture doctrine captures the mutual arrangement forming the foundation of a FAA, whereby each party makes contributions, both financial and non-financial, with a view to each gaining reciprocal benefits until the arrangement comes to its natural end.[900] The equity is enlivened when the 'substratum' of the endeavour fails without

[899] *Henderson v Miles (No 2)* [2005] NSWSC 867 [14].
[900] See eg *Hill v Hill* [2005] NSWSC 863.

attributable blame and the consequence is that property is unconscionably retained by one party at the exclusion of the other.

The principle is derived from the case of *Muschinski v Dodds.*[901] In *Muschinski*, an unmarried couple purchased land in circumstances where the woman paid the purchase price but agreed to include the man's name on the title as a tenant in common in equal shares, on the understanding that he would over time renovate the cottage and pay for a prefabricated house. The parties separated before the cottage was renovated or the house acquired, and the woman claimed sole beneficial ownership of the land. It was held that the presumption of a resulting trust arising from her provision of the entire purchase price had been rebutted and the parties held their respective legal interests as tenants in common upon trust after payment of any joint debts, to refund each person's contribution and to hold the residue in equal shares. Mason and Deane JJ concluded that it would be unconscionable after failure of the joint venture between the parties for the man to assert his legal entitlement without recognising the woman's payment. Justice Deane stated that:

> [T]he principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.[902]

2 *Failed Joint Ventures in the context of FAAs*

For those matters that are litigated, the failed joint venture is a commonly pleaded cause of action. Taking our hypothetical example, it would be incumbent on Anna to establish the elements of the cause of action. These include establishing the existence of a joint venture aimed at the parties' mutual benefit; valuable contributions being made by parties towards the joint venture; the breakdown of the joint venture or the removal of its 'substratum'; the absence of any attributable blame; that retention of wealth by one party to the exclusion of the other party was not contemplated; and that retention would be unconscionable.[903] Yet applying the failed joint venture is not without its challenges, and these arise primarily because FAAs are a particular type of arrangement that does not always fit neatly within the threshold requirements of the doctrine.

[901] *Muschinski v Dodds* (1985) 160 CLR 583.
[902] Ibid [14] (Deane J).
[903] Dane Bryce Weber, *Windfall Equity and the Joint Endeavour Principle: Restatement of the Principles in Muschinski v Dodds* (Lexis Nexis, 2021) 55 [3.74].

Barkehall Thomas identifies several shortcomings of applying the failed joint venture to FAAs.[904] She argues that, first, while the FAA can be viewed broadly as a joint venture between the parties, it does not fall neatly into the concept of the parties 'pooling their resources' for the benefit of the joint venture, and there is no expectation of a beneficial ownership in the property. For the parent in a FAA, this can pose challenges as, unless someone has a legitimate expectation of acquiring a proprietary interest, they cannot claim a beneficial interest in the adult child's property.[905] It is more common in a FAA for the parent *not* to anticipate a proprietary interest until the failure of the arrangement. Establishing the existence of a joint venture is fundamental, and without its identification the equity will not be enlivened.[906] Secondly, on the breakdown of a joint venture the usual remedy is a constructive trust, awarded over the property in proportion to the parties' contributions. However, an older party is rarely awarded a proprietary interest pursuant to a constructive trust; courts have adopted the view that the 'minimum equity' should be awarded based on a restitutionary analysis.[907] In *Henderson v Miles (No2),* the court distinguished between cases based on 'promise' and 'free acceptance'.[908] Here, a mother had used her own funds to build a house with a granny flat on property owned by her daughter and her husband, on the understanding the mother could live there for the rest of her life. On the failure of the arrangement, the plaintiff mother argued the equitable charge over the property should be calculated by reference to expectation (and include a sum acknowledging the benefit the daughter would receive in renting the property). However, Young CJ distinguished the present case from the non-fulfilment of a promise and found that the promise had been fulfilled but had ended prematurely. Thus, the minimum equity was calculated by reference to the detriment in 'losing a fund' to another party, not to any future gain that could be made.[909] The amount awarded was calculated by estimating the value of improvement to the land because of the property being erected on it – $39,000 – and this amount was discounted by acknowledging the mother was only to have a life estate. Therefore, a calculation based on actuarial tables reduced the amount to $32,000. The emphasis is thus upon the prevention of an unconscionable retention of property by the adult child, rather than the loss or detriment suffered by the elder party.

[904] Barkehall Thomas, 'Families Behaving Badly' (n 31).
[905] *Moustapha v Nelson* [2018] NSWSC 1816.
[906] In *Craig v Craig* [2015] SADC 109, the payment of $70,000 by a father to his son was considered to be a conditional gift rather than a contribution to a joint endeavour. As a gift, the father was not able to establish a proprietary interest in the property.
[907] Ibid 159.
[908] *Henderson v Miles (No 2)* [2005] NSWSC 867.
[909] Ibid [95].

Henderson demonstrates that a restitutionary approach and, the proposition that the parties may only envisage that the parents receive a life interest rather than a share in the property, has a significant impact on the remedy awarded by the courts. There are similarities with an estoppel claim in that the approach fails to recognise that the agreement of a life interest is premised on the continuation of the arrangement until the death of the older party, rather than the parties contemplating what should occur if the arrangement is discontinued. [910] The shortcomings of both these causes of action place the older party in an uncertain position; the remedy is largely determined by the facts and the state of mind of the parties when they assumed the arrangement would continue without incident. This is based on the reasoning that, in the joint venture cases, the promise has been fulfilled (in that the living arrangements have been organised but the arrangement has broken down), whereas in estoppel cases the promise has not been fulfilled. The distinction highlights the artificiality of the rights-based approach to such arrangements, and the dangers of drawing analogies with commercial enterprises. The aim of the joint venture approach is to prevent one party gaining a 'windfall' but does nothing to anticipate the loss that is experienced by the elder party in relation to their long-term care and security.

Despite the general trend identified by Barkehall Thomas, in some instances courts have found a constructive trust based on respective contributions to a failed joint venture. An example is *Swettenham v Wild*.[911] In this case, an elderly father sold his property in Melbourne to live with his daughter and son-in-law in Queensland. A house was purchased by him, which he then transferred to his daughter. Along with a loose agreement concerning cleaning provided by the daughter and the provision of meals, the father had the right to remain in the property for the rest of his life. Unfortunately, there was a complete and acrimonious breakdown in the relationship. As is common in disputed FAAs, the daughter claimed that the transfer of the property to her was a gift. At first instance it was held that the father's interest in the property was limited to an entitlement to equitable compensation represented by the cost of his residing in similar accommodation for the rest of his life, and the respondent was ordered to pay $45,000.00 by way of equitable compensation.[912] On appeal the Supreme Court found that the arrangement went beyond just a financial one and applied the joint venture principles. It said:

[910] In Victoria, if the older party can establish they have a life interest rather than a personal right to reside in the property, s 42(2)(e) of the *Transfer of Land Act 1958* (Vic) confers a proprietary right in the property enforceable against third parties, and may allow the older party to remain in the property: see *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 [19].
[911] *Swettenham v Wild* [2005] QCA 264.
[912] Ibid [29].

> In this case, Mr Swettenham intended that Ms Wild would take the legal title to the property. However in return he was to retain not only a right to reside in the granny flat but also receive the support and comfort of living in a family environment with his daughter and her family as he aged. That was the joint endeavour between them and not, as the learned trial judge held, the conferral by Ms Wild on Mr Swettenham of the right to reside in the granny flat for the rest of his life. That joint endeavour between the parties was to be for their mutual benefit but failed through no attributable fault of either party. Mr Swettenham contributed a large proportion of the purchase price. In these circumstances it would be unconscionable for Ms Wild to retain the beneficial interest in the whole of the property subject only to Mr Swettenham's right to reside in the granny flat.[913]

Consequently, constructive trust over the property arose in favour of the father, giving him a proportionate share of the property relative to his capital contribution. The property had increased in value from $235,000.00 when it was purchased in 2000 to $390,000.00 at the time of trial. Despite this conclusion, the appellant only sought repayment of his original contribution together with interest, and the final award reflected that amount.

3 *Remedies*

In *McKay v McKay,* Brereton J stated:

> In the field of the premature failure of the substratum of joint ventures, the cases made clear that the guiding principle is the return of contributions. Once again, it may well be that, as a matter of discretion, equity can decree something less than that where to so would be disproportionate to requirements of conscionable behaviour. But, in my opinion, the prima facie remedy in such a case is the return of contributions.[914]

Therefore, the remedy awarded looks to contributions that, if not returned, would be unconscionably retained by one party at the exclusion of the other. It does not seek to compensate the plaintiff for the detriment suffered by the non-fulfilment of a promise. In some instances, this may take the form of a constructive trust over the property, but in many instances an equitable charge is awarded.

In *McKay v McKay* the defendant and his de facto wife (B) were the owners of a property as tenants in common in equal shares. The defendant became ill, and the de facto relationship broke down. It was proposed that his daughter and her partner, the plaintiffs, buy out B's share of the property, and the defendant assign his share of the property to his daughter in exchange for an entitlement to reside in the property and receive care for the remainder of his life. The agreement was recorded by deed. The arrangement continued for a time, but subsequently the

[913] Ibid [42].
[914] *McKay v McKay* [2008] NSWSC 177 [33].

relationship broke down and the plaintiffs moved out. The plaintiffs claimed they were entitled to the whole property subject to an obligation to pay the defendant the value of his lifetime right of residence. As the agreement was by deed, they contended that the dispute was contractual, and the liability was only to pay damages. The defendant claimed it was unconscionable for the plaintiffs to retain the benefit of the transfer in circumstances that had not been intended and, as such, the substratum of the relationship on which the transfer of the proper interest was undertaken had been destroyed.

The court found that, owing to the nature of the relationship, the elements of mutual trust and confidence, the obligations to provide care and the fact that the arrangement was in a family context, this was not merely a contractual arrangement. The final order reflected the respective contributions: the property was to be sold by trustees, the plaintiffs to pay the balance of the mortgage, and the defendant to pay the plaintiffs an occupation fee for the period the defendant resided in the property after the plaintiffs moved out.[915]

B *Resulting Trust*

1 *Establishing a Resulting Trust*

A resulting trust is equity's 'default position' in circumstances where unequal contributions are made to the purchase price of property but the legal title does not reflect those contributions.[916] Resulting trusts are based on the presumed intentions of the parties; a court will give effect to the grantor's intention by adopting a presumption in regard to that intention.[917] They may arise in a number of situations, including where property is purchased by one party but held in the name of another party; where property is purchased jointly and is only in the name of one party; or where property is held jointly but the respective contributions to the purchase price were not equal. It is open to the legal title holder to point to contrary evidence to rebut the presumption of resulting trust.[918]

2 *Resulting Trusts in the Context of Family Accommodation Agreements*

In the context of FAAs, the equitable rules concerning resulting trusts rarely offer satisfactory relief as there are several obstacles that may either prevent a resulting trust arising or determine

[915] Although not specifically mentioned, it is implied that prior to the sale, the plaintiffs held the property on trust for themselves and the defendant in equal shares, the final accounting being subject to the orders made in relation to the mortgage and occupation fee.
[916] *Xiao Hui Ying v Perpetual Trustees Victoria Ltd* [2015] VSCA 124 [39]–[40] (Beach, McLeish JJA, Dixon AJA).
[917] *Calverley v Green* (1984) 155 CLR 242, 246, 266.
[918] *Buffrey v Buffrey* [2006] NSWSC 1349 [14]; *Anderson v McPherson (No 2)* [2012] WASC 19.

that the resulting trust is an inappropriate remedy. First, the contribution must be towards the property itself. In the hypothetical example, Anna would be unable to argue a resulting trust as her contributions were not to the purchase of the property. Payments made must be directly referable to the purchase price, and not towards any other purpose.[919] Therefore, monetary contributions towards mortgage instalments made *after* the purchase will not be treated as contributions to the purchase price, nor will money paid towards renovations or extensions.[920] Hence, Anna building a granny flat or adding renovations to an existing property would not give rise to a resulting trust. However, relief could be sought under failed joint venture principles or estoppel, or a trust could be found if the criteria for a CICT were satisfied.

Secondly, if a voluntary transfer of land has occurred, legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia provides that no resulting trust will arise on the conveyance of land despite an absence of consideration.[921] Hence, a resulting trust will only consider very narrow criteria, and although the doctrine may secure initial money contributions, it will not consider the wider circumstances and contributions made by the parent.

3 *The Presumption of Advancement*

The presumption of a resulting trust is further complicated by the presumption of advancement, under which the contribution may be determined to be a gift.[922] In certain relationships equity will assume the purchase or contribution has been made by way of gift, rather than presume a resulting trust. Transfers or contributions made from husband to wife, or parent to child, are presumed to be gifts by way of advancement.[923] The underlying justification is that parents will strive to enable their children to become independent. As such, a parent would have to rebut the presumption of advancement to allow a resulting trust over money paid towards the purchase price of a property in their child's name.[924]

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[919] *Haley v Perkins* [2010] NSWSC 1091 [78].
[920] *Calverley v Green* (1984) 155 CLR 242; *Tabtill Pty Ltd v Creswick* [2011] QCA 381 [159].
[921] *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; *Bhana v Bhana* [2002] NSWSC 117 (Hamilton J).
[922] *Yoshino v Niddrie* [2003] NSWSC 57. See discussion in Chapter 4.
[923] *Wirth v Wirth* (1956) 98 CLR 228, 232 (Dixon J); *Bennet v Bennet* (1879) 10 Ch D 474; *Gregor v Amaya* [2021] NSWSC 89.
[924] See eg *Craig v Craig* [2015] SADC 109 where a contribution of $70,000 towards the purchase price of property did not give rise to a trust (resulting or constructive); instead the money was held to be a gift, albeit with an equitable personal obligation attached to house the donor and his wife. The equitable personal obligations gave rise to remedies either in equitable compensation, or specific performance: [228].

4 *Applying Resulting Trusts to Family Accommodation Arrangements*

Despite the rare occurrence of the resulting trust, a decision of the New South Wales Supreme Court applied resulting trust principles and found on the facts that a *Quistclose* trust arose. A *Quistclose* trust arises when money is provided for a particular purpose; if that purpose is fulfilled, the relationship between the transferor and transferee is that of debtor and creditor. If the purpose is not fulfilled, the money held by the transferee is held on resulting trust for the transferor. The doctrine originates in *Barclays Bank Ltd v Quistclose Investments Ltd*, and the decision has given rise to much academic and judicial debate.[925] It is not proposed to traverse those discussions here, except to note that the mechanism is one the courts may apply. In *Djemal v Cemal*,[926] the plaintiff was an elderly woman of Turkish background who spoke very little English. At her son's suggestion, she entered into an agreement with her son and daughter-in-law whereby she would sell her home and the proceeds of sale would be used to purchase a vacant block of land. A house was to be built for the mother, her son, and her daughter-in-law to live together. The purchase of land by the defendants was wholly funded by the money received from the sale of the plaintiff's property. The surplus funds from the sale were deposited into a special bank account, also opened in the name of the defendants, and were to be used to fund the building of the new home. The new home was never built, and the relationship between the plaintiff and defendants deteriorated. The plaintiff brought proceedings seeking a declaration that the land and money in the account were held on trust for her. White J found that with respect to the land, the presumption of advancement arose but was rebutted, and the defendants failed to rebut the presumption of a resulting trust.[927] In relation to funds in the special bank account, White J held that, because the funds were to be used exclusively for the specific purpose of constructing a house, a *Quistclose* trust arose once that purpose had failed.[928]

5 *Remedies*

Should a resulting trust be found on the facts, then there are advantages for the parent in a failed FAA. First, the trust will be secured over the property in proportion to the financial

[925] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. See generally William Swadling (ed), *The Quistclose Trust – Critical Essays* (Hart Publishing, 2004); Jamie Glister, 'The Nature of Quistclose Trusts: Classification and Reconciliation' (2004) 6)(3) *Cambridge Law Journal* 632; Fiona R Burns, 'The Quistclose Trust; Intention and the Express Private Trust' (1992) 18(2) *Monash University Law Review* 147.
[926] *Djemal v Cemal* [2015] NSWSC 1125.
[927] Ibid [25].
[928] Ibid [28]–[30].

contribution. If the property increases in value, the parent will gain the benefit of that increase. Secondly, the adult child is subject to trustee obligations and would be in breach of trust should the property be dealt with in a way inconsistent with the beneficiary's interest.

C *Distribution Under the Family Law Act 1975 (Cth)*

The Family Court has jurisdiction to declare the rights and titles that parties to a marriage have to property, and the power to alter those rights. Section 85A (1) of the *Family Law Act 1975* (Cth) states:

> The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.

If the property failure of the arrangement is due to the breakdown of the marriage of the adult child and proceedings for property settlement are being dealt with by the Family Court, then the parent in a family accommodation arrangement can be joined as a party and has standing to be considered in the distribution of property under the Act.[929]

D *Distribution Under the Property (Relationships) Act 1984 (NSW)*[930]

The framework provided by the *Property (Relationships) Act 1984* (NSW) has the potential to apply to the resolution of disputes in the context of a family accommodation arrangement. The Act provides a mechanism for determining financial settlements arising from the breakdown of a de facto relationship, but is not restricted to intimate partner relationships.[931] Section 5 of the Act specifies that parties to a domestic relationship – which includes 'a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care' – may apply on the breakdown of the relationship, to have interests in property adjusted.[932] The court in these circumstances has a discretion to make a just and equitable distribution of property. The legislation is, however, geared specifically towards de facto couples, and there have been very few FAA claims made

[929] See eg *Wright v Adams* (1997) 22 Fam LR 89 where the court determined the equitable interest of the wife's mother where the mother had contributed money towards an extension where she lived for several years.
[930] It is beyond the scope of this thesis to discuss the different state equivalents; the NSW Act provides an example
[931] The Act was amended in 1999 to include same-sex relationships within the definition of de facto relationships.
[932] *Property (Relationships) Act 1984* (NSW) s 5(1)(b).

under the Act. It is more commonly used by carers making claims against property after providing care.[933] Given the rise in FAAs, there is justifiable cause for legislation to be enacted, albeit modelled on the above Act, dealing specifically with FAAs and the resolution of property disputes on their breakdown. These proposals are dealt with in detail in Chapter 8.

V CONCLUSION

This chapter has explored the range of legal and equitable actions available to resolve a dispute arising from failed FAAs, along with the diversity of outcomes arising from the available causes of action. This chapter used individual fact scenarios to demonstrate the challenges faced by claimants in navigating contentious and sometimes competing or overlapping legal issues which are highly sensitive to variations of fact. The chapter also highlighted the complexity of the principles and the difficulty a parent may encounter in gathering evidence to prove each element of a cause of action. Consequently, this chapter reveals the deficiencies of the present law in providing appropriate mechanisms to address the vulnerable legal position of the elderly claimant.

Combined with the challenges associated with bringing an action in the appropriate jurisdiction,[934] the breadth and scope of the present applicable law contributes to the vulnerability experienced by the parent, raising substantial access to justice issues. The following chapters address these vulnerabilities. Chapter 7 will look at specific reforms outside of the proposed statutory scheme proposed by this thesis. Chapter 8 contains the central proposed reforms and examines how a dedicated statutory scheme would address the personal, legal and system vulnerabilities so far identified in this thesis.

[933] Susan Barkehall Thomas, 'Practitioner Attitudes to Caring Relationships under the Victorian *Relationships Act*: An Empirical Study' (2022) 46(2) *Monash University Law Review* 214.
[934] See Chapter 5 'Systemic Vulnerability: The Present Forum'.

CHAPTER 7
RESPONDING TO LEGAL SITUATIONAL VULNERABILITY: POSSIBILITIES FOR STATUTORY AND DOCTRINAL REFORMS

> It is now accepted that … judges do make law when they extend, qualify or re-shape a principle of law. Equally we accept that the courts have a responsibility 'to develop the law in a way that will lead to decisions that are humane, practical and just'. Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of the rule, to the fairness and practical efficacy of its operation in the circumstances of contemporary society.[935]
>
> We see in legislation the more direct and accurate expression of the general will.[936]

I INTRODUCTION

The primary reform proposals of this thesis target both legal and systemic vulnerability and therefore focus on circumventing the need to pursue complex equitable causes of action in the Supreme Court. As an alternative to the comprehensive statutory reform proposed in Chapter 8 this chapter will explore the feasibility of more individual improvements to current doctrine that apply to the family accommodation agreement (FAA). In recognising the parent is placed at a serious legal disadvantage once having entered the FAA, these alternative reforms are designed to minimise the consequences of the parent's legal situational vulnerability by addressing the 'legal imbalance' they experience. The suggested reforms would occur either through judicial activism resulting in doctrinal changes or through statutory reform.

Situational vulnerability has been explained as the vulnerabilities we experience that are referrable to a particular context or environment. In the context of FAAs, situational vulnerability is further divided into legal-situational vulnerability and personal-situational vulnerability. While there are no bright lines between these categories, and there is some overlap between them, they do serve as a useful taxonomy to identify the underlying problem the proposed reform aims to address. Personal situational vulnerability arises because of the

[935] Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 158 citing Sir Harry Gibbs on the occasion of his swearing in as Chief Justice of the High Court, 12 February 1981.
[936] Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 406

nature of the parent/child relationship. While some transactions are undertaken out of a sense of obligation, or even guilt, others may be attributed to the 'unconditional love' parents feel for their children.[937] This is in no way to be criticised or discouraged; however, knowledge and subsequent exploitation of the emotional ties and willingness of a parent to undertake improvident transactions could reasonably be analogised with the 'utter infatuation' of the appellant in *Louth v Diprose*.[938] A greater recognition of the nature of the parent/child relationship as a form of 'special disability' under the unconscionability doctrine targets personal-situational vulnerability.[939]

The remainder of the reforms address legal-situational vulnerability. This category of vulnerability emerges from the relative weakness of the legal position of the elderly claimant once they enter the arrangement and transfer assets. This legal imbalance derives from an absence of legally enforceable obligations on the adult child, or the existence of various doctrines and presumptions that converge in the context of the failed FAA and must be overcome by the parent. Commonly, these presumptions are causally related to the familial setting.

The chapter classifies specific areas where there is the potential for reform under four broad thematic headings. The first concerns areas where the law might develop to broaden the scope of duties and liabilities of a recipient of assets, the adult child. This theme includes an examination of two areas: first, expanding the scope of the fiduciary duty in Australia to include prescriptive duties aimed at protecting the parent's non-economic interests, and, secondly, whether additional obligations imposed on the adult child through filial responsibility laws would be an effective means of strengthening the parent's legal position.

The second theme in this chapter will look at re-examining certain areas of property law to address legal-situational vulnerability. FAAs are commonly structured in such a way that the parent has no proprietary interest in the disputed property. If they do establish any rights, these are often weak as against the indefeasible title of the adult child. This part will revisit the exception to indefeasibility through statutory fraud and discuss whether broadening the scope of the exception would allow for greater opportunity to challenge the adult child's title. In response to the fragile interests of the parent, it is suggested that there be greater clarity

[937] *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7 (Higgins CJ, Crispin J).
[938] *Louth v Diprose* (1992) 175 CLR 621. See Chapter 2 Part III(D) 'Motivations for Entering the Family Accommodation Agreement – Financially Assisting Children' and Chapter 3 Part IV(B) 'Situational Vulnerability'. Other outcomes of personal-situational vulnerability include the reluctance of parents to bring an action against their children, and the potential for the loss of 'home' as a consequence of the failure of the arrangement.
[939] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14.

concerning the right of the parent to lodge a caveat, or, that the interest created in the property be considered a registerable interest. Lastly, this section will look at some alternative ways of construing the interest so that it is more robust and able to withstand third-party dealings.

The third proposed reform concerns potential changes to the law through a re-evaluation of normative familial relationships, particularly that between a parent and adult child. This analysis critiques the presumption of advancement and suggests that while the presumption may be easily discharged when the child is an adult, it poses yet another legal barrier to overcome and, in the context of FAAs, should be abandoned. Similarly, the challenges associated with establishing a contractual relationship owing to the presumption against the intention for families to be contractually bound is challenged by viewing the arrangements through the lens of relational contract theory. Under this theory, the formation and evolution of agreements is holistic. By looking at the norms of the relationship rather than strict compliance with contractual formalities and intention, the substance of the contract can be established. The normative relationship between the parent and child is further explored by looking at potential reforms to the doctrine of undue influence. It suggests statutory reforms that would dictate that in circumstances where a significant transfer (of money or property) has been made by an elderly, dependant person, the transfer should be subject to a rebuttable presumption that the elderly person was unduly influenced. This reform would significantly ameliorate the older person's legal situational vulnerability. The chapter goes on to consider whether 'clouded judgement' cases could be analogised with the parent/child relationship. In cases such as *Louth v Diprose*,[940] the respondent suffered a special disadvantage (or 'clouded judgement') owing to his emotional attachment to the appellant. This section explores whether the 'unconditional love' of a parent should be analogised with the 'utter infatuation' of the appellant in *Louth*. If the adult child were to exploit this vulnerability, then this should be grounds to set aside a transaction on the grounds of unconscionable conduct.

