A PROPOSAL TO GIVE STATE AND TERRITORY TRIBUNALS JURISDICTION TO RESOLVE 'ASSETS FOR CARE' DISPUTES

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This article explores a proposal for a new 'assets for care' jurisdiction in state and territory tribunals. Older persons who have lost their homes (or other assets) under 'assets for care' arrangements could seek effective redress in state and territory tribunals, to regain assets which were lost ('the new jurisdiction'). The Australian Law Reform Commission's 2017 report, titled Elder Abuse: A National Legal Response has previously recommended such a new 'assets for care' jurisdiction be introduced, which is more accessible for older persons to obtain a remedy in these circumstances. However, the key features of enabling legislation for the new jurisdiction (ie how it would work in practice) have not yet been articulated as a single body of work. This article addresses that gap by providing a 'legislative roadmap', which policymakers could follow to implement new laws conferring an 'assets for care' jurisdiction on tribunals. This 'legislative roadmap' comprises key recommendations as to its features, which are discussed in the article. A new jurisdiction is necessary to overcome problems with the existing law, whereby older persons do not have effective redress to regain their assets when they are lost under 'assets for care' arrangements.

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I INTRODUCTION

Older Australians have lost their homes (and other assets) when so called 'assets for care' arrangements[1] have not worked out.[2] Under these arrangements, older persons transfer legal title of their assets (often a family home) to a friend or family member, in exchange for care.[3] However, if these arrangements breakdown — as they have a tendency to because parties do not 'consider the long-term consequences',[4] and they are made between friends and family[5] — older persons can lose significant assets which they have transferred.[6] Frequently, no contract will have been made between the parties which makes provision for what should happen.[7] While it might be expected that existing laws would thus step-in to safeguard the older persons' rights in such cases by providing appropriate and accessible remedies, this is unfortunately not the case. Existing laws fail in this regard, as has been established by anecdotal and case law evidence discussed in

1 'Assets for care' arrangements are sometimes also referred to as 'family agreements', 'private care agreements', 'personal services contracts', or 'lifetime care contracts': see Seniors Rights Victoria, *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (Report, 2012) 32 <http://seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf> ('*Assets for Care*'). The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle: at 2.

2 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 203–4 [6.3] ('*ALRC Report*'): 'there can be serious consequences for the older person if the promise of ongoing care is not fulfilled, or the relationship otherwise breaks down. … The older person may be left without money or even a place to live, a kind of financial abuse identified by many stakeholders as financial abuse'.

3 Ibid 203 [6.1]. See also Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse through Assets for Care Arrangements?' (2016) 22(1) *Canterbury Law Review* 120, 121–2 ('What Role for Real Property?'), citing Eileen Webb, 'Explainer: What Is Elder Abuse and why Do We Need a National Inquiry into It?', *The Conversation* (online, 25 February 2016) <https://theconversation.com/explainer-what-is-elder-abuse-and-why-do-we-need-a-national-inquiry-into-it-55374>; Teresa Somes and Eileen Webb, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33(2) *Law in Context* 24, 25 ('What Role for the Law?'); Seniors Rights Victoria, *Assets for Care* (n 1) 32.

4 Rosslyn Monro, 'Family Agreements: All with the Best of Intentions' (2002) 27(2) *Alternative Law Journal* 68, 70. See also Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' [2002] 81 (Spring) *Reform* 29, 30 ('Care Agreements'); Margaret Isabel Hall, 'Care for Life: Private Care Agreements between Older Adults and Friends or Family Members' (2003) 2 *Elder Law Review* 1, 2 ('Care for Life').

5 Hall, 'Care Agreements' (n 4) 31; British Columbia Law Institute, *Private Care Agreements Between Older Adults and Friends or Family Members* (Report No 18, March 2002) 10, 23 ('*BCLI Report*'). See also Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (2019) 12(1) *Elder Law Review* 1, 23.

6 *ALRC Report* (n 2) 203–4 [6.3]. In particular, the other party might outright refuse to return the transferred assets, or may not be in a position to do so because they have transferred or dissipated them. See also Somes (n 5) 31.

7 Monro (n 4) 68, citing *Balfour v Balfour* [1919] 2 KB 571: 'It is a well-established principle that family agreements are not usually contractual in character or intended to create legal relations'. See also *ALRC Report* (n 2) 206 [6.14]: 'When things go wrong, a failure to clearly document the agreement may mean that the agreement is unenforceable'; Hall, 'Care Agreements' (n 4) 32; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 139 [4.15] ('*Older People and the Law*').

the literature.[8] The equitable doctrines on which older persons must rely for a remedy may technically be able to provide a remedy (equity sees to that), but do not do so in many cases as older persons are unable to bring these proceedings in the superior courts due to the costs and time this takes.[9] Further, these doctrines are not arguable in assets for care cases which do not satisfy the elements of the relevant cause of action.[10]

Accordingly, the Australian Law Reform Commission ('ALRC') has recently recommended a new 'assets for care' jurisdiction be introduced in state and territory tribunals, which is more accessible for older persons to obtain a remedy.[11] Recommendation 6–1 of its 2017 report, titled '*Elder Abuse: A National Legal Response*' ('*ALRC Report*') is that: 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement'.[12] Tribunal jurisdiction would ensure redress can be more easily accessed by older persons than under the existing law administered by the courts, as tribunals are typically 'no cost' jurisdictions.[13] How this would work in practice, in terms of its key features, has not yet been articulated as a single body of work. This article addresses that gap by providing a (practical) 'legislative roadmap', which policymakers could follow to develop and implement new laws conferring an 'assets for care' jurisdiction on tribunals. This 'legislative roadmap' is in the form of a number of key recommendations, discussed throughout the article. This is a reform which ought to be seriously considered to ensure older persons have effective redress in 'assets for care' disputes.[14] The risk of older persons being exploited will persist otherwise, noting the existing laws' inadequacy,[15] and that the use of these arrangements will potentially increase as Australia's ageing population increases, and older persons

8 See especially *ALRC Report* (n 2) 209–14 [6.27]–[6.47]; Susan Barkehall Thomas, 'Families Behaving Badly: What Happens When Grandma Gets Kicked out of the Granny Flat?' (2008) 15(2) *Australian Property Law Journal* 154 ('Families Behaving Badly'); Somes and Webb, 'What Role for the Law?' (n 3); Somes and Webb, 'What Role for Real Property?' (n 3); Somes (n 5); Samuel Tyrer, '"Assets for Care" Arrangements: The Current State of the Law (and Its Weaknesses) from the Perspective of Home' (2020) 28(3) *Australian Property Law Journal* 149. For a useful discussion of some recent cases, see Tina Cockburn, 'Equitable Relief to Enforce Family Agreements' [2008] 86 (May/June) *Precedent* 41.

9 *ALRC Report* (n 2) 207–8 [6.20]–[6.24]. '[P]ursuing litigation in these cases can be prohibitively costly' and 'unsatisfactorily lengthy': at 207 [6.20]; 'such actions are lengthy processes that may take many years to be resolved': at 208 [6.24]. See also Somes (n 5) 34–8.

10 Somes and Webb, 'What Role for Real Property?' (n 3) 125–7. See also Somes (n 5) 33.

11 Recommendation 6–1 of the *ALRC Report* (n 2) is that: 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement'.

12 Ibid.

13 *ALRC Report* (n 2) 204 [6.4].

14 *ALRC Report* (n 2) 206 [6.13].

15 See especially *ALRC Report* (n 2) 209–14 [6.27]–[6.47]; Thomas, 'Families Behaving Badly' (n 8); Somes and Webb, 'What Role for the Law?' (n 3); Somes and Webb, 'What Role for Real Property?' (n 3); Somes (n 5). For a useful discussion of some recent cases, see Cockburn (n 8).

seek 'to remain in a familial and familiar environment'.[16]

This article is divided into five parts. Part I is this Introduction. Part II provides relevant background to the proposed new 'assets for care' jurisdiction. In particular, it discusses the case for the reform, which centres on problems with existing (equitable) laws — primarily, their inaccessibility to older persons — which justify introduction of a new tribunal jurisdiction. The *ALRC Report* recommending that new jurisdiction, along with the work of other law reform bodies, including in Canada, is also discussed, to demonstrate the significant attention already given to reform in this area. Part III articulates the key features of the new 'assets for care' jurisdiction as a single body of work, thereby filling an existing gap in the literature. While the discussion is approached from the perspective of Victorian law, the features articulated could apply equally to other Australian states and territories in the same way, except where stated otherwise. The existing scholarship of Somes and Webb, and of Hall, and the work of the ALRC and the British Columbia Law Institute ('BCLI'), are relied on in this part, noting their work articulated some of the features discussed. This part is the 'legislative roadmap' and contains recommendations which, as noted, policymakers could follow to develop and implement new laws conferring an 'assets for care' jurisdiction on tribunals, as recommended by the ALRC. Part IV discusses other policy responses which could address the risks faced by older persons under 'assets for care' arrangements. Education is a particularly necessary policy response, as it is directed to ensure all parties to these arrangements — older persons and their friends and families — understand the risks they present. They might thus avoid these arrangements or seek legal advice to protect their interests, and avoid future disputes.[17] Education is preventative in this way, whereas the new jurisdiction is primarily remedial. It addresses harm once it has occurred. That said, the new jurisdiction is also preventative in that its introduction would create greater awareness in the community of the risks with these arrangements.[18] Both the new jurisdiction, and education about it, are necessary policy responses for these reasons. Part V sums up.

16 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (n 7) 137–8 [4.9], quoting Law Institute of Victoria, Submission No 78 to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (13 December 2006) 5 [3.3]. See also *ALRC Report* (n 2) 204 [6.7].

17 Somes and Webb, 'What Role for Real Property?' (n 3) 146; Brian Herd, 'The Family Agreement: A Collision between Love and the Law?' [2002] 81 (Spring) *Reform* 23, 28; *BCLI Report* (n 5) 20–1; Monro (n 4) 71.

18 On the distinction between 'preventative' and 'remedial' measures, in this context: see Somes and Webb, 'What Role for Real Property?' (n 3) 129–31.

II A NEW 'ASSETS FOR CARE' JURISDICTION — A PROPOSAL

This part provides, first, relevant background to the proposal for a new 'assets for care' jurisdiction (discussing both the case for reform, and its previous consideration in law reform reports), and, second, outlines its benefits.

A *The Case for Reform*

The existing laws on which older persons must rely for a remedy in 'assets for care' cases — estoppel, undue influence, unconscionable conduct, resulting trusts and the failed joint venture doctrine[19] — are inaccessible to many older persons, who cannot afford the cost of bringing these equitable proceedings in the superior courts[20] (which currently hear these). Cost is a particularly significant barrier to redress considering that in these cases older persons may have lost a significant proportion of their assets under their failed arrangement.[21] Further, as Somes and Webb have explained: 'The diverse form and nature of individual family accommodation arrangements often do not fit neatly within available equitable causes of action [mentioned above] despite there being clear wrongful conduct',[22] which reflects that the doctrines were developed in different contexts.[23] As different elements must be satisfied under each cause of action,[24] the law is both complex for older persons to navigate and '"ill-fitted"' to the particular circumstances of 'assets for care' cases.[25] Further again, the remedies awarded may not be adequate to address the disadvantage suffered by them.[26] For example, the approach to remedies may presume the older person is not entitled to any (capital) uplift in the value of a property since entering an arrangement, but should instead receive a monetary award limited to the value of their initial contribution.[27] Somes and

19 *ALRC Report* (n 2) 210 [6.29]–[6.31]; Somes and Webb, 'What Role for Real Property?' (n 3) 125: 'At present, an older party wishing to commence an action to recover property in a failed asset for care arrangement would need to pursue an equitable cause of action, which is in turn dictated by the particular circumstances giving rise to the dispute'.

20 *ALRC Report* (n 2) 207–8 [6.20]–[6.24]. '[P]ursuing litigation in these cases can be prohibitively costly' and 'unsatisfactorily lengthy': at 207 [6.20]; 'such actions are lengthy processes that may take many years to be resolved': at 208 [6.24]. See also Somes (n 5) 34–8.

21 *ALRC Report* (n 2) 208 [6.22].

22 Somes and Webb, 'What Role for Real Property?' (n 3) 127. See also Somes and Webb, 'What Role for the Law?' (n 3); Somes (n 5) 33.

23 Somes and Webb, 'What Role for the Law?' (n 3) 29–31.

24 Somes and Webb, 'What Role for Real Property?' (n 3) 125–7. See also *ALRC Report* (n 2) 207 [6.20]: 'Proof, presumptions and remedies pose significant issues in such cases'.

25 Somes and Webb, 'What Role for Real Property?' (n 3) 122. See also Somes (n 5) 32.

26 Thomas, 'Families Behaving Badly' (n 8) 154–65; *ALRC Report* (n 2) 213 [6.42]. See also Somes and Webb, 'What Role for Real Property?' (n 3) 123, 127; Somes and Webb, 'What Role for the Law?' (n 3) 26; Somes (n 5) 32–4.

27 Thomas, 'Families Behaving Badly' (n 8) 154–65; *ALRC Report* (n 2) 213 [6.42]. See also Somes and Webb, 'What Role for Real Property?' (n 3) 127.

Webb have thus commented that older persons can be 'subject to the prospect of an uncertain and often insufficient award to enable them to "start again"'.[28]

Taken together, these problems mean that older persons struggle to access appropriate and accessible remedies under existing laws to respond to the loss of their homes and other assets under failed arrangements. The existing law is thus inadequate, as the relevant literature has demonstrated.[29] The proposal for a new 'assets for care' jurisdiction is to address these problems older persons currently face under existing laws, when arrangements fail.

Regarding a theoretical basis for law reform in this area, Somes has argued compellingly that the problem should be conceptualised through the lens of 'vulnerability theory' (rather than through 'the "elder abuse" paradigm').[30] According to this conceptualisation, the obstacles older persons face in seeking a remedy under existing laws (complexity, expense and delay, etc) represent particular vulnerabilities.[31] These vulnerabilities justify law reform, namely the introduction of a new cause of action to ensure older persons have equal access to the law and so are protected in 'assets for care' cases.[32] Somes applies a particular form of vulnerability theory, being the 'refined taxonomy of vulnerability' proposed by Rogers, Mackenzie and Dodds.[33]

28 Somes and Webb, 'What Role for Real Property?' (n 3) 127. 'The problem is that, when such arrangements break down, there is a lack of legal recourse for the older person that will see a person almost invariably left without funds, accommodation and care': at 123. See also Somes and Webb, 'What Role for the Law?' (n 3) 26: 'any relief is, for the most part, insufficient for the older person to "start again"'. '[T]he remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation': at 50.

29 See especially *ALRC Report* (n 2) 209–14 [6.27]–[6.47]; Thomas, 'Families Behaving Badly' (n 8); Somes and Webb, 'What Role for the Law?' (n 3); Somes and Webb, 'What Role for Real Property?' (n 3); Somes (n 5).

30 Somes (n 5) 3. This article 'critiques why the "elder abuse" paradigm is not the appropriate framework for analysis and explains why vulnerability theory offers a more appropriate framework for isolating the need for law reform': at 3–4.

