‘HOME’ AMONG THE GUMTREES: THE EXPERIENCE OF HOME UNDER AUSTRALIAN REAL PROPERTY LAW AND IN PROPERTY THEORY

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THESIS BY PUBLICATION

This thesis is submitted as a thesis-by-publication in accordance with rule 3.1 of the *Specifications for Thesis*. The thesis comprises the following articles published within candidature and which argue the thesis regarding home:

- Article 1 – Samuel Tyrer, 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340.
- Article 2 – Samuel Tyrer, 'A New Theorisation of 'Home' as a Thing in Property' (2022) 49(2) *University of Western Australia Law Review* 191.
- Article 3 – Samuel Tyrer, ''Assets for care' arrangements: The current state of the law (and its weaknesses) from the perspective of home' (2020) 28 *Australian Property Law Journal* 149.
- Article 4 – Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve 'Assets for Care' Disputes' (2020) 46(3) *Monash University Law Review* 204.
- Article 5 – Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).
- Article 6 – Samuel Tyrer, 'Rooming House in Victoria: Home and the Nature of Property' (2022) 30(2) *Australian Property Law Journal* 108.

The articles are attached.

Style Note: Each of the individual articles, which comprise part of this thesis is presented in a distinct style. This is because each article, so far as possible, has been drafted in the house style of the journal in which it has been, or will be, published. Likewise, some variations in footnoting may occur due to the journal of publication for each article.

ABSTRACT

This thesis considers the experience of home in Australian law, and the relevance of law to that experience. It defines that experience as, ideally, encompassing a feeling of security, self-identity and relationships and family. Three case studies are presented which demonstrate areas of Australian property law undermining that home experience for individuals in housing. Having demonstrated the capacity for property law to undermine home, the thesis advances proposals for legislative reform in relevant areas to better protect the home experience. The thesis also addresses the problem of home as a matter of property theory, whereby it is argued that home – the experience – is capable of being the subject matter of property systems. Property systems can thus be designed to protect home, as well as to ensure distributions of that experience to ensure human flourishing. In terms of its design and legitimacy, Australia's property system must ensure home – the experience – for all. This argument is advanced, drawing on a particular interpretation of the personhood and human flourishing theories of property. The argument developed draws attention to the fact that some people in society have more than enough property in which to experience home, while others live in precarious housing or do not have even a roof over their head in which to experience home. The property system further undermines the experience of home through unequal distributions of ownership, which perpetuates the injustice of a lack of home.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship and the FA and MF Joyner Scholarship in Law, and the Zelling-Gray Supplementary Scholarship.

The first article in this thesis was published in 2020 in the University of New South Wales Law Review:

> Samuel Tyrer, 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340.

The second article in this thesis was published in 2022 in the University of Western Australia Law Review:

> Samuel Tyrer, 'A New Theorisation of 'Home' as a Thing in Property' (2022) 49(2) *University of Western Australia Law Review* 191.

The third article in this thesis was published in 2020 in the Australian Property Law Journal:

> Samuel Tyrer, ''Assets for care' arrangements: The current state of the law (and its weaknesses) from the perspective of home' (2020) 28 *Australian Property Law Journal* 149.

The fourth article in this thesis was published in 2020 in the Monash Law University Law Review:

> Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve 'Assets for Care' Disputes' (2020) 46(3) *Monash University Law Review* 204.

The fifth article in this thesis will be published in 2023 in the University of New South Wales Law Review:

> Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

The sixth article in this thesis was published in 2022 in the Australian Property Law Journal:

> Samuel Tyrer, 'Rooming Houses in Victoria: Home and the Nature of Property' (2022) 30(2) *Australian Property Law Journal* 108.

Each of these articles contains original research, which I conducted during the period of my Higher Degree by Research candidature, and which is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:

Date:

13 December 2022

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Fifth, I thank each person who shared their understanding of home with me and indulged me in conversations about home in law. I sincerely hope this thesis captures something of our conversations and leads to practical law reform in the areas it investigates. I look forward to continuing to do work in the future which improves laws and other systems, so they are accessible and fair to all, respect the inherent dignity and beauty of each person, and impart the experience of home in the world.

Finally, the opportunity to study for this PhD at Adelaide Law School would not have been possible if not for the support of the FA and MF Joyner Scholarship in Law, and the Zelling-Gray Supplementary Scholarship. I also acknowledge the support of the Australian Government Research Training Program Fees Offset Scholarship.

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CONTEXTUAL STATEMENT

'The house is a tool for the achievement of the experience of home.'[1]

'The goal here is not only to create a sense of home but rather to recognize and preserve it in its myriad of processes and forms. Its processes are seldom visible, and its forms are not always beautiful' yet beneath them lie the seeds of a deeper sense of home, struggling to flower.' [2]

'Home is a place of security within an insecure world, a place of certainty within doubt, a familiar place in a strange world, a sacred place in a profane world'.[3]

I. INTRODUCTION

All human beings long for an experience of home. 'The ache for home lives in all of us'.[4] It is easy to understand why. Home is necessary for a flourishing life. Ideally, buoyed by this experience in housing, people go out into the world to, in turn, nourish others. The experience meets their basic human needs. Home as an experience brings security, identity, and relationships.[5] When housing is not experienced in this way, this impacts peoples' ability to flourish. People who do not feel secure through home may not contribute as meaningfully to society as those who do. Peoples' wellbeing is also linked to home.[6] Home affords 'a profound centre of meaning and a central emotional and sometimes physical reference point in a person's life which is encapsulated in feelings of security, happiness and belonging'.[7] A lack of home in the form of a feeling of insecurity in the world may, conversely, have negative health impacts. From the outset, then, it is worth emphasising that housing is key to home. Housing is the medium for this home experience.[8] Australia's housing system is thus inextricably linked to home.

In Australia, housing is – to characterise it at a high level – becoming increasingly unaffordable, insecure, and substandard for vulnerable groups. In terms of who is impacted by these conditions, disproportionately it is women and children, older persons, and people living with disabilities both mental

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[1] Kimberly Dovey, 'Home and Homelessness' in Irwin Altman and Carol Werner (eds), *Home Environments* (Plenum Press, New York, 1985) 33, 54.
[2] Ibid, 61.
[3] Kimberly Dovey, 'Home: An Ordering Principle in Space' (1978) 22(2) *Landscape* 27– 30.
[4] Maya Angelou, *All God's Children Need Traveling Shoes* (Virago Press Limited, 1987), as cited in Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home' (Speech delivered at the Costello Lecture, Monash University Faculty of Law, 18 September 2012) 6.
[5] Samuel Tyrer, 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340 ('*Home in Australia*').
[6] Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) *29(4) Journal of Law and Society* 580, 593 ('*The Meaning of Home*').
[7] Judith Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6(4) *Journal of Environmental Psychology* 281, 290, as cited in Tyrer, *Home in Australia*, above n 5, 351.
[8] Fox, *The Meaning of Home*, above n 6, 607: 'as an ultimately experiential phenomenon, is difficult to prove'. See also, 590.

and physical. They may feel insecure and disconnected – the opposite of home – in these conditions, and eventually they may need to leave their housing, for example, due to rising costs, or poor standards of premises. Some of them will become homeless. Obviously, many factors contribute to this situation. This thesis focuses on the role played by Australia's property system, as embodied in its real property laws. It seeks to understand the relevance of these laws to the home experience—of security, identity, and relationships.

In a nutshell, it implicates these laws in the problem of a lack of home. The legal rights necessary for home in housing are either not afforded to vulnerable groups, or inaccessible in the way they are. The state must respond with appropriate reforms to ensure home for all. Through home, human beings flourish in the world. The overarching focus of the thesis on home for vulnerable groups, and the preciousness of that experience, has been made clear in this introduction. The next part outlines the argument advanced in the thesis.

II. THE THESIS

This thesis argues that: (i) Australian real property law impacts on individuals' experience of 'home'[9] in housing, and is undermining positive aspects of that experience for some individuals; and (ii) that home – the experience – is a thing which is capable of being the subject matter of property, such that state action must be taken in response. The first part of this argument is demonstrated using three case studies which examine specific areas of Australian real property law. The first case study concerns real property laws applying in the particular context of failed 'assets-for-care' arrangements entered into by older persons.[10] The second case study concerns Victoria's rooming house laws under the *Residential Tenancies Act* 1997 (Vic) (RTA) .[11] The third case study concerns protections for family violence victims under the RTA.[12] All demonstrate real property laws impacting, and in the specific ways identified undermining, home—the experience in housing—for affected individuals, and thus prove the first part of

[9] 'Home' is placed in parenthesis here to denote that 'home' is an experience in housing; and thus, to distinguish it from house. References to home from hereon in have that meaning and thus are not so qualified.
[10] Samuel Tyrer, ''Assets for care' arrangements: The current state of the law (and its weaknesses) from the perspective of home' (2020) 28 *Australian Property Law Journal* 149 ('*'Assets for care' arrangements*'); and Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve 'Assets for Care' Disputes' (2020) 46(3) *Monash University Law Review* 204 ('*'Assets for Care' Disputes – A Proposal*').
[11] Samuel Tyrer, 'Rooming Houses in Victoria: Home and the Nature of Property' (2022) 30 *Australian Property Law Journal* 108 ('*Rooming Houses in Victoria*').
[12] Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

the argument. Recommendations for law reform are made, under each case study, so that law might appropriately respond to this problem of a lack of home.

The second part of the argument—that home – the experience – is a thing which is capable of being the subject matter of property and that state action must be taken in response—is approached as matter of property theory. It is argued that home can be theorised in such a way that property laws can be developed to protect that experience.[13] Further, it is argued that the state must take action because home is essential to legitimate property rights in housing, drawing on the personhood and human flourishing theoretical justifications for property.[14] However, it is not enough for the state to merely confer property rights and so to protect only the physical asset of house.[15] House must not equal home, in other words.[16] Further action is required to ensure home in that property laws must themselves embody the conditions for home, which this thesis argues must include *housing stability* and *housing control*.[17] This argument—that Australian real property laws must do more by embodying these conditions for home—is catalysed through a new theorisation that home—the experience—is capable of being the subject matter of property.[18] This new theorisation seeks to ensure the legitimacy of private property as a means for personhood and human flourishing.[19]

The remainder of this contextual statement serves four purposes. First, Part III–the literature review—engages with the existing literature on home within the discipline of law, and so places this thesis within a broader body of work. Second, Part IV identifies the two research problems—one legal and one theoretical—of the inquiry and justifies their relevance. Third, Part V makes clear the contributions being made by the thesis. Finally, Part VI outlines the structure for the thesis. As a thesis by publication, it comprises six articles.

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[13] Tyrer, *Home in Australia*, above n 5. Samuel Tyrer, 'A New Theorisation of 'Home' as a Thing in Property' (2022) 49(2) *University of Western Australia Law Review* 191 ('*A New Theorisation of 'Home'*').
[14] Tyrer, *A New Theorisation of 'Home'*, above n 13.
[15] Ibid, 232. A significant contribution of Fox O'Mahony's work is to illustrate that mere possessory rights to property (i.e. housing) are not enough for 'home': see, eg, Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 161 ('*The Meaning of Home: From Theory to Practice*'). Similarly, human rights law principles recognise that 'home' is more than a house (see further discussion at Part III below).
[16] Tyrer, *A New Theorisation of 'Home'*, above n 13, 232.
[17] Ibid, 233. Tyrer, *Home in Australia*, above n 5, 362-370.
[18] Tyrer, *A New Theorisation of 'Home'*, above n 13, 235.
[19] Ibid, 194.

III. LITERATURE REVIEW

There is wide engagement in the literature with home—both as an experience (i.e., home) and as a physical place—including in sociology, philosophy, architecture, geography and theology.[20] However, in law, the home literature is not as extensive.[21] That is not to say legal academics, courts, law-makers and laws themselves do not engage with home in various ways. They certainly do. [22] As this is a law thesis, this review focusses mainly on 'home' literature in the discipline of law. It is not necessary to review the breadth of home literature generally. However, the review makes some reference to philosophy and indigenous perspectives to enrich the thesis. This literature review contains six sub-parts exploring relevant home literature: first, on home scholarship in law; second, on home and discourses of property; third, on human rights law; fourth, on property theory; fifth, on philosophy; and sixth on indigenous perspectives.

1. *Home scholarship in law*

Scholars outside Australia are already engaging with home in law, although they represent a minority. Leading the field is UK academic Fox O'Mahony. Her vast body of work has already been cited and is relied on in the thesis.[23] Fox O'Mahony makes three significant contributions to home in law relevant to this thesis. First, that home – the experience – can be conceptualised. Second, that its conceptualisation is useful as it facilitates law being analysed from a home perspective. And third, that by developing a concept of home, home might be considered in legal disputes involving occupiers with a 'home interest'.[24] Having had the benefit of these three contributions, this thesis expressly acknowledges them and unpacks them in the following three sections; first, on conceptualising home; second, on evaluating the impact of law on home; and third, on making home justiciable. These sections, while focussed on Fox O'Mahony's work, also discuss the home scholarship of others.

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[20] See generally, Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford, 2007) ('*Conceptualising Home*'); and Steven Bouma-Prediger and Brian J. Walsh, *Beyond Homelessness: Christian Faith in a Culture of Displacement* (Wm. B. Eerdmans Publishing Co, USA, 2008).
[21] Fox, *Conceptualising Home*, above n 20, 131-132.
[22] Fox, *The Meaning of 'Home'*, above n 6, 582.
[23] Ibid; Fox, *Conceptualising Home*, above n 20, 179; Lorna Fox O'Mahony and James A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37(2) *Journal of Law and Society* 285; and Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15. In Singapore, see, eg: Tang Hang Wu, 'The Legal Representation of the Singaporean Home and the Influence of the Common Law' (2007) 37 *Hong Kong Law Journal* 81. In the USA, see, eg: M.J. Ballard, 'Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy' (2006) 56 *Syracuse Law Review* 277.
[24] Fox, *Conceptualising Home*, above n 20, 28-29.

(a) Conceptualising home

In *Conceptualising Home*, Fox O'Mahony proposes a home-values framework. This framework is, essentially, an understanding of home in all its different dimensions. Drawing on 'interdisciplinary home scholarship',[25] Fox O'Mahony proposes that 'home' can be understood through five 'value-types', which span the tangible and intangible (i.e. experiential) aspects of home: home as a financial investment; home as a physical structure; home as a territory; home as a centre for self-identity; and home as a social and cultural unit.[26] This conceptualisation demonstrates that home is definable. And thus, as this thesis argues, it is a thing capable of being the subject matter of property and which laws can enhance or undermine.[27] This thesis defines home in its own way,[28] and makes this theoretical argument.[29] Fox O'Mahony's second contribution is to demonstrate that laws impact on home and can be evaluated from that perspective.

(b) Evaluating the impact of law on home

Home is useful as an analytical tool. It 'enables us to identify those problems in need of policy attention; to develop a narrative to express them; and to generate support for solving them.'[30] Fox O'Mahony's home-values framework prompts consideration of 'the human experiences of occupiers',[31] against which laws can be evaluated and, in this way, it opens up the possibility of exploring the relationship between law and home, and of understanding how law might affect the experience of home.[32] As Fox O'Mahony explains, the framework 'enables us to examine questions which are not always deemed "relevant" to legal proceedings, for example, the human, social and personal costs of displacement and dispossession.'[33]

In applying this 'home' evaluative framework to Australian real property law, this thesis follows in Fox O'Mahony's footsteps. It also makes concrete recommendations for law reform—as noted—and so like

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[25] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 159. See also, Lorna Fox, *The Meaning of 'Home'*, above n 6, 609.
[26] Fox, *Conceptualising Home*, above n 20, 146.
[27] Of course, just because some thing is definable as a *thing* does not necessarily mean that it is a thing that is capable of being the subject matter of property, and thus that law (as an institution of the state) can grapple with. The argument that home is capable of being a thing the subject of property is made as part of this thesis: Tyrer, *A New Theorisation of 'Home"*, above n 13.
[28] Tyrer, *Home in Australia*, above n 5.
[29] Tyrer, *A New Theorisation of 'Home'*, above n 13.
[30] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 167.
[31] Ibid, 166. See also 160.
[32] Fox, *Conceptualising Home*, above n 20, 4.
[33] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 167.

Fox O'Mahony's work it seeks 'to build the bridges that can make the reality of home's meanings count where it matters most: in the governance of the real issues and challenges of property law and housing.'[34]

Home evaluative scholarship exists in addition to that of Fox O'Mahony. Home evaluative scholarship has spanned broad areas of law, including migration law,[35] repossession law,[36] shared ownership,[37] and family law.[38] Although the thesis does not engage with these areas of law, the existing home scholarship in these four areas is explored here as part of this literature review. It demonstrates the approach of evaluating law from a home perspective, as this thesis does in respect of the areas of Australian law it evaluates. Migration law is an area of law explored in home scholarship as noted.

Migration law: Fox and Sweeney show clearly that UK migration law and policy discriminates against asylum seekers in their ability to experience home. Policies implicated in that analysis include, for example, restrictions on work rights, removing 'support for failed asylum seekers with children',[39] locating refugee accommodation in far-flung places,[40] and the 'uncertainty and insecurity' which accompanies 'asylum seeker status' (i.e. its transience) which can itself undermine 'home-making'.[41] These 'deliberate' policies seek 'to *prevent* (failed) asylum seekers from developing a relationship with 'place' in the United Kingdom',[42] and hence from experiencing the meaning of home.[43]

Asylum seekers in the UK may, therefore, be characterised as "doubly displaced".[44] Asylum seekers are, first, 'displaced from their home state',[45] and, second, in the UK 'in light of their precarious claim on

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[34] Ibid, 158.
[35] Fox O'Mahony and Sweeney, above n 23, 285.
[36] Beverley A. Searle, 'Recession, repossession and family welfare' (2012) 24(1) *Child and Family Law Quarterly* 1. Fox O'Mahony also makes suggestions for reform of repossession law in the context of legal proceedings: see Lorna Fox, *Conceptualising Home*, above n 20, 108. Other literature exists on repossession and foreclosure, much of this following the increasing numbers of repossessions during the global financial crisis: see Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 158 and work cited therein.
[37] Susan Bright and Nicholas Hopkins, 'Home, Meaning and Identity: Learning from the English Model of Shared Ownership' (2011) 28(4) *Housing, Theory and Society* 377.
[38] 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.
[39] Fox O'Mahony and Sweeney, above n 23, 297.
[40] Ibid, 299. Reference is made to a Dutch study revealing how those persons in refugee reception centres did not have 'even the most basic attributes of home.'.
[41] Ibid, 298-299.
[42] Ibid, 291-292.
[43] Ibid, 296: such policies mean that asylum seekers may 'face 'homelessness' in the sense of being without shelter', and where they have shelter 'in the sense that the nature of the shelter provided does not satisfy the criteria of 'housing', and is not likely to be conducive to feelings of 'home'.'
[44] Ibid, 286.
[45] Ibid.

housing – being unable to secure the use of a dwelling which they can establish as a home.'[46] Asylum seekers exclusion from housing and home is 'a social problem requiring policy attention'.[47] '[A]sylum seekers …[are] among the most marginalized, poor, and vulnerable people in our society.'[48] Repossession law – another area of law the literature has explored from a home perspective – is reviewed next.

Repossession law: Searle's concern is with housing repossessions and their continuing deleterious impacts on individuals beyond the repossession itself.[49] Following repossession, individuals can experience 'further difficulties with regard to security and sustaining accommodation;'[50] relationship breakdown; and impacts on children.[51] These underlie the point that 'houses are bought, *homes* are repossessed'.[52] Searle recommends 'more flexible management of mortgage terms and repayment criteria' as a reform to preclude repossessions.[53] This shows 'the very products that facilitate the purchase and occupation of homes' may themselves hold the answer to enhance home protections.[54] Arguably, Searle's attentiveness to the human impacts of repossession leads her to these new possibilities for legal reform, which is a characteristic of home scholarship. Other literature exists on repossession and foreclosure, much of it emanating from the global financial crisis in which the numbers of repossessions increased.[55] Yet another area explored in the home literature is shared ownership law.

Shared ownership: Bright and Hopkins assess the UK model of shared ownership for housing from a home perspective.[56] Specifically, to determine if shared ownership delivers the promise of 'home ownership' (as individuals commonly understand that term). Under this model, an individual part-buys with a housing provider. The individual receives a lease of the property. The provider retains the freehold. Bright's and Hopkins' conclude that this shared ownership model does not deliver home in a traditional 'home-ownership' sense. They explain: 'once we focus on the actual legal rights and responsibilities of

[46] Ibid.
[47] Ibid, 289. Explanation is offered for why, thus far, the exclusion of asylum seekers has not been identified as a problem requiring attention.
[48] Ibid.
[49] Searle, above n 36, 17.
[50] Ibid.
[51] Ibid, 18.
[52] Ibid.
[53] Ibid, 21. Fox O'Mahony also makes suggestions for reform of repossession law in the context of proceedings: see Fox, *Conceptualising Home*, above n 20, 108.
[54] Searle, above n 36, 23.
[55] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 158 and work cited therein.
[56] Under this model, individuals part-buy with a housing provider and receive a lease of the property while the provider retains the freehold.

shared owners we see that many of the qualities often associated with ownership are absent.'[57] Specifically, shared owners lack the same financial security,[58] stability and security,[59] and autonomy and control[60] associated with home ownership of the freehold. The different legal structure of the shared ownership model simply does not equate to traditional (freehold) home ownership. In that way, the model does not necessarily deliver 'in the real world'.[61] Use of the term 'home-ownership', in respect of shared ownership schemes, is thus questionable,[62] as is whether individuals should opt for the model. Having taken a home perspective, Bright and Hopkins generate these new insights. In the Australian legal scholarship family law has also been the subject of home analysis .

Family law: Natalier and Fehlberg highlight that family law has given 'little attention' to home.[63] Children's experiences of home when parents separate under Australian family law is their focus. Australia's *Family Law Act* 1975 (Cth) empowers the court to make orders regarding the family home and parents' rights to access to children. In deciding what happens to the family home, home – the place – is treated 'as an economic assets of adults'.[64] Similarly, in deciding parents' rights to access children, the court is to apply a 'predominantly adult-focused rather than child focussed' legislative provision.[65] Under parenting orders made, children of separated families generally spend time across two physical homes, which suggests law sees home as '*people* and *time*, rather than physical houses.'[66] Law may thus be 'at odds with the concept of home, which is usually understood as a single place' i.e. providing constancy.[67] This research reveals laws' lack of focus on children's experience of home. Therefore, 'thinking more closely about 'home' for children [in separated families], and their capacity for 'home making'' would be in children's interests.[68] To inform future policy development, Natalier, Fehlberg and Smyth have undertaken related empirical research with children on home. Interviews were conducted with children.[69] Separately, Sarmas and Fehlberg have explored how bankruptcy law impacts the family home.[70]

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[57] Bright and Hopkins, above n 37, 393.
[58] Ibid, 386.
[59] Ibid, 387.
[60] Ibid, 388.
[61] Ibid, 393.
[62] Ibid, 391.
[63] Natalier and Fehlberg, above n 38, 112.
[64] Ibid, 124.
[65] Ibid.
[66] Ibid.
[67] Ibid, 117.
[68] Ibid.
[69] Belinda Fehlberg, Kristin Natalier, and Bruce M. Smyth, 'Children's experiences of 'home' after parental separation' (2018) 30(1) *Child and Family Law Quarterly* 3. See also, Natalier and Fehlberg, above n 38, 134.
[70] Lisa Sarmas and Belinda Fehlberg, 'Bankruptcy and the Family Home: The Impact of Recent Developments' (2016) 40 *Melbourne University Law Review* 288.

While not exhaustive, the review presented here gives a sense of existing home scholarship. In this scholarship, '[t]he concept of home provides the vocabulary, and the theoretical framework, for articulating the human claims of vulnerable people, with fragile claims to adequate housing, more coherently.'[71] Home as a concept is used to highlight 'the ways in which the idea of home is present or absent in legal responses to home issues.'[72] This thesis follows in that vein, in respect of Australian property laws evaluated in its three case studies.

Thus far, this sub-part has discussed two of Fox O'Mahony's significant contributions to the home scholarship in law—conceptualising home and evaluating the impact of law on home—and reviewed existing home scholarship of hers and others in particular areas of law. The next section outlines a third contribution of Fox O'Mahony, on making home justiciable.

(c) Making home justiciable

Fox O'Mahony argues the home values framework is a 'conceptual springboard for the development of a legal concept of home.'[73] A legal concept of 'home' would assist decision makers to identify 'home-interests' (of occupiers) in legal disputes, so they can properly be 'weighted in the balance'.[74] Fox O'Mahony explains: 'If a legal concept of home could be developed, it could be utilized to inform the decision-making process where home is the scene or substance of legal disputes.'[75] Home would be made (more) justiciable in this way. Alternatively, without a clear legal concept of home, '[t]he outcome is skewed against the occupier from the outset'.[76] Fox O'Mahony directs her conceptualisation of home to the development of a legal concept of home, so that in legal disputes home may be considered as against other 'competing claims'.[77]

A legal concept of 'home' would be useful in disputes between occupiers (who have a 'home interest') and others with a commercial interest,[78] such as a landlord or a secured creditor.[79] In such disputes, home might 'potentially generate the basis for a legal claim [of the occupier] which should be weighted in

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[71] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 167.
[72] Ibid.
[73] Fox, *Conceptualising Home*, above n 20, 119.
[74] Fox, *The Meaning of Home*, above n 6, 587.
[75] Ibid, 581.
[76] Fox, *Conceptualising Home*, above n 20, 132.
[77] Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 156: 'competing claims with commercial clout'.
[78] Fox, *The Meaning of Home*, above n 6, 587.
[79] Fox, *Conceptualising Home*, above n 20, 11-12.

the balance against other types of claim'.[80] However, by no means will 'strong property rights'[81] be defeated by an occupier's 'home-interests'.[82] Fox O'Mahony does not, at any point, make such an argument. Rather, the gist of her argument is that 'home-interests' should be recognisable in law, and that this might prompt more nuanced legal responses, reflecting the home-interest. Fox O'Mahony illustrates these points with reference to creditor-occupier possession disputes.