The final proposal concerns the ability of the equitable jurisdiction to respond to inadequacies in the law. It examines the potential of equity to create a new cause of action in response to novel situations. This contemplates a new cause of action at common law, distinct from the statutory cause of action proposed in Chapter 8.

It is important to acknowledge some shortcomings of these proposed reforms, particularly in the light of the overarching concerns of this thesis involving access to justice. The adoption of

[940] *Louth v Diprose* (1992) 175 CLR 621.

any of these reforms would do little to decrease the main barriers preventing access to the law, namely the complex nature of the existing law and the inaccessibility of the forum where matters are heard. In many cases the reforms would create more law, and therefore compound systemic vulnerability. Some of the proposals are likely to be more palatable than others. For instance, the suggestion concerning widening the scope of fiduciary duties is unlikely to gain traction in Australia.[941] Conversely, there are compelling arguments in favour of adopting statutory reforms in order to address undue influence within the family context. Nevertheless, any of these proposals, or a combination of them, would deliver a more robust legal position to older parties when challenging the consequences of a failed FAA. This, in turn, could either encourage the parties to contemplate the implications of entering the arrangement prior to doing so or strengthen the 'bargaining position' of the parent in settlement negotiations. Similarly, by addressing the legal imbalance the reforms would streamline and improve the parent's position and discourage challenges to their claims. Importantly, though, even if these proposals are not feasible per se, the concerns they address and their shortcomings can be borne in mind when formulating the reforms suggested in Chapter 8 of this thesis.

Some of the material in this chapter is drawn from two co-authored articles. The first, published in the *Canterbury Law Review*, explores several ways in which real property law principles might be used to safeguard the interests of an older person entering a family accommodation arrangement.[942] The second specifically address the issue of caveats in the context of FAAs.[943]

II CASTING A WIDER NET: REINTERPRETING EXISTING PRINCIPLES, IMPOSING NEW OBLIGATIONS

The proposals under this section explore ways in which obligations could be created, or existing principles reinterpreted, to impose greater responsibility on the adult child towards the parent, and in turn strengthen the parent's legal position. The proposals include expanding the scope of fiduciary obligations to impose positive duties on the adult child, the creation of new obligations towards the parent in the form of filial responsibility laws and adopting a broader interpretation of 'fraud' under Real Property Legislation to capture any egregious behaviour of the adult child.

[941] *Breen v Williams* (1996) 186 CLR 71.
[942] Somes and Webb, 'What Role for Real Property' (n 31) 129, 131–8, 142–51.
[943] Somes and Webb, 'What Role for Caveats' (n 31).

A *Extending Fiduciary Duties*

The first proposal explores a reassessment of the fiduciary obligation as it is currently understood in Australia. The fiduciary duty arises in equity's exclusive jurisdiction, and its purpose is to hold a person to standards of behaviour where that person has undertaken to act for, or in the interests of, another. The purpose of equity's supervisory role is to prevent such persons from misusing their position for their own advantage.[944] For fiduciary obligations to potentially be imposed on an adult child, aspects of the fiduciary duty as applied in Australia would require radical modification: the proscriptive nature of the duties, and the requirement that the fiduciary act in the principal's best legal or economic interests. Expanding the scope of fiduciary duties would require a fundamental shift in doctrine and judicial attitudes in recognising the existence of a duty.

1 *How Would a Fiduciary Duty Arise?*

The law of fiduciary obligations is to 'impose standards of acceptable conduct on one party to a relationship for the benefit of the otherwhere the one has responsibility for the preservation of the other's interests'.[945] This standard of conduct exceeds the standards imposed by tort law or contract law.[946] A critical feature of establishing a fiduciary relationship is the undertaking or agreement by the fiduciary to act in the interests of the principal to the exclusion of the fiduciary's own interests (to the extent the action is within the scope of the fiduciary relationship), along with the reliance by the principal on the fiduciary so acting.[947] Certain relationships are presumed to be fiduciary in nature, the trustee and beneficiary being the most common example.[948] The fiduciary obligation may arise in other relationships but is not presumptive, and the existence of the fiduciary obligation must therefore be established.[949] These categories are not closed. Indeed, the very nature of equity allows fiduciary relationships to be recognised in new situations. As Justice Kirby has noted:

> Fiduciary obligations are not confined to established relationships or to exactly identical facts as those that have given rise to them in the past. Even those jurists most resistant to analogical extensions in this field accept that the list of persons owing fiduciary duties is not closed. It could

[944] PD Finn, *Fiduciary Obligations* (n 809) 8.
[945] Ibid 309.
[946] PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1.
[947] Young et al (n 327) [7:20].
[948] Others include agent and principal, directors and companies, guardians and wards, lawyers and clients, partners, executors and beneficiaries.
[949] For the indicia of fiduciary relationships see *Breen v Williams* (1995) 186 CLR 71, 107 (Gaudron and McHugh JJ).

> scarcely be so, given that equity is itself the embodiment of judicial invention. Unless legislation requires a different approach, equity and equitable remedies respond to changing times, different social and economic relationships and altered community expectations.[950]

It is the expansion of this latter category, where the fiduciary relationship arises as a matter of fact out of the specific circumstances of the relationship, that would need to encapsulate the parent/adult child dynamic. It would arise from the assumption of responsibility or undertaking to act in the interests of the parent, along with a relationship of dependence or trust on the part of that other.[951] In *Daunt v Daunt*, the court did concede that a fiduciary relationship existed between an elderly mother and her adult son, Michael, by reason of 'the care of and responsibility for them' that he had undertaken. The mother had arranged the transfer of her property to Michael, who was her primary carer.[952] She requested the transfer in order to preserve her pension and to ensure she continued to have access to the property. Therefore, Michael came under a duty to ensure that his duties to his mother did not conflict with his interest (as a transferee). In dismissing claims that the transfer was due to the undue influence or unconscionable conduct of her son, the court also dismissed any suggestion there had been a breach of fiduciary duty. It was found that the mother's informed consent to the transfer removed any possibility of breach of fiduciary duty, Indeed the court found that 'not only did Michael have her consent to the transfer, rather it was his mother who was behind the proposal itself'.[953]

Critical to the Australian approach is the requirement that the undertaking be to act in the principal's best 'economic' interests.[954] This requirement significantly limits the activity to which the fiduciary duty can attach. In contrast, the Canadian jurisdiction adopts a relational approach, recognising a wider range of relationships that may be presumed to be fiduciary in nature. In *Frame v Smith* Wilson J set down a threefold test for determining the existence of a fiduciary duty. Her Honour stated that:

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[950] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 217 [136] (Kirby J).
[951] *Breen v Williams* (1996) 186 CLR 71, 82 (Brennan CJ); *Gebadi v Woosup (No 2*) [2017] FCA 1467; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; *Pilmer v The Duke Group Ltd* [2001] HCA 31.
[952] *Daunt v Daunt* [2015] VSCA 58 [80].
[953] Ibid.
[954] In Australia, the economic interest forms the subject matter of the fiduciary duty. Therefore, care and accommodation are not interests to which a fiduciary duty can attach: *Cubillo v Commonwealth* (2001) 112 FCR 455, 576–8 (Sackville, Weinberg and Hely JJ); *Paramasivam v Flynn* (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ); *Breen v Williams* (1996) 186 CLR 71, 83 (Brennan CJ), 93–5 (Dawson and Toohey JJ), 108 (Gaudron and McHugh JJ), 135 (Gummow J); Parkinson, 'Fiduciary Obligations' (n 809) 339; Michael Tilbury and Gary Davis, 'Equitable Compensation' in Parkinson (ed), *The Principles of Equity* (n 70) 797, 800.

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[955]

Zhou suggests that the Canadian approach derives from 'the tendency to emphasise the requirements of a power-dependency relationship and vulnerability when defining what constitutes a fiduciary relationship'.[956] Applying these criteria to the FAA, the wider Canadian approach would be more sympathetic to establishing the parent/adult child relationship as fiduciary in certain circumstances. However, in Australia, finding a fiduciary obligation other than where an undertaking was made concerning a parent's finances would be novel.[957] If we considered an undertaking by an adult child to provide care and accommodation for a parent to be the source of the duty, it may be established that this was made where there was a relationship of ascendancy or influence, accompanied by dependence and trust. However, the notion of loyalty is also a fundamental characteristic of the fiduciary relationship. The standard requires the fiduciary to act selflessly and with undivided loyalty in the interests of the other.[958] The 'inflexible rule' is such that there must not only be no conflict of interest, but even the *possibility* of a conflict of interest could result in a breach of the duty.[959] Finn contrasts this standard with other equitable doctrines such as unconscionability, which allows self-interested conduct but not exploitative conduct, and good faith, which permits self-interest but imposes an obligation to have regard for the legitimate interests of the other party.[960] Considering the complexity of relationships and responsibilities, applying the standard of 'utmost loyalty' in the context of close or familial relationships could pose significant challenges.

Fiduciary duties have been found to arise in the context of FAAs, but only in very specific circumstances – for example, where the adult child had been given authority to access and operate an account holding her mother's funds for the purpose of building accommodation for her.[961] Therefore, the duty was in respect of the mother's financial interests, and the

[955] *Frame v Smith* (1987) 42 DLR (4th) 81, 99.
[956] Lisa Zhou, 'Fiduciary Law, Non-Economic Interests and Amici Curiae' (2008) 32 *Melbourne University Law Review*, 1158, 1160.
[957] See *Miller v Begeda* [2009] QDC 122.
[958] *Bristol and West Building Society v Mothew* [1998] Ch1, 18; Finn, 'The Fiduciary Principle' (n 946) 1.
[959] *Bray v Ford* [1896] AC 44, 51–2.
[960] Finn, 'The Fiduciary Principle' (n 946) 3–4. The doctrine of good faith is generally applied to contractual relationships.
[961] *Miller v Begeda* [2009] QDC 122.

circumstances demonstrated a clear breach. There was evidence that some expenditure had been undertaken with the mother's authority; however, considerable sums of money were withdrawn from the mother's account by the daughter and paid into her partner's account for items seemingly unrelated to the care of the plaintiff or building her accommodation. Hence, the duty was not framed as a positive duty to provide care and accommodation but, instead, arose from the misapplication of funds for the daughter's own purposes.

2 *Imposing Positive Duties*

At present in Australia, fiduciary duties are classified as 'proscriptive' but not 'prescriptive'.[962] That is, the duties are negative, stating what a principal must not do, rather than requiring positive acts to be performed. The specific 'proscriptive' duties that are imposed are 'not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'.[963] The proscriptive characteristic of the fiduciary duty is closely tied with the concept of loyalty, as a contravention of either the 'no profit' of 'no conflict' duties encapsulate disloyalty – that is, acting in one's own self-interest rather than that of the principal. There is a large body of literature concerning the approach of the courts in applying the negative duties, the doctrinal and philosophical basis of the duties and the debate over whether Australia should look to the Northern American cases for examples of the expansion of the duties.[964] It is beyond the scope of this thesis to undertake a detailed investigation concerning these arguments, but they will be touched on for the purposes of illustrating the potential for the family accommodation context.

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[962] *Breen v Williams* (1996) 186 CLR 71, 93 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–9 [72]–[77] (McHugh, Gummow, Hayne and Callinan JJ); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 501 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Friend v Booker* (2009) 239 CLR 129, 160 [84] (French CJ, Gummow, Hayne and Bell JJ); *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 98–9 [31]–[32] (French CJ and Keane J), 106 [56] (Hayne and Crennan JJ) *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 29 [67]–[69] (Gageler J); *P & V Industries Pty Ltd v Porto* (2006) 14 VR 1, 9 (Hollingworth J). But see *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1 [4552], where the traditional model of labelling the fiduciary obligation as strictly proscriptive is questioned (Owen J).

[963] *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

[964] See eg Shaunnagh Dorsett, 'Comparing Apples and Oranges: The Fiduciary Principle in Australian and Canada after *Breen v Williams*' (1996) 8(2) *Bond Law Review* 158; Smith, 'Prescriptive Fiduciary Duties' (n 809) 262; Leon Firios, 'Precluding Prescriptive Duties in Fiduciary Relationships: The Problems with the Proscriptive Delimitation' (2012) 40 *Australian Business Law Review* 166; Gillian Dempsey and Andrew Greinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1; Julie Brebner, '*Breen v Williams*: A Lost Opportunity or a Welcome Conservatism?' (1996) 3 *Deakin Law Review* 237; Nicholas Saady, 'The Dangerous Dichotomy: Abandoning the "Proscriptive" and "Prescriptive" Classification of Fiduciary Duties and the "Proscriptive Limitation"' (2018) 30(2) *Bond Law Review* 275; Justice Fabian Gleeson, 'Proscriptive and Prescriptive Duties: Is the Distinction Helpful and Sustainable and If So, What Are the Practical Consequences?' (2018) 14 *The Judicial Review* 69; Richard Joyce, 'Fiduciary Law and Non-Economic Interests' (2002) 28(2) *Monash University Law Review* 239; Devdeep Ghosh, 'Fixing the Fiduciary Obligation: The Prescription-Proscription Dichotomy' (2012) 11(1) *Canberra Law Review* 24; Derryn Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21 *King's Law Journal* 333; Zhou (n 956).

Imposing positive obligations would constitute a fundamental change from our present jurisprudence, as it would require expanding the fiduciary obligations to include positive obligations of a 'duty of care' – or, perhaps more accurately, a 'duty to care' (distinct from the tortious duty) – to protect an older person's interests. For instance, the duty could cover obligations to provide accommodation, or do what is possible to maintain the older person's physical or emotional health. While this appears to be a radical proposition for Australian courts, the positive duties form a part of the fiduciary characteristics in other jurisdictions, in particular Canada. Canadian courts have extended the reach of fiduciary duties to find a duty of a parent not to molest their children,[965] a duty of a custodial mother to provide the father with access to the children[966] and a duty owed by the Crown to the Indigenous peoples of Canada.[967] In *Frame v Smith*, Wilson J observed that '[t]o deny relief because of the nature of the interest involved, to afford protection to material interests but not to human or personal interests would, it seems to me, be arbitrary in the extreme'.[968] Smith argues that the reason for imposing a general fiduciary duty of care and skill, as in Canada, is that otherwise the fiduciary may avoid breaching their duty by staying 'home with the blinds drawn'[969] – in other words, failing to take any positive action, perhaps even with knowledge of the harm that may result, would not amount to a breach.

Australia has maintained its adherence to proscriptive fiduciary duties as a way of distinguishing those duties from positive obligations imposed by contract or tort law.[970] Justice Kirby in *Pilmer* commented that '[w]here the voice of equity is silent, the party harmed will have to rely upon entitlements, if any, that it enjoys under the common law, specifically on the basis of contract or tort'.[971] In the context of FAAs this argument is problematic, as the arrangement is rarely determined to be contractual and the relationship does not give rise to a tortious duty of care such that it imposes duties to ensure the older party is housed and cared for, with not doing so deemed negligent. As Finn has observed, equitable doctrines such as

[965] *KM v HM* (1992) 96 DLR (4th) 289. See also Lionel Smith, 'Parenthood Is a Fiduciary Relationship' (2020) 70 *University of Toronto Law Journal* 395.
[966] *Frame v Smith* (1987) 42 DLR (4th) 81 (Wilson J). While Justice Wilson was in dissent, McManus observes that his judgement 'has proven to be influential in matters of principle': John McManus, 'Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada of Canada' (1997) 28(1) *Canadian Business Law Journal* 104, 111.
[967] *Guerin v The Queen* [1984] 2 SCR 335.
[968] *Frame v Smith* (1987) 42 DLR (4th) 81 (Wilson J) 81, 143.
[969] Smith, 'Prescriptive Fiduciary Duties' (n 809) 262, 266.
[970] GE Dal Pont, *Equity and Trusts in Australia* (7th ed, Lawbook Co, 2019) [4.15]; see also *Norberg v Wynrib* [1992] 2 SCR 226.
[971] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 217 [136] (Kirby J).

unconscionable conduct target specific exploitative behaviour.[972] Similarly, estoppel allows a plaintiff to enforce a non-contractual promise where there has been reasonable reliance on a promise, and knowledge of the plaintiff's reliance by the defendant.[973] Yet these doctrines target the property transaction rather than imposing obligations to care for the parent. There are, in fact, very few laws imposing any form of duty on a child to care for a parent. Section 285 of the Queensland Criminal Code imposes a duty to provide 'necessaries of life' when one person has the charge of another, but this section has never been used to prosecute a child for failing to care for a parent.[974] Positive obligations imposed upon the adult child, where the relationship is found to be fiduciary, would impose on the adult child a new source of legal responsibility. Failure to comply with the obligations would therefore be a breach of those duties. This would address a significant lacuna in the law by creating a cause of action based on a relational premise addressing personal care and provision of secure housing, rather than narrow proscriptive duties aimed at protecting the principal's economic interest. By creating obligations independent of proprietary interests, it would circumvent many of the doctrinal obstacles that presently increase the legal vulnerability of the older party – for instance, indefeasibility of title, and the need to pursue a cause of action aimed at establishing an exception to indefeasible title.

3 *Prospects in Australia*

For Australian courts, it appears the existence of a gap in the law does not warrant the need for the law of fiduciary obligations to fill that gap. The expansive approach of the Canadian courts has been critiqued as 'creating a conceptual muddle'.[975] Meagher JA expressed concerns over the Canadian approach in the New South Wales Court of Appeal when he said:

> [W]hen analysing the Canadian jurisprudence in this field one has the uneasy feeling that the courts of that country, wishing to find for a plaintiff, but unable to discover any basis in contract,

[972] Finn, 'The Fiduciary Principle' (n 946) 3.
[973] Sir Anthony Mason has observed that recent decisions by the courts that impose a remedial constructive trust for actions for both breach of confidence and unconscionable conduct have 'taken the pressure off the fiduciary relationship as a passport to proprietary relief and have focused attention on other equitable doctrines; Sir Anthony Mason, 'The Place of Equity and Contemporary Equitable Remedies in the Common Law World' (1994) 110 *Law Quarterly Review*, 239, 248.
[974] Section 285 of the *Criminal Code 1899* (Qld) states: 'It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.'
[975] Jeff Berryman, 'Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 *Alberta Law Review* 95, cited in Dempsey and Greinke (n 964) 4.

> tort, or statute for his success, simply assert that he must bear the victor's laurels because his opponent has committed a breach a fiduciary duty even if hitherto undiscovered.[976]

When the above case was heard in the High Court, the court specifically denied that the fiduciary principle should be applied in an expansive manner 'so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs'.[977] Therefore, Australia has not adopted 'the protection of 'fundamental human and personal interests' in fiduciary duties evident in Canada, and is unlikely to do so.[978] Expanding the duty would raise significant questions concerning the nature, scope and purpose of the obligations imposed and would require a paradigm shift in the jurisprudential basis underlying Australian fiduciary duties. Further, the most appropriate remedy under these circumstances would be compensatory. While the calculation of compensation based in the expectation of care and accommodation could be calculated drawn from analogous estoppel cases, this is uncharted territory. [979]

In *Pilmer v Duke Group Limited*, Justice Kirby acknowledged the possibility of recognising new relationships that, by analogy, would be subject to fiduciary duties, but added this important caveat:

> [W]here a suggestion is made that fiduciary obligations arise in a new relationship, or out of particular facts, it is essential that judges perform their functions by analogy from settled principles. They are not entitled to distort those principles. Nor may they superimpose an equitable classification on facts, simply because to do so would afford better or larger remedies to a plaintiff who appears to have suffered some wrong. Specifically, it is not sufficient, to impose fiduciary obligations on an alleged wrong-doer, simply to point to the vulnerability of the person claiming to have been wronged. Many people who are in an arm's length relationship with each other (if they have any real relationship at all) experience a serious disproportion of power in their dealings. To turn every such case into one giving rise to fiduciary obligations would be to distort basic doctrine. [980]

In light if these observations, it is appropriate to consider the possibility of imposing obligations on adult children to care for their parents through alternative legal means. The next section will explore the area of statutorily enshrined filial obligations to parents. Like fiduciary obligations, the aim in exploring this as an alternative source of legal obligation is to provide the parent with the means to either compel behaviour or create a claim for compensation for breach for

[976] *Breen v Williams* (1994) 35 NSWLR 522, 570 (Meagher JA).
[977] *Breen v Williams* (1996) 186 CLR 71 [40] (Gaudron and McHugh JJ).
[978] Dempsey and Greinke (n 964) 5.
[979] *Donis v Donis* (2007) 19 VR 577 [19] (Nettle JA), *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 [3] (Allsop P), [56], [59] (Handley AJA); *Sidhu v Van Dyke* (2014) 251 CLR 505 [85].
[980] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 217 [136] (Kirby J).

non-performance of an obligation to care and, in some circumstances, provide accommodation. This type of claim would be based on obligation and is based outside the realm of property law.

B *Filial Obligations to Parents: The Recognition of a Duty to Care?*

1 *Is There a Need for a Duty to Care for the Elderly?*

Australia's ever-growing ageing population has brought into sharp focus the question of who bears the responsibility of caring for elderly Australians, and whether such care is the responsibility of the individual, society, family or a combination of sources. The process of ageing raises a spectrum of matters that will shape the needs and care outcomes for a particular individual. This can include their financial status, the need for and availability of institutional care, the presence of any cognitive issues and the availability and willingness of family to offer support. 'Caring' has many dimensions and can include financial, physical, social, spiritual and emotional support. Financial support can be obtained through receipt of the aged pension (for those who are eligible). To acknowledge the reality of Australia's ageing population and to reduce the cost burden on taxpayers, Australia introduced a compulsory superannuation scheme via the *Superannuation Guarantee (Administration) Act 1992* (Cth) which included a guaranteed level of contributions by employers. Along with voluntary employee contributions, superannuation enables people to 'self-fund' retirement and relieves some of the burden on government pension schemes. Outside of financial support, governments provide aged care support and services through both Commonwealth and State government schemes. These schemes can assist in funding home and community care services, or these can be funded privately.[981] Other forms of informal care can be provided by community, social or religious organisations. National Seniors Australia observes that informal or unpaid care 'plays a critical role in fulfilling the care gap in society'.[982] A significant number of carers are family members, and this care may be provided gratis or, if eligible, the carer may receive funding through a Commonwealth-funded carer's payment or allowance.

Yet concern is commonly expressed about Australia's capacity to care for the elderly.[983] In 2010, the then Department of Health and Aging determined that the aged care workforce would need to increase between two and three times before 2050 to provide adequate aged care

[981] Alex Grove, *Aged Care: A Quick Guide* (Parliamentary Library Research Paper Series 2018-19, 5 June 2019) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/6721322/upload_binary/6721322.pdf>.
[982] J Maccora et al, *Who Cares? Older Australians Do* (National Seniors, 2020) 5.
[983] Eileen Webb, Christie M Gardiner and Teresa Somes, 'Despite More Than 30 Major Inquiries, Governments Still Haven't Fixed Aged Care. Why Are They Getting Away With It?', *The Conversation* (21 October 2020).

facilities.[984] Increasingly, policymakers are exploring ways to incentivise greater family involvement in caring for older family members.[985] Nonetheless, while care and support is often provided by family members, there is of course no legal obligation to do so. In the absence of finding an enforceable contractual duty, and apart from a moral duty, there is no law that compels family members to personally provide direct care for the parent.[986]

In the context of failed FAAs, the introduction of filial responsibility laws imposing a positive duty on adult children to provide care for their parents could, at the very least, provide an alternative legal avenue to secure financial support and ensure accommodation and care was provided by adult children who had the means to do so. The notion of an obligation to care for elderly parents, whether moral or legal, has generated a vast body of literature.[987] It is beyond the scope of this thesis to discuss the theoretical frameworks that propose to explain why or how these obligations arise, or undertake a cross-cultural analysis of how obligations are interpreted.[988] Instead, this section will focus on discussing whether legally imposed duties to maintain parents may be one alternative to counter what is described in this thesis as the elderly person's legal-situational vulnerability, and to provide the elderly person with an avenue to enforce a positive duty to provide care.