31 Ibid 32–8.

32 Ibid 15, 39:

> All of these key principles have particular relevance for the parent/donor dealing with a failed family accommodation arrangement. In particular, the recognition of the particular vulnerabilities they experience, highlights the conditions that result in a lack of equal access to the law. The conception of formal equality, relying on people being equal before the law, fails to account for the particular characteristics of individuals who, because of these characteristics, are denied access to justice. State intervention, in the form of legal reform, is therefore necessary to address the source of substantive equality and to ensure equal access.
>
> These reforms should aim to provide a statutory cause of action to avoid the complexities associated with the current law, greater emphasis on alternative dispute resolution, and a move to a tribunal forum rather that the Supreme or District Court. Law reform is therefore seen as a state response to the recognition of the particular vulnerability of a specific group and should be undertaken as a form of social responsibility.

33 Ibid 14, 21–2, citing Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11 ('Bioethics Concept of Vulnerability'). These authors theorise that vulnerability can be understood through the lenses of 'inherent vulnerability', 'situational vulnerability', and 'pathogenic, or structural vulnerability': see Somes (n 5) 21–2. See also Rogers, Mackenzie and Dodds, 'Bioethics Concept of Vulnerability' (n 33) 24–5.

The case for reform presented in the literature — and summarised above — informs the ALRC's law reform proposal for a new 'assets for care' jurisdiction (ie a whole new legislative scheme), which is this article's focus. It is also relevant to note, by way of background, the various significant law reform reports, in which such reform has received attention.

B *Key Reports*

1 *ALRC Report — 2017*

The ALRC has recently proposed a new 'assets for care' jurisdiction. Recommendation 6–1 of the *ALRC Report*, as noted, is that: 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement'. This would require that new legislation be introduced to confer the new jurisdiction on state and territory tribunals ('enabling legislation'), the key features of which are articulated in Part III.[34] The discussion of these features will be relevant to any future consideration of recommendation 6–1, noting that the Victorian government has recently undertaken to consider options to implement recommendation 6–1 as part of a national response to elder abuse agreed between the Commonwealth, states and territories.[35] Policy responses to 'assets for care' arrangements have also been considered in other fora.

2 *Western Australian Parliament Select Committee Report — 2018*

A Western Australian Parliament Select Committee has — subsequently to the *ALRC Report* — expressed the view that giving Western Australia's state tribunal (the State Administrative Tribunal) jurisdiction to resolve 'assets for care' disputes

34 The *ALRC Report* itself does not articulate all of these features which is understandable considering the breadth of issues on which the ALRC was required to report. See *ALRC Report* (n 2) 5–6.

35 In March 2019, the Council of Attorneys-General released a *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, 18 March 2019) <https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf> ('*National Plan*'). The *National Plan* is a high-level framework document guiding Australian governments' future policy responses to elder abuse, in its various forms. The *National Plan* was developed by the Commonwealth, with the States and Territories, and acquits recommendation 3 of the *ALRC Report* for 'A National Plan to Combat Elder Abuse': *ALRC Report* (n 2) 9. Of the five priority areas in the *National Plan*, a new 'assets for care' jurisdiction fits within priority area 5: 'Strengthening Safeguards for Vulnerable Older Adults', as made clear in a companion document to the *National Plan*, referred to as the *Implementation Plan to Support the National Plan to Respond to the Abuse of Older Australians 2019–2023* (Report, 8 July 2019) <https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/Implementation_Plan.pdf> ('*Implementation Plan*'). The *Implementation Plan* relevantly states (under priority area 5) that '[t]he Victorian Government will consider options to implement recommendation 6.1 of the Australian Law Reform Commission's report, *Elder Abuse — A National Legal Response*, that a state tribunal should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement': at 28 reference item 5.1.8.

'would provide an alternative pathway to justice for an older person'.[36] In a report from September 2018, titled *'I Never Thought It Would Happen to Me': When Trust Is Broken*, the Western Australian Parliament Select Committee found that: 'Assets for care arrangements carry great potential for an older person to experience financial elder abuse and older people are often left vulnerable to abuse when such an arrangement exists within a family'.[37] Further, it recommended that '[t]he Government direct the Law Reform Commission of Western Australia to inquire into the possible expansion of the State Administrative Tribunal's jurisdiction to cover disputes that involve assets for care arrangements'.[38]

3 *Commonwealth Parliament Standing Committee Report — 2007*

A Commonwealth Parliament Standing Committee has, similarly to the ALRC, contemplated new legislation in this area. In a report from September 2007, titled *Older People and the Law*, the Committee recommended that 'the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements'.[39] It recommended a detailed investigation be undertaken on '[w]hether the legislation should be implemented at the Commonwealth level or at the state/territory level, or as a cooperative scheme between the Commonwealth and the states and territories' and '[t]he provision of a mechanism to enable the courts to dissolve family agreements in cases of dispute and grant appropriate relief to the parties involved'.[40] These recommendations 'have not progressed at either Commonwealth or State level'.[41] The Rudd Labor Government responded to the Committee's report in 2009 by deferring these recommendations (for the investigation of the new legislation) to the states (instead of progressing them through the then Standing Committee

36 Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust Is Broken* (Final Report, September 2018) 104 [9.15].

37 Ibid 104 Finding 50.

38 Ibid 105 Recommendation 28.

39 *Older People and the Law* (n 7) 147 [4.45] Recommendation 30.

40 Ibid 147–8 [4.45] Recommendation 30:

> The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements. Areas to be investigated should include, but not be limited to:
> - Whether the legislation should be implemented at the Commonwealth level or at the state/territory level, or as a cooperative scheme between the Commonwealth and the states and territories;
> - Requiring or providing for the formalisation of family agreements in writing;
> - Requiring or providing for the registration of family agreements;
> - The provision of a mechanism to enable the courts to dissolve family agreements in cases of dispute and grant appropriate relief to the parties involved; and
> - The impact on any related Commonwealth or state/territory legislation.
>
> The Committee also recommends that, as part of this investigative process, the Standing Committee of Attorneys-General should commission and release a discussion paper on the regulation of family agreements.

41 Somes and Webb, 'What Role for the Law?' (n 3) 45.

of Attorneys-General ('SCAG'), as the Committee's report had recommended).[42] The response stated: 'Rather than SCAG directly developing a discussion paper, the Government will encourage the states to refer the matter to a State law reform commission to allow the issues to be better identified and options for possible legislative reform to be carefully considered and developed'.[43] To date, no state has referred the issue of new 'assets for care' legislation to a law reform commission, and the issue of law reform in this area had remained dormant until the ALRC's Report in 2017.[44] The *ALRC Report* was particularly significant, it should be noted, because it recommended a new 'assets for care' jurisdiction, whereas the Committee's 2007 report recommended only 'an investigation of legislation'.[45] Legislation to resolve disputes under 'assets for care' arrangements has also been recommended overseas.

4 *British Columbia Law Institute's Report — 2002*

The British Columbia Law Institute's ('BCLI') 2002 report titled *Private Care Agreements Between Older Adults and Friends or Family Members* ('*BCLI Report*') contains draft model legislation for an 'assets for care' jurisdiction in Canada, which has not yet been implemented.[46] The *BCLI Report* also contains useful commentary on the social drivers of arrangements, and their problems.[47] The *BCLI Report* is referred to in the *ALRC Report* in discussing its recommendation, and is similarly relied on by this article in later articulating the key features of enabling legislation for a new 'assets for care' jurisdiction in Australian states and territories. The *BCLI Report* is also relevant to note as it demonstrates that new 'assets for care' laws have been considered in Canada, a jurisdiction with similar problems arising under 'assets for care' arrangements as for Australia.[48]

42 The Meeting of Attorneys-General ('MAG') and Council of Attorneys-General ('CAG') are now the relevant bodies which assist the Council of Australian Governments ('COAG'). The SCAG no longer exists.

43 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law: Government Response* (26 November 2009) 21 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/reports.htm>.

44 Somes and Webb, 'What Role for the Law?' (n 3) 45.

45 *Older People and the Law* (n 7) 147 [4.45] Recommendation 30.

46 *BCLI Report* (n 5) 22–3.

47 Ibid 8–22.

48 Herd (n 17) 26 (citations omitted):

> There is little statistical or empirical evidence in Australia of families systematically formalising or documenting any such agreements. … Anecdotal evidence in comparable societies, such as Canada, suggests that people are undoubtedly forming these arrangements but generally on an informal or oral basis. As well, they are usually discovered when it all goes wrong and there is a breakdown in the family arrangement or relationship.

C *Benefits of Reform*

The benefits of a new 'assets for care' jurisdiction are twofold. First, it would ensure redress for older persons involved in these disputes. Second, it would limit the potential for these disputes to arise by deterring exploitative conduct.

1 *Redress for Older Persons*

A new jurisdiction in state and territory tribunals would be beneficial as it would ensure older persons can seek redress for the loss of their assets under 'assets for care' arrangements. Tribunals would resolve disputes as to the allocation of property between the parties, if arrangements fail. Tribunals are a more accessible legal forum for older persons than the courts, as they are generally low cost,[49] quick,[50] flexible and informal.[51] Tribunals are not constrained by the general law, although it remains relevant.[52] Tribunals also offer access to alternative dispute resolution ('ADR') earlier than some courts, which require fulfilment of certain expensive and lengthy pre-trial steps before ADR.[53] A new jurisdiction in tribunals would thus overcome the existing laws' inaccessibility, whereby, to obtain a remedy, older persons must generally initiate proceedings in the Supreme Court,[54] with the related expense and time such proceedings require.[55] A new jurisdiction would also be specifically fitted to 'assets for care' disputes,[56] whereas the existing law has been described as '"ill-fitted"' to these disputes, and therefore older persons may find it difficult to successfully rely on it for a remedy.[57]

A new jurisdiction would, in short, ensure Australian law can respond effectively in failed 'assets for care' cases, and, where necessary, intervene to protect older persons' interests. As such, it is a necessary reform, at least while there are older persons who continue to enter these arrangements without advice, and thus who

49 *ALRC Report* (n 2) 214 [6.48].

50 Ibid 214 [6.51].

51 Ibid 216 [6.55], citing Jason Pizer, 'The VCAT: Recent Developments of Interest to Administrative Lawyers' (2004) 43 *Australian Institute of Administrative Law Forum* 40, 41.

52 *ALRC Report* (n 2) 217 [6.60], quoting *Davies v Johnston (Revised) (Real Property)* [2014] VCAT 512, [27] (Senior Member Riegler) ('*Davies v Johnston*').

53 Ibid 217 [6.62].

54 The Supreme Courts have inherent jurisdiction in those matters. See, eg, ibid 207 [6.20].

55 It is difficult for older persons to bring a claim under existing law for reasons of cost, and delay. See ibid 207–8 [6.20]–[6.24].

56 As detailed in Part III.

57 Somes and Webb, 'What Role for Real Property?' (n 3) 122.

may lose their assets if the arrangement does not work out.[58] Such older persons need effective redress under law, which this new jurisdiction would provide.

2 *Deterrence Against Exploitative Conduct*

A new jurisdiction would also be beneficial as it would deter friends and family from taking advantage of older persons, following the breakdown of an arrangement. Friends and family will be less likely to engage in exploitative conduct — unfairly retaining an older person's assets after an arrangement has failed — in the knowledge that their conduct could readily be subject to review in state and territory tribunals. This makes the new jurisdiction a 'preventative measure', (in addition to being a 'remedial measure' because of the redress it would provide if that is, ultimately, necessary).[59] Being a 'preventative measure', it should result in a reduction of 'assets for care' disputes, as, through its deterrence, it would encourage parties to resolve their disputes without bringing a claim. The same cannot clearly be said for the existing law, precisely because it is difficult for older persons to bring a claim to enforce their rights.[60]

A new jurisdiction would also, by its very existence, raise awareness of the risks of arrangements, and so would naturally contribute to education as a complementary policy response, as discussed further in Part IV.

III NEW LEGISLATION FOR AN 'ASSETS FOR CARE' JURSIDICTION – KEY FEATURES

Key features of new legislation — for an 'assets for care' jurisdiction, in Australian state and territory tribunals — are articulated in this part, approached from the perspective of Victorian law. The features could apply equally to other Australian

58 *BCLI Report* (n 5) 4, 24; *ALRC Report* (n 2) 207 [6.17] (citations omitted):

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

See also Herd (n 17) 28:

> It is understandably difficult for older people to discuss with their children and to descend into what may be seen as the tawdry details of the promise to 'care for life'. The older person might think that, in doing so, their children may perceive a lack of trust on their part. Some older people will prefer to cross their fingers and avoid any detailed discussion with the son or daughter and will live in hope that it will simply 'work out' because, after all, my son or daughter would never do the wrong thing by me!

59 On the distinction between 'preventative' and 'remedial' measures, see above n 18 and accompanying text.

60 It is difficult for older persons to bring a claim under existing law for reasons of cost and delay: see *ALRC Report* (n 2) 207–8 [6.20]–[6.24]. The complexity of existing legal doctrines is also a compounding factor: see Somes and Webb, 'What Role for Real Property?' (n 3). 'The diverse form and nature of individual family accommodation arrangements often do not fit neatly within available equitable causes of action, despite there being clear wrongful conduct' at 127. See also *ALRC Report* (n 2) 207 [6.20]: 'Proof, presumptions and remedies pose significant issues in such cases'.

jurisdictions, except where stated otherwise. The result is a 'legislative roadmap' for new 'assets for care' laws, which builds on the existing scholarship of Somes and Webb, Hall, and on the ALRC and BCLI Reports. The discussion herein synthesises, extrapolates from, and adds to, that body of work. The discussion is intentionally practical in its tone, and, to that end, recommendations are made throughout to ensure the conclusions drawn are clear for policymakers. The overall conclusion is that the new jurisdiction is legally viable. Further, that it would overcome the problems caused by failed 'assets for care' arrangements by helping parties to resolve disputes about their assets.[61] Key features of enabling legislation are now considered in turn.

A *Legislative Purpose*

The legislative purpose of a new jurisdiction should be 'to protect seniors from potentially harmful outcomes in a way that is fair to caregivers'.[62] This goal recognises that a new jurisdiction is not just about older persons, but that it must also take account of the interests of those caring for them. Caregivers, it must not be forgotten, are also impacted by the breakdown of arrangements, and have particular vulnerabilities, as discussed under Part III(E) below.[63]

B *'Assets for Care' Arrangement — A Definition*

A definition of '"assets for care" arrangement' will be the most critical feature of the new jurisdiction, relevant to standing. Parties who can show they have an '"assets for care" arrangement' would have standing under the new jurisdiction, which would then be enlivened. The definition will, in this way, determine the scope of the new jurisdiction, ie which arrangements and persons are covered.

The policy goal should be to capture, by definition, any such arrangements which justify scrutiny by state and territory tribunals. This is no easy task. Arrangements can take 'a number of forms'.[64] Seniors Rights Victoria has explained:

> These 'assets for care' transactions take many forms — the direct transfer of property to an adult child (or other relative); the use of proceeds of a sale of the older person's property to build a 'granny flat' at the back of an adult child's property, or to discharge the mortgage on an adult child's property, or to buy

61 Older persons, in particular, would benefit from this as they are at most risk of losing assets under these arrangements because they will have transferred legal title to their assets, in exchange for care. See *ALRC Report* (n 2) 203 [6.1]: 'The older person transfers title to their real property, or proceeds from the sale of their real property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing'.

