Security of tenure for the ageing population in Western Australia

Does current housing legislation support Seniors’ ongoing housing needs?

Summary

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Introduction

The genesis of this research commenced several years ago as the impact of Western Australia’s ‘resources boom’ was becoming evident. Although that period augured in years of prosperity for some Western Australians, for many – especially those on lower and fixed incomes – the rising cost of living became problematic. In the case of housing the problem was particularly acute; housing and rental prices soared and many people who, for example, had rented in the private market for many years found themselves unable to afford to stay in their homes or meet rising rental costs. Even those Seniors who were desirous of moving to a smaller property faced difficulties regarding supply, location, price and amenity. As people age, housing security is of considerable importance and the downside of the changing economic circumstances was, in our view, falling disproportionately on older people.

Research commenced two years ago at the instigation of COTAWA and with the support of funding from Lotterywest. The study examines security of tenure for the ageing population in Western Australia and considers whether current housing legislation supports seniors’ on-going housing needs. The context for this research is the ageing Western Australian population and the consequent economic and social implications for the housing needs of Western Australian seniors. ‘Housing needs’ is a broad and somewhat nebulous term and encompasses a diversity of potential components. For the purposes of this research, however, it is acknowledged that the most important of these is the need for stable and secure accommodation on a continuing basis- considerations directly relevant to the notion of security of tenure.

Such aspirations cannot be met without a legal framework which provides for unambiguous rights and responsibilities upon the parties involved in housing and accommodation arrangements. Safeguards and processes need to be available when such rights are undermined and responsibilities disregarded. The research assesses the adequacy of the existing legal framework regulating housing and accommodation in Western Australia in relation to older Western Australians residing in a range of diverse accommodation types.

The resultant report is very long and, in our view, comprehensive. We have examined a variety of different forms of housing and accommodation utilised by older people from home ownership, through various forms of rental to marginal forms of accommodation. Each form of accommodation has its own chapter where factors impacting on legal and ontological security of tenure are examined. We have done our best to make each chapter a ‘stand-alone’ publication – a ‘one stop shop’ – outlining the issues pertinent to older people residing in each form of accommodation. Readers can choose whether to download the whole report or just chapters of interest.

This publication is a summary of the Study. The full chapters will be published on the COTAWA website in early 2015.

Throughout the report we have done our best to consider Seniors from a range of circumstances and backgrounds, for example Seniors in rural and
Introduction

regional areas, CALD seniors and Seniors with a disability. Unfortunately the scale of the task is enormous and, in our view, further, more focussed research is required in these areas. As will be discussed in Chapter 1, the Ethics Committee at The University of Western Australia placed limitations – as is their right – on us regarding research into Indigenous housing and direct contact with certain groups of seniors. While we respect this decision, and understand the basis on which it was reached, it did mean that certain, important areas could not be considered in a meaningful way in this report. It is our hope this will be remedied through further research and enhanced collaborations in the new year. Indeed, we will be continuing our research into Indigenous housing, and in relation to housing issues for CALD seniors and those with a disability into 2015.

No report of this breadth will be perfect and no doubt readers will alert us to issues we should have raised or disagree with some of our conclusions and recommendations. We welcome feedback on our work and, given the online nature of the full report, we will be in a position to update and make additions to the material. For example, in the case of disability, as the situation involving the NDIS becomes clearer, further analysis can be performed.

The authors would like to thank COTAWA and Lotterywest for their support and funding of this project. We would also like to thank the Reference Group for their valuable input and interest in our research. Special thanks goes to Mr Ken Marston, CEO COTAWA for his ongoing advice and support as well as the team at the Seniors Housing Centre, especially John Millar, Dianne Marks and Phil Airey. We appreciate too the support of the Faculty of Law at The University of Western Australia. Last, but of course, not least we are grateful to our interviewees who gave up their time to speak with the research team about their personal experiences. Our interviewees included Seniors and/or their family members and friends. Other interviewees were representatives from a variety of government and non-government organisations and agencies working with Seniors and/or in the housing arena. The insights were invaluable and took this project from being a sterile piece of academic work to research that, we hope, demonstrates the human face of housing issues affecting older people in Western Australia.

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November 2014
Chapter 1

Overview

The States Parties to ... [the International Covenant on Economic, Social and Cultural Rights] recognise the right of everyone to an adequate standard of living for himself and his family, including ... housing ...

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹

This study examines security of tenure for the ageing population in Western Australia and considers whether current housing legislation supports seniors’ on-going housing needs. The context for this research is the ageing Western Australian population and the consequent economic and social implications for the housing needs of Western Australian seniors. ‘Housing needs’ is a broad and somewhat nebulous term and encompasses a diversity of potential components. For the purposes of this research, however, it is acknowledged that the most important of these is the need for stable and secure accommodation on a continuing basis; considerations directly relevant to the notion of security of tenure.

Such aspirations cannot be met without a legal framework which provides for unambiguous rights and responsibilities upon the parties involved in housing and accommodation arrangements.² Safeguards and processes need to be available when such rights are undermined and responsibilities disregarded. The research will assess the adequacy of the existing legal framework regulating housing and accommodation in Western Australia in relation to older Western Australians residing in a range of diverse accommodation types.

Seniors in Western Australia are far from a homogenous group and live in a variety of dwellings: homes on green title blocks; units and villas; ‘granny flats’; residential parks; retirement villages; aged care facilities; and boarding houses. No matter what the form of dwelling however, many older people experience vulnerability in relation to their accommodation.

The laws relating to housing and accommodation are many and impact differently on individuals depending on a person’s particular life circumstances. However, the effectiveness of, and any shortcomings in,

¹ The International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1), and art 2(1).
² This refers to the judicial, statutory and administrative systems such as court decisions, laws, regulations, bylaws, directions and instructions that regulate society and set enforcement processes.
the law pertaining to housing and accommodation arrangements are likely to present a greater level of stress and anxiety to seniors than other age groups. Seniors are at a stage in their lives when tenure is especially important. Seniors place a high value on their home environment as they are less likely to be in full-time employment and consequently more likely to spend greater time in their homes and in their immediate neighbourhoods than at any other period in their lives. This stage in a senior’s life can be impacted by a variety of issues associated with ageing which may affect accommodation choices. For example, there may not be the variety of accommodation options available to seniors as to younger persons due to physical limitations and the rising cost of accommodation. Illness and age-related health concerns are likely to become more prevalent and there may be changes in the family dynamic due to the necessity for carers, transition to widowhood and/or the need to reside with or closer to relatives. From a financial perspective if ‘something goes wrong’ it is unlikely that seniors will be able to rebuild and recoup losses. Given that the base retirement age is 55 and that life expectancy has increased to around 80 years, it is foreseeable that many older people will pass through several forms of accommodation between retirement and end of life. Therefore, while a particular kind of housing may meet a person’s needs at one point in time, such needs can change dramatically with the ageing process. Perry et al. note that the experience of aging may necessitate transitions in living environments, either through adaptations to current residences or through relocations to more supportive environments. Although such issues may be experienced by other age groups and demographics as well, it is suggested that seniors are particularly vulnerable to their occurrence and may face distinct barriers in accessing assistance.

**Why is security of tenure important?**

Whatever the mode of accommodation, security of tenure is a priority for almost all older people. Apart from the obvious desirability of stable accommodation, there are also discernible health, social and economic benefits to safeguarding security of tenure as the population ages. Transitions in later life are complex and ‘challenge older adults to make projections of a future self and to anticipate their emotional, medical and financial needs’. Older people who are secure in the knowledge that they can stay in their accommodation for an extended period – or permanently – exhibit demonstrably better physical and psychological health than those in less stable accommodation. The impact of a change of residence, transitions in later life are complex and ‘challenge older adults to make projections of a future self and to anticipate their emotional, medical and financial needs’.

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4 Indeed a female born in 2012 will on average live for an estimated 94.4 years while a male born in 2012 will live on average 91.6 years: Productivity Commission, An Ageing Australia: Preparing for the Future: Key Points (2013).

5 Three types of relocation over the course of retirement have been described being motivated by lifestyle, adaption to increased needs and finally the need for institutional care: Eugene Litwak and Charles F. Longino Jr., ‘Migration Patterns Among the Elderly: A Developmental Perspective’ (1987) 27 The Gerontologist 266; Tam E. Perry, Troy C. Andersen and Daniel B. Kaplan, ‘Relocation Remembered: Perspectives on Seniors Transitions in the Living Environment’ (2013) 54 The Gerontologist 75.


7 Ibid 4.

8 Although studies have concluded that older people in their own homes have the highest levels of ontological security, those in longer term rental or permanent public housing...
particularly a sudden or involuntary one, heightens the risk of physical and psychological health implications in both the short and longer term.9 Furthermore, relocation that takes place without regard to the personal preferences of older people gives rise to feelings of powerlessness.10

Insecure accommodation may also impact upon older people’s social milieu through a reluctance to engage in their local communities11 or, in the event of having to relocate, the loss of existing support and friendship networks.12 The prospect of possibly having to move weighs heavily on older people, especially where there are limited options for accommodation elsewhere.13

Finally, there are significant economic costs which may result from the heightened risk of illness and the consequences of actual or potential dislocation. Much attention has been paid to the rising cost of funding the healthcare of older people yet the nexus between secure accommodation and better health outcomes for older people is for the most part overlooked.14 Where an older person must relocate, voluntarily or involuntarily, support formerly provided by friends or family within a community is likely to cease and must be provided in some other way. Similarly, if an older person must move from a private arrangement to public housing, more cost falls to the public purse.15

Involuntary relocation has been identified as a factor in increased morbidity. The relocation process has also been linked to the emergence of physiological and psychosocial disorders such as Relocation Stress Syndrome.16 Abir Bekhet, Jaclene Annette Zauszniewski and Wagdy E. Nakhla, (2009), ‘Reasons for Relocation to Retirement Communities: A Qualitative Study’ (2009) 31 Western Journal of Nursing Research, 462.


For example, some interviewees from residential parks reported that many older residents do not complain even if conditions in a residential park are poor or essential maintenance is neglected. Some stated they were not prepared to engage with residents’ groups or be seen to engage with other residents for fear of being branded a troublemaker.


This was a common thread in many of the interviews, particularly in relation to residents in residential parks on rolling periodic leases (see Chapter 8) and older people in the private rental market (see Chapter 5). Studies have, unsurprisingly, recorded heightened quality of life for older people formerly residing in private rentals who have been able to access age appropriate public housing with community supports: Housing for the Aged Action Group, Older Australians Experience - the Impact of Living in Insecure Tenancies (2003), www.oldertenants.org.au/files/Older_Australians_Experience.pdf.


In the research a significant number of private tenants and residents of residential parks made the comment that if, in the first case, the rental increased too much, or, in the second case, if the resident was forced to vacate the park their only option was public housing.

“These demographic trends create unique challenges for all people, particularly for the governments of nation-states around the globe. Elderly individuals are often subject to discrimination and abuse because they are perceived as easily taken advantage of... Obviously, with the number of elderly people on earth at any one time rising rapidly, there is an increased urgency to address the rights and roles of elderly persons in our world.”

The research

The importance of the research

Despite the obvious benefits of secure accommodation for older people there has not been a comprehensive response to the focus on security of tenure for older people. Unfortunately, issues affecting seniors are often a low priority for resource allocation and policy innovation because of their relative lack of economic and political power.16 Furthermore, gradual shifts in the nature of society, even with profound consequences, rarely elicit the same scrutiny as immediate policy issues.17

This research identifies common legal issues affecting WA seniors in relation to housing and accommodation. Given the ageing demographics of our community and the current state of the housing market it is important to be able to have a thorough understanding of the current housing arrangements of seniors and the legal issues which impact on seniors’ housing. To date there has not been any one study which seeks to collate such a significant amount of information about seniors’ housing and accommodation law in Western Australia and its specific, and at times unique, areas of concern.

The context of the research

The context of the research is complex; indeed it is not an exaggeration that housing and accommodation issues for older Western Australians are experiencing a perfect storm. The ageing population is changing the size and nature of demand for seniors’ housing and for several years Western Australia, and Perth in particular, has experienced a tight property market where there is an imbalance of power between those who supply and

16 Howden-Chapman, Signal and Crane, above n 12.
17 Productivity Commission, above n 4.
those who demand seniors’ housing. This has culminated in a shortage of age-friendly housing stock. Consequently, many seniors have experienced increasing housing costs and housing stress. Seniors’ preferences are changing too with greater emphasis on living in community rather than aged care and the introduction of new models for the delivery of community care coming out of the Living Longer Living Better report and its consumer directed care emphasis. Such developments have seemingly undermined the retirement village industry which, together with increasing tenant longevity which threatens their financial models, must develop and promote different accommodation and financial products to encourage people to buy into villages. There has been an emergence of new products and services available to seniors including manufactured homes in residential parks and granny flats as well as independent seniors’ ‘clusters’.

Added to this turbulence are financial considerations faced by seniors, not only with regard to housing affordability but to the disquieting development towards diluting seniors’ equity in their homes. This can take place in several ways but all can undermine financial security and, in many cases, security of tenure. First, many seniors who own their own homes are asset rich yet cash poor. To some there are obstacles to downsizing yet the cost of maintaining homes in addition to everyday living expenses is challenging. Equity release products to fund retirement living and enhance quality of life are accessible to many but the nature of the products and, ironically, the impact of increasing life expectancy, means such facilities and the growing array of like products, should be approached with caution. Furthermore, both providers and government are examining ways in which older people may be compelled to access their equity to forestall rent increases or to fund aged care. Several lifestyle villages have introduced arrangements whereby home equity is ‘traded off’ to forestall rental increases and, it has been suggested, such strategies should apply to all residential parks. In November 2013, the Productivity Commission suggested a similar approach in relation to senior homeowners whereby annual growth in the housing equity of older Australians is contributed towards aged care services.

The aims of the research

The aim of the research is to identify housing and accommodation related issues through engaging with seniors, carers, agencies and other stakeholders, give an account of laws relevant to these situations and expose the shortcomings in, and difficulties experienced by seniors in relation to, the existing law. It is anticipated that this research will also provide a sound platform for future research projects to be undertaken on specific aspects within the spectrum of seniors’ accommodation by university researchers, relevant agencies and/or government. It will also provide important information to government departments and other organisations who are responsible for policy and program work relating to seniors’ housing and

“The whole thing has been difficult for us as we had been living there for so long. But it got too expensive, we just couldn’t pay anymore. It has affected our health, it has affected our whole life.”

Interview PR 13
accommodation, and lead to policy development and law reform in several highlighted areas.

**The limitations on the research**

The research is limited by the scale of the project and the guidelines placed upon the research team by the University of Western Australia Ethics Committee.

With regard to the scale of the project, the research is, of necessity, an overview of the most pressing issues and the present state of the relevant law. Issues arising from each of the substantive chapters could (and it is suggested should) be the subject of further research in the future.

The University of Western Australia Ethics Committee placed some constraint on the research team and it is important that these limitations be stated. The Ethics Committee would not permit the research team to consider indigenous housing issues unless we complied with conditions that were in the circumstances beyond its resources. A separate project will be undertaken regarding Indigenous housing. Second, the research team was constrained with regard to approaching particular groups of seniors for interview, including people in boarding and lodging accommodation and the homeless. Therefore, our interviews and discussions were, in such cases, limited to advocates.

**This chapter**

This chapter provides the foundation for the ensuing discussion. The chapter commences with a consideration of the meaning of ‘security of tenure’ from both a legal and colloquial perspective. This discussion leads to the formulation of an appropriate definition of security of tenure for the purposes of this study and a touchstone upon which we can assess the adequacy of the legal framework.

The legal framework affecting housing and accommodation for Western Australian seniors is then examined within the overriding context of Australia’s human rights obligations in relation to adequate housing. Obviously, the focus of this study is the domestic law but it is instructive to consider the extent to which Australia’s housing laws complement the ideals espoused in international law. The chapter then lists the relevant Commonwealth, and particularly Western Australian, legislation and classifies the legislation according to its focus as either age-specific, property and/or planning law, consumer law or a general category.

“One of the most frightening scenarios for an elder person is the possibility of financial ruin … Losing assets accumulated over a lifetime, often through hard work and deprivation, can be devastating, with significant practical and psychological consequences … Financial abuse can have as significant an adverse impact for an elder person as a violent crime … or physical abuse.”

Defining security of tenure

What is security of tenure?

One of the difficulties with a research project of this kind is the differing interpretations of legal notions when translated into common parlance. While security of tenure will be discussed in more detail below, in its simplest form, security of tenure is a legal concept that refers to a person’s right to occupy premises for a given time. While it is essential to ground our discussions in the correct legal terminology, we must be mindful that the expression has taken on a broader – colloquial – interpretation that encapsulates issues of adequate housing and quality of life issues. Both options are problematic: too narrow a focus on a bare legal notion may exclude consideration of pertinent related issues and yet too broad an interpretation will dilute the precision of the ensuing legal discussion.

How does security of tenure relate to ‘housing needs’?

In feudal times, the Crown was the absolute owner of all land and there was no private ownership. The King granted land to certain individuals (a tenant-in-chief) in return for service and loyalty. In turn, the tenant-in-chief could grant land to other tenants who were authorised to occupy the land for a period of time and/or under certain conditions. Such tenants could then enter into similar arrangements with others (sub-tenants). Due to these historical origins, discussions about tenure are coined in terms of tenancy. Therefore, tenure was the system through which a person would be granted land by a person higher in the feudal hierarchy; it referred to the relationship between the grantor and the grantee. As there were different types of relationship, different forms of tenure developed. Today, although theoretically all land still resides in the Crown, freehold grants of land permit private ownership. Private owners can deal with their land as they wish, subject to any agreements they enter into regarding the land (including granting rights to occupy the land) or government constraints.

In summary, tenure is the conditions under which land or buildings are held or occupied. It is the right of a person to hold property; a person’s entitlement to occupy land, the nature of that right and the term and manner of the occupation. For example, a person’s tenure pursuant to a lease gives that person the right to occupy the land for the term of the lease under the terms and conditions stipulated in the lease or as implied by statute. The security of a person’s tenure in any given case is gauged according to the extent of an individual’s right to occupy the land. Legal security of tenure means that, in the eyes of the law, a grantee has a right to remain in occupation of land that the law will enforce.

21 While the legal classification serves a valid purpose, the reality is that the concept of security of tenure is generally understood to mean more than the right to occupy four walls with a roof. A Home is More than Four Walls and a Roof: A short subject documentary produced for St. James Drop-In Centre in Montreal, Quebec, Canada (Directed by Mark Andrew Job, 2010): <http://www.youtube.com/watch?v=T9Flyb-0Jp1w>

22 Kevin Gray and Susan Francis Gray Land Law (7th Edition) 2011 Oxford University Press, London. 1.3.21 Tenure is a quaint term that has its origins in the era of the Norman conquest of Britain. Pursuant to the doctrine of tenure, all land was the property of the Crown so persons who were granted and held land were either tenants or sub-tenants.

23 Gray and Gray ibid 1.3.21.

It is obvious, therefore, that tenure, and thus security of tenure, is not a one size fits all concept. There is an array of different tenure arrangements. Determining security of that tenure focuses on a continuum from people who are very secure in their tenure through ownership or long term leases through to people with little or no security of tenure. In any given case, the degree of security of tenure will depend on the nature of the occupation and the legal rules that will determine the security and the term of the tenure. So, a person who owns their own home will, prima facie, have the most secure tenure. A home owner can occupy the premises for as long as they desire and use the property as they like, subject, of course, to overriding government requirements or any arrangements made with others to occupy the premises, for example a lease. In comparison, under a private residential lease for one year under the Residential Tenancies Act 1987 (WA), the tenant will have the right to exclusive possession of the premises for the term of one year. This right may be impacted upon by the terms of the residential tenancy agreement and/or the provisions of the Act. Therefore, if the tenant is in breach of his or her obligations under the lease, the lease – and the tenant’s tenure - may be terminated. In a boarding or lodging situation, any notion of security of tenure is illusory; the occupant can be evicted from the premises at will.

**Extending the legal notion of security of tenure – The right to adequate housing and ontological security**

The legal understanding of security of tenure may be quite different to the use of the term in common parlance. Rather than an arrangement between the grantor of the interest and the grantee, the natural conclusion is that it is an interest in the land obtained by the grantee; a relationship between the tenant and the land. There is often a view that the tenant has rights in and over the land for an undefined period. Although in some cases, for example a leasehold interest, the tenant does obtain an interest in the land, it is inferior to that of ownership and is regulated by the agreement between the parties.\(^{25}\) Also, security of tenure is often regarded as synonymous with quality of life issues, a matter explored below in relation to the concept of adequate housing. This is not correct in a legal sense; legal security of tenure has no correlation with quality of life issues, except to the extent that people take comfort in knowing that one’s occupation is secure and long-lasting. Indeed, there may be an inconsistency between the two, for example, where a person in public housing has secure tenure but the stress of neighbourhood dysfunction results in a below average quality of life.\(^{26}\)

If the extent of an individual’s security of tenure is limited by and to the characteristics of the form of the tenure it does not take us very far. An unencumbered home owner will, for the most part, have considerable security of tenure; a boarder in a lodging house has virtually none. This makes a legal analysis of security of tenure relatively straightforward as reference to the relevant statutes, and in some cases the common law, will reveal its nature and extent. However, to most people, security of tenure is not just occupation for a time span.

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25 Or as imposed by statute.

26 For example, in the interviews for this study several senior public housing tenants were quite distressed by the activities and behaviour of some of their neighbours but were told by Department of Housing representatives that it would be several years before they could be transferred to other accommodation.
Commentary clarifying Article 11(1) of the International Covenant on Civil and Political Rights (ICCPR) describes legal security of tenure as one of seven components in the right to adequate housing. The other six factors are affordability,27 habitability,28 availability of services, materials, facilities and infrastructure,29 accessibility,30 location31 and cultural adequacy.32 As such, security of tenure is but one of several factors that combine to produce adequate housing. Although security of tenure is a – and in many cases the – pivotal element in the mosaic that represents adequate housing, it is not the be-all and end-all. Indeed, after a cursory examination of the common law and real property legislation the existence of, or degree of security of, tenure is easily ascertainable. What is a more difficult prospect is examining whether, despite legal security, the housing is adequate to the person’s needs – adequate being by reference to these other factors.

Traditionally, the common law in relation to the occupation of a dwelling is constrained; it rarely differentiates between real property (a physical structure upon land with a capital value) and a home (described by Fox-O’Mahoney as a social, psychological, cultural and emotional phenomenon).33 Despite recognition in other academic disciplines, it is fair to say that real property law has been slow, even reluctant, to weigh up the importance of a secure and stable living environment for an occupant in a contest with commercial or economic considerations. With the exception of an unencumbered owner of land, an occupant’s tenure was viewed traditionally in terms of length and nature; how long an occupant would be indulged by an owner before the law permitted the occupant to be moved on.

But is the focus on security of tenure artificial in relation to the overall wellbeing of older people and the circumstances in which they age? Does security of tenure equate to adequate housing or quality of life? Security of tenure may be a factor that contributes to quality of life – indeed, in some cases the lack of security of tenure is a cause of considerable angst – yet its mere existence does not guarantee a secure lifestyle in the sense of being comfortable in one’s surroundings. When considering security of tenure, it seems appropriate to examine security in the narrow legal but also in a broader sense. This requires looking beyond the time based legal notion to encompass other issues. Security means a secure condition or feeling,34 with secure being defined as untroubled by danger or fear, safe, reliable and

27 Further discussion of Article 11(1) can be found in General Comment No 4: The Right to Adequate Housing, UN Committee on Economic Social and Cultural Rights (CESCR) <http://www.refworld.org/docid/47a7079a1.html> For example, personal or household financial costs associated with housing should not threaten or compromise the attainment and satisfaction of other basic needs (for example, food, education, access to health care).
28 General Comment No 4, ibid n 27: Adequate housing should provide for elements such as adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.
29 General Comment No 4, ibid n 27: Housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, etc.
30 General Comment No 4, ibid n 27: Adequate housing must be accessible to those entitled to it and that disadvantaged groups, such as the elderly, must be accorded full and sustainable access to adequate housing resources.
31 General Comment No 4, ibid n 27: Adequate housing must allow access to employment options, health-care services, schools, child-care centres and other social facilities and should not be built on polluted sites nor in immediate proximity to pollution sources.
32 General Comment No 4, ibid n 27: Adequate housing should respect and take into account the expression of cultural identity and ways of life.
stable. Therefore a wider view of security of tenure extends beyond the legal notion (which, of course, remains extremely important) and encompasses factors such as those outlined above in relation to adequate housing. Affordable, convenient and secure housing is critical in the lives of seniors and security in one’s home environment is linked directly to physical and mental wellbeing as people age.\footnote{Hiscock, above n 8.}

This discussion links well with housing literature, in particular with Gidden’s theory of ontological security - the confidence that most human beings have in the continuity of their self-identity and in the constancy of their social and material environments.\footnote{Anthony Giddens, The Constitution of Society: Outline of the Theory of Structuration. (Polity Press in association with Basil Blackwell, 1984); Anthony Giddens, Modernity and Self Identity: Self and Society in the Late Modern Age (Polity Press, 1991)} Basic to a feeling of ontological security is a sense of the reliability of persons and things.\footnote{Dupuis and Thorns note that home can provide a locale in which people can work at attaining a sense of ontological security in a world that at times is experienced as threatening and uncontrollable: Ann Dupuis and David C. Thorns, ‘Home, Home Ownership and the Search for Ontological Security’ (1998) 46 The Sociological Review 24.} Several commentators have explored the relationship between stable housing and ontological security and, in turn, the link between ontological security and health and social outcomes.\footnote{There is an abundance of literature that considers the relationship between ontological security and home. In addition to the sources referred to above, other noteworthy discussions include: Susan Bright and Nicholas Hopkins, ‘Home, Meaning and Identity: Learning from the English Model of Shared Ownership’ (2011) 28(4) Housing, Theory and Society 377; Kathleen Mee, ‘I Ain’t Been to Heaven Yet? Living Here, This is Heaven to Me’: Public Housing and the Making of Home in Inner Newcastle’ 2007 24(3) Housing, Theory and Society 207; Beverley A. Searle, Susan J. Smith and Nicole Cook, ‘From Housing Wealth to Well-being?’ (2009) 31 Sociology of Health & Illness 112; Kate E. Mason et al, ‘Housing Affordability and Mental Health: Does the Relationship Differ for Renters and Home Purchasers?’ (2013) 94 Social Science and Medicine 91.} Indeed, the World Health Organisation emphasises the quality and environment of housing and its impacts on the health of occupants; affordable and appropriate housing protects people from hazards and promotes good health and well-being.\footnote{World Health Organisation, Health Impact Assessment - Housing and Health (2010) <http://www.who.int/hia/housing/en/>.}

Ontological security is of particular importance to older private homeowners\footnote{Ann Dupuis and David C Thorns, ‘Meanings of Home for Older Home Owners’ (1996) 11 Housing Studies 485.} and renters\footnote{Whether ‘secure housing’ means ‘home ownership’ and whether ownership is a prerequisite for ontological security remains a matter of debate: Ade Kearns et al, ‘Beyond Four Walls – The Psycho-Social Benefits of Home: Evidence from West Central Scotland’ (2000) 15(3) Housing Studies 387. Cf Hiscock above n 8.} and is undermined by factors influencing insecurity of tenure including housing cost and complex tenancy procedures.\footnote{Ibid.} While security of tenure does not equate to ontological security the two concepts overlap and, in reality, the existence of security of tenure will, in a predominance of cases, foster the feelings of safety and perceived control essential for a high degree of ontological security.
Defining security of tenure for the purpose of this study

To balance the legal and broader concepts of security of tenure, and to ensure that the study encompasses issues of relevant concern to seniors, we have defined security of tenure for the purposes of this study thus:

Security of tenure is the legal right or practical option that a resident has to remain in their existing accommodation or acquire alternative accommodation.

In this way we will focus on the right to occupy, and remain in occupation, conferred by the law (the legal right) and the circumstances that may impact upon an older person's ability to enjoy those legal rights (the practical option). We will consider the alternatives available where the older person wants to, or is required to, move and examine legal, financial and availability barriers that inhibit an older person's ability to relocate.

Viewed through this touchstone the research will:

• Identify the various forms of accommodation utilised by older people in Western Australia and the relevant common law, state and/or Commonwealth legislation regulating each form of accommodation;
• Ascertain common legal issues impacting on older people’s security of tenure (as defined above) and test the adequacy of the existing laws in addressing these issues;
• Identify the shortcomings in the existing legal framework and make suggestions as to how the existing law can be amended or enhanced to address such inadequacies;
• Discuss the scope of other law and legislation relevant to seniors’ security of tenure in other Australian and selected overseas jurisdictions. Of particular interest will be how issues not addressed presently in the Western Australian context are dealt with elsewhere; and
• Alert relevant agencies, government and the law to these shortcomings thus paving the way for further policy development, research, innovation and law reform.

The legal framework governing security of tenure

International and domestic legal approaches to security of tenure

Given that security of tenure is a desirable outcome not only for an individual’s home environment but for wider social, economic and health benefits, the next consideration is whether the law plays a role in upholding security of tenure. International law imposes obligations upon member states in relation to adequate housing but, in effect, the impact on domestic law is, to some extent, illusory. In a domestic context, law relevant to security of tenure, and in particular for seniors, is found in legislation and in some cases pursuant to the common law and equity. In the case of legislation, some is directly relevant while other legislation has a more generic character. The common law, where relevant, provides little protection specifically relevant to seniors however equity may play a significant role in cases where there is vulnerability or a stronger party has behaved unconscionably.

“A Human Rights Act that includes human rights such as the right to adequate housing, health and an adequate standard of living (commonly known as economic, social and cultural rights) would make a difference to the lives of older people in Australia…. It would require our government to examine how decisions impact on the human rights of older people. (Australian Human Rights Commission, Human Rights and Older People.)”

International obligations regarding housing for older persons

At present, there is no international convention on the rights of older persons. Nevertheless, there are several existing international human rights instruments that impact upon the rights and freedoms of older persons, including the right to housing and shelter. In 1991, the United Nations General Assembly adopted the United Nations Principles for Older Persons. Although the resolution is not binding on governments, nations are encouraged to take heed of the contents of the resolution when formulating government policy. Three principles are of particular interest to this research:

- **Independence**: Older persons should have access to food, water, shelter, clothing, health care, work and other income-generating opportunities, education, training and life in safe environments;
- **Care**: Older persons should have access to social and legal services and to health care so that they can maintain an optimum level of physical, mental and emotional well-being. This should include full respect for dignity, beliefs, needs and privacy; and
- **Dignity**: Older persons should be able to live in dignity and security, be free of exploitation including physical or mental and be treated fairly regardless of age, gender and racial or ethnic background (emphasis added).

In a more general sense, Article 25(1) of the Universal Declaration of Human Rights provides for a right to an adequate standard of living for individuals and their families including food, clothing, housing and medical care. Security of tenure, in the context of adequate housing, is considered in two international covenants, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Article 11(1) ICESCR states:

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

This Article is clarified by General Comment No 4 that notes:

The human right to adequate housing, which is derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

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43 Most recently, the General Assembly of the United Nations passed a resolution in December 2010 which resulted in the establishment of an Open Ended Working Group on Ageing. The Working Group's mandate includes reviewing existing protection of older people's human rights and considering how it may address any gaps. The Working Group had its first meeting in New York in April 2011 and is expected to have its fifth meeting in July/August 2014: Human Rights Law Centre, National Human Rights Action Plan <http://www.humanrightsactionplan.org.au/nhrap/focus-area/older-people>.

44 For example the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Covenant on the Rights of Persons with Disabilities (CRPD) and the UN Principles for Older Persons.

45 Resolution 46/91


47 Note too, Article 17 ICCPR includes the right to be free from arbitrary or unlawful interference with privacy, family and home, and to be protected by law against such interference.
The concept of adequacy under the Covenant will, of course, vary depending on the differing circumstances of Member States. It is possible, however, to identify several factors that can be used as touchstones. Paragraph 8 of General Comment No 4 identifies 7 factors from which an assessment of ‘adequate housing’ can be made, being:

- Legal security of tenure;
- Availability of services, materials, facilities and infrastructure;
- Affordability;
- Habitability;
- Accessibility;
- Location; and
- Cultural adequacy.

As discussed earlier in this chapter, legal security of tenure is one of the seven components of the right to adequate housing. It is recognised that, regardless of the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. A person or household ‘can be said to have secure tenure when they are protected from involuntary removal from their land or residence, except in exceptional circumstances, and then only by means of a known and agreed legal procedure, which must itself be objective, equally applicable, contestable and independent’.

The right to adequate housing is said to include a degree of security of tenure described as the ‘perception of security, both de facto and de jure, that comes with that tenure’. People should be protected against forced evictions or harassment, and such rights include the need for consultation and the availability of appropriate procedures including adequate disclosure and notice periods, legal remedies and adequate compensation. Indeed all levels of government are responsible for ensuring third parties do not breach a person’s right to adequate housing.

In Australia, the Commonwealth Parliament may enter into international treaties pursuant to s51(xxxix) of the Constitution. Housing is primarily a state responsibility but it is possible for the Commonwealth and States to take a joint approach to housing tied to funding. Australia has ratified the ICESCR. Compliance with the ICESCR is monitored by the UN Special Rapporteur on the Right to Adequate Housing and the Committee on Economic, Social and Cultural Rights. Interestingly, in 2006, the Special

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48 At the international level, security of tenure is considered ‘an essential element of a successful shelter strategy’: Farouk Tebbal, The Global Campaign for Secure Tenure: From campaign launches to the implementation of the Millennium Development Goals 2003 UN HABITAT, 2.
50 Ibid.
51 Ibid.
52 Ibid.
53 General Comment No. 7, The Right to Adequate Housing: Forced Evictions, paras 13-16.
54 The Commonwealth may make laws regarding matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.
56 The Special Rapporteur reports to the Human Rights Council and monitors the provision (or not) of adequate housing in various states.
Rapporteur examined the status of the realisation of adequate housing in Australia. Particular attention was focussed on specific groups, which were inclusive of older people. Seniors as a discrete group, however, were not considered. The Special Rapporteur noted that he was ‘troubled’ by his visit, consultations and situations witnessed and concluded there was a serious national housing crisis in Australia. This crisis, he argued, was having a critical and direct impact on the most vulnerable groups of the population as well as other segments of Australian society, especially low-income households and, increasingly, middle-income households. Indeed, the conclusion was that Australia had failed to implement the human right to adequate housing, (our emphasis) and it was recommended that a comprehensive and coordinated national housing policy based on a human rights approach be introduced as a national priority. Furthermore, domestic research suggests that from a human rights perspective, many appropriate safeguards are absent from Australian housing law.

At present, Australia does not fully incorporate its international treaty obligations into domestic law. Indeed, from some views, the Australian Constitution, statute law and common law do not sufficiently uphold and protect human rights in Australia. While Victoria and the ACT have enacted human rights legislation, Western Australia has not and a proposed Commonwealth Human Rights legislation was jettisoned in 2009. An Australian Human Rights Act would have recognised certain human rights and freedoms, many of which are particularly relevant to older people, including the right to an adequate standard of living such as access to adequate food, clothing and housing.

**Legislation impacting on seniors’ security of tenure**

In later years, legislation has played a significant role in bolstering the security of tenure for occupants of several types of accommodation. In 1975 the Commonwealth Commission of Inquiry into Poverty in Australia published two reports which recommended the urgent reform of the common law governing residential tenancies. The author, Adrian Bradbrook, regarded the existing law as ‘a scandal’ that featured ‘overwhelming deficiencies’ that ‘made good sense in the fifteenth century’ but for the modern urban tenant were ‘far removed from reality’. The result of the inquiry was the introduction of residential tenancy legislation throughout Australia, including the *Residential Tenancies Act 1987* in Western Australia that provided basic safeguards for tenants in relation to a variety of landlord/tenant issues, including (to a limited extent) security of tenure.

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58 For example Indigenous people.

59 Miloon Kothari, Mission to Australia, above n 57.

60 Ibid.


63 The Henderson Commission.

64 Extracted from Caroline Hunter, Judy Nixon and Michelle Slatter, ‘Neighbours behaving badly: Anti-social behaviour, property rights and exclusion in England and Australia’ (2005) 5 Macquarie Law Journal 149, 156.
Similar legislation to provide inter alia some degree of security of tenure in other forms of accommodation followed, for example the *Residential Parks (Long Stay Tenants) Act 2006 (WA)* and the *Retirement Villages Act 1992 (WA)*.

Legislation may originate from the Western Australian or the Commonwealth Parliament. The allocation of Constitutional power between the states and the Commonwealth will determine jurisdiction. For example, legislation in relation to aged care facilities is a Commonwealth responsibility whereas retirement village and residential park accommodation is regulated by state legislation. For the most part, the Western Australian legislation is of most concern to a discussion of seniors’ security of tenure.

The legislation can be usefully classified as:
- Age specific;
- Property;
- Planning;
- Consumer; or
- General.

**Age specific legislation**

Some legislation is directly relevant to seniors being:

**Commonwealth**

- *Aged Care Act 1997 (Cth)* (and supporting legislation).65 This legislation provides for the Commonwealth to give financial support through payment of subsidies for the provision of aged care and through the payment of grants for other matters connected with the provision of aged care.66 In 2013 the legislation was the subject of considerable reform through the *Aged Care (Living Longer Living Better) Act 2013 (Cth)*.67

- *Age Discrimination Act 2004 (Cth)*
  
  The Act relates to acts of direct and indirect discrimination on the grounds of age. This legislation may be relevant where an older person experiences discrimination regarding accommodation arrangements.

**Western Australia**

- *Retirement Villages Act (RVA) 1992 (WA)*
  
  The legislation regulates the operation of retirement villages and makes reference to a retirement village scheme - a scheme established for retired persons or predominantly for retired persons who have obtained an interest in a retirement village.68 The *Retirement Villages Regulations 1992 (WA)* and the *Fair Trading (Retirement Villages Code) Regulations (WA)*, which prescribe the Code of Fair Practice for Retirement Villages (WA) support the operation of the *RVA*.

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66 Part 3, 3-1 (a) and (b).
68 Retirement Villages Act 1992 (WA) s 3.
Chapter 1 – Overview

Property Law

- **Transfer of Land Act (TLA) 1893 (WA)**
  The Transfer of Land Act 1893 (WA) regulates land held under the Torrens system of land registration. Most privately owned land in Western Australia is held under the Torrens system, the cornerstone of which is the concept of indefeasibility of title. The Act regulates how land is held under the Torrens system, how priority between registered proprietors and between registered proprietors and unregistered interests is determined, exceptions to indefeasibility and, in certain circumstances, compensation in the event of the loss of an interest.

- **Property Law Act 1969 (WA)**
  This legislation regulates a variety of circumstances relevant to both Torrens and also some unregistered interests in land. Matters addressed include inter alia formalities and general rules affecting property. Aspects of particular transactions including conveyances, covenants, mortgages and leases are considered as are, importantly for later discussions in this study, powers of attorney.

- **Residential Tenancies Act 1987 (WA)**
  This Act regulates private and public residential tenancy agreements (as defined).

  The Residential Parks (Long Stay Tenants) Act regulates long-stay tenancies (those exceeding three months) in residential parks. By definition the legislation is also applicable to lifestyle villages.

- **Caravan Parks and Camping Grounds Act 1995 (WA)**
  This legislation provides for the regulation of caravanning and camping. The Act seeks to control and license caravan parks and camping grounds and to provide for standards in respect of caravans.

- **Strata Title Act 1985 (WA)**
  The Strata Title Act regulates strata complexes through the regulation of governance, rules and by-laws and dispute resolution.
Planning Laws

- **Planning and Development Act 2005 (WA)**
  This legislation provides for a system of land use planning and development in Western Australia. Of most significance is the creation of the Western Australian Planning Commission (WAPC) that is the statutory authority with state-wide responsibilities for urban, rural and regional land use planning and land development matters. The WAPC operates in cooperation with the Department of Planning.

- **Relevant local laws**
  Pursuant to the *Local Government Act 1995 (WA)* local governments can make laws considered necessary for the good government of their areas. Such laws must be authorised by the *Local Government Act 1995* or other applicable laws and cannot be inconsistent with state or Commonwealth laws. Obviously local governments make laws in areas relevant to their local area and administration. Such laws are subsidiary legislation and therefore may be disallowed by the Upper or Lower House. Local councils can make binding decisions in relation to development within their jurisdiction and oversee planning and planning approvals subject to WAPC requirements.

Consumer Law

Interestingly, consumer law plays an important role in several issues related to housing and accommodation including security of tenure. The *Australian Consumer Law* may be applicable to conduct involving misleading or deceptive conduct, unconscionable conduct and harassment. The *National Consumer Credit Protection Act 2009 (Cth)* regulates lending to consumers, including certain types of investment and credit transactions. The legislation focusses on responsible lending practices including reverse mortgages.

General

Some miscellaneous property legislation may impact upon seniors’ security of tenure, for example through compulsory acquisition of land (*Land Administration Act 1977 (WA)*), health and safety issues (*Health Act 1911 (WA)*) and building regulations (*Building Act 2011 (WA)*). A detailed discussion of all these statutes and their applicable supporting legislation are beyond the scope of this study but will be referred to in relevant chapters as necessary.

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69 Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*.
The structure of the report

Chapter overview

Part 1 Introduction

Chapter 1 Overview

Part 2 Types of tenure

Chapter 2 Home ownership

Chapter 2 considers security of tenure for older people who own their own dwelling and have an interest in the land it is built upon. This group enjoy a considerable degree of security of tenure yet there are certain risks that may undermine security of tenure. At present most older people who reside in their own residence are mortgage free, however, the number of people reaching retirement while still paying a mortgage is increasing.70

The availability of home equity withdrawal means that some seniors will enter into products such as reverse mortgages; these facilities have been the subject of improved regulation but are still not without risk. Ownership of property and security of tenure may be impacted upon by financial arrangements entered into with friends and family. Finally, the positives of home ownership and security of tenure are undermined if the home becomes too large, expensive to maintain or if health problems make living in a property difficult.

Chapter 3 Strata title

Our consideration of strata title is an extension of the discussion of home ownership. It can also be relevant to the discussion of seniors in rental accommodation. Strata title refers to the manner of division of a parcel of land into lots or into lots and common property under a strata plan and the unit entitlements among the lots. A discussion of strata living in relation to security of tenure will focus on the rights of the occupant to remain on the premises. Assuming ownership, the same impediments noted in the discussion of home ownership remain relevant. Security of tenure, as defined in this study, also requires a consideration of the rights and obligations of and between the proprietors of the lots, the maintenance and administration of the development and dispute resolution. As well as impacting on the adequacy of housing, such issues can impact on the quality of life. The chapter identifies several concerns regarding strata title, in particular the issue of conduct and professionalism of many strata managers, unfairness regarding complex expenses and the appropriateness of the dispute resolution procedures. The issue of over 55’s strata developments is a topical one that raises issues of planning policy, including strata developments tailor-made by and for older people and the use of suburban infill.

Chapter 4  Private rental

Chapter 4 examines the provisions of the *Residential Tenancies Act 1987 (WA)* in relation to older private renters. The rising cost of rental has created what has been described as a ‘seniors’ rental crisis’ in Western Australia.71 After examining the relevant legislation the chapter examines issues of disclosure, the nature of residential tenancy arrangements, factors impacting on affordability and security of tenure, notice provisions and dispute resolution. Age discrimination in relation to renting is also canvassed.

Chapter 5  Social housing

Community housing is part of a broader social housing system that also includes public housing. However, community housing differs from public housing in that it is generally owned or managed by a non-government, not-for-profit organisation. Many shires and local government authorities also offer community housing.

Public housing is managed by government housing authorities such as the WA Department of Housing. The discussion of the *Residential Tenancies Act 1987 (WA)* continues with consideration of public rental through Homeswest. While there are obvious similarities to the private arrangements, public rentals are subject to the controversial three strikes policy that can result in eviction of older tenants. This can have harmful repercussions in circumstances where younger family members cause trouble and the older person is evicted. The study revealed concerns too about the plight of many older people living in Homeswest accommodation who do not feel safe, want to move and are prevented by waiting lists from doing so.

Chapter 6  Retirement villages

Retirement villages constitute an important retirement living option in Australia. Data obtained from the Seniors’ Housing Centre in December 2012 indicates that there were a total of 215 retirement villages and 14 812 units of retirement village accommodation in Western Australia housing, approximately 20 000 persons.72 These numbers have the potential to increase exponentially as the state’s population ages.

The legislative framework regulating retirement villages is complex. The *Retirement Villages Act (1992)* has been the subject recently of significant amendments to reflect recommendations of the Statutory Review of Retirement Villages Legislation Final Report.73

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“If Australians are to age well, they must be housed well.”

Chapter 7 Residential parks

Sometimes referred to as, inter alia, relocatable, manufactured or mobile home parks, residential parks provide sites upon which (ostensibly) moveable dwellings are placed. Of late, lifestyle villages, where the dwellings resemble strata title or villa accommodation but are governed by the same legislation as other residential parks, have emerged. The relevant legislation is problematic as it is applicable to tenancy agreements in residential parks in excess of 3 months. Some residents have very insecure periodic tenure, others have tenure ostensibly lasting decades. Security of tenure can also be undermined because of rising rent and other expenses. The lack of alternative locations to place park homes and the vulnerable position of residents in the event of the park owner’s insolvency are identified as further issues of concern.

Chapter 8 Aged care facilities

Security of tenure in Australian aged care facilities is a topical issue from a legal, economic and societal perspective. Recently, regulation of aged care facilities has seen the introduction of a considerable number of new regulatory measures, including the integration of high care and low care facilities and Community Common Care Standards. Other legislative changes include variation in the use of accommodation bonds and the mix of high care and low care places. In the future it seems likely that the use of the family home to fund aged care will become a controversial issue. The chapter examines the Aged Care Act 1997 (Cth) and the impact of the recent amendments in relation to residents’ security of tenure.

Chapter 9 Granny flats and family accommodation arrangements

The traditional notion of a granny flat – a converted shed or demountable in a backyard – has evolved considerably in recent times. Sections of the building industry have embraced granny flats as an extension of their traditional building, extension or renovation work. While standards will vary depending on individual circumstances, many contemporary granny flats are well designed, purpose built ‘micro homes’. This chapter considers the security of tenure surrounding granny flats from a property law and planning perspective. Some reference will also be made to Centrelink and taxation implications.

Granny flats are, of course, a form of family accommodation arrangement. One of the greatest sources of concern in the course of this research was the financial and emotional impact of the breakdown of family accommodation arrangements. These arrangements, where an older person makes a financial contribution to a family member, relative or friend in exchange for accommodation for life are, for the most part, unregulated and the legal position of an older person where such an agreement breaks down is precarious. The chapter examines the nature of these arrangements.

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74 Lifestyle villages have become increasingly popular and have become a more specialised form of tenancy arrangement; indeed, separate legislation for lifestyle villages is a consideration of the statutory review of the relevant legislation: Residential Parks (Long Stay tenants) Act 2006 (WA).
their differing structures, the relevant law and the difficult path to resolve a dispute. The chapter recommends law reform as a matter of urgency.

Chapter 10  Boarders and lodgers

Boarders and lodgers in Western Australia have little legal protection. There is no Western Australian legislation that directly regulates the relationship between owners and boarders and lodgers. Although the definition of residential tenancy agreement under the Residential Tenancies Act 1987 (WA) appears wide enough to encapsulate a boarding or lodging arrangement, boarders and lodgers are expressly excluded from the operation of the Act. There is no statutory protection so disputes must be resolved by the parties. Despite this, boarding and lodging accommodation is flexible and, for the most part, more affordable than renting in the public or private tenancy market. It is less expensive to enter into such arrangements as there are lower entry costs and fewer ongoing expenses.77 Chapter 10 considers security of tenure in boarding and lodging arrangements from the perspective of low-income, older Western Australians, service providers and relevant government agencies.

Chapter 11  Seniors’ homelessness

This chapter examines the growing incidence of senior homelessness in Australia, particularly homeless older women. In 2009 Housing the Homeless, a report by the House of Representatives Standing Committee on Family, Community, Housing and Youth considered the homelessness legislative framework and its recommendations were incorporated into the Homelessness Bill 2013 (Cth). The Bill, once enacted, aimed to increase recognition and awareness of people who are experiencing or at risk of homelessness. The Bill lapsed on 12 November 2013 and, with the change of government, the fate of the Bill is uncertain. The chapter considers the legislative framework relevant to homelessness, critiques the provisions of the proposed Homelessness Bill and discusses the plight of homeless older people in Western Australia.

Part 3  Seniors with differing needs/special disadvantages

Chapter 12  LGBTI seniors

In 2010 research undertaken by LGBTI Rights in Ageing Inc (GRAI) and the Centre for Research on Ageing at Curtin University concluded that older and ageing LGBTI individuals ‘experienced unmet needs and fears of discrimination’ when accessing retirement and residential aged care services in Western Australia. This chapter builds on that research by examining the introduction of legislation to deter discrimination of LGBTI residents in church operated facilities. The chapter also examines the development of LGBTI retirement communities.

Chapter 13  Loss of a partner

Older people may experience loss of a partner through separation, divorce or bereavement and this may have ramifications for security of tenure. The loss of a partner is likely to dilute household income and interfere with the supply

77 For example utility connections are not required.
of domestic services. In the case of separation or divorce it will often be the case that two dwellings will need to be supported on what was formerly a combined contribution.

Part 4  Miscellaneous factors that may undermine security of tenure

Chapter 14  Guarantees

This chapter focuses on the circumstances of an older person who enters into a mortgage or a guarantee on behalf of another person. The failure to pay the mortgage or the guarantee being relied upon can result in the loss of an older person's home. Many older people enter into such transactions without being fully aware of the nature of the transaction and the consequences of failure. The chapter examines circumstances where the agreements are entered into as a result of fraud, undue influence or unconscionable conduct, where such actions will bind the financier and the legal position of the older person.

Chapter 15  Equity release products

Reverse mortgages and other home equity withdrawal mechanisms can be advantageous in permitting older people to access equity in their homes to improve quality of life in retirement. The downside is that although there may be low or no repayments, interest is, of course, accruing and in some cases seniors have found themselves in a negative equity situation. Although recent legislative amendments have addressed this issue, the products still have some disadvantages and seniors need to be well advised as to the risks involved before entering into such arrangements. This chapter examines the legal framework regulating reverse mortgages and provides examples of potential pitfalls that could undermine security of tenure.

Chapter 16  Enduring powers of attorney

Like family accommodation arrangements, Enduring Powers of Attorney (EPAs) can be advantageous when used appropriately but can be disastrous to older people's financial security and security of tenure when exploited.

Chapter 17  Consumer fraud

This chapter examines consumer issues that may impact directly and indirectly on security of tenure. For example, many older people have fallen victim to scammers; confidence tricks aimed at obtaining money through various means including lotteries, romance or emergency relief. In serious cases, victims of consumer fraud may lose substantial amounts of money thus undermining legal and ontological security of tenure.
Chapter 2

Home ownership

We have lived in this house since we were married. It was a battle to pay it off back then but the kids laugh when we say how much it cost. Everything is so expensive now but back then that was a lot to us! Lots of things have changed but we have always been happy here. I wouldn’t like to leave. I suppose if we got sick or something we would have to think about it then. I like it here, we know most of the people in the street. Everything is convenient. I have been going to the same doctors surgery for years and we like the local shops.1

Chapter 2 examines security of tenure for older people who reside in their ‘own’ home. For the purposes of this chapter this means that the land and the dwelling constructed upon it are owned by an older person or persons.2 The property may be unencumbered or subject to a mortgage.3

Homeowners enjoy a considerable degree of security of tenure; indeed in the legal sense theirs is the most secure form of tenure. Strictly speaking, under Australian real property law all land resides in the Crown but in practice freehold grants of land are akin to private ownership.4

Privately owned land in Western Australia is regulated by the Torrens system of land registration.5 Under the Torrens System the registered proprietor of the fee simple (the owner of the land) enjoys indefeasible title to the land subject to a limited number of exceptions.6

Despite the status of the owner – and the resultant security of tenure – within the Torrens system, a registered interest is not unassailable and can be undermined, or defeated, in several ways. Challenges to a home owner’s title, and thus security of tenure, can arise in four broad categories:

• Through the operation of the Torrens System itself.

Security of tenure may be undermined or extinguished if an owner

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1 Interview HO 5.
2 In comparison to residents of residential parks (discussed in Chapter 7) who may own the park home but rent the land on which it is placed.
3 At present most older people who reside in their own residence are mortgage free, however, the number of people reaching retirement while still paying a mortgage is increasing. – Gavin Wood, Val Colic-Peisker, Rachel Ong, Naomi Bailey and Mike Berry Housing needs of asset-poor older Australians: other countries’ policy initiatives and their implications for Australia 2010 AHURI <http://www.melbourneinstitute.com/downloads/hilda/Bibliography/Other_Publications/Wood_etal_Housing_Needs_of_Asset_Poor_Older_Australians.pdf>.
4 Bradbrook MacCullum and Moore, Real Property Law in Australia (5th ed) 2011 Thomsons Australia, Sydney.
5 Ibid.
6 The concept of indefeasibility is discussed in some detail in the online report. See generally Douglas J. Whalan, The Torrens system in Australia 1982 Law Book Co., North Ryde, N.S.W.
is subject to one of the statutory or common law exceptions to indefeasibility.

- **Through fraud**
The pivotal status of a registered interest under the Torrens System means that if a registered owner’s land is mortgaged or transferred to an innocent third party through fraud the registered interested will prevail over that of the owner/former owner.

- **As the result of legal or financial dealings that directly or indirectly affect the land.**
Legal or financial arrangements entered into by an older person may lead to losses that impact on security of tenure. Such arrangements include:
  a. Entering into an enduring power of attorney;
  b. Mortgage arrangements over the land;
  c. Transactions involving the land entered into to assist another person, usually a child;
  d. Other transactions that undermine the older person’s financial position and thus security of tenure, for example poor quality investment advice and various forms of financial fraud.

For the purposes of this chapter, Categories 1 and 2 will be examined. The issues in Categories 3 and 4 are discussed in separate chapters of this Study.

**What the interviews revealed**

Twenty seniors were interviewed for this chapter of the Study. The respondents either owned their own home or had owned their own home. The research team also interviewed from several agencies and organisations relevant to this chapter including Landgate, the banking industry, ASIC and the Western Australian Police. We also spoke to practicing lawyers and academics with experience and expertise in real property law and criminal law.

It is probably no surprise that home owners were the most content group of the interviewees. Generally older people in their own home were satisfied with their accommodation. Many interviewees enjoyed the confidence and financial independence of residing in one’s own home. Most expressed little

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7 Or made subject to any registered interest. 
8 An enduring power of attorney (EPA) is a legal agreement that enables a person to appoint another person or persons to make financial and/or property decisions on their behalf. When used correctly an EPA is a prudent safeguard as the attorney has authority to make financial decisions on another person’s behalf that that person is unable to do due to illness or loss of capacity. Unfortunately, when an EPA is used inappropriately considerable financial and/or property losses can occur: See generally: The Office of the Public Advocate (WA): Enduring power of attorney <http://www.publicadvocate.wa.gov.au/E/enduring_power_of_attorney.aspx> and Northern Suburbs CLC Elder Abuse: the need for law reform 2010 <http://www.nsclegal.org.au/documents/EPOA_Report_2010_20April.pdf> Enduring Powers of Attorney are discussed in Chapter 19 of this Study.
9 The availability of home equity withdrawal means that some seniors will enter into products such as reverse mortgages or home reversion. These facilities have been the subject of improved regulation but are still not without risk. Chapter 18 of this Study discusses these financial arrangements.
10 For example, circumstances where the older person mortgages his or her property or enters into a guarantee to assure the financial obligations of another (discussed in Chapter 17) or enters into a family accommodation/assets for care arrangement (discussed in Chapter 9).
11 See Chapter 20 Consumer Fraud.
desire to move from where they were living and hoped to remain in that home for the rest of their lives. Some had or were considering downsizing.

Many of the interviewees were not aware of the potential vulnerability of their interest in the property. Although they knew that they owned a valuable asset, it did not seem to occur to many of them that the property could be vulnerable to theft or fraud. Although several interviewees were aware of high profile issues in the media such as the recent Nigerian scam where homes were fraudulently sold they did not seem to think this could happen to them and had not thought about investigating ways in which they could protect their interest. One person remarked that such problems arose only when people didn’t live in their own home and “couldn’t keep an eye on things.”

On the other hand several interviewees were aware of the dangers of identity theft and were very careful to protect their personal information. Having said this, the awareness of identity theft was in relation to financial matters, few considered the link between identity theft and being defrauded of property. Several asked about what steps could be taken to protect a registered proprietor’s interest and when matters such as caveats were discussed they were dismissed as overly complex and expensive.

Several kept title deeds at their home in vulnerable places. One recounted how when they lived in the country “we never locked our doors or anything” and that “I suppose that someone could just walk in and take them out of the drawer.”