2 *What are Filial Responsibility Obligations?*

Respecting our elders is a key universal value. The Bible tells us to 'Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee'.[989] Philosophers such as Aristotle and theologians such as St Thomas Aquinas believed that children had a moral duty to care for their parents.[990] Eastern cultures have a tradition of valuing

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[984] Harrington and Jolly (n 14).
[985] Incentives include allowing monetary transfers from parent to child without affecting social security entitlements (if part of a FAA): see discussion in Chapter 2 Part III (D).
[986] AM Soden, 'Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations' in I Doran and AM Soden (eds), *Beyond Elder Law* (Springer-Verlag, 2012) 99.
[987] Sarah H Matthews and Tena Tarler Rosner, 'Shared Filial Responsibility: The Family as the Primary Caregiver' (1988) 50(1) *Journal of Marriage and Family* 185; Daniel H Brown, 'Picking up the Tab for Mom and Dad: The Clash of Filial Laws with Liberty, Morality, and Culture' (2020) 11 *Journal of Comparative and International Aging Law & Policy* 1; Qingxiu Bu, 'To Legislate Filial Piety: Is Elderly Rights Law a Panacea?' (2021) 42(2) *Statute Law Review* 219.
[988] See eg Francine Russo, 'Caring for Ageing Parents: Should There Be a Law?', *Time Magazine* (22 July 2013) <https://healthland.time.com/2013/07/22/caring-for-aging-parents-should-there-be-a-law/>.
[989] Exodus 20:12 King James Version (KJV) See also The Quran 17:23–24: 'Your Lord has commanded that you worship none but Him, and that you be kind to your parents. If one or both of them reach old age with you, do not say to them a word of disrespect, or scold them, but say a generous word to them. And act humbly to them in mercy, and say, 'My Lord, have mercy on them, since they cared for me when I was small.'
[990] Seymour Moskowitz, 'Filial Responsibility Statutes: Legal and Policy Considerations' (2001) 9(3) *Journal of Law and Policy* 709, 710–11.

their elders and providing support out of respect.[991] Blackstone refers to the mutual responsibilities owed by the parent to the child when the child is a minor with the former in turn 'entitled to our protection in the infirmity of their age'. He observed:

> The duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws.[992]

Equally, there exists the perception that children fail to observe such values. Shakespeare's King Lear demonstrates the tragedy of rejection by one's children and the vulnerability of old age when he laments, 'Turn all her mother's pains and benefits/To laughter and contempt, that she may feel/ How sharper than a serpent's tooth it is/To have a thankless child!'[993] Filial obligations aim to give legal force to such values, and are described by Schinkel as a type of special obligation adult children may owe to their elderly parents.[994] While moral obligations of filial responsibility are strong in some cultures, they are not universal.[995] Consequently, filial responsibility laws fill a 'gap' by transforming a moral obligation into a legally enforceable one, and opens another avenue to claim financial support. In doing so, it places a level of responsibility for caring for the elderly on the family, and thus relieves the State of some of that responsibility.

In western society, the origins of such a responsibility have been traced to the system of 'Poor Laws' enacted in England during the sixteenth century, whereby liability was imposed on family members to maintain one another. Collingridge observes that even then the primary concern of legislators was to relieve the burden on the public purse.[996] While these laws were

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[991] Filial piety is also a core pillar of Confucian ethics: DY Ho, 'Filial Piety, Authoritarian Moralism and Cognitive Conservatism in Chinese Societies' (1994) 120(3) *Genetic, Social, and General Psychology Monographs* 347, 349.

[992] Blackstone (n 302) Book I Chapter VI 'Of Parent and Child'.

[993] William Shakespeare, *The Tragedy of King Lear* (Signet Classics, 1963) Act I Scene IV, 70. When questioned by Albany as to why Lear is so bitter, Goneril replies: 'Never afflict yourself to know more of it /But let his disposition have that scope/That dotage gives it.'

[994] Anders Schinkel, 'Filial Obligations: A Contextual, Pluralist Model' (2012) 16 *Journal of Ethics* 395, 397.

[995] Ariela Lowenstein and Svein Olav Daatland, 'Filial Norms and Family Support in a Comparative Cross-National Context: Evidence from the OASIS Study' (2006) 26 *Ageing and Society* 203; Isabel Valarino, Gerardo Meil and Jesús Rogero-García, 'Family or State Responsibility? Elderly- and Childcare Policy Preferences in Spain' (2018) 38 (11/12) *International Journal of Sociology and Social Policy* 1101.

[996] Michael Collingridge and Seumas Miller, 'Filial Responsibility and Care of the Aged' (1997) 14(2) *Journal of Applied Philosophy* 119, 120.

later repealed, filial responsibility laws do exist in many other jurisdictions.[997] For instance, both the United States and Canada have enacted legislation at the state and provincial level that evolved from the poor laws and which impose obligations on adult children to financially support their parents.[998] There is a significant degree of variation between the respective laws in each state or province; however, as an example s 32 *Family Law Act* (Ontario) states:

> Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for or provided support for the child, to the extent that the child is capable of doing so.[999]

In order to determine the amount and duration of support for a parent in relation to need, s 33(9) (a–k) and (m) lists matters the court may take into consideration, such as each party's current assets and means,[1000] the adult child's capacity to provide support[1001] and each party's respective age and physical and mental health.[1002]

As the above section indicates, the obligation is confined to a responsibility to provide financial support to parents so that they receive the 'necessities of life', such as accommodation and/or nursing care.[1003] In some Eastern cultures, however, the duty extends further and can include visiting or tending to the spiritual needs of the elderly relative, with the moral obligation codified in law.[1004] In China, these measures are a response to a perceived erosion of traditional Confucian virtues of filial piety. The mid-1980s saw the emergence of The Family Support

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[997] L Neville Brown, 'National Assistance and the Liability to Maintain One's Family' (1955) 18(2) *Modern Law Review* 110. The responsibility for children to provide for their parents was removed by the *National Assistance Act 1948* (UK).

[998] The matrix of legislation across the United States and Canada is vast and complex. For more detail see Chris Bulcroft, June van Leynseele and Edgar F Borgatta, 'Filial Responsibility Laws: Issues and State Statutes' (1989) 11(3) *Research on Aging* 374; Moira J More, 'Identical Origins, Divergent Paths: Filial Responsibility Laws in Canada and the United States' (Master of Laws Thesis, Queen's University Kingston, Ontario, Canada, September 2016) 39–54 (identifying specific legislation in both Canada and the United States); Usha Narayanan, 'The Government's Role in Fostering the Relationship between Adult Children and Their Elder Parents: From Filial Responsibility Laws to … What? A Cross-Cultural Perspective' (1996) 4(2) *Elder Law Journal* 369; WWW Scott and Erica L Sharp, 'The Wolf at the Door: Filial Responsibility under Delaware Law' (2014) 20(2) *Widener Law Review* 239; Allison E Ross, 'Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly beyond the Government's Assistance' (2008) 16(1) *Elder Law Journal* 167, 173–7.

[999] *Family Law Act* RSO 1990 cF.3, s 32.

[1000] Ibid s 33(9)(a); *Dragulin v Dragulin* (1998) CanLII 19365 (Ont SC).

[1001] *Family Law Act* RSO 1990 cF.3, s 33(9)(d); *Hanna v Hanna* [1983] OJ No 2364 (Ont HCJ).

[1002] *Family Law Act* RSO 1990 cF.3, s 33(9)(e); *Daskalov v Daskalov* [2007] OJ No 3428 (Ont SCJ).

[1003] *Health Care & Retirement Corporation of America v Pittas* 46 A.3d 719 (Pa Superior Court 2012) where the court held that an elderly woman's son was obliged to pay her medical expenses amounting to nearly US$93,000.

[1004] See for example in China, 'Family members should care for the spiritual needs of the elderly and must not ignore or neglect them. The supporters who live separately from the elderly should frequently visit or send a greeting': *Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly* (adopted 29 August 1996, promulgated by Presidential Order No 73 on 29 August 1996), available at <http://www.china.org.cn/english/government/207403.htm>. Amendments to this Act in 2013 mean that parents may now sue their children for not visiting them enough.

Agreement, a voluntary agreement between parents and their children whereby children are contractually bound to provide for their parents. While the agreement itself is voluntary, it is supported under the Article 49 of the Chinese Constitution.[1005] While the initial focus was on food and clothing, as wealth increased throughout China the 'provision' extended to include emotional support and health care as well as funeral expenses.[1006] In Japan, rather than imposing positive statutory duties on adult children the government has formulated policies in order to support adult children who have taken on the responsibility of caring for ageing parents.[1007]

3 *Filial Responsibility Laws and Family Accommodation Agreements*

Although filial responsibility laws exist in some western jurisdictions, their purpose and utility have been questioned and support is, at best, mixed.[1008] Moore suggests that in the United States, they are primarily used by state and private institutions seeking payment for the costs of housing and health care incurred by the elderly person.[1009] Arguments have been raised against the introduction of such laws, such as the potential for exacerbating interfamilial conflict, or the imposition of liability on an adult child who may have been abused or neglected by their parents.[1010] At the theoretical level, there is no consensus concerning what framework forms the basis of filial responsibility.[1011] The parent/child relationship is informed by sociocultural systems and associated normative practices. In Australia, it would seem an anathema to many to have an overarching legal 'duty' imposed to care for an elderly parent.[1012] More commonly, the amount and nature of parent/child contact and the degree of mutual aid between generations tends to be left to individual families and is largely a matter of choice,

[1005] National People's Congress of the People's Republic of China, 1982, Article 49: 'Parents have the duty to rear and educate their children who are minors; and children who have come of age have the duty to support and assist their parents' cited in Rita Jing-Ann Chou, 'Filial Piety by Contract? The Emergence, Implementation, and Implications of the "Family Support Agreement" in China' (2010) 51(1) *The Gerontologist* 3, 8.
[1006] Chou (n 1005) 6.
[1007] Narayanan (n 998) 392–5.
[1008] See eg Moskowitz, 'Filial Responsibility Statutes' (n 990), and the conclusion that filial responsibility laws create more interfamily tensions and are beset with administrative issues.
[1009] More (n 998) 5. See also Scott and Sharp (n 998) 249–51.
[1010] Seymour Moskowitz, 'Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective' (2002) 86(3) *Marquette Law Review* 40. Although in some jurisdictions the statute includes exceptions to the obligation, which include a child not cared for sufficiently by the parent: Katherine C Pearson, 'Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents' (2013) 20(2) *Elder Law Journal* 269, 275.
[1011] These are explored in Maria C Stuifbergen and Johannes JM Van Delden, 'Filial Obligations to Elderly Parents: A Duty to Care?' (2011) 14(1) *Medicine, Health Care and Philosophy* 63; Rona M Berger, 'Gratitude and the Duties of Grown Children Towards Their Aging Parents' (1990) 5(1) *International Journal of Applied Philosophy* 29; Schinkel (n 994).
[1012] Collingridge and Miller (n 996) 120.

with only with limited pressure from society.[1013] This reflects, in western cultures at least, the importance of the individual over responsibilities to family members or society.[1014] The absence of a cultural norm or obligation to care for a parent is reflected in the reciprocity that is a characteristic of the family accommodation agreement – children receive a benefit as a consequence of the agreement to look after parents.

Nonetheless, when the element of reciprocity is not performed by the adult child and the arrangement fails, the existence of filial responsibility laws could assist the parent where they were left unable to provide for themselves. As discussed throughout this thesis, the legal-situational vulnerability experienced by the parent means they are at a significant disadvantage when trying to recover assets or money transferred under the agreement. [1015] One consequence of not being able to overcome such vulnerability is the potential impoverishment of the older person, and the inability to house or provide for themselves. Filial responsibility laws like those enacted in Ontario would provide parents with an alternative legal pathway to counter that vulnerability, and transfer some of the liability for accommodation and care back onto the adult child. Relying on a statutory basis for the provision of financial support would allow the parent to avoid the complex equitable causes of action necessary to claim against the property, and, therefore, arguments of advancement and indefeasibility, which work strongly in favour of the adult child, would be unnecessary. The existence of the obligation could also have a deterrent effect or encourage parties to document their arrangement prior to commencement.

While the concept of filial responsibility laws may be attractive to policymakers wishing to relieve the burden on the public purse, the introduction of such laws in Australia would require a radical shift in our current societal normative practices. Additionally, with no single successful legislative model, its proposal would raise a multitude of procedural and substantive legal questions concerning the jurisdiction, scope and operation of the legislation. For instance, FAAs can be made between 'family' members and, as discussed earlier in this thesis, the definition of 'family' is an expansive one.[1016] It is conceivable, then, that while a parent who is impoverished through the failed accommodation arrangement could rely on filial responsibility laws, a donor who is not a parent would not. Widening filial responsibility laws

[1013] J Jill Suitor et al, 'Aged Parents and Aging Children: Determinants of Relationship Quality' in Rosemary Blieszner, Victoria Bedford and Lillian E Troll (eds), *Handbook of Aging and the Family: Theory and Research* (ABC-CLIO, 1996) 223, 225.
[1014] Stuifbergen and Van Delden (n 1011) 63; De Vaus (n 302) 17–18.
[1015] See generally discussion in Chapter 4.
[1016] See Chapter 2 III(C) 'Participants in the Family Accommodation Agreement' and the discussion of the definition of 'family' pursuant to the *Family Violence Protection Act 2008* (Vic) s 8.

beyond the parent/child relationship would require a reassessment of the theoretical justifications of the obligation.[1017] More importantly, while such laws would ameliorate the legal-situational vulnerability of the parent, they would do little to mitigate, and would potentially exacerbate, the more pressing concern of systemic or pathogenic vulnerability. Filial responsibility laws would only add more law to an already complex array of actions available to the elderly person. Alternatively, rather than enacting filial responsibility laws designed to apply to the general population, it is conceivable that the legislature could draw upon certain parts of the Ontario legislation – for example, concerning ability of the adult child to pay, and the needs of the parent – and apply them to specific legislation enacted to cover failed FAAs. A detailed examination of the proposed legislation is undertaken in the following chapter.[1018]

III REDEFINING PROPRIETARY RIGHTS AND THE PROTECTION OF EXISTING PROPERTY RIGHTS

In view of growing evidence that older people are being deprived of property through failed FAAs, it is worth examining ways in which property law can develop responses to assist and improve the parent's legal position. One vital contributing feature of the parent's legal-situational vulnerability is their non-existent, or at best weak, proprietary interest in the property held by the adult child. The latter's interest is, of course, protected by the indefeasible nature of Torrens title. Much of the present law governing the arrangement and the interests of the parent has already been discussed in Chapter 4.[1019] Therefore, this section seeks only to address those weaknesses already identified.

The nature of the interest held by the parent is critical in determining their legal position as against the registered proprietor, the adult child. However, their position is particularly vulnerable in light of any dealings by the registered proprietor with third parties, such as a mortgagee or purchaser. This section seeks to address both aspects of legal vulnerability by exploring possibilities for reform that could apply to both two-party and three-party situations.

A *RE-EXAMINING RESPONSES TO STATUTORY FRAUD*

[1017] See Stuifbergen and Van Delden (n 1011).
[1018] Chapter 8 'Legal Reforms – A Statutory Cause of Action'.
[1019] See Chapter 4, Part IV.

1 *Should Accepting Assets with No Intention to Provide Accommodation and Care, or Withdrawing the Promise to Provide Accommodation and Care, Be an Exception to Indefeasibility Under the Fraud Exception?*

The circumstances giving rise to an allegation of statutory fraud are quite specific. It would only apply to a scenario whereby the adult child has obtained title to the parent's property. Therefore, the exception would not be relevant in circumstances where the parent has, for example, sold their property and financed the building of a granny flat on the adult child's property, or contributed to paying down the adult child's mortgage, as the adult child's status as registered proprietor has not changed. Statutory fraud in the context of failed FAAs has already been discussed in Chapter 6 'Sources of Systemic Vulnerability: The Present Law' at Part II(A). Consequently, this section will briefly propose that courts take a broader interpretation of the meaning of 'fraud' under the statutory exception to indefeasibility to include equitable fraud. This would align with the approach taken by Mason CJ and Dawson J in *Bahr v Nicolay (No 2)*, when they stated that 'not … all species of equitable fraud stand outside the concept of statutory fraud'.[1020] The interpretation would be designed to apply to a scenario where an adult child has accepted the benefits of the arrangement but, once title is in the hands of the adult child, they revoke the intention to provide care or accommodation for the parent. Examples of such behaviour have been documented in interviews involving older people in Western Australia. [1021] Therefore, the scenario would be captured by the circumstances described by Mason CJ and Dawson J when they said:

> [Th]ere is no difference between the false undertaking which induced the execution of the transfer in Loke Yew and an undertaking honestly given which induces the execution of a transfer and is subsequently repudiated for the purpose of defeating the prior interest.[1022]

At present, the fraud exception could apply if it could be shown that the adult child transferred the property with knowledge of the parent's expectation of care, and if it could be shown that the promise for care was never intended – that is, that the adult dishonestly induced the transfer and became the registered title holder because of their dishonesty. In *Loke Yew v Port Swettenham Rubber Co Ltd*, statements of present intention (that an unregistered interest would be preserved) made to induce a transfer and subsequently not honoured were found to amount to fraud.[1023]

[1020] *Bahr v Nicolay (No 2)* [1988] HCA 16 [12] (Mason CJ, Dawson J).
[1021] Freilich et al (n 116).
[1022] *Bahr v Nicolay (No 2)* [1988] HCA 16 [15] (Mason CJ, Dawson J).
[1023] *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491.

While the expansion of the fraud exception may add to the parent's armory of potential claims, evidence of fraud is very difficult to establish and is therefore only pleaded in clear cases. Unlike Australia, in New Zealand, s54-55 *Land Transfer Act 2017* (NZ) allows title to be changed in cases of manifest injustice which don't amount to fraud. Here, penalties will apply to legal practitioners who make allegations of fraud without sufficient evidence.[1024] There may be specific circumstances and evidence that would warrant pleading this cause of action; where it is possible, then assuming the property is extant, the adult child's title would be defeated. However, if this were not the case, there is often little to be gained, apart from the deterrent effect, by alleging fraud that cannot be achieved by pursuing other exceptions to indefeasibility.

2 *Enhance Responsibilities of Banks and Financial Institutions Regarding Guarantees and Mortgages*

Given the recent rise in awareness of elder financial abuse, it is appropriate that transactions involving older people should require a heightened degree of scrutiny on the part of bank employees. The *National Consumer Credit Protection Act 2009* (Cth) introduced enhanced responsible lending obligations on financial institutions,[1025] and since 2014 Australian bank employees have been the subject of comprehensive in-house education campaigns with a view to identifying suspected elder financial abuse. In 2021, the Australian Banking Association published industry guidelines outlining a framework for banks to raise awareness and promote consistent arrangements to deal with suspected cases of financial abuse.[1026] Furthermore, FAAs have been recognised for some time as a potential source of such abuse.[1027] Several states now impose stringent processes regarding mortgagor identification.[1028] In a new era of responsible lending, it seems anomalous that safeguards put in place to ensure appropriate levels of bank

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[1024] See eg *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) Reg 21.4.

[1025] Frances Gibson and Francine Rochford, 'Emerging Consumer Credit Issues for Older Australian' (2008) 12(1) *University of Western Sydney Law Review* 73; Eileen Webb, 'Extending Responsible Lending to Small Business – A "Consumer" Categorisation' in Therese Wilson (ed), *International Responses to Crisis-Credit, Over-indebtedness and Insolvency* (Ashgate, 2013) 135, 160; Eileen Webb, 'The Response of the Australian Courts to Real Property Mortgages Involving Predatory Lending Practice' in Lyria Bennett Moses, Brendan Edgeworth and Cathleen Sherry (eds), *Property and Securities: Selected Essays* (Thomson Reuters, 2010) 89.

[1026] <https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>.

[1027] Standing Committee on Legal and Constitutional Affairs Inquiry (n 20), Recommendations 30–33. See however the critique of describing all failed arrangements as elder abuse: Chapter 2, Part IV above.

[1028] Several jurisdictions have adopted various approaches in relation to mortgage fraud. For example, in Queensland, the *Land Title Act 1994* (Qld) requires mortgagees to verify the identity of persons executing registrable mortgages. A mortgagee who does not take reasonable steps to confirm the identity of the person signing as mortgagor will be denied the benefits of indefeasibility should the mortgagor's signature turn out to be forged. The mortgagee bears the onus of establishing such compliance, and if the mortgagee fails to do so, he or she is not entitled to compensation. NSW and Victoria have also adopted such legislation: see *Real Property Act 1900* (NSW) s 56C.

behaviour would be ignored where the end result of the conduct is the loss of a person's title. Indeed, several academic commentators – and the Canadian courts – have suggested that deferred rather than immediate indefeasibility should be preferred in instances where a bank has not taken the appropriate amount of care to check the bona fides of the mortgagor and the transaction.[1029]

B *Protecting Existing Interests, Creating New Interests*

1 *Creating a Caveatable Interest*

The nature of the parent's equity and whether there is a caveatable interest has been discussed at length in Chapter 4.[1030] That discussion detailed the requirements necessary for a party to have a caveatable interest. In summary, a caveatable interest does not have to be a registerable interest, so long as it is one that equity will give specific relief against the land.[1031] The dilemma facing the parent in a failed FAA is that, except in very narrow circumstances, prior to any ruling by the court that the plaintiff holds a proprietary interest (for example, on the award of a remedial constructive trust), the plaintiff only holds a 'mere equity. A 'mere equity' is a right ancillary to the recognition of an equitable interest.[1032] Put another way, a mere equity exists where a person is in a position to make a claim to a court of equity which, if successful, *may* entitle the person to an equitable proprietary interest. A mere equity is, therefore, not a caveatable interest.[1033]

While caveats are quite often lodged by parents in the event of a failed FAA as a pre-emptive measure, if the caveat is challenged on the basis the parent has no proprietary interest in the property, it makes the parent extremely vulnerable to third-party dealing on the property.

[1029] In *Lawrence v Maple Trust Co* (2007) 278 DLR (4th) 698, an unidentified forger transferred the title of Ms Lawrence's home to Thomas Wright. The fraudster, claiming to be Wright, then mortgaged the property to Maple Trust Co. The court imposed a requirement on the mortgagee that it must undertake due diligence. Interestingly, the 'cheaper cost avoider' analysis utilised was consistent with deferred indefeasibility. Furthermore, Pamela O'Connor has noted that: 'The process of institutional reform must extend to review of legal rules which allow transacting parties to internalise gains and externalise losses. Of prime concern are rules of the Torrens system which allow mortgage lenders to omit reasonable precautions to ensure that the borrower is the registered owner and shift the risk of losses through identity fraud to persons who are external to the transaction.' Pamela O'Connor, 'Immediate Indefeasibility for Mortgagees: A Moral Hazard? (2009) 21(2) *Bond Law Review* 133, 133. The ways in which the law sets inadequate standards for mortgagees are detailed in Rodrick (n 696). Toomey first posited a causal link between immediate indefeasibility and the incidence of forged mortgages: Elizabeth Toomey, 'Fraud and Forgery in the 1990s: Can Our Adherence to Frazer v Walker Survive the Strain?' (1994) 5 *Canterbury Law Review* 424.

[1030] See Chapter 4 Part IV(D). See also Somes and Webb, 'What Role for Caveats' (n 31).

[1031] *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286, 287; Boyle (n 551).

[1032] *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

[1033] *Nguyen v Sage Consultant Group Pty Ltd; Dang v Nguyen* [2021] NSWSC 753 (Robb J).

Should the property no longer be extant, the only alternative would be a personal claim against the adult child. Therefore, permitting a caveat to be lodged, or a notation on the title to provide notice of a potential interest created pursuant to the agreement, would provide a method of protection and address a significant level of legal vulnerability. Given the urgency surrounding the pending registration of the third party's interest, it would seem appropriate to lodge the caveat until such time as the court assesses the interests of the parties.

A strictly non-proprietary merits protection has been suggested by Boyle, who notes:

> [T]he right that may require protection may be a non-proprietary right. It will relate to, or have a nexus with, the land in some way and certainly will result from the actions of the registered proprietor of the land; but it need not arise only in the context of transactions that confer a proprietary interest.[1034]

Further support for this approach can be found in the United Kingdom, which has recognised the need to offer some level of security for these types of claims. In the UK, the role of mere equity is discussed primarily in relation to claims in estoppel.[1035] The courts have generally taken the view that the inchoate equity, in particular in relation to the estoppel claim, is a 'type' of proprietary right that can bind successors in title.[1036] This is so despite the position being the same as in Australia, in that the claimant does not know what remedy the court will award and it is open to the court to award something less than a proprietary remedy. Cooke states that '[t]he equity has proprietary status because of the strength of the court's power to grant a remedy'.[1037] Following from this approach, the practice of land registry has been to treat an equity arising out of an estoppel as a proprietary right which may, therefore, be protected by a notice or caution.

The UK has somewhat different rules concerning the protection of an unregistered interest, depending on the circumstances. Under the *Land Registration Act 2002*, a caution can be placed against first registration. A caution may be lodged at the Land Registry by any person claiming to have ownership of, or an interest in, unregistered land. The effect of the caution is to oblige the registrar to notify the cautioner of any application for first registration of that land, and of the cautioner's right to object to that registration.[1038] When the land in question is registered, a party

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[1034] Boyle (n 551) 240.
[1035] See generally Ben McFarlane, *Proprietary Estoppel* (Oxford University Press, 2014).
[1036] *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC) (for the purposes of a claim under statute, was considered a proprietary right); *Voyce v Voyce* (1991) 62 P & CR 62 690 (CA); *Re Sharpe (a bankrupt)* [1980] 1 WLR 219.
[1037] Elizabeth Cooke, 'Estoppel, Discretion and the Nature of the Estoppel Equity' in M Bryan (ed), *Private Law in Theory and Practice* (Routledge Cavendish, 2007) 194.
[1038] Section 15(1) states that a person may lodge a claim if they claim to be entitled to an interest affecting the qualifying estate: s 15(1)(b).

may lodge a notice on the register under Part 4 of the *Land Registration Act 2002*. The lodgement of the notice does not mean that the claim is valid, only that, if it is valid, its priority will be protected.[1039]

In 2002 the *Land Registration Act* came into force and 'for the avoidance of any doubt', s 116 was enacted, which reads:

> It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following—
>
> (a) an equity by estoppel, and
>
> (b) a mere equity,
>
> has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).