In these disputes, Fox O'Mahony argues occupiers' 'home-interests' are currently overlooked by law.[83] This motivates her argument for a legal concept of home, and that 'home interests' should not 'continue to be overlooked in legal analysis'.[84] Recognising an occupier's home-interest would enable the occupier's and creditor's interests to be re-balanced.[85] For example, the creditor might be 'required to suffer a delay in the enforcement of his legal rights over the property'[86] because an occupier's 'home-interest' is present, but creditors would not lose 'their proprietary rights in the property'.[87] Fox O'Mahony explains:

> 'the creditor's interest would not be eliminated, but the creditor could be required to wait for his rights, either while giving the home occupier more time to organise their financial affairs, to make adequate arrangements regarding another property, or to ensure that the occupiers are not evicted from their home until some other specific date, such as the date at which any children living in the property reach the age of majority or are ready to leave full-time education.'[88]

Other scholars have also been concerned with occupiers' home interests. Ballard proposes the home interests of subsidised housing tenants be protected. Her proposal seeks 'to ascribe legal value' to their interest in remaining in their home.'[89] Law should assess if their house is a home by focussing on 'the extent to which …[the home] is constitutive of that tenant.'[90] Factors to be considered include: the 'length

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[80] Lorna Fox O'Mahony and James A. Sweeney, 'The Idea of Home in Law: Displacement and Dispossession', in Lorna Fox O'Mahony and J.A. Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing Limited, 2011) 1, 6 ('*The Idea of Home in Law: Displacement and Dispossession*').'
[81] Ibid.
[82] Creditors would not lose 'their proprietary rights in the property': Fox, *Conceptualising Home*, above n 20, 28.
[83] Home interests are being overlooked in creditor-occupier disputes due to a bias towards the creditor's interest; in turn, this undermines the development of a concept of home in law: Fox, *Conceptualising Home*, above n 20, 77 and 108.
[84] Fox, *Conceptualising Home*, above n 20, 308. In support of her argument that 'home interests' be considered in the creditor-occupier context, Fox O'Mahony also mounts an economic argument for the occupier's interest (remaining) in home being considered in repossession disputes. There are economic costs to be considered on the home-interest side. A legal concept of home is thus necessary to highlight these issues: Fox, *Conceptualising Home*, above n 20, 108 and 123; and Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 2.
[85] Fox, *Conceptualising Home*, above n 20, 28.
[86] Ibid.
[87] Ibid.
[88] Ibid, 29.
[89] Ballard, above n 23, 281.
[90] Ibid, 307.

of tenure in particular dwelling'; the 'degree to which a tenant customised or improved a dwelling'; the 'interests of children or other dependent family members residing in the dwelling'; and the 'reasonableness of the conduct or circumstances that put housing at risk'.[91] Ballard argues that, if those 'attributes of home' are found, the landlord must justify eviction of the tenant.[92] Further: 'The stronger the tenant's connection with his or her home, the more significant the justification must be for an eviction.'[93] Ballard counters objections to her proposal,[94] and clarifies that her 'approach reflects the starting point rather than the final destination'; that is, it is 'to set the stage for a scholarly debate on the best way of lending legal weight to the meaning of home.'[95]

In conducting this literature review, this thesis found few Australian home scholars in law i.e., those engaging directly with 'home' as an experiential concept, which law impacts. Thus far, evaluation of law from a home perspective has mostly been confined to the UK and North American legal academies, with a few exceptions of Australian legal scholars having engaged with the concept or having considered laws from that or related perspectives.[96] This thesis seeks to redress this deficiency in the Australian legal scholarship. The three case studies in the thesis detailed in Part IV evaluate areas of Australian property law from the perspective of home.

The literature review, to this point, has focussed on home scholarship in law, in particular on Fox O'Mahony's work and that of other scholars evaluating particular areas of law from a home perspective.

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[91] Ibid, 308-310.
[92] Ibid, 307.
[93] Ibid, 307.
[94] Ibid, 316.
[95] Ibid, 308.
[96] See, eg, Margaret Davies, 'Home and State: Reflections on Metaphor and Practice' (2014) 23(2) *Griffith Law Review* 153 (Davies argues the concept of home potentially 'obscures violence and disempowerment', especially in relation to Indigenous peoples when home is associated with the state: 161 and 163); Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017) (Sherry's comprehensive analysis of strata by-laws in Australia reveals the impact they have on people's lives and experiences in their homes: see Chapter 5 on 'Privacy and personal autonomy'); Fehlberg, Natalier, Smyth, above n 69 and Natalier and Fehlberg, above n 38 (regarding work in the family law context concerning children and home); 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, and 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* 52, 55 (regarding older persons and home); Larissa Behrendt, 'Home: The Importance of Place to the Dispossessed" (2009) 108 (1) *The South Atlantic Quarterly* 71 and Larissa Behrendt, 'Genocide: The Distance Between Life and Law' 25 (2001) *Aboriginal History* 132 (regarding the impact of colonial laws and policy on Indigenous people in Australia); and Kathrine Galloway, *Yours, Mine, or Ours? Charting a Course Through Equity's Determination of Domestic Proprietary Interests* (PhD Thesis, The University of Melbourne, 2017) (arguing the concept of home is relevant to the law of intimate partner trusts. Specifically, when that law applies to determine the property interests of men and women whose intimate relationship has failed. Incorporating home into the law in the ways described would redress its gendered approach which currently favours men over women.)

The remaining sub-parts of this literature review explore other relevant home literature, including on home and discourses of property.

2. *Home and discourses of property*

Roark's scholarship engages with the experience of home as understood by this thesis. Roark examines 'how property [law] impacts poor people – the under-housed and under-propertied – in their ability to form identity and community in housing.'[97] However, Roark's scholarship proceeds a step further from evaluating laws. Roark explores the discourses property law promulgates about people who are homeless (without housing) or living in precarious housing (the 'under-propertied' and 'under-housed'). That discourse behind property rules and doctrines, in effect, distinguishes between these vulnerable persons, and property owners who are thus 'justifiably' protected by law regarding their experiences.[98] Non-owners' experiences are not prioritised, by contrast, because they lack ownership – the system says, in effect, it is their fault for the vulnerable position they are in i.e., lacking ownership.[99] In this way, property law shapes the identities of vulnerable individuals, and how society views them, in addition to shaping their day-to-day experiences in housing.[100] Uncovering these (hidden) discourses has real practical relevance. The discourses may 'shape our policy views and outcomes',[101] whereby 'blame for their plight [is directed to] … the poor themselves, as a result of their being 'different'.'[102] 'Such discourses resulting from property shape how the poor are perceived, and need to be unpacked and changed as part of addressing housing problems faced by the poor'.[103] Roark's other scholarship similarly focuses on laws impacting homeless persons, and which define their identity vis-à-vis the community, as well as the identity of the community who makes those laws.[104]

Another relevant area to explore regarding home is human rights laws, as these laws expressly protect home.

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[97] Tyrer, *Rooming Houses in Victoria*, above n 11, 109, citing Marc L. Roark, 'Under-Propertied Persons' (2017) 27(2) *Cornell Journal of Law and Public Policy* 1, 9-11, 31 ('*Under-Propertied Persons*').
[98] Roark, *Under-Propertied Persons*, above n 97, 5-6.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Tyrer, *Rooming Houses in Victoria*, above n 11, 109, citing Roark, *Under-Propertied Persons*, above n 97, 9, discussing Teresa Gowan's work in Teresa Gowan, *Hobos, Hustlers, and Backsliders: Homeless in San Francisco* (Minneapolis: University of Minnesota Press, 2010).
[103] Tyrer, *Rooming Houses in Victoria*, above n 11, 109, citing Roark, *Under-Propertied Persons*, above n 97, 8, 11.
[104] Marc L. Roark, 'Homelessness at the Cathedral' (2015) 80 *Missouri Law Review* 53 ('*Homelessness at the Cathedral*'). Tyrer, *Rooming Houses in Victoria*, above n 11, 110.

3. *Human rights law*

Human rights laws are, without a doubt, the laws in which home is most pronounced. They also advance a key tenet of this thesis: home is more than a house, and law must do more than confer proprietary rights to a physical structure.[105] Instead, human rights laws require 'adequate housing', which implies that law must protect home—the experience. Two sections on human rights law follow. First, on international human rights law; and second, on domestic human rights law.

(a) International

International human rights law expressly protects home. A right to adequate housing is included in the Universal Declaration of Human Rights of 1948, entered into by states following the second world war.[106] This right is clearly binding on states that are party to the International Covenant on Economic, Social and Cultural Rights,[107] including Australia. As a result, Australia (as a matter of international law) must progressively realise a right to adequate housing for individuals, according to its resourcing constraints.[108] This requires that Australia take positive steps to afford individuals 'adequate housing'.[109]

Regarding 'adequate housing', the United Nations Committee on Economic, Social and Cultural Rights (the Committee)[110] explains what this broadly requires:

> 'the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. *Rather it should be seen as the right to live somewhere in security,*

[105] See generally, Fox, *Conceptualising Home*, above n 20.

[106] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) ('UDHR'). A right to adequate housing appears in article 25(1), as a sub-set of the right to an adequate standard of living. The UDHR also contains a right against 'arbitrary interference' with 'home', via the right to privacy in article 12. Regarding the UDHR's legal status, see: Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, Australia & New Zealand, 2nd ed, 2017) 22-23.

[107] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). A right to adequate standard of living, including housing, appears in art 11(1). See also, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). A right not to be 'subjected to arbitrary or unlawful interference' with one's home appears in art 17(1).

[108] ICESCR, above n 107, article 2(1): 'to achieve progressively the full realization of the rights'.

[109] Interestingly, the Victorian Supreme Court has made observations on the states' resources in a human rights case concerning children in that state's youth justice system: see *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017), [475] (Justice Dixon).

[110] This committee—known as a 'treaty body'—is responsible, under ICESCR, for hearing complaints made against state parties and thus makes pronouncements on the scope of relevant rights under ICESCR. Regarding the UN treaty body system, see: McBeth, Nolan and Rice, above n 106, 229-268.

peace and dignity. … the reference in article 11 (1) must be read as referring not just to housing but to adequate housing.'[111]

Adequate housing, as noted, goes beyond 'merely having a roof over one's head'.[112] It is to ensure 'the right to live somewhere in security, peace and dignity'.[113] The Committee has identified factors which are relevant to assessing if housing is 'adequate',[114] including '[l]egal security of tenure',[115] '[a]vailability of services, materials, facilities and infrastructure',[116] affordability,[117] habitability,[118] accessibility,[119] location,[120] and '[c]ultural adequacy'.[121] All of these affect the adequacy of housing. Further, and significantly for this thesis, they go to improving the experience of home.

The provision of 'adequate housing'—an obligation of Australia under international human rights law—is therefore consistent with the expansive and experiential sense of home argued for in this thesis.[122] This is because 'adequate housing' requires housing laws and policies to go beyond the provision of shelter—and basic property law—to afford to individuals with a safe, stable, secure and private home experience.

Unfortunately, a lack of adequate housing remains a problem, even in affluent Western states. In 1998, as the then Chair of the Committee, Philip Alston wrote: 'Homelessness is the predictable result of private and public-sector policies that exclude the poor from participating in the economic revolution, while safety nets are slashed in the name of 'global competitiveness.'[123] Alston further wrote: 'the situation is perpetuated by a deep reluctance to tackle the roots of the problem.'[124] Significantly, Alston used the word 'reluctance' (rather than 'inability'), implying that states have it within their power to address this situation.[125] What, then, explains their 'reluctance' to take action? Alston considers: 'Such concepts as the existence of a social contract, of community, of concern for the long-term good or even of public

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[111] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, (adopted at 6th sess of the Committee on Economic, Social and Cultural Rights, 13 December 1991), para. 7.
[112] Ibid.
[113] Ibid.
[114] Ibid, para. 7 and para. 8: the Committee indicates 'a number of factors must be taken into account'.
[115] Ibid, para. 7 and para. 8(a).
[116] Ibid, para. 7 and para. 8(b).
[117] Ibid, para. 7 and para. 8(c).'
[118] Ibid, para. 7 and para. 8(d).
[119] Ibid, para. 7 and para. 8(e),
[120] Ibid, para 8(f).
[121] Ibid, para 8(g).
[122] Fox, *Conceptualising Home*, above n 20: see Chapter 10, 'The Concept of Home in a Human Rights Framework'. See also, Ballard, above n 23, 295: acknowledges that human rights law 'may lead to the protection of the home as something more than physical shelter.'
[123] Philip Alston, 'Hardship in the Midst of Plenty' in *The Progress of Nations 1998—Industrialized Countries: Commentary* (Geneva, UNICEF, 1998), as cited in Bouma-Prediger and Walsh, above n 20, 104.
[124] Ibid.
[125] Bouma-Prediger and Walsh, above n 20, 104.

morality are discarded as people ignore the growing, simultaneous presence of high levels of prosperity on the one hand and of homelessness on the other.'[126] Overwhelmingly, this thesis argues for policies to overcome this to ensure adequate housing, and so home, for all.[127]

As for international human rights law, domestic human rights law also supports the thesis. Domestic human rights law is explored in the next section.

(b) Domestic human rights law

Victoria, the Australian Capital Territory, and Queensland have all, in recent years, introduced domestic human rights frameworks.[128] Victoria's *Charter of Human Rights and Responsibilities Act* 2006 (Charter), the Australian Capital Territories' *Human Rights Act* 2004 (ACT HRA) and Queensland's *Human Rights Act* 2019 (Qld HRA) are human rights frameworks established under statute. They represent one means by which 'home interests'[129] are reflected in Australian law, albeit in the limited ways discussed below.

Neither the Charter, the ACT HRA or Qld HRA includes a right to 'adequate housing' which requires the government to take positive steps to afford this right to individuals, as is the case under international

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[126] Alston, , above n 123.

[127] Tyrer, *A New Theorisation of 'Home'*, above n 13.

[128] Generally, these frameworks require decision-makers (within the definition of 'public authority') to consider human rights, and balance competing interests in their decision making. The goal is to ensure government decision-making is proportionate, justifiable and least restrictive of human rights. Victoria's Charter provides a useful example of how these statutory human rights frameworks operate. While there are some differences between Victoria and the other jursidictions' frameworks, these are not relevant for present purposes. Victoria's Charter, under section 38, requires public authorities to: (i) give proper consideration to relevant rights; and (ii) act compatibly with human rights.

The first limb is a procedural requirement for rights consideration. *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 181 (4 May 2010)), Justice Emerton, at [185]: 'Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests.'

The second limb is a substantive requirement necessitating human rights compatible decisions. Whether decisions are compatible with rights is determined by criteria in section 7(2), to arrive at a decision whereby any limitation or interference with rights is nonetheless reasonable and demonstrably justified in the circumstances. Section 7(2) lists the factors to consider in conducting this analysis: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.'

[129] Fox, *The Meaning of Home*, above n 6, 587.

human rights law. However, each framework contains a right to privacy.[130] Home interests have received some protection under this right. To explain, the right to privacy protects against arbitrary interferences with home—among other things—by public authorities.[131] Section 13(1) of the Charter, for example, provides: 'A person has the right 'not to have his or her privacy, family, *home* or correspondence unlawfully or arbitrarily interfered with' (emphasis added). This is a negative right i.e., one requiring the state to refrain from interfering with (existing) home interests (as compared to a positive right that requires the state to take action to improve home experiences). Accordingly, this right protects home in a limited way. Particularly, because the right assumes persons have a home to begin with, and thus which the state ought not to interfere with. Those who lack a home cannot rely on this right to redress their situation of homelessness is what this means. That said, the right to privacy has benefitted individuals by protecting their (existing) home. For example, in public housing disputes where the Director of Housing (or a public accommodation provider) seeks to evict a person,[132] or in a guardianship and administration dispute, where the appointment of an administrator would likely have resulted in an individual's home being sold against their will.[133]

Other perspectives beyond human rights law also promote home, including property theory as explored next.

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[130] Section 13(1) of the Victorian Charter provides: 'A person has the right 'not to have his or her privacy, family, *home* or correspondence unlawfully or arbitrarily interfered with' (emphasis added). Section 12 of the ACT Human Rights Act provides:

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

Section 25 of the *Human Rights Act* 2019 (Qld) provides:

A person has the right—

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

[131] 'Public authority' includes the usual government entities and some non-government entities doing government like things. This is a gross over simplification of the definition of 'public authority' under the statutory frameworks, but is all that is required for present purposes.

[132] Under Victoria's Charter, see *Director of Housing v Sudi* (2011) 33 VR 559 (*Sudi*). (This was an appeal from the decision of Justice Bell in the Victorian Civil and Administrative Tribunal. See *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328.) Under the ACT's Human Rights Act, see *Canberra Fathers and Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74. See also discussion in Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home' (Speech delivered at the Costello Lecture, Monash University Faculty of Law, 18 September 2012); and Tyrer, *Home in Australia*, above n 5, 367-370.

[133] *PJB v Melbourne Health and Another* (2011) 39 VR 373 (*Patrick's Case*). This was an appeal from a decision of the Victorian Civil and Administrative Tribunal to appoint an administrator to Patrick's estate.

4. *Property theory*

Property theory seeks to explain matters which are foundational to any system of property—what property is, who should have it, and how much of it,[134] and whether those conclusions can be justified; thus, property theory develops property law through its guiding norms. Different theories of property exist,[135] and can generally be characterised as either justificatory or content-based theories. Justificatory theories examine the purpose or basis for property, whereas content theories examine the nature of property i.e., its defining characteristics and features, which inform the system's design. However, in practice the division is not so arbitrary. Justificatory theories for property might also inform the content of property. Their justificatory ends have implications for the design of property systems so as to achieve those ends.

This sub-part reviews two justificatory theories. Both theories support home being protected by law, and both inform the content of property as this thesis interprets them. The personhood and human flourishing theories of property are identified in Fox O'Mahony's scholarship as relevant to home; the thesis draws on that scholarship including in the following discussion.[136] While each theory provides a different justification legitimising property, each naturally supports home in law– their justificatory ends inform the design of property systems for home. First, to explain how this is so for the personhood theory of property. The personhood theory of property recognises that property can reflect personhood and, particularly, that individuals might reflect this personhood through homes.[137] The personhood theory is naturally poised to protect homes in this way, on the basis that they reflect personhood – which the theory says is the justification for property. Additionally, this theory should be understood to seek the protection of personhood—which is part of the home experience itself—not just by conferring rights to the home as an asset, but by going further and ensuring laws enable that personhood to *actually* manifest in homes.[138] This is essentially saying the theory should distinguish between the property system protecting the physical home, and protecting the experience of home including personhood, and that it should protect

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[134] Gregory Alexander and Eduardo Penalver, *An Introduction to Property Theory* (Cambridge University Press, New York, 2012) 6: 'a theory of property as an attempt to provide a normative justification for allocating those [property] rights in a particular way.'

[135] The modern theories of property can be grouped in this way: Utilitarian, Libertarian, Hegelian and Kantian theories of property, as well as Property and Human Flourishing: see, Ibid. On theories of property, see Joseph William Singer, *Property* (Wolters Kluwer Law & Business, New York, 2014), 13-21; and Bruce Ziff, *Principles of Property Law* (Thomson, Canada, 2006), 9-51.

[136] Fox, *Conceptualising Home*, above n 20, 245-304 (on home and personhood) and 245-303 (on home and human flourishing). See also, Fox O'Mahony and Sweeney, 'The Idea of Home in Law: Displacement and Dispossession', above n 80, 2-6.

[137] Radin claims: 'in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum.': M.J. Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 54, as cited in Fox O'Mahony and Sweeney, 'The Idea of Home in Law: Displacement and Dispossession', above n 80, 4.

[138] Tyrer, *A New Theorisation of 'Home'*, above n 13, 228-235.

both. The theory, while typically seen as a justificatory theory, is thus being used by the thesis to also inform the content and design of property.[139]

Similarly, the human flourishing theory of property supports the protection of home and informs property's content. It says flourishing requires individuals to have enough (materially speaking) to flourish.[140] Further, that individuals must have their intangible needs met,[141] such as for security, identity and relationships. These intangible needs can, at least partly, be met through the experience of home in housing according to this thesis.[142] Property, as it regards housing, thus has a role to play in helping individuals to realise this experience; property must, first, afford individuals rights to housing (i.e., shelter) for home, and, second, ensure those rights afford stability and security in that place so as to manifest the experience of home.[143] Returning to the theory, it justifies this interpretation that property must protect home. The key idea is that for property to actually realise human flourishing – which the theory says is the justification for property – it (and the laws providing for it) must support home as home is necessary for human flourishing, and thus the theory supports home in law. Overall, both theories support the protection of the experience of home by property law.

These dual purposes of property – personhood and human flourishing – espoused in these theories are important. They indicate how property systems should be designed as described above and in detail in this thesis.[144] These property theories – personhood and human flourishing – ground this thesis.[145] Naturally, they validate the central concept of home. Home—the experience—is the actual realisation of these theories' justificatory ends—personhood and human flourishing—apropos housing.[146] The key propositions behind each theory are reviewed below given their relevance to this thesis.

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[139] Ibid, 191.
[140] Alexander and Penlaver, above n 134, 87.
[141] Ibid, 88 and 96.
[142] Tyrer, *A New Theorisation of 'Home'*, above n 13, 231-232.
[143] Ibid. Tyrer, *Home in Australia*, above n 5.
[144] Ibid.
[145] Fox, *Conceptualising Home*, above n 20: Fox applies these theories in the context of 'home', and specifically in support of an argument for a 'legal concept of home'; Fox thus 'considers the influence of property theory on the legal concept of home' (at 245) and 'the potential scope for the development of a legal concept of home in the context of property theory'(at 248-249). See also, Fox O'Mahony, *The Meaning of Home: from Theory to Practice*, above n 15, 164: 'Radin's personhood philosophy is certainly an important thread within home scholarship.'
[146] Fox, *Conceptualising Home*, above n 20: Fox draws the link between the experience of 'home' and the personhood and human flourishing theories of property: see245-304 (on home and personhood) and 245-303 (on home and human flourishing). See also, Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 2-6.

(a) *Human flourishing theory of property*

Some theories contend that property exists to foster or encourage human flourishing.[147] What constitutes human flourishing requires explanation. Gregory Alexander—the renown human flourishing theorist—has made significant contributions in this regard. Drawing on Aristotle and Aquinas, Alexander explains that 'human flourishing has two aspects: faring well (well-being) and doing well (virtue).'[148] The first aspect—well-being—is about having 'the basic human necessities'.[149] Flourishing is simply not possible 'if we live in conditions of extreme deprivation and in want of basic human needs.'[150] The second aspect—virtue—is about 'the cultivation of our specifically human capacity to reason in cooperation with others'.[151] It is also about individuals developing to their full potential in terms of capabilities.[152] Of course, these aspects require certain material goods.[153] However, that alone is not enough. Others in a society are necessary for individuals to fully develop and flourish.[154] Aristotle recognised this, stating: 'a human being is by nature a political animal.'[155] What this is saying, essentially, is that human beings need each other, and contribute to each other's lives.[156] The human flourishing theory of property is deeply relational in this sense.[157] Important implications follow from this premise—that human beings need each other—underlying the human flourishing theory.

First, that there are natural limits on property rights which translate to impose obligations on owners. These limits are to ensure others' flourishing, and they are morally justified because of the relational aspect; each individual owes it to others to ensure their flourishing, because that individual has, themselves, flourished through others.[158] For example, through the support of parents.[159] Limits, such as

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[147] Gregory Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (2013) Paper 653 *Cornell Law Faculty Publications* 1: 'The moral foundation of property, both as a concept and as an institution, is human flourishing.'
[148] Alexander and Penalver, above n 134, 87.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid, 89; and Gregory Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (2013) Paper 653 Cornell Law Faculty Publications, 4-5, both drawing on and citing Amartya Sen's capabilities approach to flourishing in Amartya Sen, *Commodities and Capabilities* (Oxford University Press, New Delhi, 1999); Amartya Sen, *Development as Freedom* (Anchor Books, New York, 1999).
[153] Alexander and Penalver, above n 134, 88: virtue is developed and supported by having enough (i.e., the well-being aspect). On the Aristotelian idea of virtue: see 82-83.
[154] Ibid, 88, and 90.
[155] Aristotle, *Politics*, trans. Ernest Barker (1982), I.2 1252a2—3, as cited in Alexander and Penalver, above n 134, 80.
[156] Alexander and Penalver, above n 134, 81.
[157] Alexander, above n 152, 2.
[158] Ibid 2, and 6. See also, Alexander and Penalver, above n 134, 94-95
[159] Alexander and Penalver, above n 134, 91.

these, are inherent within property,[160] in what Alexander terms 'the social obligation norm' of property.[161] The social obligation norm challenges the 'core image of property rights', and their traditional emphasis on the owner's 'right to exclude others' with 'no further obligation to them.'[162] The social obligation norm does not sideline discussion of the limits of property to the periphery, but makes them the front and centre.[163]

A theory of human flourishing carries distributional consequences for the design of property systems. It requires that individuals have the 'resources necessary for physical survival',[164] and this might mean, in terms of property, 'an entitlement to the material assistance of others'[165] Clearly, the home—as a physical shelter—is necessary to survival and thus to flourish. So, this theory would support a right to home for all for their flourishing.[166] However, other things may be necessary to flourishing, including intangible things such as education,[167] or, relevantly to this thesis, the experience of home—security, identity, and close relationships in and through house. Accordingly, at least to the extent one agrees home—in that sense—is necessary to human flourishing, the human flourishing theory would support a property system being developed in such a way as to ensure home. That is how this thesis says the human flourishing theory supports home, and this theoretically grounds the work herein.[168]

The theory also recognises the state might take action, in the form of property reforms, to ensure flourishing.[169] However, the theory is not a licence for wholesale state intervention.[170] On the contrary, it generally envisages that owners will self-regulate (i.e. limit) the exercise of their property rights for the sake of others' flourishing,[171] and that only where that does not occur should the state intervene to ensure human flourishing.[172] In other words, only where individuals ignore the social obligation norm operating upon them, can the state justifiably reform property law.[173] Relevantly, state responses might be required

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[160] Alexander, above n 152, 2: Alexander argues obligations are 'inherent in the concept of ownership rather than being externally imposed'.
[161] Gregory Alexander, 'The Social-Obligation Norm in American Property Law' (2008-2009) 94 *Cornell Law* Review 745. See also, Alexander, above n 152, 2: 'The basis of this norm is human flourishing. The social-obligation theory builds on the claim that the basic purpose of property is to enable individual to achieve human flourishing.'
[162] Alexander, above n 152, 1.
[163] As is the case for more traditional approaches: Ibid.
[164] Alexander and Penalver, above n 134, 95.
[165] Ibid.
[166] Tyrer, *A New Theorisation of 'Home'*, above n 13.
[167] Alexander and Penalver, above n 134, 96.
[168] Tyrer, *A New Theorisation of 'Home'*, above n 13.
[169] Alexander and Penalver, above n 134, 92.
[170] 'Alexander and Penalver, above n 134, 96. See also 92 and 94.
[171] Ibid, 92 and 95. Alexander, above n 152, 6-7.
[172] Ibid.
[173] Ibid.

more often in modern societies, where 'the bonds of affection and reciprocity' are absent because of scale, according to the theory.[174]

This thesis similarly agrees that the state ought only intervene in exceptional cases, where vulnerable individuals' flourishing is at risk because of how another group of people are exercising property rights, or because distributions of essential types of property (like home) are particularly unfair. To contextualise this in Australia, this thesis argues that the state is required to re-balance rights between rooming house operator-owners (who have strong freehold ownership rights) and residents.[175] Similarly, that state action is required to afford parties to 'assets for care' arrangements, or who are victims of family violence, specifically enforceable and accessible rights to ensure just housing outcomes under their arrangements.[176] Other areas in which state action (altering property rights) would potentially be justified could be explored in future. For example, state action might be required to amend Australian taxation laws. Owners who purchase housing for home, and not for investment purposes, could be advantaged (or at least not disadvantaged) over those who purchase for investment.