Several kept title deeds at their home in vulnerable places. One recounted how when they lived in the country “we never locked our doors or anything” and that “I suppose that someone could just walk in and take them out of the drawer.”

There was a certain comfort in having the deeds at the home but in many cases they were not aware of the risk of fraud if the deeds were stolen or otherwise fell into the wrong hands.

Some interviewees recounted stories they had heard regarding older people defrauded of property. Generally the perpetrator was a family member although there was one instance where an interviewee outlined fraudulent activities of a real estate agent. None of the interviewees had been defrauded themselves but several made the comment, particularly in relation to families, that “it happens all the time.” Issues such as family accommodation arrangements and enduring powers of attorney were scattered throughout many of the interviews and will be the subject of separate discussion in other chapters.

Interviewees were also asked to comment on their thoughts on using the home as security for either a loan for their own purposes or to assist a family member. Several interviewees had considered a reverse mortgage. There seemed to be a feeling of asset-rich cash poor amongst some and many commented upon the rising cost of living in Western Australia. Having said this, few actually went ahead. There seemed to be an awareness of the pitfalls of the products and a fair degree of suspicion of them. The desire to leave property to family also seemed to be another factor at play.

With regard to assisting family members, the issue of guarantees for family members loomed large. Again there were recounted stories of people who had used their property to guarantee the debts of a family member, almost

“Apparently X (interviewee’s brother) gave the signed transfer to the lawyer and the property was transferred from Mum to him (X). The lawyer didn’t ask to see Mum; X said she wasn’t feeling well and that she just wanted him to drop off the documents. Mum didn’t know what she had signed. He (X) sold the house. Mum won’t do anything because she doesn’t want him to go to jail. I would.”

Interview HE 4

12 Interview HO 12.
13 Interview HO 18.
14 Interview HO 18.
15 Interview HO 2,6,7,14,17.
invariably a child and it did not end well. Having said this, several of the interviewees had acted as guarantor for a child and the matters proceeded smoothly. Those interviewees were for the most part a little reluctant at first but were persuaded by the circumstances of their child. Only one said that she proceeded “without really thinking about it.” In some cases there seemed a lack of awareness of the consequences of the transaction. Despite the provision of legal advice one person said the consequences were not really discussed or understood. The discussion was very short, which the interviewee said they were happy about as they were concerned about the cost of legal services.

Few knew that there were limits on the owners rights and, for example, the property could be the subject of compulsory acquisition. This was a particular issue for a couple who had lived in a rural area and part of their land was resumed by the State government. The interviewees outlined the bluntness of the process and the bureaucratic way in which the matter proceeded. Many of the persons affected were seniors and many had lived in that particular area for decades. While this occurrence is rare the research team were concerned by the high handed approach of the government representatives and the lack of concern when dealing with older people facing the loss of their property.

Finally, our interviews raised the issue of downsizing and whether seniors in their own homes were considering a move to smaller premises, why this would be the case and what factors they would consider prior to doing so. Ageing in place does not invariably mean ageing in the same house. Our interviews showed that some Seniors wanted to downsize in home size but still remain within a familiar location, connected to their local community. It seems some Seniors would choose to downsize if there was a greater variety of housing options available within existing communities. Recent research has the reasons Seniors - who may otherwise choose to do so – do not downsize, indeed, evidence suggests, both in Australia and internationally that older people remain in large houses because there are no alternatives available to them.

“It all happened a bit fast. We wanted something smaller and found this – it seemed all right. We didn’t want someone else to buy it so we jumped in. There was a lot of paperwork but we didn’t really try to read it; we had a settlement agent. I suppose we didn’t know what we were getting into, it’s all very complicated.”

Interview ST 12
Summary of findings

One of the most frightening scenarios for an elder person is the possibility of financial ruin... Losing assets accumulated over a lifetime, often through hard work and deprivation, can be devastating, with significant practical and psychological consequences... Financial abuse can have as significant an adverse impact for an elder person as a violent crime ...or physical abuse. 16

(References omitted)

Our research revealed numerous weaknesses in the relevant legal framework that could undermine security of tenure for older homeowners. We are particularly concerned about financial abuse involving an older persons real and personal property.17 This risk is likely to increase as the population ages.18 The operation of the Torrens system and its focus on the indefeasibility of a registered proprietor leaves defrauded (former) owners unable to get their property back when it has been registered in the name of an innocent third party.

Such frauds may occur through:
- Forgery of the older person’s signature on the mortgage or transfer instrument;
- Identity fraud or impersonation of the older person; and
- Persuading the older person to sign mortgage or transfer documents while under a misapprehension about the nature of the documents or their effect.

Usually a fraudster either sells the property to a third party, or mortgages the property as security for a loan. The fraudster may or may not become registered as the owner during the transaction. It is likely in both cases that the fraudster will take the proceeds of the mortgage or the sale and disappear. This means the older person will be left with either no property, or a property encumbered by a registered mortgage.

A fraudulent mortgage will be enforceable against the homeowner if the mortgagee was not implicated in the fraud. If the debt is not repaid, the mortgagee could sell the property to recoup the debt. Similarly, in the case of the sale, the purchaser becomes the registered proprietor upon registration, as long as they are not implicated in the fraud. While there is a fraud exception to indefeasibility of title, it must be brought home to the present registered proprietor or his or her agent. The only recourse for the older person is to seek monetary compensation.

In such circumstances the only remedy may be recourse to the state assurance fund for compensation once the usually futile option of pursuing the perpetrator has been exhausted.

17 And in many cases other assets such as bank accounts.

“We had one matter where a fellow’s mother went into hospital to have an operation. When she came out he had sold the house.”

Interview HO 19
With the resulting dire financial and emotional consequences we believe there are insufficient educative programs for Seniors on the risk of elder financial abuse, including property fraud. In our view, many Seniors are simply not aware of the significance and safekeeping of title documents, the risk of identity fraud and the risk of elder financial abuse. Our research demonstrates that, although available, such educative programs do not have a significant ‘reach’. In particular we are concerned about lack of information available to Seniors in rural, regional and remote areas and to CALD Seniors.

Similarly, in our view, more needs to be done to alert lawyers and bank employees to the risk of Seniors being deprived of their property.

**Recommendations**

The two prime issues are the prevention of fraud in the first place and then, if a fraud does occur how to best salvage a difficult legal position. The discussion below must, however, be placed in a wider context of enhanced awareness of the risks of elder financial abuse. Aside from the emotional and financial toll resultant upon fraud, the reality of the existing legal framework is that prevention is a far superior tool. Our recommendations regarding senior home owners are:

- **Landgate, the Department of Commerce and the WA Police should prepare qualitative data recording fraud related losses of real property in Western Australia. This information should form part of a larger, ongoing information bank that collects statistics on elder financial abuse in Western Australia.**

At present, there is no reliable qualitative data with regard to elder financial abuse in Western Australia, let alone recording of fraud-related loss of real property.19 Evidence of Seniors experiences with property fraud are primarily anecdotal and it is difficult to get a precise idea of the scope of the problem. Also, the statistics that are available are muddy, especially when they are included in frauds involving all ages, the inclusion of misuse of enduring powers of attorney, family accommodation arrangements and the fact that it seems many cases remain unreported.20 It is essential that the real scope of the problem is assessed with ‘hard’ data. It is possible to obtain data about the scale of such frauds and, given the impact on security of tenure for an owner, it is essential to do so.

We suggest that Landgate and the Department of Commerce, given their respective fields of expertise and the recent collaboration in response to the Mildenhall matter, should take the lead to obtain accurate data and facilitate cooperation between the government and agencies to guard against this type of financial abuse. Input could also be provided by the WA Police.

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19 Crime Research Centre, above n14, 6.
20 Many elderly victims do not report fraud because they feel ashamed, or they fear others will think they cannot care for themselves, which may trigger placement in a nursing home or long-term care facility.
• Design and implementation of educative programs regarding:
  • the importance of title documents, safekeeping and the nature of dealings; and
  • identity theft and property fraud.

We suggest that educational programs for seniors be developed and implemented throughout Western Australia emphasising the significance of safekeeping title documents, protection against identity fraud and the danger of financial, including real property, abuse.

Although such a program is important for all seniors, in our view there is a particular need in relation to rural and regional seniors and those from culturally and linguistically diverse (CALD) backgrounds. Our research demonstrates that unique issues can arise regarding properties held in, for example, farming families. Furthermore, language barriers, often in combination with familial cultural expectations may render CALD Seniors vulnerable to loss of their home through fraud.

Any such program should extend to persons who have relevant contact with older people including banks employees, lawyers, settlement agents and real estate personnel.

• Design and implementation of educative programs for legal professionals that enhance skills and awareness of the potential for property fraud and the potential vulnerabilities of older clients.

Where solicitors are involved in mortgages or sales, we are concerned about a seeming lack of awareness, at times, of appropriate procedures for matters involving older clients and their families. While we acknowledge that older people may often require a relative or carer to attend a solicitor’s office with them, there needs to be strict practice guidelines for dealing with the property of older clients, particularly around questions such as:
  • Who is the client?;
  • Are there signs of duress or pressure?; and
  • Is this the right move for the older person to make?

Competing concerns where a solicitor is effectively acting for both parties have the potential to cloud judgement.

Also, more educational programs should be available to lawyers on elder financial abuse via the CPD program.

These comments are applicable too, to real estate agents and settlement agents.

• Design and implementation of educative programs for bank employees

Similarly, banks and financial institutions are often at the front line when instances of elder financial abuse arise. A person who has obtained title documents can approach a bank to raise money on the security of an older person’s home.

In 2013, the Australian Banker’s Association announced the adoption of voluntary guidelines to guard against financial abuse. While we welcome this
initiative, we believe that banks can play a more proactive role in deterring fraudulent activities involving seniors. Bank employees should also receive regular and comprehensive training on how to detect mortgage fraud.

- **Consider the introduction of mandatory reporting by bank employees**

We believe that bank employees should be obliged to report suspected property and mortgage fraud involving property owned by older people. Although the issue of mandatory reporting is controversial we believe that banks need to enhance a culture of caring for the security of their elderly customers.

- **Investigate and introduce improved means of protecting title to land from fraud**

An education program is a pre-emptive measure but, of course, cannot prevent fraud in its entirety. The next consideration, therefore, is to consider improvements to the existing procedures that can protect the title to the land from fraud.

We believe further preventative measures in the administration of the Torrens system should be investigated. Landgate offer ‘Title Watch’, an annual subscription service where a person is notified if there are dealings with their property. In our view this service should be promoted through any education campaign to encourage older people to subscribe to this service. To enhance access, Title Watch should also provide a non-electronic means of notification, for example notification by express post.

Landgate have tightened procedures in the wake of the high-profile Mildenhall matter, including introducing new regulations regarding identification for the purpose of registering documents. The ‘improper dealings caveat’ requires stringent identification verification prior to dealings involving the land. In our view, making this caveat widely available, and transmitting this information through the education programs, could be an effective preventative measure for property owners, including older owners, to deter unauthorised dealings. We acknowledge that lodgement of a caveat on the title may be costly and inconvenient when legitimate dealings are anticipated.

- **Review the circumstances where duplicate certificates of title are issued**

In our view it is problematic that unencumbered properties in Western Australia receive a copy of the duplicate certificate of title. If the duplicate certificate of title falls into the wrong hands it can be used to deal with the property, including property transfers and mortgages. In our view, a duplicate certificate of title should only be issued upon request by the registered proprietor. In Queensland, the certificate of title is only issued upon a request in writing from the registered proprietor.

…”there is no doubting the catastrophic impact that losing title to one’s home would have on that individual – irrespective of the availability of compensation.”


21 The price for monitoring one property is $28.50 per year.
23 Section 42(1) Land Title Act 1994 (Qld).
• Introduce statutory requirements on mortgagees to verify the identity of the mortgagor.

Landgate have recently imposed new regulations regarding identification for the purpose of registering documents. The Verification of Identity Practice recommends that lawyers, settlement agents and mortgagees take reasonable steps to verify the identity of their clients and confirm their clients’ authority to give instructions when dealing with a particular property. While these measures are to be welcomed, however, in our view, this should go further by stating in the legislation that the mortgagee bears this responsibility.

The TLA should be amended to require mortgagees to verify the identity of persons executing registrable mortgages. Other jurisdictions have adopted various approaches in relation to mortgage fraud. 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.24 Reasonable steps refer to practices set out in the Land Titles Practice Manual. 25 The mortgagee bears the onus of establishing such compliance26 and if the mortgagee fails to do so, he or she is not entitled to compensation.27

• There should be more significant obligations placed on banks in relation to detection of fraud.

There is no special legal relationship between the bank and the owner of property over which a mortgage is sought. There is no recognised fiduciary relationship that would impose a duty of care.

Once a mortgage is registered, the question then becomes whether the bank can be implicated in the fraud. This is difficult to do as the decided cases require actual fraud brought home to the registered proprietor or their agent. Interestingly, there has been some concern about the indefeasible nature of the mortgage especially when the bank has, for example, not dealt with the older person and dealt solely through the fraudulent relative. In this case there is some disparity between Australia authority and cases abroad. In Australia, the mortgagee is in a very strong position.

In New Zealand, however, different results can flow. In Nathan v Dollars and Cents28 elderly parents were able to avoid a mortgage forged by their son. In this case the son forged his parents’ signatures to a mortgage and obtained the loan money. The court found that the bank – in failing to deal with the parents at all and dealing solely through the son – had effectively appointed the son their agent to procure the mortgage – and therefore the son’s fraud was the banks fraud and the mortgage was unenforceable.

“The Supreme Court has held unanimously, upholding the judgments in the High Court and the Court of Appeal, that the mortgage should be removed from the Land Transfer register. It has held that Mr Nathan was engaged as an agent by Dollars & Sense to obtain signature of the mortgage and that his act of forgery was sufficiently closely connected with the task he was engaged to undertake that it must be treated as done within the agency. The fraud committed was therefore the fraud of an agent of Dollars & Sense and accordingly it did not by registration obtain an indefeasible title.”

Supreme Court of New Zealand, Media Release 8 April 2008: DOLLARS & SENSE FINANCE LIMITED v REREKOHU NATHAN

24 Section 185(1A) Land Title Act 1994 (Qld).
25 Section 11A Land Title Act 1994 (Qld).
26 Section 185(5) Land Title Act 1994 (Qld).
27 Section 189(1)(ab). See too ssBC Real Property Act 1900 (NSW).
28 [2008] 2 NZLR 557.
As is the case in New Zealand, if the bank fails to take heed of responsible lending to an extent that a fraud is perpetrated, the bank should be implicated in the fraud and the mortgage set aside.

This contention complements the operation of the National Consumer Credit Protection Act 2009 (Cth) (NCCPA). The NCCPA requires that licensed banks and financial institutions comply with responsible lending obligations. Under the NCCPA, a credit provider must not enter into a credit contract with a consumer without first making a preliminary assessment as to the suitability of the loan, including making reasonable enquiries about the consumer's requirements and objectives in relation to the credit contract and the consumer's financial situation.

In our view, the introduction of responsible lending obligations in the legislation take the bank's obligations beyond the minimal responsibilities imposed by the courts in decided cases and necessitate that banks be held to a higher standard than before.

- Deferred indefeasibility should be reconsidered in circumstances involving fraud

Although this is a controversial recommendation, we believe that, the judicial preference for immediate rather than deferred indefeasibility be reconsidered in circumstances of fraud.

This is particularly the case in relation to mortgages. 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 bone fides of the mortgagor and the transaction. Immediate indefeasibility to mortgagees means that, so long as they are not implicated in the fraud themselves, the mortgage will stand. This is despite circumstances where the mortgagor could have taken greater precautions to ensure the mortgage was untainted by fraud. This is, on some views, unfair because:

As between the mortgagee and the landowner, the mortgagee is the ‘cheaper cost avoider’ - the party that can at the least cost avoid identity fraud by adjusting their behaviour in the transaction. The landowner, who is typically ignorant of the fraudulent transaction, can do little or nothing to prevent it.

Further, in a Canadian decision it has been noted that:

By interpreting the Act in accordance with the theory of deferred indefeasibility, the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the
party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.\textsuperscript{33}

In our view this gives rise to an interesting possibility for Western Australian law especially when also considering the introduction of the NCCPA. It would seem the comments such as those noted above could be adopted in an Australian context so that if the responsible lending requirements were not met by the lender, deferred indefeasibility should be applicable.

- Legislative amendment to the \textit{Transfer of Land Act (1898)} so that a defrauded former owner can proceed directly to the State Assurance Fund for compensation.

Although monetary compensation is available to the aggrieved former proprietor, negotiating the compensation provisions is a difficult task. The structure of the compensation system in Western Australia is such that the victim of a fraud must, in most cases, proceed first against the perpetrator, a difficult task if that person is a member of the family. Then, if unsuccessful, compensation can be sought from the state assurance fund.

In our view the TLA should be amended so that aggrieved parties can proceed directly against the Assurance Fund in all cases. Recourse could then be sought by the state against the perpetrator.

- Although generic criminal laws exist that can be used to take matters of elder financial abuse forward, specific provisions should be inserted into the WA Criminal Code making it a distinct offence.

Specific criminalisation of elder abuse would provide additional statutory protections to older persons. Although many crimes perpetrated against older persons (for example assault and fraud) are already found in the criminal law, there are distinct advantages in creating equivalent offences that focus on older persons. Policy and attitude barriers amongst law enforcement authorities mean that the circumstances of many abused or neglected older adults are not treated as crimes.

The “status” of elder abuse as a crime in itself and the likely media interest associated with the conviction of offenders would result in heightened public recognition of elder abuse. This could assist in changing public perception about the nature of the abuse.

Classification of elder abuse as a discrete offence would assist in keeping records of offences committed. This would allow authorities a window into the nature and prevalence of the abuse.

Although circumstances of aggravation can already be taken into account with sentencing, specific sanctions for crimes against older persons are indicative of the seriousness of the crime and the public distaste for crimes against vulnerable people.

\textsuperscript{33} \textit{Lawrence v Maple Trust Co} [2007] ONCA 74; 278 DLR (4th) 698; 84 OR (3d) 94.
Chapter 3

Strata title

Waldemar Niemotko, President of the Australian International Research Institute, called for strata reform to help seniors live independently, rather than move to retirement villages and nursing homes increasingly overburdened by Australia’s ageing population. He said that many seniors had downsized their homes and invested their life savings in strata units, only to find their limited resources stretched by levies passed by younger investors seeking to increase the value of their property. He believed that many seniors felt intimidated and marginalised in decision making, particularly as they tend to be “asset rich and cash poor” and consequently ineligible for free Legal Aid if they wished to contest an unfair decision. They also tend to be less computer literate at a time when information is increasingly distributed online.¹

This chapter continues the discussion of home ownership but focuses on a particular form of title, strata title.² Strata title refers to the manner of division of a parcel of land into lots or into lots and common property under a strata plan.³ Strata titled properties are a popular choice for people who prefer smaller, more easily maintained lots and close proximity to established suburbs.

Although the issues discussed in Chapter 2 regarding senior homeowners are applicable to owners of strata title property too, the special nature of strata title means that other issues may arise that impact upon legal and/or ontological security of tenure.

Many older people wanting to downsize but who do not want to move into a retirement or lifestyle village environment are attracted to living in a strata titled complex. Seniors may also want to maintain their independence and/or prefer to live in a mixed generation environment. The growth in the numbers of strata complexes throughout Western Australia enables many seniors to remain in a familiar locality but in smaller, easily maintained premises.⁴

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² In Western Australia there are two kinds of strata title: strata title and survey strata title, see ss3,5 and 5A Strata Titles Act 1985 (WA) (hereafter STA).
³ The term ‘Strata’ is derived from the Latin word Stratum or ‘covering’ which, in turn originates from ‘Stratus’; to spread or extend. The standard singular form is stratum; the standard plural is strata (or sometimes stratums), not strata’s: <http://www.thefreedictionary.com/stratum>.
⁴ Department of Commerce Consultation Regulatory impact statement and discussion paper: The licensing of strata managers in Western Australia, October 2011, Perth page 3: <http://
Indeed, some strata developments are limited to residents over the age of 55.5

The communal and interdependent nature of the strata environment may precipitate issues which affect security of tenure in both the legal and ontological sense. As registered proprietor of strata titled property, an owner's security of tenure can be lost or undermined through a variety of vulnerabilities, some common to all home owners,6 and others unique to owners of strata title.

In a strata title complex, a piece of land – a parcel - is divided into lots or lots and common property in a strata ‘scheme’.7 Each strata complex is different in terms of size, residents, management and use.8 Strata schemes are popular in Western Australia, mirroring developments in other Australian States and Territories.9 Residential, commercial or industrial land may be converted to strata title, which enables multiple ‘lots’ to be created on a single parcel of land. Examples in a residential context include duplexes, townhouses, apartments and, in some cases, retirement accommodation. In a commercial context, larger complexes may be comprised of a number of strata titled factory units, offices and/or shops.

What the interviews revealed

It must be said that, when strata living works well for older people it can be a very rewarding existence. Like our interviewees on home ownership, many older strata title owners were delighted with their home and the lifestyle strata titled communities offered. Most respondents had sold their family home to ‘downsize’ whether because of a desire to do so or because health issues or widowhood intervened. The decision to enter into a strata titled complex varied. Many did not like the idea of going to a retirement village and did not feel they were “ready yet”. Indeed many did not contemplate such a move at all, some described how they “liked their own space” and that “you can choose to live your life as you wish, you are not press-ganged into activities.” Indeed, there was a general reluctance amongst this group to move to a complex where all the residents were older or retired. They did not feel ‘old’ and wanted to be around people of all ages. Also, several chose a particular complex because it was in a familiar area and was proximate to shopping, transport and support networks. Those in over 55’s strata complexes chose to enter a complex with that limitation because it was smaller than the larger retirement complexes but without the concern of younger people and renters.

Unfortunately, living in close proximity to a variety of people, and those people often having input into ones daily life, can result in disputes. Even

“...We really thought of it as just like our house but smaller. We had always got on with the people next door. It hasn’t worked – we are not happy ... we don’t like the neighbours and we want to do things around the place without getting somebody’s permission.”

Interview ST 1
those people relatively happy with their accommodation had experienced difficulties.

Several respondents were of the view they had been “misled” by sales people prior to the sale. They were unaware of the necessary forms or found them too complex.

Also, seniors chose to proceed through settlement agents because of concerns about legal fees. Generally, they felt that there was little explanation and the intricacies of strata living had not been explained.

Many of our respondents regarded a strata title property as akin to a green title block, in other words it was “their” property and they felt they should be able to make improvements and generally treat the property as their own. The reality of community living led some respondents to regret making the move to a smaller property and the perceived advantages were outweighed by what were regarded as limitations on their autonomy and lifestyle.

One of the main issues was the misunderstanding about what one can, and cannot do with their strata titled property. Several respondents mentioned issues such as wishing to make improvements to the property and were refused by the strata council. Examples ranged from the installation of air conditioners to Foxtel satellite dishes to cosmetic improvements. There were concerns about lack of autonomy and resentment that, in some cases at least, seemingly superficial improvements or alterations were refused. Some respondents had actually gone ahead with improvements and incurred the wrath of the strata council, indeed, an issue with one respondent proceeded to the SAT.

Another related concern was difficulties with other residents. Several respondents experienced difficulties with people renting other units in the complex or concerns about day to day issues such as parking and cleanliness. Related to this was a considerable amount of frustration about investors - ‘absentee owners’ – who, in some respondents’ view, neglected the properties and had no concern for other owners. Some complained that there was a reluctance to pursue owners or residents who did not comply with by laws.

Rising fees and maintenance costs were of concern to respondents. In addition to council rates and charges, owners of strata title properties must pay strata levies and, at times, make other monetary contributions. Several respondents were concerned about the frequency and the magnitude of rising fees and in some cases felt that, eventually, the cost would drive them to sell the property.

Management was another concern. Many felt that their voices could not be heard as they were “outnumbered” in meetings or simply disregarded by members of the strata company or strata council. There was concern about the transparency of accounting, contracting, payment of accounts and the necessity for certain works. There were concerns about agreements with particular contractors and the failure to seek a range of quotations for services. Where strata managers were employed by a strata company or strata council respondents also voiced concern. Again the complaints involved a lack of information and transparency. Many were concerned about the skills, and indeed the ethics, of some strata managers.

“It is the best thing I have done. It’s small, quiet but everything is close. The people are all nice and look out for me. There are all ages here so it is a real mix.”

Interview ST 4
Another concern prevalent in the interviews was the difficulty in negotiating dispute resolution. Respondents found that internal efforts at dispute resolution were often too “poisonous” to be worthwhile but were deterred by the “legalistic” SAT process.

Finally, there are examples of a ‘divide’ between younger and older residents in strata titled complexes. While perhaps this can be explained away by the age old differences between generations, the issue was of considerable concern to our respondents. The main concern is the financial implications on older people who are on fixed incomes. Several respondents believed that strata councils were made up of younger people with more disposable income and who made decisions without reference to the financial resources of other people in the complex. There were also complaints that improvements were of no or little benefit to older people in the complex. On the other hand there were complaints that there was a resistance to the installation of age-friendly aids.

**Summary of findings**

Our research revealed numerous weaknesses in the relevant legal framework that could undermine security of tenure for older homeowners. While these issues are common to residents of strata title complexes of all ages, they are likely to have more effect on seniors. Seniors are likely to be at home for longer periods and, if there are problems within the complex there will be greater opportunities for exposure to issues of consternation. Rising fees and charges are of concern to older residents as they are often on fixed incomes. A lack of autonomy and feelings of being ignored by other residents, particularly in relation to complex management decisions also undermines legal and ontological security of tenure.

Our findings revealed a significant issue of the lack of awareness and understanding about the nature of strata ownership and the related vagaries of use of common property, by-laws and management responsibilities. This is of concern to us as it seems many of the interviewees would not have chosen to live in a strata titled environment if they had been aware of these issues. On the one hand, there are publications produced by the Department of Commerce on strata title living, rights and responsibilities. The Seniors Housing Centre provides information and seminars on various forms of seniors’ accommodation, including strata title. This information, however, does not seem to be getting through to many older people and efforts to educate potential purchasers, and emphasise the differences between strata and green title ownership, need to be enhanced.

Another shortcoming revealed was the lack of qualifications for and competence of management. Upon the registration of a strata title or survey strata scheme a strata company comes into being.\(^\text{10}\) The strata company is comprised of the owners of the lots in the strata scheme and can make management decisions about the day to day running of the complex. Responsibilities include enforcing by-laws, maintaining common property and other statutory requirements.\(^\text{11}\) Sometimes it is impracticable for all owners to participate in the day to day running of the complex, therefore the STA provides for the creation of a representative body, the strata council to

\(^{10}\) STA ss 32(1).

\(^{11}\) Ibid 35(1).
perform the duties of the strata company. While this is a sensible and efficient alternative to insisting that all owners participate in the strata company, in our view, this procedure can result in disputes and ill-feeling about decisions made by the council. This is especially the case if, as was the case for several of our interviewees, the strata council becomes dominated by particular groups of owners.

Another concern to us is the seeming lack of information and transparency associated with strata council decisions. Although there are prescriptive requirements in the STA regarding decision making, resolutions, notice and so on, it seems that in many cases decisions are made on an ad hoc basis and imposed on often reluctant owners. Indeed, it seems there is often blatant disregard of the provisions of the STA. Whether this is the result of ignorance of the provisions or blatant disregard is a matter of conjecture. It is clear to us, however, that there is a disconnect between the procedures in the legislation and what often occurs in practice. Again it is imperative that strata councils are educated in relation to their rights and responsibilities towards all owners and residents.

The problem is not necessarily alleviated by the appointment of a strata manager. We hold grave concerns about the standard of strata management in Western Australia and suggest that the role of strata managers should be addressed directly in the STA and they should be licensed. Strata managers should be subject to character checks and have obtained appropriate educational qualifications. In our view this is a fundamental flaw in the legislation governing strata title in Western Australia and, given the dire results in the event of improper practices, should be addressed as a matter of priority.

The additional and ongoing costs of living in a strata titled complex are often not factored in by owners. Such costs impose a greater impost on older owners due to limited or fixed incomes. We have some concerns about decisions made in relation to contractors. Also, if the need arises for significant capital repairs such as elevators, and the sinking fund is inadequate, older owners may be unable to meet their contributions. Similar results follow where, for example, a resolution passes in relation to renovation works and all owners have to make a contribution. Again there needs to be greater transparency of such expenses and consideration needs to be given to ways older people can make the requisite contributions without hardship.

A related finding is the vexed issue of improvements to the complex as a whole. We found that there are two ‘sides’ to this coin, the first where other owners may want to incur expenditure that older owners do not necessarily benefit from or, where the construction of facilities appropriate to Seniors is vetoed. In both cases we have found that there can be a divide between younger and older residents. For example, in the first case, cosmetic renovations may be appealing, and add value, but of little day to day relevance to some older residents especially if a financial impost is imposed. In the second case, there has been resistance to the installation of ramps in some complexes as younger (and indeed some older) residents felt it made the property less attractive and thus devalued the property. In our view, consideration should be given to required contributions to inessential improvements and that the installation of age friendly facilities should be encouraged. Issues of discrimination could also be canvassed in this regard.

“Those committees are like ‘little Hitlers’. They can’t keep their nose out of anything and are always telling you what to do.”

Interview ST12
In our view, dispute resolution processes must be streamlined and more use made of mediation. Disputes arise between residents themselves, as is almost invariably the case where people reside in close proximity, and with management. Such occurrences undermine security of tenure, particularly in the ontological sense.

**Recommendations**

Seniors are likely to be at home for longer periods and consequently more vulnerable to weaknesses in the law. A lack of autonomy and feelings of being ignored by other residents, particularly in relation to management decisions also undermines legal and ontological security of tenure.

**The contract of sale and accompanying disclosure material**

Complex and confusing pre-purchase information and disclosure is often a source of subsequent consternation. Also, the prevalence of ‘off the plan’ sales often leads to confusion about the features, particularly the presentation, of the final product.

In our view, documents should be in plain English and supported by comprehensible information regarding strata title. There should be a one page summary highlighting the vendor and purchaser’s rights and responsibilities.

**Pre sale information and education**

Our findings revealed a lack of awareness and understanding about strata ownership. It seemed that many interviewees would not have chosen to live in a strata complex if they had been aware of these issues.

In our view, it is appropriate that the Seniors Housing Centre expand its services to provide classes on pre-strata title purchases.

**Pre-contractual variations, disclosure and misrepresentation**

There is also a need for clarification regarding the effect of pre-contractual representations. Several respondents who had purchased ‘off the plan’ had been disappointed that the end product was different to that anticipated. For our respondents, an often emotionally difficult purchase was amplified by a perceived failure to “live up to” promises.

**The Law**

A purchaser may terminate the contract of sale where they may suffer ‘material prejudice’ as a result of contractual variation. However, this is only applicable to variation to material in the contract itself. In our view, this is a concern for older people entering into a contract ‘off the plan’. Although some changes may be reasonably anticipated, it is a question of degree as to what changes would have impacted the decision to purchase. We believe the

12 *Strata Title Act 1985* (WA) s 69D(2)(b).
Strata Titles Act 1985 (WA) (STA) should be amended to ensure that purchasers must be notified of significant variations in aesthetic issues.\textsuperscript{13}

The STA should also be amended to include prohibitions equivalent to those in the ACL involving misleading or deceptive conduct and unfair contract terms.\textsuperscript{14} Recourse should be provided via the SAT rather than the courts.

Management by a strata company or strata council

In larger schemes it may not be practicable for all owners to be involved in management. Consequently, strata councils can be formed to carry out the duties of the strata company.\textsuperscript{15} Given their influence, it is imperative that members of the strata council are aware of their responsibilities. It would be desirable for accreditation of strata complexes, especially where a council is formed. We would suggest the development of several online modules that would need to be completed and passed before that person could sit on the strata council.

Transparency

Another concern to us is the seeming lack of information and transparency associated with council decisions. It seems there is often blatant disregard, through ignorance or intent, of the prescriptive requirements in the STA. Council decisions are often made on an ad hoc basis and imposed on reluctant owners.

Money management

The additional and ongoing costs of living in a strata complex, such as capital repairs and renovation works, are often not factored in by owners. Such costs impose a greater impost on older owners due to limited or fixed incomes. There needs to be greater transparency of such expenses. Consideration also needs to be given to ways older people can make contributions without hardship.

A NSW proposal will ensure that the sinking fund cover structural and maintenance costs for a period of more than 10 years.\textsuperscript{16} WA should consider such a proposal.

Concerns regarding money management could also be assisted by regular audits; two yearly in small complexes and yearly in larger ones.\textsuperscript{17}

Information regarding finances should be in a digestible form, such as a one page summary of key financial information provided to all members at least one week prior to the AGM.\textsuperscript{18}

Meetings

\textsuperscript{13} Due to the issues arising in Harvey Fields Private Estates Pty Ltd v 33 Malcolm Street Pty Ltd [2012] WASC 218.
\textsuperscript{14} Bennet v Elysium Noosa Pty Ltd (In liq) [2012] FCA 211.
\textsuperscript{15} Strata Title Act 1985 (WA) s 44.
\textsuperscript{16} Department of Fair Trading (NSW), Strata Title Law Reform (Strata and Community Title Law Reform Position Paper), November 2013, para 3.3.
\textsuperscript{17} Regular audits – each year for budget of over $250,000.
\textsuperscript{18} Department of Fair Trading (NSW), Strata Title Law Reform (Strata and Community Title Law Reform Position Paper), November 2013, para 3.4.

“At the display we were shown all sorts of lovely things. The units looked beautiful. When they were finished we weren’t happy at all. Things had changed; the finishes were not good – even a window was in a different place. We called the agent but he said we were only looking at an ‘artist’s impression’ – that there was no guarantee that the finished unit would look like that. That isn’t what we were told at all.”

Interview ST 3
Seniors are often limited in their ability to participate in meetings due to mobility or illness. Although proxies are available, we suggest that there should be more flexible methods of participation including postal voting and electronic means such as Skype. All information must be available at least one week before meetings.

**Voting**

Voting is a vexed issue. Owners should be given an option of a secret ballot, due to fears of intimidation when voting in a certain way.

There are few restrictions on the use of proxies which have the effect of allowing large groups with vested interests to vote in a particular way. In other jurisdictions a limit is imposed on the number of proxies one owner can hold.

**Elections**

Several respondents also complained about certain people ‘stitching up’ executive positions on councils and “running the show”. The proposed amendments in NSW could address this problem by providing that office bearers are to be elected by an ordinary resolution at each AGM and not by the committee itself.

**Responsibilities**

Members of the strata council and office bearers should be statutorily obliged to act with due care and diligence and to declare conflicts of interest.

**Liability**

We suggest that members who execute their duties in good faith receive an exclusion of liability. This would provide peace of mind and enhance the willingness of older owners to participate in the strata management.

**By-laws**

By-laws should not be unreasonably oppressive or discriminatory. Standard by-laws should permit keeping pets.

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19 Strata Title Act 1985 (WA) s 50A.
20 Ibid.
21 Such limits are already placed in Qld and such limits are proposed in NSW: see Department of Fair Trading (NSW), Strata Title Law Reform (Strata and Community Title Law Reform Position Paper), November 2013, para 1.14.
22 This already exists in legislation in QLD and will soon exist in NSW: see Department of Fair Trading (NSW), Strata Title Law Reform (Strata and Community Title Law Reform Position Paper), November 2013, para 1.3.

“*These people don’t know what they are doing. They have no business experience. They gang up on other people in the complex and try to tell them what to do. It’s only an air conditioner. It’s our property, we should be able to do what we like.*”

*Interview ST 1*
Alterations and improvements

Alterations to the property are one of the most troublesome issues. Many respondents were concerned that they were prevented from making improvements to their properties. If an unauthorised structure is erected on common property, the strata company may: remove it, request an order for it to be removed, or, if it remains, for conditions to be attached regarding its maintenance and upkeep.23

Age friendly alterations

Respondents mentioned that, at times, there was a reluctance to agree to age friendly improvements to the complex. A common complaint is that (usually) younger owners object to such improvements because it may deter other buyers if the complex presents like an ‘old people’s home’. This is a serious issue because, as the population ages, it will be necessary for buildings to be modified. In our view, the STA and/or standard by-laws should be amended to allow the construction of age related/disabled access alterations.

Moreover, it seems the refusal to permit the construction of ramps, elevators or like equipment to assist access to older residents could potentially contravene section 27 of the Age Discrimination Act 2004 (Cth).24 Similarly, s 66J of the Equal Opportunity Act 1984 (WA) makes it unlawful to discriminate against another person’s impairment in relation to access to places.25

Bullying and harassment

Some respondents had experienced bullying and harassment in strata complexes.26 This occurred both between residents but also between strata councils and residents. Potentially, this could lead to an owner leaving the complex or impaired ontological security. Strata councils should treat these allegations seriously and encourage ‘in house’ dispute resolutions. The STA should be amended to include provisions prohibiting harassment and unconscionable conduct towards residents.

Role of strata co vis a vis strata managers

The strata council, through the STA and by laws, can appoint a strata manager where it is impracticable for all owners to participate in the day to day running of the complex. Prima facie, strata managers have limited powers. It seems, however, that strata managers are often “left to it” by the strata company or strata council.

“Many lawyers act for individuals involved in neighbourhood disputes. Those involving strata environments are by definition more hotly contested. Strata environments can often create predatory, bullying and stalking type activities which in my opinion also need to be addressed in strata laws as well as building design to minimise these increasingly common types of complaints.”


23 See for example, Robinson and Stevens [2009] WASAT 207.
25 Strata Title Act 1985 (WA) s 66A. It would seem, unpalatable as the term may be, that ‘impairment’ extends to age, especially in combination with a medical or physical condition.
Strata managers are an important contact for owners and residents, as they are often an intermediary for new residents. Consequently, the STA should be amended to include regulation of strata managers, including screening and accreditation. Managers should be fit and proper and hold relevant qualifications. Recourse should be available if the performance of the strata manager has been unsatisfactory. Furthermore, managers should disclose commissions paid to third parties and conflicts of interest to owners. The agreement between manager and company must also be made readily available. Licensing of strata managers is long overdue.

Over 55s strata and younger relatives

These complexes have been a source of consternation where younger people, usually members of a resident’s family have sought to move in. We believe an exemption for a younger carer is appropriate to ensure an older person can remain in their home.

Dispute resolution

Disputes arise between residents themselves, as is almost invariably the case where people reside in close proximity, and with management. Such occurrences undermine security of tenure, particularly in the ontological sense. Dispute resolution processes must be streamlined and mediation emphasised. Furthermore, costs orders should be awarded against strata councils or managers that will not mediate, and the SAT should be empowered to deal with dysfunctional schemes.

27 Western Australian Consumers Association Inc: “Some strata owners self-manage (through a strata company or strata council) while others, particularly larger complexes, employ the services of professional strata managers. Strata management is spread across the variety of entities including independent strata managers, real estate agents, property managers and self managed complexes.”

28 Department of Consumer and Employment Protection, Review of Proposed Licensing/Regulation of Strata Title Managers (June 2007); Western Australia Legislative Assembly, Economics and Industry Standing Committee, Inquiry Into The Western Australian Strata Management Industry Report No. 5 (2003); Western Australia Legislative Council, Standing Committee on Public Administration, Report in Relation to the Inquiry into Western Australian Strata Managers (September 2011).
Chapter 4

Seniors in the private rental market

I was renting this place from an old lady for 12 years. The rent had been the same for a while ($210) but she knew I looked after the place. She died suddenly just before Christmas. Her son came around and said that the unit had been left to his daughters. He said I would have to leave because he wanted to renovate the unit and lease it out at $450 a week. I looked around but there was nothing I could afford. I didn’t want to move out of the area because I had choir, my doctor, shops and the rest. I went to see my member of parliament and the woman in his office told me to just stay put for as long as I could. I didn’t want to do that because if they threw me out I would never be able to rent anywhere again. Finally I spoke to the son and told him I didn’t have anywhere to go. He said he would put off the renovation and I could stay on for 6 months. The rent rose by $150. I am happy to be staying for a while but I don’t know what’s going to happen when the 6 months is up.

Chapter 4 takes our discussion away from older people who own their own green title or strata title property to those in the private rental market.

Despite some easing, the Perth rental market remains tight and comparatively expensive. The average private rental for a house is $475 and $450 for a unit. Vacancy rates remain low at 4.1%.

Rentals were an affordable option until 2006. With an increase in mining activity, however, and a resultant increase in rents, rentals became unaffordable to many. The Bankwest Curtin Economics Centre notes that 38% of renters between the ages of 55 and 64 are spending more than 30 per cent of income on rent and 22 per cent more than 50 per cent. Even though the

1 Interview PR3.
4 Ibid.
6 Housing Affordability Report – The real costs of housing in WA (Focus on Western Australia Report Series, No.2), above n 2. This has increased from 12 per cent to 38 per cent between 2003-04 and 2011-12.
7 Ibid.
Mining boom has slowed rents have not generally significantly decreased to become affordable for low income earners. The private rental market in most capital cities is beyond the means of many older people yet it may be their only option.

The annual Anglicare snapshot of rental affordability (where affordability is spending 30% or less of income on housing) paints a bleak picture. Anglicare looked at 4,272 properties and found that no properties in Metropolitan Perth were affordable for couples on the aged pension. Prices in the South-West and Great West were lower, but ‘moving to the country is becoming less of a solution to housing.’ Rental prices in the resource-based North-West continue to be completely unaffordable.

Vacancy rates are another issue both affecting and driving the rental crisis. Low vacancy rates not only means there is a shortage of housing supply, but also that rents will rise in line with supply and demand. Unsurprisingly, the problem is at its height in mining hubs around Karratha and Port Hedland, which have near zero percent vacancy rates. The problem is exacerbated by the number of unoccupied dwellings in the state, 48,684 in 2006, which many investors, both overseas and domestic, continue to hold. According to ABS statistics, unoccupied dwellings in Perth rose by 26% between 1996 and 2006. However, there have been some reports of a welcome rise in vacancy rates in very recent times.

These socio-economic conditions have created a ‘perfect storm’ for renters in the private market. High rents, scarcity of housing, low vacancy rates, a growing population and cost of living pressure combine to create a very difficult situation for renters. Seniors in the private renting market are especially vulnerable. Relying on a pension of around $220 a week and Commonwealth Rental Assistance (CRA), maximum $123 for singles, will be insufficient to meet housing needs. Even in situations where ‘affordable’ housing is secured, where and in what condition will it be? As Cashmore points out in her examination of the Australian rental market, it may be

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8 REIWA data October 2013 Since the end of 2012 overall median rent is down by $5 per week although falls were greater in some areas than others: in Bayswater, Bassendean, parts of Wanneroo, Cockburn and Rockingham median rents are down by $10 per week; in Fremantle by $15 in Vincent by $20.
9 According to Anglicare and the Salvation Army, despite the downward movement in rents there is still a crisis in affordable housing in WA The World today with Eleanor Hall Dec 2013.
12 Ibid 65.
13 Ibid 67.
14 Ibid 68.
15 See for example The Housing We’d Choose: A study for Perth and Peel published by the Department of Housing and Rowley and Ong (2012) Housing stress, housing affordability and household wellbeing in Australia. AHURI Final Report Series. Australian Housing and Urban Research Institute, Melbourne.
17 Ibid.
18 Western Australia Statistical Indicators, Dec. 2007, ABS.
acceptable for some groups (e.g. students) to live in smaller dwellings; others including seniors may need more to fulfil their basic requirements. 20

With rising rents, many seniors are being forced to move away from their community, familiar surrounds and support systems. 21 Those who are not fortunate enough to be able to remain in their homes or secure alternative accommodation end up with family or joining the already congested waiting list for public housing. 22

What the interviews revealed

The research team interviewed 20 people in relation to private rentals. There were three couples who were interviewed together and the other respondents were interviewed individually. Most were older people who had entered the private rental market. Two respondents were children of older people who had been, or were living, in private rental housing and one person was a neighbour of an older person who was renting a home.

Our respondents rented privately for several reasons. Many were long term renters who, for a variety of reasons, has chosen not to purchase a home. Others had been home owners but no longer owned a property because of personal, financial or lifestyle considerations. The attitude of the respondents seemed, at best, resigned. Their experience in the private rental market has not been particularly pleasant. With some respondents, financial issues had caused them to sell a home and move into rental accommodation which, in some respects, may have jaundiced their views of the experience. Having said this, several of the respondents were long-term renters and raised almost identical issues.

Unfortunately, there was some sense of embarrassment amongst the respondents because they did not own a home in older age. This was especially the case with the respondents who had owned a home previously and had to sell: For example, an older couple had to sell their home when the husband was injured in a motor vehicle accident:

I was talking to a neighbour about how hard it was to find a rental we could afford. He asked me what I had been doing all my life to still need to rent now. I didn't really know what to say because I didn't want to go into what had happened with A (husband). I felt really embarrassed, like he thought we had just frittered all our money away. 23

Several respondents mentioned they felt there had been discrimination about age, indeed it seemed to feed into the perception discussed above about homeownership with renters a group of second class citizens.

The main concern is a fear of eviction. With rising costs and low availability, older people in rental situations are concerned that if they have to leave the

“...The more rent goes up so the further out you have to go. We were in X (suburb) for years but we have moved away now.”

Interview PR 6

22 Ibid.
23 Interview PR5.
property they are residing in, they may not be able to afford another, at least not in a familiar area. Even under a fixed term residential tenancy security of tenure is for only a short period of time. Upon expiry of the fixed term many older people are on periodic tenancies that can be terminated without grounds on very short notice.

…of course I worry about it. The owner won’t sign up for a longer term, he says he may want to renovate down the track. So we don’t know when he might say, “that’s it, time to go”\textsuperscript{24}

Some older people were paying very high rents to stay in a particular area. For example, one couple had to sell their home after being affected by health problems. They wanted to stay in the same area due to its familiarity and proximity to networks established over time. This is becoming more difficult as the area is quite desirable and rental increases continue.

What would we do? I don’t know. We wouldn’t be able to stay in this area, it is too expensive. But this is where we know and D (daughter) is close.\textsuperscript{25}

There was an acknowledgement that if older renters moved further out to the city fringes they may find something cheaper but there were concerns regarding travel, infrastructure and establishing new networks. And, as one respondent said:

I moved out here to save money on rent but it costs me to get anywhere. Where I was living I could walk. Now I can’t get anywhere unless I drive. I have kept the same doctor so if I need to see him it’s a cut-lunch job. I pay a bit less rent but pay a lot more in petrol and time.\textsuperscript{26}

Another concern was the reluctance to complain about the state of the premises as this could lead to higher rents or even eviction. Several respondents mentioned that they do not report the need for maintenance and repairs due to concerns that if they ‘draw attention’ to themselves there could be undesirable consequences. There seemed to be reluctance on the part of some landlords to make modifications for access for older tenants:

Mum put up with a faulty stove and a leak in the roof for ages. I was going to say something to the agent but she didn’t want me to. She was scared that if they repaired it they may put the rent up or think she was complaining. In the end I paid to get the repairs done.

Of some concern were comments regarding the health of older people in private rental and the fact that this went unnoticed unless a neighbour or a property manager drew attention to it:

S and I lived next to each other for years. After C (S’s husband) died she became a bit withdrawn but we thought that was just normal. We popped in and we used to talk to her and check on her and that. Gradually she became very reluctant to talk and we noticed she was losing weight. She just wasn’t looking after herself. I didn’t really

\textsuperscript{24} Interview PR11.
\textsuperscript{25} Interview PR 2.
\textsuperscript{26} Interview PR 16.
Summary of findings

Most of our findings will come as no surprise to those familiar with the Western Australian rental market. In recent times renters of all ages have experienced an increase in rental prices and a decrease of available properties. Although conditions have eased to some extent, the damage has been done and it is unlikely that the rental markets will return to truly affordable levels for low income earners in the foreseeable future.28

As Australia moves towards a larger proportion of the population – by choice or by circumstances - renting long term, there will be a demand for more legal protection for tenant’s security of tenure. In our view, it is appropriate for the relevant stakeholders to accept this inevitable development and work collaboratively to achieve mutually beneficial reform.

In addition, we were concerned about (albeit anecdotal) attitudes regarding older people in the rental market. In our view there is a prevailing societal attitude that if a person has reached retirement age without owning a home they have been errant and financially irresponsible. While this could be explained by the Australia’s preoccupation with home ownership – and the relative wealth of Western Australia - our concern is that such dismissive attitudes could undermine discussion about heightened tenant protections, particularly regarding older renters. Such views do not take into account the vagaries of life including the compounding effect of a lifetime of low income, family circumstances and responsibilities and unexpected health issues. It can also permeate the self-confidence of older renters making them feel like they ‘don’t deserve anything’ because ‘they think I haven’t been careful’.29

With regard to legal security of tenure, the obvious point to make is that there is virtually none, at least for any reasonable period of time. The Residential Tenancies Act 1987 (WA) (RTA) remains focussed very much on the rights of the landlord. While there are valid arguments to support such an approach, including encouraging people to invest in the residential tenancy market, we are not convinced that an increased period of tenure for renters and enhanced rights at the end of a residential tenancy agreement would undermine investor confidence. Indeed, we cannot understand what objection a small investor would have to a lengthy lease over a property; there would be stability of the tenancy, the likelihood a person staying long term would care for the property and no loss of income between tenancies nor fees for finding new tenants. Obviously, legislation would retain procedures to terminate tenancies where rental was unpaid or the property damaged.

In our view there should be a reexamination of the RTA to introduce more tenant protection to safeguard legal security of tenure. This should include

27 Interview PR 7.
29 Interview PR 19.
Chapter 4 – Seniors in the private rental market

In many parts of Europe, renting has long been considered a respectable and viable long-term alternative to ownership. In Germany, about 60 per cent of households rent, about twice the Australian rate, including public housing. Many Australian renters see themselves as second-class citizens, saying they are ‘just renting.’


rental caps for significant periods, automatic renewal and the necessity for just cause for termination.

Our findings include reservations about the suitability and accessibility of rental housing for older people. There also must be stronger regulations of landlords who fail to repair properties in a timely and sufficient manner. There are very real issues of legal liability for landlords who fail to repair and any education programs directed at landlords should emphasise this vulnerability. The nature of the rental market – and the ‘take it or leave it’ attitude that has prevailed among some landlords – has seen properties permitted to deteriorate without adequate maintenance and repair. By extension, this includes a reluctance to renovate or spend too much money on properties, especially if an older tenant requires better access. Tenants are reluctant to complain because they are fearful of rent increases or being evicted. This is of particular concern for older residents where health or safety could be undermined by failure to repair.

Indeed we are also of the view that issues of design and maintenance should receive more attention by state and local government, including mandating a move towards universal design for all new builds and renovations. There also should be more vigilance on the part of local authorities regarding the repair of properties.

Age discrimination is an issue for some older renters. In some ways this is counterintuitive because most older people are perceived as quieter and more reliable tenants. The discrimination impacted particularly on those seniors on a pension or fixed income. It seems that with rising rents many landlords were opting for younger people with higher disposable income. There also seemed to be a perception that older tenants may ‘want too much’ or ‘be too demanding’. Indeed, some interviewees noted the unwillingness to modify rental properties to assist older people – including very long-term reliable tenants – with mobility issues. We believe that there should be more education for landlords and those in the real estate industry about discrimination in relation to age.

We are concerned about social isolation of older renters and the emotional and financial impact of the loss of an older person’s partner in the private rental market. Also, there needs to be heightened awareness of health issues that can lead to tenancy and/or rental delinquency. For example, the incidence of hoarding among older people is more common than is realised and can lead to eviction on grounds of lack cleanliness. As the persons on the ‘front line’ and most likely to be informed of a problem with a tenancy we suggest that education for property managers on detecting signs of distress in older residents is essential.

Finally, in our view there must be a serious discussion about affordable rental housing between government, the housing industry, business, investors and financiers.

30 Interview PR1, 8, 13.
31 And indeed other types of discrimination as discussed in this report.
**Recommendations**

- In our view there should be a re-examination of the RTA to introduce more tenant protection to safeguard legal security of tenure. This should include rental caps for significant periods, automatic renewal, abolition of any option fee for applicants over 60 and the necessity for ‘just cause’ terminations.

As a greater proportion of the population rents long term, there will be a demand for increased protection of these renters’ security of tenure. In our view, relevant stakeholders should collaborate to achieve mutually beneficial reform.

With regard to legal security of tenure, there is virtually none, at least for any reasonable period of time. The RTA, which regulates the relationship between owners (lessors) and tenants in WA,\(^ {32}\) remains focussed very much on the rights of the landlord.

We are not convinced that an increased period of tenure for renters and enhanced rights at the end of a residential tenancy agreement would undermine investor confidence. Indeed, we believe a lengthy lease over a property would:
- increase the stability of the tenancy;
- provide greater incentive for the tenant to care for the property; and
- ensure no loss of income between tenancies or fees for finding new tenants.

Obviously, legislation would retain procedures to terminate tenancies where rental was unpaid or the property damaged.

The RTA permits some regressive fees and charges, such as rent in advance and security bonds. There is also little control on excessive rents.\(^ {33}\)

Furthermore, currently, an owner may terminate an agreement without giving any grounds and only 60 days notice.\(^ {34}\) Perhaps unsurprisingly, the lack of security of tenure in the private market has been cited as one of the key reasons why seniors move into public housing.\(^ {35}\)

WA compares unfavourably to other jurisdictions, notably Western Europe where residential rental terms are, mostly, lengthy, there are strict limitations upon termination and, in some cases, specific protections for older tenants.\(^ {36}\)

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32 *Residential Tenancies Act 1987 (WA).*
33 *Residential Tenancies Act 1987 (WA)* s 32.
34 Ibid s 64(2).
• There must be stronger regulation of landlords who fail to repair properties in a timely and sufficient manner, both through incentives and via stronger provisions in the RTA. Education programs should reinforce to landlords their legal liability if they fail to make repairs.37

Our findings include reservations about the suitability and accessibility of rental housing for older people. The tight nature of the rental market has seen many properties permitted to deteriorate without adequate maintenance and repair. This includes a reluctance to renovate or spend too much on properties, especially if an older tenant requires better access.38 Tenants are hesitant to complain because they are fearful of rent increases or eviction. In one case, even when a tenant was prepared to pay for modifications herself, this was refused on the grounds that the modifications (a ramp and various aids within the home) may affect the appearance of the property.39

Indeed, we are also of the view that issues of design and maintenance should receive greater state and local government attention, including mandating universal design for all new builds and renovations.40

• We believe that there should be more education for landlords and real estate industry professionals concerning age discrimination that emphasise their statutory obligations.41 The State Government should also introduce meaningful penalties for discrimination against seniors in the private market.

Under the Equal Opportunity Act,42 it is unlawful for an owner to discriminate against a person seeking accommodation due to their age. Age discrimination is an issue for some older renters, particularly for seniors on a pension or fixed income. Although most older people are perceived as quieter and reliable tenants, rising rents has led many landlords to opt for younger people with higher disposable income. Landlords also seemed to believe that older tenants may ‘want too much’ or ‘be too demanding’. Indeed, some interviewees noted an unwillingness to modify rental properties to assist older people – including very long-term reliable tenants - with mobility issues.43

• We suggest education for property managers, as those on the ‘front line’, to assist in the detection of signs of distress in residents. We also recommend the provision of more home care programs to assist senior tenants to age in place. ‘Ageing in place’ is a goal often unduly limited towards home-owners.

We are concerned about the social isolation of older renters. When older people have to move it is likely to mean that they must move to a new and unfamiliar area, without local networks, family and friends. Furthermore, the
emotional and financial impact of the loss of an older person’s partner in the private rental market is troubling. 44

Also, there needs to be heightened awareness of health issues that can lead to tenancy and/or rental delinquency. For example, the incidence of hoarding among older people is quite common and can lead to eviction on grounds of lack of cleanliness. We suggest education for property managers, as those on the ‘front line’, to assist in the detection of signs of distress in residents. We also recommend the provision of more home care programs to assist senior tenants to age in place. ‘Ageing in place’ is a goal often unduly limited towards home-owners.

• The operation of the Seniors Housing Centre, a “gateway for information and referrals for seniors on their available housing options,”45 should be extended to include the provision of financial and legal advice.

At present, the Seniors Housing Centre provides information and referrals but can go no further. For the most part, the Department of Commerce is similarly constrained. In our view, Western Australia needs a designated low cost advice and advocacy service for seniors navigating their legal, in particular, housing rights.

• We believe that a specialist residential tenancy tribunal should be established with a presence in rural and regional areas. The tribunal should also emphasise mediation prior to resorting to legal proceedings.46

Unlike most other Australian states,47 WA does not have a specialist Tribunal to deal with tenancy disputes under the RTA. Rather, the Magistrates Court has exclusive jurisdiction to deal with any matter under the RTA for disputes under $10 000.48

Owners and/or their agents may be at an unfair advantage, as, although proceedings are ‘informal’, they are more familiar with the procedures.49
The requirement to operate one’s own case may place an especially difficult burden on seniors.50

• Finally, in our view there must be a serious discussion about affordable rental housing between government, the housing industry, business, investors and financiers.