The legislation confirms that the inchoate right should be treated as a proprietary right, or a 'minor interest'.[1040] It seems incontrovertible that a person claiming a mere equity pursuant to an equitable claim against the land would be entitled to lodge a notice against that land, either as an application of the common law or by arguing the status of the claim is elevated to a recognised interest in the land.

The caveat system is an ideal vehicle to protect the interest of the parent in a FAA. A mechanism to lodge a caveat on the title upon entering an arrangement would provide a notice function to alert any potential third parties of the existence of the agreement. Furthermore, such lodgement would provide some protection in the event of a priorities dispute, as the failure to lodge a caveat on the part of the party first in time can be regarded as disentitling conduct.

A further step towards protecting the parent's interest would be to adopt the reasoning of Griggs, who advocates, not for a priority to be determined by the distinction between legal and equitable interest, but for there to be two forms of interest: registered and unregistered.[1041] Priority, he argues, would therefore be determined not by the nature of the interest (legal or equitable) but by the timing of either registration of lodgement of the caveat. Assuming the parent's interest could be determined caveatable,[1042] this would give additional protection.

[1039] *Land Registration Act (2002)* s 32(3).
[1040] The consultative document notes that an equity arising from an estoppel claim coupled with occupation already can be registered as a 'minor interest'.
[1041] Lynden Griggs, 'Torrens Title – Arise the Registered and Unregistered, Befall the Legal and Equitable' (1997) 4(1) *Deakin Law Review* 35.
[1042] Griggs does not venture into a debate concerning what interests should be registerable of caveatable.

2 *Creating a Registerable Interest*

Although controversial, a method of protecting the parent's contribution to the property would be the creation of an interest pursuant to the agreement that could be registered on the title. This would require significant legislative reform and is one step further than realising the interest as caveatable. Conferring the legal status of a registerable interest (alongside interests such as leases, mortgages and easements) would be the most far-reaching response to the parent's legal-situational vulnerability, as it would offer the most robust form of security and protection of the parent's contribution. For this to occur, the parties would have to be willing to formalise the arrangement. As explained earlier in this thesis, many families are unwilling to do so, or are unaware of the necessity of doing so.[1043] At the very least, the possibility of noting the existence of the agreement on the title is overdue.

C *Recognising the Right to Occupy*

It must be noted that arguments in favour of recognising a parent's right to occupy would only be advantageous in certain factual situations. In most cases, either the arrangement has failed for some reason (commonly the parent/child relationship has deteriorated) and the parent is attempting to recover either all or part of their contribution to the property, or their interest is in danger of being defeated by the presence of a registered or unregistered third-party mortgagee or purchaser. However, as discussed in Chapter 4, even if the older person did argue in favour of a right to occupy, or challenge the rights of the third party, it would be a Pyrrhic victory. The reality is, even if the older person's occupation of the premises was preserved, the basis of the arrangement – care and companionship in old age – would be destroyed. For example, if the sale were set aside for fraud, what would become of the relationship with the older person and their family, even if the third party was no longer in the picture? Similarly, in relation to the *in personam* exception or a short-term lease, the older person may be able to stay in the property. However, if the family had departed and the property was registered in the name of a third party, it would be only in very particular circumstances that the parent would wish to stay.

1 *Leases*

[1043] See Chapter 2 III(E) 'Reasons for Failure of the Family Accommodation Agreement'.

Leases have been discussed in Chapter 4 at Part IV(B)(3) 'Tenancies'. At common law, the requirements of exclusive possession and certainty of term could exclude many FAAs from being characterised as leases. In many states, however, the respective residential tenancy laws do not require exclusive possession to be granted for the statute to apply.[1044] However, if a family accommodation agreement was to give rise to a lease arrangement, the obligations and rights of landlord and tenant, derived from both common law and the relevant state legislation, would apply to the parties. In Victoria, exclusive possession is still required and the substance of what constitutes exclusive possession was explored in *Swan v Uecker*.[1045] Whether exclusive possession has been granted is determined by not only by any documentation but also by looking at the surrounding circumstances.[1046] In *Swan v Uecker*, a tenant who offered the rented property to holidaymakers on AirBnB was found to have granted the AirBnB clients a lease.[1047] The decision turned largely on the relationship between the tenant and the AirBnB guests, and whether the guests were granted exclusive possession. As Swannie observes, 'the significance of the Swan decision is that home sharing arrangements can be leases'.[1048] Nonetheless, owing to the presumption against families creating binding contractual obligations, the formality of the lease arrangement sits uncomfortably with the family context of FAAs. Swannie notes that the decision of the House of Lords in *Street v Mountford* acknowledged this fact.[1049] The court suggested that despite exclusive possession being satisfied, a pre-existing relationship between the parties made the imposition of the landlord/tenant relationship inappropriate and that it could be said there was no intention to create a legal relationship.

If a FAA was held to be a short-term lease, the older person could resist the purchaser or mortgagee as an exception to indefeasibility.[1050] Obviously, if it was a longer lease it could be

[1044] *Residential Tenancies Act 1997* (ACT) s 6A(3); *Residential Tenancies Act 2010* (NSW) s 13(1); *Residential Tenancies Act 1999* (NT) s 4; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 12(2); *Residential Tenancies Act 1995* (SA) s 3; *Residential Tenancy Act 1997* (Tas) s 10(1); *Residential Tenancies Act 1987* (WA) s 3.
[1045] *Swan v Uecker* (2016) 50 VR 74.
[1046] *National Outdoor Advertising Pty Ltd v Wavon Pty Ltd* (1988) 4 BPR 97322, 9733–4 (Young J); *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174, 177 [6] (Tadgell JA).
[1047] *Swan v Uecker* (2016) 50 VR 74.
[1048] Bill Swannie, 'AirBnB and Residential Tenancy Law: Do "Home Sharing" Arrangements Constitute a Licence or a Lease?' (2018) 39 *Adelaide Law Review* 233. Although, the definition of 'home sharing' – the provision of accommodation by means of an online platform – does not cover the family accommodation arrangement.
[1049] *Street v Mountford* [1985] AC 809, 817–8 (Lord Templeman) cited in Swannie (n 1048) 241.
[1050] *Real Property Act 1900* (NSW) s 42(1)(d); *Real Property Act 1886* (SA) ss 69(h), 119; *Land Title Act 1994* (Qld) s 185(1)(b); *Land Title Act 2000* (NT) s 189(1)(b); *Transfer of Land Act 1893* (WA) s 68; *Land Titles Act 1980* (Tas) s 40(3); *Land Titles Act 1925* (ACT) s 58(d).

regarded as equitable but generally would not be binding on third parties. Alternatively, if the lease was registered, the lease would have the benefits of indefeasibility.

The characterisation of the parent's interest as a life interest rather than a personal right to reside in the property, and the impact of s 42(2)(e) *Transfer of Land Act 1958* (Vic), has been discussed in Chapter 4 at Part IV(B)(3).

2 *Estoppel Licence*

At its core, the FAA is an agreement to occupy the premises. At the very least, most FAAs could be described as a licence. A licence is, of course, a mere personal right and does not lead to a proprietary interest in the land.[1051] Nor is a licence an express exception to indefeasibility. The difficulty with the characterisation of the right to occupy as a licence is the difficulty in trying to forge some sort of proprietary interest from what is essentially a 'personal' right. In some circumstances, it could be argued that a proprietary estoppel can arise, such that a licence is actionable against third parties.[1052] McFarlane notes that in some (albeit rare) cases the 'needs of practical convenience' may make it appropriate to recognise some contractual agreements as binding upon third parties.[1053] While it is not suggested that every licence agreement could bind third parties, it is argued that the circumstances of the FAA would be an appropriate transaction to consider such reform. Using McFarlane's discussion, it would be first necessary to examine the nature of the parent's right and isolate the situation in which they needed protection. It is noted that the occupation of a home is 'especially worthy' and thus would warrant recognition against third parties in the absence of another interest. This is especially the case where the third party is aware of the older person's occupation.[1054] Whether or not this approach could gain traction in Australia is unclear. In *Lorna June Smith v Ian Ross Smith*, while the court found the defendant was estopped from denying the plaintiff's right to occupy the property, it was found the licence did not give rise to a proprietary interest and thus was not a caveatable interest.[1055] However, *Irons v Irons* found that where it would be unconscionable to revoke a licence, equity would prevent the revocation and that equity constitutes an interest in land.[1056]

[1051] *Thomas v Sorrell* (1673) 124 ER 1098.
[1052] *Williams v Staite* [1979] 1 Ch 291.
[1053] Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 522.
[1054] Note that, in the United Kingdom, knowledge of such occupation can be regarded as an 'overriding interest'. The Torrens legislation in Australia and the irrelevance of notice would tell against this being a factor in Australia.
[1055] *Lorna June Smith v Ian Ross Smith* [2004] NSWSC 641.
[1056] *Irons v Irons* [2007] SADC 54.

IV CHANGES TO LAW THROUGH REVALUATION OF RELATIONSHIP NORMS

Several examples of legal-situational vulnerability outlined in Chapter 4 arise because of legal doctrine evolving in accordance with long-held presumptions and views on the nature of family relationships, and in particular the normative foundations of the parent/child dynamic. This part aims to revisit those areas and suggest reforms to certain areas of the law that contribute to the parent's legal-situational vulnerability. The presumptions of advancement and the presumption against legally binding agreements between family members are examples of broad assumptions made about family functioning that create legal barriers for the parent to overcome. Similarly, while a transaction from child to parent is a presumptive relationship of influence, a transfer from an elderly parent to an adult child would need to prove a relationship of actual undue influence. Although the evolution of these doctrines is based on accepted normative behaviour developed over years, the relatively new circumstances brought about by the rise of FAAs call for their re-evaluation, and this part will make suggestions concerning their reform.

Further, in light of the High Court's decision in *Louth v Diprose* and analogous 'clouded judgment cases, this chapter will explore whether 'special disability' requirement under the doctrine of unconscionable conduct could be extended to a parent's unconditional love.[1057]

A *PRESUMPTION OF ADVANCEMENT*

The presumption of advancement has been discussed in Chapter 4 as an example of legal-situational vulnerability.[1058] Whether the presumption will be rebutted will depend on how the court interprets the parent's intention at the time of the transfer and the understanding between the parties concerning continued accommodation and care. In Australia, the presumption of advancement continues to be applied, and while Glister contends that the presumption rarely decides a case,[1059] parents in failed FAAs will bear the onus of proving the transfer made was not a gift. This is despite strong arguments by some judges that both the presumption of resulting trust should be abolished, and the presumption of advancement with it. McHugh J in *Nelson v Nelson* stated that

[1057] *Louth v Diprose* (1992) 175 CLR 621.
[1058] See Chapter 4 Part III.
[1059] Jamie Glister, 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement' (2010) 73(5) *Modern Law Review* 807, 809.

> there is a strong case for examining whether the presumption of a resulting trust accords with the effect of contemporaneous practices and modes of thought. If that presumption goes, there is no compelling reason for a presumption of advancement in the case of transfers of property by parents to children. Indeed, the presumption of advancement itself may not accord with contemporaneous practices and modes of thought.[1060]

In the light of Australia's ageing population and the increasing incidence of failed FAAs, there is much to recommend the reconsideration of the presumption of advancement and the added burden it places on parents.[1061] Of itself it may be a relatively straightforward burden to discharge;[1062] however, along with other examples of doctrinal 'legal imbalance', it contributes to the legal-situational vulnerability experienced by the parent.

B *Contract: Relational Contract Theory*

Family accommodation agreements rarely pass the threshold tests of intention and formality to be considered contracts and thereby allow the parent to seek a remedy based on contract. This section looks at whether seeing the agreement as 'relational contract' – rather than through the formal rules that have evolved out of commercial situations – the arrangement might more readily be accepted as a contract. If this were possible, it would allow damages for breach of contract to be a more plausible outcome upon the breakdown of the relationship.

In applying traditional contract principles, courts make assumptions about how decisions are made and the autonomy of the contracting parties.[1063] By assuming parties make agreements on equal footing and in their own best interests, the dynamics and hierarchies of family relationships and how those dynamics can impact decision-making process are ignored.[1064] This binary approach that forms the basis of traditional contract principles is at odds with more contemporary theories of contract, such as relational contract theory.[1065] Relational contract theory, based on Macneil's thesis, has particular application to family accommodation agreements. Macneil posits that parties to a relational contract do not agree terms at the moment of formation, but that terms evolve and adjust throughout the relationship as circumstances change. Therefore, establishing

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[1060] *Nelson v Nelson* (1995) 184 CLR 538, 602 (McHugh J).
[1061] Radan and Stewart (n 325) [25.92].
[1062] *Bosanac v Commissioner of Taxation* [2022] HCA 34; while the High Court refused to abolish the presumption of advancement, it did acknowledge evidence of the intentions of the parties would be paramount. This raises the question of whether the presumption is a default position when intention cannot be determined, or whether the presumption exists and must be rebutted by contrary evidence.
[1063] See Chapter 4 Part II (B).
[1064] Sharon Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* 617.
[1065] IR Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001); Stewart Macauley, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 *Modern Law Review* 44.

intention to create a contract at the commencement of the agreement and certainty of terms is unnecessary. Secondly, the theory looks to how self-interest is constructed and mitigates against adversarial self-interest by accepting that collaboration is mutually beneficial, and that each party's interests will be served through good faith cooperation. Relational contract theory distinguishes discrete transactions (or 'one-off' transactions) from long-term relationships (including commercial, employment contracts, manufacturers and suppliers) and intimate relations.[1066] The latter agreements are viewed in their wider social and economic context where the ongoing relations between the parties are prioritised in order to support the contractual relationship. Rules of contract (formality, certainty etc.) become less important, and parties rely on social or relational norms. Relational autonomy recognises that behaving in one's own self-interest is not paramount, and instead stresses the need to examine the pattern of the various relationships of those involved and the impact on the decision-making process. As Herring observes, '[o]ur lives are not marked by freedom, but by our obligations to others. For most people it is obligations to children; friends or relations who are dependent on us; or wider social causes which mark our daily lives.'[1067] It acknowledges that parties can enter into agreements which give rise to expectations of obligations of both parties, but these obligations are never committed to writing and therefore fail to conform to traditional contract formalities. Wightman argues that in the commercial sphere relations are 'built on the understanding and norms of a particular contractual community', and therefore those understanding become known by the participants that sector.[1068] He goes on to argue that this is not the case in intimate relationships, as 'the relation is not fundamentally perceived as a deal, there is no pressure to clarify – at any stage – what each is getting under it'.[1069] Yet FAAs cannot be strictly analogised with intimate party relationships, as they have a different genesis. One cannot argue that there is 'no shared understanding'.[1070] While FAAs can take on myriad forms, at their heart is an agreement to provide accommodation, and oftentimes care, in exchange for property or money – a bargain. It is this reciprocity that has successfully rebutted the presumption of advancement and prompted the court to characterise the transfer of property as a 'conditional gift'.[1071]

Keyes and Burns argue the distinction between commercial and familial agreements, and the presumption that the latter are not intended to be contractually binding, cannot be

[1066] John Wightman, 'Intimate Relationships, Relational Contract Theory, and the Reach of Contract' (2000) 8 *Feminist Legal Studies* 93, 102–5.
[1067] Jonathon Herring, *Relational Autonomy and Family Law* (Springer, 2014) 16.
[1068] Wightman (n 1066) 106.
[1069] Ibid 108.
[1070] Ibid 109.
[1071] *Flourentzou v Spink* [2019] NSWCA 315, where payments made by mother to daughter were considered a conditional gift on the basis that the mother had the right to occupy the property (Bathurst CJ, Gleeson JA Barrett AJA).

maintained.[1072] Drawing on the works of Macneil and Macauley, they observe that commercial parties rely far less on contract law to regulate their relationships than previously thought. Rather than being governed by contractual intentions, the relationship 'reflects a variety of influences, including social norms and the norms of conduct that develop within the relationship'.[1073] Therefore, relying on what the parties intended at the beginning of the relationship is 'ill-founded' and there are no bright lines between family agreements and commercial contracts. Viewed in this way, the authors conclude there seems little justification for distinguishing intention based on whether the arrangement is commercial or familial.[1074]

C *Presumption of Undue Influence to Apply to Transactions Where Transfers Are Made Between Parent and Adult Child*

The doctrine of undue influence has been discussed at length in Chapter 6.[1075] In that discussion, the difficulties associated with setting aside a transaction pursuant to undue influence are explored. At the most fundamental level, the elderly parent/adult child relationship is not, of itself, presumptive of undue influence.[1076] This means the onus is on the parent to prove either that there is a relationship of trust and confidence, which then raises the presumption of undue influence, or alternatively that there is actual undue influence.[1077] The absence of a presumption of undue influence, even in transactions between elderly parents and adult children, is largely a consequence of the normative expectation that parents advance property to children out of natural love and affection. Burns observes that courts have demonstrated little appetite to extend the doctrine of relational undue influence to include relationships between parents and their children.[1078]

The recent attention given to elder abuse has highlighted how, in certain circumstances, one's status as an older person can give rise to vulnerabilities.[1079] The key feature of undue influence is the impaired consent or judgement of the plaintiff. Bearing in mind that for many older people the provision of care is a fundamental element driving their decision to enter the arrangement, inherent vulnerabilities affecting physical and cognitive abilities may be

[1072] Keyes and Burns (n 368).
[1073] Ibid 585 citing EA Posner, 'Conditions of Radical Judicial Error' (2000) 94 *Northwestern University Law Review* 749.
[1074] Keyes and Burns (n 368) 585–7
[1075] See Chapter 6, Part II(C).
[1076] However, child to parent transactions are an example of an automatic relationship of influence.
[1077] *Hogg v Hogg* [2007] EWHC 2240 (Ch) [43] (Lindsay J) cited in Sloan (n 729) 42. See also *McFarlane v McFarlane* [2021] VSC 197 (Richards J).
[1078] Burns, 'Undue Influence' (n 721).
[1079] See ALRC Final Report (n 19) [1.4]–[1.6].

present.[1080] At the same time, relationships between parents and children change over time – the dynamics associated with authority, economic capacity and level of education achieved can all modify the power relationships.[1081] This is not to suggest that the relationship becomes abusive, only that over a lifespan the dynamics of the relationship will evolve. The present doctrine of undue influence continues to overlook the changing normative behaviours in elderly parent/adult child relationship, particularly in the context of the FAA. While not impossible to prove, the onus of establishing undue influence is a heavy burden to discharge and places the older party at a considerable legal disadvantage.[1082]

One response would be to undertake statutory changes along the lines introduced in the State of Maine in the United States, which effectively reverses the presumption of undue influence by requiring the recipient to establish the transaction was *not* a result of influence.[1083] Under the legislation, the presumption of undue influence will arise where an elderly dependent person has transferred real estate or undertaken a major transfer of personal property or money (a transfer of money or items of personal property representing 10% or more of the elderly dependent person's estate) for less than full consideration. Only certain relationships attract the automatic presumption, but they do include family relationships. If the transferee is unable to rebut the presumption, the transfer may be set aside or the court may order alternative remedies. These would give the older party protection, for instance, if the property was no longer extant. An important qualification is that the older party must be 'dependent' on others. However, as Burns observes, this notion of dependency is broader than the dependency required to establish relational undue influence at common law.[1084] The presumption would not operate if the older person was given independent legal advice.[1085] Burns concludes that the effect of the legislation widens the reach of undue influence to protect older people in certain circumstances, without undermining its fundamental doctrinal features.[1086]

An argument against introducing such reforms is that they are overly paternalistic and assume that, solely because of age, the older party is entitled to protection. However, this ignores the

[1080] Ibid.
[1081] See generally Alice S Rossi and Peter H Rossi, *Of Human Bonding: Parent-Child Relations Across the Life Course* (A de Gruyter, 1990); Gisela TrommsDorff, 'Parent-Child Relationships over the Lifespan: A Cross Cultural Perspective' in Kenneth H Rubin and Ock Boon Chung (eds), *Parenting Beliefs, Behaviours, and Parent – Child Relations: A Cross Cultural Perspective* (Taylor and Francis, 2006) 143.
[1082] Not only the burden of discharging the onus, but the older person also must overcome the sources of systemic vulnerability.
[1083] 33 ME REV STAT ANN (West) § 1022(1) (2001).
[1084] Burns, 'Undue Influence' (n 721).
[1085] 33 ME REV STAT ANN (West) §§ 1021(3), 1022(1) (2001).
[1086] Burns, 'Undue Influence' (n 721).

reality of many circumstances giving rise to the transfer of major assets, and the presumption can, of course, be rebutted.[1087] Therefore, the introduction of the familial relationship as a presumptive relationship in circumstances where a transfer of a significant amount of money or property has been undertaken by a person in a position of dependency would go some way towards reducing that burden on the older party and would provide an extra safeguard. It would address, to a degree, the legal situational vulnerability experienced by the parent. The status of the adult child as volunteer may have further bearing on the proposal that the adult child should bear the onus of justifying their title to the property.

While the effect of legislative reform of equitable doctrine allows for a larger class of people to successfully challenge transfers of assets, the reforms do little to eliminate the social, physical, financial and emotional impediments to commencing litigation,[1088] and the older person would still be required to commence proceedings in the Supreme Court. Nonetheless, one advantage of placing the onus on the adult child is that in future it may encourage adult children to seek advice regarding having FAAs in place before commencing transfers that potentially may be reversed at the discretion of the Registrar General. The amendments would, in turn, have the effect of reversing the common law presumption of advancement.

Another alternative might be to introduce a 'screening tool' so transactions that might be induced by undue influence could be detected prior to their completion. For example, California has developed a screening tool for undue influence for use by Adult Protective Services (APS).[1089] This tool directs the agent through questions on four areas: the vulnerability of the person, the position of power or authority of the potential perpetrator, the actions used to persuade the person, and how or why the outcome is detrimental for the older person. This tool can be used across disciplines or customised to particular settings. By directing specific questions to known indications of risks giving rise to undue influence, it provides a structured approach and can be adapted across a range of professions to identify potential risk situations. The advantage of this approach is that the screening tool is aimed at preventing a transaction occurring. If intervention is successful, it avoids the older person experiencing the vulnerabilities associated with setting aside the transaction.

[1087] These have been discussed in Chapter 2.
[1088] Cheryl Tilse et al, 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice' (2002) 1 *Elder Law Review* 1.
[1089] Mary Joy Quinn et al, 'Developing an Undue Influence Screening Tool for Adult Protective Services' (2017) 29(2–3) *Journal of Elder Abuse and Neglect* 157.

D *Unconscionable Conduct: Applying the 'Clouded Judgement' Analysis to the Elderly Parent*[1090]

I'll do anything
For you dear anything
For you mean everything to me.[1091]

Transactions whereby parents either guarantee children's lending or transfer property to them under a FAA may not always reach the threshold of undue influence of unconscionable conduct, even if the transaction is improvident.[1092] The application of the doctrine of unconscionable conduct in the context of FAAs has been discussed previously.[1093] For transactions to be set aside on the basis of unconscionable conduct, the plaintiff must establish they were under a 'special disability', that the defendant was aware of the disability and that the defendant took unconscientious advantage of it.[1094] In determining whether a 'special disability' exists, Australian courts have emphasised that mere inequality of bargaining power is insufficient: the disability must be the source of the weaker party's inability to act in their own best interests.[1095]

This section will interrogate the prospect of including a parent's 'unconditional love' for a child as a source of special disability for the purposes of unconscionable conduct by analogy with cases such as *Louth v Diprose*.[1096] Cases such as *Louth* have been described as 'clouded judgement' cases – the donor has an emotional attachment to the donee and, with the donee's knowledge of the attachment, undertakes an improvident transaction.[1097] Cases coming under this 'subset' of the unconscionable conduct doctrine have mostly involved intimate partners, although in *Williams v Maalouf* the relationship was with a co-worker who was suffering from cancer.[1098] In *Louth*, emotional dependence in the form of 'utter infatuation' was determined to be a special disability and the female recipient of the gift (a house) was found to have

[1090] See Chapter 2 Part IV(B)(2)(a) 'Entering into the Accommodation Agreement – Personal Vulnerability: The Parent/Child Relationship'.
[1091] Lionel Bart, 'I'd Do Anything' (from the musical *Oliver!*, 1960).
[1092] See generally Fiona Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29(2) *Monash University Law Review* 336.
[1093] See Chapter 6, Part II(D).
[1094] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. See also *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 621; *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Thorne v Kennedy* (2017) 263 CLR 85; *Ip v Chiang* [2021] NSWSC 822 [323] (Lindsay J).
[1095] *Blomley v Ryan* (1956) 99 CLR 362, 381, 415 (Kitto J), 405 (Fullagar J).
[1096] *Louth v Diprose* (1992) 175 CLR 621.
[1097] Thampapillai (n 784).
[1098] *Williams v Maalouf* [2005] VSC 346, cited in Thampapillai (n 784).

exploited the disability by 'dishonestly manufacturing an atmosphere of crisis'.[1099] The expectation that a parent will act out of love and affection for their children is deeply embedded in societal norms and, by virtue of that, in our law.[1100] How, then, might this 'special disability' be addressed? For the law to presume that transactions entered into by a parent in favour of a child were a result of unconscionable conduct of the child raises similar arguments canvassed in Chapter 2 concerning defining FAAs as 'elder abuse' – it unfairly categorises the adult child in all transactions as having acted 'unconscionably'. Unconscionable conduct is doctrinally different from undue influence, as undue influence is presumed in some instances merely by virtue of the relationship and can be presumed without any *mala fides* on the part of the dominant party.[1101] Unconscionable conduct, however, requires a 'predatory state of mind' on the part of the dominant party.[1102] An alternative approach would be for courts to aware of the potential for exploitation by virtue of the relationship, and to take into account the relational imbalances that may exist between parents and their children. The emotional vulnerability of the parent and evidence of the exploitation of that vulnerability could be included as a factor to be considered when determining whether the transaction was made pursuant to unconscionable conduct or was a freely made, albeit improvident, transaction.