62 *BCLI Report* (n 5) 4.

63 Ibid. See also Hall, 'Care Agreements' (n 4) 29–30; Hall, 'Care for Life' (n 4) 1–2.

64 *ALRC Report* (n 2) 203 [6.1].

> another property and place it in an adult child's name; a conveyance of property to an adult child as joint tenant. These transactions are made in the belief that the adult child or other family member will care for the aged parent or relative for life.[65]

Defining them is accordingly complex, although it will be recalled that arrangements all share the common trait that they involve an exchange of 'assets for care'; that is 'their essence'.[66] The definition – of '"assets for care" arrangements' – will thus need to address particularly: (i) *persons* who arrangements are between; (ii) *assets* transferred under arrangements; and (iii) *care* under arrangements. These matters are discussed in turn.

Persons who arrangements are between: The definition (and thus the new jurisdiction) should only capture arrangements between particular classes of persons who are at risk under these arrangements, according to available evidence. Currently, that is older persons and their families, or those akin to family. This makes sense because 'older people are more likely than other adults to consider a private care agreement'.[67] The definition could be expanded to other classes of persons in future, if necessary, once it is established by evidence that arrangements are also problematic for other classes of people, for example, for those living with disabilities who might also rely on arrangements.[68]

The *ALRC Report* has recommended the above approach, whereby the new jurisdiction would be limited to arrangements between an older person and a family member, or a person in a '"familial like" relationship'.[69] This appropriately reflects that it is older persons who are most impacted by these arrangements with family or those akin to family. 'Familial like' relationships are included to reflect the reality that caring relationships take different forms and can change overtime.[70] The *ALRC Report* refers to submissions referring to the *Family Violence Protection Act 2008* (Vic) as legislation which defines family to

65 Seniors Rights Victoria, *Assets for Care* (n 1) 31.

66 Somes and Webb, 'What Role for the Law?' (n 3) 25; Somes and Webb, 'What Role for Real Property?' (n 3) 121–2.

67 *BCLI Report* (n 5) 6.

68 Existing scholarship has generally focused on older people's use of these arrangements, so the use of these arrangements by other cohorts would be a useful area for future exploration.

69 *ALRC Report* (n 2) 220 [6.73]; Somes (n 5) 6–8.

70 *ALRC Report* (n 2) 222 [6.79], quoting Justice Connect Seniors Law, Submission No 362 to Australian Law Reform Commission, *Elder Abuse* (March 2017) 17 (citations omitted):

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

The ALRC notes 'significant support for a definition of family that was broad and recognised the diverse range of relationships that may exist in assets for care type arrangements': *ALRC Report* (n 2) 220 [6.76].

include 'family-like' relationships.[71] An appropriate definition of 'familial like' relationships for the new jurisdiction could be developed from this legislation, if that approach were adopted, with any necessary modifications as acknowledged by the ALRC.[72]

Defining the classes of persons does, however, mean that the new jurisdiction would not apply to offer protection in respect of all 'assets for care' arrangements. Particularly, it would not apply to arrangements made between persons who fall outside the specified classes. That is, persons outside the class of family (or persons in a 'familial like' relationship),[73] and persons who are not 'old', such as persons with a disability who would thus be excluded from protection.[74] There would also be a latent risk of arbitrariness in setting an age limit for 'older person'. The age of eligibility for the age pension, which is 65.5 years from July 2017, could however be used.[75]

However, these drawbacks should not be overstated. A definition limited to the classes of persons recommended by this article (and by the ALRC) — being older persons and their families, or those akin to family — will capture most problematic arrangements, which are those between older persons and family members. The alternative broader approach of having legislation capture arrangements regardless of the classes of persons involved could always be considered at a later date, if necessary.

Assets transferred under arrangements: The type of assets transferred under arrangements should not matter. The definition should, as such, apply to arrangements regardless of the type of assets transferred. Older persons might transfer a myriad of different types of assets under arrangements; residential property, money and shares are the most likely types, but the types of assets

71 *ALRC Report* (n 2) 220–2. 'The Law Council of Australia, Eastern Community Legal Centre, and the Office of the Public Advocate (Vic) also suggested the definition of family in the *Family Violence Protection Act 2008* (Vic) be adopted when implementing Recommendation 6–1. In that Act, family is defined broadly': at 220 [6.78] (citations omitted).

72 Ibid 222 [6.80].

73 Ibid 220 [6.73]: 'The tribunal's jurisdiction should be defined by the relationship of the parties, that is, a familial or "familial like" relationship. This would enable a tribunal to easily confirm its jurisdiction by ascertaining the nature of the relationship between the parties to the proceedings'.

74 It seems assumed in the *ALRC Report* that the new jurisdiction would operate for 'older persons'. See, eg, ibid 219 [6.68]: 'The ALRC recommends that the tribunal's jurisdiction encompass any type of legal or equitable interest an older person may have in their current or former principal place of residence'.

75 Probably, for these reasons, the *BCLI Report* (n 5) took a much broader approach and recommended legislation to capture any arrangements regardless of the classes of persons involved. It proposes a provision which 'is age neutral, with no reference to "the senior". Private care agreements are a "legal issue affecting seniors" not because seniors are the only people who can or do enter into them, but because, in fact, seniors are more likely than other people to do so': at 23. The proposed legislation would apply:

> Where the consideration for a *disposition of property of any kind* is, in whole or in part, the provision of *services for the care of* the transferor, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances:

at 22 (emphasis added) (citations omitted).

are practically endless. Thus, restricting the definition of arrangements to those involving only certain types of assets risks excluding some arrangements. The *BCLI Report* contains an example of proposed legislation that would capture any arrangements regardless of the assets transferred, referring to arrangements where the consideration is 'for a disposition of property of any kind'.[76] A similarly broad approach of capturing arrangements transferring any property is recommended by this article. 'Assets' should be defined in a non-exhaustive way, so as to include any property regardless of type.[77]

The alternative approach (not recommended) is to limit arrangements to those involving certain types of property. The *ALRC Report* takes this alternative approach, considering that arrangements ought to be limited to those involving 'residential property'.[78] The residential property would need to be, or have been, 'the principal place of residence of one or more of the parties' to the arrangement.[79] This approach would mean the asset being transferred must be residential property, or (if interpreted slightly more broadly) could also include the proceeds of the sale of residential property. The *ALRC Report* would also exclude specific asset types being 'disputes involving family businesses and farms'.[80] It says '[m]ore commercial arrangements are better suited to formal adjudication through the courts'.[81] This approach of excluding particular asset types is — for the reasons given — considered unduly narrow.

Regarding assets, the enabling legislation should also include a rebuttable presumption in favour of older persons that any assets they have transferred

76 *BCLI Report* (n 5) 22: See above n 75 for the proposed legislation which would apply.

77 See, eg, s 35(1) of the *Relationships Act 2008* (Vic), which defines 'property' to include:
(a) real and personal property; and
(b) any estate or interest in real or personal property; and
(c) money and any debt; and
(d) any cause of action for damages (including damages for personal injury); and
(e) any other thing in action; and
(f) any right with respect to property …

78 Recommendation 6–1 is that '[s]tate and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement': at *ALRC Report* (n 2) 13. See also:

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

at 204 [6.4].

79 Ibid 204 [6.4].

80 Ibid 215 [6.51]: 'Recommendation 6–1 excludes disputes involving family businesses and farms, and focuses on domestic disputes involving residential property under assets for care arrangements. More commercial arrangements are better suited to formal adjudication through the courts'.

81 Ibid. Superannuation accounts are another asset receiving particular attention by the Seniors Rights Service. Their submission to the ALRC recommends the new jurisdiction 'be expanded to ensure that family disputes concerning the improper use of superannuation accounts be included in the jurisdiction of state and territory tribunals': Seniors Rights Service, Submission No 296 to Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (27 February 2017) 5 [2.27] ('*ALRC Elder Abuse Submission*').

were not provided as a gift but, rather, were provided in exchange for care.[82] The caregiver would have to adduce evidence of a gift (and would thus have an incentive to gather this at the time of the gift), if they are to disclaim the existence of an 'assets for care' arrangement (and thus defeat a claim under the new jurisdiction in this way). This is necessary to assist older persons, who might otherwise run into evidentiary difficulties if they are required to demonstrate, in every case, that no gift was made before satisfying the tribunal that theirs was an 'asset for care' arrangement.[83] Such evidentiary difficulties may arise particularly with arrangements that are informal (which is probably many arrangements) where, without a written record, the older person may have difficulty proving the assets were not a gift, but rather in exchange for care.[84] As has been noted, the transfer of assets under arrangements can appear as a 'gift',[85] even though those arrangements are not always altruistic.[86] A rebuttable presumption that no gift was made would ensure older persons can more easily access redress in appropriate cases by placing an evidentiary burden on to the caregiver to show a gift if they wish to avoid the new jurisdiction applying.

Regarding a financial limit for disputes under the new jurisdiction, this article recommends that there should not be one. 'Assets for care' disputes can concern interests in real property and thus can be of significant value. Applying a financial cap would, therefore, potentially exclude many disputes. And, for comparison, it is noted that the Victorian Civil and Administrative Tribunal's existing jurisdiction in respect of property disputes between co-owners (under the *Property Law Act 1958* (Vic)) is uncapped as to monetary value,[87] probably for similar reasons. As the new jurisdiction would similarly apply to disputes over real property, it should thus similarly be uncapped as to monetary value.

82 Somes and Webb, 'What Role for the Law?' (n 3) 48: 'To avoid the vagaries of the presumption of advancement in relation to gifts from parent to child, any legislation governing family agreements should provide that such a presumption is to be disregarded'. See also the proposal discussed by Barkehall Thomas to remove the presumption of advancement (ie gift) as it currently applies in Australia to transfers between parents and their adult children. As a result, transfers from a parent to an adult child would automatically give rise to a resulting trust (ie no gift) in favour of the adult, noting that this could be rebutted. See Susan Barkehall Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (2010) 18(1) *Australian Property Law Journal* 75, 85.

83 This is currently a problem under existing law. See Somes and Webb, 'What Role for the Law?' (n 3) 41. See also *ALRC Report* (n 2) 210–11, [6.32]–[6.33]. Regarding reform of the presumption of advancement in Australia, see Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (n 82) 75.

84 *ALRC Report* (n 2) 210–11 [6.32]–[6.33].

85 Hall, 'Care Agreements' (n 4) 32: 'Where the care agreement is not characterised as a contract, it may be interpreted as a gift, meaning that the person taking the property takes it with no obligations owed to the giver (the senior) whatsoever. This outcome can be very unfair to the "giver" if the arrangement breaks down'.

86 Seniors Rights Victoria, *Assets for Care* (n 1) 9: 'Also, while the sacrificing of home ownership may be irrational, it would be wrong to assume that it was intended to be altruistic', citing Thomas, 'Families Behaving Badly' (n 8). See also Thomas, 'Families Behaving Badly' (n 8) 163–4.

87 *ALRC Report* (n 2) 217 [6.59]: 'The tribunal's jurisdiction over property disputes between co-owners has an uncapped monetary value'.

Care under arrangements: As noted, the essence of the 'assets for care' arrangement is the transfer of assets by a person, to another, in exchange for care.[88] The care to be provided is often not defined by the parties. Including a fixed definition of 'care' — in the definition of '"assets for care" arrangements' — thus risks excluding arrangements where the care is not within the definition, either because care has not been defined by the parties themselves, or only in a vague way (for example, general promises to 'look after' older persons).[89] As Hall writes: 'terms tend to be very general — a promise of "care for life"'.[90]

A definition of 'care' which affords discretion to the decision-maker to determine if the arrangement is for 'care', such that it ought to enliven the new jurisdiction (and thus receive protection), is thus necessary (and recommended). Such an approach is evident in the model legislation contained in the *BCLI Report*, which provides: 'the provision of "care" includes the provision of assistance and support'.[91] 'Assistance' or 'support' is not defined in the *BCLI Report*'s model legislation, but further guidance could be included in any new legislation by way of non-exhaustive examples. 'Assistance' and 'support' might, for example, include the provision of housing (ie accommodation as a form of 'support'), food, nursing assistance, emotional or financial support.[92] This broad approach to defining 'care' — of which the provision of housing (ie accommodation) is but one form of 'care' — is entirely appropriate. While accommodation is provided as part of 'care' in many cases (and this would be a strong indication of 'care' to ground a finding of an 'assets for care' arrangement), that is not always so. Therefore, it is recommended to include a broad definition of 'care' as proposed, which recognises the diverse range of 'care' which might be provided under these arrangements, and, in particular, that 'care' will not always include the provision of accommodation, if other forms of 'care' are being provided. Equally, 'care' may be limited to the provision of accommodation but nothing else. The new legislation's definition of care' should capture both of those scenarios.

88 Somes and Webb, 'What Role for the Law?' (n 3) 25; Somes and Webb, 'What Role for Real Property?' (n 3) 121–2.

89 See, eg, *Keremelevski v Keremelevski* [2008] NSWSC 1290, [43] (Hamilton J): 'there was a general promise that the parents would be looked after until their deaths'.

90 Hall, 'Care for Life' (n 4) 2.

91 *BCLI Report* (n 5) 23. See also the *Judicature Act*, RSNB 1973, c J-2 of New Brunswick (a Canadian province) which similarly takes a broad approach to care, referring to 'the maintenance and support of any person' ('*New Brunswick Judicature Act*'). Section 24 of that Act provides that

> [t]he Court may, on such terms as appear just, set aside or vary at the instance of an interested party any conveyance or transfer of property, the consideration of which, in whole or in part, whether expressed in the instrument of conveyance or in a collateral agreement, is the maintenance and support of any person; but nothing done hereunder affects the title of a bona fide purchaser for value.

92 Factors considered by the Commonwealth Registrar in the child support assessment context were considered in preparing this list of examples relevant to the new jurisdiction: see Commonwealth Department of Social Services, *Child Support Guide* (Guide Version 4.57, 1 July 2021) 2.2.1 Basics of Care <https://guides.dss.gov.au/child-support-guide/2/2/1>. The Registrar assesses whether a person is providing care to a child for financial support purposes, considering a range of factors. See also, *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth).

C *Informal and Formal Arrangements to be Covered*

The new jurisdiction should apply to both informal and formal arrangements. The definition of '"assets for care" arrangement' should clarify this, as appropriate. Arrangements are informal where they do not meet the requirements for a valid contract at law.[93] For example, because they are vague and do not cover essential matters.[94] Informal arrangements do not, therefore, confer contractual rights on the older person. 'Assets for care' arrangements might be informal arrangements. Hall has observed that '[o]ral promises to "care for" elderly friends and relatives may make dubious contracts because of their vague, informal and uncertain terms'.[95] Informal arrangements should, therefore, be within the new jurisdiction to more effectively assist older persons.[96] Parties could more easily access a remedy, where previously a remedy in equity (which can step in, in the absence of a contract) would have been difficult for older persons to access because of the costs associated with litigating in the superior courts, in circumstances where they have little or no assets left.[97] Capturing informal arrangements would also mean that state and territory tribunals would be permitted to make binding orders in appropriate circumstances, even where parties have not formed a valid contract. Although this could be seen to go against freedom of contract, the existing equitable doctrines can also operate in this way to ensure equity.[98] As capturing informal arrangements would mean more arrangements would be covered, this approach should also reinforce the deterrence effect of the new jurisdiction discussed earlier in Part II.