The National Rental Affordability Scheme (NRAS) sees the Commonwealth and State governments collaborate to invest in affordable rental housing. The scheme offers financial incentives to persons or entities, for example community organisations, to build dwellings and rent them to low to middle income people at a rate at least 20% below market value rent. In the 2014

“Social isolation is a very worrying and real concern for many as they age, particularly with the changes in family values, the loss of community and an increase in lone person households. The links between social isolation and depression and ill health are a significant concern for seniors and this issue ties in closely with the type and location of housing, and the support which is attached to housing in which older people are living.”

Queensland Shelter 2009
Budget, the government announced that stage 5 will not proceed. NRAS will continue to contribute over $1 billion to housing supply and affordability over the next 4 years until 30 June 2018.\textsuperscript{51} We believe the NRAS should be reenergised with an emphasis on seniors housing.

More affordable housing is required for seniors but, if the public sector is unable – or unwilling - to fund it alone, other sources of funding from the private sector, through public/private partnerships or solely through private investment, must be cultivated. We also believe that planning approvals should contain a percentage of dwellings that are affordable and are to be inhabited by seniors.

Chapter 5

Social housing

There was something in my roof. I complained about it but nobody came to look. I was terrified; I knew someone was up there. This went on and on and I was beside myself. I wanted to leave but DOH said there was nothing available. I think they thought I was mad. Finally I got someone to have a look up there. It turned out some fellows from another unit could climb up through the man-hole, into the roof and crawl along to my unit. They thought it was a joke to scare me. They got warned but they are still around. I still want to leave.

This chapter continues our discussion of seniors in rental accommodation but focuses on social housing rather than private rental. In Western Australia, social housing comprises public housing and community housing. Public housing is owned and managed by the state government housing authority, the Department of Housing (DOH). Community housing is usually managed and/or owned by non-government, not-for-profit organisations, although many shires and local government authorities also provide community housing. In some cases community housing providers cater exclusively to particular groups of vulnerable clients, such as people with disabilities, older people or Indigenous people.

All public housing tenancies, including community housing tenancies, are regulated by the Residential Tenancies Act 1987 (WA) (RTA).

Security of tenure is a concern for many social housing residents. On the face of it, tenure is secure in the legal sense. The reality is, however, that a tenancy can be terminated in a variety of circumstances, including without grounds, on 60 days’ notice. While there are obvious similarities to the private rental arrangements discussed in Chapter 5, it is important to emphasise that social housing tenancies are subject to Division 3 of Part V RTA, Special provisions about terminating social housing tenancy agreements.

Often referred to as the ‘three strikes’ policy, these controversial provisions have resulted in eviction of older tenants, for example where younger family members visiting the premises cause trouble and the older person is consequently evicted. We are also concerned about the eviction of tenants if they have been under-occupying and have been offered suitable alternative accommodation. Also, research for this study has received complaints that

1 Interview SH 2.
3 Section 64 RTA.
4 Section 75A RTA.
5 Section 71H RTA. In the UK a ‘bedroom tax’ is mooted to address this issue: Shelter England,
some housing providers were using the threat of the three strikes policy to ‘discipline’ older residents and dissuade them from making complaints. Likewise, we are concerned that certain behavioural issues of older residents, for example hoarding, have been used as grounds to terminate a tenancy.\(^6\)

In an ontological context, security of tenure can be undermined by a variety of factors including living conditions, the behaviour of neighbours and, in some cases, the conduct of management.

**Vulnerabilities affecting tenants of public and community housing**

The primary vulnerability in this area is getting into the social housing system in the first place. Once within the system, however, vulnerability may arise through the risk of termination and also issues impacting on quality of life.

The initial vulnerability to consider is, of course, barriers to entry into social housing. Eligibility criteria are strict and there are lengthy waiting lists for those who are eligible. Once a home is made available, several respondents raised issues impacting on quality of life including troublesome neighbours and tardiness with regard to repairs and maintenance. Other vulnerabilities were revealed in that some respondents felt they had been bullied by management (in circumstances where management was involved in the tenancy) and that some managers seemed ill-equipped to fulfil their roles.

Finally, the three strikes policy is of considerable concern to older tenants. Also, the risk of termination can seemingly be applied in circumstances involving illness and perceived social issues such as hoarding.\(^7\)

**Summary of findings**

Our research revealed several matters of concern within the legal framework that could undermine security of tenure for older public and community housing tenants. Many of the issues, such as waiting lists, delays in repairs and neighbourhood issues, will affect social housing tenants of all ages however some have the potential to impact to a greater degree on older people.

We have two main concerns. The first is in relation to the role of DOH and the nature of its duty (if any) towards its tenants. The second is the use – and misuse – of the ‘three strikes’ provisions.

First, there is a need for clarification of the relationship between DOH and its tenants. On the one hand we can see why DOH regards itself simply as a landlord. It is a large government department and the logistics of having a welfare function would weigh on already scarce resources. Having said this, much of DOH’s clientele can be described, to some degree, as vulnerable thus necessitating an obligation upon DOH with regard to the welfare of its clients. DOH does fund support programs for its tenants, though, to alleviate

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6 See generally Schaefer v Department of Housing (No 2) [2012] WASCA 229.
7 See for example, Schaefer v Department of Housing (No 2) [2012] WASCA 229. While it must be said here that hoarding, depending on the level of it, can present considerable risk to the tenant and damage to the property, these issues should be managed rather than terminating the tenancy.
tenancy issues and provide that duty of care. Programs such as the STEP and the Public Housing Support Programs are both funded to support DOH tenants to address tenancy issues, including hoarding, anti-social behaviour and to develop skills to maintain successful tenancies. If, however, DOH is desirous of moving towards being a housing provider and nothing more, efforts to transfer DOH properties to community housing providers must be intensified.

Second, we are troubled by the use of the three strikes provisions. On one hand, it could be seen as a blessing because difficult tenants can be ‘moved on’ thus easing problems some older tenants experience with troublesome neighbours. However, several respondents described the use of the policy to intimidate tenants where the process was used as a way to discipline older residents.

Once within the system, it is fair to say that those respondents residing in a community housing environment were generally (but not universally) more satisfied than those in the public housing system. These findings echo findings in a national survey of social housing tenants by the Australian Institute of Health and Welfare in 2012. While acknowledging that satisfaction rates had declined since the 2010 survey, the findings revealed that community housing tenants report higher levels of satisfaction regarding their tenancy in comparison to public housing tenants in relation to the physical condition of the property, amenities, location and the management and maintenance services supplied by the provider.

Our other findings are predictable in that there is a shortage of social housing and an oversupply of eligible applicants. We can only reiterate calls for the funding and development of more social housing. We are also of the view that more thought needs to be given to allocation of older people to properties, especially where there are transport limitations or health issues. The safety of the complex and the surrounding neighbourhood is another important consideration. Also, if more thought was given to housing older people, more suitable properties may become available for larger families. This gave rise to two issues:

- Several respondents were living in houses with more rooms than they needed. While we are not suggesting people should be ‘moved on’ if they do not want to go, in some cases a smaller property would be welcome to an older tenant; but
- In other cases, respondents were concerned they would be made to leave a larger property as they were under-occupying. In these examples, respondents had been in an area for some time and did not want to move from established networks. Pursuant to s 71H RTA, DOH tenants can be moved when they are under-occupying and there is appropriate alternative housing available.

Finally, the concerns of older people in public housing need to be taken seriously. It seems that complaints, particularly involving security or safety, often fall on deaf ears. This impacts adversely on quality of life and thus ontological security. On the one hand, older tenants are aware that social

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9 Ibid.
housing is a scarce resource and do not want to ‘rock the boat’, yet it is simply not good enough for older people to be afraid to leave their home or walk past neighbours.

**What the interviews revealed**

Many respondents were happy to be living in social housing and ‘grateful’ to have a place to live. Most had lived in private rental before being allocated a public or community housing property. Indeed, several commented on how ‘lucky’ they were to ‘get a place’ now that rentals in the private rental market had risen. Some respondents had lived in social housing a considerable time.

It is important to make a few introductory points. First, all the respondents were happy with the fact they had been allocated a property. There was recognition that their social housing provided them with security of tenure for a reasonable price. Second, most were satisfied with their dwellings and their dealings with the relevant housing organisation, be it the DOH or a community housing provider. Third, the responses from tenants in community housing were generally more positive than those for public housing.

Having said this, several of the respondents had experienced some degree of difficulty in relation to a property, particularly maintenance, neighbours and management (in the case of community housing). Those who had unfortunate experiences were very concerned about their plight primarily due to the fact that if the tenant had to leave, they would be unlikely to find another affordable property. Several opted to stay put despite encountering what, to those respondents, was a difficult situation.

The respondents all agreed that there should be more social housing provided in an effort to reduce waiting lists and provide affordable housing. There was a suggestion that being older, particularly with a medical condition, should result in being given greater priority on waiting lists. Interestingly, more than 30 per cent of public housing tenants are on an age pension, which would suggest that seniors are in fact prioritised in public housing. Also seniors with a medical condition would already be eligible for priority.

There was also general agreement that more thought should be put toward appropriate placements for older people with a consideration of neighbours, transport and facilities. This was a particular concern for residents of public housing who did not feel consideration had been given to their age, and in some cases, health, before being allocated a property. Persons working within the sector noted, however, that because of the shortage of social housing, paying heed to such considerations would mean longer wait times.

Several suggested the construction of more age-appropriate dwellings including single room dwellings for older single residents. One single resident wondered aloud why he was allocated a spacious two bedroom property when he ‘didn’t need that much room’ and ‘others need a bigger place’. Having said this, some respondents were of the view that they did

"I think the reason some are not moved is because there is an over-abundance of 3 bedroom properties and a vast shortage of 2 bedroom and 1 bedroom properties in the public housing system.”

*Interview SH 6*
not want to be in an ‘oldies’ complex and liked the idea of being in housing where people over a range of ages were living.

Neighbourhood issues figured prominently in several interviews. Some were pragmatic about their situation commenting that ‘you can’t have everything’ in that they had a secure and affordable home and ‘this stuff can happen anywhere, it’s not just in public housing.’ In other cases, respondents were obviously shaken by their experiences and some claimed to be ‘living in fear.’ There was a general feeling of helplessness in that those who had made reports to the housing provider felt their complaints had ‘fallen on deaf ears’ or when some action had been taken ‘things went from bad to worse.’

Several respondents in community housing were concerned about the conduct of complex managers; indeed, one respondent had commenced legal proceedings against a manager. Concerns were raised in several contexts including financial management, mediation of tenant disputes and claims of bullying. Mention was made of the use of the three strikes provisions under the RTA to ‘keep us in line.’ Respondents gave examples where minor, and sometimes allegedly fictitious or exaggerated, breaches had been the subject of notices.

Waiting periods for repairs and maintenance were mentioned but there seemed to be a resigned acceptance from respondents, particularly those in public housing, that a lengthy wait was inevitable. Respondents in community housing were considerably more positive in this respect.

“CALD seniors should also be given appropriate consideration when allocating social housing. They are potentially more at risk of social isolation due to language and cultural barriers and efforts should be made to ensure appropriate placement, taking into account support services relevant to the particular CALD community.”

Interview SH 1

12 Interview SH 8.
13 Interview SH 3.
14 Interview SH 18.
15 Interview SH 18.
Chapter 5 – Social housing

Recommendations

Public housing

DOH relationship with tenants

First, there is a need for clarification of the relationship between DOH and its tenants. On the one hand, DOH is a large government department and the logistics of having a welfare function would weigh on already scarce resources. Yet, as much of DOH’s clientele is, to some degree, vulnerable, the Department should have an obligation to safeguard the welfare of its clients. If, however, DOH is desirous of moving towards being solely a housing provider, efforts to transfer DOH properties to community housing providers must be intensified.

Recommendations

• There should be an examination as to DOH’s role and responsibilities;
• Assuming the role is primarily a provider and developer of affordable housing, the transfer of assets and management responsibilities to community housing providers should be hastened;
• Outsource management and welfare considerations to community housing providers;
• If the dual (and in some respects conflicting) roles continue, DOH should introduce 6 monthly checks of older residents;
• Facilitate closer ties with care organisations such as Silver Chain;
• Ensure representatives of DOH retain duplicate keys of the properties and can enter the premises without notice in circumstances where it is feared the tenant may be incapacitated or ill.

Misuse of the three strikes provision

Second, we are troubled by the use of the three strikes provisions. Admittedly, the laws may benefit older tenants in that troublesome neighbours can be ‘moved on’. However, several respondents believed the policy was used to intimidate and discipline older residents.

Overview of the laws

Under section 75A of the RTA the DOH may apply to the court to terminate a tenancy on the basis that the tenant has:
• caused or permitted the premises to be used for illegal purposes,
• caused or permitted a nuisance to occur on the premises; or
• interfered or permitted an interference to neighbours.16

A tenant is also responsible for the behaviour of others on their premises with their permission.17 The DOH’s response to a tenant’s ‘disruptive behaviour’ is proportionate to the severity of the alleged behaviour.18 If a tenant has a history of breaching their tenancy agreement the Department may not rehouse them.19

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16 Sections 75(1)(a)-(c) RTA.
18 Ibid, 80.
19 Ibid, 200.
Criticisms

In a report entitled ‘A Better Way’, the Equal Opportunity Commissioner noted that strikes had been issued to seniors after unruly behaviour of guests outside of their control (including when a tenant was in hospital). The Commissioner argued that as public housing was used by people who could not access the private market, eviction should not be a punitive measure.

Recommendations

- Review the use of the three strikes policy as it impacts on seniors;
- Investigate claims that the three strikes policy is being used in the community housing sector because the provisions are applicable only to public housing;
- Investigate claims that the three strikes policy is being used as a threat to discipline tenants in relation to trivial actions or to deter complaints;
- Although this research project was prevented from examining the plight of Aboriginal Seniors, we recommend that the impact of the three strikes policy on this group of older people, and the ensuing consequences, should be the subject of investigation.

Towards more social housing

As governments increasingly opt for fiscal restraint, they are unlikely to increase budgets for social housing. Consequently, waiting lists will continue to grow as the population ages. It is evident too that the composition of older people in vulnerable housing circumstances is changing. For example, older women who had lived normal lives and not accessed welfare services have been recognised as a ‘new face’ of homelessness.

Recommendations

- Focus on familiar and novel partnerships to fund new social housing and encourage partnerships with developers;
- Impose a mandatory age friendly public housing component in every new private and public development. In relation to private developments there should be inclusionary zoning for senior social housing tenants;
- Investigate other models, for example the City of Port Phillip in Melbourne;
- Take proactive steps to overcome neighbourhood resistance to affordable housing;
- Encourage private sector investment by promoting social housing as a stable long term investment.

“I ended up taking X (community housing provider) to court. I wanted a restraining order against Y (complex manager). They seemed surprised and they all turned up in court. I had written so many times and they fobbed me off. When they knew I was going to court they transferred her but she keeps coming back to ‘visit’ staff and some of the other tenants. I think she is just trying to scare me off. I am not going to let her get away with it, she has bullied me and X have done nothing about it.”

Interview SH 5

20 Ibid.
21 Ibid.
23 This is one of the goals of the affordable housing strategy.
Chapter 5 – Social housing

Getting into social housing

Long public housing waiting lists (sometimes up to 8-9 years) make it difficult for older people to move into public housing, or to move to another area. Priority waiting lists do not assist older people without a significant disability or other extenuating circumstances.

Recommendations

• Increase the availability of social housing stock as a matter of urgency;
• Examine financing options for public and private collaborations to construct more social housing, particularly one and two bedroom properties suitable for older people;
• Ensure all new public housing meets universal design standards.

Access and placement

In our view, more attention must be paid to the allocation of older people to particular public housing areas and types. Support services should be maximised to ensure that seniors in social housing can age in place.

Recommendations

• Ensure all allocations are age appropriate;
• Ensure availability of programs to assist ageing in place;
• Provide professional development to housing staff about appropriate community resources so referrals can be made;
• Ensure suitable accommodation if a carer is required;
• Have more conversations regarding s71H – moving to smaller accommodation to avoid underutilisation – without unduly concerning tenants who do not want to move;
• Extension to rural and regional areas including support services to enable ageing in place;
• Special consideration of the needs of CALD seniors to ensure community support and avoid social isolation.

Security concerns

It seems that complaints involving security or safety are often ignored. This impacts adversely on quality of life and thus ontological security. It is simply unacceptable that older people are afraid to leave their home or walk past neighbours.

Community housing

Once within the system, it is fair to say that those respondents residing in a community housing environment were generally (but not universally) more satisfied than those in the public housing system. These findings echo results of a national survey of social housing tenants by the Australian Institute of Health and Welfare in 2012. Higher levels of satisfaction were reported in relation to physical condition of the property, amenities, location and the management and maintenance services supplied by the provider.24


“There is a security door on the front door. It is good to have it open in the hot weather. The lock broke months ago and no one has come to fix it. I don’t feel comfortable with just the security door open if I am not in the front rooms so I tend to leave the front door closed as it locks.”

Interview SH19
Recommendations

- Continue development towards devolution of assets from DOH to community housing providers. However, there is a place for public housing, for those tenants who would be rejected by community housing because of complex issues25;
- While encouraging people into their own homes through Keystart is commendable, it cannot supplant the necessity to enhance the supply of housing. Some potential tenants, particularly older people, have no prospect whatsoever of borrowing for a home, even at a subsided rate;
- Ensure that as community housing providers grow that they do not lose sight of the needs of their clientele. Requiring that growth providers develop plans for ‘place-making’ has been suggested by sector representatives26;
- Ensure that smaller niche community housing organisations are not disadvantaged by the growth and market dominance of the larger providers.

Management and training

In our view, managers of community housing complexes should be appropriately screened, trained and licensed, their performance monitored and complaints investigated.

Some community housing tenants, particularly quite elderly people, described the use of breach notices for spurious reasons. The tenants did not understand the intricacies of the ‘3 strikes’ legislation. This caused considerable stress and flies in the face of the rationale, and practical operation, of the provisions. While not widespread, it is certainly being utilised in several community housing complexes.

Recommendations

- Introduce prescribed eligibility requirements for managers;
- There should be prompt investigation of complaints;
- Breach notices must be utilised appropriately and tenants informed of their rights in relation of the action taken;
- There should be appropriate oversight of financial dealings and records and regular audits performed by the community housing provider;
- There should be no tolerance by management of inefficient service or inappropriate behaviour by staff towards residents. Complaints must be dealt with promptly.

25 Interviews conducted for the purpose of this study.
26 Interviews conducted for the purpose of this study.
Chapter 6

Retirement villages

Retention villages can only function properly if there is a close relationship between the respective parties – in particular between the residents, owners/trustees and managers of a village. Most if not all of the issues that were raised … could have been dealt with if proper channels of communication existed whereby residents could raise queries and receive proper and accurate information and responses.¹

Chapter 6 examines security of tenure for seniors who reside in retirement villages, being complexes that come under the Retirement Villages Act 1992 (WA) (the Act). It examines the adequacy of the legislative framework regulating these areas and the resident’s ability to acquire alternative accommodation.

Retirement villages in Western Australia are regulated by the:

- Retirement Villages Act 1992 (WA) (the Act);
- Retirement Villages Regulations 1992 (WA) (the Regulations); and
- Fair Trading (Retirement Villages Code) Regulations (WA), which prescribes the Code of Fair Practice for Retirement Villages (WA) (the Code).

The Strata Titles Act 1985 (WA) also applies where residential premises in a retirement village are strata titled.

It is noted that although the chapter focuses on a resident’s security of tenure, there is an acknowledgment that owners need an incentive to enter and remain in the retirement village industry. Achieving a sense of balance between the rights and obligations of owners and residents is therefore critical. The level of regulation of the industry must not be ‘so excessive as to stifle desirable growth in the industry’.² This would be contrary to the purpose of the legislative framework that governs the industry.

What the interviews revealed

Our interviews with residents of retirement villages revealed that residents are generally not concerned about their legal right to remain in their village – with their lack of concern apparently justified by the fact that eviction from retirement villages is practically non-existent in Western Australia.

As explained in this chapter, the primary concern of residents interviewed for this study related to their circumstances in the village becoming untenable as

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¹ Maclean and Beacon Hill Village Incorporated [2005] WASAT 29 per Dr B de Villiers, the member of SAT hearing the matter at para 49.
² See speech given by Yvonne Henderson, then the Minister for Consumer Affairs, on the second reading speech of the Retirement Villages Bill 1991 in Parliament of Western Australia, Parliamentary Debates, Legislative Assembly, 16 May 1991 at 2049-2051.
a result of mismanagement and clashes with management to the extent that some residents said that the situation was becoming so intolerable that they would leave their respective villages ‘tomorrow if [they] had the money’. 3

**Summary of findings**

This study has identified three key events which may directly impact on a resident’s legal right or practical option to remain in a retirement village, and may result in a resident being forced to leave the village. These include circumstances in which:

- a retirement village ‘fails’ as a result of operator insolvency or an operator chooses to terminate a retirement village scheme;
- a residence contract is terminated by an administering body; or
- living conditions in a village become untenable for a resident because of mismanagement and/or clashes with management.

The chapter also discusses the issues relating to where residents may find that although they feel that they cannot stay in the village, they cannot afford to leave because of their general financial position and the unsaleability or unleasability of their units which may in large part also be attributable to the management of the village. Further issues impacting on a resident’s inability to afford to leave are the fees that they are required to pay upon departure.

Given the comprehensive nature of the “Statutory Review of Retirement Villages Legislation 2010: Final Report” (the Review) prepared by the Department of Commerce (the Department) tabled in Parliament in November 2010, this chapter does not set out to reinvent the wheel. Rather, it summarises the findings and recommendations already made in the Review which are relevant to the above circumstances. This chapter provides examples drawn from case law and interviews with residents and people within the retirement village industry to support and build on the findings made in the Review. It further expands upon the recommendations made in the Review and considers the extent to which these recommendations have been implemented and the consequences of any implementation. Importantly, it identifies any gaps that remain.

Our research revealed that residents of retirement villages enjoy a considerable degree of security of tenure.

**Village failures or voluntary termination of retirement village schemes**

Although the Review suggested that fear of eviction and loss of security of tenure as a result of the failure of a retirement village caused by operator insolvency was an overwhelming concern among residents of retirement villages, 5 this was not found to be a significant concern of the residents that were interviewed for the purposes of this study.

3 Interviews conducted with residents for the purposes of this study. However, we do acknowledge the recent results of the McCrindle Baynes’ Villages Census Report 2013 which found that 98 percent of residents who live in retirement villages in Australia would still make the same decision to move into a village: Property Council of Australia, The case for retirement villages, 14 July 2014, <http://www.propertyoz.com.au/Article/NewsDetail.aspx?p+16&id+9679>.


5 Department of Commerce, Statutory Review of Retirement Villages Legislation 2010: Final
Indeed, the Act currently aims to address residents’ fears and protect their rights to remain in the village by various means including requiring the use of memorials6 and the creation of statutory charges on land used for retirement villages,7 making residence contracts binding on successors in title of the owners of retirement villages8 and prohibiting the termination of a retirement village scheme while any resident remains in occupation without the approval of the Supreme Court.9 These provisions seem to be effective as in practice an eviction due to village failure is almost non-existent.

The same provisions that address residents’ fears and protect residents’ rights to remain in the village in the event of village failure also protect residents in the event of an operator voluntarily choosing to terminate a retirement village scheme. Indeed, the case of Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection10 demonstrates that under the current legislation, it is near impossible for an operator to obtain Supreme Court approval to terminate a retirement village scheme. It is noted that this may prove difficult in circumstances where there is a genuine need to sell off land in a retirement village to maintain, if not enhance, the standard of accommodation and amenities in a retirement village and Parliament will need to consider how to address these circumstances.

Termination of a village contract by an administering body

Although we have identified the termination of a residence contract as another possible exception to a resident’s security of tenure in a retirement village, none of the residents or organisations with an interest in retirement villages interviewed had heard of any residence contract ever having been terminated without the agreement of the resident, generally for reasons relating to a resident’s physical or mental ill health. Indeed, the possibility of termination did not seem to be of concern to any residents interviewed for the purposes of this study.

Under the Act, an administering body of a retirement village cannot terminate a residence contract without the agreement of a resident, although it may make an application to the State Administrative Tribunal (SAT) to terminate the contract in certain specified circumstances,11 including: physical or mental ill health;12 a breach of the resident’s contract or residence rules;13 injury or damage to the administering body or an employee or other resident;14 or where the administering body would suffer undue hardship if the residence contract was not terminated.15

However, although the Act provides for an administering body to make application to the SAT in certain circumstances for the termination of a

“Although clearly the RV Act seeks to strike a balance between the rights and obligations of owners and residents, the balance falls heavily in favour of the protection of the interests of the residents of retirement villages, particularly in the long term certainty and security of their accommodation.”

Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection [2013] WASC 219 at para 175

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6 Retirement Villages Act 1992 (WA) s 15.
8 Retirement Villages Act 1992 (WA) s 17.
9 Retirement Villages Act 1992 (WA) s 22.
11 Retirement Villages Act 1992 (WA) s 17(d).
12 Retirement Villages Act 1992 (WA) s 58.
14 Retirement Villages Act 1992 (WA) s 62.
15 Retirement Villages Act 1992 (WA) s 63.
residence contract without the agreement of the resident, the consultations undertaken in this study revealed that the perception among operators and their legal advisers is that there is little if any chance of the SAT ever making an order to terminate a residence contract. However, a review of the relevant SAT decisions that are available indicates that SAT may be more willing to make these types of orders than has previously been thought within the industry.\(^{16}\) Operators may also likely be deterred from making such an application due to the potential negative impact on their reputation.

Although the legal right of residents to remain in a retirement village may be sufficiently protected, it should be noted that, in some circumstances, the termination of a particular resident’s contract may be necessary to protect the practical option of other residents to remain in the village. However, the apparent reluctance of operators to apply to the SAT in relation to the termination of a residence contracts seems to extend to these types of situations. Further, it is questionable whether the SAT has jurisdiction under the Act to terminate the contract of a resident who is causing a serious nuisance to other residents. This may need further consideration.

**Mismanagement and clashes with management**

The primary concern of residents interviewed for this study related to their circumstances in the village becoming untenable as a result of mismanagement and/or clashes with management. This chapter discusses the following issues relating to this concern: a) quality control of management; b) management’s treatment of the village’s finances (including both the way in which they are spent and the way that they are reported); c) disputes between residents and management (relating to who is liable for the costs of maintenance, repairs and replacement works, delays in these works being carried out and disagreements as to whether these works are necessary); and d) the lack of consultation and communication with residents.

**Quality control of management**

As to quality control of management, the legislation does not provide for the licensing of managers, nor does it set competence standards for the management of retirement villages.\(^{17}\) Recent amendments to the Act prohibit unsuitable persons from being involved in the management of retirement villages\(^{18}\) and enable a statutory manager to be appointed by SAT upon the application of the Commissioner (on behalf of the residents).\(^{19}\) However, the amendments do not provide elderly residents with a safe and confidential way of bringing matters of concern to the Commissioner’s attention for an application to the SAT to be made in relation to the appointment of a statutory manager.

Although the amendments do prohibit unsuitable persons from being involved in the management of a retirement village, they do not go so far as to specify the qualifications required to be a fit and proper person in the industry. In this regard, although they may assist in reducing the level of bad

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\(^{16}\) See, for example, Retirement Care Australia (Hollywood) Pty Ltd and Turpin (2012) WASAT 125.


\(^{18}\) Retirement Villages Act 1992 (WA) s 76.

\(^{19}\) Retirement Villages Act 1992 (WA), Part 5A.
management within the retirement industry, they may have little or no effect on increasing the level of good management within the industry.

A lack of resources may prevent the Department from actively involving itself in the improvement of training managers in the industry or the accreditation of the industry.

Since August 2013 the Property Council has organised a new system of accreditation through the BSI (British Standards Institution) - the Lifemark Village Scheme. At this early stage, participation rates are unknown and because it is a form of self-regulation, only independently approved quality criteria and an independent assessment of this accreditation scheme will be able to determine whether this scheme is an accurate indicator of quality in retirement villages.

Importantly, the Lifemark Village Scheme only oversees the appearance of the village and the manner in which the manager generally runs its normal activities. It plays no part in monitoring the financial integrity of the village.

There appears to be no current mechanism for residents to provide any input or feedback in relation to the appointment of managers. Although the Department has recently started making visits to different retirement villages to meet with management and the chairs of residents’ committees, it is only intended that these visits take place every 2-3 years. Further, they are not mandated under the legislation and cannot be enforced.

A sufficiently high level of remuneration is necessary to attract good managers to the industry. The question of whether the operator or the residents should be liable for management fees in a village and whether any deferred management fees are being used to pay for management and if not, whether they should be, may need to be considered.

Management’s treatment of the village finances

The concerns of residents relating to management’s treatment of the village’s finances appear to be primarily caused by the lack of experience of managers in the industry, the lack of clarity in residence contracts, the wide discretion granted to management under these contracts and the lack of adequate reporting requirements resulting in undesirable practices such as the integration of transactions into computerised accounts which cannot produce a record of a stand-alone account in relation to the expenditure of a particular village.

Proposed amendments to the Regulations and the Code clarify the matters that must be included in, and the format of village operating budgets and financial statements in relation to a village’s operating budget and any reserve fund budget. Further, all annual financial statements will be

“I would leave this village tomorrow if I had the money.”

Interview RV 1

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21 Interviews conducted with the Department for the purposes of this study.

22 Clauses 17,18,19 and 26(1)(a) and(b) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
required to be audited, unless the residents decide, by special resolution, that an audit is not required. 23

Proposed amendments to the Code also provide residents with more control over village budgets and the amount of recurrent charges and other charges that they are required to pay by clarifying the importance of an administering body engaging in effective consultation with residents. 24 The amendments also prohibit funds from payments towards operating costs or reserve funds in one village from being used to develop another village and require the administering body to apply any surplus in the operating budget to the village in which the surplus arose (unless a special resolution of residents approves the application of all or part of these monies to any other purpose of benefit to the residents of the village) 25.

The proposed revised Code further requires the administering body to provide information on a specific operating financial arrangement or about the steps taken to minimise increases in village operating costs and the costs of reserve funds upon a reasonable request by a resident for information. 26 However, this proposed amendment does not take account of any anxiety that residents may have in calling upon the administering body for this information.

Under the recent amendments to the Act, the residents may agree by special resolution to apply to the SAT in relation to a dispute about an increase in charges or the imposition of a levy. 27

The fact that the administering body is to call the meeting of residents to decide whether an application should be made against the administering body has obvious issues associated with it. Although the Department has tried to address these issues by clarifying that a residents’ committee can, of its own volition, call a meeting of residents for any purpose, 28 this is of no use to a village without a residents’ committee.

The proposed amendments require the administering body to be invited to attend a meeting of residents at which a special resolution is to be held. 29 Once at the meeting, the administering body may remain at the meeting unless a majority of residents decide that the administering body must

“We were told by the owners that if any resident was unable to afford the village charges, they would have the opportunity of entering into a reverse mortgage with the owner, with any amounts owing to be taken out of the proceeds once the unit was re-leased.”

Interview RV 2

23 Clauses 19(11) and (12) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
24 Clauses 4(e) and 16 of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
25 Clause 20(3) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
26退休村法1992年（西澳）s57A.
27退休村法1992年（西澳）s57A(3)和草案26(1)的拟议修订版，退休村（退休村临时代码）法规2014年（西澳）（拟议咨询法规）
28 Clauses 16(3) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
29 Clause 26(15) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
leave the meeting. As recommended in the Review, the new section 25 of the Act prohibits an administering body from demanding or receiving payment from residents in respect of any prescribed matter. This is a welcome development in an industry where administering bodies have been known to on-charge all manner of costs incurred by them to vulnerable residents. However, whether this provision will have its intended effect and administering bodies will not find other ways of packaging these costs and passing them on to residents, specifically under contractual arrangements with new residents, is yet to be determined.

Indeed, whether following the legislative changes, there will be a pronounced change in the degree of transparency and the level of consultation with residents practised by managers in relation to financial spending and reporting remains to be seen. The quality of management and the strengthening of monitoring and enforcement functions to ensure legislative compliance within the industry is essential to the protection of residents’ security of tenure in a retirement village.

Clearly, more precision in the legal drafting of residence contracts (and information statements) would also obviate many of the concerns of residents in relation to the treatment of village finances. It is noted that one of the issues discussed and rejected in the Review was the introduction of a standard form contract with the Review finding that the standardisation of contracts would not be practical in view of the different types of residential arrangements within the industry and that it could also inadvertently result in reduced competition and innovation in the products and services offered. However, it would seem that WARVRA’s recommendation of standard contracts for each type of arrangement with one section containing standard terms and another section containing non-standard terms might overcome these difficulties.

Disputes between residents and management relating to maintenance, repairs and replacement works

The disputes between residents and management as to who is liable for the costs of maintenance, repairs and replacement works in a retirement village are generally caused by a lack of clarity in residence contracts, including the very ambiguous definitions of variable outgoings and refurbishment fund. Residents also complain of significant delays in maintenance, repairs and replacement works being carried out by management. There may also be disagreements between management and the resident as to whether any maintenance, repair or replacement work is necessary.

The proposed changes to the Regulations and to the Code go some way towards addressing these issues. The proposed regulations under section 14A of the Act include a requirement for a residence contract to set

31 Clause 26(16) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
33 Retirement Villages Act 1992 (WA) s 25(1) and regulation 11 of the Regulations.
34 The new section 14A of the Act enables regulations to prescribe provisions that must or
out who is responsible for arranging to carry out maintenance, repair or replacement work to ensure that the residential premises (and any fixtures, chattels and capital items on the premises) are maintained in a reasonable condition during the occupation of the premises; the contributions to be made by the resident and the administering body to these costs; and how any contribution to the costs by the resident is to be paid.35 The proposed regulations also contain similar requirements in relation to the maintenance, repair, renovation or replacement work of other buildings in the village.36

Another recommendation made in the Review which would assist to address the concerns of residents in relation to the costs of maintenance, repairs and replacement works is the introduction of mandatory reserve funds to enable retirement villages to be maintained in a reasonable condition. We understand from our interviews with the Department that it is proposed to incorporate the Review’s recommendations in relation to reserve funds into the Second Amendment Act. However, there are additional issues associated with the mandatory introduction of reserve funds that need to be addressed. For example, whether retirement villages within the not-for-profit sector where residents are not currently liable to fund maintenance works under their residence contracts should be required to have a reserve fund. It is also anticipated that there will be a need for the provision of information to residents in relation to any mandatory introduction of reserve funds so that residents are fully aware of how their contributions to any reserve fund will benefit them.

In the interviews conducted for the purposes of this study, residents also complained of significant delays in maintenance, repairs and replacement works being carried out by management.37

The proposed regulations under section 14A of the Act also prescribe a provision to be included in a residence contract allowing non-owner residents to carry out urgent repairs by selecting a contractor from an approved list displayed in a prominent place after having given the operator a reasonable opportunity to carry out the work, and to be able to seek reimbursement of costs from the administering body.38 This will go some way towards addressing clashes with management relating to delays in maintenance and repair works. But we suspect the provision may cause other disagreements in relation to the interpretation of this provision prescribed by the regulation. For example, although the proposed regulations define ‘urgent repair’ to include a repair that is necessary ‘for the supply or restoration of an essential service’, what constitutes an essential service? When will an operator have been given a reasonable opportunity to carry out the work?

“I have complained to the administering body about the way in which the manager of the village is spending the village’s finances but have received no response.”

Interview RV 3
Delays in the performance of non-urgent repairs would also seem to be undesirable and should be addressed.

There may also be disagreements between management and the resident as to whether any maintenance, repair or replacement work is necessary. It is arguable that maintaining a minimum standard of repair of the common areas of a retirement village is a term implied at law in all retirement village residence contracts.

**Lack of consultation and communication**

Although there are general objectives, principles and basic rights for residents set out in the Code in relation to a resident’s freedom and autonomy over their property and affairs as well as the promotion of consultation with residents, the general nature of these objectives principles and rights do not assist in their practical application. It seems obvious that an open relationship between the owners, management and the residents in a village would be a significant contributing factor to a village’s success and yet our interviews with residents revealed that in many instances, this is not the case.

Proposed amendments to the Code emphasise and detail the requirement of administrative bodies to consult with residents, not just in relation to the financial operations of a village but on the day-to-day running of a village too.\(^\text{39}\) These include making it clear that an objective of the Code is to facilitate *an effective means of consultation* between the administering body and the residents on the management of a retirement village.\(^\text{40}\) Further, it is proposed to provide guidelines in a grey boxed area in the Revised Code to provide practical examples of what might constitute effective consultation and to clarify that the term consultation means effective consultation throughout the Code.\(^\text{41}\) However, unless administering bodies genuinely believe that compliance of these obligations will be enforced, they are of little value.

Although the Code currently provides for the formation of a residents’ committee to consult with the administering body on behalf of residents, the lack of effective residents’ committees is apparent. Under the proposed amendments to the Code, administering bodies will be required to establish appropriate procedures for consulting with a residents’ committee.\(^\text{42}\) A further constructive recommendation made by the Department to increase the effectiveness of residents’ committees included developing educational materials providing practical information relating to the establishment and operation of residents’ committees for use by residents.\(^\text{43}\) However, we understand that a lack of resources may have prevented this recommendation from being implemented.\(^\text{44}\)

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\(^{39}\) Clauses 16(d) and (e) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).

\(^{40}\) Clause 4(e) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).

\(^{41}\) Grey boxed area under Clause 4 of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).

\(^{42}\) Clause 16 (e) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).


\(^{44}\) Interviews conducted for the purposes of this study.
It is noted that the ‘perceived lack of autonomy’ of residents is only increased by residents’ inability to alter their premises by adding or removing fixtures in their own unit or in doing gardening without the consent of management, a consent which is almost impossible to obtain where there is so little communication between management and residents.

Proposed regulations under section 14A of the Act require a residence contract to provide that residents have the right to add or remove fixtures in their own dwelling, subject to approval from management which should not be able to be unreasonably withheld. It also requires a contractual provision that the administering body must include in its notification to a resident of the approval of an application for an alteration to the statement of the terms and conditions that apply to that approval. However, there is still no requirement that residence contracts in relation to a resident’s right to garden.

**Dispute resolution processes**

In circumstances where there are clashes with management, the chances of these issues being resolved will be dependent on the effectiveness of any dispute resolution process.

The Code outlines the processes to be used to resolve a dispute within a retirement village between residents and the administering body or between residents. If the dispute cannot be resolved using the village dispute resolution process set out in the Code (explained below), an application can be made to the Commissioner to refer the matter to mediation. The Commissioner can also provide conciliation services to either party. We understand from our interviews with the Department that matters are very rarely referred to mediation, with the cost of mediation being the major deterrent. It is noted that the proposed amendments to the Code provide that unless the Commissioner decides otherwise, the costs of the mediation of a dispute must be shared equally between each of the parties.

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45 These were complaints raised by residents in the interviews conducted for the purposes of this study which were also raised in initial public meetings and written submissions for the Review conducted by the Department of Commerce: see Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report*, p 83.

46 See proposed Retirement Village Amendment Regulations 2014 (Draft Regulations for Consultation), regulation 7G, Table, Items 4-5 under Retirement Villages Act 1992 (WA), s 14A.

47 See Division 6 of the *Fair Trading (Retirement Villages Interim Code) Regulations 2014 (WA)*.

48 Clause 6.2 of the *Fair Trading (Retirement Villages Interim Code) Regulations 2014 (WA)*; Clause 30 of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).

49 Clause 6.3 of the *Code of Fair Practice for Retirement Villages* (WA); Clause 31 of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation).

50 Retirement Villages Act 1992 (WA) s 8(d) and Clause 6.3(2)(b) of the *Code of Fair Practice for Retirement Villages* (WA); Clause 31(2)(b) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation). If a potential serious breach of the legislation is identified at any stage of the conciliation process, the potential breach is referred to the compliance area within the Industry and Consumer Services Directorate of the Consumer Protection Division within the Department of Commerce: see Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report*, p 108.

51 Clause 32(5) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014 (WA)* (Draft Regulations for Consultation). It is anticipated that mediation will become more affordable with the introduction of pro bono mediation (or mediation for a non-commercial low fee) as part of a Seniors’ Legal Clinic being developed at UWA.
Proposed amendments to the Code require the administering body to nominate a suitable person or body to deal with the dispute that is acceptable to all parties. 52 Although the Code Consultation Discussion Paper made reference to the fact that it is important that the person should have good mediation skills, it is not proposed that the amendments to the Code incorporate this as a requirement. 53

It is unclear what the options are if the dispute remains unresolved. The proposed amendments to the Act make it clear that the dispute resolution processes described above do not apply to a dispute that may be determined by SAT under the Act. 54

However, a dispute resolution process is only effective if it is utilised. As the Department has noted, there appears to be a distinct lack of awareness as to the current dispute resolution mechanisms. 55 Further, residents may be reluctant to institute complaints for various reasons. 56 Residents may also find themselves ostracised by management or even fellow residents as a result of instituting a complaint. 57 A mechanism must be put in place where it is part of the normal and regular operation of the retirement village that complaints and concerns are aired and discussed.

It should be noted that administering bodies too may be reluctant to use the Code’s dispute resolution procedures and seek assistance from the Department in circumstances where the Department has a dual conciliatory and prosecutorial role.

In the interviews conducted for the purposes of this study, residents complained that in circumstances where they have sought assistance to resolve their disputes, they have come to a dead end. 58

It would appear that a lack of government resources may be the main reason for the reluctance to set up any new structure for dispute resolution, such as a retirement village ombudsman. 59

In its Review, the Department proposed that the Seniors’ Housing Information Service (discussed further below) develop guidelines and

52 Clause 30(2)(a) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).
54 See Clause 29 and the definition of ‘retirement village dispute’ in the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation). See also Part 4, Division 5 of the Act which details the SAT’s powers in relation to the resolution of disputes in retirement villages.
56 Some of the reasons given in the interviews conducted for the purposes of this study for residents failing to institute complaints include their fear of management; their reluctance to let their families know for fear of being put into aged care; their unwillingness to give their village a bad reputation for fear that their units will become devalued or unsaleable; and elderly people wanting to live out their lives with a minimum level of stress.
58 According to WARVRA, residents who have referred complaints to the Department of Commerce have generally not had satisfactory outcomes. This has been said to be due to the fact that the compliance section is not well versed in village operations and is under resourced. Residents also feared recriminations from management as they were readily identifiable after they made their complaint.
educational initiatives in regard to effective dispute resolution within villages. However, there are no specific guidelines or educational initiatives that have been developed in respect of dispute resolutions. Apart from being stretched over all areas of seniors’ housing, residents have complained that the majority of personnel at the Centre have no real knowledge of the industry and are unable to provide legal advice. We are uncertain about the future operation of the Centre.

There is clearly a need for the establishment of an advocacy service for residents of retirement villages in WA. The Aged-care Rights Service (TARS) is such a service in NSW, also providing legal advice and information to residents of retirement villages.

**The right to acquire alternative accommodation**

In the event of a resident losing their right or practical option to remain in a retirement village, the resident’s financial security may be significantly compromised, resulting in their being unable to afford to acquire alternative accommodation. One member of the industry referred to there being ‘a degree of lock down when a person enters into a retirement village’.

The security of a resident’s capital investment and the timing and amount of any exit payment (being the full or part repayment of the premium, that is the premium minus the deferred management fee) in the event that a resident is forced to leave a retirement village is understandably of concern to residents. Indeed, residents can be placed under considerable stress when they discover that they may not be able to afford to leave the village due to the deferred management fees (or exit fees) payable. Further, any imposition of excessive or unwarranted increases in recurrent charges or the unreasonable imposition of a levy during their stay in the village may have eroded their financial position. The resident may also be liable for the costs of repair and refurbishment of their unit upon their vacation, a liability which is not always made clear in residence contracts. Then there are the ongoing recurrent charges that a resident may still be liable to pay to the administering body once they have vacated the unit.

It has been said by people in the industry that operators and residents are ‘co-venturers’, both wanting to obtain the highest price possible from a prospective purchaser/lessee of a unit. However, the discrepancy in the rights and obligations of the owner and the resident becomes very pronounced at the stage of a resident vacating the premises, revealing at best an unequal ‘co-ownership’. It is noted also that the departing resident of a village is generally in a far more precarious position than a departing tenant in a residential tenancy arrangement.

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61 Interviews conducted for the purposes of this study.
63 Interviews performed for the purposes of this study.
65 It is noted that welcome amendments to the Act allow for residents to agree by special resolution to apply to the SAT in relation to a dispute about an increase in recurrent charges or the imposition of a levy: See new s 57A of the *Retirement Villages Act 1992* (WA).
66 Interviews performed for the purposes of this study.
Remarketing

A resident is often not entitled to receive any capital or exit payment until their unit sells or is re-leased, and it is common for the amount of that payment to be directly linked to the sale or re-leasing price that is ultimately achieved. In circumstances where the units are unsaleable or unleaseable, or there is significant delay in the sale or re-leasing of units, the departing resident may be left with no alternate accommodation pending the sale or re-lease of their unit and no ability to use the unsold or unleased unit as security for a bridging loan.

Although the Code currently requires operators to take reasonable steps to enable a residence to be put on the market as expeditiously as possible and provide the resident with a monthly marketing report that details their actions to market the premises,\(^67\) the Department has found that in certain cases, the management of a village was responsible for delaying the sale or re-leasing of units by their tardiness in providing information about the units and the retirement village scheme to potential buyers.\(^68\)

As set out in the Review, the Act aims to address these concerns and protect residents’ rights to acquire alternative accommodation by, for example, requiring that the resident’s right to any exit payment is protected by way of a statutory charge on land in the retirement village (other than residential premises owned by a resident).\(^69\)

However, as Armstrong has opined, these provisions offer little comfort to residents in circumstances where an operator will be unlikely to be able to make any payment to the resident unless or until the unit sells and the amount of this payment is likely to be significantly reduced in circumstances where the units have likely lost their value.\(^70\) Further, under the Act, any order by the Supreme Court for the enforcement of the charge must not be contrary to the interests of any of the residents of the retirement village\(^71\) – this would seem a virtual impossibility unless all residents of a village sought to enforce their charge at the same time.

It should also be noted that section 19 of the Act requiring an exit payment to be made within a limited period capped at 45 days is able to be avoided if the resident has the right to appoint an outside agent to effect a sale.\(^72\)

It is proposed that the Review’s recommendations in relation to the sale or releasing of premises within a retirement village\(^73\), including providing residents with greater input into the sale of their unit and requiring the operator to make available to prospective purchasers all relevant information regarding the unit, be implemented in the Second Amendment Act that the Department is to commence drafting later this year.\(^74\)

\(^67\) Clause 5.7 of the Fair Trading (Retirement Villages Interim Code) Regulations 2014 (WA).
\(^69\) Retirement Villages Act 1992 (WA) s 20.
\(^70\) Les Armstrong, President of the Association of Residents of Queensland Retirement Villages (Inc), What happens if a retirement village operator becomes insolvent or goes into receivership? 1 May 2011 <http://www.rvra.org.au/villagelife.html>.
\(^71\) Retirement Villages Act 1992 (WA) s 21(2)(b).
\(^72\) Retirement Villages Act 1992 (WA) s 19.
\(^74\) Correspondence from the Department to the authors dated 17 July 2014 for the purposes.
Chapter 6 – Retirement villages

Exit Fees

Even if a resident’s unit is sold or re-leased without delay and the resident receives the exit payment to which they are entitled, the quantum of this exit payment will be dependent upon the terms of their particular residence contract and any deferred management fees that are required to be paid. The considerable cost of these deferred management fees can significantly reduce the ability of residents to acquire alternative accommodation elsewhere, or even, in some instances, to another unit within the same village.\(^75\)

There is no legislation governing the quantum of deferred management fees (or exit fees) that may be charged.

In our view, there is still a need for more transparency for residents in relation to the nature and purpose of the exit fee – to provide them with some understanding as to what they are paying for, even if they are informed that this amount constitutes the profit of the operator. The deferred management fee terminology that is commonly used to describe the exit fee makes it very confusing for residents who understandably find it hard to reconcile this fee with the recurrent charges that they may have been paying during their residency in the village in relation to management costs.

This Chapter questions whether the exit fee may be the subject of the unfair contract terms in the ACL, being dependent on whether the exit fee may be considered an upfront price.

Refurbishment costs

A resident will also likely be liable for the costs of repair and refurbishment of their unit upon their vacation of the unit. The liability that a resident has for these costs is not always made clear in their contracts.

Disputes may also arise in relation to the extent of the refurbishment that is required upon the resident’s vacation of the unit.

The proposed amendments to the Regulations under s14A of the Act and to the Code include introducing a definition of refurbishment work meaning ‘maintenance, repair, replacement or renovation work carried out in respect of residential premises that return the residential premises to a reasonable condition’ (our emphasis),\(^76\) including a requirement for a residence contract to set out who is responsible for arranging for residential premises to be refurbished, who is responsible for paying the costs associated with carrying out the work and how any contribution to be made by the resident is to be paid\(^77\); clarifying the information that an administering body must give of this study. It is noted that the new s 25 of the Act and its regulations prohibit charging a former resident a marketing and advertising fee which is more than any costs incurred in marketing or advertising the individual premises: see Retirement Village Regulations 1992 (WA), regulation 11(3)(c).


Clause 22(1) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).

See proposed Retirement Village Amendment Regulations 2014 (Draft Regulation for Consultation), regulation 7G(2) and Table, Item 2 under Retirement Villages Act 1992 (WA), s 14A.
items of refurbishment work to be done;\textsuperscript{78} inserting a requirement for the former resident or their personal representative to be given a reasonable opportunity to inspect refurbishment works that they will be contributing to;\textsuperscript{79} clarifying matters to which an administering body must have regard when assessing what refurbishment work may be required,\textsuperscript{80} and building upon the SAT's existing jurisdiction to deal with refurbishment disputes to ensure that arrangements relating to the costs of refurbishment are fair, including, inter alia, that any refurbishment work is reasonably required and the cost of the work is not excessive or unreasonable.\textsuperscript{81}

It is expected that as part of the general conciliation services provided by the Department, conciliation relating to refurbishment will be undertaken by referral to the requirements of the Code and the Regulations once the amendments are introduced.\textsuperscript{82}

It is noted in this Chapter that it seems likely that an operator would benefit from getting input from other residents in respect of any proposed refurbishment.

**Ongoing recurrent charges after departure**

Until 1 April 2014, a former resident of a retirement village could still be liable to pay ongoing charges to an administering body for extended periods after they had left a village until their former unit was sold or re-leased.

A similarly strong argument to the one made above in relation to a contractual term providing for a deferred management fee being an unfair term could be made in relation to a term requiring a resident to continue paying recurrent charges after termination of the contract.\textsuperscript{83}

However, we note that the long awaited amendments to the Act do cap the liability of non-owner residents to pay these charges.\textsuperscript{84}

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\textsuperscript{78} The proposed revised Code: Fair Trading (Retirement Villages Code) Regulations 2014, Clause 22(2)(a) and (b) – including itemised details of the refurbishment work the administering body believes is required to be done, an estimated cost for each item of work and a proposed timeframe for the commencement and completion of the work.

\textsuperscript{79} Clause 22(2)(b)(iii) and (b) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).

\textsuperscript{80} Clause 22(3) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation) – including the age, character and physical condition of the residential premises at the time the resident entered into occupation of the premises; the age, character and physical condition of other comparable residential premises in the retirement village at the time the resident permanently vacated the residential premises; and the age, character and physical condition of the common facilities and amenities in the retirement village at the time the resident permanently vacated the residential premises. These provisions seek to 'introduce a level of consistency in the standard that residential premises must be refurbished [as] currently, refurbishment clauses in residence contracts range from a reasonable standard allowing for fair wear and tear, to wholesale gutting and renovation of premises without regard to the age and standard of other "like" premises in the village or the standard to which the retirement village as a whole has been maintained'. Government of Western Australia, Department of Commerce, Retirement Villages: Revised code supplementary information p 1 at <http://www.commerce.wa.gov.au/publications/retirement-villages-revised-code-supplementary-information>.

\textsuperscript{81} Clause 22(4) of the proposed Revised Code, the Fair Trading (Retirement Villages Code) Regulations 2014 (WA) (Draft Regulations for Consultation).

\textsuperscript{82} Correspondence from the Department to the authors dated 17 July 2014 for the purposes of this study.


\textsuperscript{84} Retirement Villages Act 1992 (WA) s 23 and Retirement Village Regulations 1992 (WA), regulation 5.
Amendments made to the legislation in relation to recurrent charges include the new section 23 of the Act limiting the liability of a former non-owner resident\footnote{Residents who do not have any proprietary interest in the village as a tenant in common under a purple title scheme or as an owner under a strata title scheme of the residential premises that they formerly occupied: see definition of former resident in section 23(1).} to pay recurrent charges. The regulations made under s 23 limit the time that these charges can be levied once a non-owner resident has permanently vacated\footnote{However, in the event of the death of a former resident, the former resident’s liability to pay recurrent charges will not cease until the administering body has been given evidence of death. It is understood that the requirement for the provision of death to an administering body is intended to address concerns by industry about matters beyond their control that can delay the remarketing of a residence so that the specified period will not start until these matters are addressed: see Explanatory Memorandum, Retirement Villages Amendment Bill 2012 (WA), p 9. However, it is hoped that administering bodies do not take advantage of the requirement relating to the provision of death and allow recurrent charges to be levied on the former resident’s estate unnecessarily in excess of a three or six month period. For example, it should be expected that administering bodies notify family members of a deceased former resident of the requirement to provide evidence of death and the effect of their failure to do so.} a village to three months for future contracts and six months for existing contracts.\footnote{Retirement Villages Act 1992 (WA) s 23 and Retirement Village Regulations 1992 (WA), Reg 9.}

However, it is unclear what the position will be if the administering body is unable to afford to pay recurrent charges in the period between the former non-owner resident ceasing to pay these charges and the new resident becoming liable to pay them. There is no prohibition in the Act to prevent them from seeking to cover any additional costs by, for example, amending new residence contracts.\footnote{Explanatory Memorandum, Retirement Villages Amendment Bill 2012 (WA), p 8.} This raises the question of whether section 23 will have any real effect on the overall financial commitments of new residents with new residence contracts or whether their liability will be merely brought forward to be paid in the form of an increase in other costs.
We note that a further unintended and undesirable consequence of the ‘capping’ of ongoing charges for former non-owner residents and the loss of the resulting income stream in the retirement village may be a deterioration of the quality of the amenities of the retirement village for both remaining and future residents. In these circumstances, owner-residents may find it more difficult to sell their units, leaving both owner and non-owner residents forced to pay recurrent charges for longer periods than they may have had to pay if they had put their unit on the market prior to the new amendments to the Act.

There may be a real incentive for operators to build future retirement villages as strata titled to avoid the effect of these provisions.

**Monitoring and compliance**

The regulation of the retirement village industry, including any reforms made to this, will only be as effective as the extent to which there is compliance.

In this regard, the Review recommended that:

- the legislation be amended to provide that a breach of a clearly expressed obligation stated in the Code is an offence under the Act and establish a penalty for such breach; and that
- the Department continue to strengthen its investigation, compliance, prosecution and dispute resolution functions and be adequately resourced to do so.

The Code Consultation Discussion Paper provides that the proposed Revised Code will remain under the FTA until a second Amendment Act when the legislation will be restructured to comprise the Act, the Regulations and a Code made under the Act (as distinct from the FTA as is currently the case) so that all components regulating retirement villages are contained within a single legislative package. This will enable a standardised and more effective enforcement process, allowing for a relatively immediate impact on the behaviour of an administering body that is not complying with its obligations.

The Report also considered the possibility of an independent authority separate from the Department to actively monitor compliance with the Act and the Code. However, the Department’s view was that any new structure would be costly and unnecessary – a similar view to that taken by it in relation to conciliation arrangements as discussed above. Again, it would appear that a lack of government resources may be the main reason for the reluctance to set up any new structure.

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91 Department of Commerce (Consumer Protection), *Consultation Discussion Paper – Review of the Terms of the Fair Trading (Retirement Villages Interim Code) Regulations 2013*, June 2013, para 2.2.1. It is noted that it is not proposed to consolidate the Act and the Code, only to create a Code under the Act. This is because the process involved in amending the Act is far more time consuming and complicated than that of making amendments to the code and so consolidating the two could delay responses to immediate issues that could arise. This will also make the structure of retirement village legislation in Western Australia consistent with other states, such as Victoria, Queensland and New South Wales: see Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report*, pp 139-140.
Chapter 7

Residential parks

I would like to see better guidelines and protection and sensible laws for the elderly in park homes...make law for solid lease agreements for maximum compensation and relocation costs in case of park closure or sale by park owners. And all wording in park rules and such to be written in layman’s terms to be understood and not in complicated legal jargon.1

Chapter 7 examines security of tenure for seniors who reside in residential parks.