As the law currently stands, a parent's willingness to enter into improvident transactions and risk what potentially could be disastrous financial outcomes has been regarded as merely an unfortunate by-product of their natural love and affection.[1103] Moreover, courts have shown a particular reluctance to legitimise the role emotions play in human interactions, particularly financial ones. In *Ryan v Tooth*, Bryson J made the following observations in a claim based on undue influence:

> The fact that a call is made upon a blood relationship in support of a request that a party enter into a substantial gift or a transaction which is otherwise improvident or diseconomic should not have any great effect on a judgment on the subject of unconscionability. In the absence of evidence proving unusual susceptibility, there is no reason to think of calls on blood relationships as blinding persons to their interests or conferring on them unusually ready access to equitable relief against transactions which they decide to enter into. Calls on blood relationships are features found in people's decisions to enter into transactions into which they would not be led by ordinary commercial motivations, and when persons yield to them their conduct should

[1099] *Louth v Diprose* (1992) 175 CLR 621, 626. This decision is not without its critics: see Hepburn, 'Equity and Infatuation' (n 784); Sarmas (n 784) 19(3); Graycar and Morgan (n 784); Thampapillai, (n 753).
[1100] For instance, reflected in the presumption of advancement.
[1101] *Allcard v Skinner* (1887) 36 Ch D 145.
[1102] *Richardson v Wagner* [2021] QDC 24 [52] (Barlow QC DCJ).
[1103] *Janesland Holdings Pty Ltd v Francisc Simon* [2000] ANZ ConvR 112 [120] (Crispin J); *Mitchell v 700 Young Street Pty Ltd* [2003] VSCA 42, 42 (Orminston JA); *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7; *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10.

> usually be interpreted as an expression of their economic liberty and not as a ground for them to escape their obligations.[1104]

Bryson's approach ignores the deeply influential factual and emotional matrix that often supports such decisions. It is suggested that taking an 'arms-length' approach to the relevance of the family dynamic seriously disadvantages the parent in family accommodation situations.

Much of the literature concerning the behaviour of parents towards their children in the financial sphere concerns parents providing guarantees for a child's business lending and points to the sense of obligation parents experience. In the context of providing guarantees for family members, Millibank and Lowrie observe that

> [d]ependency, vulnerability and absence of real choice do not always fall into the neat legal category of 'undue influence', nor do they necessarily fall within the parameters of unconscionability. Several respondents felt that they were under an emotional or moral obligation to help family or repay assistance from other family members. Many parents who assisted their children with loans did so out of a sense of moral obligation.[1105]

Yet while there are a range of reasons why a parent would enter a transaction which may not appear to be in their best financial interests – generosity, obligation, guilt – what is being highlighted here is the natural desire to help one's children because of the unconditional love given by parent. Stuifbergen goes so far to say that 'practically in no other human relationship is love so unconditionally given'.[1106] It is also different to the 'emotional dependence' that founded the special disability in *Bridgewater v Leahy*.[1107] The unconditional love of a parent is less founded in dependency or obligation and is more analogous to the 'special disability' found to exist in the case of *Louth v Diprose*. There it was found the appellant 'from the first time they met he was utterly infatuated by [the respondent] … he knew he had what she accepted in evidence "an enormous weakness" for her'.[1108] As such, he was 'unable to make a worthwhile judgment as to what is in his best interest'.[1109] Although it is not suggested the law should discourage the natural generosity a parent feels for their child, there should nonetheless be adequate safeguards to recognise and provide appropriate remedies if the generosity is *exploited.* As Conaglen observes, '[t]he heart of the inquiry, and the justification for relief, is

[1104] *Ryan v Tooth* (Unreported, Supreme Court of NSW, Bryson J, 24 September 1993).
[1105] Jenni Millibank and Jenny Lowrie, '"Darling, Please Sign This Form": Relationship Debt and Guarantees' (2003) 28(6) *Alternative Law Journal* 282.
[1106] Stuifbergen and Van Delden (n 1011) 67.
[1107] *Bridgewater v Leahy* (1998) 194 CLR 457, In Bridgewater, the special disability was described as 'emotional attachment ... and dependency' at [122].
[1108] *Louth v Diprose* (1992) 175 CLR 621 [3].
[1109] Ibid [9].

always the impropriety of the ascendant party's conduct'.[1110] The impropriety that needs to be proven is whether the defendant has taken unconscientious advantage of the special disability, requiring the plaintiff to establish 'victimisation, exploitation or unconscientious conduct'.[1111] Exploitation is difficult to define.[1112] 'Taking advantage', moral approbation or obloquy accord with the court's view of the female respondent in *Louth.* There the court found that

> [the respondent] deliberately manufactured the atmosphere of crisis in order to influence the plaintiff to provide the money for the house. I am satisfied, moreover, that she played upon his love and concern for her by the suicide threats in relation to the house. She then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her. I am satisfied that it was a process of manipulation to which he was utterly vulnerable by reason of his infatuation.[1113]

Drawing analogies with *Louth* and the appellant being 'utterly vulnerable by reason of his infatuation', it is not difficult to envisage a situation where an adult child could seek to exploit the natural love and affection of a parent by manufacturing an 'atmosphere of crisis' to encourage the transfer of property or money under a FAA. In *Cirillo v Manieri*, an elderly widow agreed to sell her house and contribute the proceeds ($240,000) towards the reduction of the son's mortgage.[1114] In exchange, she was promised accommodation and care. In her evidence, she said the defendants 'implored me, they beseeched me, they said "Look Mum, if you don't sell the unit the bank will take our house". I felt very bad about that, and so in June I did sell the unit.'[1115] This case was decided on other grounds, but the plaintiff's evidence clearly shows a degree of emotional exploitation on the part of the adult child to convince his mother to undertake the sale of her property.[1116]

[1110] Matthew Conaglen, 'Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh' (1999) 18 *New Zealand Universities Law Review* 509, 515. Similarly, Crispin J in *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7 notes that 'the contract of guarantee will be unenforceable only if the lender's conduct has been unconscionable' (at 120).

[1111] *Kakavas v Crown Melbourne Ltd* **(**2013) 250 CLR 392 [161]; *Thorne v Kennedy* [2017] HCA 49 [38]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239; (2008) 225 FLR 1 [4924] (Owen J).

[1112] See generally Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003).

[1113] *Louth v Diprose* (1992) 175 CLR 621 [6]. See also Allsop CJ in *Paciocco v Australia & New Zealand Banking Group Ltd* [2015] FCAFC 50: 'That a degree of morality lies within the word "unconscionable" is clear. "Unconscionability" is a value-laden concept. "Obloquy" is "the condition of being spoken against; bad repute; reproach; disgrace; a cause of detraction or reproach"; "obliquity" is "a deviation from moral rectitude, sound thinking or right practice; a delinquency; a fault or error"' [262].

[1114] *Cirillo v Manieri* [2013] VSC 399.

[1115] Ibid [23].

[1116] The statements do not have to be dishonest: see *Paciocco v Australia & New Zealand Banking Group Ltd* [2015] FCAFC 50 [262] (Allsop CJ).

The legally enforceable duties to provide for a child when they are minors do not continue into adulthood; however, parental bonds and the desire to help, even if it means entering improvident transactions, can be a primary motivation for entering FAAs. If the ‘sense of urgency’ or financial desperation has been created to exploit this bond, this could arguably amount to unconscionable conduct and allow for the parent to have the transaction rescinded.

V REFORMS AIMED AT RECOGNISING A NEW CAUSE OF ACTION

The *in personam* exception is confined to known legal and equitable causes of action against the registered proprietor.[1117] This confines the older party to relying primarily on equitable causes of action, such as undue influence, unconscionable conduct, failed joint venture and estoppel.[1118] As explained in previous chapters, there are significant shortcomings in the present law. Absent a statutory scheme, if courts were willing to recognise the position of an older party in a FAA, a suitable cause of action could be fashioned to allow an older party to plead a specific cause of action in relation to a transaction pursuant to a FAA, rather than analogise from de facto or commercial situations. Equity has always responded to new and novel circumstances in order to provide a just outcome. Justice Kirby has stated that

> [t]he vitality of equity in Australia is necessarily dependent on the readiness of our courts to develop equitable principles to respond to modern conditions and needs … [T]he categories of equity are never closed. All lawyers have responsibilities to play in the ongoing renewal of equity's doctrines and remedies.[1119]

Indeed, the High Court during the Mason era saw the failed joint venture principle adapted to de facto situations in *Muschinski v Dodds*[1120] and *Baumgartner v Baumgartner*,[1121] confirming the constructive trust had, in Australia, moved away from traditional English principles. Similarly, the courts have recognised a 'special wives' equity' in response to particular situations where wives have 'agreed' to guarantee their husband's debts.[1122] The principle means that a wife who provides security in support of her husband's debt may be able to avoid that contract if she can show that she misunderstood the transaction in some way and that she did not receive adequate explanation of the transaction by the lender.[1123]

This 'special equity' is based on the principle that a relationship of trust and confidence exists between the guarantor and the borrower, and the creditor has knowledge of this relationship. It is not heretical, therefore, to suggest equity respond to the recognised legal-situational vulnerability of the parent as a matter of policy and principle. To create a new, or at least an

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[1117] *Butler v Fairclough* (1917) 23 CLR 80, 90 (Griffith CJ). *Grgic v Australia & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.
[1118] And arguably common intention constructive trust, although this is rare as parties rarely have an intention to share the property; rather, there is an agreement for care and to provide accommodation.
[1119] Justice Michael Kirby, 'Overcoming Equity's Australian Isolationism' (2009) 3 *Journal of Equity* 1.
[1120] *Muschinski v Dodds* (1985) 160 CLR 583.
[1121] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[1122] *Yerkey v Jones* (1938) 63 CLR 649, affirmed in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. The 'special position' of the wife is born out of her lack of understanding and the absence of any benefit derived from the transaction.
[1123] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

adapted, cause of action, in circumstances where an arrangement has been made where assets are transferred in exchange for the promise of care and/or accommodation, and that promise is not fulfilled or the arrangement fails, so that the adult child is (arguably) liable to return the contributions would eliminate the doctrinal issues that arise from applying principles drawn by analogy. A specific cause of action would allow a body of law and precedent to be developed with consideration of the 'Gordian knot' of issues that accompany FAAs. It would allow an older party to challenge the title of the adult child and place the onus on the child as registered proprietor to justify the retention of the title. The wrong that would establish the cause of action would be the unfulfilled condition subsequent to the transfer of the assets – namely, the provision of care and accommodation. Any change to the law is, however, dependent on the will of the courts to develop a new cause of action in response to these growing situations. In light of the inherent conservatism of courts to take these steps, the best way forward may be to develop a legislative response. This is discussed in detail in Chapter 8 'Legislative Reform: A Statutory Cause of Action'.

VI CONCLUSION

In the event of the failure of a FAA, the parent is at a significant disadvantage with respect to their legal position. The extent of their legal-situational vulnerability was discussed in Chapter 4. This chapter explores legal reforms aimed at ameliorating that vulnerability and strengthening the parent's legal position and considers a combination of approaches, from judicial activism to legislative changes The suggested reforms vary in their approaches – from expanding existing obligations owed to parent or donors, to re-thinking property law principles, re-evaluating doctrinal principles that rely on accepted normative assumption about the family, particularly the parent/child relationship, or creating new causes of action.

While each of the suggested reforms target a specific area of vulnerability, it is acknowledged they do little to address the primary sources of systemic vulnerability experienced by the parent – the complexity of the substantive law and the procedural challenges posed by the current forum. Augmenting the legal position of the parent could, however, have a deterrent effect or encourage parties to formalise agreements, which could lead to fewer disputes. However, disputes will still arise and without reforms aimed at improving access to justice, the parent in these circumstances will still be subject to systemic vulnerability. The following chapter is aimed at addressing those issues.

CHAPTER 8
RESPONDING TO VULNERABILITY: LEGAL REFORMS

> It can be accepted as a general proposition that most people come to NCAT [New South Wales Civil and Administrative Tribunal] because they have a problem and want that problem resolved … [h]ow the problem is resolved is less important to them than having it resolved quickly, at least expense and fairly.[1124]

> In the reformation of the common law… there is a point at which responsibility for change, no matter how much desired, passes to the legislature. The reasons for this are various and include the limitations of the judicial method, constitutional principle, the degree to which a particular doctrine in need of reform has become embedded in the legal landscape, the nature of the change that is desired and, importantly, the demonstrated preparedness of Parliament to concern itself in common law reform.[1125]

I INTRODUCTION

This chapter examines proposals for reform of the present law and procedures in relation to family accommodation agreements (FAAs). It critiques and develops the recommendations made by the Australian Law Reform Commission (ALRC) in relation to FAAs.[1126] In that report, the ALRC recommended that 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement'.[1127] This chapter adds to those recommendations by interrogating the scope of the jurisdiction, being informed by how the reforms would address the vulnerabilities identified throughout this thesis.

While appreciating that before the enactment of any statute a detailed interrogation of all aspects of the legislation must be carried out to ensure alignment with policy rationales and to

[1124] Robertson Wright, 'A New Approach to Civil Disputes' (Speech delivered at the Alternative Dispute Resolution Forum, Newcastle, 12 August 2016) 11–2 [33]; NSW Civil and Administrative Tribunal, *Administrative and Equal Opportunity Occupational Division Guideline — Resolution Processes*, August 2017, 2 [4] and [102].
[1125] Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 22.
[1126] ALRC Final Report (n 19).
[1127] Ibid Recommendation 6-1.

minimise the incidence of unforeseen outcomes,[1128] including human rights infringements,[1129] the focus of this chapter is quite specific. It is confined to those key features of the proposed new jurisdiction that target the examples of situational and systemic vulnerability previously identified in this thesis.[1130] Tying these reforms to the conceptual framework of vulnerability, these reforms would constitute action by the state to create alternative structures that will strengthen or create resilience on the part of the older parent, or indeed (if the presumption of advancement was removed), remove sources of vulnerability altogether. The reforms comprise two limbs; first, that tribunals are given jurisdiction to hear failed family accommodation disputes, and, secondly, the existing law be replaced with a simplified legislative framework enacted specifically for FAAs. Together, the dual reforms modify the systemic issues that create access to justice challenges. Within the scope of the legislation, specific doctrines that have developed over time, but that in the context of FAA are found to cause an 'imbalance' in legal opportunity and thus generate legal-situational vulnerability, can be addressed or removed to facilitate the timely resolution to disputes.

In looking at these key features, regard is given to any existing legislation relevant to FAAs – for instance, the *Social Security Act 1991* (Cth)[1131] – to avoid, as far as possible, any inconsistencies. Legislation including the *Property (Relationships) Act 1984* (NSW) and other State's equivalents can also offer guidance as it concerns the division of property in intimate relationships and takes into account financial and non-financial contributions.[1132] Other legislation, such as the *Retail Leases Act 1994* (NSW) and its equivalents, and the *Competition and Consumer Act 2010* (Cth), provide examples of how the statutory equivalent of common law equitable principles (unconscionable conduct) are incorporated into statute in specific contexts and can offer assistance in how the respective conduct of the parties could impact the outcome.[1133]

[1128] Some time ago, Sir Owen Dixon pessimistically opined that 'nothing which you attempt to do in the way of law reform seems to operate quite as you supposed it would': Dixon, 'Response to KO Shatwell' (n 666) 341.
[1129] *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[1130] For an examination of the breadth of these inquiries see Tyrer, 'A Proposal' (n 31).
[1131] Although the *Social Security Act* has a different purpose from the present, there should be some alignment of concepts. For instance, regard should be given to the definition of a 'granny flat interest': *Social Security Act 1991* (Cth) ss 12C(2), (3).
[1132] While each state has an equivalent of the *Property (Relationships) Act 1984* (NSW), the New South Wales legislation will be used as an example. Other State and Territory legislation include *Domestic Relationships Act 1994* (ACT); *Domestic Partners Property Act 1996* (SA); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic).
[1133] *Leases (Commercial and Retail) Act 2001* (ACT); *Business Tenancies (Fair Dealings) Act 2003* (NT); *Retail Shop Leases Act 1994* (Qld); *Retail and Commercial Leases Act 1995* (SA); *Australian Consumer Law (Tasmania) Act 2010 Pt 4* (Tas) and *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas); *Retail Leases Act 2003* (Vic); *Commercial Tenancy (Retail Shops) Agreements Act* 1995 (WA).

Ideally, participation by people who stand to be affected by law reform enables change to be informed and ensures more responsive and effective law.[1134] Consequently, a more robust framework for this legislation would ideally incorporate an opportunity for community consultation and allow a process for participants to articulate their legal needs.[1135] Time constraints, along with limitations imposed by COVID-19 outbreaks and subsequent lockdowns, prevented the undertaking of qualitative research for this thesis. Therefore, the chapter will rely on existing literature and case law that expose the primary focus of the legislation.[1136]

New legislation concerning FAAs would be enacted at the State level as there are constitutional limits on the ability of the Commonwealth to legislate (except if the matter comes within the jurisdiction of the *Family Law Act 1975* (Cth)). This reinforces the desirability of a co-ordinated national scheme to prevent, or at least minimise, any inconsistency between States. Both the former de facto property legislation and the *Property (Relationships) Act 1991* (NSW) and its counterparts have been critiqued for the lack of uniformity across the States.[1137] Commentators have observed that the eight statutes across Australia contain inconsistencies concerning the types of relationships covered by the statute, the requirement of registration of the caring arrangement, and the matters the court may have regard to when exercising its discretion to distribute property. A lack of consistency in state legislation concerning FAAs could lead to similar injustices and diverse outcomes.

The chapter will be structured as follows. Part II will discuss the advantages and disadvantages of tribunals being the decision-making bodies in FAA disputes. In assessing the merits of the forum through the lens of the older person's vulnerability, it examines how the forum can respond to the three main challenges for the parent associated with bringing a claim in the Supreme Court; formality, cost, and the time involved for actions to proceed through to finalisation. It will also discuss the role of alternative dispute resolution in tribunals, and whether alternative dispute resolution (ADR) processes can further assist the older litigant.

[1134] Natalina Nheu and Hugh McDonald, *By the People, For the People? Community Participation in Law Reform* (Law and Justice Foundation of NSW, 2010) <http://lawfoundation net.au/report/lawreform>.

[1135] A research grant was awarded to the author to collect data concerning experiences of participants who had sought legal advice on family accommodation arrangements. Due to COVID-19 the research had to be paused but will recommence at a future date.

[1136] The British Columbia Law Institute (BCLI) compiled a 'Consultation Paper', published in 2001. The consultation process involved feedback from legal professionals, estate planners, notaries, seniors' organisations, seniors' counsellors, and advisory committees. The information drawn from this process informed the final recommendations of the Institute: see BCLI Report (n 32) 5. The information gleaned from this consultation process will also inform the approach taken in this chapter.

[1137] Lindy Willmott, Benjamin P Mathews and Greg Shoebridge, 'Defacto Relationships Property Adjustment Law – A National Direction' (2003) 17(1) *Australian Journal of Family Law* 1; Barkehall Thomas, 'Care-givers and Property Claims' (n 549); Barkehall Thomas, 'Practitioner Attitudes to Caring Relationships' (n 933).

While allowing tribunals the power to resolve these disputes may not be a panacea for all the issues raised by this thesis, it is argued that the removal of significant barriers to dispute resolution would logically enhance access to justice and address an important legal need. Nonetheless, enlarging the jurisdiction of tribunals to include FAA disputes would increase the work of the tribunal, and this burden necessitates making appropriate resources available.

Part III will explore the scope of the second limb of reform and examine how the enactment of a new statutory scheme might best address both situational and systemic vulnerability. It will address the primary questions regarding what is necessary to fulfil the requirements of a FAA, which in turn informs the question of standing. Interrogating the policy behind the legislation against the backdrop of vulnerability to determine who and what situations come within the scope of the legislation, and what circumstances it is designed to target enables the legislation to perform its function.

Part IV then looks at the powers given to the tribunal to resolve disputes. It examines the decision-making process in accordance with the overarching requirement of being 'just and equitable'. To determine to what extent the tribunal should incorporate equitable concepts into its decision-making, judicial statements concerning the meaning and application of the term, and examples such as s 21 of the *Australian Consumer Law* and the *Retail Leases Act*, where equitable concepts of 'unconscionability' have been embedded into statutory schemes, will be considered.[1138] Drawing on other statutes such as the *Property (Relationships) Act* and the *Family Law Act*, as well as the recommendations of the British Columbia Law Institute (BCLI), this section will evaluate those matters that should be taken into consideration by the tribunal when coming to a 'just and equitable decision, and the possible remedial outcomes available to the tribunal.

Finally, Part V examines how the enactment of specific legislation addressing family accommodation disputes will address the systemic and legal-situational vulnerability experienced by the parent.

II ARE TRIBUNALS THE APPROPRIATE FORUM?

Tribunals are decision-making bodies of limited jurisdiction created by State and Commonwealth legislation.[1139] According to the ALRC, the term 'tribunal' 'is most often used to describe a body which is not a court but carries out a mix of judicial or quasi-judicial

[1138] And State and Territory equivalents: see n 1099 above.
[1139] Being creatures of statute, their jurisdiction, powers, and obligations are determined by the governing legislation.

tasks'.[1140] Since their inception in the mid-1970s, tribunals have become an integral part of the Australian justice system. More recently, 'super' or 'hybrid' tribunals have been created in every Australian State and Territory.[1141] The super tribunals absorbed a number of smaller tribunals, and have jurisdiction over a wide range of administrative, civil and commercial disputes. Their jurisdiction is conferred by originating legislation.[1142] This wide-ranging jurisdiction means that a significant number of matters have been moved from the jurisdiction of courts to that of tribunals.[1143] Their informal, discretionary and inquisitorial mode of operation distinguishes them from the more formal adversarial proceedings of a court, and they are characterised as providing accessible, speedy and inexpensive justice.[1144]

The purpose of this section is not designed to undertake an in-depth analysis of the functionality of tribunals, as to do so is beyond the scope of this thesis. Indeed, the stated *raison d'être* of the tribunals – providing outcomes that are just, quick, and cheap – raises significant questions as to how these outcomes are to be achieved. As Ransome has observed:

> We need to recognise the complexity of trying to assess whether tribunals are actually usable. The criteria are complex and different interests will articulate them differently. As we've seen, for some the speed of the proceedings and the prompt delivery of the decision are fundamental qualities. Others say that the most important thing is that the outcomes must be correct – that decisions must be legally sound and understandable. Many consider that treating people with dignity and respect is a priority, as is the independence of the tribunal. Some people say that a tribunal cannot be actually usable unless the tribunal is accessible to all those who may need its services.[1145]

[1140] Australian Law Reform Commission, 'Review of the Adversarial System of Litigation: Federal Tribunal Proceedings' (Issues Paper 24, 1998) 19.

[1141] The Victorian Civil and Administrative Tribunal (VCAT), the Western Australian State Administrative Tribunal (SAT), the Queensland Civil and Administrative Tribunal (QCAT), the New South Wales Civil and Administrative Tribunal (NCAT), and the South Australian Civil and Administrative Tribunal (SACAT)); the Tasmanian Civil and Administrative Tribunal (TASCAT) and in the territories (the Australian Capital Territory Civil and Administrative Tribunal (ACAT) and the Northern Territory Civil and Administrative Tribunal (NTCAT)). See also Robyn Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26 *Australian Journal of Administrative Law* 206.

[1142] For example, established in 2014, the NSW Civil and Administrative Tribunal (NCAT) replaced 22 existing tribunals. Across its four divisions (Administrative and Equal Opportunity, Consumer and Commercial, Guardianship and Occupational), NCAT determines disputes in a diverse range of areas such as discrimination, consumer claims, guardianship, dust diseases, tenancy disputes and professional disciplinary matters.

[1143] 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, 245.

[1144] *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 [23]. See also Council of Australasian Tribunals, 'Australia and New Zealand Tribunal Excellence Framework' (June, 2017): Tribunals_Excellence_Framework_Document_2017_V4.pdf (coat.asn.au).