Arrangements are formal where they do meet the requirements for a valid contract at law, and should also be within the new jurisdiction. Formal arrangements (much like informal arrangements) can also result in disputes, whereby the older person might lose their assets in circumstances that justify remedial intervention.

93 The main elements for a valid contract are as follows: (1) offer and acceptance; (2) intention between the parties to create binding relations; (3) consideration for the promise made; (4) legal capacity of the parties to act; (5) genuine consent of the parties; and (6) legality of the agreement. See Fitzroy Legal Service, 'What is a Contract?', *The Law Handbook* (Web Page, 1 July 2020) <https://www.lawhandbook.org.au/2020_07_01_01_what_is_a_contract/>.

94 Contacts must be certain as to their essential terms: see, eg, *Australian and New Zealand Banking Group Ltd v Frost Holdings Pty Ltd* [1989] VR 695 and other cases, discussed in John Tyrril, 'Contract Formation: *Australia and New Zealand Banking Group Ltd v Frost Holdings Pty Ltd* [1989] VR 695' [1989] (9) A*ustralian Construction Law Newsletter* 12, 12–13.

95 Hall, 'Care Agreements' (n 4) 32.

96 Somes and Webb, 'What Role for the Law?' (n 3) 47: 'Such legislation [regulating family accommodation arrangements] should define a family accommodation arrangement with such definition being broad enough to encompass informal arrangements'.

97 *ALRC Report* (n 2) 207–8 [6.20]–[6.24]. '[P]ursuing litigation in these cases can be prohibitively costly' and 'unsatisfactorily lengthy': at 207 [6.20]. '[S]uch actions are lengthy processes that may take many years to be resolved': at 208 [6.24].

98 Existing equitable doctrines which operate in this way include estoppel, resulting trusts and the failed joint venture doctrine: see ibid 210 [6.31].

The contract might also be silent as to what should happen.[99] As Hall has noted: 'A flexible, legislative provision might be very useful where there is a formal care contract that does not make provision for relationship breakdown'.[100] Hall has also observed, in the Canadian context, that 'no model contract [she has] seen makes explicit provision for relationship breakdown'.[101] The *BCLI Report*'s model legislation would also appear to apply to formal contracts, given that it includes a power to make orders terminating obligations between the parties.[102] Relatedly, the presence of a formal contract would be a relevant consideration for the tribunal in determining what orders to make, as discussed further below in Part III(E). It might not be 'just and fair' to make orders in cases where there is a formal contract, which covers what should happen in the circumstances giving rise to the dispute. That should give comfort to parties that their freedom of contract will be appropriately respected, notwithstanding the new jurisdiction would extend to formal arrangements by their inclusion in the definition.

D Standing Requirements

Standing under the new jurisdiction would be satisfied by a party showing they are a party to an 'assets for care' arrangement. Standing would thus turn on the definition of 'assets for care' arrangement proposed above. Standing should also extend to a party's estate. There are situations in which it might be necessary for the estate of a party to sue under the new jurisdiction, as discussed later in this part under Part III(L). Standing would also extend to a third party representative of an older person, where the older person is incapable.[103] Once standing has been demonstrated, the tribunal would be left to decide whether the factual circumstances warrant its intervention. It might, for example, decide to intervene because there is disagreement as to the terms of the arrangement, changes in circumstances, or relationship breakdown. However, the new legislation need not require a party to show a 'dispute', on a basis such as these, to enliven the new jurisdiction.

99 See, eg, *Marlow v Boyd* [2012] QSC 331.

100 Hall, 'Care for Life' (n 4) 8.

101 Ibid.

102 *BCLI Report* (n 5) 22:

> [T]he Court may … grant such relief as is appropriate in the circumstances including an order that, …
>
> (d) any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is no longer enforceable by the transferor …

103 Ibid 23: '[I]n the opinion of the Committee third party interference should only be permitted where a senior was incapable, in which case a guardian, committee, attorney under a power or attorney or representative under the *Representation Agreement Act* is already empowered to bring an action'.

E *Orders of the Tribunal — 'Just and Fair'*

A power for the tribunal to make orders would be another key feature of a new jurisdiction. Such a power should ensure that orders made by the tribunal are appropriate to resolve disputes under 'assets for care' arrangements (and redress any elder abuse, if that has occurred).[104] The new legislation should thus empower state and territory tribunals to make orders that are 'just and fair' to the parties, to resolve disputes under arrangements.[105] This means that it would be up to the tribunal to determine which orders to make in a particular case. Such a wide power to make any order would be beneficial for its flexibility. A wide power to make any orders is consistent with the *ALRC Report* which states: 'Where the tribunal is satisfied that a party has suffered loss as a consequence of a breakdown of a family agreement, the tribunal should award *the appropriate remedy that is just and fair* having regard to the financial and non-financial contributions of the parties'.[106] It also has similarities to legislation in the Canadian province of New Brunswick, where the court can make orders 'on such terms as appear just'.[107] In conferring a wide power, the Victorian Civil and Administrative Tribunal's ('VCAT') existing co-ownership jurisdiction could provide an appropriate model in that the tribunal is, similarly, conferred wide discretion to make any order

104 Financial elder abuse is the 'illegal or improper … use of funds or other resources' of older persons: Eileen Webb, 'Housing an Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse' (2018) 18 *Macquarie Law Journal* 57, 64 ('Housing an Ageing Australia'), citing Shelly L Jackson and Thomas L Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors and Society's Response* (Report No 233613, February 2011). Webb explains that the WHO's definition of financial elder abuse is broad; it encompasses abuse committed by 'strangers and institutions', as well as persons close to older persons. Other forms of elder abuse include psychological, sexual and emotional abuse: Webb, 'Housing an Ageing Australia' (n 104) 64. For a discussion on the relationship between elder abuse and human rights law, see Seniors Rights Victoria, *Assets for Care* (n 1). See also Somes (n 5) 3–4 which 'critiques why the "elder abuse" paradigm is not the appropriate framework for analysis and explains why vulnerability theory offers a more appropriate framework for isolating the need for law reform'.

105 According to the ALRC, this 'builds on VCAT's jurisdiction to resolve disputes between co-owners of land and goods': *ALRC Report* (n 2) 216 [6.59]. The co-ownership jurisdiction exists under Victoria's *Property Law Act 1958* (Vic).

106 *ALRC Report* (n 2) 214 [6.50] (emphasis added).

107 *New Brunswick Judicature Act* (n 91), s 24 (emphasis added):

> The Court may, on such terms as appear just, set aside or vary at the instance of an interested party any conveyance or transfer of property, the consideration of which, in whole or in part, whether expressed in the instrument of conveyance or in a collateral agreement, is the maintenance and support of any person; but nothing done hereunder affects the title of a bona fide purchaser for value.

However, it is noted that the courts' power is limited to orders to set aside or vary a conveyance or transfer of property, and thus is not as broad as the power to make orders proposed for the new jurisdiction below, for example, orders to pay compensation. Another approach that could be taken in legislation is to provide older persons (as transferors) with a right to revoke any conveyance under an 'assets for care' arrangement. This approach was considered in the *BCLI Report* (n 5) 22. Again, it suffers from the same limitations as s 24 of the *New Brunswick Judicature Act* in that it would not allow the court to order that compensation be paid. It also does not sufficiently address a situation in which the assets transferred by the older person have been on-sold by the transferee to a third party. The legislation provides the older person with no rights in that situation, the right to revoke the transfer not being relevant anymore.

considered 'just and fair', and with an uncapped monetary value.[108]

Regarding the substantive content of the 'just and fair' requirement, the new legislation should provide some explanation to assist tribunal decision-makers to know what kinds of orders would be 'just and fair'. A way to do this would be for the new legislation to detail key principles to guide tribunal decision-makers regarding what is 'just and fair', with such principles being given a hierarchy of precedence.[109] An important key principle should be that orders should accommodate parties' housing needs (ie ensure that they have a place to live, or sufficient funds with which to obtain another home, as far as is possible),[110] considering their respective contributions. This principle may prompt the making of orders, under which older persons receive a proportion of any capital uplift in the value of relevant property which they have contributed to, so as to assist them in obtaining a new home.[111] Other key principles, to guide the application of the 'just and fair' requirement, will need to be developed (and their order of precedence formulated), and this would be a useful area for further research. However, it is beyond the scope of this article, which seeks to flag the new legislation's various features to facilitate their further development.[112]

That said, the following factors could be incorporated into any key principles for interpreting the 'just and fair' requirement (or included separately in legislation as a non-exhaustive list of factors for tribunals to consider in making orders, to ensure tribunal decision-makers are cognisant of all circumstances relevant to the making of orders which are 'just and fair'[113]). Factors could include — non-exhaustively — the following:

108 *ALRC Report* (n 2) 217 [6.59].

109 This approach mirrors a proposal in respect of the 'just and equitable' requirement under Australia's *Family Law Act 1975* (Cth) ('*FLA*'). See also *FLA* (n 109) ss 79(2) (spouses), 90SM(2)(a) (de factors) as identified in Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property Law: "Just and Equitable" Outcomes?' (2018) 32(1) *Australian Journal of Family Law* 81, 84 n 25.

110 Housing needs (of children) form part of the proposal for key principles articulated by Fehlberg and Sarmas. See Fehlberg and Sarmas (n 109) 81–2 (citations omitted):

> We suggest that the structure of the current legislation places too great a focus on the parties' contributions and that a reformulation to prioritise the provision of suitable housing for dependent children, followed by consideration of the parties' material and economic security would increase the likelihood of outcomes that are more fundamentally consistent with the key legislative requirement that '[t]he court shall not make an order … unless it is satisfied that, in all the circumstances, it is just and equitable to make the order'.

Regarding other work in the family law context concerning children and home, see, eg, Kristin Natalier and Belinda Fehlberg, 'Children's Experiences of "Home" and "Homemaking" after Parents Separate: A New Conceptual Frame for Listening and Supporting Adjustment' (2015) 29(2) *Australian Journal of Family Law* 111.

111 The article acknowledges the following scholarship, which has highlighted the importance for older persons of obtaining proprietary (rather than monetary) remedies in these cases, so as to share in any capital uplift in the property: Thomas, 'Families Behaving Badly' (n 8) 155; *ALRC Report* (n 2) 213 [6.42].

112 It is also notable that key principles have been the subject of a standalone article in the family law context, thereby indicating they require significant analysis in and of themselves. See Fehlberg and Sarmas (n 109).

113 As has occurred in Victoria's co-ownership legislation. See *Property Law Act 1958* (Vic) s 229(2).

- the parties' respective contributions under the arrangement, both financial and non-financial.[114] In particular, regarding non-financial contributions, 'the care and support provided by the parties to each other' would be relevant, ie the value of in-kind care.[115] The *ALRC Report* explains: 'the tribunal would consider the care and support provided by all parties under an assets for care arrangement as well as the financial contribution to the property'.[116] The *BCLI Report*'s draft model legislation similarly would require the court to consider the nature, duration and value of care provided;[117]

- that one or both of the parties received legal advice on their arrangement (or could have afforded legal advice);

- that an appropriate balance is to be struck between the interests of free contractual relationships, as against protection of persons under 'assets for care' arrangements;[118]

- the presence of a formal contract, including any of its terms covering what should happen in the circumstances giving rise to the dispute. The *BCLI Report*'s draft model legislation similarly would require the court to consider 'the terms of any agreement between the parties and the reasonableness of those terms'.[119]

These factors seek to ensure that the interests of both parties — the caregiver and the older person receiving care — are appropriately reflected in the orders made. Regarding caregivers, it is necessary to ensure their interests are adequately considered by the tribunal, alongside those of older persons. The non-financial contributions of each party would be considered as a factor, as noted above, to ensure that 'care' provided is accounted for in orders made by the tribunal. Caregivers could receive compensation for care they have provided, if such an order would be appropriate. Caregivers, like older persons, are also potentially vulnerable under arrangements.[120] They might continue to provide care when no longer qualified or able, motivated by a fear that all assets transferred to them

114 *ALRC Report* (n 2) 219 [6.68], 214 [6.50].

115 Ibid 219 [6.69].

116 Ibid 214 [6.49].

117 *BCLI Report* (n 5) 23.

118 Hall, 'Care for Life' (n 4) 8:

> Older adults, like other adults, have the right to enter into free contractual relationships. Despite our concerns about the vulnerability of seniors when care agreements break down, it is important not to infantalise older adults but to respect their ability to freely contract; '[t]he law has never treated an old person as an infant.' [citing *O'Neill v O'Neill* [1952] OR 742] If the senior chooses to go forward with the agreement, it is his or her right to do so — unless, of course, there are issues about the capacity, or undue influence, or the unconscionability of the bargain.

119 *BCLI Report* (n 5) 23.

120 Ibid 4. See also Hall, 'Care Agreements' (n 4) 29–30.

will be taken from them, if they cease providing care.[121] However, providing care where not qualified carries risks for the caregiver and the older person. The *BCLI Report* explains:

> Private caregivers may lack the necessary skills and abilities, especially where the senior's needs increase over the life of the agreement; fearing to break the bargain a caregiver may feel there is no option but to struggle on, with dangerous consequences for the senior who receives inadequate care. A caregiver's illness or other problems may also compromise the ability to provide adequate care over the life of the agreement.[122]

And, as has been noted, 'the caregiver may go without compensation after providing years of care at great personal expense'.[123]

Finally, the *ALRC Report* recommended that the tribunal consider — in determining what orders to make — the availability of legal and equitable remedies, and their amount, in accordance with equitable principles.[124] The tribunal would thus be prompted to have regard to (but would not be constrained by) the approach to remedies under existing law, under such doctrines as undue influence, unconscionable conduct, constructive and resulting trusts, and equitable estoppel.[125] This article disagrees with the ALRC's recommendation, and is strongly of the view that equitable doctrines should not be considered as a factor or otherwise imported into the new legislation. Equitable doctrines were developed in the common law for contexts other than specifically addressing vulnerability under 'assets for care' arrangements.[126] Including them would, therefore, arguably create the same complexity and confusion under the new legislation as exists under the current law vis-à-vis 'assets for care' cases[127] (in turn, this increases the likelihood of tribunal decisions being appealed). Reliance on equitable doctrines under the new legislation would also create the same problem for parties as exists currently, whereby they would need to be legally represented so as to properly make submissions on complex equitable principles, which would operate as a significant barrier to redress due to the associated costs

121 Hall, 'Care Agreements' (n 4) 30–1.

122 *BCLI Report* (n 5) 10.

123 Ibid 24. See also Hall, 'Care Agreements' (n 4) 29–30; Hall, 'Care for Life' (n 4) 1–2.

124 *ALRC Report* (n 2) 219 [6.71]:

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

125 In Victoria, VCAT already has regard to general property law as a matter of practice: ibid 217 [6.60], citing *Davies v Johnston* (n 52) [27] (Senior Member Riegler).