Sometimes referred to as relocatable, manufactured or mobile home parks, residential parks provide sites upon which (ostensibly) moveable dwellings are placed. Of late, lifestyle villages, where the dwellings resemble strata title or villa accommodation, but are governed by the same legislation as other residential parks, have emerged.

At the outset, it is important to note that, in some cases, there is an unfortunate perception about residential parks and their allegedly ‘mobile’ character. A common impression is that the home is cheaper than a standard dwelling and is of a transient nature. While such dwellings may be less expensive than a standard house and land, the price of a park home can be well in excess of $100,000 while homes in lifestyle villages can fetch in excess of $400,000. Residents invest a significant amount into the purchase, establishment and upkeep of the homes. There are also ongoing fees for site rental and connection to services. Such dwellings are very difficult and expensive to, in fact, relocate.

Residential parks in Western Australia are operated by private operators and by government, in particular local councils. Unfortunately there is little comprehensive demographic information on the residents of residential parks, and the number of long stay sites in Western Australia;2 Research in 2012 estimated that there are approximately 37,329 permanent, semi-permanent and long-stay sites in Western Australia.3 Anecdotal evidence suggests that the numbers of long stay arrangements are increasing and, relevant to the focus of this Study, residential parks host a considerable number of older residents.4

1 Interview RP 12.
4 Indeed, in Queensland over 80% of residents in manufactured home parks are over 65: Nicolee Dixon, The Future of Manufactured Homes in Residential Parks in Queensland, 2012
Indeed, the plight of tenants in residential parks has become controversial with the closure of several parks in and around Western Australia. The sites, often located on what has become prime land with considerable redevelopment potential, have been purchased by developers, necessitating the departure of the residents. In such circumstances, many former residents are left without alternative accommodation and those who own a relocatable home may be unable to find an alternative site. Such developments are likely to necessitate government intervention to preserve, and encourage, this form of affordable housing, for example by using Crown land, or introduce government held land trusts, to maintain residential park accommodation.

This is not to say that park owners have not raised concerns of their own. Park operators are conducting a business and must make decisions to further their commercial agenda. A park operator may, subject to other encumbrances on the freehold or conditions within the lease, use the land as he or she sees fit, including reviewing the length of tenancies available and/or redevelopment. If the park operator owns the freehold he or she may sell the land. If operating the park becomes unprofitable and/or increased regulation restrains the flexibility of the business, operators may decide to exit the industry thus further exacerbating the already decreasing number of residential parks in Western Australia.

The Residential Parks (Long Stay Tenants) Act 2006 (RPLSTA) specifies the rights and obligations of parties to long-stay tenancy agreements in residential parks. The scope of the RPLSTA is limited to tenancies of more than 3 months; residents on shorter term tenancies do not receive the protection of the RPLSTA. A long-stay agreement is a residential park tenancy for a fixed or periodic tenancy that continues for 3 months or longer.

In summary the legislation tries to ‘cover the field’ for tenancies in residential parks. The RPLSTA:

- deals with tenancies of as little as three months to as much as 60 years;
- is applicable to ‘mixed’ parks as well as park home parks and lifestyle villages;
- provides little security of tenure, even in the case of a fixed term tenancy;
- can be avoided relatively easily by park operators; and
- provides minimal, if any, compensation, in the event of terminations.

Recently, the RPLSTA has been the subject of a comprehensive review by the Western Australian Department of Commerce.6

They (management of a mixed use park) don’t care about the people living here. People are kept in the dark and not told anything. Nothing is explained to residents. If you try to complain you are in danger of being put out of the park.”

Interview RP 10

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After consideration of legislation in other states and territories, in our view, the Western Australian government should introduce new legislation that balances, in a meaningful way, the interests of residents, who have made significant investment and have an expectation of long term accommodation with the interests of park owners. In so doing we believe:

- there should be open ended terms on all leases;
- periodic leases should be abolished;
- ‘without grounds’ termination should be abolished; and
- determination of leases can only be achieved through application to the State Administrative Tribunal unless there is mutual agreement or, in appropriate cases, mediation.

**What the interviews revealed**

There was a considerable amount of interest in this Study from park home residents. The information obtained from the interviews of 20 residents was supplemented by responses to the written questionnaire; indeed there were more responses from park home residents than from residents of any of the other forms of accommodation.

In a nutshell, interviewees were concerned that accommodation that was being targeted at a particular market – retirees – in many cases did not offer what was foremost in the minds of potential residents – security of tenure - for the rest of their lives or until the resident needed residential care. Indeed, many were bemused that some agreements, even those covered by the RPLSTA, were of relatively short duration. Many felt there had not been adequate disclosure at the point of the agreement and the potential pitfalls had not been highlighted. Life within the villages was of concern to some with rising rents, maintenance costs and poor relationships with park management.

Security of tenure was the main concern for most residents consulted. Although, for obvious reasons, this was most acute where residents were on short term or periodic leases, all expressed some reservations about whether they would be able to remain in the particular park for the long term.

Interviewees were aware of the considerable land value of the parks and the likelihood that, sooner or later, the property would be sold for development. Some residents realised that they were being kept on periodic leases so, if the property was to be sold, they could be ‘moved on’ and compensation would not be payable.

Another point of concern for interviewees was the way some park operators use the shorter terms to manipulate and control residents. Several interviewees recounted events where a park operator had threatened to terminate an agreement on the basis a person was a ‘troublemaker’ or if they complained about the need for maintenance. Indeed, in one case this response was received by a resident requesting a Park Liaison Committee. The termination without grounds provision in the RPLSTA was referred to on several occasions as being used as a threat by park managers. This conduct, it seemed, was directed at older or more vulnerable residents on periodic tenancies or where a fixed term was moving towards expiration. Some

“I have lived here (residential park) for seven years and I have been on a periodic tenancy pretty much all that time. I know I could go at any time. The place was promoted as being suitable for retirees but there is no security at all.”

Interview RP 17

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7 This was a common theme in interviews and written submissions for this Study.
Interviewees queried why something could not be ‘done’ to prevent this type of behaviour.

There was a realisation that it was difficult to find alternative sites and, for those who own their park home, the expense of moving a park home is considerable. A move away from familiar surroundings was particularly difficult for older residents as it breaks up community links that develop within the villages and necessitates a move to another village that is likely to be some distance from the original site and from familiar amenities and services.

There seemed to be somewhat of a divide between residents in lifestyle villages and those in traditional parks. Some residents of lifestyle villages couldn’t understand why they were covered by the same legislation and regarded their interest as a completely different mode of dwelling. On a structural level that may, to an extent, be true but there seemed to be a disconnect between residents realisation or understanding that they were merely renting the land upon which their dwelling was placed. Although lifestyle village residents were on lease terms of 30 years or more, there was very much a view that they regarded themselves as ‘owners’ rather than ‘renters’.

Industry representatives were concerned about further restrictions on security of tenure for park residents. Many were open about having a business to run and that, in the long term, selling sites was a viable option they had every right to prepare for. They denied knowledge of park operators who were not professional in their attitude towards residents but said these were isolated instances and generally residents were happy with their situation. A comment was that many people didn’t want to live in the sites permanently and wanted the option to move around.

Discussions by the research team with lifestyle village organisations demonstrated a professional and resident focussed approach. While not avoiding the fact that some residents had raised issues (usually with regard to village rules or fees) the management approach and the dispute resolution procedures within the villages seem to keep disputes to a minimum.

Summary of findings

The strict legal position of many residents in residential parks is precarious.

The RPLSTA covers two types of ‘long-stay’ resident who differ considerably. The first group of residents do not own their own dwelling; they rent the park home and are in virtually the same position as residential tenants under the Residential Tenancies Act 1987 (WA). The RPLSTA is also applicable to a second group of residents who rent the site but have purchased their own dwelling.

The two groups differ in the level of investment they have made in order to reside in the park. The former group have made no capital outlay whereas the latter group have made a sizeable investment with the purchase of the dwelling. The dwelling retains, however, the character of personal property – it is a mere chattel. The resident leases the site upon which the dwelling is located and has no interest in the land itself; ‘ownership’ resides with the park owner/operator whether through a leasehold or freehold interest.

“But I am in a Lifestyle Village, that’s not like a mobile home park… Well, how is it the same? I can’t pick it up and take it away.”

Interview RP 16
While in the event of termination both the first and second group would have to face the vagaries of finding new accommodation, the first group can, seemingly, walk away\(^8\) while the second group of residents will have to bear the expense of moving and are likely to face difficulties in finding another site.

Residents who have purchased their own dwelling can be divided into two broad groups; those who are ‘long-stay’ tenants in that their residency exceeds 3 months but have a relatively short period of tenure and those who have lengthy periods of tenure, sometimes up to 60 years. Of course, there is a range of terms and tenures between the two extremes. Therefore, the circumstances of a person on a rolling periodic lease are regulated by the same legislation as a person on a fixed term lease lasting decades.

The type of parks available differs. Mixed parks combine both short term tenants, for the most part tourists, and longer term residents whereas other parks only provide accommodation for longer term tenants. Mixed parks often demonstrate a mismatch between the attitudes of the different types of residents towards each other and the attitude of the park operator towards the respective groups.

Indeed, the range of accommodation contemplated exposes, in our view, the fundamental impediment to the RPLSTA being capable of meeting the aspiration of security of tenure for many park residents: a single Act is attempting to regulate divergent tenancy arrangements with differing levels of financial and emotional investment and domestic and commercial aspiration.

The RPLSTA is also conflicted through its close relationship with the Caravan and Camping Grounds Act 1995 (CACGA) because many residential parks come within the ambit of the CACGA. The CACGA’s focus is, in reality, tourism and not long term or permanent accommodation. The provisions of the CACGA are often irrelevant to residential parks and in some cases even undermine the capacity to offer long term tenure. For example, a lease for a park under the CACGA may only be for a year. Therefore, park owners are reluctant to lease for a longer period as, if their lease is not renewed it will be unable to fulfil its commitment to the residents.

**The need to protect residents’ legal right to remain in a residential park**

The different groups of residents who reside in residential parks can be identified as follows:
- Residents on short term leases (being leases of less than 3 months);
- Residents on fixed term agreements; and
- Residents on periodic agreements;
- The security of tenure of each of these groups differs.

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\(^8\) This is not to undermine the impact of the loss of community.
Short term leases

There is a significant shortcoming in the legislation in that residents on short term agreements do not enjoy the protection of the RPLSTA. Such agreements are not subject to minimum statutory notice periods for termination and do not have access to the dispute resolution procedures within the Act. Many residents are only offered agreements that are less than the 3 month period necessary for the RPLSTA to apply; an 89 day tenancy is commonplace. Despite the fact that these agreements will often ‘roll over’ on many occasions, the cumulative length of occupation is not relevant; the legislation is applicable only to agreements where the initial term (fixed or periodic) exceeds 3 months.

Residents may, therefore, reside in a residential park for lengthy periods and yet not receive any protections under the legislation. This is risky because, if the statutory notice periods do not apply, a person could be required to vacate an on-site dwelling, or move a mobile home from a site-only situation on minimal notice. This underscores the vulnerability of such residents and the reluctance they may feel to speak out on issues of concern.

Fixed term agreement

An agreement for a fixed term of more than three months enjoys security of tenure for the term of that lease. In the absence of a valid option, the resident has no right to be offered a new agreement upon expiry of the original term. Upon expiry, a resident may be offered a new fixed term, the agreement may be converted to a periodic lease or the resident may have to vacate the park.

A fixed term agreement of more than three months can be terminated for non payment of rent or some other breach of the lease. In cases of default, the park operator must provide the requisite statutory notices in the time limits prescribed, being at least 60 days notice for on-site premises and 180 days in the case of a site-only agreement and, if the breach is not resolved, must apply to the State Administrative Tribunal (SAT) for a termination notice. Such agreements can also be terminated on other specified grounds although in some cases the long term tenant will be paid compensation. Importantly, a fixed term tenancy cannot be terminated ‘without grounds’ during the fixed term.

Periodic agreements

Like a fixed term agreement, a periodic agreement where the initial term of which exceeds 3 months and falls within the ambit of the RPLSTA, can be terminated for a failure to pay rent or a breach of another term of the agreement. The same statutory procedure must be followed as discussed above in relation to termination of fixed agreements. A critical point of difference is that periodic agreements can be terminated without grounds. This means that a park operator may terminate a periodic tenancy without having to provide reasons to the resident.

“The majority of residents have little say in the content of their lease or the type of lease. Currently, the majority of park home residents have a periodic lease. While fixed term leases are the norm in Lifestyle Villages, the fate of caravan parks is dependent on the park owner.”

POHA Submission 12

9 Section 39 RPLSTA.
10 Section 40 RPLSTA.
11 Schedule 10, Residential Parks (Long Stay tenants) Regulations 2007 (WA)
12 See generally part 5, Division 2 RPLSTA.
13 Section 46 RPLSTA
14 Section 42 RPLSTA.
15 Section 42 RPLSTA.
Grounds for termination of long stay tenancy agreements

There are several other ways a fixed or periodic long-stay tenancy may be terminated under the RPLSTA being:

- if vacant possession is required on sale of the park;16
- by a park operator without grounds;17
- if the agreement is frustrated;18 and
- in the event of hardship to the park operator.19

However, it is noted that a long-stay tenant under a long-stay agreement for a fixed term cannot be terminated without grounds but is entitled to compensation for loss incurred as a result of the termination of the long-stay agreement for any of the other above reasons.20 A long stay agreement can also be terminated by a mortgagee in possession.

Recommendations

- Open-ended terms akin to those in the Manufactured Homes (Residential Parks) Act 2003 (Qld)

Our pivotal recommendation is the introduction of legislation resembling the Manufactured Homes (Residential Parks) Act 2003 (Qld) (MHRPA). Alternatively, if the Queensland approach was not adopted, a fixed term of at least five years should be mandated. As will be discussed below, periodic leases should not be available and tenancies should only be set aside by a tribunal or through genuine mutual agreement.

Although we appreciate that this may not be a popular recommendation with park owners, in our view the MHRPA pays heed to:

- the fact that many residents enter into such tenancies in the expectation that they will continue to reside in the property. Indeed, the business model for many parks is based on this premise while in other cases, including mixed parks, residents are often led to believe this is the case;
- the significant level of investment residents make in purchasing and establishing a home in a residential park;
- the vulnerability of many residents of residential parks; and
- the park owners interest in dealing with his or her own land, subject to oversight from the relevant Tribunal.

16 Section 41.
17 Section 42 RPLSTA.
18 Section 45 RPLSTA.
19 Under an order under section 73 RPLSTA.
20 Section 46(1),(2),s65 RPLSTA The amount payable is the amount agreed between the long-stay tenant and the park operator or, if the parties cannot agree, the amount determined by the SAT on an application under section 65.

“Due to the eviction without reason clause we sought legal representation...for compensation. All residents received $3000 and an extended time at the (name) caravan park until we could find other premises to reside. The relocation fee ended up around $30,000 for those who could afford to. This left a large hole in the retirement nest egg.”

Interview RP 3
Chapter 7 – Residential parks

An overview of the Queensland provisions

Under the Queensland provisions, a manufactured home is defined as:
A manufactured home is a structure, other than a caravan or tent, that—
   a. has the character of a dwelling house; and
   b. is designed to be able to be moved from one position to another; and
   c. is not permanently attached to land.21

In some circumstances the legislation extends to a converted caravan.22

So far as legal security of tenure is concerned, the owner of a manufactured
home has a right to remain on the site until the agreement is terminated.23
The agreement can be terminated pursuant to abandonment24 or in
accordance with Part 6 of the legislation. In summary an agreement can only
be terminated:
• During the cooling off period (in certain circumstances);26
• By mutual agreement between home owner and park owner;27
• by the home owner;28and
• by the relevant tribunal in circumstances of certain anti-social behaviour29
  or where the park owner wants to use the land for another purpose.30

Potential pitfalls

An agreement can be terminated by a home owner and park owner by
mutual agreement. Concerns have been raised under the Queensland
legislation where it has been alleged park owners have tried to intimidate
residents into agreeing to a termination, meaning that the park owner does
not have to pay compensation.31 The park owner is prohibited from coercing,
or attempt to coerce, the home owner to terminate.32 Similarly some park
owners entered into fixed term agreements33 or utilised ‘mutual termination
agreements’.34 This has been described as “effectively, this being a separate
agreement to terminate at a fixed time.”35 Any adoption by Western Australia
would need to consider the possibility of such ‘loopholes.’

Another contentious issue is the park owners’ power to terminate so as to
change the use the park, or part of the park, for another purpose. In these
cases a termination order must be sought by the park owner from the
relevant Tribunal. To ensure that the change of use is legitimate and not a

“I have developed
quite a community
here. We look out for
one another, especially
the elderly people.
Some of the men fix
things for them and we
check in to make sure
everything is alright.
If that was broken up
I don’t know what
they would do.”

Interview RP 19

21 Section 10(1) MHRPA.
22 Section 10(2),(3) MHRPA.
23 Section 26 MHRPA.
24 Part 8 (ss 52-55 MHRPA).
25 Section 32 MHRPA.
26 Sections 33-35 MHRPA.
27 Section 36 MHRPA.
28 A breach of s 23 MHRPA.
  Queensland Parliamentary Library and Research Service 6.
30 Ibid.
ruse to terminate the agreement for other reasons\textsuperscript{36} a certified document from the local council must be obtained to substantiate the change of use.\textsuperscript{37}

\textbf{Rationale for our conclusions}

The Queensland legislation has been operating for some time although significant amendments were introduced in 2010 to address ‘loopholes’ such as park owners imposing fixed terms.\textsuperscript{38} A significant inquiry into the future of the sector has been completed\textsuperscript{39} and, for the most part, the legislation has not led to a significant decline in the number of parks nor unduly interfered with the business of most park operators.

In our view adopting such provisions in Western Australia would enhance security of tenure and remove some inconsistencies in the existing legislation primarily:

- there would be no periodic leases;
- a wider definition would extend to homes (as defined) of any duration whether they are situated in mixed parks, park home parks or lifestyle villages. This would ensure that all longer term tenancies, including those in mixed parks, will enjoy the same protections;
- Open ended terms with limited reasons for termination will provide safeguards for residents. While some other states, for example Victoria and New South Wales have adopted fixed terms of five and three years respectively, after the fixed term expires the resident may, of course, have to depart. Although there are grounds for termination under the Queensland legislation, the process provides considerable safeguards for residents. In particular, if this course was taken in Western Australia, the reasons for termination, including the potentially vague hardship and sale with vacant possession provisions, would be removed;
- Where a termination order is granted such order must provide that the park owner pays compensation for relocation. \textsuperscript{40} If the park owner is desirous of changing the use of part of the park, the tribunal can order that, if available, the home owner be offered a comparable site within the park. In the event of termination, compensation is payable to all residents;
- The notice period can be extended to a year in appropriate circumstances; and
- A change in use is still possible for park operators so long as the proposal is legitimate and compensation is paid.

\textbf{Abolition of periodic leases}

In our view, periodic leases should not be permitted unless for holiday lettings. Such leases undermine security of tenure and can be manipulated to avoid the provisions of the legislation\textsuperscript{41} and/or leave both short and long

\textsuperscript{36} As was the case in a Western Australian context in Batavia Coast Caravan Park and Thomas [2012] WASAT 91; Batavia Coast Caravan Park and Hansel [2012] WASAT 88; Josey and Batavia Coast Caravan Park [2012] WASAT 176 but compare Howe and Kelmscott Caravan Park [2010] WASAT 148.

\textsuperscript{37} Sections 39, 40A MHRPA.

\textsuperscript{38} Nicolee Dixon, Above n 33.

\textsuperscript{39} Department of Communities (Queensland) Residential Parks – Strategies for encouraging alternative manufactured home sites in Queensland <www.communities.qld.gov.au/housing>.

\textsuperscript{40} The park owner must compensate the manufactured home owner for relocation costs up to 300 kilometres. There is also compensation for incidental expenses.

\textsuperscript{41} For example 89 day rolling leases.

“\textit{Its hard for the older people. One lady asked me not to put information about the Park Liaison Committee in her letterbox because people might think she was a “stirrer”. Old people worry what will happen if the agreement ends and they have to find somewhere else.”}

\textit{Interview RP 1}
term residents uncertain about whether another term will be granted. A genuine periodic tenancy for holiday purposes would be better placed in legislation elsewhere.

- **‘Without grounds’ termination should be abolished**

Presumably if periodic tenancies were abolished in these circumstances, the without grounds termination would be unnecessary. Nevertheless, in our view, such a provision has no place in the legislation. The evictions without grounds provisions are problematic to residents who own their own park home.

Although there are some safeguards regarding termination in circumstances where the park owner has an ulterior motive, such as the fact a resident has made complaints, proof is difficult for the resident to obtain.

Safeguards can be built into legislation regarding termination for non-payment of rent, breach of the agreement and anti-social behaviour.

- **Determination of leases can only be achieved through application to the State Administrative Tribunal unless there is mutual agreement or, in appropriate cases, mediation**

In our view, the State Administrative Tribunal should have the final word as to whether an agreement can be terminated. In Queensland, as well as factors involving non-compliance with the terms of the agreement or anti-social behaviour, the agreements can be determined where the park owner is desirous of using part or the entire park for another purpose. Such purpose must be confirmed by the relevant local authority. In our view, any Western Australian legislation should follow suit.

If mutual agreement was not forthcoming, the mediation services of SAT could be utilised to reach a resolution and, failing this, the matter could proceed to a hearing.

**An alternative? Fixed term leases**

A fixed term for all tenants is another possibility. For example, Victoria imposes a 5 year fixed term and periodic leases are not available. In NSW a fixed term must exceed 3 years and can only be set aside by tribunal or via mediation.

In our view it is better for older people to have the security of a continuing term with termination only available in restricted circumstances. Even with a 5 year term there is always the spectre of non-renewal of the agreement.

42 Throughout our interviews this was a common concern amongst residents. Many were kept on periodic leases with a veiled threat that they would not be granted another term.

43 It seems the provision is there to mirror provisions in the RTA about eviction but in the case of rental people have not invested vast sums of money in the properties. Although 180 days is a significant period of time, the reality is that it may be insufficient in order to find alternative appropriate accommodation.

44 Section 68(4).
Additional recommendations (whether or not the above recommendations are adopted)

• Education

The Department of Commerce and the Seniors Housing Centre are proactive in preparing and providing information and pre-purchase information to inform decision making. The materials prepared by the Department of Commerce are very comprehensive but this may, in fact, be deterring some prospective residents from reading them. Although there is a danger of diluting information, we suggest that a one sheet summary be prepared that must be provided to prospective tenants prior to entering into the agreement. The sheet should emphasise the position regarding security of tenure and state clearly the maximum length of the term where tenure is secure.

• Register of residential parks

A Register of residential parks in Western Australia needs to be established.\textsuperscript{45} It is imperative that accurate statistical data is sought on the size and scale of the residential park industry in Western Australia and the structure, operation, tenure and demographics of residents residing in residential parks. For future planning purposes, and to anticipate the impact on the affordable housing market if parks were to close, such demographic information should be sought as a matter of priority.

The Register should incorporate information about the number of parks, the nature of the sites (short term or long stay) and the number of residents living in residential parks in Western Australia. The Register should form a resource outlining the structure, operation, tenure and demographics of residential parks. Park management should be required to keep the Register up to date.

The importance of obtaining current information about the structure, operation, tenure and demographics of residential parks has been identified in New South Wales with the establishment of a register of all the residential communities in the State. Indeed, one of the rationales for the Register was to provide, for the first time, accurate statistical data on the size and scale of the residential park industry.\textsuperscript{46} It is proposed to build on the Register with the introduction of the \textit{Residential (Land Lease) Communities Act 2013} (RLLCA).\textsuperscript{47}

\textit{“The problem is, however, that operators or managers may comply administratively but behave badly towards their residents.”} \textsuperscript{48}

\textsuperscript{45} The desirability of a Register has been identified for some time but has failed to materialise. Unnecessary duplication and inconsistent collection of information by various state government departments is no substitute for a comprehensive register.

\textsuperscript{46} The Hon. Greg Pearce, Second Reading Speech \textit{Residential Parks Amendment Register Bill 2011}, 11 August 2011. The legislation received assent on 13 September 2011 (Act no 39 2011). The Register has identified that there are close to 500 residential communities across New South Wales with over 33,000 permanent residents: Mr Anthony Roberts, Second Reading Speech \textit{Residential (Land Lease) Communities Bill 2013} 18 September 2013.

\textsuperscript{47} At the time of writing before the Legislative Council, passed by Legislative Assembly 28 October 2013. Of particular importance to this Study is that information relating to the occupation and use of residential sites located in the community must be recorded in the Register. If park management fail to provide the information, or make false or misleading statements in relation to the information provided they will be guilty of an offence under the legislation.
Chapter 7 – Residential parks

• Management

We recommend that there should be improved screening, training and regulation of park operators and managers. The management structure of residential parks differs. Some parks are managed by owner/operators but the most common scenario is a park owned or leased by an operator but the day to day management is left, depending on the size of the complex, to a manager or management team.

Park operators and/or managers have to deal with a variety of people, including older people, with complex needs. It is important that they be cognizant of their clientele as, especially in a mixed park environment, there will be a variety of residents: people exhibiting a range of ages, backgrounds and vulnerabilities. In our view, the importance of the role of management in a residential park should not be underestimated. Managers are the principal point of contact for the resident and it is through management that most residents will receive information about the terms of their occupation. Managers, therefore, can wield a significant amount of power, particularly in circumstances where a resident may be old or experiencing some vulnerability and the tenancy is of short duration.

The problem is, however, that operators or managers may comply administratively but behave badly towards their residents.

At the moment, in Western Australia any person can own or manage a residential park. There are no stipulated qualifications or training required nor is it necessary to have experience in this or like industries. Although many park owners and managers do the right thing by residents, the Study has found that there are many residents who feel they are treated unfairly and have found operators or managers to have engaged in harassing and intimidating conduct, including threats in relation to tenure.

“IT SHOULD BE NECESSARY THAT A PARK OPERATOR OR MANAGER ESTABLISH HE OR SHE IS A FIT AND PROPER PERSON

Certain persons should be prohibited from being involved in the management of a park if, during the last 5 years he or she has:
• been convicted of an offence involving physical violence to another person; or
• been convicted of an offence involving fraud or dishonesty; or
• become bankrupt or insolvent or been the director of a company which has been wound up (otherwise than voluntarily).

Park managers should attain minimum training requirements and there should be continuing professional development for park managers

There is no compulsory training for park managers. Some larger organisations, such as National Lifestyle Villages provide training for managers and staff but this is not accredited.

Licensing of park operators and managers

Licensing of park operators and managers would provide for a stipulated amount of training and a reference point for manager/operator behaviour.
It will build confidence in the industry and provide options where unsavoury operators are at play. New operators would need to obtain a licence in order to operate a residential park and there would be minimum education, training and character assessments. This would provide a reference point for prospective tenants to check the previous conduct of operators. Such a system could monitor persons in the industry and their track record. If appropriate, a person could be prevented from managing or operating a residential park.

New South Wales have recently canvassed several options. The first option involves licencing residential park operators in a similar manner to real estate agents. This accords with other recommendations elsewhere in this Study regarding the licencing of managers of other complexes including strata title and retirement villages.

**Mandating behavioural standards**

Evidence gathered in the course of this Study, submissions to the Department of Commerce’s recent review and material made available by the Park Home Owners Association suggests that the limited statutory protection of security of tenure is residential parks causes some residents to feel intimidated and reluctant to speak out about even minor issues about the park and its management for fear of eviction. In some cases, this means a resident may tolerate unsatisfactory conditions so as to ‘keep under the radar’ and not provoke park management.

The RPLSTA should include prohibitions of inappropriate conduct by operators or managers in the relevant legislation. Several pieces of Australian legislation contain provisions prohibiting certain unfair practices in commercial and consumer transactions. However, at present, there is no express prohibition of such conduct in the RPLSTA. The Queensland legislation prohibits fraudulent or misleading conduct and harassment or unconscionable conduct in the operation of a residential park. The Queensland Act provides examples of the types of conduct which would offend the prohibition.

48 Pursuant to the *Property, Stock and Business Agents Act 2002.*
49 From origins in the *Trade Practices Act 1974* (Cth) and now continued in the *Australian Consumer Law* (ACL) such prohibitions seek to address imbalances in bargaining power, restrain the excesses of unfair dealing and provide for a ‘fairer’ commercial environment. In summary, the prohibitions in the ACL encompass prohibitions of or limitations upon: Unconscionable conduct; Misleading or deceptive conduct; False and misleading representations; Unfair contract terms; and Coercion and harassment.
50 Section 95 MHRPA.
51 Section 96 MHRPA.
• Similar protections should apply as those applicable to retirement villages

As older people choose to occupy residential parks, especially for lengthy periods, it is suggested that similar protections should apply as those applicable to retirement villages. The nature of the residential park agreement of course differs from that of a retirement village so as there is no payment of a premium the statutory charge would seem to be inapplicable.

However, in a similar way to the RVA, a memorial could be lodged with the Registrar of Titles in relation to land used for the purposes of a residential park, giving notice to potential purchasers or lenders that the land can only be used as a retirement village while any resident remains in occupation.

Long-stay agreements could be made binding on successors in title of the owners (including holders of mortgages, charges, or other encumbrances over the land) requiring them to perform the obligations of the (previous) owner who entered into the contract with the residents of the village.

Indeed, the reality is that there is little difference between retirement villages and residential parks, especially those offering longer term tenures. They are being marketed as a retirement community. A premium may be paid in the case of a retirement village however the cost of purchasing a park home is a considerable investment. It may not be a contribution directly to the park operator but the fact is a dwelling has been purchased to be placed on a rented site for retirement purposes. The rationale behind the parks and the retirement villages is, in many cases identical. There seems no reason why,
especially in the case of lifestyle villages, that these protections should not be duplicated.

On the other hand, mixed parks pose a problem. The variety of residents – some short term, holidays, seasonal employment are combined with longer term residents desirous of a lengthy stay. It would not seem feasible to extend these protections to such sites although potentially they could be applied to those designated as long term sites.

The downside of this is that while it would certainly improve security of tenure, businesses may feel that this constrains them too much and move away from providing residential parks, thus reducing the amount of affordable housing. It is uncertain if the protections in the RVA have impacted adversely on supply.

With regard to notice periods, given that the RPLSTA recognises that notice periods of 60 or 180 days, depending on the residents circumstances, are appropriate it is inequitable that similar periods will not apply in the event of an operator’s insolvency. This should be introduced as a minimum.

• **Registration and caveats**

Provision needs to be made for the ability to register an interest on the title to the land and/or provide a mechanism for a non-lapsing caveat to be lodged over the portion of land occupied by the occupant.

• **Dispute resolution**

In addition to the potential use of mediation discussed above in relation to matters brought before SAT, low or no cost mediation should be available to park home owners. Such mediation should be compulsory and the refusal of a manager or owner to mediate should be the subject of sanction. Similarly, SAT members should be provided with professional development in Seniors rights and discrimination issues to improve dispute resolution.
Chapter 8
Aged care

Chapter 8 examines security of tenure for older people, in need of care and assistance, living in a residential care facility as defined under the Aged Care Act 1997 (Cth) (Aged Care Act).¹

Over recent years, there has been a gradual move away from residential care, in line with the preferences of older people and increasing government support for the provision of home care.²

It is noted that there have been recent significant reforms to the Act. On 28 June 2013, the Living Longer, Living Better reform package of bills received Royal Assent and passed into law.³ The reforms reflect the culmination of a detailed review of the aged care sector originally commissioned by the government in 2010, undertaken by the Productivity Commission through 2010 and 2011,⁴ followed by industry and community consultation. These reforms are referred to, where relevant, in this chapter.

What the Interviews revealed

Interestingly, it was very difficult for us to source interviews for this chapter and when we did obtain interviews, the interviewees were very reluctant to be quoted.

However, the fact that care recipients in residential aged care facilities enjoy a considerable degree of security of tenure under the Act was generally borne out in the interviews. In fact, the message that was conveyed to us by the industry was that the protection granted by the legislation to individual care recipients is making it increasingly difficult for providers in circumstances where people are living longer and mental health issues such as dementia are becoming more prevalent. The lack of available alternatives for these care recipients means that they generally remain in their existing residential care service even if their high dependency and inappropriate behaviour means that they impact on the practical option of the other care recipients to remain in the residential care service and the aged care facility finds it difficult to afford to provide appropriate care for them. As to this, we were informed that generally, the funding provided by the government does not

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¹ Aged Care Act 1997 (Cth) s 1-3(1) and Schedule 1 - Dictionary, cl 1 and s 41-3(1).
² ‘Home care’ is defined in the Aged Care Act 1997 (Cth), Schedule 1 – Dictionary, cl 1 and s 45-3(1). During 2012-2013, a total of 226,042 people received permanent residential care and 48,162 received short term respite care in aged care homes. In addition, 82,668 people who would otherwise be eligible for residential care chose to receive care in their home through a package of care: see Australian Government Department of Social Services, 2012-2013 Report on the Operation of the Aged Care Act 1997, (Canberra, 2013) 8.
³ These include the Aged Care (Living Longer Living Better) Act 2013; Aged Care (Bond Security) Amendment Act 2013; Aged Care (Bond Security) Levy Amendment Act 2013; Australian Aged Care Quality Agency Act 2013; and the Australian Aged Care Quality Agency (Transitional Provisions) Act 2013.
Chapter 8 – Aged care

cover these losses. People in the industry also told us of the very difficult issues that arise because of the uncooperative and, in some cases, harmful behaviour of care recipients’ relatives and the impact of this behaviour on care recipients and staff in the residential aged care facility.

Although there was general satisfaction with the current accreditation process of residential aged care services, some of our interviewees from within the industry were of the view that there is more of a focus now on compliance than on quality of care and that if a facility ‘ticks the boxes’, they will satisfy the requirements. There was also a view that compliant providers were often unfairly targeted where the focus should have been more on those with serious deficiencies. Further, the unannounced visits made by the Australian Aged Care Quality Agency (Quality Agency) were found by some to be ‘demeaning and insulting’, with interviewees asking why aged care facilities were treated differently from hospitals in that hospitals did not receive unannounced visits for their accreditation.

The interviewees for this study emphasised the importance of Advocare Incorporated (Advocare) in complaints resolution. The Aged Care Complaints Scheme (ACCS) was also generally considered to be effective.

**Summary of findings**

Our research revealed that care recipients in residential aged care facilities enjoy a considerable degree of security of tenure as required under the Act.5

Under the Aged Care Act and the *Aged Care Principles and Determinations*, an approved provider may only ask a care recipient to leave in certain specified circumstances.6 However, the legislation requires an approved provider who decides to require the care recipient to leave for any of these reasons to give the care recipient a written notice 14 days before the care recipient is to leave that includes prescribed information, including, inter alia, the reasons behind the decision and the care recipient’s right of access to available complaints resolution processes and advocacy services.7 Further, and more significantly, the approved provider must not take action to make the care recipient leave, or imply that the care recipient must leave, before suitable alternative accommodation is available that meets the care recipient’s assessed long-term needs and is affordable by the care recipient.8

5 It is noted that the detailed review of the aged care sector commissioned by the government in 2010 and undertaken by the Productivity Commission through 2010 and 2011 identified several weaknesses in the aged care system: Australian Government Productivity Commission, *Productivity Commission Inquiry Report – Caring for Older Australians*, No 53, 28 June 2011. This review was used to amend the Act through the Living Longer, Living Better reform package of Bills which were passed into law on 28 June 2013. To the extent that the weaknesses referred to in the review relate to the lack of supply of residential aged care places (as a result of, for example, the limits on the number of bed licences or difficulties in obtaining finance, in particular, to build residential facilities), they are outside the scope of this chapter. This chapter is premised on the assumption that a care recipient has already entered an aged care facility.

6 *User Rights Principles 1997*, s 23.5 – these include (i) where the residential care facility is closing; (ii) where the residential care facility no longer provides accommodation and care suitable for the care recipient; and (iii) where the operator of the residential care facility asks the care recipient to leave for the reasons set out in s 23.5(3) of the *User Rights Principles 1997*. (Although not treated as a specific exception to a resident’s security of tenure under the legislation, the transfer of a resident to a new bed or room within a residential care facility is treated as such an exception to a resident’s security of tenure in this chapter.)

7 *User Rights Principles 1997*, s 23.6(1) and (2).

8 *User Rights Principles 1997*, s 23.6(3).
Although there are several issues that we have identified relating to the way the legislation is worded, leaving it open to different and potentially undesirable interpretations, we understand from our interviews with people in the industry that the legislation is generally interpreted and applied in the same way throughout the industry, with approved providers far too concerned about their reputation to risk any undesirable outcomes. For example, the legislation does not require an approved provider who decides that they are going to require that a care recipient leave, to secure suitable alternative accommodation for the care recipient, only to ensure that suitable alternative accommodation is available that is affordable to the care recipient and meets their long-term care needs. Further, the legislation does not require the place that is available to be acceptable to the care recipient that is being asked to leave. However, our research has revealed that the requirement for an approved provider to find alternative suitable accommodation for care recipients has not proved problematic in practice – with care recipients never left without a place to live and generally accepting of the alternative accommodation found for them.9

Further, we understand that the 14 day notice is almost never used by approved providers, with approved providers doing everything they can to resolve a situation before the 14 day notice needs to be prepared.10

**Key areas impacting on a residential care recipient’s security of tenure under the Aged Care Act**

**Residential care service is closing**

The most common situation in which an approved provider may ask a care recipient to leave is where a residential care service is closing. Even if the alternative accommodation is acceptable to the care recipients and their families, the move itself can understandably cause significant upset and disruption and, anecdotally, the life expectancy of many care recipients may be adversely affected as a result. Our research revealed that most residential care services close as a result of business decisions11 – however, more research needs to be done concerning the cause of closures of residential care services in order to work out how the number of these closures can be reduced.

**Where the residential care facility no longer provides accommodation and care suitable for the care recipient**

The approved provider may also ask a care recipient to leave if the residential care facility no longer provides accommodation and care suitable for the care recipient, having regard to the care recipient’s long term assessed needs, and has not agreed to provide care of the kind that the care recipient presently needs.12 This may become less of an issue with the removal of the distinction between low and high residential care facilities under the new Living Longer, Living Better reform package of bills.

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9 Interviews conducted for the purposes of this study. For example, meeting with Advocare at their offices on 22 January, 2014.
10 Interviews conducted for the purposes of this study.
11 Interviews conducted for the purposes of this study.
12 User Rights Principles 1997, s 23.3(2)(b).
Where the operator of the residential care facility asks the care recipient to leave for the reasons set out in s 23.5(3) of the User Rights Principles 1997

A care recipient may also be asked to leave for certain specified reasons including where the care recipient:
- no longer needs the care provided through the residential care service;
- has not paid any agreed fee to the provider within 42 days of it being payable for a reason within the care recipient’s control;
- has intentionally caused serious damage to the residential care service or serious injury to the approved provider, an employee of the approved provider or another care recipient; or
- is away from the residential care service for a continuous period of at least 7 days for a reason that is not permitted by the Aged Care Act nor an emergency.

Where a care recipient is transferred to a new bed or room within a residential care facility

The law relating to when a care recipient may be moved to another bed or room in the same facility seems to take account of the resident’s needs and sensitivities.

Situations in which living conditions in the residential care facility may become untenable for a care recipient

Although the Aged Care Act does not directly refer to the situation in which living conditions in a residential care service become untenable for a care recipient as an exception to their security of tenure, it is treated as such an exception in this chapter as it impacts on a care recipient’s practical option to remain in the residential care service.

The possible impact of a care recipient’s legal right to remain in a residential care service on another care recipient’s practical option to remain in the facility

Interestingly, our research and interviews revealed that the significant protection given under the Act to the legal right of care recipients to remain in their residential care service or to be accommodated elsewhere may, and in many cases does, impact on the practical option of the other care recipients to remain in the residential care service and on the approved provider. For example, where a care recipient is causing damage to the residential care service or injury to other care recipients, it is obvious that conditions in the facility may become less tenable for the other care recipients, impacting on their practical option to remain in the facility. Further, the approved provider may have difficulty attracting more care recipients and retaining staff if the care recipient causing the damage or injury remains in that service. However, if there is no alternative provider that will agree to provide accommodation to the resident, the approved provider has no option but to keep, and try to manage the behaviour of, the care recipient.

“Our last resort is to apply for violence restraining orders which may restrict the visiting times of the care recipient’s relative.”

Interview AC 1
The relatives of care recipients

Another issue which apparently has a very real and significant impact on the practical option of care recipients to remain in an aged care facility but which is not addressed by the aged care legislation and generally receives inadequate attention is that of care recipient’s relatives being unco-operative to the extent that they may cause harm to either their own relative, staff or other care recipients. Sometimes this behaviour can be in the form of intentional harassment, bullying or racially abusive behaviour. Other times, the care recipient’s relatives may be trying to be of assistance to their loved one but in fact, may be causing them harm. We have been informed that in these situations, aged care services have had to resort to applying for violence restraining orders which may restrict the visiting times of the care recipient’s relatives. More attention needs to be given to this issue.

Quality of care

Other circumstances that may obviously impact on a care recipient’s practical option to remain in an aged care facility involve insufficient quality of care.

The Aged Care Act does place great importance on the quality of the aged care sector as evidenced by the process involved in the approval and accreditation of providers.

In order to receive approval as a provider of aged care, being a precondition to a provider of aged care receiving a subsidy for the provision of aged care, the Secretary of the Department of Social Services must be satisfied, inter alia, that the applicant is suitable to provide aged care before approving the person as a provider of aged care. Once approved, the approved provider becomes subject to the obligations in the Aged Care Act, including, inter alia, providing such care and services as are specified in the Quality of Care Principles in respect of residential aged care: maintaining an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met; and complying with the Accreditation Standards made under s 54-2 of the Aged Care Act.

The Quality Agency undertakes the task of accreditation of residential care services in accordance with the Accreditation Standards and the Quality Agency Principles. Once a residential care service has been accredited, the approved provider must have a plan for continuous improvement and comply with that plan. Further, the Quality Agency must continue to assess the approved provider’s performance against the Accreditation Standards and assist the approved provider’s process of continuous improvement. Although under the Aged Care Act, a negative report from the Quality Agency could result in the revocation of a service’s accreditation and, possibly, their approval – we understand from our interviews with people in the industry that this rarely happens, given the potential financial ramifications of such an outcome and the resultant potential effect on residents.

“There was another view that compliant providers are often unfairly targeted where the focus should be more on those with serious deficiencies. Proponents of this view suggested that review audits may not need to be so frequent where providers have a good record – resources should rather be channelled to those facilities with less than perfect records and those where there have been changes in management, which can often affect a facility’s compliance with the required standards.”

Interview AC 2

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13 Aged Care Act 1997 (Cth) s 8-1.
14 Quality Agency Principles 2013, s 2.28.
15 Quality Agency Principles 2013, ss 2.8 and 2.30.
16 Quality Agency Principles 2013, s 2.41 and Aged Care Act 1997 (Cth) Pt 4.4.
Generally, the view of the people in the industry that we interviewed is that the current accreditation process is effective and generally acceptable.\textsuperscript{17}

**A care recipient’s ability to enforce the laws relating to security of tenure (including their practical option to remain in the facility)**

However, although the law relating to a residential aged care recipient’s security of tenure seems adequate, it will only be as good as the extent to which the resident can enforce the law relating to it. In this regard, the resident agreement and an effective complaints resolution mechanism is going to be significant. Similarly, the adequacy of the sanctions which may be imposed on an approved provider in the event that they contravene the law in relation to a care recipient’s security of tenure or non-compliance with the Accreditation Standards is critical.

**The resident agreement**

The Aged Care Act requires that a resident agreement should be offered before the care recipient enters residential care. The terms of the agreement are specified in the Act.\textsuperscript{18} However, as noted by Rodney Lewis, a practising lawyer engaged in resolving legal problems for the aged and the ageing in the community and the author of the book *Elder Law in Australia*\textsuperscript{19} and other articles on the topic, there is little or nothing a resident can do if their agreement does not comply with the Act or does not include the Accreditation Standards or the *Charter of Residents’ Rights and Responsibilities*.\textsuperscript{20} In this regard, we suggest mandatory resident agreements with two deeming provisions in the Act, treating matters or provisions that are prescribed to be included in a resident agreement as taken to be included and treating matters that are prohibited from being included in a residence agreement as void. Alternatively, it may be even more effective if a standard form contract was used in this context. In any event, given the non-compulsory nature of the resident agreement under the current law and the lack of any consequences if it does not comply with the Act, an effective complaints resolution and enforcement process becomes of utmost significance.

**The complaints resolution process**

Under the Aged Care Act, an approved provider must establish their own complaints resolution mechanism and use it to address any complaints made by or on behalf of a person to whom care is provided through the service.\textsuperscript{21}

\textsuperscript{17} However, Rodney Lewis has made the point that it is very difficult for a prospective care recipient of an aged care facility or their families to ascertain whether a residential aged care facility is complying with their obligations under the Act, both currently and historically. That is, there is no disclosure statement required to be provided by an aged care facility to a prospective care recipient or their family setting out details of any breaches of the provider’s obligations under the Act leading to the imposition of notices of non-compliance or sanctions. So, if the care recipient or their family wants to obtain this information in order to make a proper assessment or comparison of different aged care facilities, they must search for this information themselves, a search which Rodney Lewis suggests can be difficult given that this information is not freely available: *R Lewis, A Legal Perspective* (15 March 2010) <http://www.agedcarecrisis.com/legal-issues-column/A legal perspective>.

\textsuperscript{18} *Aged Care Act 1997* (Cth) s 59-1.

\textsuperscript{19} *Elder Law in Australia* (LexisNexis Butterworths Australia, 2nd edn, 2012).


\textsuperscript{21} *Aged Care Act 1997* (Cth) s 56-4(a).
However, the view of people within the industry is that the quality and effectiveness of these mechanisms varies between providers. This could be due to a number of reasons including, inter alia, the lack of any incentive of building satisfaction and loyalty of care recipients given the unlikelihood of any of them choosing to leave. Further, care recipients or their families may not feel comfortable raising concerns directly with the provider due to strong feelings of gratitude for their care or a fear of retribution.

**Advocacy Services**

The care recipient (or their representative) can request that another person assist them in dealings with their approved provider, being a family member or friend or an advocate of their choice or an independent advocacy service. Advocare is one such service, providing advocacy, information and education to, inter alia, residents of government-funded aged care facilities. Our interviews revealed the importance of Advocare in providing a middle ground between an informal internal complaints system and the formal Aged Care Complaints Scheme. Indeed, most of Advocare’s clients are from the aged care sector but the amount of Commonwealth funding with which they are provided does not seem to reflect this.22 We are of the view that more resources need to be directed towards Advocare to reflect the number of clients and advocacy and information hours involved in Advocare’s National Aged Care Advocacy Program.

**Aged Care Complaints Scheme**

The Department of Social Services also manages the ACCS which can consider concerns relating to an approved provider’s responsibilities under the Aged Care Act or the Principles under the Act.23 Complaints can be made to the ACCS openly, confidentially or anonymously.24 The ACCS can use a range of approaches to resolve the issues in a concern25 including service provider resolution, conciliation, investigation and mediation. However, we understand that the ACCS does not provide the mediation services themselves – if the ACCS is unable to achieve a suitable outcome through any of its approaches, it may suggest that the complainant and service provider work with a mediator which would come at a cost to be paid by the parties.

The ACCS can refer a matter to the Department of Social Services compliance area for compliance action on the basis that the service provider has not complied with, or is not complying with, its responsibilities under Parts 4.1 to 4.3 of the Act. Such compliance action may include giving the approved provider a Notice of Non-Compliance or imposing a sanction.

When the ACCS has finished looking at the complaint, the complainant will usually have review rights to the Aged Care Commissioner26 and to the Commonwealth Ombudsman27 if they are not satisfied with the outcome. There are critics of this review process – specifically due to the fact that neither the Commissioner nor the Ombudsman has any power to overturn

“Although the law relating to a residential aged care recipient’s security of tenure and that surrounding their quality of care required to be provided by a residential care facility may be adequate, it will only be as good as the extent to which the resident can enforce it.”

Freilich, Levine, Travia and Webb

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23 Complaints Principles 2011 (Cth) s 13A.5(1).
24 Complaints Principles 2011 (Cth) s 13A.5(2) and (3).
26 Complaints Principles 2011 (Cth) s 13A.23.
a decision by the ACCS and substitute a new decision, they can only require the ACCS to reconsider its decision.

Although our interviews revealed that the ACCS is generally considered to be effective, with the prevailing view that it is a great improvement on the previous forms (the Complaints Resolution Scheme and the Complaints Investigation Scheme) with less delay and staff turnover, there are still criticisms that are directed at the ACCS. These include the inability of the ACCS to make any award for damages to a resident – leaving a resident who has suffered injury or damage as a consequence of an approved provider not complying with its legislative and common law responsibilities and wants compensation with the sole option of bringing legal proceedings. This is an undesirable option for anyone, given the personal and financial costs associated with it as well as the uncertainty of the outcome, and is even less desirable for the aged and infirm.

However, putting these obvious obstacles to litigation to one side, it has been noted that complainants are not even aware that the ACCS does not have the power to make awards for damages or of their entitlement to seek remedies through any other mechanism other than the ACCS as the ACCS does not educate them in relation to the limits of the ACCS’s powers or the availability of any alternatives. This may be a result of the ACCS not being fully aware themselves of all the possible courses of action that may be available to the complainant. Surely complainants are entitled to be made aware of all of the legal options available to them – perhaps the ACCS itself needs to be made more aware of these options, for example, through legal education seminars, in order to be able to transmit this information to complainants. Information sessions should also be provided to residential aged care recipients and their families as to the benefits of the ACCS but also the limits of the ACCS’s powers.

Arbitration has also been proposed as a good alternative, with the added benefit that it is also able to take place at the aged care facility itself. The suggestion has been made that a provision for arbitration should be included into resident agreements, with the arbitrator being given the power to make awards for damages. However, with it not being a requirement under the Act to enter into a resident agreement and given the obvious inequality of negotiating power between a potential care recipient and a provider, the likelihood of any such provision being included in a resident agreement without it being a legislative requirement is minimal. Even if the Act did require such a provision in a resident agreement, the fact that there is little or nothing a resident can do if their agreement does not comply with the Act would not provide as much of an incentive as is necessary for providers to include the provision in the agreement. However, we recommend that a mandatory resident agreement and the inclusion of two deeming provisions in the Act dealing with required and prohibited terms in the resident agreement could address this – with an arbitration clause being a required

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28 R Lewis, *Elder Law in Australia* (LexisNexis Butterworths Australia, 2nd edn, 2012) 309-310. However, it is noted in this chapter that any right that a resident would have to bring an action against a service provider would generally arise from a breach of a resident agreement. However, if there is no formal agreement or an agreement that does not contain appropriate provisions, the chance of a resident having any cause of action against a provider will be remote.


30 R Lewis, above n 28.
term. Similarly, a standard form contract where arbitration clauses are express would achieve the same, if not a greater, effect.

Sanctions

We are of the view that the sanctions as listed in the Aged Care Act appear to be constructive and meaningful. Although quality of care should not be compromised, the potential ramifications of a residential care facility and the effect on residents of being too heavy handed could be counter-productive.

Conclusion

It is apparent from our research that any real gaps as to the law relating to the legal right and practical option of care recipients to remain in aged care facilities relate to the enforceability of the law.

Our research revealed that care recipients in residential aged care facilities enjoy a considerable degree of security of tenure as required by the Aged Care Act, both in terms of a care recipient’s legal right and practical option to remain in the residential care facility.

Critical to this is the existence of a resident agreement and an effective complaints resolution mechanism. Similarly, the adequacy of the sanctions which may be imposed on an approved provider in the event that they contravene the law in relation to a care recipient’s security of tenure and the related law is vital.
Chapter 9

Granny flats and family accommodation (‘assets for care’) arrangements

The most prevalent kind of transaction involved in financial abuse is a disposal of land owned by the older person, or an investment in land without adequate protection or for consideration which is illusory. These 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 name. A loose agreement to care for the older person is the usual accompaniment to these transactions.

Chapter 9 examines security of tenure for seniors who enter into family accommodation or ‘assets for care’ arrangements.

Family accommodation arrangements (FAA), where older members of a family live on or in the same property as younger members, are increasing in popularity and in kind. Although there are many possible variations in the structure of these arrangements, their essence is that an older person’s family receives a 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. Such arrangements include accommodation ‘solutions’ that range from the purchase of a new home to accommodate the larger household; the archetypal “granny flat” where an older member or members of a family live in a self-contained extension; a separate structure on a family member’s property; the construction of an additional storey or some other form of renovation on an existing home or where the older person simply occupies a room in an existing house. Not all older people own their own home but can be subject to family accommodation arrangements through contributions of savings, investments and other assets. Of course, such accommodation arrangements are not entered into invariably with family members; in some cases such arrangements can be made with friends or even acquaintances.

There is no accurate statistical data available regarding family accommodation arrangements or granny flat arrangements. Much of the information available about such living arrangements is anecdotal. In

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1 The authors would like to acknowledge the contribution of Teresa Somes, Faculty of Law, The University of Sydney in the research and writing of sections of this chapter.

addition, local authority records of approvals for granny flats and extensions do not specify how the premises are to be used.

This chapter considers the law relating to family accommodation arrangements. Unfortunately, the legal regime is inadequate to protect the interests of the older adult where such an arrangement breaks down. Law reform to ensure the protection of older adults in such circumstances is overdue and imperative.

**What the interviews revealed**

Twenty interviews were conducted with seniors in various forms of family accommodation arrangements.

**Age of the interviewees**

Our findings suggested that younger seniors were less likely to enter into the arrangements. Two seniors (55-65) did so because of family issues associated with a child and the arrangement was entered to be of assistance. Seniors aged 55 – 70 were more likely to live in self contained accommodation and, health permitting, maintained an independent lifestyle. Those 70 – 75 also preferred a self contained area but this depended on the financial arrangements. Those over 75, especially when they had entered into the arrangement later in their senior years were within a home.

**Financial contributions and legal advice**

The 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.

**Nature of the dwellings**

While several of our case studies involved accommodation in a granny flat, others involved shared occupation of a single home. One case saw the family move in with the older person while two cases involved the purchase of a new, larger property to accommodate the family and the older person.
Construction of a dwelling

In 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.

Considerations

One of the main considerations was an awareness of not ‘getting in the way’ and maintaining privacy for the older person/s and their family. While there was the expectation that there would be interaction between them, most of the interviewees valued their privacy and that of their children. Indeed, many of the younger interviewees had the view that they would not “be there all that much”, as they planned to travel. In fact, a bone of contention was the issue of grandchildren. Far from the archetypal ‘meddling’ grandparent, one of the issues was that the older person did not want to become “an unpaid baby-sitter” and, while valuing the close proximity to their grandchildren some, at times, reported feeling taken advantage of in that respect.

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”. One assumed that if care had become too difficult he would have “gone into a home.”

How they came to enter into the transaction in the first place

The decision was often made after some significant life event. In most cases one spouse had passed away (often relatively recently) and the family was of the view the surviving parent should not be left alone. In two cases an older person had become ill and had required hospitalisation.

However, in two cases, the offer came from the family due to financial constraints. Therefore, in one case a marriage had broken up and, in order to keep the home and buy out the other partner, the older person was asked to sell their house and live with the child and her family. In another an illness and loss of a child’s job saw a request to “tap into” the inheritance early.

Some interesting features:

Often arrangements would occur quickly, especially in a rising market. Indeed, sometimes other children were oblivious to the arrangement until it was completed. Most sales occurred quickly (which could have been a result of the relatively strong property market) but some interviewees were concerned that they had not received the best price. In some cases a sense of
“panic” and “urgency” surrounded the sale. Emotional pressure was a factor too, even if an older person didn’t really want to enter into the arrangement “we felt we should as we didn’t want them (the child and her husband) to be worried about us or to make them feel we didn’t want to live with them. In the cases of family financial stress there was often a feeling of obligation to assist.

In few cases was legal or accounting advice taken. The child dealt with the real estate agent for the sale of the property. There was one disturbing incident re the older person borrowing money that will be summarised in the consumer credit section of this chapter. Where legal advice was sought there seemed to be no clear differentiation as to who the solicitor was acting for – it was “all one big conversation”. Comments were made that they really didn’t understand the ramifications. There was concern that lawyers would cost too much and that time had to be kept to a minimum.

Monetary arrangements

In several cases the sale of the house financed the renovations and/or a lump sum payment of some kind was made. Therefore, in one case, the older persons house was sold and she moved into a single room at the rear of the 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 child and his spouse.

Legal title to the property

In one case the property was held as joint tenants with the child and the child’s spouse. This meant that upon the death of any of the joint tenants, including the older person, according to the rules of survivorship the deceased joint tenant’s interest passes to the other joint tenant/s despite what may be said in the older person’s will. Therefore, where an older person thought he was leaving his interest in property to be divided among all his children, it would in fact pass to the other joint tenants – one child and that child’s spouse.