[1145] Kay Ransome, 'The Effectiveness and Efficiency of Administrative Law: The Tribunal Perspective' (2008) *Australian Institute of Administrative Law Forum* 68, 70.

Consequently, this chapter will discuss those aspects of the current forum that have been previously identified as preventing an older person in a failed FAA from accessing the courts, and how tribunals might ameliorate those challenges.

Chapter 5 of this thesis detailed the features of the Supreme Court jurisdiction that impeded accessibility and discouraged people from seeking redress in courts. The inaccessibility of the court is one source of systemic vulnerability experienced by parents. Conversely, the characteristics that distinguish tribunals from courts make them a more suitable forum to hear family accommodation disputes. Clearly, the objective of having tribunals hear family accommodation disputes is to minimise those obstacles that inhibit people from seeking an enforceable legal outcome and thereby enable a greater number of people to access the justice system. While outcomes will vary depending on the individual circumstances of each case, an enforceable ruling could mean the recovery of property that would allow a parent to 'start afresh' and, importantly for governments, reduce reliance on the public purse.

As FAAs are created between either family members or people in close personal relationships, ideally the forum in which the dispute is resolved should accommodate and be responsive to the personal, cultural, social and economic circumstances of the parties, as well as their legal positions. This 'responsiveness' is reflected in the in the enabling legislation of each civil and administrative tribunal. For instance, s 3 of the *Civil and Administrative Tribunal Act 2013* (NSW) specifies the tribunal functions are to be accessible and responsive to the needs of all its users, to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and to ensure that the decisions of the tribunal are timely, fair, consistent and of a high quality. Each state tribunal has similarly expressed aims.[1146] The underlying philosophy embodied in these objectives allows tribunals to adapt their proceedings according to the needs of the parties. Being unconstrained by strict rules of procedure and evidence allows tribunals to operate in a more inquisitorial manner and arrive at a decision personalised to the parties' circumstances.[1147]

[1146] *Victorian Civil and Administrative Tribunal Act 1998* s98(1); *ACT Civil and Administrative Tribunal Act 2008* s7; *Queensland Civil and Administrative Tribunal Act 2009* s3; *State Administrative Tribunal Act 2004* (WA) s9; *South Australia Civil and Administrative Tribunal Act 2013* s8; *Northern Territory Civil and Administrative Tribunal* Act 2014 s10; *Tasmanian Civil and Administrative Tribunal Act 2020* s10.
[1147] Tribunals are, however, required to adhere to the rules of natural justice: see below at p235. See also Mathew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 181–2 and Duncan Wallace, 'The Victorian Civil and Administrative Tribunal and the Rules of Evidence' (2018) 25(3) *Australian Journal of Administrative Law* 171.

Nonetheless, tribunals are not a complete solution to the access to justice challenges discussed throughout this thesis. In some instances, the very features that play a role in the tribunal being 'quick and cheap' may compromise the 'just' outcomes. Parties who are not legally represented may achieve less successful outcomes,[1148] particularly if there is a reluctance to confront family members. The Law and Justice Foundation found that some older people did not find the legal process 'empowering' and, without assistance, may choose not to proceed.[1149] Further, the 'no cost' jurisdiction removes any deterrent effect, although the tribunal does retain the power to award costs in specific circumstances.[1150] A lack of resources and backlogs mean many hearings are held over the phone. In circumstances where the parties are still living together, having the family member who is party to a dispute present during such calls can cause problems for an elderly person.

A *Formality*

In Chapter 5, it was noted that 'formality and the intimidating nature of court processes were aspects specifically identified by the Law and Justice Foundation as being a disincentive to older people achieving court-based resolutions'.[1151] In that chapter, the sources of formality associated with the Supreme Court jurisdiction were identified as arising from the court's procedures, and its adversarial environment.[1152] Tribunals, on the other hand, are obliged to act 'with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms'.[1153] The term 'equity and good conscience' has no fixed legal meaning independent of the statutory context in which it was used.[1154] For instance, there is no discovery process or affidavit evidence, and tribunals have the freedom to depart from the laws of evidence.[1155] As

[1148] However, see contra: Bertus de Villiers, 'Self-represented Litigants and Strata Title Disputes in the State Administrative Tribunal: An Experiment in Accessible Justice' (2014) 24(1) *Journal of Judicial Administration* 30
[1149] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 37.
[1150] See eg *Civil and Administrative Tribunal Act 2013* (NSW) s 60.
[1151] Chapter 5, Part III(B)(3) citing Ellison et al, *The Legal Needs of Older People* (n 63) 365.
[1152] Ibid.
[1153] See eg *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4). As to the meaning of the term 'equity and good conscience', Rees observes that: 'they do not authorise a tribunal to depart from the rules of substantive law which otherwise govern the case before it. They are not directives to decide all cases according to common sense notions of what is fair and just, they are not grants of power to depart from the rules of law in those cases where an application of those rules may produce a result which is unfair or unjust, and they are not grants of jurisdiction to apply the principles of equity. They may permit a tribunal to excuse compliance with some matters of procedure.' Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 60. See also John Keogh, 'The Duty to Act with Equity and Good Conscience' (1998) 36(8) *Law Society Journal* 59; *Russito Pty Ltd v Rosso* (1993) 173 LSJS 14 (Noblet J).
[1154] *Qantas Airways Ltd v Gubbins* [1992] 28 NSWLR 26, 29.
[1155] Rees (n 1153) 50.

Hill J has explained, '[t]he criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance'.[1156]

Similarly, there is no right for a person to cross-examine a witness. The tribunal may choose to draw on its own expertise and experience when assessing information.[1157] Aspects of pre-trial procedure, and even tribunal hearings, may be conducted by telephone or video conferencing, or entirely on the basis of written submissions.[1158] One advantage of this flexibility is that the tribunal can conduct itself with the level of formality that is appropriate for the matter being heard. For instance, an unwillingness to engage in conflict, particularly with family members, can contribute to a reluctance to engage in legal proceedings. The informality of the tribunal process, along with ADR procedures may go some way towards ameliorating this reluctance. That is not to say that procedure is abandoned. Tribunals cannot operate with unfettered discretion and so must still observe natural justice and procedural fairness.[1159] The challenge is balancing adherence to the tenets of procedural fairness and natural justice with the aim of delivering outcomes that are 'quick, cheap and just'.

Examples of procedural fairness might include that reasonable notice be given of a hearing and of the matters that are in issue so that participants have time to adequately prepare for a hearing.[1160] As McDermott and Meyerson observe, people care deeply about procedural matters in formal legal settings, but also in informal ones. They state that

> when people are treated in ways that they experience as procedurally just, this has beneficial effects. The perception of just treatment sends a message of social inclusion, enhances self-respect, promotes satisfaction with and willing compliance with the outcomes that are ultimately reached, and fosters a perception that legal institutions are legitimate.[1161]

The requirement that parties represent themselves contributes to the informality of tribunal proceedings.[1162] As litigants are self-represented litigants, there is a much greater emphasis on providing information to parties prior to their arrival at the hearing room, simplicity of forms and procedures, and an increased reliance on the skills and conduct of tribunal members, who

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[1156] *Casey v Repatriation Commission* (1995) 39 ALD 34, 38 (Hill J).
[1157] *Chief Psychiatrist and A (Mental Health)* [2011] ACAT 21 [8].
[1158] In 2020–21, there were 88,431 NCAT hearings held across NSW. Almost all matters were heard remotely via telephone or video conference due to the COVID-19 pandemic: *NCAT Annual Report 2020-21*, 20.
[1159] *Chief Psychiatrist and A (Mental Health)* [2011] ACAT 21 [4].
[1160] Ibid [5].
[1161] Therese MacDermott and Denise Meyerson, 'Australian Tribunals and Alternative Dispute Resolution: A Procedural Justice Perspective' (2018) 37(4) *Civil Justice Quarterly* 443, 445.
[1162] *Civil and Administrative Tribunal Act 2013* (NSW) s 45. The absence of legal representatives also keeps costs down.

must ensure that proceedings are conducted fairly.[1163] Appearing without the benefit of legal representation can, however, be a two-edged sword. First, appearing in a tribunal without representation can be emotionally fraught, particularly when the parties to the dispute were once in a close personal relationship. Secondly, FAA disputes invariably involve property, and potentially large sums of money. Without the benefit of legal representation an older person may not be able to effectively participate in the tribunal proceedings.[1164] While the tribunal does have the power to grant leave to allow for a party to be represented by a solicitor, a better solution would be to have specialist members hearing FAA matters who have legal experience in property disputes and redistribution.[1165] Experienced members would allow all parties to receive the benefit of their expertise, and results would not be dependent on who was able to afford legal representation.

B *Cost*

Costs involved in litigation are a significant disincentive for many older people when considering challenging a FAA. In many cases, the parent may be retired or receiving a pension. Wealth that was held in property has, by the nature of the agreement, been transferred to the adult child. In some instances, the parent/donor may be eligible for legal aid; however, the applicant must meet quite stringent financial thresholds to be eligible.[1166] Alternatively Community Legal Centres specialising in elder law may be available to assist the more vulnerable.[1167]

The costs associated with taking a dispute to the Supreme Court were discussed in Chapter 5.[1168] In that chapter, it was noted that the Productivity Commission found that litigation in courts is generally the most expensive means for private parties to resolve their disputes. The (then) Chief Justice of the Western Australian Supreme Court noted that

> [t]he hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice,

[1163] Ransome (n 1145) 72.
[1164] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 365.
[1165] *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(b).
[1166] People who are neither wealthy enough to afford legal representation, nor impoverished enough to be eligible for legal aid have been termed the 'missing middle': Productivity Commission (n 271) 20.
[1167] Community legal centres are community-based not-for-profit organisations. They play a role assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid. As community-based organisations, they seek to embed their services within their communities, drawing on volunteers and pro bono services. Their primary focus is on civil (including family) law matters: Productivity Commission (n 271) 26.
[1168] Chapter 5 Part III(B)(2) 'Costs'.

> access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.[1169]

Costs incurred in litigation can include fees paid to solicitors, court fees and disbursements (such as fees to barristers and expert witnesses).[1170] Additionally, there is a risk of an adverse cost award. The elimination of representation and associated fees significantly reduces costs in tribunals. In the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal (NCAT), the filing fees are $52, or $13 for a 'reduced' fee. However, these fees increase to $277 ($69) if the disputed cost exceeds $30,000. As many FAAs involve considerable sums of money and can be complex, the fees involved could be at the upper end. Applications to the Guardianship Tribunal do not attract any fees.[1171] Any costs borne are at each party's own expense, although tribunals often have the discretion to award costs in certain circumstances. It is conceivable, therefore, that should any party require representation, and the tribunal finds the other party has acted 'unconscionably', costs may be awarded against the latter.[1172]

C *Time*

Most tribunals operate under a statutory regime requiring them to deal with matters quickly.[1173] Delays associated with litigation, and the consequent impact on a potential litigant, were discussed in Chapter 5. Delayed proceedings can have a financial impact – for instance, if the parent has money tied up in the property and only limited access to money until the conclusion of the dispute, it can prevent them from obtaining alternative permanent accommodation. Having litigation drawn out over a long period of time not only contributes to the expense, but also prolongs the emotional distress that people suffer. Emotional distress is exacerbated by the familial context, and there would be an understandable reluctance to spend the later years of one's life tied up in litigation.

While the lack of representation may mean more time must be taken by administrative staff and tribunal members assisting self-represented litigants, there is no empirical evidence to

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[1169] Productivity Commission (n 271) 6.
[1170] Ibid 118.
[1171] NSW Civil & Adminstrative Tribunal, *Fees at NCAT* <https://ncat nsw.gov.au/forms-and-fees/fees-at-ncat html>.
[1172] *Civil and Administrative Act 2013* (NSW) s 60. For a discussion of 'unconscionability' see below Part IV(2).
[1173] See eg *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d); *State Administrative Tribunal Act 2004* (WA) s 9; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b).

suggest that this increases the time for matters to be concluded.[1174] Additionally, almost all tribunals operate under legislation that encourages parties to use a range of ADR strategies before matters are heard, which further aims to expedite matters reaching conclusion. In the context of family accommodation disputes, the requirement to attend ADR could be incorporated in any enabling legislation. However, those procedures are subject to the reservations expressed below.

[1174] Richardson et al (n 643) 3.

D *The Role of Alternative Dispute Resolution (ADR)*

As explained above, ADR aims to resolve disputes before a matter comes to hearing. McDermott and Meyerson observe that ADR is often utilised in tribunals in order to achieve higher rates of settlements, thereby achieving savings in costs and time.[1175] Nonetheless, ADR, more so than a tribunal hearing, may present difficulties for older people. ADR does not always provide access to justice because its lack of procedural protections can result in injustice when it is undertaken by vulnerable disputants. ADR does not provide the same protections present in a tribunal hearing and can lead to unjust outcomes where parties have unequal bargaining power or unequal knowledge.[1176] The Law Foundation has observed that these processes may require participants to exhibit a certain level of self-confidence and ability to negotiate, and therefore may not be the most appropriate forum for older people. For many, 'the prospect of having to negotiate face-to-face with a party with whom they are in conflict may be too daunting'.[1177] In situations where the adult child has been the primary carer, issues of dependency, reliance and influence may need to be traversed. The family dynamic can be further complicated by issues such as abuse, physical and mental health needs, and the impact of any cognitive impairment.[1178] Therefore, the mediator would need to be aware of and address the balance of power issues which may present when an older person is one of the stakeholders.[1179]

E *Prospects and Wider Impacts*

Statutory tribunals are a hybrid of litigation and alternative dispute resolution designed to improve access, efficiency and open justice. While most statutory tribunals more closely resemble courts than ADR, the procedural shortcuts they take to aid access to justice and efficiency closely resemble ADR procedure. The relative efficiency and informality of statutory tribunals aim to increase the accessibility of justice to those who could not have afforded court proceedings.

[1175] MacDermott and Meyerson (n 1161) 446.
[1176] Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16 *International Journal of Law in Context* 108, 109.
[1177] Ellison et al, *The Legal Needs of Older People in NSW* (n 69) 365.
[1178] Ibid.
[1179] Barbara Blundell, Joe Clare and Mike Clare, 'Family Group Conferencing as an Additional Service Response to the Abuse of Older People in Australia' (2021) 74(3) *Australian Social Work* 307, 314.

Whether the proposed reforms would have these desired outcomes in failed FAAs is difficult to assess. Without empirical evidence, it is unknown how many matters would come before a tribunal that would otherwise have been left unresolved.[1180] However, we can gather some important insights from a comparative study looking at disputes before the local court in Waverley, New South Wales, and those coming before the Residential Tenancy Tribunal after it was given jurisdiction to hear residential tenancy disputes in 1991.[1181] Writing in 2006, Edgeworth recorded those matters that came before Waverley Local Court in selected years between 1971 and 1989, when the court had exclusive jurisdiction to hear residential tenancy disputes. These findings were then compared to selected years between 1991and 2001, when residential tenancy matters were heard by the tribunal. Edgeworth found the most 'striking' finding of the study was the number of matters being resolved in the tribunal compared to the local court – a sixfold increase. The author concludes that '[t]his explosion of disputes can only be explained by the introduction of the new forum and the growing willingness of parties to make use of it'.[1182] The findings also revealed that the range of matters being determined also changed. In the local court, matters were solely landlord-based (repossession), with no matters were brought by tenants. Under the jurisdiction of the tribunal, matters such termination orders were still resolved but, importantly, these was counterbalanced significantly by tenant-led applications (rental bond disputes, breaches, excessive rent applications and applications to re-hear matters). Again, Edgeworth observes that 'the obligations of both parties are coming under much closer scrutiny by the Tribunal than was ever the case under the old regime' which led to a tenant's capacity to have matters heard and allowed them to 'avail themselves of rights wholly unexercised before the former court regime'.[1183] In the context of residential tenancy, the reduced costs and minimal formality created a more accessible forum for tenants, thus servicing a much-needed legal need. These findings are cautiously encouraging for people involved in a FAA dispute. Should these outcomes be translated into the context of FAA disputes, it would have a significant impact on the number of disputes being heard and resolved.

If we assume the proposed reforms would allow more people to access the legal system for their disputes to be resolved, then that increase will itself have an impact on the volume of matters listed for the tribunal to hear. Without appropriate funding to cope with growing volumes, and training to ensure appropriate levels of expertise among those tribunal members

[1180] This issue is raised in the conclusion of this thesis as area that deserves further research.
[1181] Brendan Edgeworth, 'Access to Justice in Courts and Tribunals' (2006) 31(2) *Alternative Law Journal* 75.
[1182] Ibid, 76.
[1183] Ibid, 77.

listed to hear FAA disputes, there is a real risk that pressure on the tribunal process will create its own form of systemic challenges which would flow through to litigants.[1184]

One way of assessing the impact of a new jurisdiction would be to adopt the United Kingdom's Justice Impact Test (JIT). The Law Council of Australia (LCA) has proposed that Commonwealth Government departments adopt a justice impact assessment process to determine the potential impacts of proposed policy and legislative change.[1185] In the United Kingdom, the JIT is used as a tool used to assist policymakers to systematically consider the impact of government policy on the justice system, including legal aid, courts and tribunals, prisons, prosecuting bodies and the judiciary.[1186] Where there is a potential impact identified, the detailed assessment includes the quantification of the costs and benefits of potential outcomes and triggers consideration of alternative approaches with the aim of avoiding or minimising the impact on the justice system.[1187] The Ministry of Justice must agree with any policy proposal with a justice impact before it can be submitted for consideration by ministers.[1188] Legal Aid (Victoria) has proposed JITs be introduced to determine the impact new policy or legislative proposals have on legal aid funding.[1189] A JIT, or similar comprehensive investigation, would be necessary to determine whether the experience of the Residential Tenancy Tribunal would be replicated and, if so, what wider impacts this increase in dispute reaching the tribunal would have on costs, timing and quality of outcomes and experiences of parties to the dispute.

III JURISDICTION AND STANDING

The creation of a new jurisdiction will require the legislature to determine the scope of the jurisdiction – that is, what matters can be heard and who is able to bring matters before the tribunal. Determining and defining the boundaries of the jurisdiction will help avoid unintended situations falling within the scope of the jurisdiction that do not align with the overall policy objectives of the legislation. A threshold question is, therefore, whether the disputed

[1184] Volume of work adding to time pressures in tribunal hearings is already an issue: see Productivity Commission (n 271) 359–60.
[1185] Law Council of Australia, 'Justice Impact Assessments' (Policy Statement, September 2013) 2 <https://www.lawcouncil.asn.au/publicassets/136c7bd7-e1d6-e611-80d2-005056be66b1/1309-Policy-Statement-Justice-Impact-Assessment-Policy-Statement.pdf>.
[1186] Ministry of Justice, 'Justice Impact Test' (Guidance, March 2010) 3 cited in Victoria Legal Aid, Submission to the Access to Justice Review (March 2016) 73-4.
[1187] Ibid.
[1188] Ibid.
[1189] Victoria Legal Aid, Submission (n 1186).

arrangement meets the threshold criteria of a 'family accommodation arrangement'. This, in turn, raises questions concerning four distinct but overlapping parts: the definition of 'family' (and, indeed, whether a 'family' type bond is a necessary requirement); the structure of the arrangement; whether an agreement to 'care' is an integral feature; and whether the plaintiff needs to establish a 'right' in property. In a paradigm arrangement between an ageing parent and their adult child, these criteria will all be met.[1190] Nevertheless, it is submitted that any new jurisdiction should avoid being too prescriptive.

A *Jurisdiction Based on Relationship Between Parties*

1 *Family or Familial-type Relationship*

The Australian Law Reform Commission (ALRC) has stated that '[t]he tribunal's jurisdiction should be defined by the relationship of the parties, that is, a familial or "familial like" relationship'.[1191] While the preponderance of arrangements are made between parents and their adult children,[1192] the term 'family' is broad enough to include non-traditional arrangements across a range of cultural groups and communities, as well as relationships that can develop and change over time. The ALRC Report refers to the *Family Violence Protection Act 2008* (Vic) as legislation which defines family to include 'family-like' relationships and provides a valuable template for the purposes of the tribunal's jurisdiction.[1193] In addition to accepted definitions covering the parent/child relationship, ss 8(3)(a)–(i) list matters that may be considered when determining whether a person is a 'family member', with the proviso in sub-s (4) that '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'.[1194]

Confining the jurisdiction based on the relationship between the parties is, as conceded by the ALRC, 'novel'.[1195] The purpose is to target arrangements made where there is an expectation of trust, which, in turn, gives rise to an environment perpetuating the parent's vulnerability. Relying on a belief in the integrity of the relationship, or conforming to relationship norms based on family, cultural or gender roles, parents commonly fail to consider outcomes should the arrangement fail, and rarely do they take precautions to protect their financial or

[1190] Described in Chapter 2 Part III(B) "The Structure of the Family Accommodation Agreement'.
[1191] ALRC Final Report (n 19) [6.73].
[1192] BCLI Report (n 32) 6.
[1193] ALRC Final Report (n 19) [6.78].
[1194] See Chapter 2 Part III(C) 'Participants in Family Accommodation Agreements'.
[1195] ALRC Final Report (n 19) [6.74].

proprietorial interests.[1196] While the ALRC based its proposed jurisdiction on the finding of a familial-type relationship, it was not restricted by the age of the participants.[1197] Although arrangements are most commonly made between adult children, reaching a certain age (for example, 65) is not (and should not be) a criteria to establish standing. Conceivably, the jurisdiction would be available to anyone within the definition of 'family' that complies with the criteria as set out in section 8(3) Family *Violence Protection Act 2008* (Vic).

Another approach might be to remove the requirement of a 'familial' relationship. Section 12A(2) *Social Security Act 1991* (Cth) does not require any family relationship to establish a 'granny flat interest'. The interest is created when a person 'pays' for a life interest or right to accommodation for life, and the life interest or right to accommodation for life is in a private residence that is to be the person's principal home.[1198] In other words, the granny flat interest and the motivations for entering an arrangement can exist in relationships not deemed 'familial'.[1199] Determining whether the existence of a familial type relationship is necessary to having standing requires an interrogation of the policy underlying the legislation. Should the dispute resolution processes offered by the new jurisdiction be available to parties who enter an arrangement of convenience? For example, if an older individual enters into an accommodation arrangement with, say, a former colleague because of a need for accommodation and care, and the colleague agreed to the arrangement owing to the need for an injection of funds as they were unable to service a mortgage, it is unlikely the parties would satisfy the threshold for 'family' status and would therefore be excluded from accessing the jurisdiction. In these circumstances it would be anomalous for the arrangement to be recognised under the *Social Security Act 1991* (Cth) but for the parties to be prohibited from accessing the new jurisdiction should the arrangement fail.

Nonetheless, it is more likely that an arrangement with a person not coming within the definition of family or close personal relationship (as in the example above) would be subject to more scrutiny and formality, and parties are more likely to have sought legal advice than in agreements made with a family member. Hence, those entering arrangements 'at arm's length' would be less likely to find themselves burdened with vulnerabilities that arise as a result of the familial context.

[1196] As to what constitutes a 'relationship of trust' or an expectation of trust, see Kaspiew et al, *Elder Abuse National Research – Strengthening the Evidence Base* (n 140).
[1197] Cf Tyrer, 'A Proposal' (n 31) 217.
[1198] Australian Government, *Guides to Social Policy Law. Social Security Guide Version 1.291: 4.6.4.50 Granny Flats – Features, Rights & Interests* <https://guides.dss.gov.au/social-security-guide/4/6/4/50>.
[1199] Although it is acknowledged they would be rare.

For instance, the presumption against intending to be contractually bound, or the presumption of advancement, would not apply. Plaintiffs would not experience the same reluctance to resort to legal proceedings to recover assets or property. However, despite these arrangements being less common, and presumably be more formalised when they do occur, there is no reason arrangements made under these conditions should be excluded from the jurisdiction.

2 *Application to Deceased Estates*

Whether the new jurisdiction should apply to deceased estates arises for consideration in two circumstances. First, should the jurisdiction be available to family members to challenge a transfer made pursuant to a FAA after the death of the parent? Any transfer of property made under a FAA in exchange for accommodation and/or care will have a significant impact on the available assets to be distributed on the death of the parent. Increasingly, post-mortem claims in estoppel, undue influence and unconscionable conduct are being made by family members in estate litigation, in order to set aside *inter vivos* transactions and enlarge the available assets for distribution to beneficiaries.[1200] Therefore, if the parent dies, family members might wish to commence an action based on the grounds that a transfer was made under vitiating circumstances, or, if the death of the parent occurs prematurely (for instance, before any substantial care or accommodation can be provided), that the adult child has received a windfall on the basis of a failed joint venture.[1201] The danger in allowing these actions to commence under the new jurisdiction is that the ease of bringing a claim potentially opens the floodgates, exposing the tribunal to claims by family members who believe they have been wrongfully disinherited. The BCLI proposed that 'only the transferor or the transferee should be empowered to bring an application …. This power would die with the transferor, and not be available to the estate (the rules of the common law and equity would continue to apply after the death of the senior).'[1202] There is merit to this approach, in that the vulnerability that occurs because of the characteristics of the older person and the context of the FAA do not arise. Allowing claims by family members on behalf of the estate of the parent derogates from the policy concern underpinning the jurisdiction, which is to enhance access to justice for the individual who has parted with their assets in the context of a close personal relationship. If family members were not able to commence an action under the new legislation, they would still have the option of proceeding under the current regime, bringing an action in the Supreme Court.