Another way the human flourishing theory of property supports home is in providing a way to talk about property system values. Singer makes the point:

> 'we need some way to talk about justice, fairness, morality, liberty, and equality that is more nuanced, less quantitative and more qualitative [than law and economics], and better attuned to ethical reflection. Hence, Professor Penalver suggests that we use virtue ethics to think through the contours of an acceptable property system. Alexander suggests we focus on human flourishing and the scope of legitimate social obligations.'[177]

Law and economics fails in this regard; it considers, in very basic terms, that property should be distributed to those who will derive the most 'value' from it, and because these individuals will in turn contribute further 'value' to a society through their use of the property. However, 'value' in these terms is limited to quantifiable, economic measures, and so cannot necessarily account for the true value of home.[178]

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[174] Alexander and Penalver, above n 134, 95. See also, Alexander, above n 152, 6-7.
[175] Tyrer, *Rooming Houses in Victoria*, above n 11.
[176] Tyrer, *'Assets for Care' Disputes – A Proposal*, above n 10. Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).
[177] Joseph William Singer, 'Democratic Estates: Property Law in a Free an Democratic Society' (2009) 94 *Cornell Law Review* 1009, 1037.
[178] Fox, *Conceptualising Home* above n 20, 97-98, applying the work of Robin Paul Malloy. See especially, Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge University Press, Cambridge, 2000) and Robin Paul Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (Cambridge University Press, Cambridge, 2004).

Relevance to home

In conclusion, human flourishing theory supports a property system which supports home for individuals. The basis for this interpretation argued for in this thesis and in Fox O'Mahony's scholarship is quite simple. To flourish, individuals require certain intangible needs to be met, including for identity, security and relationships. These intangible needs can—at least partly—be met through the experience of home in housing. Accordingly, the human flourishing theory of property must be concerned to ensure home, particularly through the careful design of residential property rights.[179] Home and the human flourishing theory go hand in hand, in this way. However, the human flourishing theory is not without critique.

Critique

Human flourishing is not enough, on its own, to justify property. Because it cannot be quantified or measured, human flourishing seems difficult to theorise.[180] Proponents of human flourishing acknowledge this critique; indeed, '[t]here is no one way in which human beings can flourish. The well-lived life is not captive to any single good or human value.'[181] However, the critique—while it may have some substance—does not necessitate rejection of the theory. It is, contrary to the critique, possible to hypothesise about common aspects necessary for flourishing. Alexander and Penalver explain: the theory supposes 'certain features that are basic to the well-lived life',[182] and which can provide a measure of flourishing. This thesis argues that home is one such thing, essential to human flourishing for all people.[183] Home provides shelter.[184] Home is also security, identity, and relationships.[185] Therefore, home must be a feature of any system of property, which takes for its justificatory purposes the goal of human flourishing. It is also relevant to note that the theory, in embracing possibly conflicting conceptions

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[179] Tyrer, *A New Theorisation of 'Home'*, above n 13. The human flourishing theory, which is generally approached as a justificatory theory for property, is being used here as a content-based theory. Refer discussion above regarding justificatory and content-based theories of property. On theories of property, see Singer, above n 135, 13-21; and Ziff, above n 135, 9-51.

[180] Adam J. MacLeod, 'Private Property and Human Flourishing', *The Public Discourse* (online), 25 October 2011.

[181] Alexander and Penalver, above n 134, 88. See also 97-101 on 'pluralism and indeterminacy'.

[182] Ibid, 88.

[183] Tyrer, *A New Theorisation of 'Home'*, above n 13.

[184] Fox, *The Meaning of Home*, above n 6, 591; and Tyrer, *Home in Australia*, above n 5, 345.

[185] Fox, *Conceptualising Hom*e, above n 20,24; Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 162; and Fox, *The Meaning of Home*, above n 6, 600 (and studies cited therein); and Tyrer, *Home in Australia*, above n 5, 349.

of flourishing, does not shy away from the reality of 'irreducible conflict among plural values.'[186] This is a benefit.[187]

Another critique relates to the state taking action to reform property for flourishing, if individuals are not themselves providing for others' flourishing in the way they exercise their rights, in accordance with the social obligation norm. The critique is that state intervention would undermine flourishing:

> 'the core of property is very simple: the property owner has the right to exclude others from his or her asset. This right to exclude gives the property owner space in which to exercise other rights, such as the right to use, exploit, and encumber the property. To undermine these simple rights is not to promote but rather to impoverish human flourishing. In order to work effectively, property rights must free the property owner to pursue projects that others do not value. Property must honor and protect the freedom of the owner-sovereign to choose'.[188]

The personal choice that property affords to individuals is a good thing and it generally promotes flourishing.[189] However, no system of property should rely on the self-regulation of owners in all cases. While property owners (individuals and associations) will make choices to acquire and use their property in ways which benefits theirs and others flourishing, that will not *always* be so. Individuals sometimes make selfish choices, that significantly adversely impact on others flourishing; relying on existing property rights in those cases will not be sufficient—on its own—to guarantee flourishing in society.[190] The critique does not properly account for this point, which is especially pertinent in large societies. People in large societies do not necessarily know their neighbours and so do not have the kinds of relationships which would traditionally have moderated excessive self-interest with respect to property.[191] And, of course, not everyone has property and thus the privilege of exercising property choices for human flourishing. State action may be necessary to redress that issue.

Relatedly, another critique is that state action, to restrict property rights, will alter the fabric of property rights, such that property is no longer property.[192] The critique is: 'If property rights are created by, and

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[186] Alexander and Penalver, above n 134, 99. See also, Gregory Alexander, Eduardo M. Penalver, Joseph William Singer and Laura S. Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743, 743 (para2): 'Property implicates plural and incommensurable values.'
[187] Alexander and Penalver, above n 134, 99.
[188] MacLeod, above n 180.
[189] Ibid.
[190] Alexander, Penalver, Singer and Underkuffler, above n 186, 743 (para1): 'the inevitable impacts of one person's property rights on others make it [the right to exclude others] inadequate as the sole basis for resolving property conflicts or for designing property institutions.'
[191] Alexander and Penalver, above n 134, 95.
[192] MacLeod, above n 180.

maintained at, the discretion of the state, then property ceases to be property.'[193] This is simply not true. Property is, and has always been, dependent on the state for its existence. If the state decides to alter the nature of property, this does not mean property disappears. Rather, the state would be doing what it has always done—exercising its prerogative as arbiter of property systems. Morris Cohen's famous observation—that property is essentially state conferred sovereignty—encapsulates these realities.[194] Reich's *The New Property* also makes the point that property is what the state says it is, rather than something that exists independently of the state.[195] Bentham similarly recognised this, observing that 'Property and law are born together, and die together'.[196] Other scholars have also recognised that property must be defined through law.[197]

The human flourishing theory, while subject to these critiques, grounds the thesis in the ways discussed. The personhood theory of property – explored in the next section – does similarly.

(b) *Personhood theory of property*

The personhood theory of property justifies private property by arguing it is essential to development of human identity. 'As a theory of property, it is generally attributed to Hegel. As Fox and Sweeney explain:

> 'For Hegel, the justification for private property was rooted in the role of property appropriation in the formation of identity. Property was identified [by Hegel] as a vehicle through which the individual could manifest himself as a human being in the world; by appropriating property, the person confers personal meaning onto the property and expresses his identity outwardly through exercising his will in relation to the property.'[198]
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> 'Similarly to Hegel, Radin's personhood theory recognised the importance of property to self-development.

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[193] Ibid.

[194] Morris R. Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 14: 'the recognition of private property as a form of sovereignty'.

[195] Charles A. Reich, 'The New Property' (1964) 73(5) *The Yale Law Journal* 733, 771: 'Property is not a natural right but a deliberate construction by society.'

[196] Hanoch Dagan and Avihay Dorfman, 'The Human Right to Private Property' (2017) 18 *Theoretical Inquiries in Law* 1, 2, citing Jeremy Bentham, The Theory of Legislation 113 (R. Hildreth trans., 2nd ed., 1914).

[197] Paul Babie, 'Review Essay: Private Property Suffuses Life' (2017) 39 *Sydney Law Review* 135, 138; Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 814, as cited in Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property' (2013) 36(1) *UNSW Law Journal* 280, 284 ('*Lessons in Personal Freedom*'); Margaret Davies, *Property: Meaning, Histories, Theories* (Routledge, Cavendish, UK, 2007) 16; and Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, New Haven & London, 2000) 215–16 as cited in Sherry, *Lessons in Personal Freedom*, above n 197, 284.

[198] Tyrer, *A New Theorisation of 'Home'*, above n 13, 228-231.

> 'The core of Radin's theory was the idea that an individual's attachment to particular property, for example their home, may be so strong that the particular property becomes constitutive of their personhood.'[199]
>
> Radin's particular contribution was in distinguishing different kinds of private property, along a continuum, ranging from that which constitutes personhood ('personal property'), to that with no relevance to the person ('fungible property').'[200]

Homes are an example of 'personal property', with their close connection with the person, to their personhood.[201] Radin's 'personhood' analysis recognises the individual's relationship with their home 'is a relationship which laws and policies should support.'[202] Hegel, by contrast to all of this, 'focused on private property more generally'.[203]

Radin's 'personhood perspective'

Radin's 'personhood perspective' is articulated in a seminal 1982 article titled 'Property and Personhood'. It articulates the basis for the personhood approach: 'The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.'[204] Radin expressly acknowledges Hegel's theory, as developed in the *Philosophy of Right*, and it is from this she builds the 'personhood perspective'.[205]

Radin's unique contribution, as noted, is in theorising a spectrum of property. At one end of the spectrum are objects that have 'become a part of oneself'[206] in the sense 'they are part of the way we constitute ourselves as continuing personal entities in the world.'[207] These are termed 'personal property'.[208] At the other end of the spectrum are objects that are 'perfectly replaceable with other goods of equal market

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[199] Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 3.
[200] Tyrer, *A New Theorisation of 'Home'*, above n 13, 228, citing Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 3.
[201] Radin claims: 'in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum.': M.J. Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 54, as cited in Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 4.
[202] Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 4.
[203] Ibid, 3.
[204] Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 957.
[205] Ibid, 958. See also 971-978.
[206] Ibid, 959-960.
[207] Ibid, 959.
[208] Ibid, 960.

value.'[209] These are termed 'fungible property'.[210] An 'apartment in the hands of the commercial landlord' is an example of 'fungible property' because this property 'is held purely instrumentally';[211] it lacks intrinsic, personal value to the owner and could quite easily be exchanged.[212]

Whether property is 'personal'—in the sense of constituting personhood—is a subjective matter.[213] Radin explains: 'The intuitive view of property just stated is wholly subjective: self-identification through objects varies from person to person.'[214] However, this subjectivity does not preclude objects which reflect personhood being identified. Radin explains:

> 'One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.'[215]

Radin recognises that not all property should be protected based on personhood. Radin explains:

> 'But this intuitive view does not compel the conclusion that property for personhood deserves moral recognition or legal protection, because arguably there is bad as well as good in being bound up with external objects. If there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself *in the wrong way* or *to too great an extent* in external objects. Property is damnation as well as salvation, object-fetishism as well as moral groundwork. In this view, the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring. At the extreme, anyone who lives only for material objects is considered not to be a well-developed person, but rather to be lacking some important attribute of humanity.'[216]

From the 'personhood perspective' follow clear distributional consequences. Essentially:

> 'rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not

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[209] Ibid, 959-960.
[210] Ibid, 960.
[211] Ibid.
[212] Ibid, 987.
[213] Ibid.
[214] Ibid, 961.
[215] Ibid, 959.
[216] Ibid, 961.

> that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending on the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.'[217]

Decision makers may use this spectrum 'as a guide to determine which property is worthier of protection.'[218]

Relevance to home

In conclusion, the personhood theory supports a property system which supports home. Homes constitute personhood and are therefore 'worthier of protection' by law in Radin's view.[219] Radin particularly identifies homes as 'personal' i.e., not 'fungible' property, referencing home throughout the article.[220] The personhood perspective also supports the experience of home as a distinct thing that property ought to protect, according to this thesis. This is because the theory is concerned with the realisation of identity, which is a part of the home experience.

Of course, not all homes reflect personhood or do not to the same extent. What does the personhood theory—which has more generally been thought of as a normative basis for protecting (existing) homes because of personhood—say then? This is a problem which requires a response, particularly if the lack of personhood in home is actually the result of laws—themselves—precluding individuals forming a connection with their homes. While Radin's perspective does not necessarily justify action to ensure home in that case,[221] this thesis interprets the personhood theory of property broadly to support laws to ensure personhood (i.e., home) can *actually* manifest and develop, in addition to laws protecting existing personhood (i.e., home) connections. This broad interpretation must prevail if personhood is truly to be seen as a core function of property for without home there is no personhood, at least not in housing. In this way, the personhood perspective supports home and its development as a thing the subject of property.[222] Relatedly, it also informs the content of the property system for home, so that the justificatory

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[217] Ibid, 986.
[218] Ibid, 987.
[219] Ibid, 979. Radin considers that homes are generally a form of property reflective of an owner's personhood: 987.
[220] Ibid, 987, and 992.
[221] Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 5-6: pointing out that neither Hegel or Radin 'go so far as to advocate that housing or home should be available to all'. Instead, their theoretical contribution lies in articulating how private property is linked to development of the person and their identity; the 'question of 'property entitlements'' is a separate one they do not address, but one which is taken up by progressive property scholars such as Alexander, Penalver, Singer and Underkuffler. See Alexander, Penlaver, Singer, and Underkuffler, above n 186; and Ezra Rosser, 'The Ambition and Transformative Potential of Progressive Property' (2013) *California Law Review* 101(1) 107.
[222] Tyrer, *A New Theorisation of 'Home'*, above n 13.

end of personhood can actually be realised in this way.[223] However, the personhood theory is not without critique.

Critique

*'*A critique of the personhood perspective, from the discipline of psychology, is that individuals do not manifest their identity in things, or at least not to the extent suggested by personhood theorists. … home [therefore] is not necessary to self-identity or personhood'.[224] This thesis disagrees:

> 'Individuals do manifest themselves in things, including to a significant extent in their homes. Fox O'Mahony cites evidence of how deeply individuals are affected when deprived of their homes,[225] and which demonstrates that 'the embeddedness of occupiers in their homes is linked to health and well-being'. Radin similarly considered that personhood could be sensed.'[226]

Further, the personhood perspective already takes a balanced view. The theory acknowledges people can be too bound up with their things, in a way that is unhealthy.[227] Accordingly, natural limits to what constitutes property for personhood are recognised.[228]

The personhood and human flourishing theories of property have been found to support the thesis. Support for home in philosophy is examined next.

5. *Philosophy*

Selected philosophical literature resonates with the expansive view of home argued for in the thesis. That is, that home is a valuable human experience. While the literature goes beyond the present focus on home in housing, it is nevertheless important. It highlights different aspects of home. For example, relationships with other human beings. These aspects transcend law, and so demonstrate laws limits in 'fixing' the experience of home. Broader notions of home also show that home extends beyond an experience in housing (although that is part of it). Relevant perspectives from Heidegger, Kuang Ming Wu and Weil are briefly considered in this review.

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[223] Ibid.
[224] Ibid, 228-231, citing Stephanie M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107(7) *Michigan Law Review* 1093, 1096, and D. Benjamin Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255, 277, and Nestor M. Davidson, 'Property, Well-being, and Home: Positive Psychology and Property Law's Foundations' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 47, 57, as cited in Tyrer, *Home in Australia*, above n 5, 358-359.
[225] Fox, *Conceptualising Home*, above n 20, 109-118.
[226] Tyrer, *A New Theorisation of 'Home'*, above n 13, 230. See also, Radin, above n 204, 959.
[227] Radin, above n 204, 961.
[228] Ibid.

Heidegger

To the philosopher Heidegger, the idea of dwelling encapsulates something of home. He says to be human is to dwell: 'the way in which you are and I am, the manner in which we humans are on the earth, is Buan, dwelling. To be a human being means to be on the earth as a mortal. It means to dwell…man is insofar as he dwells.'[229] The experience of dwelling, as philosophised by Heidegger, is very much a part of our humaneness, and of being human. Other philosophers also emphasise the experience of dwelling.[230]

Kuang-Ming Wu

Kuang-Ming Wu highlights that home can be found in other people. This is a particularly important dimension of home, in the view of this thesis. Wu's article, titled 'The other is my hell; the other is my home', shows that home infiltrates beyond housing and into interpersonal relationships. Wu describes 'two-modes of being-with-others – the other is my hell, the other is my home.'[231] The other is home when they are accepting: 'Being at home means that you accept me (as I am), I accept your acceptance of me, and I am born in this reciprocal acceptance.'[232] 'You make yourself a home for me to be me.'[233]

Imagery of the womb is used by Wu to vividly communicate home being 'in' other people: 'Home is where I both was born and am continually being born, within that womb called other people, in their being *not me*.'[234] Examples of 'this wombing motherliness continues throughout life';[235] for example, as between teachers and students and parents and children.[236] Wu also refers to the romantic embrace as illustrative of home being in others: 'The inner personal touch fills the void in me and in you, making us one. Yet we

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[229] Martin Heidegger, 'Bauen, Wohen, Denken' (1951) ['Building Dwelling Thinking'] in A. Hofstadter (trans.), *Poetry, Language, Thought* (Harper Colophon Books, 1971), as cited in Fox O'Mahony and Sweeney, 'The Idea of Home in Law: Displacement and Dispossession', above n 80, 4.
[230] See also, Emmanuel Lévinas, *Totality and infinity. An essay on exteriority* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1971).
[231] Kuang-Ming Wu, 'The Other is my Hell: The Other is My Home' (1993) 16(1/2) *Human Studies* 193, 199.
[232] Ibid, 194.
[233] Ibid.
[234] Ibid.
[235] Ibid, 195.
[236] Ibid.

remain two, for two-ness enables touch. We are thus two in one, and one in two, thanks to our personal void and touch inside.'[237]

However, when the other person rejects—does not have 'open arms' and a 'receptive heart'—this is the opposite of home for Wu.[238] Individuals can either accept the rejection (hoping the person doing the rejection will effect a 'metanoia') or, alternatively, the individual can reject that other person: 'I have to reject you, kicking you out of myself, putting you out of my mind. You are no longer in me; you are no longer my home. I now leave you – leave the pain of losing my home with/in you – to find someone else, a new "you," for my new "home." After all, I need home to be myself.'[239]

Other people are clearly a fundamental part of home. Wu sums this up: 'Our life is a story of the interweavings of these two – the other as home, the other as hell.'[240] However, there is limited scope for law to assist these relationships with others, beyond providing a stable home environment in which they might form.[241] Relationships and family are considered in the thesis as fundamental aspects of home.[242] Another philosopher whose writing has engaged with themes related to home is Simone Weil.

Weil

In *The Need for Roots*, Simone Weil seeks to investigate 'what are those needs which are for the life of the soul, what the needs in the way of food, sleep, and warmth are for the life of the body.'[243] 'Private property' is among the various needs identified. Private property is a 'vital need of the soul', without which 'the soul feels isolated, lost'.[244] For this reason, the soul should be 'surrounded by objects which seem to it like an extension of the bodily members'.[245] This echoes Radin's personhood perspective of private property, discussed above.[246] Weil, similarly to Radin, identifies housing—as a type of property—that is particularly important. Housing falls within a soul-need: 'it is desirable that the majority of people should

[237] Ibid, 196.
[238] Ibid, 195.
[239] Ibid, 198.
[240] Ibid, 199.
[241] Tyrer, *Home in Australia*, above n 5, 366.
[242] Tyrer, *Home in Australia*, above n 5, 357.
[243] Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Toward Mankind* (Arthur Wills trans, Harper & Row, Publishers, New York/Evanston, San Francisco, London, 1952) [trans of: *L'Enracinement, prélude à une déclaration des devoirs envers l'être humain* (first published 1949)] 9.
[244] Ibid, 34.
[245] Ibid.
[246] Tyrer, *Home in Australia*, above n 5, 354.

own their house and a little piece of land round it'.[247]

Philosophy offers significant insights about home as the work of Heidegger, Kuang Ming Wu and Weil reveals. Indigenous perspectives do similarly, and are explored in the final sub-part.

6. *Indigenous perspectives*

Indigenous perspectives are particularly informative. Indigenous Australians have, for thousands of years, understood that identity can come from place. Their cultures are direct evidence of a key proposition advanced throughout this thesis: identity is bound up in places, including homes.[248] While houses are the most commonly recognised place for home and identity in Western societies, including in Australian society, for other cultures or peoples the relevant places for home might be elsewhere.[249] For Indigenous Australians, the land holds special importance.

Miriam Rose Ungunmerr-Baumann, an Aboriginal woman and tribal elder from Daly River, Northern Territory, explains that for her people identity is bound up with land: 'Aboriginal people have a special respect for Nature. The identity we have with the land is sacred and unique.'[250] Professor Marion Kicket, an Aboriginal woman from Noongar, Western Australia, similarly explains: 'Land is very important to Aboriginal people with the common belief of 'we don't own the land, the land owns us'. Aboriginal people have always had a spiritual connection to their land...'[251]

Land has inherent value in its natural state for indigenous cultures. Australian Aboriginal art, which frequently depicts the land in its natural state, is evidence of this. Art from Ungunmerr-Baumann's region (the Daly River in NT), for example, reflects 'the unity of body, land and spirit'.[252] Ungunmerr-Baumann's comments, extracted above, also arguably reflect this insight. She refers to identity '*with* the land'.[253]

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[247] Weil, above n 243, 35.

[248] Dovey, above n 1, 42: homes reflect 'who we are by where we have come from'; Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 163. Non-indigenous cultures have, unfortunately, 'often failed to acknowledge the deep need [for a sense of place] in ourselves', explains social researcher Hugh Mackay. Mackay says: 'they could teach the rest of us a thing or two about how to nurture it [sense of place]': Hugh Mackay, 'A sense of place', *The Age* (online), 15 October 2005.

[249] Amos Rapoport, 'A Critical Look at the Concept "Home"' in David N Benjamin (ed), *The Home: Words, Interpretations, Meanings and Environments* (Avebury, Publishing Ltd, England, 1995) 25, 45.

[250] Miriam Rose Ungunmerr-Bauman, 'Dadirri – A Reflection by Miriam Rose Ungunmerr-Bauman' available at < http://nextwave.org.au/wp-content/uploads/Dadirri-Inner-Deep-Listening-M-R-Ungunmerr-Bauman-Refl.pdf>.

[251] David Clark, *Marion's Story,* Sharing Culture <http://www.sharingculture.info/marions-story.html>.

[252] Rosemary Crumlin and Anthony Knight, *Aboriginal Art and Spirituality* (HarperCollins, Melbourne, 1991) 42. See also Eileen Farrelly, *Dadirri: The Spring Within: The Spiritual Art of the Aboriginal People from Australia's Daly River Region* (Terry Knight and Associates, Nightcliff, NT, 2003).

[253] Ungunmerr-Bauman, above n 250 (emphasis added).

'With' indicates a oneness with land; neither land nor people impose itself on the other. They, instead, seem to exist together, 'as is'. This suggests, perhaps, that identity can exist in places, without individuals needing to alter them first. Dovey makes this point with respect to homes: 'Home as identity is not just a matter of the representation of a self-image of a world view; it also entails an important component that is supplied by the site itself. We not only give a sense of identity to the place we call home, but we also draw our identity from that of the place.'[254]

Recognising the significance of place, to identity, is important, as is protecting those places.[255] The special relationship Aboriginal Victorians have with land, which has existed for thousands of years, receives limited recognition in law. Victoria's *Charter of Human Rights and Responsibilities Act* 2006 recognises, for example, Aboriginal Victorian's 'diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.'[256] Further, that Aboriginal Victorians are not to be denied the right 'to maintain their distinctive spiritual, material and economic relationship with the land and waters…',[257] pursuant to cultural rights under section 19(2) of the Charter.