126 Somes and Webb 'What Role for Real Property?' (n 3); Somes and Webb 'What Role for the Law?' (n 3).

127 Somes and Webb, 'What Role for Real Property?' (n 3) 122. See also Somes (n 5) 32.

of being represented.[128] It would be far better for new legislation to elaborate its own key principles on what is 'just and fair', and on the kinds of orders which could be made.

F *Types of Orders — Examples*

Regarding the types of orders which could be made, an example list of orders should also be included so as to give an indication of the kinds of orders which might be made, although consistent with the power to make any orders that are 'just and fair' the list of orders would be non-exhaustive. Non-monetary, monetary and property orders could all be made.[129] The discussion below explores the kinds of orders which could be made, drawing on the *BCLI Report*'s draft model legislation 'which would allow for courts to "dissolve" the agreement, restore property and compensate'.[130]

Orders declaring arrangements to be ended: Orders could be made to dissolve (ie terminate) the 'assets for care' arrangement, following its failure. Alternatively, particular terms of the arrangement could be amended. This is obviously only relevant in the case of formal arrangements, which, unlike informal arrangements, are binding as contracts at law. The *BCLI Report*'s draft model legislation envisages that orders could be made whereby 'any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is no longer enforceable by the transferor'.[131]

Orders that property be restored: Orders could be made that property (ie assets) be restored to a party or divided between the parties as appropriate. The *BCLI Report*'s draft model legislation envisages that orders could be made that a disposition of property be set aside.[132] Property transfers by an older person, to a family member (or person in a 'familial like' relationship with the older person), could thus be set aside. Those assets could then be returned to the older person, should the tribunal make such an order. Including these powers for the tribunal to return transferred property (or award particular interests in it) is relatively non-controversial.

A controversial issue which does, however, arise is: should assets 'related to

128 Somes (n 5) 36: 'However if the present law is to continue to be applied without reform, it is difficult to see how matters could be argued in the absence of legal representation'.

129 The Law Council of Australia submitted to the ALRC that there be 'appropriate remedies available, including, non-monetary, monetary and real property': *ALRC Report* (n 2) 219 [6.70], citing Law Council of Australia, Submission No 351 to Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (6 March 2017) 28 [88] ('*Elder Abuse Submission*').

130 Hall, 'Care Agreements' (n 4) 32.

131 *BCLI Report* (n 5) 22.

132 Ibid.

the arrangement' be subject to orders, even though they are not the same assets originally transferred by the older person? An example of an asset 'related to the arrangement' is the house acquired with (part of) the older person's money, but not transferred by them per se. Powers for the tribunal to make orders over such property 'related to the arrangement', but not directly transferred by the older person under it, are likely to be contentious, as any such orders may involve the impeachment of indefeasible title. This article recommends, nevertheless, that the tribunal's powers with respect to property ought to extend more broadly to include assets 'related to an arrangement', as well as those directly transferred by the older person. This is vitally important to ensure fairness for older persons, whose other assets (money, for example) transferred under an arrangement could, foreseeably, have been used to acquire or improve other property. To deny the tribunal power to make proprietary orders over these related (and improved) assets would potentially cause unfairness to older persons as they may not be able to access any capital uplift in the value of property.[133] Further, they may be the only assets identifiable which are 'related to the arrangement' (the assets the older person transferred having been spent by the caregiver). However, in respect of property 'related to the arrangement', the tribunal's orders could generally be limited to a monetary order, secured by an equitable lien over the property (to ensure the indefeasible title is only impeached in terms of orders for sale, if the monetary order is not complied with and the older person then takes enforcement action under the lien, ie applying for orders for sale of the house).

An illustrative example is Mrs Field's case.[134] Mrs Field transferred $184,000, which was used by her caregivers to acquire a house.[135] In such cases, it might be appropriate for the tribunal to make orders that the older person (ie Mrs Field) obtain an interest in the house, if 'just and fair'. Indeed, that would ensure the older person obtains a share in any capital uplift in the value of property to which they have — in effect — contributed.[136] This would require that the tribunal have power to make monetary orders, secured by a lien (a proprietary interest) over property 'related to an arrangement' (as well as (less controversially) to return property directly transferred by an older person under an arrangement). Whether or not property is 'related to an arrangement' would be a matter for the tribunal to determine in each case, based on the circumstances of the arrangement. In summary, and to achieve this, this article recommends that the new legislation

133 Thomas, 'Families Behaving Badly' (n 8) 154–65; *ALRC Report* (n 2) 213 [6.42]. See also Somes and Webb, 'What Role for Real Property?' (n 3) 127. See generally Somes and Webb, 'What Role for the Law?' (n 3) 26: 'any relief is, for the most part, insufficient for the older person to "start again"'. '[T]he remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation': at 50; Somes and Webb, 'What Role for Real Property?' (n 3) 123: 'The problem is that, when such arrangements break down, there is a lack of legal recourse for the older person that will see a person almost invariably left without funds, accommodation and care'.

134 *Field v Loh* [2007] QSC 350 ('*Field v Loh*').

135 Ibid [1] (Douglas J); Cockburn (n 8) 43.

136 See above n 111.

should expressly provide the tribunal with a power to make proprietary orders in respect of property transferred under the arrangement (including orders to return that property), as well as any property 'related to the arrangement' (with such orders generally limited to monetary orders secured by a lien over that property, rather than orders for return of that property). The *BCLI Report*'s draft model legislation does not appear to take this wider approach, with orders of the court limited to the setting aside of dispositions made ie to property directly transferred by the older person.[137]

Orders that parties pay compensation: Orders could be made that either party pay compensation to the other on the failure of an arrangement. This might be in lieu of a proprietary order (although it might be secured by a lien over relevant property), should the tribunal consider this to be the most 'just and fair' remedy in the particular circumstances. The family member (or person in a 'familial like' relationship) could thus be ordered to pay compensation to the older person.[138] Similarly, the older person could be ordered to pay compensation for 'care' provided by the family member (or person in a 'familial like' relationship).[139] The *BCLI Report*'s draft model legislation envisages that orders could be made that 'the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made'.[140]

G *Protections for Third Parties' Interests*

General position: The new jurisdiction should, as a matter of fairness, not undermine the interests of innocent third parties who might take a transfer of property — land or other assets — which has been the subject of an 'assets for care' arrangement.[141] Examples of where a third party's interests might arise as an issue are where the third party has purchased a property from a caregiver, who themselves took a transfer of the property (or monies put towards it) from an older person. The new jurisdiction will need to protect the interests of innocent third parties (ie those who have 'honestly acquired' their interest) by ensuring their property is not inappropriately made the subject of tribunal orders.

137 *BCLI Report* (n 5) 22.

138 The *BCLI Report*'s draft model legislation similarly provides, that the court might make an order that 'the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made': ibid.

139 The *BCLI Report*'s draft model legislation similarly provides, that the court might make an order that 'the transferee pay to the transferor an amount not to exceed the value of the property at the time the order is made': ibid.

140 Ibid.

141 Foreseeably, assets transferred by the older person, to the caregiver, or acquired by the caregiver as part of the arrangement, might subsequently be transferred by them to an innocent third party. This issue is identified in Somes and Webb, 'What Role for Real Property?' (n 3) 122.

This is consistent with existing law (under which third parties whose land is registered under the Torrens system will already have the protection of indefeasibility of title[142]), and the *ALRC Report* which 'agrees that the general laws of property should protect third party purchasers from claims in relation to failed assets for care arrangements'.[143] Protection for third parties should be achieved by any new legislation expressly precluding tribunals making proprietary orders *to the extent that they would be inconsistent with* an interest which has been honestly acquired by a third party. Third parties' interests would be protected regardless of whether their interest is an equitable or a legal interest, and regardless of whether their interest is in land or other assets. No reason exists to distinguish the protection afforded to third parties on these bases. In summary, the protection regarding third party's interests should be expressly stated in new legislation. While it is clear that such interests in Torrens land will be protected from orders (via indefeasibility, which is a Torrens land system principle), the position may not be clear with respect to land not under the Torrens system, as well as assets other than land.

However, the existence of a third party interest will not always, it should be noted, preclude a proprietary order being made. By way of example, a third party might have acquired some lesser interest in land, short of full possession, for example an easement.[144] This could occur where the caregiver (having taken a property transfer from the older person, such as a house) decides to confer on a third party, such as a neighbour, an access easement. That kind of an interest would still be protected, such that a tribunal could not dissolve that lesser interest. However, the tribunal could still return the property (ie the house) to the older person (it would just be encumbered by the easement). The tribunal, as noted, would be precluded

142 In respect of land under the Torrens system, the principle of indefeasibility already operates to afford protection to th ird parties whose interest is in Torrens registered land, once they have become 'registered proprietors'. It protects their interest as against interests not registered on title; for example, the interests of an older person (that might otherwise have been) recognised by the tribunal under the new jurisdiction. See, eg, s 42(1) of the *Transfer of Land Act 1958* (Vic) ('*TLA*') which provides, subject to a number of exceptions, that:

> [T]he registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever …

Section 4(1) of the *TLA* defines 'land' as:

> [I]ncludes any estate or interest in land but does not include —
> (a) an interest in land arising under the *Mineral Resources (Sustainable Development) Act 1990*; or
> (b) a carbon sequestration right or soil carbon right granted in relation to Crown land under a Carbon Sequestration Agreement within the meaning of the *Climate Change Act 2010* …

However, indefeasibility may or may not operate to protect the interests of a third party *volunteer*, depending on the approach taken in the relevant Australian state or territory jurisdiction. See discussion further below.

143 *ALRC Report* (n 2) 219 [6.71].

144 An easement is a property right which confers a right to use or enter the land of another, but not to possess it. See Brendan Edgeworth et al, *Sackville & Neave*: *Australian Property Law* (LexisNexis Butterworths, 10th ed, 2016) 949 [10.1]; *Re Ellenborough Park* [1956] Ch 131 ('*Re Ellenborough Park*'). For a recent Victorian Supreme Court of Appeal case on easements, see *Laming v Jennings* [2018] VSCA 335 ('*Laming v Jennings*').

from making proprietary orders *to the extent that they would be inconsistent with* a third party's interest. The return of the house — or in technical legal terms, of the estate in fee simple — would not be inconsistent with a third party retaining an easement interest in that property. The easement could continue, noting it is not inconsistent with the right to possession of the house.[145]

Another example of where a third party's interest would not preclude a proprietary order being made by the tribunal is where that third party has engaged in conduct resulting in the older person having a claim against them *in personam*,[146] which disqualifies them from the protection of indefeasibility,[147] or, where, the third party's interest is equitable (ie not registered) and their conduct constitutes fraud.[148] Such a third party would not have 'honestly acquired' their interest and, as noted, the new legislation would only protect third parties whose interest has been 'honestly acquired'. As such, the tribunal would be free to make orders with respect to the assets of third parties in these circumstances.

Importantly, it should be pointed out that in the circumstances where a third parties' interest precludes a proprietary remedy being awarded to the older person in particular assets (ie because that would be inconsistent with the third parties' interest in those assets), that does not mean that a remedy would not be available to older persons. Protection for third parties only means that a *proprietary* remedy might not be available to recover particular assets from a third party. Monetary orders for redress could still be made against a party to the arrangement (ie not the third party, but, rather, the caregiver party with whom an older person has entered an assets for care arrangement). This reflects the Australian Law Council's view: 'the victim [ie older person] should still be able to claim compensation from the perpetrator' ie the person behaving unconscionably towards the older person.[149] Accordingly, the protection of third party's (who have title to relevant assets) does not rule out a remedy for older persons, who may pursue the party they entered an arrangement with in the first place, for monetary compensation.

Volunteers: A qualification to the above is that *volunteer* third parties should be treated differently. They should not receive protection against proprietary

145 Regarding whether easements for certain recreational uses of land are inconsistent with the right of possession of owners, see especially *Laming v Jennings* (n 144); *Re Ellenborough Park* (n 144); *Jackson v Mulvaney* [2003] 1 WLR 360.

146 Such claims against third parties would likely be rare, and would be 'unlikely to assist an older person' in these circumstances — as has been noted by Somes and Webb, 'What Role for Real Property?' (n 3) 142.

147 Under the so called 'in personam' exception to indefeasibility: *Frazer v Walker* [1967] NZLR 1069; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604; *Grgic v Australia and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202. See Edgeworth et al (n 144) 487–8 [5.100]: 'Claims *in personam* arise from a dealing or relationship between the plaintiff and the registered proprietor, as distinct from a claim *in rem*, which is a property right that the plaintiff can assert against all the world'.

148 Somes and Webb, 'What Role for Real Property?' (n 3) 140.

149 Law Council of Australia, *Elder Abuse Submission* (n 129) 28 [88].

tribunal orders on the basis of their volunteer status.[150] This is consistent with the *ALRC Report*, which does not envisage protecting volunteers: 'the general laws of property should *protect third party purchasers* from claims in relation to failed assets for care arrangements'.[151] Purchasers are not volunteers, having acquired their asset for value. This qualification is also consistent with the general law which does not protect volunteers to the same extent as a purchaser for value, in that volunteers are 'subject to the equities which affected the donor or predecessor in title whether or not the donee had notice of those equities'.[152] This means the volunteer would, at common law, be subject to any claims existing against the caregiver in respect of the property, including under any new 'assets for care' laws. (It is acknowledged that in New South Wales, the Northern Territory and Queensland (unlike in other Australian jurisdictions), volunteers of Torrens land title receive protection under the principle of indefeasibility.[153] Hence, the approach recommended here — of not protecting third party *volunteers* against claims under the new jurisdiction — would require that a specific statutory exception to indefeasibility be introduced in those jurisdictions. This issue is discussed further below, in the next section.

This qualification — of not protecting third party *volunteers* — is necessary to ensure the new jurisdiction operates effectively. The contrary approach, of protecting volunteers, might incentivise caregivers to transfer property to third party volunteers to shield it from tribunal orders (noting that it is practically easier to transfer property to a volunteer ie for no value, than to someone for consideration). The new legislation would thus be undermined. This qualification is also appropriate considering that a third party volunteer will have done nothing to acquire their interest ie their interest is a windfall gain, either by a gift made inter-vivos or under a will. It is thus appropriate to prefer the older person's interests over those of the third party (volunteer) in those circumstances. The older person's level of vulnerability is potentially significant based on their age, and allowing the tribunal to order third party volunteers to return property, originally related to the arrangement, to the older person, appropriately recognises this.

150 The issue of volunteers and indefeasibility is identified in Somes and Webb, 'What Role for Real Property?' (n 3) 136–7.

151 *ALRC Report* (n 2) 219 [6.71] (emphasis added). See also Law Council of Australia, *Elder Abuse Submission* (n 129) 28 [88] (citations omitted):

> [T]he Law Council supports the proposition that general principles of property law should apply in all cases. Where a former property or principal place of residence of the older person in an assets for care arrangement has been disposed of to a third party bona fide purchaser for value without notice, property law principles will ensure an innocent third party purchaser is not unfairly disadvantaged where assets for care arrangements fail. Nonetheless, the victim should still be able to claim compensation from the perpetrator.