[1200] Hamilton and Cockburn (n 760) 439.
[1201] *Muschinski v Dodds* (1995) 160 CLR 583.
[1202] BCLI Report (n 32) 23.

The second situation arises in the event of the death of the adult child. Having transferred assets for the promise of accommodation and/or care, should the parent be able to claim against their child's estate should the adult child predecease them? In this situation the estate is standing in the place of the adult child, who has not, or is unable, to fulfil the promise of accommodation and care. Therefore, if the parent has standing to commence an action against the adult child, when the property passes to the child's executor the executor will be duty bound to recognise the equity of the parent. In many cases, the adult child holds the property as a joint tenant with a spouse. In these circumstances, the claim would be made against the surviving spouse. Nonetheless, in the event that the property devolved to a third party unrelated to the agreement (a bona fide purchaser), the purchaser takes the property free of any prior equities.

B *Defining the 'Arrangement' in a 'Family Accommodation Arrangement'*

This section examines the various aspects of the FAA to determine the criteria necessary for the arrangement to fall within the definition of a 'family accommodation arrangement', thereby allowing the parties to bring an action under the new jurisdiction.

1 *The Transfer of 'Property' in Exchange for the Promise of Accommodation*

It has been noted that a FAA can take many different forms, depending on the circumstances and needs of the parties involved.[1203] The distinguishing features of FAAs are the transfer of property (with the recipient gaining the associated advantages and benefits of that transfer) for a promise of accommodation, or accommodation and care. It is the reciprocal nature of the arrangement, and the resulting depletion of the parent's assets, that distinguishes a FAA from an *inter vivos* gift, and places the older person in a position of legal and personal vulnerability.[1204] The transfer of 'property' in exchange for accommodation in a FAA aligns with the definition in s 12 *Social Security Act 1991* (Cth), and the examples provided by government information websites.[1205] Guidance on what constitutes property can be sought from the *Property (Relationships) Act 1984* (NSW), which states that property includes

> real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for

[1203] See Chapter 2 Part III(B) 'The Structure of the Family Accommodation Agreement'.
[1204] Whether the transfer of property was a gift is often a point of contention: see *Flourentzou v Spink* [2019] NSWCA 315.
[1205] Australian Government, Services Australia, 'Examples of Granny Flat Interests' <https://www.servicesaustralia.gov.au/examples-granny-flat-interests?context=22526>, although the *Social Security Act 1991* (Cth) refers to 'valuable consideration' rather than 'property' or 'assets': see s 12(A)(2)(b).

> damages (including damages for personal injury), and any other chose in action, and any right with respect to property.[1206]

As discussed in Chapter 2, the property transferred is commonly real property, or the proceeds of sale of the parent's principal home; however, the transfer of other forms of property, such as superannuation or shares, would also suffice. If the property is not sourced from the parents' home and they remain in their own home, this raises the question discussed below – whether the transfer of property must be in exchange for accommodation and/or care.

2 *Commercial Relationships*

One further limitation on the jurisdiction of the tribunal suggested by the ALRC was to exclude disputes involving commercial properties or family farms, thus limiting the tribunal's power to matters concerning residential property.[1207] The Commission reasoned that in order to conform with the aim of achieving a faster and more cost-effective process, 'more commercial arrangements are better suited to formal adjudication through the courts'.[1208] There is certainly merit to the argument that a higher court is a more appropriate forum to hear complex commercial arrangements. There may, however, be some difficulty in distinguishing commercial from non-commercial disputes, particularly where smaller family farms are involved, or, for instance, where a residential home mortgage is attached to a business. Indeed, if the commercial aspect is not especially complex, having the matter heard by a higher court may not be justified. One possible solution to this dilemma is to have FAA disputes heard at first instance in the tribunal but to grant the tribunal power to refer matters to the Supreme Court in circumstances where the primary goals of being 'just, quick and cheap' would be compromised.[1209]

3 *Does the Transfer of Property Need to Be for 'Accommodation'?*

Should the provision of accommodation by the adult child be a necessary component for the establishment of a FAA? The jurisdiction suggested by the BCLI specifies the transfer of assets for the provision of care, rather than accommodation, is the targeted conduct of the arrangement (although the report does recognise that the property transferred is commonly the senior

[1206] *Property (Relationships) Act 1984* (NSW) s 3(1)
[1207] ALRC Final Report (n 19) [6.51].
[1208] Ibid.
[1209] Similar provisions can be found in the *Property (Relationships) Act 1984* (NSW) allowing the local court to transfer proceedings to either the District or Supreme Court, if the matter is found to be beyond the jurisdictional limit of the Local Court: s 12. See also *Property Law Act 1958* (Vic) s 234E: 'Nothing in this Division prevents VCAT from referring a matter to the Supreme Court or the County Court under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.'

person's principal place of residence).[1210] Nonetheless, it would be possible for assets to be transferred for care, outside of any arrangement to provide accommodation for the transferor. For example, a parent could transfer a sum of money or property (not their principal place of residence) as consideration for care to be provided in their own home. While this example is not the typical structure of a FAA, it is conceivable that these arrangements may occur from time to time. This poses a conceptual difficulty and highlights the need for an interrogation of the policy behind the jurisdiction. While this arrangement would be an 'asset for care' arrangement, it would not comply with the definition of a 'granny flat interest' under the *Social Security Act* 1991 (Cth), which requires the exchange of consideration to be for a life interest or a right to accommodation in a place of residence.[1211] On one hand, one (and arguably the most important) source of vulnerability stems from the removal of secure accommodation –in both the physical sense of 'house' and 'home' in the ontological sense.[1212] However, including such arrangements within the remit of the new jurisdiction is possible as it would capture those people who might still suffer loss of assets along with the non-fulfilment of a promise (to be cared for). As such, the transferor would still suffer associated legal and personal situational vulnerability, and access to justice barriers.[1213]

4 *Does the Transfer of Property for Need to Be for 'Care'?*

The flip side to whether 'accommodation is necessary is whether the provision of 'care' must be an essential part of the arrangement. As was noted in Chapter 2, the need for increased care as the parent ages is a common motivating factor for entering a FAA; therefore, this dimension to the arrangement will commonly be present.[1214] However, should the provision of care be a necessary component in establishing whether the parties have entered a FAA for the purposes of standing? First, what constitutes 'care' needs to be defined. As mentioned above, the BCLI report makes the transfer of assets for the provision of care, and not accommodation, the critical component in the agreement.[1215] 'Care' is not defined but includes the 'provision of assistance and support', so is broad enough to cover a range of circumstances.[1216] Similarly, s 5 of the *Property (Relationship) Act 1984* (NSW) defines a 'domestic relationship' for the purposes of

[1210] BCLI Report (n 32) 22.
[1211] *Social Security Act 1991* (Cth) s 12(A)(2).
[1212] See Chapter 2, Part II, 'Significance of the Loss of 'Home'.
[1213] Some sources of vulnerability would not be present, for instance challenges associated with indefeasibility and caveats. Nonetheless, presumptions against families creating contract, and the presumption of advancement, stigma attached to legal challenges against children, would remain.
[1214] Chapter 2, Part III(D)
[1215] BCLI Report (n 32) 22. Presumably this could include eg physical, financial, emotional or spiritual support.
[1216] Ibid 23.

the Act as being 'a close personal relationship … between two adult persons … who are living together, one or each of whom provides the other with domestic support and personal care'.

A second inquiry relates to the recipient of care. In most situations, the parent would be the recipient of care (FAAs are commonly referred to as 'assets for care' arrangements). The BCLI proposals specify that care is to be provided *for* the transferor.[1217] However, in cases such as *Bennett v Horgan* the FAA was undertaken so that the parents could provide financial care and support, in this case for their adult daughter.[1218] Arguably, the BCLI approach would exclude parties in analogous situations to *Bennett*. To avoid this, it is suggested that the requirement of care not be explicit, or, alternatively, that it be expressed in general terms so the criteria could apply to either or both parties.

C *Defining the Jurisdiction by Reference to Property Rights*

In determining the scope of the tribunal's jurisdiction, the ALRC drew on the expanded jurisdiction of the Victorian Civil and Administrative Tribunal (VCAT) as a model. In Victoria, amendments made to the *Property Law Act 1958* (Vic) allow VCAT to make orders it thinks fit for the 'just and fair' sale of land or goods, or the division of the proceeds of property, and the monetary award available is uncapped.[1219] Section 228 *Property Law Act 1958* (Vic) states:

> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
>
> (2) Without limiting VCAT's powers, it may order—
>
> (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or
>
> (b) the physical division of the land or goods among the co-owners; or
>
> (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

[1217] See s 1 proposed legislation, BCLI Report (n 32) 22: 'Where the consideration for a disposition of property of any kind is, *in whole or in part, the provision of services for the care of the transferor*, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances including an order that…' (emphasis added).

[1218] *Bennett v Horgan* (1994) (unreported, Supreme Court, NSW, Bryson J, 3 June 1994). In this case the arrangement whereby the parents contributed funds for the purchase of property (title being put in their daughter's name) and a further amount to finance an extension so they could live in the property, was undertaken primarily to assist the daughter financially rather than to provide the parents with care.

[1219] The amendments followed a report tabled by the Victorian Law Reform Commission, 'Disputes Between Co-Owners' (2001) <https://www.lawreform.vic.gov.au/wpcontent/uploads/2021/07/DisputesbetweenCoownersfinalrep.pdf>.

The ALRC recognised that a significant limitation of VCAT's jurisdiction is that it only has the power to make orders in relation to disputes between co-owners of property.[1220] It has been established that 'co-ownership' includes both legal and equitable interests in the property. In *Garnett v Jessop*, the VCAT noted that 'land' under s 222 of the *Property Law Act 1958* (Vic) had the same meaning as it has in s 38 *Interpretation of Legislation Act 1984* (Vic).[1221] Section 38 provides that

> *land* includes buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.[1222]

The word 'any' preceding 'estate' was found to include both legal and equitable estates in land.[1223] Even without relying on the definition under s 38, the VCAT found that the ordinary meaning of the term 'co-owner' includes those persons with equitable as well as legal interests. Accordingly, the tribunal could not be limited by its lack of inherent equitable jurisdiction from considering a co-owner with an equitable interest, as the tribunal has been granted such jurisdiction by the statute.[1224] Nonetheless, FAAs do not commonly give rise to co-ownership, and the ALRC recognised the limitations of confining the jurisdiction to parents who could establish co-ownership.[1225] To capture the variety of accommodation arrangements, the ALRC recommended that 'any interest, either legal or equitable, in the parent's current or former principal place of residence would allow the parent to bring an action under the new jurisdiction'.[1226] Specifying an interest in either the current or former place of residence would capture most situations; however, it is conceivable that a parent could transfer assets not derived from real property to contribute to the new accommodation arrangement. Standing would therefore be determined on the equitable interest found in the disputed property.

Establishing an equitable interest in the disputed property can be problematic. An equitable proprietary interest may exist through the operation of either a resulting or common intention constructive trust; however, these types of interest require very specific fact situations to arise.[1227] More commonly, if a constructive trust is declared it will be a remedial constructive

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[1220] Section 225(1) *Property Law Act 1958* (Vic): A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.
[1221] *Garnett v Jessop (Real Property*) [2012] VCAT 156.
[1222] *Interpretation of Legislation Act 1984* (Vic) s 38.
[1223] *Garnett v Jessop (Real Property*) [2012] VCAT 156 [19].
[1224] See also *Hopkins v Hopkins and Anor (Real Property)* [2013] VCAT 414 [39] (Member P Eggleston); *Dawson v Gallant Valley Pty Ltd (Real Property)* [2008] VCAT 1183 [17] (MF Macnamara, Deputy President).
[1225] ALRC Final Report (n 19) [6.68].
[1226] Ibid.
[1227] See Chapter 6.

trust and, prior to the court declaring such a trust, the applicant may possess only a mere equity.[1228] A 'mere equity' was described by Kitto J in *Latec Investments v Hotel Terrigal* as a right ancillary to the recognition of an equitable interest.[1229] Put another way, a mere equity is recognised where a person is in a position to make a claim to a court of equity which, if successful, *may* entitle the person to an equitable proprietary interest in land, and is 'the first stage in a proprietary continuum'.[1230] The most common examples are the rights to set aside transactions for fraud, unconscionable conduct or undue influence,[1231] where proprietary estoppel is argued,[1232] or where a remedy is sought for the unconscionable retention of title based on a joint venture that has failed with no attributable blame.[1233] Whether the ALRC considered a mere equity sufficient to satisfy the requirements is unclear, although the term 'any' interest suggests a mere equity would be sufficient.

Following from this interpretation, it must be presumed the ALRC did not require the 'legal or equitable interest' to amount to a proprietary interest. There is some ambiguity in the terminology used, as the terms 'property interests' and 'interest in property' are used interchangeably. A 'property interest' would exclude a bare licence to reside, as licences are personal, contractual rights.[1234] However, an 'interest in property' could include a contractual licence to reside. As the latter is specifically contemplated, it is assumed the applicant need not establish a 'proprietary interest'. Adopting this approach means that the most fragile of interests in the disputed property would still give the parent standing. Similarly, allowing an interest in a former principal place of residence offers another opportunity to establish standing and removes any questions arising in circumstances where a person has forgone an interest in real property but cannot establish an interest in the new place of residence.[1235] One anomaly created

[1228] *LJ Carroll v LT Carroll* [2016] NSWSC 390 [24]; *Choi v Kim* [2013] NSWSC 1774 [5]; *Nguyen v Sage Consultant Group Pty Ltd; Dang v Nguyen* [2021] NSWSC 753 (Robb J); *Karabagias v Katopodis* [2021] VCC 1120 [135] (Burchell J). In *Dawson v Gallant Valley Pty Ltd (Real Property*) [2008] VCAT 1183, the Deputy President found the tribunal had jurisdiction to determine whether or not a constructive trust should be declared, although this determination was expressed 'with some hesitation' [18].

[1229] *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277–8 (Kitto J), although the categorisation is not always consistent: ibid 290–1 (Menzies J); *Commissioner of State Taxation of the State of South Australia v Cyril Henschke Pty Ltd* [2010] HCA 43.

[1230] Hepburn, 'Reconsidering the Benefits of Equitable Classification' (n 547) 158. see also Skapinker (n 547); *Shawyer v Amberday Pty Ltd (in liq)* [2001] NSWSC 399.

[1231] Young et al (n 327) [8.260].

[1232] *Giumelli v Giumelli* (1999) 196 CLR 101.

[1233] *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

[1234] In Victoria, if the older party can establish they have a life interest rather than a personal right to reside in the property, 4 2(2)(e) of the *Transfer of Land Act 1958* (Vic) confers a proprietary right in the property that is enforceable against third parties and may allow the older party to remain in the property: see *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373.

[1235] For example, if assets were sold and money transferred from the parent to adult child but that money was used for a purpose not related to the property, ie payment of a debt or school fees etc.

by this approach is that while the parent could bring an action in a disputed FAA on the basis of a mere equity or licence to reside, or an interest in a former place of residence, they may be unable to sustain a caveat over any property as, arguably, they do not have a proprietary interest.[1236]

IV RESOLVING DISPUTES- APPLICABLE LAW

In any proposal to grant tribunals the power to resolve settlements and award remedies, consideration must be given to the manner in which the tribunal exercises its power to provide a remedy.

A *ALRC RECOMMENDATIONS*

In its report, the ALRC considered what principles would be applied by the tribunal in determining the outcome of the dispute. They recommended that

> [t]he tribunal … 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.[1237]

It was envisaged that both financial and non-financial contributions be considered in the calculation of a remedy, including care provided by any party. Therefore:

> 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.[1238]

While the above notes that the tribunal would have a broader power to assess all contributions by either party, the ALRC argued 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.[1239]

[1236] *LJ Carroll v LT Carroll* [2016] NSWSC 390 [24]; *Choi v Kim* [2013] NSWSC 1774 [5]; *Nguyen v Sage Consultant Group Pty Ltd; Dang v Nguyen* [2021] NSWSC 753 (Robb J); *Karabagias v Katopodis* [2021] VCC 1120 [135] (Burchell J); Somes and Webb, 'What Role for Caveats' (n 31).
[1237] ALRC Final Report (n 19) [6.49].
[1238] Ibid [6.50].
[1239] Ibid [6.71]

There is some ambiguity as to whether the reference to 'equitable principles' refers to general principles mentioned at para [6.50] – that of awarding the most appropriate remedy that is just and equitable – or more specific doctrinal principles. [1240] The former is the most effective and likely interpretation. The difficulty with the latter approach is that requiring that the *availability* and *calculation* of equitable remedies be in accordance with equitable doctrinal principles raises the problem that the availability and calculation of equitable remedies will flow from specific causes of action. For instance, there are marked differences in the approach to awarding the minimum equity necessary under the failed joint venture approach, as opposed to expectation relief awarded in estoppel cases.[1241] Similarly, should the tribunal in calculating the appropriate remedy be required to assess the existence of vitiating factors such as duress, undue influence or unconscionable conduct? If so, this raises two primary concerns. First, this simply moves the already existing complex law from one forum to another. Secondly, without guidance concerning how and what principles are to be applied, tribunal members are left to navigate the complexities of equitable doctrine and deliver a just outcome, in the context of a forum that is designed to be quick and inexpensive.

B *Arriving at a 'Just and Fair' or 'Just and Equitable' Outcome*

The ALRC recommended that the tribunal have the power to award 'the appropriate remedy that is just and fair having regard to the financial and non-financial contributions of the parties'.[1242] There are several approaches available to policymakers to frame how the tribunal can conduct itself to achieve these outcomes.

1 *What Does 'Just and Equitable' Mean?*

A discretion to make 'just and equitable orders concerning property settlements occurs in several statutes. Section 20 of the *Property (Relationships) Act 1984* (NSW) provides that 'a court may make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them'.[1243] Section 79(2) *Family Law Act 1975* (Cth) states,

[1240] Whether specific equitable principles should be included in statutory form is discussed below in (B).
[1241] See Barkehall Thomas, 'Families Behaving Badly' (n 31).
[1242] ALRC Final Report (n 19) [6.50].
[1243] *Property (Relationships) Act 1984* (NSW) ss 20, 20(a).

in the context of making orders it considers 'appropriate' in property settlements: 'The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.'[1244] In *Stanford v Stanford*, the High Court discussed the meaning of the phrase 'just and equitable'. The Justices said that it was neither possible nor desirable to specify the 'metes and bounds' of the expression. The court must first determine the existing legal and equitable rights of the parties, and any alteration of the interests of the parties must rest upon the law and not be 'exercised according to an unguided judicial discretion'.[1245]

For the tribunal to arrive at a 'just and equitable' settlement, it is required to make a 'holistic value judgment in the exercise of a discretionary power of a very general kind'.[1246] Consideration must be given to the scope of arrangements that may occur, and the individual circumstances of each party. Guidance from decisions made under s 20 *Property Law (Relationships) Act 1984* (NSW) is a starting point. For instance, in *Evans v Marmont*, the majority of the Court held that in assessing what form of property order is just and equitable, the court should focus primarily on the types of contributions specified in s 20.[1247] The majority did, however, add that the Court could consider the parties' financial circumstances and their means and needs as secondary factors in determining what is just and equitable, as well as the length of the relationship, any promise or future expectations of marriage, and any opportunities lost by one party as a result of their contribution.[1248]

The nature of a FAA is not, however, entirely analogous to a de facto relationship, and it would be pertinent for any enabling legislation to outline, as a matter of guidance, what factors members should consider when assessing an appropriate 'just and equitable' remedy. In its Report, the BCLI proposed draft legislation with respect to, among other things, the way courts could resolve FAA disputes.

[1244] See also *Corporations Act 2001* (Cth) s 461(1)(k); *Motor Accidents Act 1988* (NSW) s 74(3); *Conveyancing Act 1919* (NSW) s 66M.
[1245] *Stanford v Stanford* (2012) 247 CLR 108, 120 [36]–[40]
[1246] McClelland J in *Davey v Lee* (1990) 13 FLR 688, 689 commenting on s 20 of the *Property (Relationships) Act 1984* (NSW).
[1247] *Evans v Marmont* (1997) DFC 95-184.
[1248] See also *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273 (Barrett J); *Thomas v MacKay Investments Pty Ltd* (1996) 22 ACSR 294, 302 (Owen J); *Saravinovski v Saravinovska* [2017] NSWCA 85 [169] (Emmett AJA); *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 (Lord Wilberforce); Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property Law: "Just And Equitable" Outcomes?' (2018) 32 *Australian Journal of Family Law* 81.

2 *Matters to Consider When Assessing a 'Just and Equitable' Outcome*

The Canadian Province of British Columbia is the only jurisdiction to investigate draft legislation regulating family accommodation disputes. In undertaking a comprehensive review of private care agreements, the BCLI aimed to provide balanced solutions to 'protect seniors from potentially harmful outcomes in a way that is fair to caregivers'.[1249] Its Report identifies the social context that that gives rise to the agreements, as well as reasons for their failure and the legal responses. These in large part mirror the Australian experience; hence, the BCLI Report provides valuable insights for the purposes of examining new legislation in Australia. There are, however, some differences to note. The Canadian Report is far more explicit in stating that the aim of any legislation is to achieve a just outcome for both parties, the receiver of care and the carer. While this is implicit in the ALRC Report, the recommendations are framed within a report on 'elder abuse'. It is suggested, therefore, that any Australian legislation, while addressing the issues of vulnerability experienced by the parent, do so in a framework that does not assume the existence of abuse.

The relevant parts of the draft legislation are brief and are set out in full below.[1250]

> 1. Where the consideration for a disposition of property of any kind is, in whole or in part, the provision of services for the care of the transferor, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances including an order that,
>
> (a) the disposition be set aside,
>
> (b) the transferee pay to the transferor an amount not to exceed the value of the property at the time the order is made,
>
> (c) the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made,
>
> (d) any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is no longer enforceable by the transferor,
>
> (e) security be provided for any payment ordered under this section.
>
> 2. Any order under section 1 must be made on such terms as appear fair having regard first to the interests of the transferor.
>
> 3. In exercising its discretion under this section, the Court must consider all of the circumstances including:
>
> (a) the circumstances in which the agreement was made;

[1249] BCLI Report (n 32) 4.
[1250] Ibid Recommendation #4, 22-23.

(b) the nature of the relationship between the transferor and transferee;

(c) the state of the relationship between the transferor and transferee;

(e) the nature of the care required by the transferor;

(f) the health of the transferee;

(g) the nature of the care provided by the transferee;

(h) the duration of any care provided;

(i) the value of the care that has been provided;

(j) any expenses incurred by the transferee;

(k) the ability, including the financial ability, of the transferee to continue to provide the care required by the transferor;

(l) the value of property at the time of the disposition and at the time of the hearing; and

(m) the terms of any agreement between the parties and the reasonableness of those terms.

4. For the purposes of sections 1 through 3, the provision of "care" includes the provision of assistance and support.

It is worth noting here that the BCLI is not an official law reform body; its status is that of an independent not-for-profit organisation, and to date these recommendations have not been implemented by the government of British Columbia.. Nonetheless, the above draft statutory provisions provide a valuable template for any potential Australian legislation. There are, however, several details of the jurisdiction not identified in the BCLI draft that would need to be addressed in the Australian context As discussed above in Part II 'Jurisdiction and Standing', the BCLI approach makes the provision of care an integral part of the existence of the agreement. Whether this approach places an unduly restrictive requirement on eligibility to bring an action is a question for policymakers to address. Secondly, there is scope for more specificity concerning inquiry into the circumstances in which the agreement was made. As outlined in Chapter 2, there are many reasons why families enter into a FAA.[1251] Unfortunately, some parents undertake transfers of property pursuant to undue influence or unconscionable conduct of the adult child. As such, there is scope within any new legislation to specifically incorporate a reference to behaviour that indicates evidence of unconscionable conduct or undue influence. Hence, evidence of such conduct would be a matter taken into consideration in determining a just and equitable remedy. The inclusion of 'statutory unconscionability' would not need to mirror the common law doctrine but could have a broader interpretation. For example, the *Australian Consumer Law* (ACL) (part of the *Competition and Consumer Act 2010* (Cth)) establishes a set of rights and obligations for businesses in their interactions with

[1251] Chapter 2 Part III(D).

customers and other enterprises. Sections 20–22 of the ACL cover the prohibition of unconscionable conduct. Similarly, the *Australian Securities and Investments Commission Act 2001* (Cth) also contains unconscionable conduct prohibitions that apply to financial product and service transactions.