Australian Indigenous cultures offer timeless wisdom on place and identity, extending back thousands of years. They understand that places embody identity. Further, that places can embody identity in and of themselves, without individuals having done anything to the place. This does not detract from the place reflecting identity. However, it does mean that places may show no outward signs of an individual or community having done anything to land. Meanwhile, the places may still manifest the selfhood of individuals and communities.

This unique insight directly challenges the labour theory of property. The labour theory, attributable to Locke, has been dominant in Western liberal societies; it justifies property rights in things, such as land, so far as individuals have mixed in their labour.[258] Individuals mix in their labour in different ways. In land, for example, this can occur by cultivating the land.[259] Obviously, if land reflects individual identity in its natural state this theory will not extend to afford the protection of property rights. The theory is limited to that extent and risks not adequately protecting things which embody personhood, such as the traditional lands of Indigenous people which may not show outward signs of cultivation. As Alexander and Penlaver

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[254] Dovey, above n 1, 41-42.
[255] It does not particularly matter where or what the relevant place for home is.
[256] Preamble, *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ('*Charter*').
[257] Section 19(2)(d), Charter.
[258] See generally, John Locke, *Two Treatise of Government* (1970) [first published 1689]; and Alexander and Penalver, above n 134, 35-56.
[259] Alexander and Penalver, above n 134, 52.

explain: 'Locke's valorization of labor (by which he meant primarily cultivation) as the mechanism for appropriating land simultaneously weakened the apparent moral legitimacy of claims by native hunter-gatherers and justified the appropriation of tribal lands by agriculturalist settlers.'[260]

Radin's personhood perspective of property—in the way it has practically been applied—might (similarly) also be challenged by the insight that things can reflect identity in their natural state. Radin's theory justifies property because it becomes part of identity, part of personhood. However, in practice Radin's theory has been applied to justify property rights in things in which the occupier's identity can readily be discerned. Homes, as noted, are the prime example used by Radin to illustrate the personhood perspective of property deserving special protection.[261] However, homes, by their nature, exhibit signs of outward expression by the occupier, for example, in the building. What about types of property where such individual expressions are not outwardly apparent, such as land which holds significance for Indigenous Australians? Would they be entitled to property rights in land reflecting their identity but in respect of which no improvements have been made? Radin's seminal article does not directly address those questions.[262] They are, however, important questions to ask. They show that Radin's theory has the potential to be applied in an unjustifiably limited way based on cultural understandings of when and how property comes to assume personhood.

Finally, it is important to acknowledge that the concept of home does not translate directly into Aboriginal cultures. Although there is a special relationship with land—including that it reflects identity as noted above—that relationship is a far more complex, nuanced and rich relationship than that which most Australians have with their home, and home does not directly translate, therefore.[263] Accordingly, this thesis expressly does not purport to conflate Indigenous Australian's relationship with land, with the concept of home. Rather, the thesis acknowledges the Indigenous perspective because these ancient cultures have much wisdom to offer, in long understanding places—like homes—have special, intangible significance and are bound up with people's identity. Further, that there are different conceptions of what home is among people.

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[260] Alexander and Penalver, above n 134, 52.
[261] Radin, above n 204, 991, and 1013.
[262] Radin, above n 204, 1013: although it would appear that Radin may acknowledge that identity could exist in property in which no improvements have been made; Radin suggests her theory applies to other kinds of 'object relations' that 'attain qualitatively similar individual and social importance' as home.
[263] W.E.H. Stanner, *White Man Got No Dreaming: Essays 1938-1973* (Australian National University Press, 1979) 230-231.

The literature review presented in this part, while by no means comprehensive, displays the breadth of existing home literature. By way of recap, this part explored first, 'home' scholarship in law; second, home and discourses of property; third, human rights law; fourth, property theory; fifth, philosophy; and sixth, Indigenous perspectives. The next part further situates the research by outlining the thesis Inquiry.

IV. THE INQUIRY

This thesis considers the experience of home – in Australian law and in property theory. This part sets out the approach taken, comprising four sub-parts: first, on an overview of the Inquiry; second, on methodology; third, on the relevance of the thesis; and fourth, on its limitations.

1. *Overview*

The primary focus of this thesis is to elucidate the impacts Australian real property law has on the home experience in housing and to propose recommendations for law reform. Home is an 'experiential phenomenon' whereas house is a physical structure.[264] House is not the same as home, therefore, although the house is 'the locus for the experience of home.'[265] Home—the experience—is defined in the thesis to include the feeling of security, the expression of self-identity, and relationships and family, in and through the house.[266] Whether that home experience is adversely impacted by Australian real property law is the problem this thesis explores. The overall finding—reflected in the central thesis set out in Part II —is that home is adversely impacted by Australian real property laws in discrete ways, and, further, that this disproportionately impacts certain groups of (typically vulnerable) individuals.[267]

The secondary focus of this thesis is to draw out relevant theoretical insights from the problem of home not fully being realised by some individuals, under Australian real property law. To explain, home, as just defined, enables personhood (through self-expression) and flourishing (through feeling secure and

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[264] Fox, *The Meaning of Home*, above n 6, 607: 'as an ultimately experiential phenomenon, is difficult to prove'. See also Dovey, above n 1, 34; and Susan Saegert, 'The Role of Housing in the Experience of Dwelling' in Irwin Altman and Carol Werner (eds), *Home Environments* (Plenum Press, New York, 1985) 287, 287.While a distinction can be drawn between house and home, they are also interrelated: see Fox, *The Meaning of Home*, above n 6, 590; Rapoport, above 249, 29; and Tyrer, *Home in Australia*, above n 5, 346-347.

[265] Fox, *The Meaning of Home*, above n 6, 590.

[266] Tyrer, *Home in Australia*, above n 5; Fox, *The Meaning of Home*, above n 6, 590.

[267] Tyrer, ' *'Assets for care' arrangements*, above n 10, 149; Tyrer, *Assets for Care Disputes – A Proposal*, above n 10; Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming); and Tyrer, *Rooming Houses in Victoria*, above n 11.

offering a place for close relationships) in housing.[268] These ends—personhood and human flourishing—are also key theoretical justifications legitimating property itself,[269] i.e., the system of rules 'governing access to and control of material resources'.[270] Accordingly, a lack of home—the problem identified—translates to a lack of personhood and human flourishing. In turn, this translates to these key theoretical justifications legitimating property not being achieved. Insights around what this means for the legitimacy of Australia's property system in housing, the state's responsibility to take action, and for future conceptualisation of property (both what property is and should be, and the design of the property system itself) are issues which are theorised in the thesis.[271]

In conclusion, this home inquiry has a dual focus. The primary focus is to evaluate existing Australian real property laws from the perspective of home and make recommendations for law reform. The secondary focus is to draw out relevant theoretical insights. This dual focus is reflected in the title to the thesis: ''Home' among the gumtrees: The experience of home under Australian real property law and in property theory.'[272] The methodology for the Inquiry is explained in the next sub-part.

2. *Methodology*

The thesis employs two different methodologies corresponding to its dual focus. Regarding the primary focus—analysing Australian real property laws for their impact on home—the methodology is law reform research. 'Reform-oriented' research is recognised as a legitimate methodology within the discipline of law,[273] and seeks to 'intensively evaluate[s] the adequacy of existing rules' and to 'recommend[s] changes to any rules found wanting'.[274] It is doctrinal to the extent it 'identifies and analyses the current law',[275] but 'reform-oriented' because it goes beyond this in recommending legal change.[276] Reform-oriented

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[268] Tyrer, *A New Theorisation of 'Home'*, above n 13, 229-232. See also Fox, *Conceptualising Home*, above n 20, 245-304 (on home and personhood); and 245-303 (on home and human flourishing); and Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, above n 80, 2-6.

[269] Regarding personhood, see especially Radin, above n 204. Regarding human flourishing, see especially Alexander, above n 165; Alexander, above n 152; and Alexander, Penlaver, Singer, and Underkuffler, above n 186. Also, see generally, Alexander, and Penalver, above n 134.

[270] Jeremy Waldron, *The Right to Private Property* (Clarendon Press, Oxford, 1988) as quoted in Jim Harris, *Property and Justice* (Clarendon Press, Oxford, 1996) 245. For an alternative definition of property, based on 'operating rules', see Evaline Raemakers, 'What is Property Law?' (April 15, 2015) available at SSRN: https://ssrn.com/abstract=2594790 or http://dx.doi.org/10.2139/ssrn.2594790.

[271] Tyrer, *Home in Australia*, above n 5. Tyrer, *A New Theorisation of 'Home'*, above n 13.

[272] The title draws on the lyrics of an iconic Australian song titled 'Give me a Home Among the Gumtrees' by Wally Johnson and Bob Brown (1983).

[273] Dennis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), 3, app. 3, at 17 [54], as cited in Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130, 132.

[274] Ibid.

[275] Hutchinson, above n 273, 132.

[276] Ibid.

research might incorporate interdisciplinary methods for evaluating law,[277] as is the case for this thesis which evaluates law from the perspective of what other disciplines' research has shown occupiers want for home.[278]

Regarding the secondary focus—drawing out relevant theoretical insights—the methodology is theoretical. Theoretical research is 'a crucial tool to provide a critical perspective on the law.'[279] Theoretical research 'fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.[280] Particularly, in adopting this as a secondary methodology, this thesis has been mindful not to let legal positivism – the law is the law because it is the law – obscure the need for legal critique.[281] The relevance of the Inquiry is explained next.

3. *Relevance*

This inquiry carries great significance for modern Australia, for two main reasons. First, because the experience of home is so important to individuals for various reasons.[282] Second, because Australian property laws impact on that experience. This sub-part considers each reason in turn, starting with the importance of home for individuals.

(a) The experience of home

The experience of home is directly relevant to an individual's physical, and psychological wellbeing.[283] Indeed, Australians seek homes for wellbeing, particularly for 'emotional security, stability and belonging', according to recent research.[284] Home is also relevant to explore because it is a common human experience. This is summed up in the opening quote '[t]he ache for home lives in all of us….'[285] Philosophers, who are concerned with fundamental truths, have thus grappled with home. Home, they

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[277] Ibid.
[278] Drawing on Fox O'Mahony's work: refer discussion in Part III above.
[279] Hutchinson, above n 273, 132.
[280] Pearce, Campbell & Harding, above n 273.
[281] Hutchinson, above n 273, 132.
[282] Fox, *The Meaning of Home*, above n 6, 593. See also Tyrer, *Home in Australia*, above n 5, 348, 351. See also, Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 158.'
[283] Fox, *The Meaning of Home*, above n 6, 593. See also, Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 158; and Tyrer, *Home in Australia*, above n 5, 351.
[284] Jill Sheppard, Matthew Gray, and Ben Phillips, 'Attitudes to Housing Affordability: Pressures, Problems and Solutions' (Report No. 24: May 2017) 6: a recent survey by the Australian National University found that Australians seek home ownership for: 'Overwhelmingly, "emotional security, stability and belonging"'. See also, Tyrer, *Home in Australia*, above n 5, 351.
[285] Angelou, above n 4.

generally identify, goes to the very depths of our humanness.[286] It is no coincidence, then, that French mystic Simone Weil identifies private property in housing, particularly, as 'a vital need of the soul', without which 'the soul feels isolated, lost'.[287] Weil is clearly engaging here with that aspect of property—home—which fosters personhood.[288] The Inquiry on home in law is also relevant because law impacts on home.

(b) The impact of Australian property laws

Australian real property law threatens the experience of home. This justifies a treatment of home as found in law, although the thesis clearly recognises home is a complex concept which can be defined in any number of ways[289] and that law is no panacea for ensuring all individuals can experience home; other factors play a role, for example culture, built environment and social and economic conditions.[290] However, the focus of the thesis is on the role law plays in producing and mediating an individual's experience of home. Three case studies elucidate these impacts. They provide the platform from which the thesis explores home in Australian law and offers recommendations for law reform.

- Case study 1: 'Assets for care' arrangements and Australian property law.

  The first case study concerns the home experience for older Australians occupying housing under informal 'assets-for-care' arrangements. Australian property laws do not clearly recognise these arrangements as conferring proprietary rights.[291] These informal arrangements see an older person transfer legal title to their home (or other assets) to a trusted person, in exchange for care and accommodation.[292] However, such informal arrangements can breakdown.[293] In that case, relevant property laws might not be able to successfully return the older persons assets, including their home (but this should, arguably, occur, at least in some cases, as a matter of fairness).[294] The principle of indefeasibility—under Torrens system legislation—has this effect,

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[286] See, eg, Emmanuel Lévinas, *Totality and infinity. An essay on exteriority* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1971); Wu, above n 231, 199; David E. Cooper, *The Measure of Things: Humanism, Humility, and Mystery* (Oxford: Oxford University Press USA, 2007); and Weil, above n 243, 35.

[287] Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Toward Mankind* (Harper and Row, 1971) as cited in D Geoffrey Hayward, 'Home as an Environmental and Psychological Concept' (1975) *Landscape* 2, 8.

[288] Tyrer, *Home in Australia*, above n 5, 354.

[289] Ibid, 345.

[290] Ibid, 371-373.

[291] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 203–4 [6.3] ('*ALRC Report*').'

[292] Ibid, 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. As an exchange of property in return for long term care is at the centre of these family agreements, they are also known as 'assets for care' agreements or arrangements.'

[293] Ibid, 203-204 [6.2-6.3].

[294] Ibid, 207-214 [6.19-6.47]. 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 *Law Context: A Socio-Legal Journal* 24, 25 ('*What role for the law*'); and Teresa Somes and Eileen Webb, 'What role for real property in

its operation in these cases prima facie precluding return of (the older person's) home.[295] This area warranted further consideration, through the lens of home[296] and to propose a detailed law reform response.[297] The law reform response proposed by the ALRC,[298] and articulated in detail in this thesis, is that state and territory tribunals be conferred with a new 'assets for care' jurisdiction.

- Case study 2: Rooming house laws in Victoria.

  The second case study concerns the home experience for rooming house residents under Victorian residential tenancy laws. Residents are impacted by these laws. While mostly enhancing the conditions for home, they are critiqued in various ways. These laws are increasingly relevant, with more vulnerable Australians being forced into rooming houses and other forms of marginal accommodation.[299] A reason for this in Australian capital cities is the lack of affordable housing.[300] Housing costs in Australian capital cities for private renters and owners have increased in recent years.[301]

combatting financial elder abuse through assets for care arrangements?' (2016) 22 *Canterbury Law Review* 120, 122 ('*What role for real property?*'); and Patricia Lane, 'Reform in Elder Law – Granny Flats' (2019) 92(6) *Australian Law Journal* 413, 419.

[295] *Transfer of Land Act 1958* (Vic), s 42; Somes and Webb, *What role for real property*, above n 297, 131; Somes and Webb, 'What role for the law' above in 297, 28; and Teresa Somes and Eileen Webb, 'What role for caveats in protecting an older persons interests under a failed family accommodation arrangement?' (2021) 29 *Australian Property Law Journal* 352.

[296] Tyrer, '*Assets for care' arrangements*, above n 10.

[297] Tyrer, *Assets for Care Disputes – A Proposal*, above n 10.

[298] ALRC Report, above n 291, 214, recommendation 6.1: 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.'

[299] Robin Goodman, Anitra Nelson, Tony Dalton, Melek Cigdem, Michelle Gabriel and Keith Jacobs, *The Experience of Marginal Rental Housing in Australia*, (AHURI Final Report No. 210, July 2013) 8.

[300] Ibid.

[301] Dr Matthew Thomas and Alicia Hall, 'Housing affordability in Australia' (Brief, Parliamentary Library, Parliament of Australia) <aph.gov.au>.

Research on Australian residential tenancy laws, and rooming house laws in particular, exists and is voluminous.[302] This thesis further contributes by evaluating rooming house laws from a home perspective.[303]

- Case study 3: Residential tenancy protections for family violence victims under Victoria's *Residential Tenancies Act* 1997 (Vic).

  The third case study concerns victims of family violence and their home experience under Victoria's RTA.[304] Existing protections in the RTA are vital to helping victims to re-establish a safe home after violence.[305] However, the accessibility of those protections could be improved if victims' matters could be heard in the Magistrates' Court of Victoria (MCV) where other family violence matters are already heard, rather than in VCAT where they are currently heard.[306] To this end, the thesis contains a detailed law reform proposal for MCV to receive this jurisdiction,[307] thereby unpacking a recommendation of the 2016 Final Report of Victoria's Royal Commission into Family Violence.[308]

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[302] On residential tenancy laws, see, eg, Nathalie Wharton and Lucy Cradduck, 'A comparison of security of tenure in Queensland and in Western Europe' (2011) 37 (2) *Monash University Law Review* 16; Chris Martin, 'Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Term Agreements' (2018) 7 *Property Law Review* 184; Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, Oxford, 2018) 1 (Part II is on 'Rental Security'); Adrian Bradbrook, 'Residential Tenancies: The Second Stage of Reports' (1998) 20 *Sydney Law Review* 402; Adrian Bradbrook, 'Rented Housing Law: Past, Present and Future' (2003) 7 *Flinders Journal of Law Reform* 1. For background on residential tenancies in Australia, see Marcia Neave, 'Recent developments in Australian residential tenancies laws' in Susan Bright, *Landlord and Tenant Law: Past, Present and Future* (Hart Publishing, Oxford, 2006) 233. Prior to 1980, the Australian residential landlord-tenant relationship was regulated by ordinary leasing principles. This operated to the disadvantage of vulnerable tenants in Australia: see Adrian Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Australian Government Publishing Service, 1975); and Ronald Sackville, *Law and Poverty in Australia: Second Main Report* (Australian Government Publishing Service, Canberra, 1975). On rooming house laws, see, eg, Chris Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' 2009 22(3) *Parity* 29, 29. See also, Robin Goodman, Anitra Nelson, Tony Dalton, Melek Cigdem, Michelle Gabriel and Keith Jacobs, *The Experience of Marginal Rental Housing in Australia* (AHURI Final Report No. 210, July 2013); Coleen Power and Peter Mott, 'A tale of two cities: legal protection for rooming/boarding house residents in Victoria and New South Wales' (2003) 7 *Flinders Journal of Law Reform* 137; and Bill Grimshaw and Colleen Power, 'Rooming House Legislation in Victoria: A History' 17(2) *Parity* 8.

[303] The evaluation of law from a 'home' perspective—and what this entails—is discussed at Part III(i) above. Tyrer, *Rooming Houses in Victoria*, above n 11.

[304] Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

[305] *Residential Tenancies Act* 1997 (Vic) ('RTA'), ss 91V and 91W(6); Dr Angela Spinney, Witness Statement 58 to the Royal Commission into Family Violence (2016), para 36. See also, *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 2, Chapter 9 'A Safe Home' 38 and 77.

[306] *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol IV, Chapter 21 'Financial Security', 112, 124, 125 and 126. Recommendation 119 of the Report was for: 'The Victorian Government consider any legislative reform that would limit as far as possible the necessity for individuals affected by family violence with proceedings in the Magistrates' Court of Victoria to bring separate proceedings in the Victorian Civil and Administrative Tribunal in connection with any tenancy related to the family violence [within two years].'

[307] Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

[308] Ibid.

By demonstrating how Australian real property law has a bearing on home and making recommendations for law reform, in the above areas of law, this thesis seeks to ensure affected individuals more fully experience home. Its practical relevance is apparent. In conclusion, home in Australian law is relevant as a thesis topic for two main reasons. First, because home – the experience – impacts individuals' lives. Second, because law impacts on home. The limitations of the thesis are acknowledged and addressed in the next sub part.

4. *Limitations*

The concept of home itself gives rise to the most significant challenge for this thesis. Home has been described as 'a complex, ambiguous concept that generates contention' and which 'transcends quantitative, measurable dimensions' to include 'subjective ones'.[309] Further, it has been said that 'understanding in this area is plagued by a lack of verifiability that many will find frustrating.'[310] Home will, thus, always be 'a difficult concept to pin down',[311] remaining in many ways an 'elusive notion'[312].[313]

This presents difficulty for this thesis on the experience of 'home',[314] and laws impacting on that experience.[315] The particular difficulty is this: How can this thesis properly evaluate existing laws (and propose options for new laws) regarding home when home itself is subjective?[316] And that is to say nothing of the difficulty in discerning when the home experience is present for individuals, and to what extent.[317] Admittedly, this represents a limitation of the research which is ultimately 'contestable on the basis that home is contestable'[318] and because the presence of home is difficult to gauge. Laws that this thesis argues 'are conducive (or not) to home might, for example, be irrelevant to what another individual believes and experiences regarding home. However, this is no reason to altogether avoid home scholarship.'[319]

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[309] Roderick J Lawrence, 'Deciphering Home: An Integrative Historical Perspective' in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing Ltd, England, 1995) 53, 58. See also, Tyrer, *Home in Australia*, above n 5, 348.
[310] Dovey, above n 1, 34.
[311] Fox, *The Meaning of Home*, above n 6, 607.
[312] Saegert, above n 264, 287.
[313] Tyrer, *Home in Australia*, above n 5, 348.
[314] And, as Fox O'Mahony explores, for developing a concept of home in law itself, which traditionally values certainty, rationality and objectivity. These values 'present obvious impediments' to developing 'home' in law: Fox, *The Meaning of Home*, above n 6, 580-581.
[315] Tyrer, *Home in Australia*, above n 5, 348.
[316] Fox, *The Meaning of Home'*, above n 6, 580-581. See also, Tyrer, *Home in Australia*, above n 5, 348.
[317] Dovey, above n 1, 51. See also, Tyrer, *Home in Australia*, above n 5, 345 and 348.
[318] Tyrer, *Home in Australia*, above n 5, 348.
[319] Ibid.

Despite the difficulty, 'it [is] possible to develop an understanding of home, reflecting the desires which many occupiers have for home', and thus to overcome these limitations.[320] This thesis has defined 'what home is, and the conditions under which it is achieved',[321] drawing on Fox O'Mahony's work, which itself draws on extensive research in other disciplines.[322] Thus, it has been possible to mitigate the difficulties mentioned which result from home being a challenging concept, by developing a central concept of home for the thesis.[323] This is used for the purpose of evaluating Australian laws[324] and theorising the home experience as a thing capable of being the subject matter of property.[325]

Another reason home scholarship should not be avoided is because 'Home is a significant experience for individuals, integral to their flourishing and so it is important to know which laws enhance it or do not.'[326] 'Real property laws, particularly, are directly implicated in this home experience.'[327] Symes and Grey explain:

> 'All of us – even the truly homeless – live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations and exerts a fundamental influence upon the lifestyles of ordinary people.'[328]

In short, property laws impact on individuals (and their experiences) because they tell individuals what they can and cannot do in relation to places, which clearly include homes.[329]

The scope of the thesis is a further limitation. Two significant objectives motivate this thesis. The first objective is to make practical recommendations for law reform, to ensure impact in policy circles. The

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[320] Ibid, 349.
[321] Ibid, 345.
[322] Ibid; and Fox, *Conceptualising Home*, above n 20, 134.
[323] Tyrer, *Home in Australia*, above n 5.
[324] Tyrer, *'Assets for care' arrangements*, above n 10, 149; Tyrer, *Assets for Care Disputes – A Proposal*, above n 10; Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming); and Tyrer, *Rooming Houses in Victoria*, above n 11.
[325] Tyrer, *A New Theorisation of 'Home'*, above n 13.
[326] Tyrer, *Home in Australia*, above n 5, 348. See also, Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 158.
[327] Tyrer, *Home in Australia*, above n 5, 348.
[328] K.J. Gray and P.D. Symes, *Real Property and Real People* (Butterworths, London, 1981) 4, as cited in Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 157.
[329] Laws impact individuals' relationship with their house and this relationship is a critical part of home: see Fox, *Conceptualising Home*, above n 20, 139; and Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 157. Focus on this relationship 'sets "home" studies apart from property or land law, on the one hand, and even to some extent from housing, with its emphasis on provision, on the other': Fox O'Mahony, *The Meaning of Home: From Theory to Practice*, above n 15, 157.

second objective is to incorporate relevant theoretical insights. The problem of home (and lack of it) engages with the key property theories mentioned—personhood and human flourishing—with relevant theoretical knowledge to thus be gained. Balancing these two objectives has been an ongoing tension. Decisions have been made to focus on particular case studies, when in reality a much broader range of laws impact home and could have been considered.[330] The thesis is limited in this way. By no means is it a full consideration of home under Australian real property law, let alone Australian law more broadly. However, it is felt the thesis strikes the right balance between legal analysis and theoretical research. The primary focus (and so taking up much of the thesis), as noted, is doctrinal analysis and law reform options from a home perspective. The secondary focus is to draw out relevant theoretical insights regarding home.

In this part, the methodology, relevance, and limitations of the thesis were discussed. Its scholarly contributions are discussed in the next part.

V. THE CONTRIBUTION

The thesis makes three key contributions to the discipline of law. First, it evaluates Australian property law from a home perspective. Second, it proposes options for law reform in relevant areas to better protect the home experience. Third, it contributes theoretical insights relevant to Australia's property system protecting home. This part examines each contribution in turn, starting with evaluating law from a home perspective.

1. *Evaluating Australian property law from a home perspective*

Evaluating Australian property law from the perspective of home is a relevant addition to the scholarship. Only a few Australian legal scholars have considered home or related concepts in evaluating laws.[331] The case studies on Australian laws in this thesis are thus ripe for discussion from a home perspective. Evaluating laws in this way, through home, also models this perspective in the Australian scholarship. The home perspective stands apart from other property law scholarship in that it 'starts from the person, rather than the law.'[332] It 'brings social science research knowledge [on home] to bear on the process of

[330] See, eg, Fox, *Conceptualising Home*, above n 20. Fox O'Mahony's vast body of work is no less than an odyssey, through different areas of law, impacting on home. In Australia, areas of law for future focus could include migration law, strata law, mortgagees' power of sale, and residential tenancy law. Regarding strata law, see footnote 96.
[331] Refer scholarship cited in footnote 96.
[332] Fox O'Mahony and Sweeney, above n 23, 286.

evaluating law and policy.'[333] In the process, it advances law through 'the possibilities for developing new thinking', 'from a person-centred perspective'.[334] That is, from the perspective of how laws impact on persons.