152 On 'Volunteers' see Edgeworth et al (n 144) 462–3 [5.69], citing *Re Nisbet and Potts' Contract* [1905] 1 Ch 391; *Wilkes v Spooner* [1911] 2 KB 473.

153 Edgeworth et al (n 144) 463.

H *Statutory Exceptions to Indefeasibility under the Torrens System*

Indefeasibility is the cornerstone principle of the Torrens system of land registration, used in each Australian state and territory under their respective laws.[154] The principle is understood by this article to have two dimensions. First, the principle of indefeasibility protects those whose land is Torrens registered by perfecting their interest, following its registration.[155] Second, the principle of indefeasibility protects parties whose land is Torrens registered, as against interests not shown on title.[156] This second dimension has the potential to undermine orders that would be made under the new jurisdiction in respect of 'land', in that a caregiver might argue that an order cannot be made over land registered in their name because the land is Torrens registered, and thus has the protection of indefeasibility (ie the land is protected against interests not shown on title). A limited statutory exception to indefeasibility should be expressly created to address this, to ensure such a situation cannot arise.

To explain further the issue which could arise (and thus which necessitates a statutory exception), a caregiver, having taken a registered transfer of land from an older person (or having become the registered owner of land using monies provided by the older person) might seek to rely on indefeasibility to say their registered interest in land is subject only to such interests as are recorded on title.[157] Further, this means the tribunal cannot make remedial orders for the older person to obtain an interest in the land. That would clearly defeat the new jurisdiction returning property to older persons and, accordingly, a statutory exception to indefeasibility should be created.

It is recommended that the new legislation expressly provide for this by providing that orders of the tribunal will have effect notwithstanding that they are in respect of land that is Torrens registered in the name of one of the parties to an arrangement.[158] Such statutory exceptions to indefeasibility have previously

154 *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Title Act 2000* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *TLA* (n 142); *Transfer of Land Act 1893* (WA).

155 *TLA* (n 142) s 40(1):

> Subject to this Act no instrument until registered as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature.

See also *Breskvar v Wall* (1971) 126 CLR 376, 385–6 (Barwick CJ). And, subject to any in personam exceptions to indefeasibility.

156 See above n 142.

157 Ibid s 42(1).

158 The form of the provision could, alternatively, be framed as follows: Orders can be made by the tribunal, notwithstanding s 42 of the *TLA*.

been implied by the courts — as a matter of statutory interpretation[159] — from the existence of statutes which create rights in conflict with the principle of indefeasibility. However, the preferable approach would be to make it abundantly clear in the new legislation that the remedial orders of the tribunal operate as a statutory exception to indefeasibility, in respect of the property of parties to the arrangement. This approach would be essential in New South Wales because that State's Torrens legislation contains a provision which means that statutory exceptions to indefeasibility will only operate if this is expressly provided for in the relevant statute.[160] Further, the new jurisdiction should provide that the relevant provisions of the Torrens system legislation cannot be relied on by the parties to defeat orders of the tribunal.

A further clarification that orders operate as an exception to indefeasibility would be necessary in the case of 'land' held by third party volunteers. It is, as noted, foreseeable that a third party volunteer might take a transfer of property in the form of 'land' which has been the subject of an 'assets for care' arrangement. For example, by being gifted property from a caregiver, who themselves took a transfer of the property from an older person. Such third party volunteers would not be shielded from orders of the tribunal, as discussed above. To support this approach, it will be necessary to clarify in the new legislation that the principle of indefeasibility also does not apply to protect those volunteers, in respect of their land which is the subject of an 'assets for care' dispute.

The new legislation should, again, expressly provide for this by providing that orders of the tribunal will have effect notwithstanding that they are in respect of land that is Torrens registered in the name of a third party volunteer.[161] This will ensure that volunteers cannot rely on indefeasibility to make arguments that tribunal orders cannot be made in respect of their land. Again, this the preferable approach as it would make it abundantly clear in legislation that the tribunal's remedial orders operate as a statutory exception to indefeasibility as against volunteers. Again, this approach would be essential in New South Wales because, as noted, that State's Torrens legislation contains a provision which means that statutory exceptions to indefeasibility will only operate if

159 So that a party cannot escape statutory obligations, such as those created under new legislation establishing a new jurisdiction. See, eg, *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472. See also Lyria Bennett Moses and Brendan Edgeworth, 'Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility' (2013) 35(1) *Sydney Law Review* 107, 130.

160 *Real Property Act 1900* (NSW) s 42(3):

> This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

161 See above n 158.

this is expressly provided for in the relevant statute.[162] However, a statutory exception to indefeasibility for volunteers would not be required in Victoria or South Australia where the principle of indefeasibility already does not extend to protect volunteers.[163] The specific effect of the principle of indefeasibility not applying is that

> the volunteer obtains a registered title that is as good as, but no *better* than that of the transferor. If the transferor's title was subject to equities enforceable against the transferor *in personam*, for example, an interest arising under a resulting or constructive trust, the equity would survive the registration of the transfer and be enforceable against the volunteer.[164]

In terms of the new jurisdiction, this means practically that the volunteers' title to land would also be subject to any 'assets for care' claim that could be made against the caregiver, from whom the volunteer received a transfer of that land. Further, the new jurisdiction should provide that relevant provisions of the Torrens system legislation cannot be relied on by volunteers to defeat orders of the tribunal.

I *Tribunal Jurisdiction — Exclusive*

Tribunals should have exclusive jurisdiction under the new legislation. This article recommends that they administer and resolve all 'assets for care' claims made under the new legislation. Exclusive jurisdiction is appropriate as it overcomes a disadvantage of having concurrent jurisdiction between courts and the tribunal, which is 'forum shopping'. 'Forum shopping' is where 'parties tactically choose the forum [either the tribunal or the court] which most advantages them'.[165] For example, a party might choose to bring a proceeding in the Supreme Court because the other party clearly cannot afford to resolve the dispute in that jurisdiction.[166] Particularly, in the 'assets for care' context, the caregiver might seek to bring a claim in a court for tactical advantage, knowing that the older person has no assets left with which to contest that claim. Exclusive jurisdiction for tribunals

162 *Real Property Act 1900* (NSW) s 42(3):

> This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

163 *Biggs v McEllister* (1880) 14 SALR 86; *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613. The position is different in other jurisdictions: see Edgeworth et al (n 144) 462–3 [5.69]. See also Katy Barnett, 'A Statutory Exception to Immediate Indefeasibility Explained: Cassegrain v Gerard Cassegrain & Co Pty Ltd', *Opinions on High* (Blog Post, 4 May 2015) <http://blogs.unimelb.edu.au/opinionsonhigh/2015/05/04/a-statutory-exception-to-immediate-indefeasibility-cassegrain-v-gerard-cassegrain-co-pty-ltd/>; Somes and Webb, 'What Role for Real Property?' (n 3) 136 n 69.

164 Edgeworth et al (n 144) 463 [5.69].

165 Victorian Law Reform Commission, *Disputes Between Co-Owners* (Report No 136, 31 December 2001) 65 [4.21] ('*Co-Owners Report*').

166 Ibid.

would overcome such 'forum shopping' for practical advantage,[167] and noting that state and territory tribunals are generally 'no costs' jurisdictions.[168]

Exclusive jurisdiction means that a tribunal's decision would be final, except on points of law which should be appealable to the courts.[169] Regarding appeals, the effect of this is that a party could only appeal on a point of law. This is consistent with existing tribunal practice in Victoria, where decisions of VCAT are only appealable at the Supreme Court of Victoria on a question of law (and leave to appeal is required).[170] This approach encourages the early resolution of disputes.[171]

However, it is recommended that a tribunal exclusive jurisdiction should be subject to limited exceptions (adopting a kind of 'hybrid approach').[172] This would avoid parties 'forum shopping', while maintaining flexibility for courts to resolve 'assets for care' disputes where it makes sense for them to do so. In particular, 'when the matter is complex'.[173] Or, alternatively, 'when there is an interrelationship with other matters which fall outside VCAT's jurisdiction'.[174] That is appropriate, noting that 'assets for care' disputes could also, foreseeably, raise other matters falling outside the tribunal's jurisdiction, such as corporations law and joint ventures, but which should be heard together in one forum.[175] So, applicants could bring proceedings in the courts (for example, in Victoria, in the Supreme Court or the County Court) in those cases.

The mechanism to achieve all this would be a provision stating that courts do not have jurisdiction to hear an 'assets for care' claim (ie under the new legislation), unless there are special circumstances such as those described above (ie 'when the matter is complex'),[176] or 'when there is an interrelationship with other matters which fall outside VCAT's jurisdiction'.[177] The courts would thus not

167 Ibid.

168 See below Part III(N).

169 This follows s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*').

170 Ibid s 148(1):

> A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding —
>
> (a) if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others, to the Court of Appeal with leave of the Court of Appeal; or …
>
> (b) in any other case, to the Trial Division of the Supreme Court with leave of the Trial Division.

See also 'Appeal a VCAT decision', *Victorian Civil and Administrative Tribunal* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/appeal-a-vcat-decision>.

171 *Co-Owners Report* (n 165) 65 [4.21], citing *VCAT Act* (n 169) s 148: 'If VCAT's jurisdiction was exclusive, appeals to the Supreme Court would still be possible, but only in relation to questions of law'.

172 *Co-Owners Report* (n 165) 65–7 [4.22]–[4.26].

173 Ibid 67 [4.24]. See also at 65–7 [4.22]–[4.26].

174 Ibid. See also at 65–7 [4.22]–[4.26].

175 Ibid 66 [4.22].

176 Ibid 67 [4.24]–[4.25]. See also at 65–7 [4.22]–[4.26].

177 Ibid 67 [4.24]. See also at 65–7 [4.22]–[4.26]; *Property Law Act 1958* (Vic) s 234C ('*PLA*').

have jurisdiction, subject to any special circumstances justifying a hearing by the courts. As the VLRC explained in its report on a new co-owners jurisdiction:

> The Commission believes that an appropriate compromise between these conflicting concerns can be reached by a provision which holds that the Supreme Court or County Court do not have jurisdiction to hear co-ownership disputes about land or goods over which VCAT has jurisdiction, unless they are of the opinion that there are special circumstances that justify a hearing by the Court. In the case of co-ownership disputes, special circumstances will arise when the matter is complex or when there is an interrelationship with other matters which fall outside VCAT's jurisdiction.[178]

Examples of similar approaches can be seen in s 52 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*') (for planning matters)[179]; and s 234C of the *Property Law Act 1958* (Vic) (for co-ownership).[180]

This hybrid approach would operate alongside certain other tribunal procedures, which may still need to (continue to) apply. In particular, in Victoria, ss 77 and 96 of the *VCAT Act*.[181] Section 77 of the *VCAT Act* provides that VCAT can order a strike out of a proceeding (or part of), 'if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a body other than VCAT'.[182] VCAT 'also has power to refer such matters to the relevant body'.[183] VCAT could thus rely on this section to refer to the courts those special 'assets for care' cases, which justify being heard by the courts (and which were not commenced in the courts).[184] Section 96 of the *VCAT Act* provides that VCAT can 'refer any question of law … to the Trial Division of the Supreme Court or

178 Ibid 67 [4.24] (citations omitted).

179 *VCAT Act* (n 169) s 52 ('Limitation of courts' jurisdiction in planning matters'), cited in *Co-Owners Report* (n 165) 67 [4.24] n 206.

180 *PLA* (n 177) s 234C ('Jurisdiction').

181 *Co-Owners Report* (n 165) 67 [4.26], 67 n 208.

182 Ibid 67 [4.26]; *VCAT Act* (n 169) s 77:

> More appropriate forum
>
> (1) At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.
>
> (2) The Tribunal's power to make an order under subsection (1) is exercisable only by a judicial member.
>
> (3) If the Tribunal makes an order under subsection (1), it may refer the matter to the relevant tribunal, court, person or body if it considers it appropriate to do so.
>
> (4) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

183 *Co-Owners Report* (n 165) 67 [4.26].

184 Ibid.

the Court of Appeal for decision'.[185] VCAT could rely on this section, at least initially, if there is any doubt surrounding the operation of provisions for the new judication. It is suggested that similar provisions could usefully be applied in other jurisdictions, concerned with developing a new 'assets for care' jurisdiction. Finally, in Victoria, the constitutional requirements in s 85 of the *Constitution Act 1975* (Vic) will need to be considered, to determine if the specific approach to jurisdiction limits the Supreme Court's jurisdiction in relation to 'assets for care' disputes.[186]

J *Other Causes of Action Would Continue*

The new jurisdiction would not displace existing legal or equitable causes of action in the courts, in respect of 'assets for care' arrangements. Existing legal or equitable causes of action would thus be maintained, and a person could still go to court to seek redress under contract or in equity. This is consistent with the *ALRC Report*, which envisaged that the new jurisdiction would be: '*in addition* to the existing avenues of seeking legal and equitable remedies through the courts'.[187] The new jurisdiction would thus provide 'an alternative avenue for dispute resolution and would otherwise not disturb existing legal and equitable doctrines'.[188] While this could possibly lead to an aggrieved party bringing parallel proceedings in equity or contract in the courts (ie parallel to a claim in the tribunal under a new jurisdiction), that is unlikely noting the barriers to seeking redress in the courts for older persons, in particular the cost, delay and complexity.[189] Further, appropriate mechanisms are available to courts and tribunals —acting within their inherent or conferred powers — to ensure there is not conflict between related proceedings.

185 *VCAT Act* (n 169) s 96:

> Referral of questions of law to Court
> (1) The Tribunal, with the consent of the President, may refer any question of law arising in a proceeding to the Trial Division of the Supreme Court or the Court of Appeal for decision.
> (2) A referral may be made under subsection (1) on the application of a party or on the Tribunal's own initiative.
> (3) If a question of law has been referred to the Trial Division or the Court of Appeal, the Tribunal must not —
> (a) make a determination to which the question is relevant while the referral is pending; or
> (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Trial Division or Court of Appeal on the question.

186 *Coles Myer Ltd v City West Water Ltd* [1998] VSC 63; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 496; *Constitution Act* 1975 (Vic) s 85 ('Powers and jurisdiction of the Court').

187 *ALRC Report* (n 2) 204 [6.4] (emphasis added).

188 Ibid 214 [6.48].

189 It is difficult for older persons to bring a claim under existing law for reasons of cost, and delay. See ibid 207–8 [6.20]–[6.24]. The complexity of existing legal doctrines is also a compounding factor: see Somes and Webb, 'What Role for Real Property?' (n 3). 'The diverse form and nature of individual family accommodation arrangements often do not fit neatly within available equitable causes of action, despite there being clear wrongful conduct': at 127. Ibid 207 [6.20]: 'Proof, presumptions and remedies pose significant issues in such cases'.

In particular, tribunals would, on learning of related proceedings in the courts, be able to strike out and refer an 'assets for care' dispute where it would be more appropriately dealt with by another body.[190] Similarly, the courts, on learning of an 'assets for care' claim in a tribunal, could exercise their inherent jurisdiction to stay related proceedings in their jurisdiction, such as any claim in equity relating to the same matters. And, later, upon resuming the proceedings, the court might refuse equitable relief (which is always discretionary) on the basis that the matter has been adequately dealt with by the tribunal under the new 'assets for care' jurisdiction.