Section 20 of the ACL mirrors unconscionable conduct as it is understood at common law.[1252] Statutory unconscionable conduct under s 21 is much broader than the general law.[1253] The section states that 'a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person or the acquisition or possible acquisition of goods or services from a person engage in conduct that is, in all the circumstances, unconscionable'. In determining what is 'unconscionable' it is not necessary to prove the weaker party was subject to a 'special disability' that was exploited by the stronger party. The Australian courts have found 'moral obloquy', rather than unfairness, must be established in order for conduct to be determined unconscionable,[1254] or that the conduct 'is against conscience by reference to the norms of society that is in question', and that '[n]otions of justice and fairness are central, as are vulnerability, advantage and honesty'.[1255] Similarly, State and Territory legislation governing retail leases incorporate provisions concerning unconscionable conduct, and provisions such as those contained in ss 21–22 of the ACL have been introduced into state retail tenancy legislation.[1256] Section 22 of the ACL lists a number of factors the court may take into consideration when determining whether conduct has been unconscionable.[1257] Clearly these factors reflect the commercial nature of the bargain. Nonetheless, equitable concepts, without being tied to specific doctrinal requirements of proof, are reflected in the matters that may be considered. For instance, s 21(2)(b) states the court may consider

> whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services.

In the context of legislation concerning family accommodation disputes and the tribunal's consideration of the 'circumstances in which the agreement was made', the inclusion of a requirement that the tribunal consider whether there was unconscionable conduct in the nature

[1252] *ACCC v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 49 (French J).
[1253] Eileen Webb, 'Land Law Transactions and the Australian Consumer Law' in Eileen Webb and M Stephenson, *Focus: Land Law* (LexisNexis, 2020) 142.
[1254] *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133
[1255] *Teddo Corporation Pty Ltd v Owners Corporation No 1* [2022] VSC 667 citing *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 [41].
[1256] Webb, 'Land Law Transactions' (n 1253) 440.
[1257] *Australian Consumer Law (Sch 2, Competition and Consumer Act 2010)* (Cth).

of ‘moral obloquy’ or undue influence on the part of either party, would inform the consideration of what was a ‘just and equitable’ outcome. [1258] These principles could develop independently in tribunals without distorting the common law doctrine and be used to supplement the very binary laws with respect to capacity.

C *Remedial Choices*

The ALRC proposed 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’.[1259] Clearly the remedial choices reflect the factual circumstances of the arrangement itself. The inquisitorial nature of the tribunal would be better suited to determine the context of the arrangement and satisfy itself of the appropriate remedy.

Subject to the reservations expressed above,[1260] remedies including monetary and proprietary orders should be available to satisfy the ‘just and equitable’ requirement. Orders such as declarations, setting aside (dissolving) agreements, awarding monetary compensation or enforcement or amendments of existing agreements should also be available under the legislation.

Particular attention should be given to the deprivation of the older person’s home and, if possible, monetary compensation to enable the person to ‘start again’. However, due consideration must be given to factors such as those outlined in the BCLI report, so that the contributions of both parties can be considered and allowance made for factors such as care provided. Proprietary remedies against disputed property may also be appropriate where contributions were made to the purchase of property and that property has since increased in value. Any proprietary remedy would constitute an exception to the adult child’s indefeasible title and should be expressly provided for in the enabling legislation.[1261]

V Addressing Specific Areas of Vulnerability

A *Systemic Vulnerability*

[1258] As an example, a FAA could fail because the parent has decided, after transferring assets, that they want to remarry, start life anew and consequently bring an action for a return of their contributions. Contrast this to a scenario wherein a parent is unduly pressured by an adult child to transfer assets owing to the child’s mortgage stress, and then demands the parent leave.
[1259] ALRC Final Report (n 19) [6.71].
[1260] See Part IV(A) above.
[1261] See s 42(3) *Real Property Act 1900* (NSW).

This chapter has addressed the main sources of systemic vulnerability identified in this thesis – that being the complexity of the present law applicable to FAAs, and the forum in which those matters are heard. As the ALRC stated, '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.'[1262] Introducing a statutory scheme specific to FAAs to be administered in tribunals means disputants will not be required to navigate the 'Gordian knot' of laws requiring specific matters to be proven. Once the plaintiff has satisfied the requirements of standing, the jurisdiction is open to them and it is unnecessary to prove specific doctrinal requirements of a cause of action – for instance, those required under either undue influence or unconscionable conduct. Drawing analogies with statutes such as the *Property (Relationships) Act 1984* (NSW) and the ACL, those matters may be considered in the final determination of the award. Further, the tribunal's aim of being 'quick, cheap, and just' would remove many of the obstacles that face litigants when commencing an action in the Supreme Court.

B *The Absence of Writing or Contractual Arrangement*

A source of vulnerability for the parent stems from the fact that, in many cases, the FAA is never formally documented. The informal proceedings of the tribunal and its inquisitorial method of gathering evidence allow it to recognise and substantiate agreements. In the event there is a written agreement, the tribunal can take the intentions expressed in the document into account when making a determination based on just and equitable considerations.

C *The Presumption of Advancement*

The presumption of advancement requires the parent to establish that the transfer of money to a child is causally connected to a reciprocal arrangement involving accommodation, and therefore should not be regarded as a voluntary gift. The ALRC declined to recommend the abandonment of the presumption generally, for fear of interfering with established equitable doctrine. However, it was acknowledged that under the proposed new jurisdiction, the breadth of the tribunal's powers meant the change would not be necessary.[1263] The reluctance to abandon the presumption has been consistently maintained in case law, with judges preferring to assess each case on its merits. More recently, the High Court decision in *Bosanac v*

[1262] ALRC Final Report (n 19) [6.20].
[1263] Ibid [6.72].

Commissioner of Taxation failed to remove the presumption from Australian law, but the court did indicate its purpose was diluted somewhat and the intentions of the parties were paramount.[1264]

While the presumption may be more easily rebutted when the child is an adult, the onus is still on the parent to do so. The lack of a formal agreement and opposing or inconsistent evidence of intention by disputing parties, can present challenges for the parent. Critically, the intention of the parent may in fact be that the transfer of assets constituted a gift, albeit a conditional one based on the expectation of care. However, the legislation offers the opportunity to have the arrangement assessed on its own merits without the need for the parent to rebut a presumption. As examined in Chapter 4, the basis of the presumption is obscure. If we assume the basis is an obligation to provide for a child, then while that may be a personal goal of an individual, that obligation as a familial or societal norm is questionable when the parent is elderly and the child an adult.

D *Determining the Nature of the Parent's Interest*

Under the new jurisdiction, by satisfying the requirements of standing, the need to determine the nature of the parent's interest would be eliminated. Once the party satisfies the requirements of standing, the jurisdiction is enlivened, and the remedy is informed by the circumstances required by the tribunal to determine a just and equitable remedy.

E *Caveats*

Given the unique circumstances created by a FAA and the resulting vulnerability experienced by the parent, there are justifiable reasons to allow a caveat to be lodged over disputed property. First, the caveat system is a practical vehicle to protect the interest of the parent in an FAA. A mechanism to lodge a caveat on the title upon entering an arrangement would provide a notice function to alert any potential third parties of the existence of the agreement or to prevent the sale of the disputed property until the matter is heard. Furthermore, such lodgement would provide protection in the event of a priorities dispute, as the failure to lodge a caveat on the part of the party first in time can be regarded as disentitling conduct. The ambiguity surrounding the status of the interest held by the parent is unnecessary. In the context of these often time-consuming, emotionally draining and expensive disputes, the removal of this

[1264] *Bosanac v Commissioner of Taxation* (2022) 405 ALR 424; [2022] HCA 34.

uncertainty would allow parties to protect their contributions and streamline procedures when anticipating disputes in what are becoming mainstream types of arrangement.

In any new legislation creating the new jurisdiction, specific reference to the parent having the capacity to lodge a caveat could be included. Further, it is suggested that guidance can be obtained from the provisions of s 12A(2) of the *Social Security Act 1991* (Cth) that define a 'granny-flat interest'. Under the definition, 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. This definition is broad enough to encompass common types of FAA and is already well recognised by the law.

VI CONCLUSION

This chapter has discussed a statutory scheme which aims to introduce the dual reforms central to this thesis: a scheme removing family accommodation disputes and their traditional causes of action from the Supreme Court to the quicker, cheaper and more informal forum of a tribunal. The analysis was not designed to cover every aspect of a new statutory regime; rather, it is confined to those key features of the new jurisdiction that target the examples of situational and systemic vulnerability previously identified in this thesis. Together, the dual reforms modify the systemic issues that create access to justice challenges and address those contextual circumstances that generate legal-situational vulnerability.

CHAPTER 9
CONCLUSION

> Turn him to any cause of policy,
> The Gordian Knot of it he will unloose,
> Familiar as his garter.[1265]

This thesis has proposed a scheme for statutory reform to improve access to justice for older people in failed family accommodation arrangements (FAAs). This concluding chapter summarises the arguments put forward in support of law reform – namely, the nature, cause and effect of different forms of personal, legal and systemic vulnerabilities experienced by the parent. It then reflects on how this analysis provides a rationale for the proposed statutory reform and the implications of these findings as they relate to access to justice for the older party. Finally, the chapter considers how these proposals might contribute to future scholarship, and what direction that might take.

I SUMMARY OF ARGUMENTS

Family accommodation arrangements (FAAs) have become increasingly popular in recent years.[1266] Pursuant to these arrangements, it is common for substantial sums of money or property to be transferred from the parent to the adult child. Most often, the agreements are informal and imprecise as to their terms, with little regard or planning for future contingencies. The arrangement is seen as advantageous as it enables elderly parents to be cared for within the family environment and provides a method of preserving family assets rather than funds being dissipated to meet the costs of aged care. Not surprisingly, however, unexpected events occur; people's lives take new directions, they meet new partners, they may suffer financial hardship and be required to sell property, or they may simply wish to move on. Either party may suffer health issues meaning they can no longer care or be cared for. Or, due to personal disharmony, the parties may no longer be able to cohabit. Irrespective of the circumstances, unless there is an amicable termination of the arrangement and agreed monies or property are

[1265] Shakespeare, *Henry V*, Act 1, Scene 1, 45–7.
[1266] Petrie (n 199).

returned to the parent, legal remedies will need to be pursued in order to recover any financial contributions.

This thesis has aimed to demonstrate the 'Gordian knot' of challenges associated with commencing legal action, intertwined with the personal, economic and social contexts in which they arise, that commonly dissuade or prevent older people from commencing legal action to recover their property. The analysis engaged the conceptual framework of vulnerability to expose the features of the legal system and social context that hinder access to justice, and to consequently guide the proposal for statutory reform.

This thesis began by explaining the phenomenon of FAAs. The purpose of this discussion was to provide critical background concepts and context to frame and situate the law, so that the subsequent critique of the law and legal systems can be understood through the lens of the unique social, financial, and familial circumstances concerning these arrangements.

First, the thesis discussed the fundamental value that underscores any decision concerning one's housing in later years: the importance of home and security of tenure. This discussion served to highlight the impact of the loss of home when the housing arrangement fails. The value of this discussion lies in an understanding of the concept of 'home' as we age, and how the distress of losing one's home can adversely affect the parent and compound their vulnerability. Further, the thesis explored motivations for entering FAAs, how they might be structured and why they might fail. An understanding of this contextual background is critical as it enables a more comprehensive understanding of the social and legal consequences of the failure of the arrangement. In light of an appreciation of the social 'setting' of FAAs, this chapter explained why elder abuse is an inappropriate framework to inform legal reform. This chapter acknowledged the overlap of many failed FAAs with definitions of what constitutes elder abuse but nonetheless concludes that an abuse-centred framework is of limited value when determining the demand and scope for law reform.

Chapter 3 explored the conceptual framework of vulnerability drawing on the tripartite theory of vulnerability conceived by Rogers, Mackenzie and Dodds.[1267] Fineman's theory of vulnerability uses the term 'vulnerability' to reference the inevitable nature of the human

[1267] Rogers et al, 'Why Bioethics Needs a Concept of Vulnerability' (n 71); Rogers et al, 'Introduction' (n 71); Rogers, 'Vulnerability and Bioethics' (n 71); Mackenzie and Rogers, 'Autonomy, Vulnerability and Capacity' (n 74).

condition. The recognition of our universal vulnerability has value in assessing the way in which law and policy arrange the organisation of society's institutions, as well as the appropriateness and possibilities for reform of those laws, policies and institutions.[1268] Fineman's theory therefore explores the role of the state in enabling resiliency. In Fineman's view, it is the state that has legitimized and given power to social institutions that increase resilience for some while undermining the resilience of others; thus, the state must accept responsibility for the 'effects and operation' of those institutions.[1269]

Identifying 'vulnerability' is taken to mean identifying factors or circumstances that expose someone to risk or place them at a disadvantage. The approach taken by Rogers et al. develops the theory proposed by Fineman and enables the position of the parent to be analysed from the perspective of their inherent, situational and pathogenic (or structural/systemic) vulnerabilities and the manner in which these impact one another. Inherent vulnerability – for instance, a parent experiencing physical or cognitive impairment – may be a motivating factor for parties to enter a FAA. In some cases, conversely, financial stress experienced by the adult child is the motivation for the arrangement. In this chapter, situational vulnerability is further divided into personal-situational vulnerability and legal situational vulnerability. Personal situational vulnerability stems from the nature of the parent/child relationship, explaining the conduct of a parent who may be motivated to enter an agreement without adequate legal protections because of the trust and confidence they have in their adult children, or, alternatively, where they are influenced by a mixture of obligation, affection, familial responsibility or even guilt. The reluctance of parents to take legal action against their children also falls into this category of vulnerability. Legal situational vulnerability arises when legal presumptions, doctrines or formalities operate to create significant obstacles to a parent claiming either in contract or against the property, amounting to a 'legal imbalance' against the parent. In turn, the chapter draws these together and explains how the legal 'system' designed to resolve family accommodation disputes is itself a source of vulnerability. The complexity of the applicable law, and the forum having jurisdiction to hear such disputes, makes recourse to the court expensive, time-consuming and overly formal. Consequently, many older people lack the resources and emotional fortitude to commence legal action. By applying this theoretical framework in the context of FAAs, this chapter demonstrated that factors which contribute to

[1268] Fineman, 'The Vulnerable Subject and the Responsive State' (n 69); Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 69); Fineman and Grear, 'Introduction' (n 69); Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' (n 69).
[1269] Fineman and Grear, 'Introduction' (n 69), 22.

the parent experiencing situational vulnerability can be exacerbated by any inherent vulnerability, and the institutional responses to those vulnerabilities are deeply flawed. The thesis next examined the sources of legal situational and systemic vulnerability. Chapter 4 detailed how various legal doctrines and presumptions, with disparate origins, converge at the point of failure of the arrangement, resulting in a 'legal imbalance' against the parent. Chapters 5 and 6 focused on the features of the legal system that give rise to systemic vulnerability. Chapter 5 examined the features of the Supreme Court that create barriers to commencing an action for many older people. These include the length, expense and formality of proceedings. Chapter 6 provided a comprehensive examination of the potential legal actions available, depending on the factual circumstances of the arrangement. The purpose of this chapter was to highlight the complexity of the present law and, in conjunction with the matters raised in Chapter 5, demonstrate that the present legal opportunities for an older person to recover property do not meet their legal needs.

Chapter 7 offered some suggestions for reform of the present law to address the legal 'imbalance' experienced by the older person. While these suggestions fall outside the primary law reform proposal of a new statutory scheme, they do offer some alternatives to counter specific instances of legal situational vulnerability.

Finally, Chapter 8 outlined the proposal for a new statutory scheme to target and address the vulnerabilities of the older person identified in the earlier chapters. This chapter addresses the research question: how might access to justice for the older person be improved in disputes concerning family accommodation arrangements? The chapter outlined two limbs of reform designed to achieve that result. First, tribunals should have jurisdiction to hear failed family accommodation disputes. Hearings held by tribunals address the problems associated with overly expensive, time-consuming and formal proceedings. Secondly, the thesis argues that existing law should be replaced with a simplified legislative framework enacted specifically to provide a cause of action and remedies for a failed family accommodation agreement. Together, the dual reforms aim to modify the legal situational and systemic issues that create access to justice challenges for older people.

II IMPLICATIONS

The proposals set out in Chapter 8 are aimed at addressing the vulnerabilities experienced by the older person in a failed FAA, and thereby improve their ability to bring legal action to

recover property. This section will briefly discuss the implications for the older person, as well as broader societal implications.

Put simply, the removal – or, at least, the amelioration – of many of the legal and systemic factors causing vulnerability aims to create greater access to the legal system. The vulnerability framework is a particularly useful lens for understanding the problems and barriers experienced by the older parent in the context of a FAA, and the sources of those problems. It allows us to identify the specific instances where the law (identified as legal-situational vulnerability), the position of the parent entering into a transaction with an adult child (identified as personal-situational vulnerability) and the responses to these situations through the development of the law and the forum in which disputes are heard (identified as systemic vulnerability) work together to create substantial barriers to – or, indeed, prevent – a parent accessing justice to obtain relief. Through the identification, allocation of resources can be applied to allow reform of the law in order to close off certain sources of vulnerability. This has been demonstrated, for example, by suggesting reforms associated with doctrines such as the presumption of advancement, or restrictions imposed on the lodging of caveats. Further, while law reform is unable to change the nature of the parent/child relationship and the associated vulnerabilities, removal of the adversarial process and the associated costs and formalities goes some of the way in ameliorating those barriers experienced by the older party.

By improving access to dispute resolution, the opportunity to recover some or all the money or property transferred under the failed arrangement is enhanced. At its most basic level, this can allow the older person the opportunity to 'start again'. This is an important consideration: the consequences of the loss of home through an unanticipated and unplanned change in an older person's living conditions and the inability to re-establish oneself can have a detrimental effect on the health and wellbeing of an older person. In some instances, breakdown of a FAA has left the older person homeless or reliant on public housing.[1270] Although commenting on the loss of funds through fraud or financial crime, the observations of the Australian Institute of Criminology are equally applicable to the loss of money or property through failed FAAs:

> Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement ... it has also been found

[1270] See *Spink v Flourentzou* [2019] NSWSC 256.

> that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons'[1271]

As the financial implications of a failed FAA can be profound, the elimination of drawn-out proceedings and resultant minimising of the financial impact of litigation is an important goal of the reform proposals If the older person's money is tied up in the property, they may only have limited access to funds until the conclusion of the dispute, which can prevent them from obtaining alternative accommodation. Having litigation drawn out over a long period of time not only contributes to the expense, but also prolongs the emotional distress that people suffer. While proceedings in a tribunal are not entirely without formality, the environment does allow for a more conciliatory approach. Compulsory ADR procedures and a more informal environment may to some extent preserve family relationships. Yet, as discussed in Chapter 8, compulsory ADR is something of a two-edged sword; many older people may well find the prospect of negotiating face-to-face with a family member with whom they are in conflict daunting.

Further, this thesis has explained how the 'legal imbalance' against the older party may be an insurmountable challenge for many, resulting in a reluctance or refusal to commence legal proceedings. However, a new jurisdiction that allows greater access to justice for the older party may in fact deter adult children from denying a parent's claim to money or property in the first place. The knowledge that the parent *can* lodge a claim easily could result in fewer matters reaching the tribunal, and act as an incentive to reach a settlement without legal intervention. Further, although the parent may still be reluctant to sue their own child, the availability of a less adversarial method of recovery would to a large extent remove some of the known barriers to access to justice.

On a broader political level, there are advantages for governments in improving the functioning and accessibility of the civil justice system. The provision of quick, affordable and accessible dispute resolution arrangements can help prevent issues escalating into more serious problems that can place burdens on health and community welfare services. It also decreases the burden on the public purse in the form of housing and financial support.

III FUTURE RESEARCH POSSIBILITIES

[1271] Australian Institute of Criminology, Submission No 40, cited in Standing Committee on Legal and Constitutional Affairs (n 20) 2.4.

There is considerable potential for further research using the vulnerability framework developed in this thesis. The identification of the sources of vulnerability and the subsequent impact on an individual's legal position can be applied to other circumstances of where legal needs are not met. For instance, concerns have been raised by LGBTI seniors who have faced discrimination from service providers, particularly where the organisation is administered by a religious organisation.[1272] In these circumstances, individuals may be reluctant to utilise complaints processes or commence legal proceedings under discrimination legislation.[1273] The framework developed in this thesis would assist in identifying the personal, legal and system vulnerabilities of such individuals and assist policymakers in addressing these concerns.

Additionally, there are areas beyond the scope of this thesis where there is potential for further scholarship concerning FAAs. These include a greater understanding of the prevalence of FAAs and the reasons for failure, and mechanisms to expand education in the community and raise awareness of the pitfalls of entering family accommodation agreements without legal advice.

One significant drawback in undertaking this research was the absence of empirical data concerning the prevalence of family accommodation arrangements and the relative rates of failure or success; this limitation was also noted by the Australian Law Reform Commission in its Final Report[1274] The Australian Institute of Family Studies (AIFS) National Elder Abuse Prevalence study gives very little insight concerning the number of arrangements occurring among older people and their families, or, more importantly, when and why they failed.[1275] Valuable information obtained through reports based on interviews with older people who have experienced failed FAAs have been tabled by organisations such as Seniors Rights Victoria (SRV)[1276] and the Council of the Aged (COTA) in Western Australia.[1277] Nonetheless, the reports cannot speak to the prevalence of arrangements throughout Australia. Valuable information could be derived from undertaking both quantitative and qualitative research to assist in the determination of prevalence, and a greater understanding of reasons for the failure of arrangements. As discussed in Chapter 8, the research undertaken by Edgeworth comparing the type and number of residential disputes heard before the court with those subsequently

[1272] Freilich et al (n 116).
[1273] Eileen Webb and Liam Elphick, 'Yesterday Once More: Stigma, Discrimination and LGBTI+ Seniors' (2017) 43(2) *Monash University Law Review* 530.
[1274] ALRC Final Report (n 19) [6.07].
[1275] L Qu et al (n 113).
[1276] Seniors Rights Victoria, *Assets for Care* (n 19).
[1277] Freilich et al (n 116) ch 9, 115.

coming before the tribunal gave some indication of the success of moving matters into the tribunal forum.[1278] There is scope, therefore, for further research to determine with greater certainty whether a greater number of older litigants would take advantage of the quicker, cheaper and less formal option of the tribunal.

While this thesis has been concerned primarily with legal responses once the arrangement has failed, there is considerable potential for exploring the need for greater education among older people who are anticipating entering into an agreement. Submissions received by the Australian Law Reform Commission in response to its Elder Abuse report revealed that a large percentage of families who had entered FAAs had done so without any formality, or indeed knowledge of the possible implications of transferring property to family members without a written agreement. While written agreements do not alter proprietary rights, the existence of a formalised agreement goes some way to addressing questions of intention. As such, greater knowledge among the older community as to the advantages of legal assistance and drawing up an agreement may address some of the pitfalls associated with failure of the arrangements.[1279]

Australia has an ageing population. Housing and care become paramount as we age, and hence the FAA will be seen as an attractive housing option for many. While the preventative measures discussed above should be pursued, the very nature and context of the FAA suggests that people will invariably enter FAA with little or no awareness of the risks involved, not of the consequences to their personal, economic and legal circumstances should the arrangement fail. The ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life. Disputes, particular within families, can affect the financial, emotional and even physical wellbeing of a person. When disputes cannot be resolved, the suitability of the available process must be questioned. Unfortunately, given the combination of factors that converge in the context of FAAs, the process is woefully 'unfit for purpose'. While governments continue to create policies to incentivise care within the family and encourage older people to enter FAAs, there is an absence of support when the arrangements fail. Therefore, it is imperative that reforms be put in place to address the legal vulnerability of the older person in these circumstances. The reforms suggested by this thesis are aimed at

[1278] Edgeworth, 'Access to Justice in Courts and Tribunals' (n 1181).
[1279] See eg Pip Coore, 'The Contractualisation of Care in an Ageing World' in Beverley Clough and Jonathan Herring (eds), *Ageing, Gender and Family Law* (Routledge, 2018) 34.

‘cutting the Gordian knot’ of FAAs and provide an innovative and decisive solution to what is, for many, an insurmountable problem.

APPENDIX A
STATEMENTS OF AUTHORSHIP

University of South Australia

Statement of Authorship

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CO-AUTHOR CONTRIBUTIONS

By signing the Statement of Authorship, each author certifies that:

I. the candidate's stated contribution to the publication is accurate (as detailed above);

II. permission is granted for the candidate in include the publication in the thesis; and

III. the sum of all co-author contribution is equal to 100% less the candidate's stated contribution.

Name of Co-Author 1	Eileen Webb-O'Brien
% Contribution to the Paper	20%
Signature *Signatures will be redacted by the Library at the time of publication*	[redacted] Date 21 Feb 2023
Name of Co-Author 2	

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By signing the Statement of Authorship, each author certifies that: I. the candidate's stated contribution to the publication is accurate (as detailed above); II. permission is granted for the candidate in include the publication in the thesis; and III. the sum of all co-author contribution is equal to 100% less the candidate's stated contribution.	
Name of Co-Author 1	Eileen Webb-O'Brien
% Contribution to the Paper	40%
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Victoria

Administration and Probate Act 1958
Civil Procedure Act 2010
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D *TREATIES*

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