In most cases the older person did not have any legal interest in the property. Interviewees did not comprehend that to establish there was an interest of some kind they would need to go to court.

Uncertainty re ‘gift’ and agreement

Our interviews revealed uncertainty too as to how the different parties regarded the transaction. For example, some respondents seemed surprised that their children had thought of the arrangement as a gift. In comparison the older persons regarded the contribution as ‘paying their way’ and as compensation for care. Again this underlines the importance of obtaining legal advice and all parties reaching an understanding of their rights and responsibilities.

“We knew when we built the granny flat that they were having problems…It was alright but after about two years things got really bad again…He wiped his hands of it all and just wanted the house sold. There was no way she could buy him out of the house and keep it and we couldn’t help.”

Interview FAA 1 7
Issues that affected the accommodation arrangement in the long term

There were a variety of reasons as to why the arrangements broke down. They included:

- changes in the health of the older person which require the relative to provide a greater level of care;
- the desire of the relative to move homes;
- the breakdown of the relative’s marriage, with the sale of the family home as part of matrimonial property proceedings; and
- the isolation of the older person from their preferred community.

CALD seniors and FAA arrangements

The complex issue of FAA and cultural expectation was also discussed in the interviews. Two cases involved an older person from a CALD background. In one case a son persuaded his mother to come to Australia. The woman trusted her son implicitly and thought he was asking her to come to Australia so he could look after her. Indeed, this was a cultural expectation. The woman paid her fare and gave her son a considerable amount of money upon arrival. She spoke little English and felt isolated and lonely in her new environment. After three months she was asked to leave. Another respondent was a close relative of an older woman from an Italian background. Upon her husband’s death the older woman’s son ‘bullied’ her into selling her house. He took the proceeds of the sale and told his mother he would ‘look after her’. Concerned relatives were told not to interfere. The older woman is very unhappy and does not want to stay living with her son’s family. She is embarrassed that her son is treating her in this way and does not want other people in the community to know.

Summary of findings

In our view, older people need much more information and advice about the pitfalls of entering into a granny flat arrangement (even a basic granny flat interest (GFI)) particularly where an older person is contemplating an arrangement that would fall within a FAA.

Related to this finding is the need to mandate as many of these arrangements as possible into formal family agreements. In our view this could be achieved in several ways:

- Promote public awareness of the importance of recording such agreement, as has been done in relation to wills and Enduring Powers of Attorney;
- Develop a standard form FAA and mandate its use for establishing a GFI;
- In cases where a GFI is not necessary, and a standard form FAA or equivalent written agreement is not entered into, there should be a presumption that the agreement resulted from the undue influence or unconscionable conduct of the beneficiaries.

In addition, the Transfer of Land Act 1893 (WA) (TLA) could be amended to permit the registration of such interests and provide an automatic right to lodge a caveat over the land.

Independent legal advice should be obtained when preparing the agreements. Related to this is, in our view, the need for a low cost and

“We didn’t really agree on anything, we just thought that if we helped them we could live with them.”

Interview FAA 2
accessible legal service for seniors, including the availability of mediation with a view to avoiding litigation.

Such arrangements involve some of the most problematic and complex issues arising in this report. Legislative intervention in the area is long overdue and should be a priority for government. While a national approach would be ideal, there is no reason why the state government could not take steps towards addressing the issue in Western Australia.

Financial abuse through family accommodation arrangements

In Western Australia, 1 in 20 older people experience some form of elder abuse with financial abuse being the most prevalent form of elder abuse. Financial abuse can be perpetrated in many forms however the risks for financial abuse of older people through “financial loss arising from the disposal of an older person’s assets in exchange for their future care and accommodation, often under pressure from another party” has increasingly become apparent. Indeed, since 2007 the majority of elder abuse cases dealt with by the Older Peoples Rights Service were financial and property related abuses. OPRS estimates 70% of these matters involve family agreements.

Before embarking on this discussion, it is important to state that many family accommodation arrangements are entered into and operate successfully. Families remain a primary source of support for older people and intergenerational living arrangements can and do provide financial and lifestyle benefits for families. Many such arrangements do not involve any financial motivation or expectation of “something in return” either on the part of the older person or the family member. Even where an older child may benefit from financial assistance, and parents may want to contribute, society should not be quick to judge. As Margaret Isobel Hall has noted:

It is important to avoid stereotyping intergenerational relationships; the adult child who needs help is not by definition weak and grasping, not is the older helper necessarily coerced, tricked or taken advantage of.

Unfortunately, whatever the intentions and motivations for entering into a family accommodation arrangement, many are unsuccessful.

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5 The Older People’s Rights Service (hereafter “OPRS”) in partnership with Advocare Inc (hereafter “Advocare”) has operated its specialist legal service as part of the services of our organisation, the Northern Suburbs Community Legal Centre Inc (hereafter “NSCLC”), and in many situations the OPRS has witnessed older people losing their family home and/or life savings.

6 National Seniors Australia Productive Ageing Centre, It’s not just about money: Intergenerational transfers of time and money to and from mature age Australians, October 2012, ii.

7 Margaret Isobel Hall, Equity theory: Responding to the material exploitation of the vulnerable but capable, 2009 Theories of Law and Ageing (I.Doran ed), 109,112.
Identifying the legal status of an occupant

Tenant or boarder?

An older person may simply pay rent to occupy a granny flat. Assuming the arrangement is at ‘arm’s length’ it is important to determine whether the arrangement is a tenancy or a boarding or lodging arrangement. The Residential Tenancies Act 1987 (WA) (‘RTA’) regulates the relationship between landlords and tenants.8 The definition of ‘residential tenancy agreement’ is wide and includes written and unwritten agreements for all or part of residential premises. Unlike the common law, exclusive possession of the premises is unnecessary. A critical exclusion from the RTA are boarders and lodgers, whose rights are covered by common law.9

Residence in a granny flat appears to fit within the definition of a residential tenancy agreement but may also be regarded as a boarding or lodging arrangement. This would be the case especially if the owner of the property had access to the granny flat and part of the consideration paid is, for example, for meals.10 The distinction is crucial as a tenant has the statutory protection of the RTA whereas a boarder has little.

Social Security and DVA Implications

The ‘granny flat provisions’ in the Social Security Act 1991 (Cth) permit property transferred or money paid to the older person’s child or children to be exempt from usual deeming legislation.11 It is necessary that there be an area in the home where the older person has exclusive occupancy. This extends beyond the traditional granny flat to an extension, alteration or a separate space in the house itself. The agreement must be approved by Centrelink. In exchange for a granny flat interest, an older person may transfer assets including ownership of the older persons home, proceeds of the sale of the home and/or other asset.

A person creates a GFI when they pay for the right to live in accommodation in a private residence for the duration of their life. This accommodation must be their principal home.12 The person may ‘pay’ for a GFI via money or assets. Centrelink and the DVA may accept that a senior has a GFI without a written agreement as proof.13 Instead, they may request a written statement advising that the GF arrangement has commenced.14

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8 Residential Tenancies Act 1987 (WA). The RTA has been in a state of flux for over a decade. A review of the Act was undertaken in 2001, which after years of consultations, policy papers and a change of government lead to several and significant changes. Several of these changes came into effect on 1 July 2013.

9 For further elaboration see Chapter 10 of the Study.


11 See generally Division 5 Provisions relating to special residences and special residents ss1145 – 1149.


Family accommodation arrangements

In most cases a GFI will overlap with a FAA. FAA involve transfers and gifts of property to secure care for life. The main difference is that GFIs are only relevant to people who are in receipt of social security. So, what are the problems arising under FAA and how do they impact on security of tenure?

- In most cases the ‘agreement’ is not in the form of a contract; nothing has been written down and, in many cases, family members have differing recollections as to what the ‘terms’ of the arrangement are. While families could seek legal advice and enter into a formal family agreement a prevailing attitude seems to be that solicitors are too expensive and that problems arise in other families.
- In circumstances involving families it can be difficult to establish the elements of a contract.\(^{15}\)
- There should be consideration of whether the older person entered into the agreement voluntarily, or as a result of some form of pressure. An older person, no matter how cognizant and capable of maintaining their own affairs, may be vulnerable to the persuasion of family or in the aftermath of a significant life event such as the loss of a spouse. If a property is transferred in such circumstances it is possible the agreement could be set aside by a court.
- If land has become registered in the name of the child, whether through a transfer of the family home by the older person; where the older person has sold his or her home and purchased outright or contributed to the purchase of land, the child is the registered proprietor and his or her interest is indefeasible unless one of the exceptions to indefeasibility applies.\(^{16}\)
- Assuming that there has not been undue pressure on the older person such that the transaction is set aside; a court may intervene to ensure an older person does not lose all their investment or contribution. Therefore, where property has been transferred to or purchased for a child in the child’s name or significant contributions have been made to the purchase price and/or contributions have been made to the joint household, complex questions will arise as to whether the transfer is a gift pursuant to a parent’s concern for their child or was part of a joint enterprise. Depending on the structure of the arrangements this can see the court consider a resulting trust (an implied trust in the amount of the gift or contribution), a constructive trust (arising through the common intention of the parties or because of the unconscionable nature of the arrangement) or an estoppel (where the older person has changed their position in reliance on the family members representations and it would be unconscionable to permit the family member to do so).
- Finally, a remedy may be problematic. The diversity of the arrangements make it hard to predict how the arrangement will be classified and what remedy is available.

\(^{15}\) Balfour v Balfour [1919] 2 KB 328; Jones v Padavatton (1969) 1 WLR 328 but compare Hardwick v Johnson (1978) 1 WLR 683.

\(^{16}\) Refer again to Chapter 3. The most likely exceptions in this case are the fraud and in personam exceptions although these can be very difficult to establish.
Considerations with regard to FAA

Capacity

Although a person is capable from a legal perspective, it does not mean that there may not be some vulnerability. An older person is free to make his or her own choices and decisions; even bad ones. On the other hand, almost everyone can be rendered vulnerable through situational factors such as the physical or financial wellbeing of the person or their family. Therefore, an appropriate legal response to the capable person who has entered into a FAA must balance the autonomy of the individual with the public interest in intervening to protect a vulnerable person from abuse.

Formalising family accommodation arrangements

Although the parties may have entered into an ‘agreement’, it may not be enforceable in contract. A contract requires several elements: offer, acceptance and consideration. The terms of the contract must be certain and the parties must evince intent to create legal relations. This is likely to be difficult in a FAA because the parties may not have agreed on terms and there is a rebuttable presumption that there is no intention to create legal relations between family members.

Many of the problems associated with family accommodation arrangements could be avoided if parties entered into a formal family agreement; a contract that sets out the contributions, rights and obligations of the parties including what will happen in the event that the agreements breaks down.

Unfortunately, such contracts are rarely considered by families, let alone actually entered into. Although agreements recording financial arrangements between spouses are now relatively commonplace this is not the case with FAAs. In our interviews most people simply did not consider recording the agreement, let alone doing so formally. The expense of drawing up a legal document was a concern to some but the overriding reason for not travelling a legal path was that people simply did not expect anything to ‘go wrong.’ Indeed, in some cases where the issue was raised it caused friction along the lines of “families don’t sign contracts” and “don’t you trust me?”

Ironically, in some cases legal advice was often obtained in order to transfer property or to review wills in the light of the family arrangement but the agreement itself was not formalised in writing.

Circumstances where there is no written FAA but the older person is noted on the title

If there is no written agreement then the structure of the arrangement must be ascertained. The first consideration is how the land is to be held, in particular if the older person has a registered interest in the land. This involves consideration of two scenarios where:
- the older person is the sole registered proprietor of the land; or
- the older person is a registered proprietor along with another person or persons, usually a family member.

“The security and well-being of older adults in the “grey zone” – not incapable but more vulnerable – is a key area of concern among practitioners and legislators. The diminished capability associated with disease may be gradual and spotty, a “grey zone” that can last for years. Other, non-medical factors are also significant: vulnerability arises by reason of an individuals total life situation, including relationships, education, experience, personality and connection to society.”

An older person who is the sole registered proprietor of the land is, on the face of it, in a very secure position.

Co ownership deals with the circumstances where people have a right to simultaneous enjoyment or possession of the land. Land may be held as joint tenants or tenants in common.

Joint tenancies are subject to the right of survivorship; tenants in common are not. Therefore, upon the death of a joint tenant the interest of that joint tenant in the land passes to the other joint tenant/s; it does not devolve according to the deceased joint tenant’s will.

Finally, if an older person transfers a property, and it is registered in the family member’s name, the family member will have indefeasible title. The transaction could only be set aside where an exception to indefeasibility is applicable, for example the fraud or in personam exceptions. However, if the FAA is not recorded or the terms not identifiable, an older person’s only option may be to navigate the court system. The difficulties associated with this course are demonstrated in this diagram.

### Family accommodation arrangements

**Possible causes of action and remedies where the older person does not have a registered interest in the land**

Depending on the circumstances of the case identify a cause, or causes, of action

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<th>Fraud</th>
<th>Undue influence</th>
<th>Unconscionable conduct</th>
<th>Failed joint venture</th>
<th>Estoppel</th>
<th>Common intention</th>
<th>Contribution to purchase price</th>
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Upon proof of fraud, undue influence or unconscionable conduct any transfer by the older person can be declared void ab initio.

Possibilities:
- equitable compensation
- equitable lien
- constructive trust

Constructive trust

Resulting trust
Fraudulent or unconscionable denial of benefit.

An agreement between parties that an older person will be able to reside in a property pursuant to a life interest in the property will not be recognised at common law unless the agreement is in writing. Although provision is made in the relevant legislation that a lack of writing may give rise to a tenancy at will, this will not be of benefit to the elder party as the tenancy can be revoked, and the elder party may be evicted. In these circumstances equity may prevent the defendant’s unconscionable reliance on the statutory requirement of writing and the denial of the tenancy. In Jones v Jones\(^{19}\), a 79 year old woman had sold her property and paid her son $100,000 on the understanding she was to live in a property owned by him for the remainder of her life, and look after her granddaughter. The money was not used to purchase the property, but was used by the son to pay outstanding debts. The arrangement continued for a number of years, until the granddaughter moved out. The son then issued his mother with a ‘Notice to Leave’, and subsequently sold the property. Although he undertook to pay her $20,000 to assist in relocation expenses and payment of $140 per week, neither of these undertakings was honoured. The court found that despite the absence of writing, the undertaking by the son that his mother would be entitled to a life tenancy or an interest in the property was sufficient to recognise a constructive trust over the property, to relieve against the equitable fraud in not honouring the obligation.

Unconscionable conduct

The doctrine of unconscionable conduct is another example of equity denying transactions on proof of specific fraudulent conduct\(^{20}\) of the defendant. An elder party relying on the doctrine of unconscionable conduct would be claiming relief where there has been an ‘abuse of power possessed by one party over the other by virtue of the other’s position of special disadvantage’,\(^{21}\) and where there has been ‘the unconscientious attempt to retain the benefit obtained from the person with the special disadvantage’.\(^{22}\) The crucial element to establishing this cause of action is the proof that the party relying on it is suffering a ‘special disability’. The doctrine is aimed at recognising the relative inequality of bargaining power between the parties, and prevents the stronger party knowingly taking unconscionable advantage of the disability. ‘Special disability’ may refer to the subjective characteristics of the weaker party, such as sickness, age, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.\(^{23}\)

The remedies available under this doctrine will depend on the nature of the transaction entered into, but generally the court will order the setting aside of any contract entered into, or the recession of a voluntary transaction. This

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18 s23(1) Conveyancing Act 1919 (NSW); s11(1) Property Law Act 1974 (Qld); s34 Property Law Act 1969 (WA); s53 Property Law Act 1958 (Vic); s29 Law of Property Act 1936 (SA); s60 Conveyancing and Law of Property Act 1884 (Tas)
19 [2014] QDC 150
20 ‘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.
23 Blomley v Ryan (1956) 99 CLR 362, 405 (Fullager J).
could take the form of an order to retransfer property from the weaker party to the stronger party or that the property should be held on trust.

For instance, in *Sleboda v Sleboda*[^24], the plaintiff bought a farming property with his son. Criminal charges were pending against the son, and the property was conveyed to the father. At a later date, the father signed documents understanding they were to transfer the property to himself and his son as tenants in common in equal shares, whereas in fact he had transferred the whole property back to his son. A dispute arose between the parties, and the son asserted his legal title over the whole property. Evidence suggested that the father had in fact contributed to more than half of the value of the property, which under resulting trust principles may have entitled him to an order that his son hold the property on trust in shares proportionate to the respective contributions. Rather, he sought orders declaring the property be held on constructive trust for the father and son in equal shares, as tenants in common on the basis that the transfer was a consequence of the son’s unconscionable conduct, and undue influence. Both causes of action were proven on the evidence. Josef Sleboda suffered a special disadvantage owing to his ill-health, partial deafness and poor English.

**Undue influence**

Undue influence is a similar, yet distinct doctrine from unconscionable conduct. Whilst unconscionable conduct looks at the conduct of the stronger party, undue influence looks at the quality of the assent of the weaker party, and a transaction or voluntary conveyance can be set aside if the consent giving by the weaker party was made pursuant to the relationship of influence.[^25] Elderly people may be placed in a vulnerable position when they become dependent on others, and that relationship of dependency has the potential to be misused. As such the doctrine of undue influence appears to be a powerful safeguard against such exploitation. However the onus placed on the elder party of proving the transaction was a result of undue influence is onerous,[^26] and there have been very few instances of success.[^27] If however the relationship is found to be one of influence, a transaction will be set aside unless it can be proven that the elder party was acting independently, and entered the transaction.

The recent case of *Janson v Janson*[^28] is an example of a successful claim of undue influence. In this case an elderly (92 year old) deaf, almost blind, childless bachelor gifted his interest in a house to his nephew. 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 whilst 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.

[^24]: [2007] NSWSC 361
[^26]: Certain relationships give rise to a presumption of undue influence: solicitor/client, doctor/patient, trustee/beneficiary and parent/child, although in the latter case the presumption is in favour of the child. There is no presumption of undue influence of a child over the parent. Therefore, the parent has the onus of proving as a matter of fact that the relationship was one where the child was in a position of influence over the parent.
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. The court found that the 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.

**Estoppel**

In the context of assets for care situations, estoppel may be argued where an owner of property encourages and elder party to alter their position, either by expending money on property, improving or building on property, in the expectation that the elder party will obtain a proprietary interest. To successfully make out an estoppel claim, the claimant must establish that there was a representation made by the defendant, which created an expectation in the claimant and as such relied on that representation to their detriment, and the defendant knew of this reliance. It has been suggested that there is less reliance on this doctrine than the ‘failed joint venture’ doctrine, owing to the difficulty in proving reliance by the claimant on an assumption created or encouraged by the defendant. 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 criteria regarding the scope of the arrangement is not explicitly expressed, or there is vastly conflicting evidence amongst family members as to expressions of intention and entitlement. One concern however expressed by the authors is the different criteria applied in relation to the remedy available. In estoppel cases, the possibility that the expectation of the claimant can be realised through the available remedies contrasts with the criteria for calculating the remedy in ‘joint venture’ cases. Therefore, in estoppel cases;

“There 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.”

In contrast, the ‘joint venture’ cases;

…one looks not to the detriment that might be suffered because the arrangement did not continue, but merely to the detriment of losing a fund to the other party to the arrangement through unexpected circumstances, where such a loss would result in the either having an unconscionable gain.

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31 Walsh v Walsh [2012] NSWCA 57 (Meagher JA).
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 loss that is experienced by the elder party in relation to their long term care and security.

**Failed joint venture:**

By and large assets for care situations are resolved relying on the concept of the ‘failed joint endeavour’ principle. As noted above, the courts approach to applying a remedy in the joint venture situations has commonly been to apply the ‘minimum equity’ approach to prevent the party holding the legal title from gaining a windfall, rather than to compensate the elder party for their loss of expectation. The outcome is often the property is held on constructive trust in proportion to the parties contributions. This outcome however potentially fails to recognise the foundations on which the arrangement was entered into, in that there is often an assurance of care and security provided for the elder party, although it does recognise that the elder party has a beneficial interest in the property through the imposition of a constructive trust. The advantages of an order of a constructive trust are explained below. The emphasis is thus the prevention of an unconscionable retention of property, rather than the loss or detriment suffered by the elder party. Hence, in *Bennett v Horgan* Bryson J said:

> “Prima facie the plaintiff’s entitlement is to a proportionate repayment of their capital contribution on the premature collapse of the venture, but the true remedy is such order as will prevent the defendants from retaining the benefit of the property to the extent that it would be unconscionable for them to retain it.”

A constructive trust based on respective contributions to a failed joint venture was applied in *Swettenham v Wild* and *McKay v McKay*. In the latter case, 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 the defendant’s daughter and her partner buy out the 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 care for the remainder of his life. The arrangement was recorded by deed. The arrangement continued for a time, whereby the 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 or 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 which 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.

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33 Unreported, NSWSC, 3 June 1994, BC 9402569
35 [2008] NSWSC 177.
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, that 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.

**Contributions to purchase price**

Unequal contributions to the purchase price that are not reflected in the legal title may lead the court to declare the property is held on resulting trust. 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. 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.

An older person who contributes money towards the purchase of a property (or payments towards a mortgage), and this is not reflected on the title, may claim that the property is held on resulting trust for them in proportion to their contributions. However there are a number of obstacles that may either prevent a resulting trust arising, or determine that the resulting trust is an inappropriate remedy.

First, the contribution must be towards the property itself. Payments made must be directly referable to the purchase price, and not towards any other purpose. Therefore money 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. The latter may only give rise to a trust if there is a common intention or agreement between the parties, or where the facts give rise to an estoppel.

Secondly, the court will look to the intention of the parties at the time of purchase. In many cases, the elder party intends that the property be held by the child, in exchange for accommodation and care. In circumstance the presumption of resulting trust will be rebutted by evidence of contrary intention.

Thirdly, the contribution may be determined to be a gift. 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. The underlying justification is that parents will strive to enable their children to become independent. As such, an elder

—I sold the house – it wasn’t hard as a lot of developers wanted the land for infill. Once the money was paid over she seemed happier but then she got a boyfriend and I didn’t think it was right that she was going out all the time. She didn’t like it and then she wanted him to move in. We had a row and I left.”

Interview FAA 5

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36 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.


38 *Hale v Perkins* [2010] NSWSC 1091, [78].

39 *Tabtil Pty Ltd v Creswick* [2011] QCA 381, [159].

40 See for example, *Anderson v McPherson* (No 2) [2012] WASC 19.
party 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.

Hence a resulting trust will only take into account very narrow criteria, and although may secure initial money contributions, will not take into account the wider circumstances and contributions made by a party.

Common intention to share property

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.\(^{41}\) There must be evidence of the actual intention of the parties, rather than inferring what fair and reasonable persons in the exposition of the parties would have intended.\(^{42}\) The common intention constructive trust is of limited value in assets for care situations. The onus is on the party alleging there was a common intention to adduce evidence that there was a mutual intuition to share the proprietary interest in the property. This may not always be the case as the elder party may not have envisaged or intended obtaining a proprietary interest. In many cases the intention is that the interest lie 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 elder party’s life. 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.

Remedies available on proof of the cause of action

Although appropriate remedies have been explored to some extend under the respective causes of action, the following is a summary of the purpose of the primary remedies that are available. It is to be noted that the remedies in equity are discretionary, and the courts will strive, within the confines of equitable doctrine, to determine the most appropriate remedy, whilst achieving a degree of practical justice. Therefore a combination of orders may be appropriate.

Setting aside transfer, order to reconvey property to claimant.

In circumstances where a transaction or transfer has been procured by undue influence or unconscionable conduct, the court may order the transaction is to be set aside and property transferred back to the claimant.

Equitable charge – over proceeds of sale:

In Terry v O’Connell\(^ {43}\) a mother spent $60,000 converting a garage on her daughters property into a granny flat in return for being able to stay in the property free of charge. In discussions with her daughter, she agreed that if the property was sold, she would accept $40,000. The relationship broke down and the property was eventually sold. Th plaintiff claimed an interest in the property in the nature of an equitable charge or equitable mortgage in the sum of $40,000. The court found that the plaintiff did not have a charge

\(^{41}\) Jin v Yang [2008] NSWSC 754.

\(^{42}\) Shephard v Doolan [2005] NSWSC 42, [34] (White J).

\(^{43}\) [2010] NSWSC 255.
over the property, but rather a charge over the proceeds of sale. An interest in the proceeds of sale is not an interest in the land, in that the chargee of the proceeds of sale does not have a right to have the land sold.

**Equitable lien**

An equitable lien and charge are similar concepts, although the charge is generally considered to arise through agreement between parties, and a lien is a remedy imposed by the court.

An equitable lien is thus a charge imposed by equity against property that renders the property security for an obligation owed to the plaintiff by the defendant. It is commonly called a secured equitable charge, and is enforceable against a third party who is not a bona fide purchaser with notice of the security.

The purpose of the equitable lien is to give to the claimant a security interest in the property that will obtain priority but does not entitle the claimant to possession, use or ownership of the property. As such the payment can be made to satisfy the lien without having to sell the property. In an assets for care situation this quality makes the lien a valuable remedy, as the defendant may able to satisfy the equity without selling the family home.

A lien may be a preferable remedy if the value of the property has depreciated. Unlike a constructive trust, the equitable lien does not give the licencsee a beneficial interest in the property. Conversely, if the property has appreciated, the beneficial proprietary right under the trust will include any increases in value.

In *Stoklasa v Stoklasa*, the defendant had a house transferred to him at an under-value on the basis that he would care for the plaintiff. The relationship subsequently broke down. Gzell J found:

> “It would be unconscionable and inequitable for [the defendant] to retain the benefit of the transfer of the house at an under-value freed from the obligation of providing care and accommodation”

In those circumstances it was considered appropriate to grant an equitable charge for the value of the obligation. There had been no expenditure by the plaintiff, but he had caused the defendant to have the house at an under-value. Although it was determined that it was not unconscionable for the defendant to retain the benefit of the transfer at an under-value, the appropriate remedy was to grant a charge for the value of the extra benefit that the defendant had gained.

**Constructive trust**

A constructive trust may be imposed, irrespective of the parties’ intentions, in cases where there is a dispute over the beneficial entitlement to property. It can be imposed by the courts in circumstances where it would be unconscionable for the legal title holder to assert or retain the benefit of property. Unlike express trusts, the constructive trust does not impose ongoing trustee duties on the trustee, rather the obligation is to disgorge

“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.”

*Anderson v Anderson* [2013] QSC 8 [61]
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The entrust property and deliver up the trust property to the beneficiaries. It is most commonly imposed in cases of estoppel or failed joint ventures, or where a common intention to share the property has been found.

The touchstone of the constructive trust is the prevention of unconscionable conduct. Deane J in \textit{Muschinski v Dodds} stated that:

\begin{quote}
Notions of what is fair and just are relevant but only in the confined context of determining whether conduct should, by reference to legitimate processes of legal reasoning, be characterised as unconscionable for the purposes of a specific principle of equity whose rationale and operation is to prevent wrongful and undue advantage being taken by one party of a benefit derived at the expense of the other party in the special circumstances of the unforeseen and premature collapse of a joint relationship or endeavour.\textsuperscript{45}
\end{quote}

The imposition of a constructive trust has certain advantages for the claimant. First, it gives the claimant an equitable proprietary right in the property, which is enforceable against all but the bona fide purchaser for value without notice. If the owners of the property were to be declared bankrupt, the beneficial title held by the beneficiary would be immune from being included in the assets for distribution. Secondly, the constructive trust allows for the beneficiary to take advantage of any increase in the value of the property. Thirdly, it may be easier to impose a constructive trust over specific property rather than calculate a specific monetary award.

In determining the scope of the constructive trust, the court may consider both direct and indirect contributions to the property, as well as contributions of labour and other non-financial contributions. The shortcomings of the approach in the assets for care situations is that the relief is centered around contributions that can be given a monetary value.\textsuperscript{46} This denies the context in which the arrangements are made, and the benefits that are no longer available to the elder party.

\begin{quote}
\textit{That the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements."
\end{quote}


\textsuperscript{45} (1985) 160 CLR 583 (Deane J).

\textsuperscript{46} See generally \textit{Swettenham v Wild} [2005] QCA 264.
Recommendations

To date, the response of the Australian legislatures has been disappointing. Such arrangements were considered in the Older People and the Law inquiry in 2008 resulting in a recommendation that the Standing Committee of Attorneys-General undertakes an investigation of legislation to regulate family agreements. Consideration was given to whether such a scheme should be implemented at the Commonwealth or at the State/Territory level, the formalities required and the desirability of registration. It was further recommended that guidelines, model provisions and educational material be developed. All recommendations were accepted in principle but have not progressed at either Commonwealth or State level. And, despite recurring calls from older peoples advocacy organisations and legal representatives that government act to introduce regulation of family accommodation arrangements little has been done to advance these recommendations.

Legislation regulating FAA

It is crucial that more people be encouraged to enter into formal agreements when entering into FAA. This measure has been recommended elsewhere but it is imperative that the legislature act promptly. The number of such arrangements will increase and a legal framework that provides some guidance and certainty to the parties involved is essential.

• The Western Australian parliament develop and implement legislation regulating formalities, content and use of FAA and provide for adequate remedies in the event of the agreement’s failure.

Such legislation should:
• Define a FAA. The definition should be broad to encompass informal arrangements.
• Provide a standard form FAA.
• State that the standard form FAA must be used. In the absence of a formal family agreement the legislation should include a presumption that the agreement was reached as a result of undue influence and, unless the beneficiary can discharge the onus, the transaction will be set aside.
• State that legal advice should be obtained prior to entering into a FAA. A certificate confirming the legal advice must be provided by the solicitor.
• Provide that the presumption of advancement in relation to gifts from parent to child is to be disregarded.

“I find that Mr Jozef Slezboda was in a special situation of disadvantage. He was partially deaf following his heart bypass operation to the knowledge of Mr John Slezboda and he had difficulty reading English, again to the knowledge of Mr John Slezboda. He placed his complete trust in his son.”

[2007] NSWSC 361

48 Recommendation 30.
49 Recommendations 32 and 33.
50 services and The Older Peoples Rights Service recommended in the strongest terms
51 Recommendation 31 proposes that existing Family Dispute Resolution Services be enacted to resolve disputes concerning Family Agreements. The Government’s Response for rejecting this recommendation is based on existing resolution services being defined solely within the domain of the Family Law Act 1975. Thus any reform accordingly would involve legislative changes to the Family Law Act 1975. We note however, that Recommendation 30 (which has been “accepted in principal” by the Government’s Response) includes investigation for establishing a provision, “of a mechanism to enable the courts to dissolve family agreements in cases of dispute and grant appropriate relief to the parties involved.”
52 The American state of Maine, for example, presumes undue influence where an older dependent person transfers real estate or has undertaken a major transfer of personal property or money for less than full consideration.
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It relates to the age old social duty of families caring for older or infirmed members within the family unit and... whether we, as members of a family and as a community, can afford to continue to assign this issue to the subterranean ethos of uncompensated love and duty and whether it deserves to be recognised in the form of a formalised agreement that both addresses the contingencies of such care and adequately compensates those who provide the care...


- Provide that an interest under a FAA is caveatable.
- Provide for suitable remedies.
- Provide for penalties in the event of financial abuse.

Amendment of the TLA

Legislation has been suggested before. If this step was not taken, we will consider other possibilities. At present an interest under an FAA cannot be noted on the title, except via caveat. An FAA is not a registrable interest or an exception to indefeasibility.

That the TLA be amended so as to:
- Provide that a FAA is a registrable interest;
- Provide for the amendment of 68 TLA so that an FAA is an exception to indefeasibility; and/or
- Provide that an FAA can be the subject of a non-lapsing caveat.

The rationale behind this recommendation is to ensure that the older person who has contributed to the FAA can be noted on the title. Although in most cases such arrangements will give rise to an equitable interest, equitable interests are only good against the original parties to the agreement. Therefore if the property was sold to a third party the purchaser would not be obliged to honour the FAA. This could be achieved in two ways:
- TLA should be amended to include an FAA as a registrable interest; or
- The reality is that few people would register their agreements so the better alternative is to amend s68 TLA so that an FAA is an exception to indefeasibility of title. This is not as controversial as it sounds. In the equivalent provision in the Victorian legislation the interest of a holder of a life estate is an exception to indefeasibility.53
- In relation to the third point, once lodged, a caveat should remain on the title until such time as the older person seeks its removal. Similar protocols should apply to those regulating the Improper Dealings caveat.

If the situation remains unchanged and the courts deal with FAA

If the situation remains unchanged it will still be up to the courts to consider FAA. The main issue in this regard is proof, presumptions and remedies.

- All GFI must be recorded in writing.

Where a GFI exists, the older person has to provide evidence of the arrangement. Although Centrelink recommend a written agreement the GFI is still recognised through indirect means such as an interview or through sighting of financial records. In our view, to obtain the GFI, Centrelink should insist that a written agreement is provided setting out the contribution of the older person and the rights and obligations of the parties associated with the GFI. This would be a method of ensuring a considerable number of FAA are recorded in writing and that the obligations of the parties are spelt out. The GFI could take the form of the standard form FAA.

- Courts should extend the presumption of undue influence to significant parent to child transfers.

53 Calderone v Perpetual Trustees Victoria Ltd [2008] VSC 373.
• Courts should avoid treating such transactions as joint ventures akin to a commercial transaction. Consideration needs to be given to the familial nature of the transaction, the expectations of the parties and the potentially serious consequences to the older person.

The remedies awarded to older people where FAA fail are often insufficient for them to start again and obtain new accommodation. Furthermore, the stress and expense of taking a matter to court would discourage most older people. In such cases the older person would leave with nothing.

• Legislation could state that a FAA arrangement is presumed to be held as tenants in common unless there is evidence to the contrary.

• In the absence of legislation the courts should take the FAA into consideration when assessing whether the property is held as joint tenants or tenants in common.

If the older person has a registered interest but is a co-owner with others it is important to consider how the property is held. If the parties are registered as joint tenants the right to survivorship applies to the property and the other joint tenant/s inherit no matter what is stipulated in a will. This can be problematic when families are involved and other members of the family do not receive anticipated inheritances.
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- **Provide for a comprehensive state wide information campaign on the nature and pitfalls of FAA.**

  In our view there needs to be educational initiatives encouraging and explaining the benefits of written family agreements and the pitfalls of these arrangements when something goes wrong. In Western Australia, the Department of Communities has published a brochure alerting older people to the pitfalls of family agreements and the benefits of entering into a written agreement. In addition, the Seniors Housing Centre and COTA provide information regarding FAA.

  While education cannot reach everyone – and many people will remain steadfast in their belief that his or her family is immune from resultant conflict – it is essential that older people become aware of the pitfalls of unwritten FAAs and that a straightforward, low cost mechanism is in place to ensure as many older people as possible enter into a written agreement.

- **Provide for mediation to play a role in FAA both prior to entering into the agreement and as a first step when the agreement falters.**

  Mediation prior to entering into an FAA could also compel parties to consider venturing into such an arrangement. For example, negotiation could take place during a mediation process rather than by a solicitor. When the terms are recorded by the mediator, a lawyer then could prepare the document and then discuss and explain the agreement with the client to ensure the client’s wishes are met and their interests protected. Also, where an FAA goes wrong, mediation should be the first step in determining the matter.

- **Provide more resources for low cost legal advice and representation for older people.**

  Lower cost alternatives may encourage more older people to seek legal advice. The Older People’s Rights Service (OPRS) at the Northern Suburbs Community Legal Centre provides advice and prepares such agreements for older people. The OPRS provides an excellent service but its capacity is limited. In the same way as low cost wills and powers of attorney can be entered into, perhaps a service for lower cost FAA could be offered by solicitors.

- **Extend the jurisdiction of SAT to consider FAA.**

  At present, the cost of going to court to establish an interest under a failed FAA is enormous. Most people simply could not bear the financial and emotional stress. The SAT would be well equipped to deal with such matters. The mediation services available through SAT would also pave the way for a lower-cost, quicker resolution for the parties.
Chapter 10
Seniors in boarding and lodging accommodation

For decades private boarding houses have been at the core of boarding and lodging accommodation in Australia, particularly in inner urban areas. Western Australia is no exception. From their origins as short to long term residences for working single men, the demographic has changed considerably over the years and they now provide refuge for many marginalised people on low incomes and other forms of disadvantage including mental illness and substance abuse.1

ShelterWA states that on Census night in 2011, there were 1,336 people living in boarding houses in WA. However, assessing accurate numbers of people living in boarding and lodging accommodation is fraught with complexity.2 In addition, statistics are somewhat unreliable in that there is an overlap between those who may reside in boarding or lodging accommodation but may slip in and out of homelessness.3

An increasing number of residents of boarding and lodging accommodation are over 55. The ageing population and the rising number of single person households is likely to result in many older people living in boarding and lodging accommodation. Also, the increasing number of older women experiencing precarious housing and, in some cases homelessness, is increasing. This is likely to see more women accessing boarding and lodging accommodation. This is of concern because many boarding and lodging houses do not cater for women and also raises concerns about safety and privacy.4

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3 As the ABS notes: Although the ABS makes a significant effort to identify boarding houses, both registered and unregistered, the ABS acknowledge that there will potentially be an underestimation of people living in boarding houses in estimates of homelessness, and an overestimation of those living in boarding houses who are likely to be homeless according to the ABS definition. Australian Bureau of Statistics 2049.0.55.001 – Information Paper – Methodology for Estimating Homelessness from the Census of Population and Housing, 2012 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/532D9A142E16CB7ECA257A6F0012ACF61?opendocument>.
4 See the reference to the services provided to older homeless women by St Batholomews House in Chapter 11 of this Study.
Categories of boarding or lodging accommodation

In Western Australia boarding and lodging establishments can be loosely divided into three categories. These are:

- Not for profit operators such as the Department of Housing (DOH) or community housing providers;
- Traditional ‘for profit’ operators;
- Non-traditional arrangements, such as suburban rooming houses operating from converted residential properties.

The Local Government Act 1995 and the Health Act 1911 give Local Governments legislative power to make local laws relating to the operation of lodging houses. Local Governments require lodging houses to obtain licenses. Registration can be revoked at any time if the lodging house is not kept to specific standards and has not complied with any aspects of the Lodging House Local Laws. However, in reality, the regulations are often not enforced and registration is rarely revoked because there is no alternative accommodation available for residents of non-compliant lodging houses.

The Building Act 2011 is applicable to design and construction of buildings and other structures, including boarding houses. This Act is supported by the Building Act Regulations 2012 (WA). Reference should also be made to the Building Code of Australia. This Act, Regulations and Code include requirements for fire protection, building structure, access and egress, services and equipment and certain aspects of health and amenity.

Lodging houses with six or less lodgers are not required to be registered and are outside the regulations. The regulations for each council are based on model laws and include building standards, fire prevention and control, room occupancy, cleaning and maintenance, health standards, register of lodgers and responsibilities of the owner.

The scope of the Residential Tenancies Act 1987 (WA) (RTA), discussed in Chapters 4 and 5 is very much limited to “mainstream tenancies”. As a result, coverage irregularities exist and there are many marginal renters with no enforceable statutory tenancy rights. This is especially the case for boarders and lodgers – a special group of ‘home-dwellers’, who pay for the right to occupy premises but who are not covered by the RTA. This is a controversial

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5 As discussed in Chapter 5 there has been a series of transfers of housing stock from the Department of Housing to community housing providers. Similar cooperation is evident in boarding and lodging accommodation.

6 This part of the industry has been in a state of flux for some time. The nature of boarding and lodging accommodation is such that rental yields are low. In addition, many such properties are in inner city areas where land prices have increased. As a result, a considerable amount of stock has been sold for redevelopment. Many such buildings are ageing and require repair and maintenance; work that may be expensive or have a variety of restrictions or limitations attached. At times the debate surrounding legislative reform of boarding and lodging arrangements has veered towards inaction because of a fear that regulatory changes may force these traditional providers out of the industry thus diluting the supply of such stock in an already depleted housing market.


8 Described as ‘small’ ‘suburban’ or mini rooming houses AHURI 2013 23, Rooming House Standards Taskforce (Vic) and Foley 2009 Rooming House Standards Taskforce (Vic.) and Foley, M. (2009) Rooming House Standards Taskforce: Chairperson’s Report. Melbourne: Victorian Government. These premises are problematic as such premises are not regulated and are unlikely to comply with health and safety standards.

9 Section 5(2)(d) expressly states that the Act does not apply to any residential tenancy agreement where the tenant is a boarder or lodger.
and troublesome exception. Boarders and lodgers are among the most vulnerable occupants yet in most cases are excluded from the operation of the RTA. To date, Western Australia does not have legislation providing protection for boarders and lodgers.

Importantly, although boarders and lodgers are specific exclusions from the operation of the RTA, they are not defined. This is important because of the changing nature of boarders and lodgers.

It is noted that a lodger has been described as “an inmate in another person’s house”\(^\text{10}\) The owner under lodging arrangements requires full access to the premises to provide “domestic” services to the lodger such as meals and housekeeping.\(^\text{11}\) In Commissioner for Fair Trading v Voulon\(^\text{12}\) the occupiers were held to be tenants, not lodgers because the owner’s right of access and entry was for the purposes of security, repair and dispute mediation – not for “domestic” purposes.\(^\text{13}\). This was the case even though the agreement under which they were occupying the premises was called a “lodging accommodation licence” and they shared toilet, bathroom, kitchen and laundry facilities.\(^\text{14}\)

There is a blurring between traditional boarding houses and those popping up in the suburbs. It is a contentious issue because, without the definition of boarders and lodgers it is uncertain as to who is, and is not, covered by the RTA.

For example, if a person takes a lockable room in a house and shares facilities (bathroom etc) it is likely to be a tenancy. A grey area though and will depend on the actual agreement and the nature of the arrangement. Therefore if the owner of a house organises cleaners, linen and other services for the residents this is likely to be a boarding or lodging arrangement. If occupants are effectively ‘left to their own devices’ they are likely to be tenants.\(^\text{15}\) Courts and tribunals have considered whether a landlord or caretaker lives on the premises, thus suggesting a lodging arrangement, whether a person can lock their door (a tenancy arrangement), is provided with house rules, cleaning services, linen, newspapers or milk (a lodging arrangement).\(^\text{16}\) The situation is very unclear and unsatisfactory.

**What the interviews revealed**

Unfortunately, the University of Western Australia Ethics Committee imposed difficult restrictions on the research team with respect to interviewing senior boarders and lodgers. The Ethics Committee was of the view that it may be exploitative to interview older boarders and lodgers and that, if we were to ask for agencies to assist us in finding candidates, they (the candidates) may

\(^{10}\) Commissioner for Fair Trading v Voulon and Ors [2005] WASC 229, per Hasluck J at [81].

\(^{11}\) Ibid at [81]-[82].

\(^{12}\) [2005] WASC 229.

\(^{13}\) Ibid at [82].


\(^{15}\) Greenhalgh et al, Boarding Houses and Government Supply Side Intervention, 2004 Australian Housing and Research Institute.

\(^{16}\) Tenants Rights Manual, above n 14, 148.

“For a long time marginal renters and their advocates… have called for basic legislated rights and remedies for renters who are not otherwise covered by residential tenancies legislation.”

feel they have no choice but to cooperate. While we disagree with this view, we were obliged to comply.

Therefore our interviews were limited to accommodation providers and representatives from the Department of Commerce and Department of Housing; ShelterWA and CHCWA.

Listed below are some of the issues that arose in our discussions. These instances affected older residents within boarding and lodging house accommodation due to the lack of legal protection of boarders and lodgers’ rights and the vulnerable profile of many of the residents:

- a boarding and lodging house owner/operator could impose unreasonable house rules and/or unfairly enforce such rules amongst residents;
- a resident may not have access to their room or facilities at certain times of the day;
- the terms of an agreement to reside in a boarding and lodging house may create uncertainty about the legal status of occupants;
- fire and safety regulations may be lacking;
- a boarding and lodging house may not be adequately maintained and repaired by an owner/operator, especially given the high wear and tear to which such accommodation is subject;
- a resident may not be given receipts for rent, security bond, utility and other payments and/or may be subject to unfair fees and charges;
- if an owner takes a security bond, the bond is not required to be lodged with the Bond Administrator and a resident could be vulnerable if there is a dispute about the condition of the room upon leaving;
- a resident may not be given a copy of an agreement to occupy premises and such agreements may not be in writing so that any terms of an agreement are difficult to prove and enforce.
- a boarding and lodging house owner/operator may unreasonably interfere with the reasonable peace and quiet enjoyment of the resident;
- a boarding and lodging house owner/operator may seek to terminate an agreement to occupy premises unreasonably and may fail to care for any items left on the premises by a resident;
- the personal safety and security of boarders and lodgers may be at risk due to close proximity of rooms and shared facilities as well as substance abuse issues or other abuse issues of the co-tenants and visitors.

The profile of residents reflected significant degrees of vulnerability and reliance on health, welfare and community services. There was virtually no other accommodation available to them so in the event of eviction the next step was homelessness. This dissuaded some residents from complaining - even where their personal safety was compromised - for fear of eviction.

One particular group that concerned us is long term older residents in hotel accommodation. In one example, older people were long term residents living above a hotel. Several had issues with alcohol and it was not a desirable living arrangement. Hotels are excluded from the RTA, as are boarders and lodgers.17 Our concern is that, even in jurisdictions that have introduced statutory regulation of boarding and lodging establishments, there remains an exception for hotel style accommodation. In our view, this is a significant loophole and prevents the extension of protection to long term tenants of such establishments.

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Finally, much of the discussion about boarders and lodgers is directed towards less reputable landlords. On the other hand, many of our discussions were encouraging. It was clear that many providers are mindful of residents’ interests. The community housing providers have a client focused system and work to not only maintain standards in boarding and lodging houses but also to assist homeless people make the transition into accommodation. There are many innovative projects underway in Western Australia that should be encouraged. In relation to private providers of traditional boarding accommodation our research did reveal significant shortcomings in some respects and such matters will be discussed in the course of this chapter. Having said this, we should note that several providers were genuinely concerned for their residents and encouraged the intervention and assistance of services to maintain the tenancy or to obtain more suitable accommodation. Similarly, although we were concerned about the conduct of some real estate agents, in other cases we were impressed by the concern, backed up with action, by some agents.

**Summary of findings**

**The legal right of boarders and lodgers to remain in their accommodation**

Under the common law tenants and lodgers are distinguished by the fact that tenants have exclusive possession of the premises while lodgers do not. Therefore an agreement to occupy premises will not be a tenancy just because the agreement does not confer rights to exclusive possession. Moreover, the court will look to substance not form\(^{18}\) and so descriptive terms referring to a boarding or lodging arrangement, for example, “lodging accommodation licence” will not be regarded as determinative of the relationship between the parties.\(^ {19}\) “Their relationship is determined by law and not by the label they choose to put upon it.”\(^ {20}\) The rights of boarders and lodgers are inadequate when compared with rights afforded to mainstream tenants. A person residing in a boarding or lodging arrangement is a licensee; the person occupies the premises under a contractual agreement with the owner of the premises. As such, boarders and lodgers can be evicted on little notice by the owner simply withdrawing permission for them to be on their property. As the arrangements are not regulated by statute, there can be considerable rent increases, fees charged and onerous conditions imposed. They must rely on the common law of contract for the terms of their rental agreements; and can only pursue dispute resolution in the Magistrates Court. The court process may be difficult to navigate without assistance for disadvantaged older people.

This lack of consistency is problematic, especially when considering that the most common occupants of boarding and lodging-type accommodation are vulnerable and disadvantaged due to socio-economic, psychological or other issues. Senior boarders and lodgers are amongst the most vulnerable.

However, the research team identified competing interests on the question of security of tenure for older people in boarding and lodging accommodation. It is clear that the lack of notice provisions and termination

\(^{18}\) Radaich v Smith (1959) 101 CLR 209.

\(^{19}\) Commissioner for Fair Trading v Voulon and Ors [2005] WASC 229 at [79].

\(^{20}\) Radaich v Smith (1959) 101 CLR 209.
procedures renders security of tenure precarious indeed. The lack of recourse to a Tribunal such as SAT, the necessity to go to the Magistrates court in the event of a dispute and no statutory protection paint a bleak legal picture. On the other hand, in cases involving Seniors this may be a good thing. First, an older person in boarding and lodging accommodation may be vulnerable to the vagaries of other lodgers. Often such people are affected by other issues such as drug and alcohol problems. It is in the interests of the lodge owners, and the older people within the lodge, that a difficult or threatening situation could be averted by the removal of the perpetrator. Second, in some cases it is the older person who is the problem. Indeed, several discussions revealed that older people with other health or addiction problems can be a danger to themselves and others. If there were notice periods, challenges to the occupation may prevent them getting the assistance they need. On balance, however, we are of the view that more regulation of boarding and lodging arrangements – and enhanced rights for boarders and lodgers in relation to their tenancies – are necessary.

The practical option of boarders and lodgers to remain in their accommodation

Most residents of boarding and lodging accommodation will be affected by some of the drawbacks of living in these facilities such as the amenity of older premises, the behavior of some residents and difficulties in relation to management. However, such issues may have a greater impact on some residents, including older occupants who also have considerable support needs. Many seniors who reside in boarding or lodging accommodation are vulnerable, whether in terms of their age, physical and mental health, abuse issues and/or financial position. Older boarders and lodgers comprise a broad church to include people who have experienced a lifetime of marginal housing to those newer to the sector, for example people who cannot afford to rent privately on a single aged pension following the death of a partner or have become disadvantaged because of illness or financial loss.

Such issues arise against a background of dwindling supply of traditional boarding houses in Western Australia. While not for profit operators are, to an extent, filling this void a matter of some concern is the rise of non-traditional establishments; suburban homes converted for the purpose of multiple occupation. In our view this development could adversely affect older boarders and lodgers. In order to stay in a familiar area at an affordable price, an older person may take such an option. Such accommodation, however, often operates ‘below the radar’ and is unlikely to comply with health and safety requirements.

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22 For example, an increasing number of older women are becoming homeless in later life due to, for example, a lack of superannuation, loss of employment, domestic violence or relationship breakdown.
In this chapter most of our recommendations are applicable to the sector generally. Only a few recommendations are specific to Seniors. If our general recommendations are implemented, however, this would also be to the advantage of older boarders and lodgers. We are of the view that legislative intervention in relation to boarders and lodgers is overdue in Western Australia and a legislative solution should be implemented promptly. The sector needs to be streamlined in terms of registration, government oversight and the licensing and conduct of management and staff.

• A national approach to boarders and lodgers (in conjunction with the wider issue of homelessness).

The legal framework relevant to boarders and lodgers is piecemeal and fragmented throughout Australia. Different states and territories provide very different levels of legislative protection for boarders and lodgers. Western Australia lags behind as the only state that does not provide some measure of legislative protection. Regulation of the industry also differs nationwide with the standards of oversight of boarding and lodging premises and staff spread between a variety of state government departments and local authorities. This is the case too in Western Australia where regulation of the sector straddles legislation contemplating health, building, local government and consumer protection.

In our view, a national approach adopting ‘best practice’ should be pursued. In particular, the various approaches adopted in Queensland, New South Wales and the ACT should form the foundation of the approach along with other enhancements such as a national training and licensing scheme. We believe this would be complimentary to any national homelessness strategy and contribute to raising standards for boarders and lodgers throughout Australia.

• If a national scheme is not forthcoming, the Western Australian government should develop an overarching strategy to provide for adequate regulation of boarding or lodging houses and legislative protection of residents.

Regulation of boarding and lodging accommodation in Western Australia is spread across several pieces of legislation. Furthermore, various local and state government departments have responsibility for discrete aspects of the sector. Although this is the case too in most other jurisdictions, in our view, such an approach is inefficient and leaves too many ‘cracks’ for issues to fall between. It also means there is not a consistent and concerted approach towards raising all standards in the sector.

In our view, there should be one piece of legislation that incorporates all aspects of the boarding and lodging sector and imposes appropriate standards. While some may argue this would cause duplication, it is our view that it is artificial for the consumer protection, health and building issues to be separated; each impact on other aspects of the boarding and lodging environment.

“A big worry if the ordinary houses in the suburbs that are just being divided up – three bedrooms become six or more – and there are two or more people to a room. It’s a big problem with international students but I can see it affecting other people as well if people can’t afford to rent. There are no safety features and they operate under the radar. Councils don’t know they are there most of the time.”

Interview B&L 3
In developing an overarching strategy to provide for adequate regulation of boarding or lodging houses and legislative protection of residents, it is necessary to establish an appropriate regulatory framework for the delivery of quality services to residents of and for the promotion and protection of the wellbeing of residents. Such strategy should include specific legislation addressing boarding houses including:

- Packaging government agencies to provide a one-stop service information point for boarding and lodging house operators and residents;
- Clear and consistent definitions of key terminology;
- The establishment of occupancy agreements and occupancy principles
- Registration of boarding houses;
- Inspection of boarding houses;
- Training, licensing and character checks of boarding houses and operators;
- Penalties for non-compliance.

**One lead agency**

In most Australian states and territories the administration of boarding houses straddles a variety of government departments and extends to different levels of government. In our view, the administration of the legislative framework should, as much as possible, be the responsibility of one lead agency. Although it may be necessary in some cases to outsource some functions, overall coordination for registration, training standards, health and safety and tenancy issues should reside in state government department. Again there is precedent for this.

In NSW, **NSW Fair Trading** is responsible for the Register of Boarding Houses, the mandatory registration of all “registrable boarding houses” under the BHA. Fair Trading is also responsible for the administration of occupancy rights for boarding house residents. An exception is management of ‘assisted boarding houses’. These are designated for boarders with special needs and are licensed by NSW Ageing, Disability and Home Care (ADHC), part of the Department of Family and Community Services (FACS).

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23 [Boarding Houses Act 2012 (NSW) pt 2.](#)
• Clear and consistent definitions of key terminology

Such legislation should contain clear and consistent definitions of key terminology. A crucial omission from the present legislative regime is the absence of a definition of both boarding house and boarder/lodger. This end could be achieved by a definitive definition of the premises and/or the residents,24 or by reference to a list of factors.25

If the legislation is to address both traditional and non-traditional arrangements it makes sense to focus on the premises rather than on individual characteristics of an arrangement. At present, the Health Act 1911 (WA) provides a definition of lodging house with reference to the number of lodgers or boarders dwelling in the premises.26 We believe a definition should be comprehensive such as that in the Boarding Houses Act 2012 (NSW) (BHA). This Act defines boarding premises as:

**premises (or a complex of premises) that:**

a. are wholly or partly a boarding house, rooming or common lodgings house, hostel or let in lodgings, and
b. provide boarders or lodgers with a principal place of residence, and
c. may have shared facilities (such as a communal living room, bathroom, kitchen or laundry) or services that are provided to boarders or lodgers by or on behalf of the proprietor, or both, and
d. have rooms (some or all of which may have private kitchen and bathroom facilities) that accommodate one or more boarders or lodgers.27

This is a useful model because, while it still provides undefined references to boarder and lodger, the focus is on a broad range of accommodation types and would include non-traditional arrangements. In several states, including NSW, a minimum number of residents is stipulated, the smallest number being five.28 There is a stipulation that there must be a minimum number of five occupants in a general boarding house and two in an assisted boarding house.29 Other jurisdictions utilise a similar approach but there is inconsistency between definitions and numbers of persons occupying premises.30

24 See for example Boarding Houses Act 2012 (NSW) s 4.
25 See for example Residential Tenancies and Rooming Accommodation Act 2008 (QLD) s 433.
26 Health Act 1911 (WA), Div 2.
27 Boarding Houses Act 2012 (NSW) s 4.
28 Except in the case of Assisted Boarding Houses in NSW where the minimum number is 2.
29 General boarding house if the premises provide beds, for a fee or reward, for use by 5 or more residents (not counting any residents who are proprietors or managers of the premises or relatives of the proprietors or managers); Boarding Houses Act 2012 (NSW) s 37.
30 In Victoria, section 3 of the Residential Tenancies Act 1997 (Vic) defines rooming house to mean a building in which there is one or more rooms available for occupancy, on payment of rent, in which the total number of occupants to occupy those rooms is not less than four. The owner of a building that satisfies these requirements may apply to the Minister for a declaration that the building is a rooming house for the purposes of the Act. A rooming house may also be referred as a boarding-house, a guest house, hostel, backpackers, share accommodation or hotel.
In South Australia, a rooming house is defined in section 3(1) of the Residential Tenancies (Rooming House) Regulations 1999 (SA), of the Act as residential premises in which rooms are available on a commercial basis for residential occupation by at least three persons.
In Tasmania, Part 4A of the Act applies specifically to boarding premises, which is defined in Section 3 as a room, and any other facilities provided with the room – such as kitchen and bathroom – where the room is occupied as the principle place of residence and other facilities are shared. It does not include premises occupied predominantly by tertiary students or students within the meaning of the TAFE Tasmania Act 1997. Section 48D

“He came home from the doctors and all his stuff was out in the street. They said they needed the room but he says it was because he complained about the manager. He wasn’t given notice or anything. There was really nothing he could do.”