The thesis also analyses legal doctrines, statutes and case law where necessary. These remain important legal academic endeavours. However, these tasks occur in aid of home. This is consistent with the underlying belief that property laws exist to serve people and society. And, regarding Australian property laws vis-a-vis housing, specifically to ensure (among other things) that people experience home. Outside of Australia it is helpful that scholars are already engaging with home in law as noted, although they represent a minority. Leading the field is UK academic Fox O'Mahony, whose vast body of work has been discussed in Part III (literature review) and in this thesis.[335] As well as evaluating Australian law from a home perspective, the thesis contributes by exploring options for law reform.

2. *Options for law reform*

In evaluating the existing law, the thesis exposes gaps, necessitating proposals for law reform. Law reform work in the areas of Australian law investigated provides a springboard in that regard, prompting the legal research and analysis in this thesis.

The first case study, on 'assets-for-care' arrangements, follows the Australian Law Reform Commission's 2017 report titled 'Elder Abuse—A National Legal Response' (ALRC Report). The ALRC Report noted current property laws respond inadequately when these arrangements fail—with the result that older persons can lose their homes.[336] The ALRC Report recommended a new civil jurisdiction in response.[337] However, details and risks of that proposed jurisdiction are less than clear. Accordingly, further legal analysis is provided in this thesis, including on details for the new civil jurisdiction, and other policy responses. This follows sustained legal research in this important area.[338]

The second case study, on rooming house laws, is an area of law which has undergone, or is undergoing, reform in some Australian jurisdictions. The Victorian Parliament passed reforms to its states' residential

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[333] Ibid, 289.
[334] Ibid, 290.
[335] Fox, *The Meaning of Home*, above n 6; Fox, *Conceptualising Home,* above n 20, 179; Fox O'Mahony and Sweeney, above n 23; and Fox O'Mahony, *The Meaning of Home: From Theory to Practice,* above n 15.
In Singapore, see, eg: Hang Wu, above n 23. In the USA, see, eg: Ballard, above n 23.
[336] ALRC Report, above n 291, 203-204 [6.3]; and 207-214 [6.19-6.47]
[337] ALRC Report, above n 291, 214, recommendation 6.1: 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.'
[338] Tyrer, *Assets for Care Disputes – A Proposal*, above n 10.

tenancy laws, including rooming house laws.[339] Victoria passed over 130 reforms under the *Residential Tenancies Amendment Act* 2018. NSW has also recently announced it will replace its *Boarding Houses Act* 2012 with new legislation applicable to shared accommodation generally.[340] Evaluating whether the existing law applicable to rooming houses enhances home, as the thesis does, is a helpful contribution. It highlights specifically: (i) changes other jurisdictions could make to protect home under their laws; and (ii) scope for further law reform, in Victoria, to enhance home for rooming house residents.[341]

The third case study, on residential tenancy protections for family violence victims in Victoria, follows the 2015 Victorian Royal Commission into Family Violence (RCFV). The RCFV recommended consideration be given to legislative reform in this area, including by conferring existing tenancy jurisdiction exercised by the Victorian Civil and Administrative Tribunal (VCAT) on the MCV.[342] This was about improving access to justice for victims, given their matters are mostly heard in MCV. Because the RCFV left the work on this detail unfinished, the thesis proposes the details of a tenancy jurisdiction for MCV.[343]

The options for law reform generated by this thesis would, if implemented, improve law from the perspective of home. The third and final main contribution of the thesis is its theoretical insights.

3. *Theoretical insights*

Theoretical insights are articulated by the thesis, with the above work having highlighted a problem of home not being realised by some individuals, under Australian real property law. This problem of home is a rich case study for drawing out various theoretical insights. It is argued that home – the experience – is capable of being the subject matter of property systems. Property systems can thus be designed to protect home (or not), as well as to ensure that experience is distributed fairly to ensure human flourishing. Australia's property system must ensure home – the experience – for all in its design. This is essential to its legitimacy. This argument is advanced, drawing on a particular interpretation of the personhood and human flourishing theories of property. The argument developed draws attention to the fact that some

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[339] See *Residential Tenancies Amendment Act* 2018 (Vic).

[340] Minister for Better Regulation and Innovation (NSW), 'Increased protections for people living in shared accommodation' (Media Release, 12 August 2020). See also, NSW Government, *Boarding Houses Act 2012 – Statutory Review* (Report, August 2020), recommendations 1 and 2 and 18.

[341] Tyrer, *Rooming Houses in Victoria*, above n 11.

[342] *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol IV, Chapter 21 'Financial Security', 112, 124, 125 and 126. Recommendation 119 of the Report was for: 'The Victorian Government consider any legislative reform that would limit as far as possible the necessity for individuals affected by family violence with proceedings in the Magistrates' Court of Victoria to bring separate proceedings in the Victorian Civil and Administrative Tribunal in connection with any tenancy related to the family violence [within two years].'

[343] Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

people in society have more than enough property in which to experience home, while others live in precarious housing or do not have even a roof over their head in which to experience home. The property system further undermines the experience of home through unequal distributions of ownership, which perpetuates the injustice of a lack of home.[344]

VI. THESIS STRUCTURE

This thesis is submitted as a thesis-by-publication in accordance with rule 3.1 of the *Specifications for Thesis*. The thesis comprises the following chapters—the articles published within candidature:

1. Chapter 1. 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340.
2. Chapter 2. 'A New Theorisation of 'Home' as a Thing in Property' (2022) 49(2) *University of Western Australia Law Review* 191.
3. Chapter 3. ''Assets for care' arrangements: The current state of the law (and its weaknesses) from the perspective of home' (2020) 28 *Australian Property Law Journal* 149.
4. Chapter 4. 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve 'Assets for Care' Disputes' (2020) 46(3) *Monash University Law Review* 204.
5. Chapter 5. 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).
6. Chapter 6. 'Rooming Houses in Victoria: Home and the Nature of Property' (2022) 30 *Australian Property Law Journal* 108.[345]

[344] Tyrer, *A New Theorisation of 'Home'*, above n 13.

[345] Style Note: Each of the individual articles, which comprise part of this thesis, is presented in a distinct style. This is because each article, so far as possible, has been drafted in the house style of the journal in which it has been, or will be, published. Likewise, some variations in footnoting may occur due to the journal of publication for each article.

ARTICLE ONE: ‘HOME IN AUSTRALIA: MEANING, VALUES AND LAW’

ARTICLE ONE: STATEMENT OF AUTHORSHIP

This paper was published in 2020 as Samuel Tyrer, 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340.

This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:

Date:

13 December 2022

HOME IN AUSTRALIA: MEANING, VALUES AND LAW?

SAMUEL TYRER*

This article argues for an expansive understanding of home as an experience, and so pushes beyond the traditional bounds of (home)ownership – either freehold or leasehold ownership – as restricted to house. Home – the desired experience motivating the article – is a feeling of security, self-expression, and relationships and family. Laws, it is argued, must embody certain conditions for individuals to experience home in this way, and these are discussed. Overall, the article's contribution is to encourage future legal research into whether specific Australian laws are perpetuating an inferior experience of home for some individuals because they undermine conditions for home set out herein. However, the article recognises that home is a challenging concept. As such, an important qualification is that the arguments presented about what home is, and the conditions under which it is achieved, are informed but not definitive. The subjective experience of home will likely differ between individuals. That said, the discussion of home in this article has ample support in the literature.

'Home is the landscape of the heart' – Unknown

I INTRODUCTION

This article on home is divided into five parts. Part I is this Introduction. Part II explores the meaning of home in the housing context. It articulates an understanding of what home ideally entails in that context,[1] and so pushes

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1 Drawing particularly on UK academic Fox O'Mahony's conceptualisation of home. Fox O'Mahony conceptualises home through five 'value-types': home as a financial investment; home as a physical structure; home as territory; home as a centre for self-identity; and home as a social and cultural unit: Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) 146. Other conceptualisations of home also exist. See, eg, 'the personal aspects of home; the social aspects of home;

beyond the traditional bounds of (home)ownership – either freehold or leasehold ownership – as restricted to house. Home is different to house. Home is an experience.[2] 'Home' in this article refers to the home experience, whereas 'house' (or 'dwelling') refers to a place, ie, the physical shelter. The home experience, ideally, entails three dimensions: (a) the feeling of security; (b) the expression of self-identity; and (c) relationships and family. These three dimensions are explained, relying on selected home literature. The three dimensions are necessary to human flourishing and a part of humanness.[3] Part III explores conditions necessary – in law – for the experience of home through house, and which could be used to reform laws – as appropriate – to expand existing ownership interests to better encompass home, and under both leasehold and freehold tenure.[4] A house is necessary for home. However, it alone is not enough for home experienced as security, self-identity, and relationships and family. More is needed, including laws that ensure conditions conducive to home. Research clearly supports the view that permanence is necessary to home. Extrapolating from this, housing *stability* – the state of being able to remain in current housing – is a very important condition for home. Individuals who perceive stability in their housing situation are empowered to experience home. Conversely, individuals who perceive an unstable and interim housing situation

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and the physical aspects of home': Judith Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6(4) *Journal of Environmental Psychology* 281, 289.

2 Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580, 607: '[A]s an ultimately experiential phenomenon, [the concept of home] is difficult to prove'. Home has also been referred to as 'part of the experience of dwelling – something we do, a way of weaving up a life in particular geographic spaces': Susan Saegert, 'The Role of Housing in the Experience of Dwelling' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 287, 287. See also Kimberly Dovey, 'Home and Homelessness' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 33, 34.

3 On human flourishing in property theory, see especially Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) *Cornell Law Review* 745; Gregory S Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (Paper No 653, Cornell Law Faculty Publications, 1 January 2013) 1; Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) 94(4) *Cornell Law Review* 743. Also, see generally Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012).

4 Leasehold and freehold tenure are, broadly speaking, the two housing tenures which exist in Australia: see Kath Hulse, 'Shaky Foundations: Moving Beyond "Housing Tenure"' (2008) 25(3) *Housing, Theory and Society* 202, 210. '[T]here are basically only two types of housing tenure in modern societies – owner occupation and renting – which are distinguished by qualitatively different modes of possession of housing as indicated by the rights of disposal, of use (particularly security) and of control (eg, in altering the dwelling)': at 204–5. However, within freehold and leasehold tenure there are different forms of each. These different forms offer different levels of control and stability to occupiers, and so varying experiences of home. An example of a particular form of freehold tenure is strata title, a unique feature of which is the sharing of common property between all lot owners. The strata title lot owners' rights of control are thus limited in that regard: see especially Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017). An example of a particular form of leasehold tenure is a protected tenancy, a unique feature of which is the tenant's (effectively) indefinite duration of tenure under statute: see below Part III for discussion of protected tenancies. Varying experiences of home are the result of different legal rights under such different tenure forms.

are at risk of '*home*lessness'.[5] Another very important condition for home is housing control – the ability to exert control over one's living space, for example, through improvements and modifications. Such housing control is particularly important so that individuals can express their identity through making changes to a house.[6] Both conditions – housing stability and housing control – are often adversely impacted by laws. Other conditions for home are also briefly described so as to demonstrate the complexity of home as a phenomenon, turning on many variables and conditions. Other conditions are, in many cases, outside the control of law and so it follows that laws cannot guarantee to individuals that they will experience home. Laws can, however, go a long way to foster that home experience, and thus to expand (home)ownership to clearly include home as an experience.

Part IV explores the relevance of tenure type – leasehold or freehold ownership – to the experience of home.[7] This article argues strongly that tenure type is not, and should not, be a condition for home. Rather, this article argues that all occupiers – under leasehold or freehold ownership – are, theoretically speaking, capable of experiencing home. Nothing inherent exists in the nature of each tenure which precludes housing stability, or housing control, and hence home. Home need not, therefore, and conceptually speaking, be experienced in an *overly* discriminatory way between the tenure types. Given this, and as a matter of policy, Australian laws should be directed towards enhancing home under both tenures by improving housing stability and housing control under both. That said, and notwithstanding that home can – conceptually speaking – be realised under both tenures, the clear reality of existing Australian laws is that home is rarely experienced equally by occupiers under different forms of tenure.[8] Australian laws have produced differences between the tenures, such that freehold ownership of the fee simple absolute estate (referred to as 'freehold ownership' in this article)[9] has characteristics which might enhance stability and

5 'Homelessness' is understood here as a lack of the experience of home. This is different from 'rooflessness', which is, more narrowly, the lack of physical shelter: see Peter Somerville, 'Homelessness and the Meaning of Home: Rooflessness or Rootlessness?' (1992) 16(4) *International Journal of Urban and Regional Research* 529, 531.

6 Hazel Easthope, 'Making a Rental Property Home' (2014) 29(5) *Housing Studies* 579, 593: 'This paper has argued that the ability of tenants to personalise their rental property and make it a home is affected by their security of occupancy and their power to make changes to their dwelling. In Australia, insufficient attention has been given to the impact of a lack of control over one's dwelling on the well-being of renters among legislators and policy-makers'. 'Also important in regard to the framing of a valued identity and lifestyle is the ability of individuals to influence the quality and attributes of their dwellings. Indeed, many studies in the field of environmental psychology have pointed to the contribution of personalising physical space towards psychological well-being': at 582 (citations omitted).

7 The link between tenure type and the experience of home is the subject of much research, oftentimes conflicting: see Bronwyn Bate, 'Understanding the Influence Tenure Has on Meanings of Home and Homemaking Practices' (2018) 12(1) *Geography Compass* 1.

8 See above n 4.

9 While, as noted, 'freehold ownership' is used in this article as shorthand for the fee simple absolute estate, there are other forms of freehold ownership – for example, the freehold life estate which ends on the death of the interest holder (unlike the fee simple absolute estate which continues forever or until devised to another). The fee simple estate is 'the greatest interest in land recognised by the common law':

control, and therefore be more conducive to home.[10] Freehold owners, for example, enjoy an indefinite duration of tenure, unlike most Australian occupiers under leasehold ownership.[11] This means that freehold owners will usually experience more housing stability and hence security. Freehold ownership will likely remain – legitimately on this basis – the preferred tenure of many;[12] and for home, and not only profit, purposes.[13] Australian laws should, therefore, assist home owners to retain their homes on this basis and as a matter of policy. Australian laws should also facilitate first home ownership for as many as possible. That is not happening currently. Laws exist which (instead) facilitate housing acquisition for investment purposes. Tax concessions given, by the state, to residential property investors, artificially create additional demand for housing, and so rapid price growth.[14] This rapid price growth precludes home ownership – including of the (potentially superior) home experience associated

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Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 179–80 [3.12].

10 This addresses one of the more polarising questions in the home literature: does freehold ownership enable 'greater scope' for home than leasehold ownership? On this, see Peter Saunders, *A Nation of Home Owners* (Unwin Hyman, 1990) 274: 'Does this mean that ownership can provide a sense of personal security, identity and autonomy which may be denied to non-owners? Put another way, does private ownership generate greater scope for the expression of self and identity in a private realm?'

11 Ibid 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense they are normally recognized as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

12 Ibid 98: 'Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other'. See also Jill Sheppard, Matthew Gray and Ben Phillips, 'Attitudes to Housing Affordability: Pressures, Problems and Solutions' (Report No 24, Australian National University College of Arts and Social Sciences, May 2017) 4: 'In March 2017, this ANUpoll surveyed 2,513 Australians on a range of issues regarding housing affordability, decisions to buy or rent, motivations to purchase investment property, and support for different policies to improve housing affordability'. A relevant finding is that '[t]hree quarters of Australians believe homeownership is a large part of the "Australian way of life"'. Another relevant finding is that 'Australians are just as likely to buy housing for non-financial reasons (such as emotional security, stability, and belonging) as financial reasons (such as investment or financial security)': at 4.

13 Sheppard, Gray and Phillips (n 12) 4.

14 Senate Select Committee on Housing Affordability in Australia, Parliament of Australia, *A Good House Is Hard to Find: Housing Affordability in Australia* (Report, June 2008) 59: 'This speculative demand for housing may be encouraged by some aspects of the taxation system, which makes investing in housing (and sometimes other assets yielding capital gains) more attractive than alternative investments'. For further commentary, see Hazel Blunden, 'Discourses around Negative Gearing of Investment Properties in Australia' (2016) 31(3) *Housing Studies* 340; Jim O'Donnell, 'Quarantining Interest Deductions for Negatively Geared Rental Property Investments' (2005) 3(1) *eJournal of Tax Research* 63; Richard Krever, 'Law Reform and Property Interests: Attacking the Highly Geared Rental Property Loophole' (1985) 10(5) *Legal Service Bulletin* 234; Rami Hanegbi, 'Negative Gearing: Future Directions' (2002) 7(2) *Deakin Law Review* 349; Jane Trethewey, 'Taxation Aspects of Real Estate Transactions: Part 1' (1994) 29(5) *Taxation in Australia* 239.

with freehold ownership – for many people,[15] especially younger Australians. While tax laws are not the focus of this article, they are referenced here because of their significant impact, precluding freehold ownership for many – and with it, the potentially superior home experience associated with that tenure. A second critical policy implication is that leasehold owners should also be assisted to experience home, including through appropriate legal change. Reforms to residential tenancy legislation in New South Wales and Victoria demonstrate that legal change can be necessary for leasehold owners (ie, tenants) to experience home.[16] Use of the term 'leasehold owners' (and the corresponding 'leasehold ownership') throughout this article, rather than the more commonly used 'tenant' (and 'residential tenancy'), is to emphasise the significance of leasehold as the basis for many people's home experience, and to overcome any cultural perception that leasehold is an inferior tenure by default.

To reiterate, this article should be understood as arguing for an expansive understanding of home, which pushes beyond the traditional bounds of (home)ownership – either under leasehold or freehold tenure – as restricted to house.[17] Overall, the article's contribution is to encourage future legal research into whether Australian laws are perpetuating an inferior experience of home for some individuals because they undermine the conditions for home set out herein.[18] The article itself does not evaluate specific Australian laws, but, rather, is an introduction to home to stimulate that kind of scholarship in Australia.

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15 Sheppard, Gray and Phillips (n 12) 12: 'Among Australians not currently in the housing market, 68 per cent are concerned about being able to afford to buy a home. Almost 40 per cent cannot currently afford to buy, while another 20 per cent of Australians do not think they will ever be able to afford to buy'.

16 The Victorian and New South Wales Parliaments have recently passed reforms to those states' residential tenancy laws: see *Residential Tenancies Amendment Act 2018* (Vic) and *Residential Tenancies Amendment (Review) Act 2018* (NSW). Victoria, particularly, passed over 130 reforms under the *Residential Tenancies Amendment Act 2018* (Vic).

17 Implied by this view is a new conceptualisation that home – the experience – ought to form part of property. That will be explored in a separate article on home and property theory and is beyond the scope of this article because it concerns normative claims about the nature and purpose of property. In that regard, see, eg, Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Alexander, 'The Social-Obligation Norm in American Property Law' (n 3); Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (n 3); Alexander et al, 'A Statement of Progressive Property' (n 3); Alexander and Peñalver, *An Introduction to Property Theory* (n 3); Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge-Cavendish, 2007); Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957.

18 Such home scholarship on particular areas of Australian law is scarce. However, that is not to say that home scholarship in law is absent in Australia. See especially Margaret Davies, 'Home and State: Reflections on Metaphor and Practice' (2014) 23(2) *Griffith Law Review* 153. Davies makes the case that certain understandings of 'home' used in reference to the state ('the home-state dyad') have obscured the dispossession of Indigenous peoples: at 163. 'In its uncritical and idealised form, it [home] can be a highly problematic concept, which obscures violence and disempowerment': at 161. 'It is for these reasons that contemporary Australia needs to confront, in a critical and dialogical way, the home-state connection. Clearly this cannot be based on a simplistic jingoistic adoption of "Australia" as "home", or on a denial of the relevance of dispossession of Aboriginal homeland. Any critical understanding of the Australian state must be based on the acknowledgement that the state was, and is, and will remain, built on dispossession': at 171–2. Separately, as Fox O'Mahony's work makes clear, understanding the concept of home allows research in law to properly engage with home, including the experience. See further Lorna Fox O'Mahony and James A Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37(2) *Journal of Law and Society* 285.

Throughout the article, reliance is placed on Fox O'Mahony's seminal home scholarship in law. Fox O'Mahony has comprehensively reviewed the social sciences literature on the meaning of home for occupiers, and elaborated on its implications for law. The reliance on that work in this article is thus worthwhile in terms of prompting consideration of its relevance to Australian legal scholarship and the Australian home. However, this article recognises that home is a challenging concept. As such, an important qualification is that the arguments presented about what home is, and the conditions under which it is achieved, are informed but not definitive. The subjective experience of home will likely differ between individuals. That said, the discussion of home in this article has ample support in the literature.

II MEANING OF HOME

The meaning of home is most easily understood in contradistinction to house, which describes something entirely different.[19] This part, accordingly, explores the meaning of home by (first) defining house, and (second) distinguishing it from home – the experience.

A House v Home

House describes the tangible structure – the building – which affords occupants 'crucial physical shelter'[20] and the 'physical amenities that sustain and support the residents'.[21] Houses are where 'families establish, grow, and bond themselves into a unit' and 'to the larger society'.[22] When the physical structure is lost there is '"*house*lessness", which is often referred to as homelessness'.[23] The physical asset of house also provides financial security.[24] In this regard, houses provide 'low cost' housing later in life, 'inheritance' for family,[25] and can

19 The distinction between house and home is widely accepted by home scholars, across disciplines. 'One issue, on which there appears to be a broad consensus, is that *home* cannot be equated with *house*': Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 178 (emphasis in original).

20 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 591. See also Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 23–4: '*home as a physical structure*, which offers material shelter, a roof over one's head' (emphasis in original).

21 Irwin Altman and Carol M Werner, 'Introduction' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) xix, xix.

22 Ibid.

23 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 591 (emphasis in original). 'Homelessness' is taken, in this article, to have a much broader meaning that lack of a house: see discussion below in Part II(D), under 'Experience of Homelessness'.

24 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24 (emphasis in original): '*home as a financial investment*, which reflects the importance of the home as a financial asset for the owner(s)'.

25 Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 159. See also Susan Bright and Nicholas Hopkins, 'Home, Meaning and Identity: Learning from the English Model of Shared Ownership' (2011) 28(4) *Housing, Theory and Society* 377, 380: '[I]n particular home ownership carries prospects of owning an asset appreciating in value over time and provides security'.

also be 'used as collateral for other borrowing'.[26] House is thus a financial investment.[27] This is why housing is widely seen as 'a commodity or an investment opportunity, something to be bought and sold with an eye to profit as well as use'.[28] Housing is, in this financial sense, becoming increasingly important. Housing ownership is increasingly a vehicle to accumulate wealth, where previously the labour market mainly determined economic wealth, according to Saunders.[29]

However, the financial benefits of housing generally only accrue to the freehold owner. Saunders explains that ownership allows individuals to 'accumulate wealth in a way that tenants cannot'.[30] The freehold owner can realise the monetary value of a house through its sale. The freehold owner can also borrow against the asset, thereby obtaining loan funds. Leasehold owners of residential property in Australia generally cannot do these things because the relatively short duration of their leases means they are not considered of value and hence tradeable for financial gain by the market.[31] Further, their rights to trade (ie, dispose) of their leases are curtailed by their lease terms.[32] Leasehold owners in Australia thus derive physical shelter from house but not generally the same financial benefits which freehold owners enjoy. House as a financial investment is thus 'the domain where the clearest blue water lies between the meanings of home across tenures'.[33] Of course, exceptions arise whereby leasehold owners are readily able to assign (ie, sell for financial gain) or borrow against their lease due to a much longer duration of tenure, as, for example, with the leases of certain residential apartments in Sydney, New South Wales, at Barangaroo, Walsh Bay and Woolloomooloo Finger Wharf. The relevance of tenure type is considered further in Part IV below.

Home, in contradistinction to house, is the *experience* individuals have in a house; it is an 'experiential phenomenon'.[34] Home is, however, related to house[35]

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26 Bright and Hopkins (n 25) 385, citing Susan J Smith, Beverley A Searle and Nicole Cook, 'Rethinking the Risks of Home Ownership' (2009) 38(1) *Journal of Social Policy* 83.

27 Home as a financial investment is a recent phenomenon. See Fox O'Mahony (n 25) 159–60: 'The growth of the homeownership sector, particularly from the 1980s, combined with a rapid rise in the value of housing as an asset emphasised the potential meanings of home as a financial asset to be accumulated and passed on to future generations as inheritance'.

28 Robert M Rakoff, 'Ideology in Everyday Life: The Meaning of the House' (1977) 7(1) *Politics & Society* 85, 93.

29 Saunders (n 10) 122.

30 Ibid.

31 Comments here are with respect to leasehold owners of residential property in Australia. Other leasehold owners, for example of commercial property, are typically not subject to the same restrictions and hence might be able to dispose of their lease asset (or borrow against it) for financial gain.

32 The standard form of residential tenancy agreement used in Victoria, for example, provides: 'The tenant must not assign or sub-let the whole or any part of the premises without written consent of the landlord. The landlord's written consent must not be unreasonably withheld': *Residential Tenancies Regulations 2019* (Vic) reg 8, sch 1 form 1.