In addition, if the caregiver decided to engage in the kind of tactical forum shopping mentioned above, whereby they seek to bring a claim in the courts under an equitable doctrine (rather than in a tribunal under the new laws), knowing that the older person has no assets left with which to defend against litigation, this should also not be a problem. The older person could respond by making an 'assets for care' claim in the tribunal, and then, as discussed above, the court may exercise its inherent jurisdiction to stay their related proceedings. And, later, the court might, on resuming the proceedings, refuse relief on the basis that the matter has been adequately dealt with by the tribunal under the new 'assets for care' jurisdiction.

Alternatively, the new jurisdiction could replace the existing law, both equitable and legal, in respect of 'assets for care' arrangements. However, this is not recommended because it would mean that older persons would not have the choice of which forum would be most likely to provide them with an appropriate remedy.

K *Mechanism to Avoid Conflict with Court Orders Made under Other Laws*

Court orders, under different laws, might potentially conflict with tribunal orders made under a new jurisdiction. Court orders made for the adjustment of property on a relationship breakdown, particularly, might conflict with tribunal orders made in respect of that same property (which is also the subject of an 'assets for care' claim — by an older person — in the tribunal, as well as being the property of parties to a relationship). The *Family Law Act 1975* (Cth) ('*FLA*'), and state-based legislation (for example, in Victoria, the *Relationships Act 2008* (Vic)), provide for orders for the adjustment of property interests of parties to a relationship, and so are relevant here. A mechanism to avoid the potential for conflict of orders made under these laws, and those made by tribunals under new 'assets for care' laws, will thus need to be included in the new jurisdiction.

190 VCAT has existing powers to both 'strike out' and 'refer': see ss 77 and 96 of the *VCAT Act* as discussed above in Part III(I).

Family Law Act 1975 (Cth) ('*FLA*'): The *FLA* — federal legislation — is relevant as it deals with property settlements after marriage or de facto relationship breakdown. Orders under this law regarding the property of spouses are examples of orders which might conflict with orders under the new jurisdiction, depending on how wide that jurisdiction is. Orders which the Family Court can make include declaring interests of parties to a marriage in property,[191] and altering the property interests of parties to a marriage.[192] Foreseeably, that same property of spouses could be the subject of an 'assets for care' arrangement, and thus could also be the subject of tribunal orders. It is important that the two bodies — the Family Court and state tribunals — do not make inconsistent orders and thus a mechanism is required, in legislation, to ensure that each body is aware of the others' processes, and that they occur in an appropriate order.

A mechanism by which this could be achieved is the inclusion of a new provision in the *FLA* requiring parties to property settlement proceedings to notify the Family Court, if separate proceedings are bought under the new 'assets for care' jurisdiction which relate (or could reasonably be considered to relate) to the same property of the parties to a marriage or de facto relationship. The Family Court would then be required — on receiving that notice, or on otherwise becoming aware of the 'assets for care' claim — to stay the property settlement proceedings until the 'assets for care' dispute is resolved by state and territory tribunal orders. This would avoid a situation where the new jurisdiction conflicts with orders under the *FLA*, as the tribunal would make its orders first. Following that, the Family Court could resume proceedings — and thus could ensure that any orders it makes for the division of spousal property properly take account of (and are not inconsistent with) the older person's interests under tribunal orders.[193] This approach should also overcome the risk of constitutional invalidity of state based tribunal orders, which potentially arises here. The constitutional invalidity risk arises because of s 109 of the *Commonwealth Constitution*, which means that Commonwealth laws (such as the *FLA*, and orders made under it) prevail over inconsistent state laws (such as any new 'assets for care' laws, and orders made under them which might be inconsistent with *FLA* orders).[194]

Practically, to introduce this mechanism — a new provision in the *FLA* — would require the Commonwealth government to amend the *FLA* accordingly. That could

191 *FLA* (n 109) s 78.

192 Ibid s 79.

193 A similar model is applied to address the potential conflict between proceeds of crime orders, which can also be made under state and territory laws, and the Federal Court's property settlement jurisdiction. See also ibid s 79B ('Notification of proceeds of crime orders etc') and s 79C ('Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc').

194 *Australian Constitution* s 109:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

For a recent s 109 case: see *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

occur in the context of the existing momentum to tackle elder abuse in Australia, which includes a National Plan to Respond to the Abuse of Older Australians, a high-level framework document guiding policy responses to elder abuse, and which was developed with the Commonwealth, and all states and territories.[195]

However, in case it could not be possible to amend the *FLA*, a state or territory could still legislate for a new jurisdiction on its own and resolve the potential problem of conflicting orders. The state-based legislation for the new jurisdiction could simply provide — as an alternative to a provision in the *FLA* — that tribunals (and courts) must stay any 'assets for care' claim where a Family Court proceeding is on foot in respect of the same property. The tribunal would become aware of these Family Court proceedings by the older person and the caregiver having obligations to notify the tribunal of any relevant proceedings under the *FLA*. This alternative approach would, similarly, avoid a situation in which the new jurisdiction conflicts with orders under the *FLA*, as it would fall to the Family Court to ensure the older person's claims are taken into account in the resolution of a property dispute between parties to a relationship. The noted risk of constitutional invalidity, because of s 109 of the *Australian Constitution*, would also not arise, as the Family Court's orders (administering the Commonwealth law) would prevail.

It is also useful to note that older persons can already seek to join in Family Court property proceedings, under a provision in the *FLA* for third parties, whose interests are potentially affected, to seek to join as a party to proceedings.[196] Older persons might also have received notice of the relevant application.[197] The *ALRC Report* has stated that its recommendation for an 'assets for care' jurisdiction 'does not seek to interfere with this jurisdiction'.[198] This article agrees; third parties should continue to have these existing rights under the *FLA*, in any case.

State and territory laws: A party to a relationship might also be able to seek orders for the adjustment of property under state or territory laws,[199] although it is acknowledged that financial matters on de facto relationship breakdown are

195 The *National Plan* (n 35) is available online at <https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf>.

196 *FLA* (n 109) s 79(10).

197 Ibid s 79F.

198 *ALRC Report* (n 2) 215 [6.52] (citations omitted):

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

199 *Domestic Relationships Act 1994* (ACT); *Property (Relationships) Act 1984* (NSW); *De Facto Relationships Act 1991* (NT); *Property Law Act 1974* (Qld); *Domestic Partners Property Act 1996* (SA); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); *Family Court Act 1997* (WA).

almost exclusively dealt with under the *FLA*.[200] Victoria's *Relationships Act 2008* ('*Relationships Act*') provides an example of such state legislation providing for 'the adjustment of interests in property between — (i) domestic partners; (ii) caring partners'.[201] The *Relationships Act* allows the Court (the Supreme Court, County Court or Magistrates Court)[202] to make declarations of property interests between parties,[203] and to make orders for the adjustment of property interests between the parties.[204] There exists — as with orders under the *FLA* — the potential for conflict between these orders to resolve property disputes between parties to a relationship, and orders made by the tribunal under the new jurisdiction. Orders might be made under the *Relationships Act* adjusting property and, foreseeably, that same property could be the subject of an 'assets for care' arrangement, and hence the subject of tribunal orders under any new laws. A mechanism to deal with this is to insert a new provision in the relevant state-based relationship legislation (for example, in Victoria, the *Relationships Act*) which would require a party to those property proceedings to give notice to the court of any 'assets for care' dispute, which might reasonably relate to the same property, so that those tribunal proceedings are then heard first, while the other proceedings are adjourned. Upon receiving notice of the 'assets for care' dispute, the court would be required to stay the proceeding until the 'assets for care' dispute is resolved by tribunal orders. Following that, the court could resume the proceeding, and thus could ensure that any of its orders properly take account of the older person's interest under any tribunal orders. Separately, notice could be given to an older person of the proceeding under the relevant state-based relationship legislation. Notice mechanisms already exist in s 64(3) of the *Relationships Act*, which requires a person applying for an order to notify 'the spouse of the person against whom the order is sought'.

The new jurisdiction's interaction with other laws will — no doubt — need to be the subject of further jurisdiction specific consideration. In particular, to identify if there are any other potential conflicts which might arise between orders made under the new jurisdiction, and those made under other laws — state or federal. Appropriate mechanisms, such as above, will thus need to be included in legislation to resolve these conflicts.

200 Following a referral of legislative power by all states and territories except Western Australia: *FLA* (n 109) ss 4 (definition of 'de facto financial cause'), 39A(5).

201 *Relationships Act 2008* (Vic) s 34(b). These relationships have a particular definition under the Act: at s 39 (definition of 'domestic partner' and 'caring partner').

202 Ibid s 65.

203 Ibid s 40.

204 Ibid s 41.

L *Deceased Estates — Capacity to Sue and be Sued*

Claims against an estate: A party's estate should be able to be sued, under the new jurisdiction. An older person could thus sue the estate of a caregiver in circumstances where a caregiver has died but the older person has not obtained the full benefit of the ongoing care promised to them (in exchange for transferred assets, which now form part of the deceased's estate). Restricting the new jurisdiction to only *inter vivos* claims would preclude an older person in these circumstances from protection under the new jurisdiction, and cause injustice in that the beneficiaries of the caregiver's estate would receive a windfall gain.[205] The ability to sue a party's estate would also operate for the benefit of the caregiver. A caregiver could thus sue the estate of the older person in circumstances where the older person has died, but the assets promised by them have not yet been properly transferred.

Claims by an estate: A party's estate should also be able to sue under the new jurisdiction. A party's estate would thus have standing to sue under the new jurisdiction on the basis that an 'assets for care' arrangement had been entered into by the deceased. A caregiver's estate could thus sue the older person to whom care was provided pursuant to an arrangement. That might be expected in circumstances where the caregiver has died without having obtained assets promised to them by the older person seeking care.[206]

To enable estates to sue and be sued under the new jurisdiction will necessarily mean the new jurisdiction will be applied in estate litigation. Estate litigation is, however, ordinarily within the jurisdiction of the superior courts of states and territories (not tribunals), and, as such, it is suggested that the presence of an estate as a party would justify the courts (rather than tribunals) hearing an 'assets for care' claim, relying on the existence of 'special circumstances'.[207] Further, to ensure that the new jurisdiction is not improperly relied on in estate claims, the new legislation should provide that it may only be relied on in estate claims with leave of the court. And, to be clear, existing equitable doctrines would continue to be available for parties, including the estate of a party, to rely on in estate litigation.[208]

205 This issue has been highlighted in Hall, 'Care Agreements' (n 4) 31: 'Finally, the caregiver may die before the senior. What are the obligations of the estate in this situation, if any?'.

206 Hall, 'Care for Life' (n 4) 7–8.

207 See above Part III(I).

208 Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (n 82) 77 (citations omitted):

> Some of the recent decisions provide useful illustrations. In *Kosmas v Cherote*, an elderly parent transferred his house to his son (his primary carer), without requiring or expecting payment of the nominated consideration of $260,000. He made no provision for his own future care and accommodation. After his death, his administrator unsuccessfully sought to set aside the transfer on the basis of undue influence.

The approach of allowing parties' estates to sue and be sued under new 'assets for care' laws is different to that proposed under the BCLI model legislation. The *BCLI Report* argued that 'only the transferor or the transferee should be empowered to bring an application … [t]his power would die with the transferor, and not be available to the estate (the rules of the common law and equity would continue to apply after the death of the senior)'.[209]

M *Joinder*

Third parties should be able to seek to join in 'assets for care' proceedings where they have an interest in the relevant property. The rights of mortgagees might be particularly relevant in this context as they may have an interest in land the subject of an arrangement. Whether the new jurisdiction should expressly create any rights of joinder of other parties is relevant to consider. Existing provisions establishing state and territory tribunals might already provide for joinder of other parties. In Victoria, there is an existing VCAT procedure for joinder which, if necessary, could be adopted elsewhere for other jurisdictions. Section 60 of the *VCAT Act* allows for joinder by the tribunal 'on its own initiative or on the application of any person' in certain circumstances, for example that 'the person's interests are affected by the proceeding'.[210]

N *Regime for Costs*

In terms of a costs regime which is applicable to a new 'assets for care' jurisdiction, the prima facie position should be that the jurisdiction is 'no cost'; each party would bear their own costs. This is vitally important to ensure the new jurisdiction overcomes the cost barrier of the existing law, which may be preventing older persons from accessing a remedy in these cases.[211] Existing provisions establishing state and territory tribunals may, again, already provide an appropriate regime for costs. In Victoria, the existing VCAT costs regime is an example which, if necessary, could be adopted elsewhere for the new jurisdiction.

209 *BCLI Report* (n 5) 23.

210 *VCAT Act* (n 169) s 60:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that —
> (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
> (b) the person's interests are affected by the proceeding; or
> (c) for any other reason it is desirable that the person be joined as a party.
> (2) The Tribunal may make an order under subsection (1) on its own initiative or on the application of any person.
> (3) On the application of a person who is entitled under section 73(4) to be joined as a party the Tribunal must order that the person be joined as a party.

211 *ALRC Report* (n 2) 207–8 [6.20]–[6.24]. '[P]ursuing litigation in these cases can be prohibitively costly': at 207 [6.20].

Section 109 of the *VCAT Act* governs VCAT's power to award costs. It provides that in the usual case 'each party is to bear their own costs in the proceeding'.[212] However, if the tribunal is 'satisfied that it is fair to do so', a party may be ordered to 'pay all or a specified part of the costs of another party in a proceeding'.[213] Relevant factors are considered by the tribunal. For example, the way 'a party has conducted the proceeding' and 'the relative strengths of the claims made by each of the parties'.[214]

O *Tribunal Procedures*

In terms of rules of procedure applicable to a new 'assets for care' jurisdiction, this might also already be appropriately covered by jurisdiction specific legislation for state and territory tribunals, or by their related practice notes. However, some amendments or additions may be desirable to ensure the accessibility of the new jurisdiction to older persons and each jurisdiction should consider this further. The Seniors Rights Service submitted to the ALRC that 'state and territory tribunals [should] have the discretion to allow evidence to be given by video-link, or without the offender present'.[215] It might be necessary for the older person to give evidence by video-link, for example, where their mobility is impaired, or where there are concerns that they have been abused by the other party, either physically or in another form, such as 'economic abuse'.[216] VCAT's existing rules of procedure currently allow for proceedings to be conducted by video-link, and otherwise appear to be appropriate for the new jurisdiction. Practice Note PNVCAT3 on the Fair Hearing Obligation says the Tribunal 'may conduct all or part of a proceeding by teleconference, video links or any other system of telecommunications'.[217]

212 *VCAT Act* (n 169) s 109(1).