Interview B&L 7
Another alternative is to take an approach similar to Queensland where the legislation contains a list of factors the court can consider when determining whether a person is a boarder or lodger. Section 433 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) lists several considerations such as whether the person has control over premises, whether another person that received money from the alleged boarder has control over the premises, any provision of services between the two and whether facilities are shared. Essentially, this requires an examination of the particular arrangement between the relevant parties to determine their legal status. The reality is most boarders and lodgers will not pursue the matter in a court.

Another term that should be defined is overcrowding. Research undertaken for this report has revealed that many establishments, especially suburban homes divided to accommodate several people may have as many as six or more people to a single small room.

- **The establishment of occupancy agreements and occupancy principles**

A perplexing issue involving the RTA is that, while the definition of *residential tenancy agreement* is broad enough to include boarding and lodging arrangements, such arrangements are expressly excluded from the RTA’s operation. In NSW and the ACT, *occupancy agreements* have been legislated:

- in NSW, proprietors are obliged to ensure occupancy agreements are in writing. However, the enforceability of an agreement is unaffected if an agreement is not written. There is also provision for a standard form for occupancy agreements to be approved.
- in the ACT, such legislation permits entry into occupancy agreements which confer the right to use part of the property, a room for instance, rather than conferring a right to use the whole property, as is typical in mainstream tenancies. Part 5A outlines the details of such an agreement, with Section 71C defining an occupancy agreement as one between a grantor and occupant when the premises are for the occupant to use as a home and the agreement is not a residential tenancy agreement. The right to occupy may or may not be exclusive. Moreover, the person given the right to occupy premises may include a boarder or lodger.

In our view, occupancy agreements should be introduced in Western Australia. Appropriate rights and obligations should be imposed on parties to the occupancy agreements. Such statutory protection will ensure appropriate standards of accommodation, facilities, safety and cleanliness.

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31 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 433.
32 Ibid.
34 *Boarding Houses Act 2012* (NSW) s 28(1).
36 Ibid s 29.
37 The ACT has passed laws in relation to ‘occupancy agreements’ in its *Residential Tenancies Act 1997* (ACT).
38 *Residential Tenancies Act 1997* (ACT) s 71C(3)(a).
39 Ibid s 71C(4)(a).
The main concern to us is the issue of notice. This has been a vexed issue, for example in Queensland, Carr notes that legislation did not address security of and retained summary eviction notices.40

An occupancy agreement should set out the amount of notice required to be given by the resident or the proprietor. A notice system could be implemented where a boarder receives warnings in the event of anti-social behaviour.

We are cognizant of the fact that sometimes the behaviour of residents may endanger themselves and other residents and a notice period will not always be appropriate. An exception could be introduced where the situation is described as an emergency. Emergency could be defined as conduct causing or at risk of causing danger to that person or to others.

In such a case the boarder or lodger could be evicted immediately. Again we are aware of the potential risk here to the resident. Therefore, legislation should contain an obligation on operators to ensure that, when overseeing an emergency eviction; appropriate steps are taken to ensure the movement of the former resident to an appropriate alternative facility.

• Occupancy principles

In the ACT Residential Tenancies Act, section 71E lays down the ‘occupancy principles’ to be considered in relation to an occupancy agreement. These principles stipulate that an occupant is entitled to:
• live in premises that are reasonably clean,41 in a reasonable state of repair,42 and reasonably secure;43
• know the rules of the premises before moving in;44
• have an occupancy agreement in writing if the occupancy is for more than 6 weeks;45
• quiet enjoyment of the premises;46
• 8 weeks' notice before the grantor increases the rent;47
• know why and how the occupancy may be terminated, including how much notice will be given before eviction;48 and
• not be evicted without reasonable notice49

According to the Tenants’ Union in the Australian Capital Territory, although effective in theory, the occupancy principles are very vague and are used as guidelines only. They stated that it would be more useful if the Act provided regulations so that all standard occupancy agreements can be regulated. Further to this, the aforementioned issues paper indicates that:

“\textit{What old person in this situation – any person really – is seriously going to take these people on? Are they going to get a case together, go to court? Few and far between I would say.}”

Interview B&L 12

41 Ibid s 71E(1)(a)(i).
42 Ibid s 71E(1)(a)(ii).
43 Ibid s 71E(1)(a)(iii).
44 \textit{Residential Tenancies Act 1997 (ACT)} s 71E(1)(b).
46 Ibid s 71E(d).
47 Ibid s 71E(f).
48 Ibid s 71E(g).
49 Ibid s 71E(h).
Current ACT legislation has minimal prescriptions for boarding style accommodation. For instance, it does not include a definition of overcrowding, and does not provide for minimum standards, minimum floor area per person or a maximum number of occupants per bedroom. The duties and obligations of the proprietor or lessor . . . are defined very broadly. Enforcement powers are dispersed over several pieces of legislation. Fines and penalties exist for those in the system but may be insufficient to act as an incentive to prevent unlawful operators.50

Similarly in NSW, residents are entitled to:
- be given a copy of the occupancy agreement;
- know the rules of the boarding house before moving in;
- not be required to pay a penalty for breaking either the rules of the boarding house or the agreement;
- live in premises that are reasonably clean;
- live in premises that are in a reasonable state of repair;
- live in premises that are reasonably secure;
- know why and how your agreement may be ended;
- know how much notice will be given if your agreement is ended;
- not be evicted without reasonable written notice;
- have quiet enjoyment of the premises;
- be given the opportunity to resolve disputes using reasonable dispute resolution processes;
- not be charged more than 2 weeks occupancy fee as a security deposit;
- receive your security deposit back within 14 days of the end of the agreement except for specific costs;
- be given 4 weeks notice of an increase to the occupancy fee;
- be given receipts for any money you pay to the proprietor.51

Legislation in Victoria provides similar protection, including the Health (Prescribed Accommodation) Regulations 2001 (Vic) and the Building Regulations 2006 (Vic).52 Smaller rooming houses with four or less people fall under the protection of the former. This outlines standards relating to ‘prescribed accommodation’ (which includes rooming houses), and provides that owners of prescribed accommodation must maintain premises in a good working order, a clean and sanitary condition and a good state of repair.53 It also makes provisions to prevent overcrowding.54 At present, the Victorian rooming house legislation is said to be the most prescriptive and comprehensive in Australia.

In Queensland, the Residential Tenancies and Rooming Accommodation Act requires premises to be clean and habitable, and links the standard of rental premises to health and safety legislation by stating that the lessor must not be in breach of a law dealing with issues about the health or safety of persons using or entering the premises.55

In South Australia, the Residential Tenancies (Rooming House) Regulations 1999 (SA) requires that there be a written rooming house agreement between tenants and landlord. The regulations also provide for a Code of Conduct

50 Chief Minister’s Department, Issues and options for regulating boarding style accommodation in the Australian Capital Territory (2010) 14.
51 Boarding Houses Act 2012 (NSW) sch 1.
52 Health (Prescribed Accommodation) Regulations 2001 (Vic); Regulations 2006 (Vic).
54 Health (Prescribed Accommodation) Regulations 2001 (Vic) Pt 3, Div 1.
55 Residential Tenancies and Rooming Accommodation Act 2008 (QLD) s 185(2)(d).
for proprietors and their general obligations. Broadly, the obligations are to ensure the tenant has reasonable access to all facilities and that the room and facilities are maintained in a reasonable state of repair.

In the NT, the Accommodation Providers Act 1981 (NT) – ‘an act to regulate the liabilities and rights of accommodation providers’ – gives protection to persons in shared accommodation. Section 3(1)(b) defines ‘accommodation establishment’ as (among other things) ‘any premises used for the purposes of providing board and lodgings for members of the public as a commercial enterprise and includes boarding-house, guest-house and lodging-house’. Section 5 extends liability to the accommodation provider for loss, theft or damage to property brought to the establishment by a guest. This is subject to Section 8, which provides that the accommodation provider is not liable if he can establish misconduct or negligence on the part of the guest, or if the guest has assumed exclusive charge of the room at the time of loss or damage. Furthermore, the Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations require:

- certain constructional standards including weatherproof and watertight walls and roof, sufficient artificial light, approved ablutionary conveniences, ventilation etc;
- sleeping apartments must be numbered; and
- the rooms must not be overcrowded or situated in the kitchen or basement areas, and must be generally maintained.\(^56\)

**Registration of boarding houses**

Since August 2002, operators of residential services in Queensland have had to lodge an application to register with the Residential Services Accreditation Branch in the office of Fair Trading. This encourages continuous improvement and fair trading in the sector. To attain registration, their premises must comply with the prescribed building and fire and safety requirements under the Accreditation Act and Accreditation Regulation.

**NSW Fair Trading** is responsible for the Register of Boarding Houses in NSW the mandatory registration of all “registrable boarding houses” under the BHA.\(^57\)

In the NT, Part IV of the Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations applies to boarding-houses but not to otherwise private arrangements for boarding and lodging. One requirement is that proprietors of boarding-houses must register by making an application to the Chief Health Officer.\(^58\)

In our view a central register should be required in Western Australia. Although local councils keep records of registered boarding houses, in our view there needs to be a central register that contains relevant details such as the number of occupants permitted, the names and contact details of the owner and, if applicable, the managements of the premises, any complaints or offences pursuant to the proposed legislation and inspection dates.

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\(^56\) Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations (NT) pt IV.
\(^57\) Boarding Houses Act 2012 (NSW) pt 2.
\(^58\) Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations (NT) regs 35-36.

“We are seeing more people coming in that are not from the ‘usual’ circumstances. People who never thought they would be looking for somewhere to live. It is particularly hard on women because many of the boarding houses are not suitable or not equipped for women. It can be a matter of personal safety in some cases.”

Interview B&L 2
Chapter 10 – Seniors in boarding and lodging accommodation

• **Training, licencing and character checks of boarding houses and operators**

This requirement was considered in relation to Queensland and the UK. In our view, it should be introduced in any Western Australian legislation. As we have argued in previous chapters, it is imperative that persons in positions of power and influence over vulnerable people be fit and proper persons who are trained appropriately. Operators must be licenced and, as a condition of these licences, should be required to meet a “fit and proper person” test. Managers or any person in a position of authority should be licensed and receive training in order to raise standards and address poor management practices.

• **Penalties for non-compliance**

Legislation in the ACT states that disputes should be resolved using practicable dispute resolution processes. The Act does not provide penalties for lessors who fail to act in accordance with the occupancy principles. However, dissatisfied tenants may apply to the ACT Civil & Administrative Tribunal (ACAT) if they encounter problems with recovering their bond or residual rent. In order to safeguard bond payments, Section 71GA(1) states that the occupant may deposit the bond with the Territory. This must be accompanied by a written notice that states the names and addresses of the occupant and grantor, and the amount being deposited. Under this Section, a receipt must be given to the occupant.

In NSW, if a proprietor breaches a term of their occupancy agreement, or breaches an occupancy principle, the resident can apply to the Civil and Administrative Tribunal to resolve the dispute. Various orders can be made including an order for the proprietor to stop breaching the agreement, to address a breach, or to pay compensation for loss caused by any breach. Similar recourse is available to VCAT in Victoria.

In our view, the penalties are insufficient for significant breaches of this legislation. For example, in the case Mr Towler received only $1230 in compensation for a litany of breaches. Western Australia can learn from this experience by imposing, and actively enforcing, breaches. Penalties should be significant.

• **Access to the State Administrative Tribunal**

We are also of the view that contested issues should proceed through the SAT rather than the Magistrates Court. Aggrieved residents should have access to the State Administrative Tribunal as is the case in most other jurisdictions.

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“While some people may choose to live in such accommodation, boarding houses can often be the housing of last resort for individuals on the verge of homelessness.”

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59 *Residential Tenancies Act 1997 (ACT) s 71E(i).*
60 Ibid s 71GA(2)(a).
61 Ibid s 71GA(2)(b).
62 Ibid s 71GA(3)(a).
63 *Boarding Houses Act 2012 (NSW) s 32.*
64 Ibid s 32(4.
65 Towler v Centred Housing Group Pty Ltd[2014] VCAT 139.
• Representation should be available for residents

It is a daunting prospect for residents to make a complaint about their boarding house accommodation. To assist in this process, residents could be represented by a tenancy organisation, for example Tenancy WA or by case workers who are familiar with the matter so as to demonstrate standing. For example, in the Towler v Central Housing Groups case a representative from the Tenants Union in Victoria was permitted to represent Mr Towler, despite the objections of the boarding house operator, because of her involvement with and familiarity with the case.

• Promoting the sustainability of, and continuous improvements in, the provision of services of boarding houses, for example the proactive role taken by the Ombudsman in NSW

In the paper ‘Issues and options for regulating boarding style accommodation in the Australian Capital Territory’, a case study of the reform in Victoria is presented. It describes ‘Rooming House Taskforce’, which was established in September 2009 by the Victorian Government as part of a strategy to take action against sub-standard operators in the boarding-house sector. According to the case study, the terms of reference for the Taskforce included standards, compliance and enforcement, registration and the impact of any changes on the supply of affordable rooming house accommodation. The Taskforce is also said to have made a number of recommendations which have all been accepted by the government and have resulted in legislative change.

In NSW, the Ombudsman has a role in investigating, reporting and making recommendations pertaining to boarders and lodgers. This can be seen in a 2011 report which preceded the introduction of the Boarding Houses Act.

Chapter 11

Seniors experiencing homelessness

Access to safe and secure housing is one of the most basic human rights. However, homelessness is not just about housing. Fundamentally, homelessness is about lack of connectedness with family, friends and the community and lack of control over one's environment.

Although this chapter focusses on seniors experiencing homelessness, its content should be considered alongside the previous chapter: Seniors in Boarding and Lodging Accommodation. Many people, including seniors, reside in marginal forms of accommodation and, while many are primarily homeless, or have been homeless for a lengthy period, others may move in and out of homelessness. As discussed in the previous chapter, residents in boarding and lodging accommodation can be rendered homeless where, for whatever reason, the boarding or lodging arrangement is terminated.

According to the Australian Bureau of Statistics a person is homeless if they do not have suitable accommodation alternatives and their current living arrangement:

- is in a dwelling that is inadequate; or
- has no tenure, or if their initial tenure is short and not extendable; or
- does not allow them to have control of, and access to space for social relations.

On any given night in Australia, 105 000 people, or 1 in 200, are homeless. This number has risen markedly since 2006, when there were 89 728 people recorded as homeless.

In Western Australia, on census night in 2011, there were 9 595 people experiencing homelessness. This equals 42.8 people per 10 000. The number of homeless in WA has increased from 8 277. The rise in people living in severely overcrowded dwellings (from 2 983 to 4 154) was the primary reason for the increase in the number of homeless.

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3 Ibid.
5 Ibid.
6 Ibid. pp. 11–12. People are assessed as living in severely crowded dwellings where the dwellings require four or more extra rooms to accommodate them.
Although there is no uniform definition of ‘homeless’, it is generally broadly defined. ‘Homeless’ includes not only those that are sleeping rough outdoors, but also people staying in:
- Improvised dwellings, tents or sleeping out;
- Supported accommodation for the homeless;
- Temporary arrangements with other households;
- Substandard boarding houses;
- Other temporary lodgings; and
- “Severely” overcrowded dwellings.7

These differing types of ‘homelessness’ are often divided into gradients:
- Primary; for example sleeping rough;
- Secondary; staying with friends/relatives and with no fixed address, or people residing in specialist homelessness services; and
- Tertiary; including those living in boarding houses or caravan parks with no secure lease and no private facilities, both short and long-term.8
- It is important to recognise that homelessness is a state with connotations beyond simply ‘being without shelter’. It impacts upon all areas of a person’s life; from employment, security and health to family and social engagement.9

Rates of homelessness

Homelessness amongst older Australians, both nationally and in WA, has been increasing.10

**Number of homeless older Australians, 2006-2011.**

<table>
<thead>
<tr>
<th>Age group</th>
<th>2006</th>
<th>2011</th>
<th>% change</th>
</tr>
</thead>
<tbody>
<tr>
<td>45-54 years</td>
<td>10,581</td>
<td>12,507</td>
<td>15%</td>
</tr>
<tr>
<td>55–64 years</td>
<td>6,950</td>
<td>8,649</td>
<td>20%</td>
</tr>
<tr>
<td>65 or older</td>
<td>5,511</td>
<td>6,202</td>
<td>11%</td>
</tr>
</tbody>
</table>

**Number of homeless older Western Australians, 2006-2011.**11

<table>
<thead>
<tr>
<th>Age group</th>
<th>2006</th>
<th>2011</th>
<th>% change</th>
<th>As a % of WA homeless population</th>
</tr>
</thead>
<tbody>
<tr>
<td>45-54</td>
<td>962</td>
<td>1115</td>
<td>14%</td>
<td>11%</td>
</tr>
<tr>
<td>55-64</td>
<td>651</td>
<td>870</td>
<td>25%</td>
<td>9%</td>
</tr>
<tr>
<td>65-74</td>
<td>337</td>
<td>431</td>
<td>22%</td>
<td>4.5%</td>
</tr>
<tr>
<td>75+</td>
<td>158</td>
<td>196</td>
<td>19%</td>
<td>2.1%</td>
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The AIHW’s annual report entitled ‘Specialist Homelessness Services 2012-13’ provides further evidence that homelessness is a growing problem amongst

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11 Ibid.
older Australians.\textsuperscript{12} The report details a 14% increase in the number of
Australians aged over 55 who sought assistance from specialist homelessness
agencies in the previous year.\textsuperscript{13}

It is evident from numerous studies and reports that there are myriad
factors that underpin the problem of homelessness, including for older
Australians. It may be a cataclysmic economic or health tragedy or a life
filled with upheaval which triggers the experience of homelessness. Yet the
greater number of older Australians and Western Australians experiencing
homelessness is perhaps a result of a lack of affordable housing and
related financial difficulties. Older women are particularly at risk due to
their comparative disadvantage in assets and the additional threat of
domestic violence.

Following recommendations in the Commonwealth’s White Paper on
Homelessness released in 2008 (\textit{The Road Home: A National Approach to
Reducing Homelessness}),\textsuperscript{14} there have been legislative changes as well as
funding of specialised aged care facilities to specifically address the needs of
older people experiencing chronic homelessness. Homelessness has been
acknowledged in the aged care reform package, \textit{Living longer. Living better}.\textsuperscript{15}
(Australian Government 2012). There has also been a number of important
research projects undertaken all seeking to examine older Australian’s
homelessness. The increased recognition in Australia is not seen in other
countries: there is a pervasive lack of attention internationally to older
people’s, especially older women’s homelessness.\textsuperscript{16}

As with older people in general, older people experiencing homelessness
are more likely to require care, assistance or medical attention. However,
unlike older Australians in a stable housing environment, the ability of those
experiencing homelessness to acquire the care they need is fraught.

The health, both mental and physical, of older people experiencing homeless
may also be particularly vulnerable:

\textit{In addition to higher rates of mental illness, people who are
homeless experience poor dental health, eye problems, podiatry
issues, infectious diseases, sexually transmitted disease, pneumonia,
lack of preventive and routine health care and inappropriate use
of medication.}\textsuperscript{17}

\textsuperscript{12} Australian Institute of Health and Welfare (AIHW) 2013. Specialist homelessness services:
2012–2013. Cat. no. HOU 27. Canberra: AIHW.
\textsuperscript{13} Ibid, 6.
\textsuperscript{14} Department of Social Services \textit{The road home: A national approach to reducing homelessness},
support/programs-services/homelessness/the-road-home-the-australian-government-
white-paper-on-homelessness-0>.
\textsuperscript{15} Department of Health, \textit{Living longer. Living better}. 2012 Australian Government <http://
reform-measures-toc>.
\textsuperscript{16} M. Peterson Older Women’s \textit{Pathways out of Homelessness in Australia} 2014 Mercy
Foundation Australia.
\textsuperscript{17} FaHCSIA, \textit{The Road Home}, 10.
Chapter 11 – Seniors experiencing homelessness

Older people may also find it more difficult to ask for assistance when faced with the prospect of homelessness or not know where to turn to for help. Older people also report barriers to receiving access to services.

Finally, family relationships and a sense of community, two pillars of support for older people, may be disrupted by homelessness. Older people who move from their traditional home may be forced to leave these support bases behind.

What the interviews revealed

Unfortunately, the restriction imposed by the Ethics Committee meant that we were unable to speak with older homeless people for the purposes of research. We were also unable to consider directly the plight of older Indigenous people experiencing homelessness. We did, however, receive considerable assistance from homelessness services and advocates throughout Western Australia with 18 interviews undertaken.

In summary, more older people are becoming homeless. Perhaps the most surprising point is that many older people, particularly women, are becoming homeless for the first time in their lives in older age.

This is occurring in a period where funding is precarious and services, of necessity, are being reduced. Discussions with advocates consistently mentioned a lack of funding and cohesiveness in the sector. Indeed as ShelterWA notes:

Inadequate funding and resources have resulted in reduced capacity to resolve homelessness issues which results in services being reviewed and assessed as ineffective. But this is actually due to inadequate funding, not because of poor delivery models.

Apart from the concerns regarding funding, we were gratified by the commitment and hard work within the sector and the awareness of, and action regarding, emerging homelessness issues, for example the focus by St Bartholomew’s House with regard to older homeless women. Our concern is, however, that the good will of such organisations can only go so far, real and sustained funding is required to address the issue of homelessness generally and the growing concern regarding homeless seniors.

Summary of findings

In summary we believe that the situation is dire and will become progressively more so. The population is ageing and although numbers of older people recorded as homeless are below the rest with the rising number of older people this will increase. Also, the method of gathering statistics on homelessness makes it unlikely that accurate levels are recorded. It has been established, for example, that older women are less likely to access homelessness services and are more likely to ‘couch surf’ or stay with friends.

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19 Ibid.
21 Interview H 9.
22 Interview H 2.
Initiatives such as Registry week are useful but overall an accurate picture is wanting.

In our view a national strategy is ideal but the terrain is uncertain due to the concerns regarding the attitude of the present Commonwealth government with regard to homelessness issues generally, in particular the future of proposed legislation considering homelessness and the future of the NPAH. Unfortunately, the priorities of the former government with regard to homelessness are, it seems, not shared by the present government. It may be that the Western Australian government may have to take the lead although will, of course, be likely to be constrained by reduced funding, again leaving services wanting.

The Homelessness Bill

The Homelessness Bill 2013 was aimed at increasing ‘recognition and awareness of persons who are, or are at risk of, experiencing homelessness’. The Bill followed the early commitment of the first Rudd Government to addressing homelessness and the release of the subsequent White Paper in 2008. As the explanatory memorandum sets out, the Bill is part of broader reform process to reduce homelessness. The aims of the reform process include halving the homeless rate by 2020 and providing accommodation for all ‘rough sleepers’.

The Bill states that homeless people should have the same ability to exercise their rights, that they contribute to family, social and community life and that they should be supported.

The Bill also states that it is the ‘aspiration’ of the Commonwealth that all Australians should have access to housing. The Bill also provides very general information on strategies to reduce homelessness such as increasing the supply of affordable housing.

The Homelessness Bill is effectively a general overview of what constitutes homelessness in Australia, the causes and possible policies aimed at amending the situation. There seems to be little substance in the Bill other than some vague affirmations of Australia’s commitments to addressing the problem. Section 14 seems to encapsulate the lack of effect in the Bill by stating that the ‘Act does not create or give rise to rights or obligations’. Furthermore, as the explanatory memorandum states, the Bill does not include a legislative right to housing.

Yet, despite these obvious (and very significant limitations) the Bill does provide a framework for future reforms. As Toby Hall, chief executive of Mission Australia argues “If we’re going to halve homelessness, it helps to be clear about what success looks like.”

“The Homelessness Bill 2013 promises to increase “recognition and awareness of people who are homeless or at risk of homelessness”…It has been alternately called vital and a mere flight of vanity – so it’s worth looking at what the Bill actually means.”

Stephanie Murphy Real Change for Australia’s homeless requires more than good intentions 9 August 2013 Right Now- Human Rights in Australia <http://rightnow.org.au/writing-cat/article/real-change-for-australias-homeless-requires-more-than-good-intentions/>
There are also worrying trends towards punitive treatment of homeless in Europe and the USA. In Europe, there has been a move towards characterising people as homeless by ‘choice’, or ‘deserving’ of homelessness (especially aimed at Roma people). In the US, the development of anti-panhandling and anti-sleeping laws has essentially led to the criminalisation of homelessness.

Consequently, although the Homelessness Bill may not drive necessary reforms, it provides a starting point far removed from less savoury developments elsewhere.

The NPAH

The National Partnership Agreement on Homelessness (NPAH) commenced in January 2009. It is a component of the National Affordable Housing Agreement to assist:

“people who are homeless or at risk of homelessness achieve sustainable housing and social inclusion.”

The NPAH is based on three key strategies aimed at reducing homelessness being the prevention and early intervention to stop people becoming homeless; breaking the cycle of homelessness and improving and expanding the service response to homelessness. The agreement funds 180 homelessness services around Australia.

After some doubts, social services minister Kevin Andrews recently announced an extension of funding for the NPAH until June 30, 2015. The government will provide A$115 million – $44 million less than its predecessor – to extend the Commonwealth-state arrangement. The government says it is not cutting funding to frontline services, only capital works. It is unfortunate that capital works are to be curbed at a time when more facilities are required to accommodate growing numbers of homeless.

“We are seeing more homeless people. Many are people you would not expect to be homeless and they never expected anything like this to happen to them either.”

Interview H 14
In our view it is essential that the NPAH is maintained and expanded. In Western Australia the NPAH saw the funding of over 80 new services and NPAH initiatives in Western Australia have been found to have made a “positive difference” for those experiencing homelessness.

Causes of homelessness and older people

A single event or long-term instability

As with the general homeless population, homelessness amongst older Australians cannot be singularly explained. It can be triggered by a single, traumatic event or a lifetime of personal disadvantage and misfortune. The AIHW’s report found that for the older people who sought specialist services, the cause of their homelessness could be either a relatively recent experience or as a result of long-term disadvantage or tenuous housing.

The Commonwealth’s White Paper on Homelessness released in 2008 (The Road Home: A National Approach to Reducing Homelessness) provides a summary of the main causes of homelessness in Australia. The report touches upon the vulnerability of certain groups, including older Australians, to experiencing homelessness:

People without support networks, skills or personal resilience, or who have limited capacity due to their age or disability, can quickly become homeless. Those with the least resources are likely to remain homeless longer.

MacKenzie and Chamberlain also provide a snapshot of the causes of homelessness, including:

- Housing stress, often driven by poverty and accumulating debt
- Family breakdown, particularly driven by domestic violence
- Untreated mental health and substance use disorders that lead to the loss of housing, education, employment, family and other relationships.

Housing affordability and financial difficulties

Of particular pertinence to older Australians, and a common thread throughout this Study, is the issue of housing affordability and housing stress. As elicited in other areas of this research, the housing market in Western Australia (in particular the private rental market) is an extremely challenging proposition for lower to middle income older people. In the

“There was a couple who were living in their car. They had been in a business all their life but things had fallen apart due to illness and financial issues. They were so embarrassed they did not seek help straight away.”

Interview H 5

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37 Ibid.


39 FaHCSIA, The Road Home, 6.

40 AIHW, Specialist homelessness services, 74.

41 FaHCSIA, The Road Home, 7-9.

years 2006-11 the median rental prices in WA increased by 76%.

The lack of housing affordability coupled with the high cost of living has made WA the most expensive state to live in the country. Additionally, high rents in the private market have pushed many onto the social housing waitlist, where the average wait time is 2.5 years.

The AIHW’s report into specialist homelessness services seems to further articulate this point. It found an increase in the proportion of clients who sought assistance due to housing affordability, from 33% to 36%. This includes problems relating to financial difficulties, rents being too high and the ‘housing crisis’. Older clients proffered financial difficulties as the main reason for seeking assistance.

Older women and homelessness

Domestic violence

Women accounted for 52% of older clients of specialist homelessness services in 2012-13. This figure was proportionally lower than the overall figure (women constituted 58% of all clients). Although women are equally as affected by housing stress and financial difficulties they also face the additional problem of domestic and family violence, another key issue related to homelessness. Homelessness driven by domestic violence is often different in that the victim continually cycles in and out of homelessness. Research suggests that this may be because the woman lacks financial independence or family support or that they accept the repentance of an abusive partner.

According to the AIHW’s report, 24% of older women cited ‘domestic and family violence’ as the main reason they were seeking assistance. This compares to only 2% of older men. Empirical evidence suggests that there are an even greater number of women who stay with family or friends rather than seeking the assistance of specialist homelessness services.

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Eileen Webb, Building funds cut even as older women swell ranks of homeless 1 May 2014 The Conversation <https://theconversation.com/building-funds-cut-even-asOLDER-WOMEN-SWELL-RANKS-OF-HOMELESS-25545>
Housing and financial vulnerability

Beyond the very prescient issue of domestic violence, there have also been several recent reports into the emerging problem of older women and homelessness. These reports examine the societal trends exposing greater numbers of women to housing insecurity and potentially homelessness.

Ludo McFerran’s *It Could be You* is one such report.\(^{56}\) McFerran argues that changes in the life expectancy of women, the lack of affordable housing, the rate of divorce and separation (and the subsequent number of women living alone) has created a potential wave of homeless, older working women.\(^{57}\) One particular driver is the fact that women tend to move in and out of the workforce, whilst earning less than men.\(^{58}\) One study found that divorced women have the lowest levels of household income, superannuation and assets.\(^{59}\) Another propounded that even if a woman received two thirds of a marriage’s assets at divorce, this still fails to provide housing security due to their inability to meet future housing costs.\(^{60}\)

McFerran found that the most vulnerable women are those who are older and living alone.\(^{61}\) They will be poorer than men and consequently less equipped to compete in the private rental market.\(^{62}\) McFerran argues that the entrenched social and economic disparity faced by women places them at risk of homelessness.\(^{63}\)

Another study by Dr Andrea Sharam seems to echo McFerran’s findings.\(^{64}\) Sharam similarly notes the intermittent working lives of many women (as a result of childcare responsibility) and persistent wage inequality as factors exposing women to an uncertain housing environment in retirement.\(^{65}\)

A further study which focuses on older Victorians points to the growing gap between pension incomes and rents as a primary reason behind the increasing number of aged people (in particular women) seeking assistance from homelessness services.\(^{66}\) In 2014 the Mercy Foundation released an excellent report titled: Older Womens Pathways out of Homelessness in Australia that examined service provision.\(^{67}\) The report drew on new empirical material gathered within Australia and internationally from

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63 *Ibid*.
64 Andrea Sharam, *No Home at the End of the Road? A survey of single women over 40 years of age who do not believe they will own their housing outright at retirement* (Swinburne Institute and The Salvation Army Australia Southern Territory, 2011).

"Statistics show that more and more single women over the age of 55 are finding themselves on the streets…We want to prevent that from happening by providing temporary accommodation in our new shelter to give these women time to get back on their feet. It’s often things like illness or loss of a job which trigger a chain of events that make older women homeless. We want to create a buffer between them and the streets."

The Perth Voice Interactive Shelter for Older Women 25 September 2014 citing St Bart’s CEO Mr John Berger http://perthvoiceinteractive.com/2014/09/25/shelter-for-older-women/
The plight of older homeless women is another troubling by-product of Australia’s housing affordability problems coupled with an ageing population. Lifetimes of wage inequality and a continuing lack of housing affordability and availability make it a near-certainty that numbers of homeless older women will increase. Innovative, cost-effective housing options that cater for emerging groups of homeless must be developed.

**Recommendations**

There is no silver bullet to addressing the problem of homelessness, either for homelessness in general or for older Australians.

Yet, the issue of affordable housing is a constant and very contemporary issue driving homelessness amongst older Australians. Various solutions have been proffered by different governments, agencies and interest groups. The need for pension and other social security payments that actually meet housing and living costs, greater investment in low-cost housing and more flexible approaches to small secondary dwellings are all common suggestions.

McFerran especially focuses on the need to lift restrictions on secondary dwellings and the need to prioritise older women and affordable single person housing in the National Rental Affordability Scheme (NRAS).\(^{68}\) Given the precarious state of the NRAS amendments of the scheme should be reconsidered.

Overseas, the UK is the only European state with a statutory responsibility towards the homeless and the only state to set up a task-force for the homeless.\(^{69}\) The Housing (Homeless Persons) Act, 1977, placed specific responsibilities on local authorities to rehouse families and other defined groups of people.\(^{70}\)

The problem of older people and homelessness will never disappear. But there must be a more concerted approach by all levels of government to institute procedures and programs that specifically meet challenges facing older Australians.

- **Assess the true scale of the problem through further statistical research.**

While we understand the difficulties in accurately recording the number of homeless people, good statistical information is vital in order to appreciate the true scale of the problem and devise appropriate responses.

A widely recognised definition of homelessness would be a good start and consideration needs to be given to more accurate means of assessing ‘real’ numbers. In our view the present statistical assessment is wanting

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and, although initiatives such as Registry Week are useful, a more complete picture is necessary.

- Incorporate targets to reduce the numbers of older people becoming and remaining homeless.

Although targets are common with regard to other demographics, this has not been the case with older people.71

- Take a ‘hard’ look at issues of housing affordability and the supply of public housing.

While this is a common call throughout this Study we can only reiterate the importance of highlighting housing affordability on the national agenda and emphasise the need for an increase in age appropriate public housing stock. At this point too we wish to emphasise again our recommendations in relation to enhancements to the private rental and social housing environment outlined in previous chapters, including considerations of public/private collaboration.

- That the Commonwealth take the lead and build on the national strategy, but recognise that the ‘coalface’ is state and local government and agencies providing homelessness services.

In our view, the recommendations in The Road Home should continue to be implemented and that the Commonwealth take the lead in a national approach to combat homelessness. The NRAS should continue and, indeed, be strengthened.

Regarding state based activities, at times during our research we were left wondering why a more coordinated approach could not be taken. In some, but certainly not all respects, we found that there was some reluctance to cooperate between agencies and that unnecessary duplication could arise because different entities were not aware about what others were doing.

We do not wish to be harsh in relation to these comments and we are sure that much of this can be explained away by the workload experienced by the departments and organisations. Having said this, in a time of budgetary constraint any duplication is of concern and cooperation to maximise services is imperative.

- Reinvigorate the efforts to date to introduce meaningful Commonwealth Homelessness legislation.

To some, this legislation was dismissed as window dressing and unnecessary. There was also considerable, and in our view justifiable, criticism that the legislation was weak and would require significant amendment to enhance its provisions to ensure meaningful operation.72

The legislation may not have been perfect but it was a start. It would result in homelessness being a consideration within the legislative framework and echo Australia’s international commitment to human rights. Over time, with sufficient lobbying and governmental will the legislation could be

“Another study points to the growing gap between pension incomes and rents as a primary reason for the increasing number of aged people...seeking help from homelessness services. The release of Anglicare's confronting assessment of rental affordability for low-income Australians underscores this trend.”

Eileen Webb Building funds cut even as older women swell ranks of homeless 1 May 2014 The Conversation <https://theconversation.com/building-funds-cut-even-as-older-women-swell-ranks-of-homeless-25545>
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strengthened. Articulating concerns regarding homelessness in legislation ensures such matters are considered by governments.

• With regard to homeless older women, adopt the recommendations of the Mercy Foundation Report (2014). Such strategies could also be employed elsewhere.

The recommendations, of course, called for the provision of affordable housing with a range of housing models including transitional, staircase and permanent housing, all social housing.73 Much can be learned too regarding the special needs of older homeless women from facilities and programs interstate.74 Of course, much good work is being done in and around Perth, especially the new facility being constructed by St Bartholomew’s House to assist older homeless women transition back into mainstream housing. The concern is, of course, whether supply can keep up with demand.

• Provide further funding to services that engage with older people in housing crisis.

This is an obvious, but nevertheless essential, recommendation. Older homeless people are a vulnerable group with diverse needs. As noted, our research demonstrates that many older homeless people have a combination of vulnerabilities including physical and mental health issues. They may have been homeless for a long time or it can be a relatively new, unanticipated occurrence. The rising number of older homeless women, and the general unsuitability of existing accommodation for women, requires investigation and prompt intervention. Funding to services that can focus on the special needs of older people in housing crisis to intercept potential homelessness or rehouse older people promptly is essential.

Also, funding should be increased in relation to ‘early intervention’ homelessness programs and homelessness services.

• Expand HACC and ACHA in relation to older homeless people.

Leading on from the last recommendation, services such as those offered by the Home and Community Care (HACC) or the Assistance with Care and Housing for the Aged (ACHA) programs should be available to more older homeless people. At present there is some availability but the logistics are, of course, difficult to navigate. Having said this, in our view it is essential that the reach of these services be expanded to older homeless people.

• Take measures to increase affordability and reduce discrimination in the private rental market.

Assistance needs to be provided to enable older people in the private rental market to:
  • Obtain a tenancy in the first place; and
  • Maintain that tenancy through affordability and age appropriate design.

74 For example the work undertaken by Withrinham: <http://www.wintringham.org.au/>
Our research revealed some discrimination in the private rental market against older people with perceptions that they could be demanding, needed additional facilities or that they simply didn’t have the income to pay the rent.75

• Priority be given to access to the aged care system for older people without property assets.

Such models can be built on the example of organisations elsewhere, particularly Wintringham.76 Wintringham is a not-for-profit welfare organisation working with older men and women who are homeless. The organisation provides residents with long-term supported housing, with particular emphasis on the rights and dignity of residents.

“…that priority needs to be directed towards funding models of aged care specifically for older people with histories of housing insecurity and homelessness. Often these models will look and operate very differently from mainstream aged care facilities, especially when seeking to accommodate older people with lengthy histories of homelessness.”

Homelessness Australia

75 Refer again to discussions in Chapter 3.
Chapter 12

LGBTI seniors

In The Coming of Age, Simone de Beauvoir reminds us how society tends to attribute non-subject status to older people, among other things, because of their exclusion from erotic possibilities. There is a lesson here for housing. The sector needs to recognise that sexual orientation and gender identity do not disappear on retirement. Increasingly, a generation of older LGBTI people who have lived their lives as out and proud citizens, will demand that their wants and needs are seen and provided for by their service providers – and that will be the beginning of a new journey of liberation for us all.¹

Chapter 12 considers housing and accommodation issues for senior gay, lesbian, bisexual, transgender and intersex individuals. LGBTI is used throughout this chapter as a general term to include people who are not exclusively heterosexual in identity, attraction and/or behaviour.² Like elsewhere, the Western Australian LGBTI community is heterogeneous and: "made up of individuals who might share a common sexual identity, but differ in their race, class, religious, or ethnic identity."³ Clearly, such diversity is also reflected in relation to accommodation choices and experiences.

Depending on the nature and circumstances of the particular accommodation choice, the housing laws discussed in the previous chapters will be pertinent to LGBTI seniors. Nevertheless, these laws may impact on LGBTI seniors in ways that do not affect the wider senior population. For example, we are concerned inter alia about the rules of succession in the case of same sex homeowners; how the relevant laws – and internal protocols – affect LGBTI seniors in retirement villages and aged care

1 John Thornhill and Tina Wathern, Inside and out: the housing experiences of older LGBT people is the housing sector prepared to meet the needs of lesbian, gay, bisexual and transgender people as they get older? theguardian.com, Thursday 3 May 2012 <http://www.theguardian.com/housing-network/2012/may/03/housing-experience-older-lgbt-people?INTCMP=SRCH&gunj=Article:in%body%20link>.
2 In this respect this Study is adopting the definition utilised in Curtin Health Innovation Research Institute and GRAI (GLBTI Retirement Association Inc), "We don't have any of those people here": Retirement Accommodation and Aged Care Issues for Non-Heterosexual Populations (May 2010) <http://grai.org.au/wordpress/wp-content/uploads/2010/07/We-dont-have-any-of-those-people-here.pdf> It is important to note too that: "The LGBTI population is not a homogenous group, although there may be similarities between groups in relation to sexual orientation, sex or gender identity. Nor are these groups mutually exclusive; for example, someone may be transgender and a lesbian. Groups within LGBTI communities have specific social, cultural, psychological, medical and care needs. For example, transgender people have different needs than gay men. However, they share the experience of being part of a minority population likely to have been subjected to exclusion, discrimination and stigma throughout most of their lives." Department of Health and Ageing (Cth) National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy, 2012 at 4 <http://www.health.gov.au/internet/main/publishing.nsf/Content/79F04CF7F62716C9ACA257BF0001ACC2/$File/lgbti-strategy.pdf>.
facilities and discrimination in the private rental market. Indeed, potential or actual discrimination may affect LGBTI seniors’ opportunities to access or remain in accommodation.

In an ontological sense, housing takes on particular significance. As discussed in Chapter 1 of this Study, ontological security is of particular importance to older people and is undermined by factors influencing security of tenure including housing availability and affordability. In the case of LGBTI people there is the added concern about societal attitudes. Lack of acceptance may encroach on the home environment thus seeing a place of ‘liberation’ become one of dejection. Negative attitudes can take on a troubling dimension when held by persons in care or control over the older LGBTI person such as aged care workers and carers. Furthermore, many LGBTI people have suffered stigma and inequitable treatment throughout their lives and may be less likely to have family members engaged in their lives to provide support as they age. This compounds vulnerability and contributes to social isolation.

Comprehensive statistics in relation to the size and composition of the LGBTI population are difficult to come by. It seems that due to concerns about discrimination and societal attitudes, many LGBTI people are reluctant to be open about their sexual identity. This is particularly the case with LGBTI seniors who grew up during a period where they are likely to have experienced considerable prejudice. What is generally agreed upon is that LGBTI people constitute a significant minority group in Australia comprising up to 11% of the population.

Despite efforts by some organisations to improve census information on the LGBTI community, information about sexual orientation, gender identity


5 Beyond Four Walls” – The Psycho-Social Benefits of Home: Evidence from West Central Scotland, ibid.


8 Indeed Horner et al note: “In addition to other risks which older adults can face, such as loneliness, isolation, loss of autonomy and increasing dependence, older LGBTI individuals may experience further psychosocial stressors.” These are usually associated with sexual orientation, disclosure, discrimination, lack of legal recognition, little if any protection of lifetime partnerships and limited opportunities to meet older LGBTI people: B. Horner, A. McManus J Comfort; R Freijah; G Lovelock; M Hunter; M Tavener, How prepared is the retirement and residential aged care sector in Western Australia for older non-heterosexual people? (2012) 20 Quality in Primary Care 263, 264.


10 National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy, above n 2, 4.

and intersex status is not sought by the Australian Bureau of Statistics. Statistics have been gathered regarding same-sex couples since 1996 with the 2011 census refining the question the inquire whether the relationship is described by the couple as husband/wife or de facto partner. In Western Australia 2576 same sex couples were recorded in the Census with a total of 33714 nationally.\textsuperscript{12}

This leaves a significant gap in statistical information with single LGBTI people and those who do not live with a partner being excluded from national statistics. Without comprehensive data on the number and geographical distribution of LGBTI people in Australia it is difficult to plan and implement programs and services for this significant portion of the population.

There are moves to address this shortcoming in the future. ACON\textsuperscript{13} has recommended that the 2016 \textit{Census of Population and Housing} collect data on sexual orientation, gender identity and intersex status.\textsuperscript{14} The substantial benefit of collecting such information is described thus:

\begin{quote}
Access to comprehensive and accurate information is particularly important for the development and delivery of policies and programs that aim to improve health and wellbeing. From the research that is currently available, there is growing recognition that LGBTI people have particular health needs that are not being addressed... Other services which could be better targeted include education, employment, housing, social services, and homophobic crime reduction. A question addressing sexual identity would also assist in the identification of future areas of policy development to address discrimination and disadvantage. Collection of information on sexual identity will allow the government to develop and monitor policies that tackle the social exclusion of LGBTI people.\textsuperscript{15}
\end{quote}

This Study can only endorse these propositions. It is concerning that comprehensive demographic information about a sizable minority group is generally unavailable.\textsuperscript{16} The development of appropriate policies for health and wellbeing – including the availability of housing and associated services – must be based on sound statistical data.

The potential shortcomings of the lack of demographic information in relation to LGBTI seniors are obvious. First, in planning for the ageing population, it is essential that policy makers be aware of the composition

\textsuperscript{12} Ibid.
\textsuperscript{13} In its submission to the Australian Bureau of Statistics \textit{Census of Population and Housing: Consultation on Content and Procedures}, 2016 in May 2013 ACON described its role thus: \textit{“ACON (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia’s largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs”:\textit{<http://www.acon.org.au/sites/default/files/14515105_Censussubmission.pdf>.}}
\textsuperscript{14} Further, there have been calls for the creation of a Sexual Orientation, Gender Identity, and Intersex Status Enumeration Strategy, akin to the \textit{Culturally and Linguistically Diverse (CALD) Enumeration Strategy}. The Sex Standard utilised by ABS has been the subject of review: ABS, \textit{Review of the Sex Standard – Potential new gender standard 2012}\textit{<http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Review+of+the+Sex+Standard>.}}
\textsuperscript{15} Ibid.
\textsuperscript{16} We acknowledge that some statistical studies have been undertaken but the size of the sample and/or the geographic areas are limited.
and geographical distribution of the cohort. Second, such information could assist in better targeted implementation of services. To use an example relevant to the housing theme of this Study, accurate demographic information about LGBTI seniors in rural areas would ensure that sufficient numbers of aged care workers in that area receive appropriate awareness training. Third, planning for new housing developments could be informed by this demographic information; for example, social housing providers could consider the needs of LGBTI clients in placement and services. Developers may be persuaded to construct more LGBTI friendly retirement villages if accurate statistical information identified a body of potential residents.17

Vulnerabilities affecting LGBTI Seniors with respect to housing

Vulnerabilities affecting LGBTI seniors in relation to housing are diverse and include the generic impact of the housing laws already discussed in previous chapters, particular legal issues that may impact adversely on LGBTI people and ontological issues arising due to discrimination and harassment.

Again, vulnerabilities will arise depending on accommodation choice. For example, home owners should be mindful of succession laws, including the consequences of holding property as joint tenants or tenants in common. This is especially the case where one or both partners have a former spouse and/or children who may be vying for a property inheritance. LGBTI renters may face discrimination in the private rental market or harassment in some public housing and park home environments. While there have been significant amendments to the anti-discrimination legislation LGBTI people in aged care facilities, the legal position of LGBTI seniors in aged care and retirement village facilities remains potentially problematic.

In an ontological sense, it is instructive to discuss the findings of various studies about LGBTI seniors’ experiences in relation to housing and neighbourhood. In our view, such considerations inform the dialogue about ontological security for LGBTI seniors. To date, with some notable exceptions,18 there has not been a significant amount of Australian research in this area. It is to be hoped that more Australian specific research is undertaken; as the LGBTI population ages, such studies will be invaluable in guiding planning and policy directions to ensure appropriate housing supply and assistance is available.

A UK study by Keogh et al. found that LGBTI seniors are two and a half times more likely to live alone, twice as likely to be single and four times as likely to not have children, than those in the broader community.19 A US study found similar results, with around 75% of LGBTI living alone,20 whilst also being less likely to have children.21

17 Obviously more market research would follow but such information informed the development of such villages in the United States and Canada.
18 For example the scholarship of Dr Andrew Gorman -Murray and Dr Jo Hamilton.
21 Brian de Vries, Aspects of life and death, grief and loss in lesbian, gay, bisexual, and transgender communities. In K. Doka & A. S. Tucci (Eds), Living with grief: Diversity and end-

“In fact these figures are misleading as estimates are that the figure could be up to 17% of the population. The bottom line is we are the largest minority group.”

Interview LGBTI 2
This often leads to greater loneliness and fewer familial support structures.\(^{22}\)

Yet, once more, it is pivotal to recognise that these are generalisations and not applicable to all members of the LGBTI community.\(^{23}\)

As a report by GRAI and Curtin University argues, LGBTI elders may have a greater reliance on formal and informal care providers due to the comparative lack of familial support.\(^{24}\) This also connotes an increased reliance on friends.\(^{25}\) The report also notes that demand for support will grow as a greater number of LGBTI live independently in the community.\(^{26}\)

LGBTI seniors may also experience additional ‘stressors’ to those felt by other elders.\(^{27}\) These mainly stem from discrimination, fear of disclosure of sexuality to health care providers, lack of recognition of partnerships and isolation from other older LGBTI people.\(^{28}\)

Such factors indicate the importance of a safe and stable home environment for ageing LGBTI people. While many concerns are shared with all seniors, the combination of prejudice rendering many reluctant to engage, fewer familial support structures and a heightened risk of harassment underscores the need to ensure appropriate accommodation and support structures.

The chapter commences with a summary of our findings to highlight issues of further discussion within the chapter. This is followed by an overview of responses from our interviewees. The chapter continues with a brief description of, where relevant, legal frameworks affecting housing and accommodation choices for LGBTI seniors and then a discussion of the main issues affecting legal and ontological security of tenure.

**Summary of findings**

While the generic property laws discussed throughout this Study are, of course, pertinent to them, the law and practice often impacts upon LGBTI people in a particular way. In our view, it is essential that these issues are addressed through identification of problem areas through further research, a heightened awareness within the LGBTI community regarding property ownership and succession.

**What the interviews revealed**

Initially we were concerned about the dearth of respondents from the LGBTI community. Through contact with representatives from GRAI we were enlightened as to some of the realities of life for LGBTI seniors including an unwillingness to speak out due to a lifetime of discrimination. This is particularly the case in relation to older lesbians. We are grateful to GRAI and to the contacts provided to us. Unfortunately the numbers of respondents were lower than was the case for other chapters so much of our research was

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22 Ibid.
23 Curtin study n. 2, 17.
24 Ibid.
26 Ibid.
28 Ibid.

“Some reports have found enhanced anxiety amongst LGBTI people, fearful about how they will be treated as they age. This anxiety may result in an unwillingness to receive medical care. Such reluctance could mean later diagnosis of routine conditions and increase the difficulty in receiving treatment.”

supplemented via desktop. The research team hope we have done justice to the issues arising for older LGBTI seniors in relation to housing and can only recommend that more research be undertaken in this area.

**Home ownership within the LGBTI community**

Unfortunately, statistics on home ownership by LGBTI people are difficult to obtain and centred on narrow geographic areas with limited responses. *Private Lives: A report on the health and wellbeing of GLBTI Australians* states that just over 50% of the respondents rented the property in which they lived and around 25% were purchasing a home. Seventeen percent owned the property in which they lived. The report’s authors noted, however, that this is a much lower rate of home ownership than in the community generally.

Legal security of tenure is a source of solace and ontological security can be enhanced by a stable and constant domestic environment. Gorman-Murray notes that:

> Domestic materiality thus (re)unites various dimensions of fractured selves, reconciling sexual identities with familial, ethnic and spiritual identities, inter alia. This reconciliatory function of material homemaking is a key way in which sexual identities are affirmed in the everyday lives of the gay/lesbian Australians.

Unfortunately, the amenity of the domestic environment is impacted upon by surrounding circumstances and some LGBTI seniors are reluctant to engage within the local community because of concerns they may not be accepted.

> In some ways it’s a two way street. When we came here we didn’t know anyone so and we didn’t know how people would react so we just didn’t engage. Most people kept to themselves anyway so we would just wave as we were coming and going and everyone minded their own business. As we got to know people it was good, no worries at all. We are just the blokes at (street number). We have lived happily here for 12 years now.

On the other hand, concerns were justified; it may be hard for LGBTI people to get to know other people in the neighbourhood and/or people may be judgemental about lifestyles. In *Housing insecurity and precarious living: an Australian exploration* AHURI researchers recounted the experiences of a 54 year old woman who lived in a same-sex relationship in inner Melbourne:

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30 Ibid.

31 These comments are also applicable to rentals so long as there is a requisite security of tenure.


33 Interview LGBTI 5.
We are kind of socially cut off from our neighbours on a more interactive level. We are friendly. I know if I was in trouble I could go to my Italian neighbours, they would always be helpful, but we keep a social distance. They keep a social distance from us, and the Muslim families that all live up and down the rest of the street, they, well, they just openly express that sort of removal … You have got to be very careful. The children ask a lot of very nosey questions, which are kind of embarrassing … So it’s actually, in terms of being part of your neighbourhood, not very good, and I would never not want to have a kind of multicultural kind of idea about where you live and I would like to be socially connected, but I think the same-sex thing really gets in the way.34

Such apprehensions can impact on even the domestic living environment with concern about “heteronormative surveillance and harassment” from the surrounding community.35 In some cases this may extend to LGBTI people feeling the need to conceal their sexual identity within the domestic environment when receiving visitors or tradespeople.36

Other studies have indicated that the privacy and autonomy of the home is of added importance to LGBTI people as, because societal prejudices often deter public displays of affection such as holding hands, the home environment permits people to ‘be themselves’.37

The legal framework impacting upon home ownership

Obviously the generic laws relevant to all home owners discussed in Chapter 2 and Chapter 3 (where the property is strata title) are pertinent to LGBTI homeowners. There are, however, several issues that impact upon LGBTI seniors in a different way. This is particularly the case where partners purchase property together or where one partner is not noted on the title either through choice or because the couple are living in a property owned by the other partner. The matter may become particularly complicated if there is a present or former spouse and/or children. In the event of the death of a partner, the surviving partner’s security of tenure could be undermined. This section of the chapter will discuss:

• The legal position of LGBTI partners in Western Australia;
• How jointly owned property is to be held and how it is to be devolved upon the death of one of the owners;
• How property is bequeathed pursuant to a will;


35 Smailes, J. The struggle has never been simply about bricks and mortar”: Lesbians’ experience of housing in ibid.


• How superannuation law impacts upon the rights of LGBTI couples;
• How other social security law may impact on the financial benefits payable to an LGBTI partner.

The legal position of LGBTI partners in Western Australia

Unlike other Australian states, Western Australia retained its own Family Court thus enabling issues involving children and/or property and assets, including superannuation to be addressed in the same court.38 Same sex couples are recognised as being ‘de facto partners’ is a ‘de facto relationship’ for the purposes of the Family Provision Act 1972 (WA) and the Family Court Act 1997 (WA).39 The terms are defined in s 13A Interpretation Act 1984 (WA) (“IA”) and the crux of the provision is that two people live together in a marriage-like relationship.40 The provision expressly states that it does not matter whether the persons are different sexes or the same sex41 or either of the persons is legally married to someone else or in another de facto relationship.42

The net effect of s13A IA is that Western Australian’s in de facto relationships have, for the most part, equal legal standing with married people.43

How jointly owned property is to be held and how it is to be devolved upon the death of one of the owners

Under the Torrens System, real property can be held by co-owners as joint tenants or tenants in common. Upon the death of a co-owner, the rules of survivorship state that property held as joint tenants will see the surviving co-owner receive the share of the deceased co-owner.44 If the property is held as tenants in common, each party may bequeath his or her share of the property as they please pursuant to a will.

To ensure that a partner receives rights to the jointly owned property upon the death of one partner it is prudent to register the ownership as joint tenants upon purchase. This is often simply assumed when a heterosexual couple are purchasing property but it seems the opposite view is taken by, for example, real estate salespeople and settlement agents when preparing contracts and title documents:

How property is to be bequeathed pursuant to a will

If just one partner is the registered owner of the property, it is essential that the dependent partner’s right to reside in the property is protected in the event of the other partner’s death. The importance of making a will is never to be underestimated and is especially so in circumstances where one, or both, partners have a previous spouse and/or children. Wills protect the surviving partner too by avoiding the need to proceed to court if there has

39 Indeed, Millbank (ibid) notes that the Acts Amendment (Lesbian and Gay Law Reform) Act 2002 and Acts Amendment (Equality of Status) Act 2003 amended over 70 statutes in Western Australia to recognise same-sex couples as having de facto relationships.
40 Section 13A(1).
41 Section 13A(3)(a).
42 Section 13A(3)(b).
43 Millbank above n 38, 21.
44 Bradbrook, MacCallum Moore and Grattan, Australian Real Property Law (5th ed) , 2011Thomson Reuters, Australia [12.05],[12.40],[12.70].
not been appropriate provision for that partner in the will or the deceased partner died intestate and the surviving partner has to compete with other family members for a property settlement. Such an experience can be expensive and traumatic, especially when LGBTI relationships are regarded, by some judges, as less valid than traditional marriages. For example, in Mair v Hastings\(^45\) a partner’s claim was upheld and, although it was dealt with in the same way as a heterosexual partner’s claim would have been determined it was noted:

“The relationship was a long one. It was for 31 years. It had its own commitments between the two parties to the relationship, but it must be noted that, in fact, it was only a de facto relationship and in this sense one cannot quite compare it to the situation of a married heterosexual couple who have made the public commitment of marriage....”\(^46\)

A de facto partner can make a claim on the estate pursuant to the Family Provision Act 1972 (WA). Under this legislation people who believe that they have not been adequately provided for in an estate of a deceased person with whom the claimant has the requisite relationship, may apply to the court for an order that they receive more from that estate.\(^47\)

**Intestacy**

The estate of persons who die without making a will, or where certain property is not mentioned in a will, is distributed according to the provisions of the Administration Act 1903 (WA). The definition of de facto partner and de facto relationship discussed in the context of the Family Provision Act above is utilised for the purposes of this legislation too. The Administration Act sets out an order of priority in which the estate is distributed. These laws can, however, be overridden by successful family provision claims.