33 Fox O'Mahony (n 25) 159.

34 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 607: 'as an ultimately experiential phenomenon, is difficult to prove'. See also Dovey (n 2) 34; Saegert (n 2) 287. Home is referred to as 'part of the experience of dwelling – something we do, a way of weaving up a life in particular geographic spaces': at Saegert (n 2) 287.

because house is 'the locus for the experience of home'.[36] House, in other words, is the place where home – the experience – occurs. This interrelationship between house and home is encapsulated in the following formula: *home* = house + x.[37] House is the physical structure providing shelter and financial security; the 'tangible' aspects of house described above.[38] The 'x factor' is the experience of home; the 'less tangible'.[39] House, and the 'x factor' experiences, are both necessary to make home. However, as the formula makes clear, unravelling 'the enigmatic "x factor"' – the experience of home – is the 'conceptual challenge'.[40]

The experience of home – and its great significance for individuals – is vividly demonstrated in the popular 1997 Australian film, *The Castle*. The fictional Kerrigan family – the main protagonists – love their home and all it entails. However, the local airport seeks to expand and compulsorily acquire their house. But this house is where the Kerrigans experience home and, accordingly, the loss of home looms large for them throughout the film. Daryl Kerrigan, the father, takes their claim about home 'all the way to the High Court'. He tells the judges: 'It's not a house, it's a home. People who love each other. Memories. Family'.[41] Kerrigan is here describing an experience of home which, although it requires the house, is different and portrayed as more precious, particularly considering that no monetary compensation can replace this home experience. This film continues to resonate with a large cross-section of Australian society. It has become an Australian classic. Many people, it seems, relate to the Kerrigans' connection to home and so can understand the destructive consequences flowing from its loss: most obviously, the loss of physical shelter, but also of cherished experiences in the form of memories, family, identity and security.

While home, for the Kerrigans, meant 'people', 'love', 'memories' and 'family', this will not universally be the case. Not everyone will have the same home experience.[42] Some people might, in fact, have a negative home experience.

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35 Although, as Fox O'Mahony notes: 'For home scholarship, the home as a possession is not distinguished, or necessarily distinguishable from the social relations that are housed within it; no more than the meanings or experience of home can in reality be fractioned into discrete elements of shelter, investment, identity and so on': Fox O'Mahony (n 25) 164.

36 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 590.

37 Ibid; Amos Rapoport, 'A Critical Look at the Concept "Home"' in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing, 1995) 29 (emphasis in original): 'One other way of thinking about what the use of *home* (as opposed to *house*) is meant to communicate (and one to which I will return) is that possibly home = house + x. If that is the case, one can ask what that "x" might be that makes a home more than a house'.

38 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 591–2.

39 Ibid.

40 Ibid 590.

41 *The Castle* (Village Roadshow, 1997), cited in Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge-Cavendish, 2010) 11; Paul T Babie, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40(3) *Houston Journal of International Law* 797, 799.

42 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 179: '"Home" is a fluid concept, which may embrace some or all of these meanings to a particular occupier. "Home" means different things to different people'.

Feminist scholars, for example, critique the positive connotations of home in their application to women.[43] Home is subjective in this way.[44] Home will, as such, always be 'a difficult concept to pin down'[45] and, at least to some extent, it will always remain an 'elusive notion'.[46] Dovey comments that 'understanding in this area is plagued by a lack of verifiability that many will find frustrating'.[47] This presents difficulty for any future legal research which is concerned with the experience of home,[48] and how it is affected by laws.

The particular conundrum is thus: how can appropriate laws be developed to protect home when the home experience is itself contestable?[49] Acknowledging this conundrum, the article suggests legal research on home will always be contestable on the basis that home is contestable. Laws that some argue are conducive (or not) to home might, for example, be irrelevant to what another individual believes and experiences regarding home. However, this is no reason to altogether avoid home scholarship in Australian law, which this article seeks to encourage.[50] Home is a significant experience for individuals,[51] integral to their flourishing, and so it is important to know which laws enhance it or do not. Real property laws, particularly, are directly implicated in this home experience.[52] They impact individuals' relationship with their house and this relationship is a critical part of home.[53]

Particular questions researchers might ask are: What does Australian society need or want in terms of home? And how must laws change in response and to ensure home? These questions necessarily involve looking at the relationship between law and society, and it is worth pointing out that the law has typically

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43 See discussion in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?'(n 2) 593–4. See also Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 366; Carole Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8(2) *Journal of Architectural and Planning Research* 96, 106. For a different perspective, see Saunders (n 10) 312: 'There is, quite simply, no evidence to support feminist claims that women experience the home as oppressive or that notions of the home as haven are a male myth'.

44 Home is 'a complex, ambiguous concept that generates contention' and which 'transcends quantitative, measurable dimensions' to include 'subjective ones': Roderick J Lawrence, 'Deciphering Home: An Integrative Historical Perspective' in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing, 1995) 58.

45 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 607.

46 Saegert (n 2) 287.

47 Dovey (n 2) 34.

48 Traditionally, law values certainty, rationality and objectivity. These 'present obvious impediments' to developing 'home' in law: Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 580–1.

49 Ibid. Fox identifies such subjectivity as among the reasons the law lacks a clear understanding of home.

50 As per Fox O'Mahony's work, see above nn 1–2, 25.

51 Fox O'Mahony (n 25) 158.

52 Symes and Gray capture the overall point. See KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 4, cited in Fox O'Mahony (n 25) 157: 'All of us – even the truly homeless – live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people'.

53 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 139; Fox O'Mahony (n 25) 157: focus on this relationship 'sets "home" studies apart from property or land law, on the one hand, and even to some extent from housing, with its emphasis on provision, on the other'.

evolved in response to society's needs. Further, the very concept of property itself has evolved over time, as required.[54] Law, therefore, it is suggested, must take account of the needs of society (of which home is one)[55] because law exists to serve society. However, before researchers can consider areas of Australian law where improvements could be made to realise home, it is first necessary to understand the experience of home.

Extensive research on home in disciplines other than law yields common understandings of the experience of home.[56] This makes it possible to develop an understanding of home, reflecting the desires which many occupiers have for home. It is to these the article now turns, providing an introduction to home for Australian legal scholars, to encourage legal research in this area.

B Experience of Home

Drawing on Fox O'Mahony's work – particularly her review of the extensive social sciences literature on home, on which this article also relies – this article understands the experience of home, ideally, to entail: (a) the feeling of security; (b) the expression of self-identity; and (c) relationships and family. This understanding of home finds support in existing social sciences research and also reflects the experience of home which this article hopes all individuals can experience in the housing context.

1 Feeling of Security

Home is a feeling of security.[57] Homes can make individuals feel secure. Security was among the needs found to be fulfilled by home in interviews with

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54 See, eg, Charles A Reich, 'The New Property' (1964) 73(5) *The Yale Law Journal* 733. Reich famously identified that the nature of property had changed.

55 On socio-legal research, see Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing, Oregon, 2011) 34–5:

> Many different approaches and perspectives on legal research come under the socio-legal umbrella, but in essence, as the name implies, socio-legal research situates laws and legal analysis in a social (some would say societal) context. In contrast with black letter analysis, the socio-legal approach looks beyond legal doctrine to understand law as a social phenomenon or type of social experience. Socio-legal scholars often characterise their approach as the difference between 'law in books' and 'law in action'. Socio-legal research was first carried out in the criminal justice field, but these days it is being conducted in all areas of law. Socio-legal research can uncover and expose the (previously unquestioned) political nature of laws, show whether laws have achieved their intended effect, assist in law reform proposals by linking law and policy goals, and reveal how law actually operates in practice by shedding light on the experiences of different groups who come into contact with the law.
>
> …
>
> By its nature, socio-legal research is inter-disciplinary, drawing on the tools and insights of disciplines such as sociology, social policy, anthropology, criminology, gender studies, ethics, economics and politics to explain and critique law and legal practices. Socio-legal research may also be theoretical, attempting to provide a social theory of law, asking what role does law play in society, or examining law as a form of power or a social systems or a cultural practice.

56 See generally Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1).

57 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24: '[*H*]*ome as a territory,* which offers security and control, a locus in space, permanency, continuity and privacy' (emphasis in original); Dovey (n 2) 46, citing Kimberly Dovey, 'Home: An Ordering Principle in Space' (1978) 22(2) *Landscape* 27–

occupiers conducted by Sebba and Churchman.[58] Interestingly, feeling secure was referred to 'more often by younger children than by parents or older children'.[59] This suggests children will be most impacted when home fails to provide security. Feelings of security, experienced by the occupiers in this study, were influenced by permanence in housing. Security was 'not a function of physical shelter but of permanency in the home', that is, 'the knowledge that nobody can force them [occupiers] to leave'.[60] Having a house, it seems, is not enough for the feeling of security. Housing permanence is needed too. The feeling of security, additionally, depends on occupiers having control of the home space.[61] This makes sense intuitively; feelings of security are unlikely to manifest in living spaces individuals do not control.

Fitchen's study also connects home with security. Interviewees included residents exposed to contamination in the home environment. Contamination was, in their view, 'a major breach of security in the broader sense: the home had proven unable to provide the protection it was supposed to'.[62] Particularly,

> parents expressed a sense of guilt for having failed to provide a fully protective home for their children … To feel that one's children are not safe within one's own home appeared to create extra anxiety precisely because the home is supposed to be a place of security and protection.[63]

It was not just residents whose homes were contaminated who identified home with security. Fitchen explains:

> This protective aspect of home was further explored in a supplementary research probe among populations who had not yet experienced residential contamination. In completing the sentence, 'Home is a place where …' the second most common answer (a close second after 'family') referred to security, safety, and shutting out or retreating from the cares of the world (107 responses out of about 600). As one respondent (male, age 27) phrased it, 'Home is a place where … I can live with peace of mind, and without the relative risk of harm from my surroundings to myself or my family'. One respondent wrote, 'safety and security are the main priorities'. Many wrote variants of 'It is my safe place' 'where I have a haven against the elements' and 'where you feel safe'. While the world outside may be full of crime, disease, and pollution, the assumption is that at home one is or should be safe from these evils – and hence, the discovery of toxics within the home may cause a diffuse sense of insecurity and anxiety.[64]

These studies were conducted with occupiers outside of Australia. However, it appears that Australian occupiers also associate their homes with security. The

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30: 'Home is a place of security within an insecure world, a place of certainty within doubt, a familiar place in a strange world, a sacred place in a profane world'.

58 Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 8–9. See also Janet M Fitchen, 'When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Homeownership' (1989) 48(4) *Human Organization* 313, 316.

59 Sebba and Churchman (n 58) 9.

60 Ibid 9. See also Fox O'Mahony (n 25) 162: 'Through its familiarity, home can foster a sense of belonging, "rootedness", continuity, stability and permanence. Many of these values are linked to the idea that the occupier who enjoys the home as territory has a satisfactory degree of control over their home territory'.

61 Sebba and Churchman (n 58) 10: '[C]ontrol is a condition … for a feeling of security'.

62 Fitchen (n 58) 316.

63 Ibid.

64 Ibid.

Australian National University, in a recent survey, explored with Australians why they sought home ownership. The finding: 'Overwhelmingly, "emotional security, stability and belonging" is the most common reason for homeownership in Australia'.[65]

Feeling secure is a beneficial part of home. Not only is security desirable, it is also important to psychological wellbeing.[66] Individuals seem, intuitively, to recognise this when they seek out more secure housing situations, and, anecdotally, it can be observed that this can coincide with the time of having children. One possible explanation for this is that people recognise that security is necessary for their future children's functioning and wellbeing. Scholars describe the various psychological needs met through security. Porteous, an expert on the destruction of home from the geography discipline, explains that home can satisfy needs for 'identity, security, and stimulation'.[67] Smith and Sixsmith, both from the field of environmental psychology, separately reach similar conclusions. Smith explains '[w]hen individuals control space and have privacy needs met, feelings of comfort and freedom are possible. This freedom implies being able to relax and do as one wishes'.[68] Sixsmith explains home 'as a profound centre of meaning and a central emotional and sometimes physical reference point in a person's life which is encapsulated in feelings of security, happiness and belonging'.[69]

Psychological benefits of security in home are also attested to by occupiers. 'It's [home] crucial to the stability of the individual … Coming from a stable environment makes dealing with the chaos of the external world easier', said an occupier, from a study by Rakoff.[70] Home, for this occupier, makes it easier to function in the world.[71] 'You feel as if you're part of the place and its part of you – you aren't a stranger or anything. It's part of your history. It's comfortable. I'm relaxed, I feel relaxed in it because, I suppose, I'm familiar with it all and, I know what to expect,' said an occupier from Sixsmith's study.[72] Their association of home with comfort and relaxation is palpable.[73]

Another particularly interesting example of home responding to psychological, and other, needs is seen in the 'Housing First' response to homelessness.[74] The Mercy Foundation explains this increasingly accepted policy

65 Sheppard, Gray and Phillips (n 12) 6.

66 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 593.

67 J Douglas Porteous, 'Home: The Territorial Core' (1976) 66(4) *Geographical Review* 383, 383.

68 Sandy G Smith, 'The Essential Qualities of a Home' (1994) 14(1) *Journal of Environmental Psychology* 31, 32.

69 Judith Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6(4) *Journal of Environmental Psychology* 281, 290.

70 Rakoff (n 28) 95.

71 Ibid.

72 Sixsmith (n 69) 290.

73 Ibid.

74 On the Housing First model, see generally Sam Tsemberis, *Housing First: The Pathways Model to End Homelessness for People with Mental Health and Substance Use Disorders* (Hazelden Publishing, 2nd ed, 2015).

response: 'Housing First is based on the idea that people need a stable and secure home before anything else (and these are only examples) such as better living or financial skills, employment, community connections or better health care is possible'.[75] The rationale appears to be that provision of housing can address complex needs, including the psychological need for security that, precisely because they were not being met in the first place, might have contributed to homelessness. This approach is supported by clear evidence. Research shows, for example, that through housing, individuals experiencing homelessness gain a feeling of security.[76] Other benefits include 'health and wellbeing' and 'social integration'.[77]

'Ontological security' is closely linked to the feeling of security of home under discussion here.[78] Accordingly, it would be remiss not to include a brief word about it, although 'ontological security' is a much broader concept. At a basic level, 'ontological security is a sense of confidence and trust in the world as it appears to be. It is a security of being'.[79] The individual develops ontological security through a belief in their own survival or, as Giddens puts it, in 'the continuity of their self identity and in the constancy of their social and material environments'.[80]

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75 'Housing First', *Mercy Foundation* (Web Page) <https://www.mercyfoundation.com.au/our-focus/ending-homelessness-2/housing-first/>.

76 Deborah K Padgett, 'There's No Place Like (a) Home: Ontological Security among Persons with Serious Mental Illness in the United States' (2007) 64(9) *Social Science & Medicine* 1925, 1934:

> This study capitalized upon a unique experiment in which homeless mentally ill adults were provided immediate access to independent housing without prior restrictions or proof of readiness. Contrary to the dominant policies and practices in the United States, housing first makes an offer that few individuals will (or did) refuse and from which most benefited, both materially and psychologically. Yet the fate of the homeless mentally ill in the United States is heavily influenced by programs and policies favoring transitional over permanent housing in the mistaken belief that such persons are not capable of stable, independent living in the community. Finally, this study has shown that the subjective experience of ontological security can now be extended from home-owners to newly housed persons with serious mental illness.

See also '1.4 The Evidence for Housing First', *Housing First Europe Hub* (Web Page) <http://housingfirsteurope.eu/guide/what-is-housing-first/the-evidence-for-housing-first/>.

77 '1.4 The Evidence for Housing First' (n 76).

78 Saunders claims that 'home ownership is one expression of the search for ontological security, for a home of one's own offers both a physical (hence spatially rooted) and permanent (hence temporally rooted) location in the world. Our home is unambiguously a place where we belong, and the things that we do there have an immediacy of presence and purpose. Putting all this in more familiar terminology, it may be suggested that home ownership represents an individual solution to the problem of alienation': Saunders (n 10) 293.

79 Ann Dupuis and David C Thorns, 'Home, Home Ownership and the Search for Ontological Security' (1998) 46(1) *The Sociological Review* 24, 27.

80 Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1991), as cited in Kearns et al, '"Beyond Four Walls". The Psycho-Social Benefits of Home: Evidence from West Central Scotland' (2000) 15(3) *Housing Studies* 387, 388: 'The confidence that most human beings have in the continuity of their self identity and in the constancy of their social and material environments. Basic to a feeling of ontological security is a sense of the reliability of persons and things'.

Giddens famously identified a 'problem of ontological security' in the modern world,[81] attributable to sociological changes such as less 'routine, face to face interaction'.[82] Home can respond to this lack of ontological security. It can provide the permanence and reliability that underpin 'ontological security'.[83] Home, in this way, could possibly enhance 'ontological security'.[84]

Debate exists over whether freehold owners enjoy more ontological security than leasehold owners.[85] That particular debate is not one the article proposes to enter. It is more suited to scholars in the disciplines of sociology and psychology. However, two passing observations are made. First, measuring 'ontological security' is difficult, if not impossible.[86] Particularly this is so because of '[t]he elusive nature of ontological security'.[87] How can something as amorphous as 'confidence and trust in the world' be measured?[88] And further, how can the precise impact of tenure type (leasehold or freehold ownership) on ontological security be measured? Ontological security is likely enhanced or undermined by many factors, including factors individuals are not aware of, and so which might remain undetected by scholars. Secondly, the debate over which tenure type

81 Dupuis and Thorns (n 79) 26, citing Anthony Giddens, *The Constitution of Society* (Polity Press, 1984); Saunders (n 10) 293. See also Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990).

82 Dupuis and Thorns (n 79) 28, and citations to Giddens' work therein.

83 Giddens explains: 'Basic to a feeling of ontological security is a sense of the reliability of persons and things': Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1991), cited in Kearns et al (n 80) 388.

84 See generally Saunders (n 10).

85 Hiscock et al, 'Ontological Security and Psycho-social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18(1–2) *Housing, Theory and Society* 50, 51. Saunders suggests that freehold ownership is more preferable for ontological security than leasehold ownership: see Saunders (n 10) 312:

> The thesis that home ownership may generate ontological security has been subject to some scepticism in recent years, but by identifying a series of indicators it was possible to assemble a strong set of evidence to support the thesis.

Others disagree: see Hiscock et al (n 85) 62–3:

> [W]e propose that greater ontological security is not necessarily to do with tenure itself: it is to do with having wealth, living in a nice area, living in a larger and better quality dwelling and being settled in relationships and work … [O]wner occupation offers the benefits of ontological security due partly to a rosy association of the tenure with stability (something which is often not true), and due to a strong desire to enter the mainstream and demonstrate personal progress – something which renting (private or public) is largely incapable of doing'.

Other housing studies literature on the relevance of tenure type to ontological security is usefully summarised: at 51. For general discussion of the conflicting literature in this area, see Rowland Atkinson and Keith Jacobs, *House, Home and Society* (Palgrave, 2016) 40–2.

86 Michael Harloe, 'Sector and Class: A Critical Comment' (1984) 8(2) *International Journal of Urban and Regional Research* 228, 236. Harloe suggests the hypothesis that ontological security explains 'demand for owner occupation' is 'unsubstantiated (and unprovable?)'. See also Saunders (n 10) 293: 'The concept of ontological security is difficult to operationalize empirically, and to test whether home ownership has any effect on levels of ontological insecurity we should presumably need to utilize sophisticated indicators of people's level of worry, concern and paranoia as well as measures of self-conception and positive social identity'.

87 Hiscock et al (n 85) 52.

88 Dupuis and Thorns (n 79) 27.

enjoys more ontological security is largely academic.[89] Just because a particular tenure might provide more 'ontological security', that does not preclude 'ontological security' under the other.[90] Further, in Australia there is an increasing number of people renting[91] and, as such, the policy focus should also be on enhancing home – and ontological security – under leasehold, and not just on showing the superiority of freehold ownership.

2 *Expression of Self-Identity*

Homes are particularly important places for identity, which is unsurprising given that individuals spend significant amounts of time in, and are likely to have more control over, their homes than compared to other spaces.[92] Home thus represents the expression of self-identity.[93] This is a further dimension of home considered in this article. French philosopher Simone Weil recognised this identity dimension of home when she wrote that

> the soul feels isolated, lost, if it is not surrounded by objects which seem to it like an extension of the bodily members ... The forms this need takes can vary considerably, depending on circumstances, but it is desirable that the majority of people should own their house and a little piece of land round it.[94]

Weil believed, therefore, private property to be 'a vital need of the soul'.[95]

Home scholarship confirms the view that homes manifest individuals' self-identity. Homes have, thus, been described as 'a world in which a person can create a material environment that embodies what he or she considers significant. In this sense the home becomes the most powerful sign of the self of the inhabitant who dwells within'.[96] Further, homes are 'a space to develop an identity, and they are "cultivators" and symbols of the self'.[97] Homes, over time,

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89 The relevance of the debate seems merely to be to show that one tenure – freehold ownership – is superior and so should be accessible to as many people as possible: see generally Saunders (n 10). This article agrees with Saunders' view that freehold ownership is a superior tenure and so should be accessible. However, this article does not need to enter an intractable debate about 'ontological security' to make that point.

90 Saunders (n 10) 303: that 'home ownership enables ontological security does not mean that non-ownership prevents it'.

91 See, eg, Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (Final Report No 170, Australian Housing and Urban Research Institute, July 2011) 4.

92 'The occupied home is a "primary territory" – it is a place where we spend much of our time, with the people who are most important to us. We look to our homes to satisfy a range of social and psychological needs; control over our environment; an appropriate physical framework for family life; a place for self-expression; and (where home meanings are positive) for feelings of security': Fox O'Mahony (n 25) 162.

93 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 598.

94 Simone Weil, *The Need for Roots* (Harper and Row, 1971), cited in D Geoffrey Hayward, 'Home as an Environmental and Psychological Concept' (1975) 20 *Landscape* 2, 8.

95 Ibid.

96 Mihaly Csikszentmihalyi and Eugene Rochberg-Halton, *The Meaning of Things: Domestic Symbols and the Self* (Cambridge University Press, 1981) 123, cited in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 599.

97 Helga Dittmar, *The Social Psychology of Material Possessions* (Harvester Wheatsheaf, 1992) 113, cited in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 598–9.

come to reflect 'one's ideas and values',[98] 'a mergence of the person and the place',[99] 'a symbol of one's self',[100] and are possibly 'the most powerful extension of the psyche'.[101]

Csikszentmihalyi's and Rochberg-Halton's research establishes that home is a 'symbolic environment'.[102] An occupier is quoted in describing their basement area:

> In my little study which I arranged downstairs … I built all the furniture, the desk, chair, bookcase, everything down there, so they surround me. It's a sort of womblike area, situation. It's quiet and it's cool … I have a warm feeling about the things that I've built.[103]

This individual's identity manifests in the furniture (which they built).[104] Another occupier, from the same study, commented: 'a house reflects where you are in your life'.[105] Home, for these occupiers, images their self in particular ways.

Sixsmith's study quotes an occupier describing home as akin to the experience of being accepted, which is clearly very affirming of selfhood. They comment: 'You're bringing a part of yourself into the place – in your things. You feel like you're accepted in it 'cos you can be yourself in it, you created it. I can relax control over myself and just be myself. If you can't be yourself at home, where can you?'[106] The self of this individual exists through 'things', in a space they created. Sebba and Churchman's study, referred to earlier, also demonstrates '[t]he home as a place for self-expression'.[107] There is also a very interesting study of individuals being shown photographs of other individuals' homes. From these photographs, the individuals being shown photographs 'could accurately predict the [occupier's] self-concept'.[108] The appearance of others' homes, which embodies the self, is clearly apparent to others, ie, not only the home occupier.

These studies were conducted with occupiers outside of Australia. However, Australian occupiers also seek to express their identity in home. Evidence of this

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98 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24 (emphasis in original): '*[H]ome as a centre for self-identity*, which offers a reflection of one's ideas and values, and acts as an indicator of personal status'.

99 Fox O'Mahony (n 25) 163.

100 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 598.

101 Després (n 43) 100.

102 Csikszentmihalyi and Rochberg-Halton (n 96) 121 ff.

103 Ibid 137.

104 'Again, the sexual asserts itself in the male's choice of the basement den and recreation area as their favourite place, which they mention much more often than their wives. In the following response one finds clear examples of the masculine instrumental orientation and also of the usually less obvious, almost childlike, emotional dependence': ibid 135–7.

105 Ibid 128.

106 Sixsmith (n 69) 290.

107 Sebba and Churchman (n 58) 9: '[H]ome is the only place that the individual can change or maintain as the same. One organizes the home according to one's needs and tastes, and gives the home one's personal, unique meaning. One can express oneself freely in the home and can be oneself'.

108 Smith (n 68) 33, discussing Edward K Sardalla, Beth Vershure and Jeffrey Burroughs, 'Identity Symbolism in Housing' (1987) 19(5) *Environment and Behaviour* 569.

exists in the form of marketing materials for a new model of rental accommodation in Melbourne. The materials for the 'Assemble Model' appeal to Australian occupiers' desire for identity in home, particularly referring to the 'freedom to customise the space just how you want it – from day one' and to 'lay down your roots and make yourself at home, with the freedom to create a space that's already yours'.[109] The model purportedly confers all this through a (longer than usual) five year lease, with an option to purchase.

It is important to note that homes project identity in a dual way. They project an individual's identity presently, as described above. They also project identity into the future. Indeed, homes are arguably the main basis on which an individual's future self-identity can develop. Dovey explains: 'Knowing that we have the power to remain in a place and change it permits us to act upon and build our dreams'.[110] Homes, in this way, give occupiers 'a connection into the future'[111] and through which they can envisage a future identity. Fox also makes the point; homes enable individuals to know 'where [they] are and where [they] will be' in the future, and so they are able 'to plan ahead'.[112]

Related to self-identity is the idea of social identity. Social identity refers to how individuals are perceived in a society.[113] Homes are relevant to this in signalling social identity.[114] Rakoff explains

> the house was seen as an indicator of personal status and success, both one's own and others … people spoke of the self-judging they went through, seeing evidence of their own success or failure in life in the quality of spaciousness of their houses, in their ability or inability to 'move up' to better houses periodically, or even the mere fact of owning some property or a house.[115]

Fitchen's research confirms home signals social identity, with residents classifying themselves publicly as 'homeowner'[116] – a 'respected category of people'.[117] 'Homeowner' indicates significant responsibility and 'a long-term commitment to the work ethic'.[118] Australians have, anecdotally, been known to use the 'homeowner' category to reflect social status, as for example, when people buy a new home and post on Facebook: 'Homeowners!'