213 Ibid s 109(2)–(3).

214 Ibid s 109(3).

215 Seniors Rights Service, *ALRC Elder Abuse Submission* (n 81) 5 [2.28].

216 See Seniors Rights Victoria, *Assets for Care* (n 1) 20, 53.

217 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT3: Fair Hearing Obligation*, 7 August 2019, para 8(d), citing *VCAT Act* (n 169) s 100(1):

> Method of conducting hearings
>
> (1) If the Tribunal thinks it appropriate, it may conduct all or part of a proceeding by means of a conference conducted using telephones, video links or any other system of telecommunication.
> (2) If the parties to a proceeding agree, the Tribunal may conduct all or part of a proceeding entirely on the basis of documents, without any physical appearance by the parties or their representatives or witnesses.

P *Alternative Dispute Resolution*

Access to alternative dispute resolution ('ADR') will be an important feature of a new jurisdiction in state and territory tribunals. Indeed, ADR in the context of 'assets for care' arrangements has the advantage of potentially preserving or restoring (as the case may be) close family relationships in a way that a more formal (and adversarial) court or tribunal hearing might not. The *ALRC Report* highlighted the value of ADR, referring to the submission of Seniors Rights Victoria: 'Seniors Rights Victoria stressed the value of the tribunal's ADR processes in providing a forum in which family members are required to sit down and resolve disputes. Seniors Rights Victoria highlighted the extent to which these disputes may be resolved through ADR, without needing to be adjudicated by the tribunal'.[218] Separately, a particular advantage of giving the new jurisdiction to state and territory tribunals (rather than courts) is that they might provide parties with earlier access to ADR than if a dispute was pursued in the courts.[219]

Different forms of ADR could be used under the new jurisdiction, and these should be considered further to determine which is the most appropriate to use in particular 'assets for care' disputes, where the parties are in a close personal relationship.[220] A practice note could be developed to provide guidance on when each form of ADR would be appropriate (and so most likely to be ordered) in an 'assets for care' case. The main forms of ADR currently used in VCAT are compulsory conferences and mediations. Both are a form of 'facilitated discussion' to resolve the dispute, and are 'pre-trial, confidential, and "without prejudice"'.[221] However, compulsory conferences take a more interventionist approach to dispute resolution.[222] The *ALRC Report* has explained:

> Unlike mediation, compulsory conferences are only conducted by tribunal members and the role of the tribunal member is to actively assist the parties to reach settlement. As set out in a VCAT Practice Note:
>
> > at a compulsory conference the Tribunal Member may express an opinion on the parties' prospects in the case, or on relative strengths and weaknesses of a party's case. The Member will exercise this power if the Member considers it to be of assistance in promoting settlement.[223]

218 *ALRC Report* (n 2) 218 [6.63].

219 Ibid 217–8 [6.62]. See also *VCAT Act* (n 169) ss 83, 88.

220 Hall, 'Care Agreements?' (n 4) 31: 'The psycho-dynamics of the care agreement are conducive to a number of "triggering events"'; *BCLI Report* (n 5) 10: 'the psycho-dynamics of the care agreement are conducive to a number of "triggering" events'.

221 *ALRC Report* (n 2) 217 [6.62].

222 Ibid 217–8 [6.62]–[6.63].

223 Ibid 217–8 [6.62] citing Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution (ADR)*, 19 December 2018, para 29 (citations omitted).

The *ALRC Report* says that the 'more interventionist approach' of the VCAT compulsory conference 'may be better suited to disputes regarding family agreements, where there is often a significant power imbalance between the parties'.[224] VCAT's existing ADR processes which, as noted, include mediation or compulsory conferences, could be applied under a new jurisdiction.

IV OTHER POLICY RESPONSES

A *Education*

Education is also an important and necessary policy response,[225] which should be pursued in conjunction with the new laws. Education is particularly necessary to ensure that older persons and their families understand the risks with 'assets for care' arrangements, and to encourage them to seek legal advice, and, if they still wish to proceed, to formalise their arrangements to minimise the potential for future problems.[226] Under a formal arrangement the older person, for example, can protect their interests via appropriate contractual obligations, or the creation of proprietary rights.[227] Education can make them aware of this course, which would protect them in case of future problems. Importantly, as the Seniors Rights Victoria guide for older persons explains, '[s]eeing a lawyer doesn't mean you don't trust your family, it means you will be better informed about any arrangements and your options'.[228] Education is, in this way, a 'preventative measure'; it addresses problems before they arise, by making parties fully aware of the relevant issues.[229] An education campaign should be pursued in conjunction with new laws to ensure older persons and their families understand the risks with 'assets for care' arrangements and are encouraged to seek legal advice before entering any arrangement.

However, education is not a satisfactory policy response on its own. Inevitably, some older persons will enter vague arrangements (which fail to legally protect their interests), and will not seek legal advice, notwithstanding having

224 *ALRC Report* (n 2) 218 [6.63] (citations omitted).

225 *Older People and the Law* (n 7) 151–2 [4.59]: 'The Committee takes the view that there is a clear need for education and awareness-raising with regard to family agreements, both for parties to these agreements and for the legal profession'. See also Hall, 'Care for Life' (n 4) 9: '[W]e also know that seniors are not likely to access the law. Prevention is, therefore, particularly important'.

226 Somes and Webb, 'What Role for Real Property?' (n 3) 146; Herd (n 17) 28; *BCLI Report* (n 5) 20; Monro (n 4) 71.

227 Somes and Webb, 'What Role for Real Property?' (n 3) 129–30; Herd (n 17) 26–7. For preventative structing options: see Seniors Rights Victoria (n 1) 34.

228 Seniors Rights Victoria, *Care for Your Assets: Money, Ageing and Family* (Report, 2013) 22.

229 On the distinction between 'preventative' and 'remedial' responses in the 'assets for care' context: see Somes and Webb, 'What Role for Real Property?' (n 3) 129–38.

been educated on the related risks.[230] This may be 'out of a desire to keep the arrangement "private"'.[231] Herd explains where this reluctance might come from:

> The older person might think that, in doing so [formalising the details of the arrangement], their children may perceive a lack of trust on their part. Some older people will prefer to cross their fingers and avoid any detailed discussion with their son or daughter and will live in hope that it will simply 'work out' because, after all, my son or daughter would never do the wrong thing by me![232]

Similarly, as Somes and Webb have said, education is not 'a panacea to prevent older people entering into assets for care arrangements'.[233]

Things can 'go wrong', however, as demonstrated by the anecdotal evidence of the problems faced by older persons in this area,[234] and relevant case law.[235] And a new jurisdiction is necessary to ensure redress for older persons when they do. In particular, it is necessary to ensure redress for those older persons mentioned above who have not taken preventative steps to protect their interests. The *BCLI Report* makes the point: 'Legislation is necessary [therefore] to provide for fair, workable and consistent outcomes, especially where agreements have not been formalised'.[236] The key point is that education will not succeed in preventing all parties from entering risky arrangements, and thus a new jurisdiction is necessary to address harm after it occurs ie at which point education is too late to assist. Education and a new jurisdiction are thus both necessary and should be pursued in conjunction. Relevantly, there is no suggestion in relevant literature on a new jurisdiction that education could be considered in place of a new jurisdiction.[237]

Existing forms of education can be seen in the two guides on 'assets for care' arrangements published by Seniors Rights Victoria; one is for older persons, and the other is for those lawyers advising them. Lentini explains:

> Seniors Rights Victoria … recently published two valuable resources entitled 'Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of

230 *BCLI Report* (n 5) 21, 24; *ALRC Report* (n 2) 207 [6.17]; Herd (n 17) 28.

231 *BCLI Report* (n 5) 24: 'In any event, there will always be those people who choose not to make formal agreements, out of a desire to keep the arrangement "private" or a reluctance to formalise intimate relationships'.

232 Herd (n 17) 28.

233 Somes and Webb, 'What Role for Real Property?' (n 3) 146.

234 *ALRC Report* (n 2) 203–14 [6.1]–[6.47].

235 Hall, 'Care Agreements' (n 4) 31: 'Anecdotal and case law evidence indicates that most case agreements fail because of relationship breakdowns'. For examples of reported cases involving disputes over property, following an 'assets for care' arrangement: see *Swettenham v Wild* [2005] QCA 264; *Callaghan v Callaghan* (1995) 64 SASR 396; *Field v Loh* (n 134); *Simpson v Simpson* [2006] QDC 83.

236 *BCLI Report* (n 5) 24.

237 *ALRC Report* (n 2) 203–22 [6.1]–[6.80]; Ben Travia and Eileen Webb, 'Can Real Property Law Play a Role in Addressing Housing Vulnerability? The Case of Older Women Experiencing Housing Stress and Homelessness' (2015) 33(2) *Law in Context: A Socio-Legal Journal* 52, 83; Somes and Webb, 'What Role for the Law?' (n 3) 47; Webb, 'Housing an Ageing Australia' (n 104) 75.

> Financial Abuse' ('Assets for Care') and 'Care for Your Assets: Money, Ageing and Family' ('Care for Your Assets'). These guides, produced with a view to increasing public awareness and understanding of elder abuse, especially in relation to financial matters, are useful aids for professionals, community members, interested parties, as well as older people themselves, to equip individuals with the skills to detect situations of potential or actual abuse, and ultimately to prevent or avoid them.[238]

Similar materials could be developed in other Australian state and territory jurisdictions.[239] Existing materials should also be updated in light of any new laws.

B *Modifying the Existing Law*

Proposals to modify the existing law (as distinct from establishing an entirely new jurisdiction, as proposed in this article) have also been contemplated, as ways to assist older persons entering into these arrangements. Somes and Webb, in a 2016 article, consider 'the potential for real property law to better protect older people' under 'assets for care' arrangements.[240] A detailed consideration of the proposals to modify the existing law advanced in that article are outside the scope of this article on new 'assets for care' laws (to establish a new jurisdiction). However, some of them are discussed briefly below to demonstrate an awareness of their contribution.

The proposal for courts '[t]o create a new, or at least an adapted cause of action' in equity, to provide older persons with redress on failure of an 'assets for care' arrangement, would appear to make it easier for older persons to argue for a remedy before the courts, thereby improving the position of older persons under the existing law.[241] However, this article notes that such modifications arguably do not overcome the inaccessibility of the current law (discussed earlier), whereby older persons would still — notwithstanding modifications to various equitable doctrines[242] — need to initiate proceedings in the courts, which can

238 Esterina E Lentini, '"Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse" and "Care for Your Assets: Money, Ageing and Family": Student Review' (2013) 7 *Elder Law Review* 1, 1 (citations omitted). See also Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1, 6: 'The production of Seniors Rights Victoria's lawyers' guide on financial abuse of older people, "Assets for Care", involved a lengthy process of literature review and extensive consultation with legal and other advocates. Lawyers are not as aware as they need to be about the prevalence of this kind of abuse, how to detect it, what their role is or how best to respond'.

239 Lentini (n 238) 3.

240 Somes and Webb, 'What Role for Real Property?' (n 3) 120. However, it should be noted that Somes and Webb have also, relevantly, supported a new 'assets for care' jurisdiction: see Somes and Webb, 'What Role for the Law?' (n 3) 47.

241 Somes and Webb, 'What Role for Real Property?' (n 3) 135.

242 Estoppel, undue influence, unconscionable conduct, resulting trusts and the failed joint venture doctrine etc: see *ALRC Report* (n 2) 210 [6.31].

be an expensive and lengthy process.[243] By contrast, the new jurisdiction would overcome these accessibility issues as it would operate in the 'low cost and less formal forum' of the state and territory tribunals.[244] Further, it is not clear whether the courts or the legislature would be prepared to develop the law in the ways advanced by Somes and Webb.[245]

Other proposals advanced in their article would appear to alter fundamental aspects of the Torrens system of land registration, and thus may not be appropriate or politically viable.[246] The proposal to amend Torrens system legislation to allow 'assets for care' arrangements to be registered on land titles might undermine the efficiency and certainty of land transactions.[247] Arrangements take a variety of different forms,[248] such that 'the permutations of family agreements are " … almost infinite"'.[249] And they may or may not create clear proprietary rights. Including them on the Register could mean, therefore, that it is not clear from the Register what, if any, proprietary rights exist because of the arrangement. This would undermine the certainty and efficiency of land transactions, which the Torrens register seeks to bring about through being (as near as possible) a complete Register of existing interests in land. Of course, if Somes' and Webbs' proposal is that an arrangement would only be registrable if it (first) discloses a clear proprietary interest, then no such issues would arise. And that may be what is intended by their proposal to allow arrangements to be registered.[250] Similar problematic issues of compatibility with the Torrens system also potentially arise in relation to the proposals to create 'a method of noting the existence of an assets for care arrangement on the title',[251] and to create a new exception to

243 Ibid 207–8 [6.20]–[6.24]. '[P]ursuing litigation in these cases can be prohibitively costly' and 'unsatisfactorily lengthy': at 207 [6.20].

244 Ibid 204 [6.4]: 'Access to a tribunal provides a low cost and less formal forum for dispute resolution — in addition to the existing avenues of seeking legal and equitable remedies through the courts'.

245 Somes and Webb, 'What Role for Real Property?' (n 3) 135: 'In light of the inherent conservatism of courts to take these steps, the best way forward may be to develop a legislative response'.

246 Ibid 138: 'A proposal to further erode the sanctity of the Register by adding another exception to indefeasibility may be viewed by some as unacceptable, and we acknowledge the reasons behind those arguments'.

247 Ibid.

248 *ALRC Report* (n 2) 203 [6.1]: 'A "family agreement", of the kind considered in this chapter, has a number of forms but is typically made between an older person and a family member'.

249 *Older People and the Law* (n 7) 136 [4.4], citing Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths, 2004) 260.

250 It may be that this is what Somes and Webb intended under this proposal, as may be implied from their statement, 'this [proposal] would still require the parties to formalise their agreements beforehand': Somes and Webb, 'What Role for Real Property?' (n 3) 131. Cf their statement at 148: 'Although controversial, an assets for care interest could be created and registered on the title. Obviously if circumstances permit, if the assets for care arrangement was in the form of an existing registerable interest, that medium could be utilised. At the very least, the possibility to note the existence of the agreement on the title is overdue'. If the intention is that only arrangements which confer clear proprietary interests are to be registered, no such issue of creating uncertainty on the Register arises.

251 Ibid 148.

indefeasibility for 'assets for care' arrangements.[252]

V CONCLUSION

This article has developed a 'legislative roadmap' to create a new 'assets for care' jurisdiction in Australian state and territory tribunals, to resolve such disputes. Key features of enabling legislation were recommended, focussing on Victorian law. The recommended features could generally apply equally in any Australian jurisdiction which may seek to develop new 'assets for care' legislation in response to the *ALRC Report*'s recommendation for that to occur. Importantly, this article has also shown that the new jurisdiction would be a legally viable response ie it could be enacted in legislation. And, further, that it is one that would ensure that older persons can properly access remedies if they lose assets under these arrangements, and which would deter parties from taking advantage of older persons. The existing law falls short in these ways, thereby failing to protect older persons who enter arrangements.

252 Ibid 135–6:

> [A] preferable solution would be to amend relevant state legislation to include a provision stating that property transferred pursuant to an asset for care arrangement amounts to an exception to indefeasibility. This approach has a number of advantages for the older party; first, it effectively allows a statutory cause of action, providing an alternative to the convoluted equitable actions outlined above. Secondly, the older party would have an added protection if the property were sold to a third party.