If a de facto partner has lived with the deceased partner for at least two years immediately before the death of the intestate and not married to another person, the de facto receives the spousal entitlement. However, an issue may arise where a person in a relationship has a former spouse from whom that person is not divorced. The spouse and the de facto partner would each have a claim on the estate. In this case, the distribution of the estate will depend on the nature of the relationship and whether the deceased and the defacto partner had been in a de facto relationship for two or five years. If the partners have been together for two years immediately before the death of the partner and the deceased partner did not live with the former spouse as husband and wife during that period, the spouse and the de facto will share the spouses share of the estate in equal shares. If the de facto relationship has been for 5 years immediately preceding the death, the de facto partner is entitled to the whole of the spouse’s share of the estate.

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46 See the discussion in Millbank above n 39. See too J.Millbank, The changing meaning of ‘de facto’ relationships.2006 12 Current Family Law 82.
47 For example see Brennan v Mansfield and Prince Alfred College Inc [2013] SASC 83.
How superannuation law impacts upon the rights of LGBTI couples

Another issue is the distribution of superannuation. A surviving partner may need access to the deceased partner’s superannuation to remain solvent and retain security of tenure. Superannuation funds require a person to nominate how they want the funds distributed upon their death through a binding and non-binding nomination. Binding nominations bind the trustee of the fund to distribute the funds as directed. Binding nominations need to be updated every 3 years. They are only applicable to a financial dependent or the executor of the estate.

How other social security law may impact on the financial benefits payable to an LGBTI partner

Same sex couples do not have the same rights regarding widow’s allowance, bereavement and other entitlements available to heterosexual partners. The Same-Sex: Same Entitlements Inquiry found that there are 58 federal laws which discriminate against same-sex couples and their children. 48

LGBTI experiences in the private rental market

As discussed in Chapter 5, private rental in Western Australia is regulated by the Residential Tenancies Act 1987 (WA). The legislation does not make provision to counter discrimination in relation to rental practices.

The Equal Opportunity Act 1984 (WA) (EOA) is said to promote equality of opportunity in Western Australia and to provide remedies in respect of:

…discrimination on the grounds of sex, marital status, pregnancy, sexual orientation, family responsibility or family status, race, religious or political conviction, impairment, age, or publication of details on the Fines Enforcement Registrar’s website, or involving sexual or racial harassment or, in certain cases, on gender history grounds.49 Part IIB of the Act addresses discrimination based on sexual orientation.50

Section 35Z EOA addresses discrimination in relation to accommodation although an exception in relation to religious providers remains in place.51 Part IIA addresses discrimination of gender history grounds52 with accommodation considered in s35AM EOA.

To date there has not been a reported case involving discrimination of LGBTI people in relation to the private rental market in Western Australia although anecdotal evidence suggests such discrimination occurs.53 In 2009 the
Equal Opportunity Commission tabled a report, *Accommodating Everyone*, into the experiences of Aboriginal and CALD people in the private rental market. The Report made 15 recommendations proposing further actions and initiatives for the Commonwealth and State Governments as well as the real estate industry in order to address the identified issues. Several of the recommendations are pertinent to the plight of LGBTI renters particularly:

**Recommendation 1**

That training in equal opportunity law be a compulsory component of licensing requirements for those operating in the private rental housing market; with equal opportunity law also being incorporated as a compulsory module in training for property managers.

**Recommendation 2**

That the Equal Opportunity Commission work with the Department of Commerce (formerly DOCEP) to develop equal opportunity law guidelines for owners who operate in the residential tenancy market.

**Recommendation 9**

That the Department of Commerce (formerly DOCEP) investigates ways to improve the handling of tenants’ complaints.

**Recommendation 12**

As recommended in the 2007 Review of the *Equal Opportunity Act 1984*, the proportionality test contained within the definition of indirect discrimination should be removed and the respondent should be the party required to prove that the condition or requirement which is the subject of the complaint, is reasonable.

The Victorian Human Rights and Equal Opportunity Commission have investigated discrimination of LGBTI renters and concluded that some LGBTI tenants were having their applications for private rental properties continually rejected due to discrimination. In *Locked Out – Discrimination in Victoria’s rental market* respondents were of the view that their sexual orientation led to being refused a rental property.

The report indicated several problems facing LGBTI tenants who were the targets of discrimination. First, it is very difficult to prove discrimination.

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54 The Equal Opportunity Commission conducted this inquiry using its research function under s 80 of the *Equal Opportunity Act 1984* (WA). The research also identified the difficulty of establishing a case of discrimination especially where, like Perth in recent times, market demand exceeds supply.

55 In *Locked Out – Discrimination in Victoria’s private rental market* respondents were of the view that their sexual orientation led to being refused a rental property.

This is especially the case when the demand in the market exceeds supply. The refusal can be disguised as some other reason. Second, the complaint process is time consuming and may be to no avail. Third, making complaints may do more harm than good because tenants are concerned they may then be ‘black-listed’ by agents and unable to find any accommodation.

**Public rental**

There is little Australian research on the experiences of LGBTI people who want to live, or do live, in public and community housing. This is, of course, contributed to by the sparse information available generally about the housing needs of older LGBTI and the lack of hard statistical information about the LGBTI population to enable appropriate planning for public and community housing. Again, in our view it is important that appropriate demographic and statistical data be obtained because “a lack of data about their real housing needs could be interpreted as evidence of an absence of real needs.”

In the United Kingdom, Stonewall Housing has undertaken research identifying issues faced by the LGBTI community, including older people, in relation to housing, including public housing. Stonewall’s research revealed one third of respondents felt they would be uncomfortable being ‘out’ to a housing provider.57

The activities of the national housing agency in the United Kingdom are instructive. The Homes and Communities Agency (HCA) in the United Kingdom has worked closely with organisations such as Stonewall Housing to assist that organisation in ensuring a voice for minority groups, including LGBTI people in *inter alia* public housing. While under an obligation to do so under the *Equality Act 2010* (UK) the HCA has encourages equity and diversity in relation to services provided by the agency; and an area of focus is LGBTI tenants.58

**Western Australia**

Like private rentals, the relevant Western Australian legislation is the *[Residential Tenancies Act 1987 (WA)](https://www.legislation.wa.gov.au/LA/Directories/Acts/1987/19870223.htm)* (RTA). The principal difference between the application of the RTA to private and public rental is the three strikes policy regarding anti-social behaviour.59 We are assuming this will not be an issue for LGBTI seniors although, as discussed in Chapter 5, personal grievances between management and tenants in some community housing complexes have seen a misuse of the three strikes policy.60 Although we do not have evidence of this conduct being directed towards LGBTI residents, a manager who did not approve of a resident’s lifestyle could use/misuse the three-strikes policy in the same way.

The Western Australian Equal Opportunity legislation discussed in relation to private rental is also applicable to public and community housing tenants.

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58 It is also obliged to ensure equity and diversity in the employment of staff, including a specific program for LGBTI employees.
59 See Chapter 5.
60 Ibid.
There is therefore an exception for religious organisations that should, in our
view, be removed.

**Aged care and retirement villages**

Although there is a clear distinction between aged care facilities and
retirement villages, the challenges faced by LGBTI people in these
environments are similar. Problems in aged care facilities may be more
intense due to the generally higher level of care required. Yet the growth in
‘gay retirement homes’ across the western world suggests that ‘standard’
retirement villages are failing to provide an equitable environment for
LGBTI elders.

In WA, in particular, the Curtin report finds that the aged care sector is
ill equipped to meet the needs of older LGBTI residents. Although the
report did not find ill intent amongst respondents, there was a lack of
understanding and ignorance about the needs and concerns of LGBTI
people. The authors of that report note:

This project confirmed that older and ageing LGBTI individuals
accessing retirement and residential aged care services in Western
Australia (WA) experienced unmet needs and fears of discrimination.
This was in line with other national and international research
indicating that older LGBTI people are likely to be disadvantaged in
the aged care sector due to their minority sexuality.

**Heteronormativity**

Many studies and reports touch upon the issue of ‘heteronormativity’ which
seems to be the dominant paradigm within aged care facilities. According to
Tolley and Ranzijn, aged care services disregard diverse sexual orientations
and gender on the assumption that heterosexuality is the norm. The
National LGBTI Ageing and Aged Care Strategy also posits that the delivery
and planning of aged care services are made under the assumption of
heterosexual and gender conforming clients. The effect of this policy may
be the increased marginalisation and invisibility of LGBTI people.

Evidence of heteronormativity can be seen in marketing material such as
brochures and posters which convey images of heterosexual couples. Irwin
identifies similar issues with admission forms which assume heterosexual
relationships and may cause problems with next of kin and consent.

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61 Tom Nightingale, ‘Advocates hail Australia’s first gay retirement village’ ABC Radio Australia,
62 Curtin Study, above n 2, 62.
63 Ibid.
64 Ibid.
65 Carolyn Tolley and Rob Ranzijn, ‘Predictors of heteronormativity in residential aged care
66 Australian Government, Department of Health and Ageing, National Lesbian, Gay, Bisexual,
Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy (2012) 4.
67 Joy Phillips and Genee Marks, ‘Coming out, coming in: How do dominant discourses around
aged care facilities take into account the identities and needs of ageing lesbians?’ (2006) 2
Assets/Files/GLIP_Review_Vol2_No2%2BS1%5D.pdf>; Irwin, L., above n 26.
68 Phillips and Marks, above n 34; Tolley and Ranzijn, above n 73.
69 Lynn Irwin Homophobia and Hetrosexism: Implications for Nursing Home Practice (2007) 25
Australian Journal of Advanced Nursing 73.
Discrimination

The existence of discrimination and homophobia within aged care services may exacerbate the anxiety and fear of LGBTI entering these facilities. The consequences for LGBTI people encountering discrimination may be especially intense, due to the dependence on workers for care.70

LGBTI residents may feel more vulnerable to maltreatment and ostracism from both other residents and workers.71 Due to this fear, many residents choose not to disclose their identity. A New York Times article reported that a common response to entering aged care was to retreat back into ‘the closet’, a defence mechanism learnt from a lifetime of discrimination.72 As a gay man interviewed as part of the article stated: “As strong as I am today...when I’m at the gate of the nursing home, the closet door is going to slam shut behind me.”73 A similar phenomenon, where transgender elderly revert to their gender of birth has also been discussed.74

In Australia also, there are reports of LGBTI clients in aged care ‘putting away their photographs, their reading material, closing the wardrobes so that any carer is not going to form a judgement and, potentially, to discriminate against them.’75

As the Curtin report suggests, the effect of hiding one’s identity can be devastating:

• Significant mental health issues such as stress, anxiety, depression; and
• Other health issues as they may not feel comfortable disclosing relevant personal information relating to care.76

The National LGBTI Ageing and Aged Care Strategy lend credence to this view, stating that there is a direct correlation between discrimination and poor health.77

The Curtin report also touches upon broader, more systemic problems which may stem from LGBTI clients hiding their identity. Aged care providers are less likely to recognise and address the needs of LGBTI clients, in terms of health, sexual and cultural expression.78 The report found that a majority of aged care providers that participated in the study did not have formal procedures for dealing with the disclosure of identity.79

“LGBTI-sensitive practices can help to facilitate the disclosure of sexual orientation and/or gender identity that may assist in meeting the unique needs of this group.”

B.Horner, A.McManus J Comfort; R Freijah; G Lovelock; M Hunter; M Tavener How prepared is the retirement and residential aged care sector in Western Australia for older non-heterosexual people? 2012 20 Quality in Primary Care 263

71 Stein, above n 9, 430.
73 Ibid.
75 Nightingale, above n 29.
76 Curtin Study, n 2, 62.
77 Australian Government, Department of Health and Ageing, above n 2, 7.
78 Ibid.
79 Ibid.
The cultural diversity of the aged care workforce may present further difficulties for LGBTI elders. Staff may have originated from regions where homophobia is commonplace or homosexuality criminalised.80

**Sexual expression**

The Curtin report also details the practice in aged care facilities of ignoring the sexuality of clients.81 In general, older people are assumed to be asexual.82 Other commentators argue that the aged care sector uses the veil of the Privacy Act as a mechanism to avoid difficult subjects.83 As a consequence, the needs of LGBTI clients are unmet.84 A Victorian study found that the lack of opportunity for physical intimacy in aged care facilities is a concern for LGBTI people.85

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80 Curtin Study, above n 2, 63.
81 Ibid, 32.
82 Barrett, above n 70.
84 Harrison, Ibid.
85 Ruth McNair and Jo Harrison. 'What’s the difference? Health issues of major concern to gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians’ (2002) edited by Victorian Government Department of Human Services. Melbourne: Rural and Regional Health and Aged Care Services Division.
Aged care reforms

Sexual orientation, sex and/or gender identity have important implications for the provision of aged care services as many LGBTI people have experienced unlawful discrimination over the course of their lives. It is thus imperative to ensure that this discrimination does not continue into old age.86

From 1 August 2013 the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth) inserts several new grounds into the Sex Discrimination Act 1984 (Cth) (SDA). As a result it is now unlawful to discriminate against a person on the basis of sexual orientation,87 gender identity88 and intersex status89 under Commonwealth law. New protections are applicable to lesbian, gay, bisexual, trans, gender diverse and intersex people. Same-sex couples are now also protected from discrimination under the definition of ‘marital or relationship status’.90

Both direct91 and indirect92 discrimination is unlawful.

A contentious issue was whether the SDA amendments would be made applicable to religious organisations and facilities, such as aged care facilities, conducted by religious organisations. The amendments make it clear that service providers in the aged care sector that receive funds from the

86 Australian Human Rights Commission <https://www.humanrights.gov.au/human-rights-approach-ageing-and-health-aged-care-reforms-and-human-rights> Human rights challenges for this area Development of disaggregated indicators to better assess the situation of all older people with special needs. These indicators will need to be disaggregated, at least on the grounds of age, sex, sexuality, race, ethnicity, place of abode, socio-economic status Ensuring that amendments to the Aged Care Act are compatible with the human rights contained in the seven core treaties to which Australia is a party
87 Sexual orientation means a person’s sexual orientation towards:
   a) persons of the same sex or
   b) persons of a different sex or
   c) persons of the same sex and persons of a different sex. Some terms used to describe a person’s sexual orientation include gay, lesbian, homosexual, bisexual, straight, heterosexual. The new definition does not use labels, as these may be offensive or inaccurate; however, it is intended to cover these orientations.
88 Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person. This includes the way people express or present their gender and recognises that a person’s gender identity may be an identity other than male or female. Some terms used to describe a person’s gender identity include trans, transgender and gender diverse. The SDA does not use these labels however it is intended to cover these identities and more. The SDA provides protection from discrimination for people who identify as men, women and neither male nor female. It does not matter what sex the person was assigned at birth, or whether the person has undergone any medical intervention.
89 Intersex status ‘means the status of having physical, hormonal or genetic features that are:
   a) neither wholly female nor wholly male or
   b) a combination of female and male or
   c) neither female nor male.’ Being intersex is about biological variations, not about a person’s gender identity. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be defined as one or other sex. Intersex people typically also have a gender identity and sexual orientation.
90 Most states and territories have some form of protection against discrimination on the basis of sexual orientation and gender identity; however, the SDA Amendment Act introduces more inclusive definitions and addresses gaps such as a lack of coverage for acts or practices of the federal government. It also includes the new ground of intersex status.
91 Direct discrimination is treating another person less favourably on the basis of their sexual orientation or gender identity or intersex status, than someone without that attribute would be treated in the same or similar circumstances.
92 Indirect discrimination is imposing, or proposing to impose, a requirement, condition or practice that has, or is likely to disadvantage people with a particular sexual orientation or gender identity or intersex status, and which is not reasonable in the circumstances.
Commonwealth must comply with Commonwealth anti-discrimination laws. This will provide additional protections for LGBTI seniors and removes the exemptions that previously allowed some providers to discriminate on the basis of their religious beliefs. Some providers had turned away, or refused some services or removed LGBTI seniors because of their sexual orientation, gender identity or intersex status.

**The impact of the move from person centred care to Consumer Directed Care**

Changes in the Australian aged care sector have also included a move from person directed care to Consumer Directed Care. Commentators are of the view that CDC will be of benefit to older LGBTI people:

The CDC approach represents significant changes to cultural views about ageing and aged care. Instead of asking older people to select choices from a list of services that have been pre-determined by service providers, the CDC approach strives to enable older people to write their own menu for how they want to manage their lives. Older people can then identify their own goals for their care outcomes and get assistance to achieve their desired level of independence. These goals will serve as the foundation for Home Care Agreements and care plans. This approach can increase LGBTI inclusion by including LGBTI-specific care needs that may not have been addressed or included in the previous list of care options. …This means that older LGBTI people will have more opportunities than ever before to address some of their LGBTI-related needs that have often been invisible or unaddressed.

**Discrimination in aged care fees**

When people enter an aged care facility they generally have to pay certain daily fees and bonds to fund their care and residence. The amount of those fees is calculated by applying assets and income tests.

A same-sex couple is treated differently to an opposite-sex couple under these tests. In particular, the home of a same-sex couple is not exempted from the assets test as it is for an opposite-sex couple.

As a result, a person in a same-sex couple will generally pay more for residential aged care than a person in an opposite-sex couple.

**Marginal accommodation and homelessness**

Again, statistics are wanting but anecdotal evidence suggests that many older LGBTI people may feature in marginal accommodation and as homeless.93

93 Interview LGBTI 3.
**Recommendations**

- That the 2016 *Census of Population and Housing* collect data on sexual orientation, gender identity and intersex status.
- That such information be, *inter alia*, channelled into planning for appropriate housing and accommodation options for LGBTI seniors.
- That there is more education in the LGBTI community regarding the importance of making wills, entering into property settlements and so on.
- Training in equal opportunity law and practice to real estate agents and property managers should be extended to include awareness of LGBTI issues.
- That all discriminatory superannuation and social security payments be reviewed and amended.
- Seek input from the LGBTI community regarding experiences in the rental market.
- Information sessions should be provided by Department of Commerce or Seniors Housing Centre to ensure that landlords and property owners are aware of their responsibilities under the Equal Opportunities legislation.
- Remove religious exemption in Equal Opportunities.
- Encourage the work of GRAI.
- Concerted education for LGBTI seniors regarding property and inheritance laws.
- Focus on discrimination laws in relation to the private rental market.
- Social housing providers adopt practice and protocols as utilised by Anchor Housing and Stonewall in the United Kingdom. There should be more attention to allocation and a zero tolerance approach to prejudice.
- Encourage the implementation of the Living Longer Living Better recommendations regarding the LGBTI community.
- Appropriate training for aged care workers.
- That there be further research regarding LGBTI in marginal accommodation (including homelessness).
Chapter 13

Loss of a partner

When X (husband) died I really didn’t know what I should do. He had made all the financial decisions and I thought that the pension would be enough for me to stay here. We had some money put away but that went on the funeral, we hadn’t thought about any of those funeral plan things.¹

Chapter 13 considers the impact of the loss of a partner on an older person’s security of tenure.

Although the emotional anguish over the loss of a partner rightfully takes precedence, it may also have consequences for the security of tenure of older Australians. This issue was examined in a broader context in a 2008 AHURI report entitled ‘How does the loss of a partner affect housing outcomes?’²

The report discovered that older women were more likely to be widowed, separated or divorced than older men:

- 70% of men were continuously married; 18% widowed, separated/divorced;
- 60% of women were continuously married; 30% widowed, separated/divorced;³
- 85% of those surveyed who were continuously married were home owners or home purchasers;⁴
- Most relevantly for our purposes, the bereaved are generally significantly older than the divorced and separated groups;
- 72 is the average age of widowed females; 74 for widowed men.⁵

However, as a result of this higher age, home ownership is high and outstanding mortgage very low amongst the bereaved. Furthermore, only 6% of widows resided in private rental housing.

Summary of findings

Several of the older people interviewed for this project had lost partners through death, or in some cases divorce or separation in later life. Our interviewees had nominated themselves for the Study because of other housing concerns but – where the older person had experienced such a loss – it invariably arose in the discussions. The impacts differed according to the type of tenure held by the older person.

To summarise, obviously security of tenure is likely to be impacted upon by the loss of a partner. Legal security of tenure can be undermined through

¹ Interview LP 4.
³ Ibid 87.
⁴ Ibid.
⁵ Ibid.
the loss of an income or part of the aged pension. Ontological security will be undermined due to the lack of companionship and assistance. Social isolation amongst older people who have lost a partner is, in our view, a serious problem that should be addressed as a matter of some priority. From our discussions it seems that it is all too easy for an older person to ‘disappear’ after the loss of a partner; this can result in serious social, health and welfare consequences.

Again lack of education about one’s home and financial situation can have dire consequences. More information and education is required in relation to retirement savings, living on the aged pension, life insurance and, perhaps surprisingly, making a will. In this respect we are of the view that the LGBTI community should be targeted for the purposes of an information campaign because even long term partners can be at a significant disadvantage vis a vis the deceased’s other relatives.

**What the interviews revealed**

In the case of home ownership (including those who owned strata titled properties), if the property was paid for, the surviving partner was generally financially secure. Issues arising in these circumstances were the loss of some income and the difficulty in maintaining a property with the death of (usually) the male partner. Where there was a mortgage existing on the property, in the absence of life insurance, the surviving partner was in a precarious financial position.

Several interviewees made mention of the family home being ‘too big now’ or ‘lonely’ and were worried that, as they aged, they would be unable to upkeep the property. Some discussed the possibility of ‘downsizing’ but were reluctant to do so due to concerns about having to move from a familiar location, and established networks, in order to find a smaller, affordable home.

Interestingly, LGBTI seniors were often in a vulnerable position if their partner had passed away without a will or without having changed a will since entering into a new relationship. In such a case the rules of intestacy will work against a partner. Similarly, property may be lost through it being diverted to former partners and/or family. Many CALD seniors too experienced some difficulty, particularly those from southern European descent. In cases where the male partner had passed away, many older CALD women felt obliged to live with one of their children. This often led to the sale of the family home and the vagaries of the family accommodation arrangement discussed in Chapter 9. Indeed, one interviewee had experienced the loss of her husband, the sale of her home with the proceeds gifted to her son family, the breakdown of her relationship with that son and being rendered homeless.

While those in public and social housing felt less financial impact, those in the private rental market were very adversely affected. Indeed, in two cases our interviewees had to move quite some distance away because they

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6 Robyn A Finaly Interventions to reduce social isolation amongst older people: where is the evidence? (2003) 23 Ageing and Society 647, 648: People are socially isolated if they had poor or limited contact with others and they perceived this level of contact as inadequate, and/or that the limited contact had adverse personal consequences for them.

7 This was not the case in all circumstances. This had an effect on those receiving the aged pension.
could not manage to pay rent in the private rental market after the death of a spouse. In one case the spouse was of retirement age and still working, in the other the couple relied on the aged pension and the relatively small reduction to the single rate was enough to necessitate moving. One respondent from a retirement village was concerned about meeting maintenance costs and charges after the death of her spouse.

Sadly, where an older person loses a partner the result may be that he or she loses their home. In these circumstances there is a dearth of options for them. As discussed previously in the Study, there is little suitable emergency accommodation for low income older people, and most boarding or lodging establishments are not suitable, in particular, for older women. We were informed of several cases where, after the death of a partner, older women could not afford the private rental market anymore, could not find public or social housing and presented at a homelessness service.8

**Housing affordability following loss of partner**

Of particular relevance to older Australians is the loss of a partner through bereavement. When one partner dies, the other is confronted with housing costs which are effectively doubled. However, it is pertinent to note that an increased financial burden relating to housing costs following the loss of a partner is a mainly private market phenomenon. Public tenants are insulated by the fact that their rate of rent is directly linked to their income.9 In other words, when a tenant in public housing loses their partner, their income drops but their rent drops proportionately.

Yet for private renters and owners the housing costs remain constant whilst income usually decreases.10 The problem of housing affordability may be compounded by the remaining partner’s reluctance to seek alternative, lower cost accommodation following the loss of their partner.11

The report found that there was a rapid increase in the housing stress encountered by those who lose a partner in the following year. For private renters, in the first year following the loss of a partner, housing costs doubled and housing stress rose by 9%.12 Older private renters are especially vulnerable, as income falls and housing costs remain the same, many simply cannot meet the enhanced financial burden.13 For purchasers, housing stress rose from 9% to nearly 33% of all these households.14

The housing stress faced following the loss of a partner is also evident in the increased number of those seeking Commonwealth Rental Assistance (CRA) in the private rental market. The report found that 41% of those that lose a partner become eligible to receive CRA or to receive a greater amount of CRA.15

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8 Interview LP 5, LP 9.
9 Ibid. Above n 2.
10 Ibid 19.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid 68.
15 Ibid.
Chapter 13 – Loss of a partner

Some people, commonly women, however, may be especially disadvantaged if they continue to reside in the same house following the loss of a partner.\textsuperscript{16} If they are eligible for CRA prior to losing their partner, they will continue to receive the same rate of CRA. This is despite enduring an often significant drop in income.\textsuperscript{17}

The report states that it’s most important finding is that a loss of a partner precipitates private renters falling into housing stress.\textsuperscript{18} For older private renters the rate of housing stress increases from around 50% to 80%.\textsuperscript{19} As explained above, CRA is ineffectual to assist in circumstances where one partner remains living in the house, as the rate does not alter.\textsuperscript{20}

However, the situation may be even more severe for home owners. Unlike private renters, who may be eligible for assistance, or public tenants, whose rental is directly linked to income, owners are untethered to any support. The report found that 59% of ‘fractured households’ are home purchasers.\textsuperscript{21} Of these, the housing affordability stress levels rose from 3.2% to 34% in the year following the loss of a partner.\textsuperscript{22}

The report also noted a fall in home ownership in the year following divorce/separation, from 42.5% to 29%.\textsuperscript{23} Yet, most pertinently for present purposes, there was only a marginal impact upon the home ownership amongst the widowed.\textsuperscript{24}

**Other impacts on security of tenure**

**Financial hardship**

Private renters were found to be the most disadvantaged, with many struggling to maintain a semblance of prosperity.\textsuperscript{25} Public tenants meanwhile were also found to be poor, yet did not suffer to the same extent due to the fixed nature of their rent.\textsuperscript{26} Home owners, especially those with mortgages, suffered significant financial concerns. Short term, every day outlays such as home repairs and the necessity to purchase new consumer goods proved difficult, as did more long-term aspirations such as holidays.\textsuperscript{27} This may be the case due to their ‘asset rich- cash poor’ status, in which their most valuable asset (their house) is not readily viewed as an income source.\textsuperscript{28}

**Moving residence**

The loss of a partner may also lead the remaining partner to seek alternative accommodation.\textsuperscript{29} This primarily applies to private tenants and outright

\begin{itemize}
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\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid 90.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid 90.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid 91.
\textsuperscript{29} Ibid 90.
owners. In the case of bereavement, although outright owners often remain in the home, they may also move to be closer to family or to downsize.30

The report found that those from CALD backgrounds were more likely to live with their children, in contrast to those from non-CALD groups.31 This is either due to the loss of a spouse, or an expectation that they will live with their children when they require greater assistance in living.32

Another report concerning downsizing amongst Australians found that single respondents to the study were more likely to have downsized than couples.33 They found that a positive relationship exists between relationship status and relocation.34

Other studies have also reported the link between losing a spouse and downsizing.35 Others have discovered that bereavement is the greatest factor determining an older person’s decision to downsize.36

Studies from other jurisdictions have found similar outcomes. In the United States it has been found that there is a reduction in the size of the dwelling following widowhood.37 Similar findings have been made in the United Kingdom although in that case there appears to be less residential mobility amongst older people.38 In French studies widowhood significantly increases residential mobility for older people with widows are also more likely to move into the rental market.39

**Recommendations**

- Dedicated campaigns targeted at seniors with regard to joint finances, retirement planning and the preparation of wills.
- Such campaigns should ensure that members of the older LGBTI community are reached;
- Investigate strategies to assist older people stay in their own home after the death of a spouse, for example:
  - Low cost, police cleared maintenance services;
  - Downsizing advice and assistance (if desired);
  - Community visits for those recently bereaved (again if desired). These visits should continue for at least one year after the death;
- Consider government subsidies for older people who have recently lost a partner to continue in the private rental market until (if necessary) alternative accommodation can be found.
- Arrangements with the Department of Housing and Social Housing providers to ‘fast track’ widowed older people who cannot afford to stay in the private rental market.

“A lady in my complex lost pretty much everything when her husband died. Apparently he controlled the finances and she thought they were quite well off. When he died she discovered he had a lot of debts and she was only working part time. They had planned to retire – or so he said – at 65. She had to sell the unit but at least she had that I suppose. I think she is living with family now but I am not really sure.”

Interview ST 20
Chapter 14
Guarantees

Y (son) came to us saying he wanted to buy a house. They had three children and it would have been good to see them settled. He wanted us to put up our house as security for the loan. We wouldn’t agree to that but we said we would guarantee the loan. I didn’t realise it was basically the same thing. Anyway, he lost his job and the bank came after us. We ended up having to sell the house so now we are living with Z (daughter). It’s not easy at our age, we came away with some money but not enough to buy another place.

Chapter 14 considers the circumstances where security of tenure may be undermined by an older person using their property or assets to assist a child, relative or friend by using the older person’s property as security for another person’s loan. The focus of the chapter will be on the most common situation: where an older person may feel pressured to assist a child. Such pressure can arise through a variety of factors including the natural love and affection for a child, the fact that a child is a caregiver or so as to ensure continued access to grandchildren. Issues regarding the capacity of the older person to enter into the transaction can also arise.

A parent may provide a guarantee over his or her home to guarantee the debt of a child for residential or business purposes. The older person may not be fully informed as to the accurate state of the child’s finances or may not contemplate the consequences if, for some reason, the child is unable to repay the loan.

It is fair to state that the law has been slow to address the fundamentally hazardous nature of guarantees. An issue invariably arises where an older person agrees, often under pressure (subtle or otherwise) to use his or her property to secure the debt of a child or close relative. In the event of default, the financial institution will call upon the guarantor to take responsibility for the debt. This can, of course, undermine the guarantor’s security of tenure.

The law is of little assistance to an aggrieved guarantor. Although in some instances undue influence and/or unconscionable conduct may have been present in the child’s activities, unless that conduct can be sheeted home to the financial institution the transaction will stand. In other words, unless the bank or financial institution has engaged in the requisite conduct, no action can be brought and the transaction will remain on foot. This conundrum has seen calls for an extension of the principles established in the Garcia decision.

1 Interview G 4.
2 For the purposes of this chapter we will make reference to a child as this is the most common form of transaction. Having said this, the comments could apply equally to a close relative or friend.
3 Interview G 8.
where special considerations attach to wives guaranteeing the debts of their husbands. On some views, a similar approach should be applicable to parents guaranteeing the debts of their children.4

Until recently there has been little statutory intervention into the issue. The *National Consumer Credit Protection Law 2009 (Cth)* has made some inroads especially with regard to the requirement for banks to lend responsibly; an obligation that extends to into guarantees.

Entering into a guarantee can be a considerable risk to older people’s security of tenure. The main issue is that if older people use their assets, usually the family home, to secure the debts of a child or children the older person/s will be responsible for that debt in the event of default by the borrower. If the guarantor cannot pay the debt, the property is likely to be sold.

There are several obstacles for an older person wanting to resist such repayment. The principles of indefeasibility mean that the mortgage will be valid unless one of the exceptions applies. Unless the lender can be implicated in the fraud or inappropriate conduct of the borrower, the mortgage will stand. Although actions such as undue influence or unconscionable conduct may be brought against the borrower, generally this will not undermine the lender’s interest unless the borrower is found to be the lender’s agent or the lender is in some way implicated in the proscribed conduct.

There have been some encouraging developments, however. Courts, particularly in New South Wales, have been prepared to find in favour of guarantors, especially in instances of asset lending. Also, the new statutory provisions in the *National Consumer Credit Protection Act 2009* decree responsible lending practices, including in relation to guarantees. In summary, loans must be ‘not unsuitable’. A transaction will be regarded as unsuitable if a family home has to be sold to repay the debt.

A concerning development is, of course, the increasing number of ‘new’ products that are directed at parents wanting to assist children enter the property market. Although many are, in reality, akin to traditional guarantees, others involve joint purchases or limited guarantees. Some of these products are concerning and should be treated with caution by older people.

**What the interviews revealed**

Interviewees for this section of the project had either entered, or considered entering, into some form of financial transaction that assisted their children financially. For the most part, those who proceeded provided the assistance through gifts or loans of money, for example, for a home deposit. Others had entered into transactions where they had ‘gone guarantor’. Interestingly, many of the latter group were older people from CALD backgrounds who felt a sense of obligation to assist their children. Two interviewees had provided a guarantee for their child’s business.

Happily, these transactions are proceeding, or have ended well. Of particular note was that most sought legal advice and seemed to fully appreciate the consequences if the transaction failed. These interviewees admitted that

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4 Interview G 11.
they were concerned but felt ‘obliged’ to agree. In other words, despite knowing the risks, the parents felt they had to proceed.

Our impression from the interviews was that, in the context of certain family relationships, some parents felt they could not refuse to assist. In some cases it was very much a cultural consideration, that families assist in this way, or a sense that there was an expectation within a community that parents assist. One interviewee did acknowledge that she agreed to enter into the transaction with some misgivings but did not want the ‘shame’ of her child’s business failing and the likely resentment within the family if that occurred.

Summary of findings

In general, a guarantee is a contractual promise made by one party (‘guarantor’) to fulfil the contractual obligations of a third party (‘debtor’) in the event that they cannot fulfil their obligations to another party (‘creditor’).\(^5\) The obligations usually relate to the payment of debt or the performance of a duty or act. However, the obligations do not need to be financial to be considered a guarantee.\(^6\) The guarantor only becomes liable to perform the obligations if the third party defaults on the contract.\(^7\)

A guarantee should be distinguished from an indemnity, which extends beyond the scope of the obligations of the contract.\(^8\) An indemnity is a promise to cover any loss that results as a consequence of the creditor entering into the contract with the debtor.\(^9\)

There are two essential elements to the existence of a guarantee:
- A third party has obligations to fulfil, either in the present or future; and
- There is an intention on behalf of the contracting parties to secure performance of the obligations.\(^10\)

The law in relation to guarantees

Common law

Primarily, the laws governing guarantees in Australia stem from contract. Consequently, the usual contractual requirements of intention, offer, acceptance and consideration apply. The parties to the agreement must also have the necessary capacity and authority to do so.

Undue influence

Guarantees may be set aside where there has been undue influence exercised over the guarantor by either the creditor,\(^11\) or debtor. This may occur where creditor has notice of the debtor’s conduct (which constitutes

“Look, it worked really well for us. I know we took a risk but we wanted to do everything we could for both children. We went in without any advice – we didn’t see an accountant or a lawyer, we just went to the bank and it was all done. In hindsight it could have gone pear shaped but it didn’t and we are glad to have done it.”

Interview G 1

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5 Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 at 254; per Mason CJ; Davys v Buswell [1913] 2 KB 47 at 54 per Vaughan Williams LJ, CA.
6 Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 at 255.
7 Turner Manufacturing Co Pty Ltd v Senes (1964) NSW R 692; Coutts & Co v Browne-Lecky (1947) KB 104.
8 Davys v Buswell [1913] 2 KB 47; Yeoman Credit Ltd v Latter [1961] 2 All ER 294.
9 Ibid.
10 Jowitt v Callaghan (1938) 38 SR (NSW) 512 at 516-17; (applied in Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228 per Buchanan JA).
undue influence), and where the debtor has the duty of obtaining the signature of the guarantor.

In general, undue influence is the improper use of an ascendancy by one person over another for their own benefit so that the acts of the other person cannot be considered his/her free and voluntary acts. Where it is established that there is a relationship of ascendancy between two persons, the court will presume that the dominant party used their position to obtain an unfair advantage.

In circumstances where there is a presumption of undue influence due to the relationship between the debtor and guarantor, the creditor has the onus to prove the guarantor acted of their own free will.

**Unconscionability**

Unconscionability relates to the conduct of a stronger party against a person with a ‘special disability’, who obtains a benefit in circumstances where equity deems it shouldn’t be allowed to stand.

Generally, there is unconscionable conduct where a special disadvantage is such that it affects the ability of a party to make decisions based on his or her interests and the stronger party takes advantage of the situation.

A creditor may be found liable for unconscionable conduct including circumstances where they ‘ought’ to have known of the debtor’s conduct and acted recklessly.

**Statute**

As a contract, guarantees may be either in writing or made orally. However, statute has modified the formalities of guarantees via two main instruments; the state based incorporations of the Statute of Frauds Act and consumer credit legislation.

**Law Reform (Statute of Frauds) Act**

In WA, the *Law Reform (Statute of Frauds) Act* provides that for a guarantee to be enforceable, the agreement, or a memorandum or note of the agreement, must be in writing and signed.

Consequently, under this section, a guarantee may be made orally provided there is some signed note or memorandum of the agreement. It is a question of fact, not intention, in determining whether an alleged document is a signed note or memorandum of the agreement. A document must

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12 *Bank of New South Wales v Rogers* (1941) 65 CLR 42.
14 *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720.
16 *Bank of New South Wales v Rogers* (1941) 65 CLR 42; 15 ALJ 67.
19 *Australia and New Zealand Banking Group Ltd v Barry* [1992] 2 Qd R 12 at 23.
22 *Elpis Maritime Co Ltd v Marti Chartering Co Inc (The Maria D)* [1992] 1 AC 21; *Re Hoyle; Hoyle v
contain all the essential terms of the agreement to be valid. A memorandum may constitute more than one document, provided a connection is made between them.23

Parties must be sufficiently described in writing. This pre-requisite is established where the description can be explained via reference to extrinsic evidence.24

**National Consumer Credit Protection**

Under the *National Consumer Credit Protection Act 2009*, a guarantee must be in writing and signed by the guarantor. The guarantee must contain a warning in the prescribed form which contains advice about things to consider and complete before signing, in addition to the rights and obligations of being a guarantor.25 It must appear directly above where the guarantor signs and on every page that the guarantor is required to sign.26

The credit provider must also give the guarantor, before the guarantee is signed:
- A copy of the guarantee;
- A copy of the credit contract; and
- An information statement outlining the rights and obligations of the guarantor (in the prescribed form).27

Unless a guarantee complies with these formalities, it is unenforceable.28

The new responsible lending provisions also apply to the provision of guarantees.

Division 3 (sections 128-132) is especially pertinent as it requires the lender to consider whether the product is ‘unsuitable’ for the prospective customer.29

A contract will be deemed unsuitable where:
- the consumer will be unable to comply with the consumer’s financial obligations under the contract;
- the consumer will only be able to comply with substantial hardship;
- the contract will not meet the consumer’s requirements or objectives or in any circumstances prescribed in the regulations.30

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25 National Credit Code s 55(3); National Consumer Credit Protection Regulations 2010 reg 81, Sch 1 Form B.
26 National Consumer Credit Protection Regulations 2010 reg 81(2).
27 National Credit Code s 56(1)(b); National Consumer Credit Protection Regulations 2010 reg 82, Sch 1 Form 9.
28 National Credit Code s 56(2).
29 National Consumer Credit Protection Act 2009 (Cth) s 129.
30 Ibid s 131.
Chapter 14 – Guarantees

Enforcement

Under the act, a creditor cannot commence enforcement proceedings unless:

• The creditor has informed the debtor and guarantor that they are in default;\(^{31}\)
• The creditor has informed the debtor they have 30 days to remedy the default;\(^{32}\)
• The creditor must contact the debtor or his/her representative to verify they have received the default notice.\(^{33}\)

Older people as vulnerable guarantors – balancing commercial certainty with vulnerability

Instances of older people acting as guarantors have been common before the courts. It is instructive to examine some of the decisions to assess the courts approach.

Probably the most high profile decision is *Commercial Bank of Australia Ltd. v Amadio*.\(^{34}\)In that case an elderly couple with limited English executed a mortgage which guaranteed their (outwardly successful) son’s debts to a bank. The son told his parents that their liability was limited to six months and for $50 000. The bank manager visited the parents with the son and the guarantee was agreed upon. The bank manager did not read or explain the document to the parents. The High Court dismissed the bank’s appeal on the basis that it had acted unconscionably in securing the agreement.

The High Court held that the banks conduct, through the actions of the bank manager, was unconscionable. The elderly parents were at a special disadvantage due to their limited English, age, lack of understanding of document and close relationship with their son. As the disadvantage ought to have been visible and known to the bank manager, it was consequently unfair and unconscionable to secure the guarantee. As a result the transaction was set aside.

In *Permanent Mortgages Pty Ltd v Vandenbergh*\(^{35}\) the Supreme Court of Western Australia found a bank acted unconscionably in engaging an elderly woman (the mother) in a mortgage agreement over her home unit. The bank had been aware of the woman’s son influencing her to enter the agreement in order to assist him to avoid bankruptcy and reach a divorce settlement. The son had informed the bank of his mother’s age, pensioner status and that the property was a retirement village. The mother did not understand the nature of the loan, she did not receive independent advice and did not have the capacity to repay the loan.

It should not be assumed, however, guarantees will be set aside in all such circumstances. The court will examine carefully the conduct of the respective parties and the elements of the relevant cause of action. Crucially the financial institution must be aware of, or implicated in, the unconscionable conduct. Therefore in *Janesland Holdings Pty Ltd v Francisc Simon & Ors*\(^{36}\)

\(^{31}\) Ibid s 88(1)(a).
\(^{32}\) Ibid s 88(1)(b).
\(^{33}\) Ibid s 88(1)(d).
\(^{34}\) (1983) 151 CLR 447.
\(^{35}\) (2010) 41 WAR 353
\(^{36}\) [2000] ANZ ConvR 112.

“In Amadio, elderly Italian immigrants were persuaded by their outwardly successful son to enter into a deed of mortgage and guarantee providing security over the present and future indebtedness of the son’s business. The Amadis did not receive independent advice and had little business experience, a limited command of English and were heavily reliant on, and trusting of, their son. The bank, who were aware of these circumstances, and that the security would almost inevitably be called upon, permitted the transaction to proceed.”

a Romanian couple (The Simons), who spoke little English and had little education, re-mortgaged their house to help secure a loan to finance their son’s business. They only acceded to his requests after months of pressure. The son soon absconded overseas, leaving his parents liable for the debt. Crispin J held that although the couple had only signed due to pressure from their son and they had concerns over the guarantee, this was not an unusual situation. As there was no ‘unconscionable conduct’ on behalf of the lender, the guarantee was upheld. The Simons lost their home.

**Relationship debt – some parallels**

Although there are protections aimed at ensuring vulnerable guarantors are not manipulated by debtors, these are imperfect in the case of children and older parents. Many of the overt forms of manipulation and coercion are covered by unconscionability and undue influence, yet the pressure between child and parent may be more subtle and consequently outside the ambit of these equitable doctrines.

Due to the special and often enhanced nature of older parent’s vulnerability, some commentators have argued for the extension of protections from what has been variously coined ‘emotionally transmitted’, ‘sexually transmitted’ and ‘relationship debt’ to these cases.

Protections regarding ‘sexually transmitted debt’ are an extension of ‘wives special equity’, first developed in *Yerkey v Jones*. These cases generally relate to one partner acting as the other partner’s guarantor and subsequently being liable for their debt following a breakup. The High Court upheld the rule in *Garcia v National Australia Bank Ltd*, finding that it was unconscionable to enforce a guarantee against a debtor’s wife where she did not understand the nature of the transaction. This was on the basis that the creditor should have been aware that the relationship between debtor and guarantor was such that the wife may not receive sufficient information from the husband.

Burns is one commentator who argues for a more comprehensive and elderly-focussed body of law relating to debt acquired by parent from child, similar to sexually transmitted debt. She proffers that there needs to be a greater understanding of the social context of parents entering into guarantees (dependence on family, fear of abandonment, emotional manipulation). Burns espouses the view that courts have narrowly interpreted equitable doctrines such as undue influence, which has excluded elderly parents from their protection.
Burns also questions the notion of allowing elderly people to be guarantors (or at least fixing the value of the guarantee to a proportion of their assets), as they usually have little income and are potentially more vulnerable.

Similarly to a marital relationship, that between parent and child connotes trust and belief. The emotional vulnerability contained in the latter mirrors that of the former. However, due to age, lack of earning capacity and, often, familial dependence, elderly guarantors are perhaps more exposed to, if not an outwardly avaricious child, an ambitious, desperate or careless one.

**Asset lending**

In this context it is also instructive to consider asset lending:

> “to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default”

Simply the fact that a loan can adequately be repaid from a security, is not a sufficient consideration; in some cases such lending can be unconscionable or, in New South Wales, unjust under the *Contracts Review Act 1980*.

Therefore, in *Fast Fix Loans v Samardzic* a son needed bridging finance for a property development and asked his parents to provide a guarantee. The parents were in their 70s, retired and living on a small property in Bowral. Unfortunately the development did not proceed, the son could not meet his debts and the lender called on the parents to pay out the loan. In holding that the guarantee could not be enforced, the court said that it was insufficient for lenders to assess the value of the property securing the guarantee; the capacity of the guarantor’s capacity to repay the loan was also a relevant consideration.

Combatting asset lending was a particular concern in formulating the *Nations Consumer Credit Protection Act 2009* and, it would seem, the responsible lending obligations would negate such transactions. To date, there have not been any decided cases involving the responsible lending provisions and parental guarantees.

**What if the child has fraudulently entered into a mortgage ie mortgaged the parents property?**

The main issue here is, will the older person be liable to the bank for a mortgage they know nothing about. Assuming the bank has registered the mortgage it is a registered charge on the land. The only way it can be discharged is if it is paid out and then maybe the parent could get compensation under the assurance fund.

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45 Ibid.
46 *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41 at [128].
48 There is no equivalent Western Australian legislation. Therefore any such matter would have to be considered via unconscionable conduct.
49 [2011] NSWCA 260
50 *Perpetual Trustees Victoria Limited v Belcastro (No 2)* [2013] NSWSC 1189.
Where the older person has been fraudulently deprived of property or where a mortgage is registered on the land without the persons consent there are several variations as to the course of the legal process.

As discussed above, the Torrens system of land registration has indefeasibility of title as its cornerstone. Most private land in Western Australia is held under the Torrens system of land registration. The Torrens System is a system of title by registration. The owner of the land is referred to as the registered proprietor of the fee simple estate. To become a registered proprietor of land requires that all formalities at law must have been completed, in particular the process decreed by Landgate. The principle of indefeasibility of title is the cornerstone of the Torrens system. Indefeasibility means that the title of the registered proprietor is paramount, subject to a limited number of exceptions to indefeasibility. These exceptions include inter alia fraud (by the registered proprietor or his or her agent) and the in personam exception.51

Therefore if the property has been sold to another person through fraudulent means, so long as the fraud has not been engaged in by the registered proprietor the title to the land will be lost. It is possible for the older person to seek compensation through the Assurance Fund.

Compensation is regulated through ss201 and 205 of the Transfer of Land Act. Section 201 deals with compensation of a party deprived of land. A person must be deprived of land or of an estate or interest in land. The deprivation can be of either a legal or equitable estate and may be a partial deprivation – as for example where a mortgage has been registered over the persons land. There are a limited number of circumstances that give rise to compensation with a deprivation in consequence of fraud being one of them.52

As we have seen in Chapter 2 (Home ownership) immediate infeasibility of the registered mortgage means that the mortgage will be valid, even if procured by fraud, if the lender was not implicated in the fraud.

Compare this to the recent New Zealand decision in Nathan v Dollars and Sense Financial Limited.53 In this case Dollars & Sense Finance Limited advanced money to a son to purchase shares in a business. The loan was conditional upon the borrower’s parents provide security for the repayment of the loan by executing a memorandum of mortgage in favour of Dollars and Sense over the parents’ jointly owned home. Neither the lender nor its lawyers were aware that the son had forged his mother’s signature on the mortgage document. (Sadly the father passed away during the course of the transaction and the mother had become sole owner of the property through the rules of survivorship).

Upon the son’s default, Dollars and Sense took steps to exercise its power of sale under the mortgage. The mother resisted this claim through reliance on the fraud exception to the indefeasibility provisions.

Two main issues arose before the court, first whether Dollars and Sense had expressly or impliedly appointed the son to act as its agent in dealing with the parents and procuring the mortgage and second whether forging the mother’s signature was within the scope of that agency.

“Tang, a like-minded critic, goes even further, suggesting that ‘the Garcia doctrine should [be allowed in the context of Torrens land] because the social utility of the doctrine – in the protection of vulnerable people in a familial situation – far outweighs the principle of indefeasibility of title.’


51 See the discussion in chapter 2.
52 Registrar of Titles (WA) v Franzon (1975) 132 CLR 611.
53 [2008] 2 NZLR 557.
Chapter 14 – Guarantees

The New Zealand Supreme Court found in favour of Mrs Nathan. It was noted that:

- Dollars and Sense legal advisors did not advise the parents to seek legal advice nor was there any direct communication between them; all communication on the part of the lender was through the son;
- The statutory disclosure obligations were not met;
- When it was noticed the parents signatures were not witnessed, the documents were posted back to the son to organise witnessing; and
- The son was authorised by the lender to obtain his parents signatures on the mortgage and his forgery was in pursuit of this task.

Recommendations

- Design and implementation of educational programs regarding the pitfalls of entering into guarantees and the risks of mortgage fraud.

As outlined in Chapter 2, many older people do not seem aware of the importance of title documents and the risks associated with misuse. Also, although the interviewees for our study seemed reasonably well-informed about the nature and potential consequences of entering into a guarantee agreement, anecdotal evidence suggests that many people remain unaware of the pitfalls or feel obliged to enter into the transactions. While education programs cannot assist in all such cases, getting more information to seniors, and making available the opportunity to obtain low-cost advice should be a priority.

- Any educational programs should also extend to persons who have relevant contact with older people, including bank employees and lawyers.

In relation to banks, enhanced guidelines regarding mortgage and property fraud would reinforce the requirements set down in the NCCPA. The Australian Banking Association Guidelines (as discussed in Chapter 3) should be enhanced with a view to mortgage fraud, particularly in relation to older people. There should also be regular and comprehensive training of bank employees to detect mortgage fraud and bank employees should be obliged to report suspected mortgage fraud and elder financial abuse.

More educational programs should be available to lawyers on elder financial abuse through the CPD program. Lawyers should also be cognizant of the services available to older people they suspect could be actual or potential victims of property fraud.

- All programs should have a section focusing on CALD seniors and an appropriate dissemination strategy.

Our interviews revealed that guarantees were a particular issue with CALD families and were intertwined with issues of expectation and, in some cases, ‘saving face’. Again, educational programs cannot assist in all cases but, in our view, a CALD related strategy would be advisable.
• A careful eye needs to be kept on newer variations on guarantees.

Promotion of these products focusses about concerns that children may not ever be able to afford a home of their own. Advertisements ‘tug at the heartstrings’ of parents who may feel pressured to assist children. Although the products differ from traditional guarantees, the end result if that the parents undermine their financial position to a greater or lesser degree.

• As discussed in more detail in Chapter 2, there should be a reconsideration of deferred v immediate indefeasibility in instances of fraud, particularly in relation to mortgages.

Inclusion in the responsible lending provisions of the National Credit Code of a rebuttable presumption of unconscionability in relation to a guarantees granted by a seniors secured by the family home.
Chapter 15

Equity release products

One of the problems with these products were that the older person could end up with negative equity in the property. They have taken steps in the legislation now to prevent this. I don’t know though, banks have a habit of getting around these things. In some cases I still think they have the potential for financial disaster.1

Chapter 15 examines equity release products and the potential impact of such innovations on older people’s security of tenure. Equity release products are loans specifically tailored for seniors. Seniors can utilise equity release products to convert a part of the value of their home into a source of income.2 Seniors can then use these cash payments for everyday expenses such as medical treatments and aged care. The value of equity release products is in their ability to transform a previously illiquid asset (i.e. a house) into a readily available cash stream. These products can potentially alter the ‘asset rich, cash poor’ phenomenon. However, as with any financial products there are risks and costs involved with their use.

Summary of findings

There are three types of equity release products available in the Australian market; reverse mortgages, home reversions and shared appreciation mortgages.

Reverse mortgage

In a reverse mortgage, the customer receives cash (a loan) in exchange for a charge (a registered mortgage) over his or her property. The customer remains the owner of their home.

The customer can access the money as a once off lump sum, a periodic income stream, a line of credit or a combination of the three methods. The amount that a customer is able to access depends on their age and the value of their property.

Interest is compounded and added to the balance of the loan. However, unlike many loans, interest is not repaid whilst the customer continues to live in the home. When the customer either permanently moves out or dies, and the house is sold, part of the proceeds is used to repay the loan, interest and fees. The contract usually stipulates a ‘no negative equity guarantee’ (recently mandated via legislation), which means that the customer is not liable where the sale proceeds are insufficient to repay the loan.3

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1 Interview G 12
3 Ibid.
Chapter 15 – Equity release products

Home reversion

Unlike a reverse mortgage, a home reversion involves the sale of a part of the customer’s home. The customer continues to reside in the home (on a lease for life agreement), but the financial provider owns a proportion of the property’s future equity.

The customer receives a reduced or discounted lump sum payment in exchange for a fixed percentage of the future value of their house. Consequently, although a customer may sell ‘50%’ of the future value of their home, they may only receive a figure representing ‘25%’ of the current value of their home as a lump sum payment.

As akin to reverse mortgages, customers of home reversions are not required to make repayments whilst living in their home. The provider receives the predetermined proportion of the value of the home when it is sold.

Equity release products in the UK and US

In two comparable jurisdictions, the USA and the UK, the equity release market is more established.

USA

Reverse mortgages dominate the American equity release market. The federal government insured scheme, ‘the Home and Equity Conversion Mortgage’ (HECM) accounts for 95% of the market.4

HECM was established in 1989 under the auspices of the Department of Housing and Urban Development (HUD). Due to the security offered under the scheme, the equity release industry underwent considerable growth during the 1990s.5

The US government insures reverse mortgages under HECM to the extent that:
- Debts may not exceed the value of the customer’s property
- Whilst the customer lives in the property, they will continue to receive regular payments from the loan, regardless of;
  - the duration of their residence in the property
  - the change in value to the property
  - whatever happens to the provider of the loan.6

Further regulation of HECM loans places limits on changes to interest rates and mandates that customers receive independent advice prior to signing a reverse mortgage loan.7 However, this regulation does not cover agreements made outside of HECM.8

6 Ibid 24-25.
7 Ibid 25.
8 Ibid 27.
UK

The equity release market is also more established in the UK, where different products have been available for between 10 and 30 years. Reverse mortgages also dominates the equity release landscape accounting for approximately 75% of the market. Home reversions make up most of the remainder.

After thousands of seniors were evicted during the 1980s after entering into variable rate reverse mortgages, a stricter regulatory regime has been instituted. Initially this was under the Safe Home Income Plans (SHIP) in 1991 which required that:
• Products contain 'no negative equity guarantee'
• Mandatory independent advice prior to entering an agreement
• Full disclosure of the benefits, obligations, variables, limitations and costs.

The Financial Conduct Authority (FCA) is now responsible for regulating both reverse mortgages and home reversions.

The Australian position

(a) Background reverse mortgages in Australia

Reverse mortgages in Australia are primarily available to people over 60. The Australian reverse mortgage market has experienced significant growth since the turn of the century, partly as a result of aggressive marketing by financial providers. Yet, the global financial uncertainty since 2007 and interest rate increases have slowed the take up of reverse mortgages.

Since 2002, ASIC has had responsibility for monitoring reverse mortgages, as they constitute a form of credit. In November 2007, ASIC identified reverse mortgages and other equity release products as an area of concern in a report entitled 'All we have is this house: Consumer experiences with reverse mortgages'.

Several salient issues emerged from the report relating to reverse mortgages, including:
• Borrowers were unaware of the real cost of the loan and interest over time
• Borrowers were unaware of the consequences of breaching an agreement
• Borrowers lacked understanding of trading off future equity for immediate gain
• Borrowers reported difficulty in resisting readily available credit
• Providers issued insufficient advice to borrowers relating to risks, discussion of alternatives and planning for the long-term.

“Retired Australians looking for easy access to cash are dipping into the equity in their homes to help fund their lifestyles after work. But experts have warned taking out a reverse mortgage comes at a price, and should be done with caution as it will eat away at their wealth.”