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109 Assemble, '8 Things You'd Never Expect as a Renter', *realestate.com.au* (Web Page, 2 November 2018) <https://www.realestate.com.au/advice/8-things-youd-never-expect-as-a-renter/>.

110 Dovey (n 2) 43, cited in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 599.

111 Ibid.

112 Fox O'Mahony (n 25) 163.

113 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 599–600. See also Rakoff (n 28) 93: '[T]he house was seen as an indicator of personal status and success, both one's own and others'. Separately, it is important to acknowledge that a particular place might also be part of a person's identity, quite apart from a dwelling house: see Jeanne Moore, 'Placing *Home* in Context' (2000) 20(3) *Journal of Environmental Psychology* 207, 211.

114 See above n 113

115 Rakoff (n 28) 93.

116 Fitchen (n 58) 320.

117 Ibid, cited in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 604–5.

118 Ibid.

3 Relationships and Family

Home is also relational in that a sense of home derives from close relations with others in a place.[119] Relationships, and in particular familial or familial-like relationships, are thus important to the experience of home.[120] This plays out in research which demonstrates home's association with *family*.[121] Fitchen's research elicited a 'close association between home and family' for residents[122] impacted by environmental contamination: 'Their comments, plaints and cries of anguish were laced with references to family: "what about my family?" "I have my family to think about here"'.[123] Similarly, the close association between family and home revealed itself in subsidiary research Fitchen conducted with residents not impacted by contamination:

> Respondents representing a diversity of geographic, socio-economic, age, and occupational characteristics were asked to complete the sentence 'Home is a place where …'. Among the 425 respondents (243 female, 177 male, 5 undesignated; ages 18–68), the most common response – mentioned 112 times out of about 600 responses – was a reference to 'family' or specific family members (e.g., parents, wife/husband, children). A frequent first answer was 'where my family is'. Thus, this research probe substantiated our observation in communities that contamination within the home environment would be particularly upsetting because home is the place of the family.[124]

Rakoff, in separate research, has similarly found that residents 'agreed that it is the presence of children and the activity of family life that makes a house into a home'.[125] And home has even been philosophised as an experience of other people, in the sense that other people show the individual to themselves,[126] and

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119 Després (n 43) 98:

> Home as a place to strengthen and secure the relationship with people one cares for, emerged as a powerful category of meaning. Home is perceived and experienced as the locus of intense emotional experience, and as providing an atmosphere of social understanding where one's actions, opinions, and moods are accepted. Ideas such as a place to share with others, to entertain with relatives and friends, and to raise children, are related to this dimension.

120 Interestingly, home as a place for privacy and family is a modern phenomenon: see Tamara K Hareven, 'The Home and the Family in Historical Perspective' (1991) 58(1) *Social Research* 253, 254:

> The close identification of home with family is a relatively recent phenomenon that can be traced to the late eighteenth or early nineteenth century. The concept of the home as the family's haven and domestic retreat emerged only about one hundred fifty years ago, and was, initially, limited to the urban middle classes. In order to understand the development of the home as the family's abode, as a reality and as an ideal, it is necessary to examine the relationship between household, family, and home as they changed over time.

121 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 600 (and studies cited therein) (emphasis in original): 'Research into modern social and cultural meanings of home has indicated that it is the association with *family* that gives the contemporary home cultural centrality'.

122 Fitchen (n 58) 315, discussed in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 600.

123 Fitchen (n 58) 315.

124 Ibid 316.

125 Rakoff (n 28) 93.

126 Shelley Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52(1) *The Sociological Review* 62, 83; Kuang-Ming Wu, 'The Other is My Hell; the Other is My Home' (1993) 16(1–2) *Human Studies* 193.

thus in other people the person finds home. Kuang-Ming Wu explains home in this way: 'Home is where I both was born and am being continually born, within that womb called other people, in their being *not* me'.[127]

Other relationships, beyond family, can also be important to home.[128] Sixsmith explains:

> Home is not only a place often shared with other people but is also a place allowing entertainment and enjoyment of other people's company such as friends and relatives. As one person said: 'It wouldn't be home without the family, now would it. And then you can bring people you like, your friends, back and make them a meal or just sit and chat. There's no front to it, just being together … well, it's hard to explain, if it wasn't home it wouldn't be the same'.[129]

Separate research has shown the relationship between landlord and tenant is important to home. This relationship can impact a tenant's sense of security in a home.[130] In the Australian context specifically, research conducted with those share housing in inner Sydney found a sense of home among the household.[131]

C Home as Identity – Critique

Some scholars consider the extent to which home reflects identity – the second dimension of home discussed above – to be overstated, notwithstanding evidence such as above. Their reflection is generally that self-identity in home is not as strong as assumed or that it might not be essential to functioning. Stern, the main proponent of this view, asserts, 'there is scant empirical support for the proposition that homes are requisites of psychological functioning such that object loss imperils the dispossessed owner's self-concept or impedes psychological functioning'.[132] Stern's argument is 'that it is not "the home" as a possession which is psychologically important to self and self-flourishing, but social relations'.[133] Barros takes a similar view, believing the 'personhood' theory of property, espoused by Radin,[134] to be overstated: '[T]he literature on the psychology of home suggests that the possessory interest in the home, while

127 Wu (n 126) 195, cited in Mallett (n 126) 83 (emphasis in original).

128 Sixsmith (n 69) 291: '[S]ocial networks built around a home and the relationships that create and are created in a home are of utmost importance'. See also Smith (n 68) 33 (and studies cited therein).

129 Sixsmith (n 69) 291.

130 Aubrey R Fowler III and Clifford A Lipscomb, 'Building a Sense of Home in Rented Spaces' (2010) 3(2) *International Journal of Housing Markets and Analysis* 100, 112: 'A good landlord-tenant relationship, it seems, enhances the sense of safety and security that one feels within the apartment'.

131 Sophie McNamara and John Connell, 'Homeward Bound? Searching for Home in Inner Sydney's Share Houses' (2007) 38(1) *Australian Geographer* 71, 88: '"Home" in the share houses of contemporary Sydney is substantially reliant on the ideology of friendship. Friends have great influence on the decision to live in a share house and the intimacy of relations between housemates blurs the boundary between friendship and family'.

132 Stephanie M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107(7) *Michigan Law Review* 1093, 1096.

133 Fox O'Mahony (n 25) 164.

134 Radin famously theorised that certain types of property, among them the home, are a part of personhood: see Radin (n 17) 959: 'These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house'.

substantial, may not be as strong as Radin asserts'.[135] Barros thus considers 'Radin's intuitive view tends to overstate an individual's personal connection to a home in a particular location because many of the important personal values associated with a home are movable'.[136] Ultimately, these claims are used to support Stern's and Barros' shared view that laws have overprotected the home.[137]

Barros' and Stern's respective arguments that law overprotects home are unconvincing. Both focus narrowly on 'home as identity', when home is a much broader concept.[138] Home is, as demonstrated, about physical shelter, financial security and emotional security.[139] This article agrees with Fox O'Mahony in this critique of Stern, and with the following:

> The 'myth of home' which Stern critiques treats home scholarship as a 'theory of property', rooted in a single strand within the 'identity cluster'; rather than as a 'theory of human experience' based on the indistinguishable elements of home as a physical, financial and experiential concept.[140]

What this is saying is that home should be comprehended in its fullness.[141] Stern and Barros, to the extent they do otherwise, cannot then justifiably assert that law overprotects home as they will not have comprehended all dimensions of home. How can they properly assess if laws overprotect home if they do not understand that foundational concept? In direct opposition to Barros' and Stern's arguments, this article hypothesises – for future research purposes – that there are laws which under-protect home in Australia, risking 'homelessness'.[142]

D Experience of 'Homelessness'

'Homelessness' is the opposite of home. It means a lack of the experience of home.[143] This conceptualisation recognises 'there is much more to homelessness than the minimal definition of rooflessness', ie, the lack of physical shelter.[144]

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135 D Benjamin Barros, 'Home as Legal Concept' (2006) 46(2) *Santa Clara Law Review* 255, 277.

136 Ibid 280.

137 Ibid 259: '[T]he unique nature of the home justifies additional legal protection in some, but not all, circumstances'. Stern (n 132) 1097: 'The central claim of this Article is that the psychological and social benefits of remaining in a particular home do not warrant the vast apparatus of categorical protections that pervade American property law'. See also Nestor M Davidson, 'Property, Well-being, and Home: Positive Psychology and Property Law's Foundations' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 47, 57: 'On the one hand, things – objects – appear not to make most people happy in comparison to experiences and relationships. This might suggest contexts where less vigorous property rights might prevail, even for resources otherwise clearly constitutive of the self'.

138 Fox O'Mahony (n 25) 164: home encompasses all 'the indistinguishable elements of home as a physical, financial and experiential concept'.

139 Ibid.

140 Ibid.

141 Ibid.

142 Somerville (n 5).

143 This is a broader understanding of 'homelessness' which is often used to describe the lack of a physical shelter, ie, house: ibid.

144 Ibid 536.

Physical shelter might exist, yet individuals can still be 'homeless' because they lack home. Physical shelter, in other words, does not – alone – guarantee the home experience. This important point can very easily be overlooked – and understandably, when there still exists in wealthy countries, of which Australia is one, the more pressing social problem of 'roofless': people with no housing at all.

As 'roofless' entails a complete absence of home – both as physical shelter and experience – it is indeed a more pressing social problem than 'homelessness'. Physical shelter is essential to an individual's survival – and, one could add, to the individual's freedom. Jeremy Waldron's essay titled 'Homelessness and the Issue of Freedom'[145] explores how homelessness – essentially a lack of private space because of a lack of private property[146] – is an issue going to 'basic principles of freedom'.[147] The homeless person lacks freedom because they are restricted in their actions. In the public places, where they must exist, they might not be allowed to perform basic human activities.[148] Waldron explains: 'What is emerging – and this is not just a matter of fantasy – is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around'.[149] 'Their homelessness *consists* in unfreedom'.[150] In society, there is a clear distinction between the homeless – who lack freedom – and those with home who are free because their private property rights entitle them to do things on their property not done in public places.[151] Of course, there are other horrible consequences of homelessness beyond a lack of freedom, including despair, disease, loneliness, and shame.[152] However, a lack of freedom is particularly pernicious. As Waldron writes, 'what we are dealing with here is not just "the problem of homelessness", but a million or more *persons* whose activity, dignity and freedom are at stake'.[153]

But none of this is to deny that the absence of the home experience – described above – is also a problem which needs addressing as part of the response. Home, the experience, should be accessible to all. Logically, for

145 Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993).

146 Ibid 313: 'A technically more accurate description of his [homeless person's] plight is that there is no place governed by a private property rule where he is allowed to be whenever *he* chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone else's say-so' (emphasis in original).

147 Ibid 309.

148 Ibid 325–9.

149 Ibid 315.

150 Ibid 320 (emphasis in original).

151 Ibid 325: 'But without a home, a person's freedom is his freedom to act in public, in places governed by common property rules. That is the difference between our freedom and the freedom of the homeless'.

152 Ibid 337: 'Lack of freedom is not all there is to the nightmare of homelessness. There is also the cold, the hunger, the disease and lack of medical treatment, the danger, the beatings, the loneliness, and the shame and despair that may come from being unable to care for oneself, one's child, or a friend. By focussing on freedom in this chapter, I have not wanted to detract from any of that'.

153 Ibid 338 (emphasis in original).

adequate housing, a roof will be the starting point,[154] but there is a need to go beyond the mere provision of housing.[155] Laws must themselves ensure home by enhancing the conditions necessary for home,[156] thereby expanding beyond ownership merely of house.[157]

III CONDITIONS FOR HOME

Conditions necessary to experience home are many and varied; this follows from home being a multifaceted and subjective experience.[158] All the various conditions work together to create home, as Dovey explains: 'There is no precise point at which a house becomes a home, and none of the properties that I have outlined previously are necessary nor sufficient for the experience of home. Rather, like fibres in a rope, each property lends strength to the meaning of home'.[159]

Two very important conditions for home are: (i) housing stability; and (ii) housing control. These conditions are discussed in detail here. In particular, the article recognises that Australian real properly law impacts significantly on these conditions (and so on home). Other conditions for home are also briefly discussed in this Part. This demonstrates the complexity of home and that home is impacted by many conditions (which, unlike housing stability and housing control) are very much outside laws' control. Laws cannot, therefore, ensure home on their own. Laws should not be seen as a panacea to ensure the experience of home. However, laws can support and empower individuals to experience home, with residential tenancy law being the classic example of this in respect of occupiers under leasehold ownership.

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154 See, eg, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1) ('*ICESCR*'): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(1)–(2) ('*ICCPR*'): 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'. See also Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UNESCOR, 6th sess, UN Doc E/1992/23 (13 December 1991) para 1.

155 International human rights law recognises 'merely having a roof over one's head' is not enough. Its concern is, more broadly, to ensure 'the right to live somewhere in security, peace and dignity'. Housing must, therefore, be 'adequate' having regard to legal security of tenure, affordability and habitability: Committee on Economic, Social and Cultural Rights (n 154) paras 7–8.

156 The challenge is in overcoming 'conditions that can erode the experience of home and paralyse its emergence': Dovey (n 2) 34.

157 See above n 19.

158 See Dovey (n 2) 51–2 regarding six 'properties of homelessness'.

159 Dovey (n 2) 51, cited in Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 179.

A Housing Stability

A very important condition for home is housing stability.[160] Housing stability is the state of being able to remain in current housing. Individuals who perceive this stability in their housing situation are empowered to experience home. Conversely, individuals who perceive an unstable and interim housing situation are at risk of 'homelessness'. Whether individuals have housing stability depends on all the circumstances, including legal, social and economic. These circumstances might enhance housing stability. Alternatively, they might lead to unstable housing and possibly prompt occupiers to leave their housing when they desire to stay.[161] This would be to the detriment of home. To give one example of a law undermining housing stability, insecure legal tenure, where landlords can terminate a tenancy for 'no reason', is a legal circumstance (ie, a law) contrary to housing stability and so to home. However, presently, the discussion is on establishing housing stability as a condition for home. Housing stability is vital to home – to the feeling of security, the expression of identity, and relationships and family. Ample evidence exists to support this particular claim.

1 Relevance to Feeling of Security

Regarding the feeling of security, Sebba and Churchman's research, referred to earlier, establishes that security derives from home's 'permanency', specifically from 'the knowledge that nobody can force them [occupiers] to leave'.[162] The feeling of security derives from housing stability, in other words. Other scholars also acknowledge housing stability as a condition for home. Fox O'Mahony explains that home fosters 'a sense of belonging, "rootedness", continuity, stability and permanence … [t]hrough its familiarity'.[163] This presupposes housing stability, as familiarity is built over time. Després, similarly, recognises housing stability. Home, she explains, is a 'temporal process that can only be experienced along time. Along weeks, months, or years, the home becomes a familiar environment, a place that provides its occupants with a sense of belonging somewhere, of having roots'.[164]

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160 Stability is 'the state of being stable', that is, 'not likely to change or fail': *Oxford Dictionary* (online at 1 October 2019) 'stability' and 'stable' (adj, def 1.3).

161 This conceptualisation of housing stability draws heavily on the concept of 'secure occupancy' proposed specifically to evaluate conditions for leasehold occupiers by Hulse, Milligan and Easthope. By contrast, this article's conceptualisation of 'housing stability' applies to evaluate conditions regardless of the tenure occupiers are under, ie, freehold or leasehold ownership. 'The concept of secure occupancy refers to the nature of occupancy of residential dwellings and the extent to which households can make a home and stay there for reasonable periods if they wish to do so, provided that they meet their obligations': Hulse, Milligan and Easthope (n 91) 20; '[F]our perspectives' are used to evaluate 'secure occupancy': market lens, legal lens, social policy lens and socio-cultural lens: at 2. See also, 'Simply living in a location for a longer period of time allowing for the development of a pool of memories or simply familiarity may assist the process of building home.': Fowler and Lipscomb (n 130) 114.

162 Sebba and Churchman (n 58) 9.

163 Fox O'Mahony (n 25) 162.

164 Després (n 43) 98.

Evidence that housing stability promotes security is illustrated by a case study of Victorian protected tenancies. A 1995 report, produced by the Tenants Union of Victoria ('TUV'), tells 'the story of protected tenancies in Victoria'.[165] That story is one of how protected tenants enjoyed particular housing stability under specific legislation making it difficult to evict them during their lifetime,[166] and that shielded them from excessive rent increases.[167] Overwhelmingly, as a result of their housing stability in this regard, Victorian protected tenants felt secure in and through their homes. Interviews were conducted by the TUV, with protected tenants, who said, variously:

> 'I've felt secure here. I haven't been kicked around or anything. It makes you feel more secure and safer. I suppose if I had my own home, I wouldn't be here but I'd rather be here … I don't think I would fit in anywhere else now, I've been safe here for so long … I feel so much more secure knowing that I am a protected tenant'. – Phyllis, first moved into Albert Park house in 1952.[168]
>
> 'Well I feel safe, that I'm not going to be tossed out at any minute'. – Lillian Wilson, first moved into Blackburn house in 1951.[169]
>
> 'That's why I don't want to go away. If I wasn't protected I'd feel terrible. It would worry the life out of me … I don't know how I would manage moving … with this breathing thing …' – Marjorie Maloney, first moved into North Caulfield house in 1939.[170]
>
> 'Being a protected tenant has made me feel secure'. – Jim.[171]
>
> 'Being protected tenants, we feel safe. We know, well we hope, they can't just come to the door one day and say we want you out'. – Peg and Arthur Olsen; Edith Williams, family first moved into Richmond cottage terraces in 1931.[172]
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> 'I suppose being a protected tenant has meant that I haven't felt anxious that they could evict me'. – Olga Finkelstein, moved into St Kilda house in 1936.[173]

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165 Dave Macrae, Julie Fry and Mary Roberts, *Theirs for the Duration: Protected Tenants in Victoria 1939–1995* (Report produced for the Tenants Union of Victoria, 1995) 6. Protected tenancies first came into being at the beginning of the Second World War, ie, 1939–45. They were a response to a housing shortage in wartime and an attempt to preclude landlords from profiteering from individuals desperate for housing. Protected tenancies had their basis in Commonwealth regulations 'to control rent and limit evictions'. Eventually, these protected tenancies came to exist under state legislation and remained for a period after the war. In Victoria, protected tenancies continued to be granted up until 1 January 1956. The laws regulating remaining protected tenancies then existed in the *Landlord and Tenant Act 1958* (Vic), until its repeal in 2012 by section 236 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic): at 2. It is also notable that protected tenancies existed in other jurisdictions. In NSW, for example, see Leesha McKenny, 'Protected Tenants Face Uncertain Future', *The Sydney Morning Herald* (online, 22 November 2012) <https://www.smh.com.au/national/nsw/protected-tenants-face-uncertain-future-20121121-29q3c.html>.

166 Regarding evictions, despite grounds for termination, a tribunal needed to be satisfied the eviction would not cause significant hardship. As most protected tenants were elderly, and had been in their homes for a long time, arguments could easily be made that eviction would cause hardship: Macrae, Fry and Roberts (n 165) 3.

167 Landlords could only increase rents with tribunal approval, having regard to financial hardship: ibid.

168 Ibid 17.

169 Ibid 23.

170 Ibid 29.

171 Ibid 47. Note that details for Jim's place of residence, and year of moving there, are not available in the source.

172 Ibid 59.

> 'A weight lifted off our shoulders [on realising their protected tenant status], you've no idea! Being protected tenants has meant that this is really our home, we know we're going to be here forever'. – Jack and Betty Hannah.[174]

The significant housing stability afforded by their protected tenant status has meant, for these individuals, feeling very secure through housing.

2 *Relevance to Self-Identity*

Housing stability is also vital to home, to the expression of identity. Again, ample evidence exists to support this proposition, discussed below. Put simply, individuals who know they can remain in a place (ie, who have housing stability) are more likely to see their identity in the place and, further, engage in creative activities expressive of identity in home. Examples of these activities are renovations, gardening, painting and decorating. Alternatively, and by contrast, individuals only in a place for a short period of time, or for an uncertain period (ie, who lack housing stability) are unlikely to express their identity in home. More likely, they are not going to invest their identity in a home from which a move is potentially imminent.[175] Lacking in housing stability, they might be less able to experience home as an expression of identity.

Evidence of individuals with significant housing stability expressing identity in their homes exists. This comes, again, from Victorian protected tenants interviewed by the TUV:

> 'I've got a garden outside, I've got tomatoes and silverbeet. All the friends I've got are around this way. If I went to another suburb I wouldn't know anybody. I don't think I would fit in anywhere else now'. – Phyllis, first moved into Albert Park house in 1952.[176]
>
> '… I have always done things inside. I was never asked to do them. My husband always did the painting, and we rewired as well'. – Lillian Wilson, first moved to Blackburn house in 1951.[177]
>
> 'Everything I have has gone into this place …' '… I wouldn't have spent so much money on the garden if I thought that I was going to be subject to continual legal action to get me out …' – Jim.[178]
>
> 'We've loved living here. It's our home. We never asked for any repairs, we've done them all ourselves. The house is in good condition but see, we kept it this way, with Jack's wages before he retired. Let's face it we have a cheaper rent but we kept the place so it's nice'. 'Our family grew up here, we used to have great evenings around the pianola singing, and the kids used to bring their friends over and they'd dance on Saturday nights! I used to join in doing these crazy new dances, I'd say, *If you can't beat them, join them!*' – Jack and Betty Hannah.[179]

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173 Ibid 85.

174 Ibid 53. Note that details for Jack and Betty's place of residence, and year of moving there, are not available in the source.

175 Another reason individuals might not be able to invest their identity in a home is if their lease precludes them making the alterations they wish to make. This concerns housing control, which is the second condition for home discussed below. See below n 209 and 210 and accompanying text.

176 Ibid 17.

177 Ibid 22.

178 Ibid 47. Note that details for Jim's place of residence, and year of moving there, are not available in the source.

179 Ibid 53. Note that details for Jack and Betty's place of residence, and year of moving there, are not available in the source.

> 'I put in shelves, altered the kitchen, had the place painted throughout six times. It's been twice carpeted. Everything is mine except the stove. As you get older [she admits to being past the age of 90] you feel more a part of it and less able to visualise yourself anywhere else. It's a quiet street and I know the people around here'. – Dorothy Harper, in Elwood home since at least 1954.[180]

The significant housing stability afforded by their protected tenant status has meant, for these individuals, the possibility of abundantly investing themselves in their home, in the knowledge that they cannot easily be forced to leave.

Memories, another part of identity, form in places, as is clear from Jack and Betty Hannah's comment recalling dances around the pianola. Memories are part of identity because they reflect back to individuals 'who they are'.[181] Sixsmith explains that 'knowledge of the home and the important events people have experienced there are strong ties between that environment and the person. These can become integral parts of the person's history and sense of identity and continuity'.[182]

A further example of memories in places, forming a part of identity, is apparent in the description of how the Kaluli, an indigenous tribe of Papua New Guinea, view their home: 'Each person knows the streams and landmarks of his longhouse territory, and these recall the people he worked with and shared with there. This growth of young trees, that patch of weeds with a burned house post, this huge Ilaha tree that dominates the crest of a ridge, reflect the contexts and personalities of his life'.[183] Only through memories have the 'huge Ilaha tree' or 'the streams' come to 'reflect the contexts and personalities' of Kuali lives.[184]

Naturally, sustaining memories tend to form in places that individuals have spent sufficient time in. This is because memories develop and enrichen overtime. Housing stability – the ability to stay – is thus necessary so that individuals can form memories in houses (and more fully enjoy the identity dimension of home). If housing stability is non-existent, individuals are likely to forget, and forgetfulness is the opposite of memory. Elie Wiesel notes: 'Forgetfulness by definition is never creative; nor is it instructive. The one who

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180 Ibid 63.

181 Homes become a 'mnemonic anchor' which tell us 'who we are by where we have come from': Dovey (n 2) 42; 'Our memories, particularly memories with personal or biographical content, are "keyed in" to our homes; like us, our memories are "housed" in the places where we live': Fox O'Mahony (n 25) 163.

182 Sixsmith (n 69) 290. The following statement from one of the interviewees captures it: 'Things have happened here, things that're important to me … it's the place I was away from home first, I was independent and doing things for myself, you know for the first time. I grew up in it. That made it home for me': at 291.

183 Edward L Schieffelin, *The Sorrow of the Lonely and Burning of the Dancers* (St Martin's, 1976) 182, quoted in Dovey (n 2) 42.

184 While the tribe may or may not have a house in the sense of a bricks-and-mortar dwelling, they clearly have a place. In this place, memories have formed over time, and thus also identity and home. The example was selected because it so vividly demonstrates the importance of memories, which require time to form and thus housing stability.

forgets to come back has forgotten the home he or she came from and where he or she is going'.[185]

Unfortunately, this lack of staying in one place is characteristic of postmodern society. Bouma-Prediger and Walsh explain: 'The postmodern nomad, by contrast, has no sense of place: he merely roams from one place to another. Or, more precisely, he wanders from no place to no place, since no particular place takes on sufficient significance to distinguish it from any other. No specific place is invested with enough story-soaked meaning to make it a place to which one would want or need to return'.[186] Further, they add: 'Once we have forgotten the stories, there is no home to return to, because there is no place, or even potential place, that could be shaped by those stories. Houses become homes when they embody the stories of the people who have made these spaces into places of significance, meaning, and memory'.[187] Further again: 'A house becomes a home when it is transformed by memory-shaped meaning into a place of identity, connectedness, order, and care'.[188]

3 Relevance to Relationships and Family

Regarding relationships and family, law cannot guarantee the close relationships which clearly contribute to a sense of home. This naturally leads to the conclusion that law cannot, on its own, ensure this dimension of home. However, laws can enhance these close relationships through ensuring housing stability. The logic here is that relationships form over time, in a place. The home is a common place for these relationships to form. It is in home that families are formed, go out, and return to be nourished by each other, in community with each other.[189] However, a lack of housing stability – being able to remain in a place – can dislodge or preclude the forming of close relationships, both within the household, and more broadly with neighbours and local community. Law can, by promoting housing stability, enhance this relational dimension of home. Alternatively, laws might undermine the relationships forming part of home. An example of a law doing that is the UK law known as the 'Right to Rent'. This immigration law empowers the Secretary to direct a private landlord to evict individual tenants who do not have a right to remain in the UK.[190] This law – itself a unique example of immigration law infiltrating residential tenancy law – will 'disrupt and break the social ties between resident non-nationals and

185 Elie Wiesel, 'Longing for Home' in Leroy S Rouner (ed), *The Longing for Home* (University of Notre Dame Press, 1996), 19, cited in Steven Bouma-Prediger and Brian J Walsh, *Beyond Homelessness: Christian Faith in a Culture of Displacement* (William B Eerdmans Publishing Company, 2008) 9.