Consequently, the report recommended improving the structure and operation of reverse mortgages and a greater focus on transparency.20

The market for reverse mortgages is expected to grow due to failure of pensions and superannuation to meet everyday living expenses.21 Many older Australians seek to maintain the standard of living enjoyed during their working years into retirement via these loans.22 The desire (or demand) to financially assist children and grandchildren may also drive the take up of reverse mortgages.23

(b) Statistics

At the end of the 2011, there were 42,410 reverse mortgage loans in Australia with a total value of $3.32 billion, up from $0.9 billion in 2005.24 Deloitte reported a 10% growth in the value of new lending in 2011, whilst there was a 22.5% increase from 2010-11.25 Seniors from regional areas constitute a significant slice of customers, comprising 30% of new loans in 2007.26

<table>
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<th>Year</th>
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<th>Number of loans</th>
<th>Average loan size</th>
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<td>16,584</td>
<td>$51,148</td>
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<tr>
<td>2011</td>
<td>$3.32</td>
<td>42,410</td>
<td>$78,249</td>
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In June 2008, the then Commonwealth government produced a Green Paper that examined financial services and the regulation of credit provision in Australia.27 This led to the rolling out of a National Consumer Credit Protection Package of reforms. The reforms, introduced in two stages, addressed problematic issues associated with existing lending practices. An overriding imperative was the necessity for financial institutions to lend responsibly.28

Stage 2 of the reforms addressed, *inter alia*, reverse mortgages.29
Reverse mortgages have been the subject of some controversy in Australia and abroad because of a lack of:

- Understanding of the complexities of the loans;
- appropriate advice regarding the pitfalls of the loans, and
- a long term view of the borrowers financial outlook.

Of particular importance was the issue of negative equity, the position of non-title holding residents and the provision of legal advice.

Reverse mortgages were addressed specifically in Stage 2 of the reforms. Although Stage 1 had introduced comprehensive responsible lending provisions it was considered that the nature of the reverse mortgage product, and the potential vulnerability of the target market, necessitated specific provisions.

**Overview of the responsible lending provisions of the National Consumer Credit Protection (NCCP) Act**

Chapter 3 of the NCCP Act addresses responsible lending. Part 3-2 imposes new disclosure requirements on licensees who are credit providers. A consumer must be provided with a ‘Credit Guide’ within a stipulated time frame. The Credit Guide must contain certain information such as reference to the availability of internal and external dispute resolution schemes.

A licensee must not enter a credit contract with a consumer unless, within the previous 90 days, the lender has made an assessment that is in accordance with s129 and has made the inquiries and verification in accordance with s 130. Section 129 is pivotal in that it requires the licensee to make an assessment of whether the credit contract will be unsuitable for the consumer if it is entered into during that period. Sections 130(1)(a)-(e) govern the suitability assessment by requiring the credit provider to make reasonable inquiries about the consumer’s requirements and objectives in obtaining credit and the consumer’s financial situation; take reasonable steps to verify the financial situation and make any inquiries or verification prescribed by the regulation. A contract will be deemed unsuitable where:

- the consumer will be unable to comply with the consumer’s financial obligations under the contract;
- the consumer will only be able to comply with substantial hardship;
- the contract will not meet the consumer’s requirements or objectives or in any circumstances prescribed in the regulations.

This includes reference to circumstances where the consumer could only comply with the consumer’s financial obligations under the contract by selling the consumer’s principal place of residence. Brokers also must disclose information about any commissions they receive. A loan application will be forwarded to the lender which makes a final credit

“It was all a bit confusing. Our daughter was separated and we were looking after our grandchildren. She needed some money to set herself up in another house. We got into a reverse mortgage and that helped her a lot. The trouble is that our other children are saying we have treated them unfairly and that she will have a bigger ‘slice’ of the inheritance.”

Interview G 5

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30 Ibid 3.
31 National Consumer Credit Protection Act 2009 (Cth) s 126 (1).
32 Ibid s 126(2).
33 Ibid s 128.
34 Ibid s 129.
35 National Consumer Credit Protection Act 2009 (Cth) s 130 (1).
36 Ibid s 131.
37 Ibid s 133(3).
38 Ibid s 136 (g)(i).
assessment. It remains uncertain how far the reforms will go and how the ‘not unsuitable’ standard will be assessed by court.

**The impact of the 2012 reverse mortgage amendments on the responsible lending provisions**

Schedule 2, *Consumer Credit and Corporations Legislation Amendment (Enhancements) Act 2012* (Enhancements Act),[^39] amended the NCCP Act (including the National Credit Code) in relation to contracts for reverse mortgages and introduced new obligations for persons engaging in credit activities regarding reverse mortgage contracts.

The amendments create specific provisions to regulate reverse mortgages. Prior to the changes, reverse mortgages were regulated consistently with all credit contracts.[^40]

The specific key changes relating to reverse mortgages are:

- **The introduction of a ‘no negative equity guarantee.’** Credit providers are prohibited from requiring or accepting repayment of the loan for an amount which exceeds the market value of the mortgaged property.[^41]

- **Credit licensees must complete the following activities before making a preliminary assessment of the loan application:**
  - Assess the application through the ASIC website that calculates the potential effect a reverse mortgage on the equity in the potential borrowers home,[^42]
  - provide the potential borrower with a print out of these projections,[^43]
  - provide any additional information that will assist the potential borrower decide whether to enter into a reverse mortgage, and, if so, on what terms,[^44] and
  - give the consumer a reverse mortgage information statement.[^45]

- **Provide disclosure of the legal position of nontitle holding co-habitants.** In the event the lender’s credit policy does not permit a person other than the borrower to inhabit the property, the potential borrower must be provided with notice that the contract does not contain a ‘tenancy protection provision.’[^46]

- **Necessitate the potential borrower receives legal advice.** Regulations may prohibit or otherwise regulate a potential borrower entering into a credit contract for a reverse mortgage if they have not received legal advice.[^48]

[^39]: *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth).
[^40]: Explanatory Memorandum, *Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011,* 34.
[^41]: *National Consumer Credit Protection Act 2009* (Cth) s 86A.
[^42]: Ibid s 133DB.
[^43]: Ibid s 133DB (1)(b).
[^44]: Ibid s 133DB (1)(c).
[^45]: Ibid s 133DB (1)(d).
[^46]: Ibid s 15A.
[^47]: Ibid s 18C.
[^48]: Ibid s 18C (1).
• Sets down procedures that must be followed by credit providers in the event of default.49 (enforcement?)

  The creditor cannot commence enforcement proceedings unless:
  • The creditor has informed the debtor that they are in default;50
  • The creditor has informed the debtor they have 30 days to remedy the default;51
  • The creditor must contact the debtor or his/her representative to verify they have received the default notice.52

The responsible lending provisions oblige credit providers and their representatives to consider the potential borrower’s requirements and objectives in relation to possible future needs. This includes the possible need for aged care accommodation and whether the older person is desirous of leaving equity in the property for his or her estate.

**What the interviews revealed**

Our interviews considered a variety of experiences with such products. As with any financial products, benefits and risks inherent in reverse mortgages were revealed. Those who had entered into reverse mortgages were, for the most part, happy with the product although some had felt that they had not been told ‘the full story’.53

There are several benefits, especially in the short term, for seniors who undertake a reverse mortgage. Primarily, reverse mortgages allow seniors to continue to live in their home until they move out or die. The customer also does not have to pay any interest on the loan whilst residing in the home. There are also few restrictions placed on who can access reverse mortgages (in terms of income and asset value). Seniors can also access their loan in flexible methods to assist meeting day-to-day or more long term needs such as aged care. Essentially, a reverse mortgage can improve a senior’s comfort of living.

Due to the nature of compound interest, in a reverse mortgage the interest continues to accrue over time. Consequently, if a person continues to live in their home, possibly longer than envisaged when the agreement was signed, the value of the loan may approach that of the property.54 The variability of interest rates on reverse mortgages may also pose similar risks.55 The ‘no negative equity’ guarantee legislated in 2012, however, does ensure that a customer or their benefactors will not be liable for an amount beyond the value of the sale proceeds of their home. Although the reforms do mandate that borrowers must obtain legal advice before entering into a reverse mortgage, the ready availability of cash coupled with the relative complexity of the scheme may confuse customers.

49 Ibid s 88.
50 Ibid s 88(1)(a).
51 Ibid s 88(1)(b).
52 Ibid s 88(1)(d).
53 Interview RV 3, 9.
55 Ibid 9-10.
Home reversion – explanation, Australian situation, pros and cons

‘Home reversion’ schemes are relatively new in Australia and only available through one provider; Homesafe Solutions.56 Homesafe offers one product, in which customers receive cash in exchange for a stake in their home’s future equity.57 It has operated since 2005 and by the end of 2012 had lodged over 2,000 contracts.58

Key features of Homesafe are:
• The product can be provided on a single or joint life basis;59
• The customer remains on the title, Homesafe lodges a caveat and a mortgage on the title;60
• The customer retains the right to live in their home for life;61 and
• Homesafe receives their share of the proceeds when the customer or their estate sells the home.62

Customers must receive independent legal advice prior to entering a Homesafe agreement.63 Homesafe is only offered on a lump-sum basis.64

The product is only available to people over 60 and living in either greater Sydney or Melbourne.65 A customer may access between $25,000 and $1,000,000.66 The customer can sell up to 65% of the future value of their home. The customer generally receives between 35-70% of the current value of their home.

Another provider of home reversions, ‘Money for Living’, went into administration in 2005.67 ASIC launched legal proceedings against the provider on the basis that it had misled and deceived consumers.68 This scheme operated on a ‘sale and lease’ basis, in which at the time of the agreement title passes to the provider and the home is leased back to the customer.69

Benefits

The customer can continue to live in their home for the rest of their life. Whereas reverse mortgages involve a perpetually expanding debt, home reversions are ‘debt-free’.70 The lump-sum payment can, as with reverse mortgages, be utilised for necessary everyday expenses.

56 Ibid 3.
58 Ibid 19.
59 Ibid 17.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid 18.
69 Ibid.
70 Alai et al., ‘Developing Equity Release Markets’ 12.
Risks

Unlike a reverse mortgage, a customer in a home reversion sells a part of their home. Depending on the type of scheme, they may have to pay rent to remain living in their home. The discounted lump-sum payment the customer receives also does not reflect the true value of their home.

Recommendations

• That ASIC remains vigilant and investigates areas of concern regarding the new reverse mortgage provisions.
• That test cases involving suspect equity release products be pursued.
• Free and comprehensive financial education should be available to older people considering equity release products.
• Due to Australia’s ageing population and the inevitability of proportionally fewer tax payers, there is scope for a greater proliferation of products such as home reversions. There is, therefore, a need for greater transparency and clarity regarding equity release products, uniformity of regulation and protection for consumers.
Chapter 16

Enduring powers of attorney

The appellant knew that the deceased’s death brought an end to his powers as attorney, yet he continued to draw on the account and evaded inquiries from the nieces and others until the Legal Practice Board became involved.1

Chapter 16 examines how misuse of an enduring power of attorney can undermine security of tenure.

An enduring power of attorney (EPA) is a legal agreement that enables a person to appoint another person or persons to make financial and/or property decisions on their behalf.2 In Western Australia, the two pivotal entities are the donor (the person granting the authority) and the attorney (the person who will make decisions on the donor’s behalf). The attorney can be authorised to act only in circumstances where the donor loses legal capacity or the authority to act may commence immediately.

When used correctly an EPA is a prudent safeguard; the attorney has authority to make financial decisions on another person’s behalf that that person is unable to do due to illness or loss of capacity.3 Unfortunately, when misused, EPAs can lead to considerable financial and/or property losses.4 Pitfalls associated with EPAs include issues of accountability, transparency and vulnerability to abuse.5 As Wuth argues,6 the lack of scrutiny of EPAs enhances the likelihood for financial abuse.7 This statement is borne out by findings that nominate powers of attorney as one of the main sources of financial abuse.8

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1 Brennan v The State of Western Australia [2009] WASCA 19.
3 In some states and territories EPAs extend to medical and other lifestyle decisions this is not the case in Western Australia; Nick O’Neill and Carmelle Peisah, ‘Chapter 10 – Enduring Powers of Attorney’ Capacity and the Law (Sydney University Press Law Books, 2011) 12.
7 Ibid 7.
Abuse of EPAs is directly relevant to the security of tenure issue as such abuse can lead to older people losing their home and/or savings at a time in their lives where they are unlikely to recoup these losses.

Like family accommodation arrangements, EPAs have the potential to undermine an older person’s financial position thus, in turn, eroding security of tenure. Given that the attorney is almost invariably a person in a close personal relationship with the older person (the donor), the arrangement is more than an arm’s length legal relationship. Indeed the complexities of family relationships make abuse of EPAs difficult to detect and litigation makes obtaining an appropriate remedy financially and emotionally arduous.

The law in relation to EPAs is unsatisfactory and has been for a considerable time. Despite recommendations in Commonwealth and State enquiries that have highlighted the inadequacy of the ‘system’ regulating EPAs there is an apparent reluctance for the legislature – in Western Australia and elsewhere - to grasp the issue. This Study makes several recommendations aimed at improving the regulation of EPAs and, in the process, diluting opportunities for abuse. Sadly, few of the recommendations are new and are overdue for implementation. Instances of financial abuse of seniors are increasing and in the view of the research team, it is untenable for the present inertia associated with regulation of EPAs to continue and legislative reform is obligatory.

Vulnerabilities associated with EPAs

In 2011, the Crime Research Centre undertook extensive research on elder abuse in Western Australia. The study identified financial abuse, largely enabled by the misuse of EPAs, as the most commonly mentioned form of abuse.

It must be said there are real advantages in entering into an EPA. An EPA provides for greater certainty in the event of an unforeseen event or disability which affects decision-making capacity. A donor can give authority to a donee that they trust to make decisions on their behalf in these circumstances. Consequently, the primary benefit of an EPA over an ordinary power of attorney is that it may continue to operate after the donor loses capacity. Similarly, an EPA may also provide continuity in the management of a donor’s affairs following a sudden illness or disability, minimising any consequent financial detriment. The donor may also be able to have greater

9 See Chapter 9.
10 This conclusion has been reached on many occasions, for example: Joseph Barber, ‘The Kids Aren’t All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes’ (2008) 16(1) The Elder Law Journal 108.
11 Mike Clare, Barbara Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia (Research Report, The University of Western Australia, April 2011) 1, 53.
12 Ibid, 2: “Misuse of Enduring Powers of Attorney was the most frequently mentioned financial abuse issue, followed by the perceived responsibilities of Banks to increase protection of vulnerable older people’s accounts.” Recently Byron Cannon has noted that “Thirty-two percent of recent cases in the Queensland Civil and Administration Tribunal related to financial abuse under enduring powers of attorney with the dollar amounts adding up to millions”: Byron Cannon Enduring Powers of Attorney – Financial Abuse 17 December 2013 Australian Estate Law Today< http://www.australianestatelawtoday.com.au/tag/elder-abuse/>.
13 Guardianship and Administration Act 1990 (WA) s 105.
14 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 5, 70.
control over their future affairs by placing limits on the attorney’s authority at the time of executing the EPA.\textsuperscript{15}

Unfortunately, however, there are pitfalls associated with the use of EPAs. Financial abuse is a concern which an EPA seeks to ameliorate. In theory, the donor can ensure that decisions which affect their finances and assets are in the hands of people that they trust. Conversely, the opportunity for financial abuse, fraud and unconscionable conduct is self-evident. Cannon lists several examples of conduct that can indicate improper behaviour on the part of the Attorney:

• If they are withdrawing funds from the principal’s bank account and using them to purchase goods purely for their own use and or benefit;
• If they have sold the principal’s house without their knowledge or without providing them with alternative accommodation;
• If they are giving away or selling the principal’s possessions inappropriately;
• If they have chosen accommodation or care for the principal which is unsafe or obviously inappropriate;
• If they are engaging in illegal activity, for example defrauding the principal or physically harming them;
• If they have transferred the principal’s house into their name without the principal’s knowledge or consent.\textsuperscript{16}

The \textit{Older People and the Law} report of 2007 prepared by the House of Representatives Standing Committee on Legal and Constitutional Affairs (hereafter ‘Committee Report’) noted the potential for elderly abuse in regards to EPAs.\textsuperscript{17} The report noted the possibility of an elderly person being pressured or misled into signing an EPA.\textsuperscript{18} One submission noted that elderly clients reported that they did not understand what they were signing when making their EPA, or were told to sign it by family members via inducement, coercion, or intimidation, or that they signed it at a time of vulnerability whilst ill.\textsuperscript{19}

Furthermore, there may be situations where the attorney simply neglects to fulfil their duties under the EPA, either wilfully or due to ignorance.\textsuperscript{20}

The Northern Suburbs Community Legal Centre prepared a powerful report in 2010 in response to many issues of elder financial abuse evinced in cases referred to the centre. \textsuperscript{21}Noting the findings regarding EPAs in the Older people and the Law report, and the government’s response to the relevant recommendations, the NSCLC made several pertinent recommendations and urged the state government to act on the issue of misuse of EPAs. Unfortunately, to date these recommendations have not been acted upon.

\begin{footnotes}
\footnote{15}{Ibid.}
\footnote{17}{House of Representatives Standing Committee on Legal and Constitutional Affairs, \textit{Parliament of Australia}, above n 5.}
\footnote{18}{Ibid 80.}
\footnote{20}{Ibid.}
\footnote{21}{Johnson, n 4.}
\end{footnotes}
The chapter commences with a summary of our findings and responses from our interviewees. The chapter continues with a brief description of the legal framework surrounding EPAs and highlights shortcomings in the law through case studies of circumstances where misuse of EPAs has resulted in an undermining of legal and ontological security of tenure. The remedies presently available are examined and recommendations made regarding amendments to the *Guardianship and Administration Act 1990 (WA)* and the future regulation of EPAs.

**Summary of findings**

It is not an exaggeration to say that the abuse of EPAs for financial gain is a pervasive and mounting problem. A donee of an EPA wields considerable power over an older persons affairs; such transactions are easily entered into and many people do not understanding the potential for misuse.

The principal hazard is financial abuse as the donee may misuse his or her powers to transfer or otherwise deal with the donor’s property and assets. Indeed, financial abuse of older people is enabled by the lack of a coherent, national framework regulating EPAs. In our view, national legislation should be introduced as a matter of priority. There should also be a national approach to determining capacity.

If a national approach is not forthcoming, Western Australia should take on a lead role. The resultant framework should include a consistent and cooperative system regarding EPAs including national uniformity of laws; mandatory registration and auditing and standardised statutory EPA forms.

We are also of the view that there should be amendment of the *Guardianship and Administration Act 1990 (WA)*. These amendments should include:

- Explicitly stating the duties of the donee in the legislation;
- Impose penalties for breaches thereof;\(^\text{22}\)
- a mechanism by which the donee must compensate the donor or the donors estate for losses arising from an EPAs misuse;
- a presumption that transactions arose through the undue influence of the donee.\(^\text{23}\)

Alternative, low-cost methods of resolving EPA disputes through mediation should be explored In addition, SAT should have jurisdiction in relation to any cause of action, or claim for equitable relief available to an aggrieved donor or his or her representative. This includes jurisdiction in relation to additional provisions recommended below regarding abuse of the powers of the donee. SAT should also have the right to order any remedy that would be available in the Supreme Court.

We believe there should be more community education to ensure older people are aware of the nature of an EPR and the Indeed, we are of the view that it should be essential to seek legal advice before entering into an EPA.

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\(^{22}\) A similar provision could be introduced to s 35 of the *Guardianship and Administration Act 2000 (Qld)* that makes it unlawful for a substitute decision maker to exercise powers other than honestly and with reasonable diligence,or contrary to the terms of their appointment. The practical effect of these provisions is to make it an offence in Queensland for substitute decision makers to fail to perform two of their fiduciary duties rather than to create entirely new wrongs.

\(^{23}\) Powers of Attorney Act 1990 (Qld), s 87.
What the interviews revealed

There is no doubt that problems associated with misuse of EPAs are of concern. Most interviewees have all experienced loss through an EPA although two were close relatives of people who had experienced losses and, as a result, those people lost assets too. For example, in one case an 82 year old woman was tricked into signing a document nominating her son as EPA. The son used the EPA to take money from the older woman’s bank accounts. A considerable amount of money disappeared. The woman only realised there was a problem when there was no money to pay bills. In another case an EPA was used to sell a property while the donor was in hospital.

The first point to make is that, until something went wrong, there was little understanding of the legal significance of an EPA. It is regarded as “a bit of insurance” while people were ill “in case something went wrong.” It is clear more education should be provided to alert seniors to the legal effect – and risks – of EPAs. In addition, EPAs are provided to people who the interviewees trusted; the inherent trust the donor has in the done may conceal early indications of financial abuse. As one respondent said:

“I went overseas in 2011 and I gave my son a power of attorney in case something happened to me while I was away. After I got back I didn’t think about cancelling it or anything. Then I realised that money was disappearing from my account. I checked another account I never touch and it was practically empty.”

Interview EPA 6

The legal framework

The Guardianship and Administration Act 1990 (WA)

At present, there is no national scheme regulating EPAs and each state and territory has its own legislation regulating their use. Obviously, while there is some consistency, these acts are far from uniform making for a patchwork of laws relevant to EPAs across Australia.

The relevant Western Australian legislation regulating EPAs is the Guardianship and Administration Act 1990 (WA) (hereafter ‘the Act’). Part 9 of the Act addresses Enduring Powers of Attorney. Pursuant to s102, ‘enduring power of attorney’ means a power of attorney created under section 104 or recognised by the State Administrative Tribunal under section 104A(2).

Who can enter into an EPA?

A person (the donor) must be 18 years and over to create an EPA. The EPA must be in the form prescribed under the Guardianship and Administration Act 1990 (WA) (hereafter ‘the Act’). The donor must specify whether the EPA will continue in force notwithstanding subsequent legal incapacity or will only come into force during periods declared by the SAT.

Scope of Authority

24 Interview EPA 11
25 Interview EPA 8
26 Interview EPA 5
27 Interview EPA 12
28 Guardianship and Administration Act 1990 (WA) ss 102 – 110.
29 Guardianship and Administration Act 1990 (WA) s 104 (1A).
30 Ibid s104 (1)(a).
31 Ibid s 104(1)(b). The specified donee must be 18 years and over and possess full legal capacity. There must be two attesting witnesses for the EPA to be effective.
The power of a donee (the attorney) is limited to making decisions regarding property and financial matters.\(^{32}\) This includes both day-to-day decisions relating to budgeting in addition to long-term matters such as the sale of property.\(^{33}\) Consequently, in WA, an attorney cannot do anything which would usually involve the donor’s discretion, such as voting or making a will.

**Statutory obligations**

The obligations of the attorney are designated under s 107 of the Act.\(^{34}\) The attorney must exercise their power under the EPA with ‘reasonable diligence to protect the interests of the donor’.\(^{35}\) If the attorney fails to do so, and a loss results, they may be liable to account for that loss. The attorney must also maintain accurate accounts of dealings and transactions made under the EPA.\(^{36}\)

**Fiduciary obligations**

The attorney owes a fiduciary duty to the donor.\(^{37}\) This duty arises due to the comparative position of vulnerability of the donor *vis-a-vis* the attorney, the reliance of the donor on the attorney and the consequent protection which is required.\(^{38}\)

**Intervention by the State Administrative Tribunal**

The State Administrative Tribunal can make certain orders regarding EPAs.\(^{39}\) It has been noted that Parliament has given the SAT a general supervisory jurisdiction in respect of the conduct of donees of enduring powers of attorney.\(^{40}\) This jurisdiction can be exercised even if the donor is deceased or has legal capacity.\(^{41}\)

A person who has, in the opinion of the Tribunal, a proper interest in the matter may apply to the Tribunal for certain orders.\(^{42}\) Such orders can:

- Require the donee to file with the Tribunal and serve on the applicant a copy of all records and accounts kept by the donee of dealings and transactions made by him in connection with the power;\(^{43}\)
- Require such records and accounts to be audited by an auditor appointed by the Tribunal and requiring a copy of the report of the auditor to be furnished to the Tribunal and the applicant for the order;\(^{44}\) or
- Revoke or vary the terms of an enduring power of attorney, appointing a substitute donee of the power or confirming that a person appointed to be the substitute donee of the power has become the donee.\(^{45}\)

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32 Department of the Attorney General, Office of the Public Advocate, Government of Western Australia, above n 2, 20.
33 Ibid.
34 Guardianship and Administration Act 1990 (WA) s 107.
35 Ibid.
36 Ibid.
37 Breen v Williams (1996) 186 CLR 71, 93.
38 Re OAC [2008] QGAAT 72 (14 October 2008) [17].
39 Guardianship and Administration Act 1990 (WA) s 109. The Supreme Court has inherent jurisdiction. See too Ibid. s 3A.
40 (KS [2008] WASAT 29 at [26] [31] [37] and [47] [59]. See too EW [2010] WASAT 91.
41 Given that an attorney (donee) remains accountable to the donor for the dealings and transactions undertaken in connection with the power conferred by the enduring power of attorney. Guardianship and Administration Act 1990 (WA), ss109(1), 109(2) and 110.
42 S.109(1).
43 S.109(1)(a).
44 S.109(1)(b).
45 S.109(1)(c).
A donee may apply to the Tribunal an order under s109(1)(c) to revoke or vary the terms of an EPA or for directions as to matters connected with the exercise of the power or the construction of its terms.

It has been noted that:

- The orders that WASAT may make are limited in nature. They do not include the power to make declarations as to the capacity of a maker of an enduring power of attorney or as to the validity of an enduring power of attorney.

**Relationship with real property legislation**

The provisions of the Act do not affect the operation of Part VIII of the Property Law Act 1969. Notwithstanding Part VI of the Transfer of Land Act 1893, an enduring power of attorney that is in force shall be effective for the purposes of that Act as if it were in the form provided for by section 143 of that Act. There is no formal registration process for EPAs in Western Australia although EPAs may be lodged with Landgate, which would allow an attorney to conduct transactions relating to the donor’s property.

**How EPAs are abused – an overview of the relevant case law**

The methods of abuse and the conduct of errant donees is documented in many decided cases. Nevertheless it is instructive to examine some of the major decisions. Wuth rightly notes that:

An investigation of the recent cases in Australia demonstrates that the common thread is the existence of a family member, friend, caregiver or trusted professional in whom the elder has placed trust and confidence. However, in the majority of cases, the elder is physically, emotionally and or physiologically dependent on the caregivers. In other situations, the elder may have once been perfectly capable of handling their financial affairs but dementia, strokes or other ailments have caused them to lose interest and ability in such matters (footnotes omitted).

**Brennan**

The leading Western Australian case is Brennan v The State of Western Australia. In this case, a legal practitioner, Mr Brennan became the donee of an elderly man, Mr Kopec, under an EPA. Mr Kopec was a Polish immigrant with failing mental and physical health. Under the agreement, made in 2000, Mr Brennan operated Mr Kopec's bank account and bought and sold property. Over a period of time, Mr Brennan stole $767,245 of Mr Kopec's money. After Mr Kopec died in 2006, Mr Brennan continued to act as his attorney and did not inform relevant financial institutions of his death. After Mr Kopec's death, Mr Brennan stole a further $129,542. Mr Brennan was convicted of stealing in addition to fraudulently attempting to gain a benefit.

Brennan’s conduct was clearly unconscionable, however, the case is significant in that Brennan was jailed for several years as a result of his fraud. Most misuse of EPAs does not result in a conviction because, as the donee

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46 S.109(2)(a).
47 S.109(2)(b).
48 Wuth, above n 6.
is usually a close family member, there is a reluctance to expose the donee to criminal prosecution. The cases underscore the problem of remedies for aggrieved donors. Like family accommodation arrangements, there is no statutory regulation in the event of misuse. Therefore plaintiffs must again navigate the vagaries of the common law and equity.

Transfers of property

In Smith v Glegg 50 the defendant, the plaintiff’s daughter, transferred her mother’s home to her son for no consideration. The defendant was the mother’s attorney under an EPA. The mother was 85 and legally blind at the time of the transfer. The court held that the mother was entitled to equitable compensation. In comparison, Watson v Watson 51 saw the Defendant transfer property to his name under power of attorney. The Court decided there had been breach of trust, as the power of attorney had been used contrary to the deceased’s intentions.

Bank accounts and property transactions

The EPAs powers to use bank accounts and engage in property transactions is illustrated in The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban 52 the Plaintiff (‘ADF’) was a 66 year old suffering from dementia and residing in an aged care facility. The first defendant was a close friend of ADF. The second defendant was married to the first defendant. In 2009, ADF appointed the first defendant his attorney under an EPA on financial and personal matters, including health matters. The first defendant persuaded ADF to open a joint account in both of their names. The first defendant executed a transfer of a property owned by ADF, allegedly because she did not think he had the capacity to do so himself. The first defendant had the second defendant collect the cheque and deposit it into the joint account. The first defendant withdrew more than $1.37 million from the joint account for her own personal benefit. The court found this constituted a conflict transaction. The plaintiff was granted summary judgement regarding the proceeds of the property paid into the joint account.

Gifts

In other cases purported ‘gifts’ to donees have been set aside. In Trevenar v Ussfeller 53 Mrs Trevenar (the plaintiff) appointed Mrs Ussfeller her enduring guardian and granted a power of attorney to Mrs Ussfeller and Thomas Edward Dawson. The first defendant wrote cheques on the plaintiff’s bank account. The plaintiff signed the cheques. The defendant claimed the cheques were gifts. The plaintiff claimed that the cheques were as a result of undue influence. The court found in favour of the plaintiff; she was 83 years old and emotionally dependent on the defendant. The ‘gifts’ were set aside. Similarly in Janson v Janson 54 the plaintiff was an elderly, old, deaf and almost blind bachelor who ‘voluntarily’ transferred his house to his nephew. The nephew was his uncle’s power of attorney. There was a presumption of undue influence which was not rebutted and the transfer was set aside.

Case Study: Scott Johnson, Elder Abuse – The need for law reform, 2010 Northern Suburbs Community Legal Centre 5

“...Our client was an elderly man who had no family or close friends in Western Australia. A woman (much younger) and in collusion with her brother took it upon themselves to become intricately involved in his personal life. The facts were that the client had sold his home and entrusted the entire proceeds (some $400,000) to an EPA on advice from the younger woman. The younger woman had requested that our client make her brother his EPA of which our client did and he also made the younger woman his executor and beneficiary in his will.”

50 [2005] 1 Qd R 561.
53 [2005] NSWSC 582.
54 [2007] NSWSC 1344.
Remedies

Statute

The Criminal Law

Clearly, misuse of an EPA can result in a breach of the criminal law. The most obvious offences would involve fraud and theft. In some cases, the misuse of the EPA may result in the donor being neglected due to funds being diverted by the donor. In such a case the donee may be liable for a breach of the failure to provide necessaries. The shortcoming here is, of course, that many older people do not report the donee to the relevant authorities.

Statutory provisions providing for compensation

In contrast to some other states, legislation in WA does not provide a right to seek damages or compensation in circumstances where an attorney has misappropriated a donor's funds. Rather, under section 109, an EPA may be revoked in circumstances where the SAT is convinced it is in the donor's best interests.55

Common Law

Breach of fiduciary duty

Radan, Stewart and Lynch state that a fiduciary relationship is a relationship of confidence and the person in whom confidence is reposed within that relationship is a fiduciary: 56

If a fiduciary abuses his or her position to obtain an advantage or benefit at the expense of the confiding party, the latter will seek relief from a court of equity to prevent such advantage accruing to the fiduciary.57

A fiduciary must act in the interests of the person to whom the duty is owed, at times described as "undivided loyalty".58

An application may be brought where an attorney obtains a profit which is in conflict with the interest of the donor.59 Moreover, where an attorney benefits from a breach of his or her fiduciary duty they are generally held accountable.

In Watson v Watson60 an elderly man granted an enduring power of attorney to his son. The son proceeded to withdraw a considerable sum of money from his father's bank account and transferred the title of the family home to himself. Less than a week later the father entered into a will that divided the property equally between his four children with the son given a right to occupy the home for life. The court discussed the nature of the defendant's duties:

59 Smith v Glegg [2004] QSC 443 [58].
60 [2002] NSWSC 919.
“The granting of the power of attorney places the defendant in a fiduciary duty in relation to the deceased, and he is required to accord priority to the interests of the deceased where there is a conflict between the interests of the two.

The use of the power of attorney by the donee contrary of the known wishes and directions of a donor is a breach of trust … The powers of attorney are specifically directed at the management of the principal’s affairs: “it is not open to attorneys to either obtain an advantage for themselves or to act in a way which is contrary to the interests of their principles.”

Section 107 of the Act also reflects the fiduciary duty. As a result of the fiduciary relationship, the attorney must perform his or her duties in good faith and with the donor’s interests in mind. Furthermore, the attorney must not allow a conflict of interest between his or her own and the donor’s interests, without full disclosure to and consent from the donor. The attorney also must not profit from his or her position, without the donor’s informed consent.

Remedies for breach of fiduciary duty require recourse to the courts. These remedies are not available in SAT and require a considerable financial outlay to pursue them. An aggrieved party may seek an account of profits, equitable compensation; the imposition of a constructive trust and/or recission.

**Unconscionable conduct**

A donee’s behaviour may result in a finding of unconscionable conduct. In *Brennan v The State of Western Australia*, the attorney, Mr Brennan, took advantage of his position to secure profits via unscrupulous transactions. He succeeded in doing so due to the donor’s poor health (and continued to do so after the donor’s death). In the case of an unconscionable transaction the donor or their representative would seek to avoid the transaction or have it set aside. This could be achieved by resisting an action for specific performance of a contract or, if the transaction has been finalised, seeking recission of the transaction. The circumstances may also give rise to the imposition of a constructive trust.

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61 Guardianship and Administration Act 1990 (WA) s 107.
63 *Hurstanger Ltd v Wilson* (2007) 4 All ER 1118.
64 Ibid.
65 *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 252.
66 Refer again to the discussion in Chapter 9.
68 See Chapter 9.
Undue influence

As discussed in Chapter 9, some relationships are presumed under law to involve undue influence, for example parent and child (although not child to parent), guardian and ward and solicitor and client. The courts have not yet recognised the relationship of donor-donee to be in this category. As a result the donor-donee relationship falls to be considered in the category of actual undue influence.

Remedies for allegations of undue influence again require recourse to the courts. Again the aggrieved party would refuse to complete or seek to have the transaction set aside.

In Queensland the Powers of Attorney Act 1998 (Qld) s 87 introduces a presumption of undue influence. The provision states:

- The fact that a transaction is between a principal and one or more of the following—
  - an attorney under an enduring power of attorney or advance health directive;
  - a relation, business associate or close friend of the attorney;
  - gives rise to a presumption in the principal’s favour that the principal was induced to enter the transaction by the attorney’s undue influence.

The consequence is that there is a presumption in favour of the donor or the donor’s estate that he or she was induced to enter into the transaction by the donees undue influence. Therefore s87 operates to create a statutory category of presumptive relationship of undue influence in the case of a gift by a principal to an attorney. Rebutting the presumption of undue influence is left to the operation of the rules of equity.

Therefore, in Smith v Glegg the defendant donee transferred her mother’s home to her son for no consideration. The mother was 85 and legally blind at the time of the transfer. The court held that the mother was entitled to equitable compensation. Applying the statutory presumption of undue influence under s87 McMurdo J said:

“The defendant must show that this transaction ‘cannot be ascribed to the inequality between them which must arise from (her) stronger position’ and that ‘the gift was the independent and well-understood act of a (woman) in a position to exercise a free judgment based on information as full as that of the donee’.”

As will be discussed in relation to our recommendations, we believe that the introduction of an equivalent to s87 in the relevant Act would be beneficial.

“I feel I was treated badly by my family. I was looking after Mum and had a power of attorney. I was only doing the things I needed to do, she really wasn’t the best but I wanted to do the right thing by her. But then my sister and brother, who never bother about Mum anyway, started to stir things up and ask what I was spending. They also were trying to say I was bludging off Mum because I was living in the house. I don’t want to be bothered anymore but I know I haven’t ripped her off and I think they are just waiting to.”

Interview EPA 1

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70 Baker & Ors v Affoo & Ors [2014] QSC 46.
71 Baker & Ors v Affoo & Ors [2014] QSC 46 (85).
72 [2005] 1 Qd R 561.
Chapter 16 – Enduring powers of attorney

**Criminal penalties**

There are no specific penalties for financial abuse of the elderly in Australian jurisdictions. These cases would be dealt with under existing criminal laws.

**Civil penalties**

At present there are no civil penalties available.

**Shortcomings in the law**

There are fundamental issues surrounded the law and governance of EPA laws in Australian and more specifically in Western Australia. Submissions to the ‘Older People and the Law Inquiry’ pointed to the general lack of awareness of EPAs as a reason why more are not implemented.\(^{74}\) This, when coupled with the fairly complex nature of the documents, acts as a deterrent to many older Australians.

The lack of uniformity of laws in Australia enhances the confusion and complicated nature of EPAs. For example, an EPA made in WA may not be recognised in other states in Australia.\(^{25}\) The donor or donees may need to apply to the relevant authorities in those jurisdictions for recognition of the EPA.\(^{76}\) Similarly, where an EPA is made under the laws of another state, the relevant parties need to apply to the SAT to recognise the EPA.\(^{77}\) The lack of recognition has been criticised as ‘senselessness resulting from regulatory inconsistency’.\(^{78}\)

Furthermore, the lack of a system of registration of EPAs in WA may create further uncertainty.\(^{79}\) It fosters a system where there is minimal monitoring of EPAs. The ‘Committee Report’ argues for a ‘national register’ to be able to effectively monitor the activity of attorneys.\(^{80}\) Of course, the donor, in circumstances where they have lost capacity, are unable to monitor the activities of the attorney.

The informal nature of the ‘system’ also does not provide for ‘checks and balances’ such as regular auditing and reporting.

There are also difficulties in seeking remedial redress for misdeeds of an attorney. Due to the lack of monitoring, an individual who believes an attorney has abused his or her power under an EPA must make an application to the SAT.\(^{81}\) In situations where the attorney is a close family member, which is common, it is difficult to ascertain who else would be aware of their actions as attorney.

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74 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 5, 72.
75 Department of the Attorney General, Office of the Public Advocate, Government of Western Australia, above n 2, 16.
76 Ibid.
77 *Guardianship and Administration Act 1990 (WA)* s 104A.
79 Department of the Attorney General, Office of the Public Advocate, Government of Western Australia, above n 2, 16.
80 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 5, 93.
81 *Guardianship and Administration Act 1990 (WA)* s 109.
In Western Australia the relevant legislation does little to assist aggrieved donors or their representatives. The EPA can be set aside upon application to SAT but there are no statutory provisions dealing with compensation or any penalties for an errant donee. Again, as is the case with family accommodation arrangements, aggrieved parties must resort to the common law or equity for relief.

As Wuth proffers, there are other practical and legal problems in seeking redress.82 This stems from the onerous standards relating to burden of proof in addition to the more practical issues of elderly and often frail plaintiffs.83 Elderly people of a CALD background may experience enhanced difficulties.84

**Recommendations**

Our recommendations reflect the opinions of many who have examined this issue before us. In many cases we can only agree and reiterate those previous findings. We are also of the view that there should be significant amendment of the Guardianship and Administration Act, or indeed separate legislation dealing with powers of attorney. These amendments would streamline and formalise the process, impose the requisite safeguards and provide accessible and appropriate remedies for aggrieved parties.

- **National uniformity of laws regulating EPAs**

A lack of uniformity across the states unnecessarily adds greater complexity to already inaccessible laws. A national body of laws would assist in the proliferation of information and in creating a more consistent approach to combating abuse of EPAs.85 The ‘Committee Report’ calls for national laws and mutual recognition.86 Johnson argues that this process would simplify and modernise the laws and facilitate the smoother transition of EPAs across Australia.87

- **Mandatory registration and auditing of EPAs**

One of the recommendations of the ‘Committee Report’ is to establish a national register of EPAs.88 As Johnson asserts,89 this may be one potential way to minimise the potential for abuse and financial exploitation. As a corollary, Johnson also argues for the requirement that a potential donor seek independent advice before executing an EPA.90 Other commentators proffer that a process of verification for the donee would enhance accountability,91 and more generally improve the management of EPAs.92

> “While Australians now move around the country with increasing regularity, many of the laws that affect how they interact with other people are state and territory laws that do not operate beyond the boundaries of a particular state and territory. Devising workable ways of ensuring that many important laws operate nationally is one of the great public policy challenges facing our federal system of government in the 21st century.”

Chapter 16 – Enduring powers of attorney

• National approach to capacity

The ‘Committee Report’ also calls for a national approach to determining capacity.\textsuperscript{93} Some have criticised the nature of determining capacity as ‘subjective’ and ‘ad hoc’.\textsuperscript{94}

• Increase awareness for prospective donors and donees

Education in relation to the rights and obligations of donors and donees appears to be lacking. Many interviewees simply did not understand the consequences of the EPA. An awareness campaign aimed at the general public and at financial institutions.\textsuperscript{95}

• Standardised statutory EPA forms

Amendments to the Western Australian legislation

In the absence of a central register of EPAs Western Australia should introduce a registration system for EPAs. Again, there should be a requirement that the potential donor seeks legal advice.

There should be consideration as to whether a new act should be introduced focusing solely on powers of attorney. Whether there is a new act or amendments to existing legislation the following provisions should be incorporated:

• There should be an offence under act in relation to a breach of duty or misuse of the donee’s powers. The duties of the donee should be set out in the legislation and a penalty imposed for breach thereof.\textsuperscript{96}

• A provision equivalent to s 87 Powers of Attorney Act 1998 (Qld) should be introduced that introduces a presumption that property transfers are subject to undue influence. Indeed, such presumption could be extended to include instances of unconscionable conduct.

• The legislation should contain a mechanism by which the donee must compensate the donor or the donor’s estate. In Western Australia the donor or their representative must go to SAT to revoke the EPA. This is of little effect and necessitates that the aggrieved donor must pursue the matter through the courts.

Such a provision could be modelled on s106 of the \textit{Powers of Attorney Act 1998 (Qld)}. Pursuant to s 106 an attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal’s estate) for a loss caused by the attorney’s failure to comply with this Act in the exercise of a power. Under the immediately following provision, s 107 (headed \textit{Power to apply to Court for compensation for loss of benefit in estate}), if a person’s benefit in a principal’s estate under a will or on intestacy (or by other disposition) is lost because of a sale of other dealing with the

\textsuperscript{93} House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 5, xviii.

\textsuperscript{94} Johnson, above n 4, 23.

\textsuperscript{95} House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 5, xvii xix.

\textsuperscript{96} A similar provision could be introduced to s35 of the Queensland legislation that makes it unlawful for a substitute decision maker to exercise powers other than honestly and with reasonable diligence.

principal’s property by an attorney, that person may apply to the Supreme Court for compensation out of the principal’s estate.  

Finally, there should be further investigation and research into:
- The effectiveness of current and alternative methods of resolution.
- Whether SAT should have jurisdiction in relation to any cause of action, or claim for equitable relief available to an aggrieved donor or his or her representative. This includes jurisdiction in relation to additional provisions recommended below regarding abuse of the powers of the done.
SAT should also have the right to order any remedy that would be available in the Supreme Court.

**Make elder financial abuse a crime**

A common theme throughout this Study has been concern regarding the increasing incidence of elder financial abuse. Under the criminal law, there are no specific offences targeting abuses against the aged. However, the age of a victim may be taken into account as a circumstance of aggravation. Specific criminalisation of elder financial abuse would provide additional statutory protections to older persons. Although many crimes perpetrated against older persons (in this case, fraud or theft) are already found in the criminal law, there are distinct advantages in creating equivalent offences that focus on older persons. Policy and attitude barriers amongst law enforcement authorities mean that the circumstances of many abused or neglected older adults are not treated as crimes.

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97 Public Trustee of Queensland v BN and Ors [2011] QCAT 666.
98 For example, in Western Australia, the age of the victim is an aggravating circumstance in certain offences against the person. Equivalent provisions operate in other Australian jurisdictions. Section 262 of the Western Australian Criminal Code, meanwhile, creates a special duty of care to provide the “necessaries of life” where someone is in charge of another person who cannot remove themselves from that charge.
99 Indeed Wuth (n 6) states that:

*Stronger and specific laws are required to adequately address the severity of this crime. To overcome the inherent difficulties associated in the prosecution of financial abuse of the elderly, it is suggested that a general offence for the misappropriation of assets should be introduced in all states and territory corresponding criminal codes. Criminalising such behaviour will facilitate greater accountability and serve as a form of prevention of financial exploitation of elders.*
Chapter 17

Seniors experiencing consumer fraud, credit and other financial issues

This chapter identifies a number of areas where seniors may be particularly exposed to financial detriment. Such exposure has the potential to impact upon their ability to pay for basic needs including housing.

The chapter considers consumer fraud, difficulties consumers face in seeking redress for defective goods and services, the pitfalls of consumer credit, the role of banks in assisting with financial literacy and in detecting financial abuse and the potential for incomplete financial advice by financial advisors.

Consumer fraud and financial crime: Scams

Older people, especially those who are socially isolated, may be vulnerable to persons with criminal intent to defraud them through theft of money or property, manipulation or through consumer frauds such as scams.

Scams vary in their complexity from the most basic confidence tricks to extremely sophisticated financial or property investment schemes, and contributions range from a small fee to obtain access to an alleged lottery prize to multi-thousand-dollar “investments.”

At face value, Australian consumer laws provide a deterrent to scammers. Prohibitions of misleading or deceptive conduct, unconscionable conduct and other, more specific prohibitions relating to, inter alia, pyramid schemes suggest a robust consumer protection regime able to address scams. Similarly the criminal law imposes significant penalties for fraudulent activity. Unfortunately, the reality is different and there are significant barriers to enforcement.

First, the effectiveness of Australian consumer and criminal laws are constrained. Although there has been some success with prosecuting domestic scams, most scams operate off-shore and the likelihood of bringing the perpetrators to justice is minimal. Smaller players may be caught in Australia but the masterminds are often overseas. Second, although there have been some successful instances of cooperation between national agencies leading to the suppression of certain scams, the logistics and expense involved will, more often than not, conspire against the meaningful pursuit of scammers. Moreover, a person who has been a victim of consumer fraud once may be likely to become a repeat victim.

“...as a demographic one characteristic increasing the vulnerability of older people to opportunistic fraud is social isolation which decreases the number of interpersonal contacts individuals have, thus increasing their reliance on impersonal modes of information. Second, because social isolation is often associated with loneliness, isolated persons may be more receptive to overtures from swindlers, simply for the opportunity to interact with someone.”

Some seniors, especially those who are experiencing social isolation may be susceptible to respond to scams:

...as a demographic one characteristic increasing the vulnerability of older people to opportunistic fraud is social isolation which decreases the number of interpersonal contacts individuals have, thus increasing their reliance on impersonal modes of information. Second, because social isolation is often associated with loneliness, isolated persons may be more receptive to overtures from swindlers, simply for the opportunity to interact with someone.¹

**Recommendation**

- More education of seniors needed to raise their awareness of the existence of scams and to help them identify scams.

**Defective goods and services**

Sometimes, when goods are purchased they are of unacceptable quality and the purchaser wanting to avoid financial loss, seeks a refund.

The remedy of rejection of defective goods is only available for a **major failure** according to the consumer guarantee in the **Australian Consumer Law**² (2011) (ACL) relating to the acceptable quality of the goods acquired³; if the

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² The text of the ACL is in schedule 2 of the *Competition and Consumer Act* (2010).
³ A failure to comply with a guarantee referred to in s259(1)(b) that applies to a supply of goods is a major failure if:
  (a) The goods would not have been acquired by a reasonable consumer fully acquainted
failure is not major the consumer is not entitled to a refund but may have the problem remedied within a reasonable time.  

When to classify a failure as major

The problem under the ACL is determining when the failure is major. The Act is confusing in determining whether a failure is major or not major. The chapter outlines why the remediability standard is a shaky one.

Unnecessary additional roadblocks for the consumer

Who will be the arbiter as to whether the failure is major or not, and thus whether there is entitlement to a refund?

The potential for argument is magnified as is the potential for any consumer but particularly, the older consumer, to be fobbed off by the supplier. Assuming the consumer is aware of their rights (probably a fanciful assumption), they will then face the hurdle of arguing their case with the supplier, and in the unlikely event it gets that far, in court. An extra layer of potential argument and opportunity for intimidation has been added.

Under previous legislation (the Trade Practices Act 1974) it was a condition that goods had to be of appropriate quality when supplied to consumers. We would suggest that the fact that the goods were defective may not in every case have resulted in a knowledgeable consumer’s insistence on a refund but would have strengthened their bargaining power in claiming some remedy. The relative certainty of the breach and its consequences afforded the consumer one less hurdle to overcome in obtaining a remedy: the hurdle of establishing the breach was major. Older consumers would have been more likely to obtain a refund when appropriate, and in that way protected their finances, indirectly ensuring the availability of funds for necessities including shelter.

Recommendation

• Our suggestion is that the major/not major dichotomy be eliminated allowing the certainty of a refund whenever goods or services are supplied in a substandard manner. In this way, consumers, particularly older consumers will be less likely to suffer a financial loss that could impact on their ability to afford some of their basic requirements.

...
Consumer credit

Although there is some evidence that older consumers may be more conservative in their borrowing behavior than younger ones\(^6\), there remains the potential for hardship and stress due to unmanageable credit debt. The consumer credit legislative regime contains provisions intended to prevent this happening.

Under the responsible lending provisions of the National Consumer Credit Protection Act (NCCPA) a lender must:
- make reasonable enquiries about the consumer’s requirements and objectives in relation to the credit contract
- make reasonable enquiries about the consumer’s financial situation and take reasonable steps to verify this.\(^7\)

A credit contract will be unsuitable if a consumer can only comply with their financial obligations with substantial hardship. It will be a substantial hardship if a consumer needs to sell their principal place of residence in order to comply with their financial obligations.\(^8\)

Despite these provisions the possibility of the formation of unjust credit contracts exists and there is a provision that allows for the re-opening of these contracts in light of the existence of various factors listed in the provision.\(^9\) Weight given to particular factors is a matter for the discretion of the court.

Given that a borrower must undertake expensive private litigation for the reopening of an unjust contract, it would be preferable if there were a stand alone provision making a contract unjust\(^10\) if a lender knew that, when the contract was formed, repayments would cause substantial hardship. Not only would this be a clear disincentive to lenders to enter unjust contracts, but the law would be easier for the older consumer to understand and provide a more straightforward case for any legal representative to argue

Recommendation

- We need to consider the adoption of the suggestion of the NSW Consumer Credit Legal Centre and single out the debtor’s inability to pay, or to pay with substantial hardship, as sufficient for a contract to be unjust and reopened.

\(^7\) S130.
\(^8\) S131(3), s141.
\(^9\) S76(1) NCC.
\(^10\) Interview with Karen Cox, Principal Solicitor Consumer Credit Legal Centre(NSW) (2007) as reported in Gibson & Rochford Emerging Consumer Credit Issues for Older Australians[2008]12(1) University of Western Sydney Law Review 10.
Credit cards

There is anecdotal evidence from the NSW Consumer Credit Legal Centre\textsuperscript{11} that increasing numbers of older consumers are asking for help with and advice about repayment of credit card debt. Financial counsellors also report older people struggling with credit card debt. The Financial Counsellors Association of WA has documented increasing numbers of those over 65 seeking help with credit problems.\textsuperscript{12}

In 2012 it became unlawful for a borrower to receive unsolicited invitations to accept an increase in their credit limit. This obviated problems which had arisen whereby borrowers were unable to service debts which had been incurred by the provision of credit to them which was unmanageable.

Nevertheless problems with credit card repayment continue, particularly for older consumers. Often debt becomes unmanageable because the circumstances of consumers change—their health deteriorates, a spouse dies, their rent increases and they have to move etc.

Recommendations

- Lenders need to be proactive in identifying borrowers who suffer hardship. Instead of waiting for borrowers to come forward and apply for special consideration (they may never come forward); lenders need to approach them offering help and solutions. This is particularly the case with older borrowers who may tend to “suffer in silence”.
- At the same time as credit cards are advertised in the media there should also be mention made in the advertisement of the availability of assistance from financial counsellors in managing credit card debt. This could be included as a mandatory requirement in the NCCPA.\textsuperscript{13}

Loans, small loans, payday lending, predatory lending

Ironically, as a result of the responsible lending regime under the NCCPA, credit from mainstream sources may in some cases be denied those who need it and they may be forced to approach payday lenders who in some cases are predatory lenders. Older people who are retired may not qualify for a mainstream loan because of a lack of an acceptable level of income.

Short term credit contracts are only covered to a limited extent by the NCCPA. According to section 6(1)(a) the Act will not apply to a credit contract that limits the period to which credit will be provided to 62 days or less. However according to s6(1)(b)-(c) if the fees and charges exceed 5% of the loan or if the interest rate exceeds 24% the Act will apply. Clearly the opportunity exists for short term lenders to avoid the operation of this section and offer loans which are beyond the reach of the Act. These borrowers will not enjoy the protections the Act offers and will inevitably be subject to an arrangement the terms of which are worse than those

\textsuperscript{12} Interestingly the Consumer Credit Legal Service of WA has not identified any spike in the number of older people seeking their help.
\textsuperscript{13} The number of seniors calling the Association’s 1800 number has doubled in 2012-2013.

\textsuperscript{13} There is an analogy here with the mandatory warning on cigarette packaging that smoking causes lung cancer.
contained in credit contracts entered into by those who are better off! The consequences of default can be catastrophic.

There are alternatives to commercial credit which need to be promoted and expanded. The chapter explores some of these. Older people need to be made aware of these and encouraged to make use of them where needed.

**Recommendations**

- Alternatives to mainstream banking need to continue to be developed and promoted amongst all borrowers, including older ones.
- It is important that the existence of these alternative lending sources is promoted as widely as possible with the help of Centrelink, financial counsellors and perhaps local members of parliament.

**Banking**

The Australian Bankers Association (ABA) has encouraged the development of financial literacy programmes by their members and we applaud this. However, rather than a generic approach, there must be a specific focus on older bank customers.

Bank staff also need to be taught how to recognise vulnerability in older customers and what to do about it. Strategies for detecting lack of capacity of a customer must be further developed.

Such strategies began to be developed in a number of states the USA in the 1990s particularly directed at training bank employees to identify banking activity that might signify elder abuse.

Drawing on the American initiative Australian banks have begun to focus more on this issue. The ABA has formulated a useful guideline *Protecting Vulnerable consumers from Potential Financial Abuse* to help staff identify financial abuse of the banks customers. Also notable is the elder abuse project run by Bendigo Bank, Clayton Utz and the Loddon Campaspe Community Legal Centre is directed at improving training of bank employees to develop efficient procedures to detect financial abuse of older customers. This needs to be further developed and the strategies used more widely.

Vulnerabilities in older bank customers can make them easy prey for those close to them as well as those more removed. The severe financial consequences that may ensue, can potentially cause irreparable financial damage to them, necessitating catastrophic lifestyle changes.

**Recommendations**

- The banks need to be encouraged to develop better strategies to convey the message to older customers that financial literacy is important for everyone.
- The banks need to make it a priority to partner with peak seniors bodies to better address the issues of financial literacy and the identification of elder abuse by their employees.

• Although the ABA Guidelines are welcomed, more needs to be done in suspected cases of elder abuse. Identification of them is futile if there is no mandatory reporting protocol. Indeed banks and police should be encouraged to liaise in cases of suspected elder financial abuse.

Financial advisors

The Coalition government’s proposed amendments to the former Labour government’s laws governing financial advice will result in less protection for investors and have the potential to confuse and disadvantage older investors. Older investors are more likely to be retired and more reliant than their younger counterparts on the income from their investments. Ill informed decisions by them on their investments can have catastrophic financial consequences.

The amendment that is most disadvantageous to investors is the one that weakens the advisors legal obligation to act in their client’s best interests.

The problem is that advisors will be absolved from taking a holistic approach to an investor’s finances and in a sense will be providing generic advice in a vacuum. Investors will be encouraged to make decisions based on incomplete advice and may not deliver the best outcomes. This will affect all investors but will potentially be more detrimental to older investors because of their relative inability to recover from financial setbacks.

Recommendation

• The proposed amendments to the Future of Financial Reforms (2013) need to be more carefully reconsidered in light of their potential impact on older investors.

“Financial counsellors are of the view that many of these customers feel they need to deal with any problems themselves and do not want to give any impression of incompetence or inability to cope.”

Interview FC WA 1

15 Labour’s Future of Financial Reforms (FoFA) These were introduced in July 2013.
16 www.smh.com.au/money/planning/financial-advisers-have-most-to-gain-in-proposals “... some of the worst financial planning disasters have been where only one type of advice was provided”.
17 Alan Kirkland from Choice Magazine was reported in the Australian Business with the Wall Street Journal on-line “If you get financial advice it should be in your best interests,” he said. “If an adviser is charging you fees they should be required to tell you about that and get your agreement. And the advice they give you should not be based on which products they’re being funded to push. It should be based on what’s best for you. The only groups that are arguing for financial consumer protection to be watered down are the big banks and the representatives of the investment industry.” http://www.theaustralian.com.au/business/latest/choice-boss-warns-on-fofa-rollback/story-e6frg90f-1226926660300.