186 Ibid 45.

187 Ibid 59.

188 Ibid 58.

189 Altman and Werner (n 21) xix: houses are where 'families establish, grow, and bond themselves into a unit' and 'to the larger society'.

190 Richard Warren, 'The UK as a Precarious Home' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 203, 221.

citizens', with possible 'divisive consequences', according to Warren.[191] It makes the UK 'a precarious home' for non-nationals.[192]

4 Relevance to International Human Rights Law

The proposition that housing stability is essential to home is also reflected in international human rights law. The *International Covenant on Civil and Political Rights*, in article 17(1), contains a right not to have, among other things, home 'subjected to arbitrary or unlawful interference'.[193] Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') incorporates this same right protecting 'home', in largely the same terms.[194] Persons have a right not to have their 'home' 'unlawfully or arbitrarily interfered with'.[195] In applying this right, a preliminary step is needed to determine if a premise is someone's 'home'. Justice Bell has opined: 'In human rights, identifying a person's "home" is approached in a commonsense and pragmatic way. It depends on the person showing "*sufficient and continuous links with a place* in order to establish that it is his home". … *If someone's links with the place where they live are "close enough and continuous enough", that is their home*'.[196] At the core of this statement of principle is housing stability; home exists following sufficiently continuous links with a place formed over time.

It is useful to consider the decision from which the above principles emerge. *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139 illustrates the recognition of an individual's home interest pursuant to Victoria's *Charter*, in their dispute with a government 'public authority'.[197] Mr Warfa Sudi

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191 Ibid 226.

192 Ibid 203.

193 *ICCPR* (n 154) art 17: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'. See also, Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 1.

194 An equivalent protection for home is also found in the *Human Rights Act 1998* (UK) ch 42 sch 1 art 8. See further Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 451, which discusses the impact of article 8 on UK domestic law, including relevant case law.

195 *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 13(1): 'A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. See also *Human Rights Act 2004* (ACT) s 12, which provides:

> Everyone has the right –
>
> not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> not to have his or her reputation unlawfully attacked.

196 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 146 [32] (citations omitted) (emphasis added). The Victorian Supreme Court of Appeal has referred to these principles with approval: see *PJB v Melbourne Health* (2011) 39 VR 373, 388 [57].

197 The *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ss 4, 13(a), 38(1) requires 'public authorities' to afford a right to home (as do the statutory charters of rights existing in the Australian Capital Territory and in Queensland). As such, the reasoning discussed here, based on 'home', is unique to those jurisdictions with a statutory charter of rights. Also, 'public authority' includes the usual government entities and some non-government entities doing government like things. This is a gross

(originally a refugee from Somalia)[198] and his three-year-old son, Shire, had been living at Mr Sudi's mother's premises following her death. Mr Sudi had also lived at the premises, at times, before his mother's death.[199] The Director of Housing, as landlord, refused an application to transfer the tenancy to Mr Sudi (from his mother).[200] Nevertheless, and despite no formal tenancy with the Director of Housing, the Victorian Civil and Administrative Tribunal ('VCAT') found the premises were Mr Sudi's 'home'. He had established a sufficient connection to the premises, and the right to 'home' was engaged.

The upshot for the Director of Housing, of this finding, was that the *Charter* obligations, under section 38, to: (i) give 'proper consideration' to human rights; and (ii) act compatibly with human rights, both extended to the right to 'home' which was engaged here. The Director had not met the second of those obligations with respect to 'home', according to VCAT. The Director's decision to apply to VCAT for a possession order[201] was, therefore, itself incompatible with 'home'. It was an arbitrary and unjustified interference with 'home' under section 13(1) of the *Charter*. It was thus unlawful under the *Charter*. The Director declined to provide any justification for seeking a possession order,[202] leaving VCAT with no other option but to find the interference to 'home', caused by the Director's application for a possession order, could not be justified.[203] Justice Bell commented: 'If the director had chosen to offer submissions and

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oversimplification of the definition of 'public authority' in the *Charter*. However, it is all that is required for present purposes.

198 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 143 [7]–[8], [15].

199 Ibid 143–4 [10]–[19].

200 Ibid 143 [11]. The Tribunal noted: 'The application was refused by the director on 9 October 2003 on account of outstanding rental arrears. That was in breach of the relevant guidelines. If the guidelines had been properly applied, this controversy may have been avoided'.

201 The relevant power is contained in section 344(1) of the *Residential Tenancies Act 1997* (Vic), which provides that:

> A person who claims to be entitled to the possession of premises may apply to the Tribunal for a possession order if–
>
> (a) the premises have been rented premises under a tenancy agreement at any time within the period of 12 months before the date of the application; and
>
> (b) the applicant alleges that the premises are occupied solely by a person (not being a tenant under a tenancy agreement) who entered into or remained in occupation without the applicant's licence or consent or that of any predecessor in title of the applicant.

202 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 163 [114]:

> [T]he director has offered nothing by way of justification for his interference with the human rights of Mr Sudi and his son. That course was deliberate. The director submits the tribunal has no jurisdiction to consider that question. Having failed to offer anything in justification of the interference, he accepts that, if the tribunal does have justification, he will be found to have acted in breach of human rights.

203 Ibid 165 [124]:

> Seeking to evict Mr Sudi and his son, and making the application for a possession order under s 344(1), constituted a serious inference (sic) with their human rights to family and home under s 13(a) of the Charter … As the director has failed to offer anything in justification of that interference, I am driven to conclude that taking such actions, and specifically making the application, breached those human rights and was 'unlawful' under s 38(1).

However, it should be noted that the Director likely gave no reasons because this case was a test case to determine VCAT's power to review decisions of the Director under the Charter, and thus not giving reasons directly prompted that issue.

evidence in justification for his actions, there would have been significant issues to consider'.[204] VCAT dismissed the Director's possession order application because the making of that application was *Charter*-incompatible with 'home'.

This decision demonstrates that the Director (and indeed all 'public authorities') must properly consider and not act incompatibly with 'home' – and the other rights protected – under the *Charter*.[205] That said, in *Director of Housing v Sudi* (2011) 33 VR 559, the Victorian Supreme Court of Appeal determined on appeal that VCAT itself did not have power to review – under the *Charter* – the Director's decision to apply for a possession order. As a result, *Charter* arguments must, for technical jurisdictional reasons, generally be heard in the Victorian Supreme Court, ie, they generally cannot be heard in the VCAT. The Court of Appeal held that VCAT did not have power to review, under the *Charter*, the Director's decision to apply for a possession order because: (i) VCAT does not have inherent judicial review jurisdiction;[206] and (ii) neither does VCAT have judicial review jurisdiction – in case of the residential tenancy legislation – under the administrative law principles of collateral review.[207]

The Court of Appeal, ultimately, remitted Mr Sudi's case to VCAT, for it to consider the possession order application of the Director of Housing, regardless of the right to 'home'. The Court of Appeal's decision means that – practically – public housing tenants challenging a proposed eviction by the Director of Housing on *Charter* grounds or under general administrative law must apply to the Supreme Court of Victoria. VCAT does not have jurisdiction to hear those

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204 Ibid 171 [155].

205 Section 38 of the Charter requires public authorities to: (i) give proper consideration to relevant rights; and (ii) act compatibly with human rights. The Director of Housing is a 'public authority' bound by the Charter, and thus the Director's decision to apply for a possession order will need to comply with section 38.

206 *Director of Housing v Sudi* (2011) 33 VR 559, 565 [24] (Warren CJ); 584 [126] (Weinberg JA).

207 Ibid 565 [24]:

> An inferior court with no judicial review jurisdiction may still be able to entertain a collateral challenge to the validity of an administration decision. For example, in *Ousley v R* the High Court considered whether an accused in a criminal trial in the County Court can mount a collateral attack on the validity of a listening device warrant, in order to challenge the admissibility of recordings made though the listening device. Having found that the issuance of the warrant was an administrative act, the High Court held that the County Court trial judge was able to examine the validity of the warrant. The trial judge was able to do so despite the fact that the County Court was an inferior court with no judicial review jurisdiction.

See also at 572 [62]–[63] (Maxwell P); and at 607 [284] (Weinberg JA):

> VCAT's jurisdiction is extremely broad. None the less, its powers are confined to those conferred upon it by statute, either expressly or by implication. There is nothing in the VCAT Act, or the RTA, or the Charter itself, that suggests that VCAT has the power to engage in broad-ranging collateral review on Charter grounds.

Subsequently, in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 108 [36] ('*Breckler*'), the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that:

> [I]n the absence of legislative prescription to the contrary, [an administrative decision] would be open to collateral review by a court in the course of dealing with an issue properly arising as an element in a justiciable controversy of which the court was seised.

Ousley v The Queen and *Breckler* make it clear that administrative decisions can generally be collaterally challenged in a court, but the scope of permissible collateral challenge remains a matter of some controversy.

Charter arguments, based on the right to 'home'. The Supreme Court is an expensive and complex jurisdiction, and hence, from the perspective of plaintiffs, this is a much less amenable way in which to raise the *Charter*. However, the Court of Appeal's decision is about the correct choice of forum in which to bring a *Charter* claim. It does not change the law that, as noted, the Director must properly consider, and not act incompatibly with, 'home' under the *Charter*.[208]

B Housing Control

Another very important condition for home is housing control. Housing control refers to the ability to control the home space in terms of what alterations or improvements might be made to it. Housing control, in this sense, is clearly relevant to home. Individuals who can make alterations or improvements to the home space (ie, who have housing control) are better able to express identity through these creative endeavours.[209] Conversely, individuals who cannot engage in such endeavours (ie, who lack housing control) are less able to experience home as identity. Ruonavaara explains: 'Residents actively *make* dwellings homes by redesigning, decorating, and changing them according to their values and wishes. As different housing tenures invest residents with different degrees of power [ie, housing control] over their living space, tenure may also be relevant for homemaking. If one's housing tenure gives little say over the living space, it may not be easy to feel at home in it'.[210] Individuals lacking housing control in Australia are, most typically, leasehold owners. However, leasehold owners need not lack housing control, with appropriate residential tenancy laws, as discussed below in Part IV.

Housing control also refers to the ability to control the home space in terms of deciding who can enter one's home, and the length of their stay. Research has shown that without such housing control an individual is unlikely to feel secure in their home.[211] Housing control is thus also relevant to the experience of home as a feeling of security.

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208 See above n 205.

209 Easthope (n 6) 582, 593.

210 Hannu Ruonavaara, 'Tenure as an Institution' in Susan Smith (ed), *International Encyclopaedia of Housing and Home* (Elsevier Science & Technology, 2012) 185, 186, quoted in Easthope (n 6) 583.

211 Sebba and Churchman (n 58) 9–10:

> In general the home is the sole, exclusive area of control for an individual. It answers the need for a space of one's own, a space over which others have no jurisdiction. Since it is under the individual's control, the home permits the individual to act freely, to supervise others within it, to control the everyday routine, etc. This aspect was most frequently mentioned by fathers and children, second in frequency by mothers. The adults stressed the spatial control and the social supervision that the home affords its owners (eg, 'In my home I decide who comes and goes'; 'In my home I decide upon the daily schedule'), whereas children stressed the freedom of behaviour that the home affords them (eg, 'At home, I can eat whenever I want' … 'At home I'm not ashamed to ask for what I want'; 'At home I can run wild') … Thus, the home fills the need of 72% of those interviewed to control a physical area; this control is a condition for freedom of behaviour, for self-expression and for a feeling of security.

C Other Conditions

Other conditions are also important to the experience of home, many of which have little or nothing to do with law. First, individuals need a foundational desire to make a home.[212] This is a preliminary condition. Other conditions might include: culture, built environment, and prevailing social and economic conditions. Achieving home is thus complex, as further discussion of these conditions, below, shows. Further, as many of these conditions are outside the full control of law, it becomes clear that law cannot, by itself, ensure home.[213]

1 Culture

Culture is also a component in producing the experience of home. This must be the case or why else would individuals incorporate cultural features into their housing designs?[214] Porteous explains: 'Emigrants try to reproduce home'.[215] 'The former British Empire is cluttered with attempts to reproduce the ambience of charming Cotswold villages, an effort most notable in the hill stations of India. Such efforts were also made in settlement colonies such as Canada. In response to her father's creation of an English garden-scape in the midst of the mid-nineteenth century British Columbia wilderness, the painter Emily Carr observes: "It was as if Father had buried a tremendous homesickness in this new soil"'.[216] Home, in these cases, is being drawn from the 'place of domicile'.[217]

Culture is a component in producing home in other ways. Particularly, local culture might influence perceptions of tenure type.[218] Freehold ownership might be perceived, by the culture, as necessary to experience home, with the concomitant view that home is not possible under leasehold tenure. Bate explains 'the meaning and making of home is often concomitant with homeownership'.[219]

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212 'Simply put, the process of constructing home in an apartment requires the choice to do so. The individual tenant must be willing to make the apartment into a home in order for the process to succeed': Fowler and Lipscomb (n 130) 112.

213 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* 52, 55.

214 Fox O'Mahony (n 25) 165.

215 Porteous (n 67) 387.

216 Ibid.

217 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 600. See also Moore (n 113) 208.

218 '[F]eelings about renting and owning are culturally specific and not innate': Atkinson and Jacobs (n 85) 41; refer to the debate around whether a 'lack of control' in renting is intrinsic to the tenure, or because of 'prevailing cultural norms about renting being an inferior, and inherently transitory form of occupancy': Hulse, Milligan and Easthope (n 91) 2; 'The homeownership ideology is by now deeply entrenched in the housing folklore, as well as in the housing policies of most capitalist societies. Indeed, so much is this so that there is very little likelihood that tenure-neutral housing policies will ever replace the current homeownership policies in most countries, at least in the near future': Jim Kemeny, *The Great Australian Nightmare: A Critique of the Home-Ownership Ideology* (Georgian House, 1983) 275, quoted in Atkinson and Jacobs (n 85) 22.

219 Bronwyn Bate, 'Understanding the Influence Tenure Has on Meanings of Home and Homemaking Practices' (2018) 12(1) *Geography Compass* 1, 1–2.

Evidence of this exists in Australia, for example, in the comments of former Treasurer Peter Costello:

> But young Australians and older Australians too, still aspire to home ownership. Why? Because it gives them a security in life, a security that gives them a little piece of our country. It is a bit like "The Castle", their little piece of turf they can defend against all comers and gives them security and their family security. And we should encourage and nurture homeownership. This is something that is important not just in an economic sense but also I believe in a social sense'.[220]

Whether the desire for home ownership (ie, freehold ownership)[221] is culturally motivated by perceptions it is a superior tenure, or reflects differences between the tenures, is a question housing scholars debate. Ronald's view is that culture is the reason for the home ownership preferences: '[H]ome ownership demand is primarily the result of discursive processes and policy development rather than a "natural" phenomenon'.[222] Saunders' view, by contrast, is that demand for home ownership reflects differences between the tenures (these differences, in his view, mean that home ownership provides more 'ontological security' than leasehold).[223]

2 *Built Environments*

Built environment – that is, the surroundings and aesthetics of housing – are another factor in creating home.[224] Built environment changes have been made which, according to Dovey, are not conducive to home.[225] Modern heating appliances are one example given. These have replaced the hearth fire and, in the process, 'certain intangible meanings' might have been lost,[226] with the hearth considered 'a symbol of home', 'a sacred center', 'an anchor for social order' and 'a place of reverie'.[227] Declining communal, open spaces are another built environment change.[228] These spaces are important to a 'broader sense of home extending into community life'.[229] Without these spaces, 'the experience of home contracts and loses meaning; yet at the same time increased demands are placed

220 Peter Costello, 'Launch of the Great Australian Dream Project' (Speech, House of Representatives Alcove, 14 August 2006), quoted in Richard Ronald, *The Ideology of Home Ownership: Homeowner Societies and the Role of Housing* (Palgrave Macmillan, 2008) 160–1.

221 See above n 11 and accompanying text.

222 Ronald (n 221) 162. See also, 'Our research shows how ontological security derives in part from the avoidance both of risk and of the appearance of failure. More so than the bypassing of shame, owner occupation offers the benefits of ontological security due partly to a rosy association of the tenure with stability (something which is often not true), and due to a strong desire to enter the mainstream and demonstrate personal progress – something which renting (private or public) is largely incapable of doing': Hiscock et al (n 85) 63.

223 'Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other': Saunders (n 10) 98.

224 Dovey (n 2) 51–8: six properties 'have eroded the traditional sense of home and that paralyze its reemergence': (1) Rationalism and Technology; (2) Commoditization; (3) Bureaucracy; (4) Scale and Speed; (5) The Erosion of Communal Space; and (6) Professionalism.

225 Ibid 51.

226 Ibid 52.

227 Ibid.

228 Ibid 57: 'the decline of communally shared open space'.

229 Ibid 58.

upon this depleted experience of home'.[230] Porches and sidewalks are a further example of communal spaces which are disappearing. The overall point, usefully put by Taylor and Brower, is that '[h]ome does not end at the front door but rather extends beyond',[231] and '[l]inking home to the community, and at the same time buffering home from the community, are home and near-home territories'.[232]

Dovey gives, as reasons for these changes to built environment undermining home, 'rapid advances in technology',[233] the architecture profession's focus on outward (rather than inward) appearance,[234] top-down bureaucracy far removed from individuals' experiences of home,[235] and scale and speed.[236]

D Social and Economic Conditions

Social and economic conditions can also impact home. Atkinson and Jacobs explain:

> Economic conditions or change in individual circumstances can dramatically affect our view of home. For example, if we lose our job and struggle to meet the mortgage payments, our view of home can radically alter. Rather than being our prized asset, the cost of servicing a mortgage debt can change the way we feel toward our home. Our feelings of the home can also be transformed following a dramatic event, such as a split relationship or children leaving the family home. Even a long journey or for migrants a trip to their former home may alter feelings of home.[237]

Policies of government on employment, social housing and social security will be very relevant in this sense, in that they will impact individuals' economic circumstances and hence possibly their experience of home.[238]

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230 Ibid.

231 Ralph B Taylor and Sidney Brower, 'Home and Near-Home Territories' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 183, 183.

232 Ibid 210.

233 Dovey (n 2) 52.

234 Ibid 58: designers are concerned 'with the image' whereas the experience of home is about '"living in" rather than "looking at" buildings'. Dovey thus 'draw[s] attention to the ways in which it [the designer's role] may be antithetical to the process of becoming-at-home'. In essence, '[a] home cannot be someone else's work of art'.

235 Ibid 55–6: 'The complexities of the experience of home and the role of the dweller in achieving it are beyond the capabilities of bureaucratic structures to deal with'. The point being made is that top-down bureaucratic approaches might conflict with the uniqueness of a particular individual's relationship to their dwelling, and thus undermine their experience of home.

236 Ibid 56–7:

> Traditional cities and villages for which our culture is so often nostalgic were not produced from master plans but grew piecemeal over a long period of time, responding to circumstances at a local level. The phenomenon of home, too, grows piecemeal rather than being created complete. Swiftly implemented large developments may lend the impression of solving large-scale problems, yet they do so at the expense of the adaptability and identification possession when we understand the processes by which houses can grow as families grow – as economic resources permit and as needs arise.

237 Atkinson and Jacobs (n 85) 41.

238 Hulse, Milligan and Easthope (n 91) 6–11: whether or not tenants have available to them 'tenant support programs' can impact on home. See also Janet Ford, Roger Burrows and Sarah Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (The Policy Press, 2001) 8:

E Concluding Remarks

The above factors are all potentially in the mix, determining the experience of home had by individuals. Conditions discussed in detail were housing stability and housing control. This is because these are conditions law – and Australian real property law in particular – can significantly impact. It thus makes sense, therefore, that these conditions be elevated in the discussion. Other conditions were also discussed briefly: culture, built environment and prevailing social and economic conditions. These were discussed to demonstrate the complexity of home and, further, that law cannot ensure home as there are conditions such as these which are not entirely within its control.

IV RELEVANCE OF TENURE TYPE

Tenure type is another factor which some scholars see as relevant to the experience of home. It is discussed separately, in this Part, because there are significant policy implications to be drawn out, and because the article argues that tenure type is not, and should not be, a condition for home. Rather, home – as experience – should be available under both tenures.

A Distinguishing the Tenure Types

Tenure describes, at a basic level, the nature of 'the legal claim we have to a particular dwelling'.[239] Further, in this article 'tenure' is used in its technical legal sense to refer to freehold tenure (comprised of three forms: the fee simple absolute estate, the freehold life estate and the fee tail estate)[240] and the leasehold estate (although historically leasehold was not a tenure per se). These are the two tenures recognised in law.[241]

In Australia, therefore, there are two housing tenures: freehold ownership and leasehold ownership.[242] Within these, there are different forms of each type of

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> It is also clear that in discussing the risks to home ownership from social and economic restructuring we are identifying processes that are sometimes also constituted by public policy – for example, housing policy, policy on labour market regulation and social security policy. The potential and actual consequences of these risks are thus public issues, although they are also experienced as personal troubles.

239 Atkinson and Jacobs (n 85) 11.

240 Fee tail estates generally no longer form part of Australian land law, in that it is no longer possible to create fee tail estates in New South Wales, Queensland, Western Australia, the Northern Territory, Victoria, or Tasmania (in respect of Torrens system land). However, fee tail estates may, in theory, still exist; for example, in Victoria which has not converted existing fee tail estates (if any exist) to fee simple estates, and in South Australia: see Edgeworth et al (n 9) 180–1 [3.14]; Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Final Report No 20, October 2010) 80–2 [6.1]–[6.18].

241 The word 'tenure' is sometimes used differently, ie, to refer broadly to any proprietary interest in land, but that is not how it is used in this article.

242 Hulse (n 4) 210; 'there are basically only two types of housing tenure in modern societies – owner occupation and renting – which are distinguished by qualitatively different modes of possession of

tenure. Within freehold ownership, for example, there exists the fee simple absolute estate, which continues indefinitely until devised to another person, and the freehold life estate, which continues until the death of the interest holder. Within leasehold ownership, for example, there exists ordinary residential tenancies, which are regulated by statute,[243] and protected tenancies, which continue for an indefinite duration of tenure based on statutory protections for those tenants.[244] Under each tenure, the form of title also impacts on the rights under each tenure.[245]

It is such different legal rights of occupiers under the different forms of tenure which distinguish them from each other.[246] The different legal rights offer different levels of control and stability to occupiers, and so varying experiences of home. Different rights also mean the experience of home is also likely to be different under each type of tenure.[247]

B Which Tenure Is Better for Home?

In Australia, the different rights enjoyed under freehold ownership[248] mean that owners of this tenure might experience home in ways that leasehold owners do not, to the same extent. However, to this must be added an important qualification, making clear the argument advanced by this article: all occupiers – under leasehold or freehold ownership – are, theoretically speaking, capable of experiencing home. Neither tenure outright precludes housing stability, nor housing control, and hence neither precludes home. Studies reflect that individuals do not need to own property to experience home. A study has shown that communards, for example, can still feel at home.[249] This should create optimism for the experience of home, for it means that home need not be experienced in an *overly* discriminatory way between tenure types. That said, in the Australian context, the different rights under freehold ownership might make it more conducive to home than leasehold. The rights under leasehold ownership

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housing as indicated by the rights of disposal, of use (particularly security) and of control (eg, in altering the dwelling)': at 204.

243 See *Residential Tenancies Act 1997* (Vic).

244 Refer to discussion of protected tenancies in Part III above.

245 Strata title, for example, offers less control than ordinary freehold title. Strata title is characterised as the sharing of common property between all lot owners, and so the owners' rights of control are thus limited in that regard. Strata title can be under freehold or leasehold tenure. On strata title, see further Sherry (n 4).

246 Saunders (n 10) 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognised as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

247 Ibid 274: 'Does this mean that ownership can provide a sense of personal security, identity and autonomy which may be denied to non-owners? Put another way, does private ownership generate greater scope for the expression of self and identity in a private realm?'

248 That is, ownership of the fee simple absolute estate. See above n 11.

249 Elena Ariel Windsong, 'There Is No Place Like Home: Complexities in Exploring Home and Place Attachment' (2010) 47(1) *The Social Science Journal* 205, 212.

in Australia[250] do not parallel those under freehold ownership. The article does not deny this point, now explored.

C Different Rights

1 Duration of Tenure

Duration of tenure is the first key difference between the tenures.[251] Duration of tenure under leasehold ownership is typically for a fixed duration,[252] and in Australia this duration is for a relatively short period of time. Duration of tenure under freehold ownership is, by contrast, 'for as long as title is held'[253] or, in other words, for an indefinite duration. This difference makes freehold ownership more stable than leasehold ownership, in the Australian context. The indefinite duration[254] of freehold ownership can ensure permanence, 'even across generations'.[255] How is this relevant to home as an experience? Well, put simply, this can enhance home – feelings of security, self-expression, and relationships built over time – under freehold ownership. Saunders' research concludes that freehold owners 'are more likely to see the home as a place where they can relax and "be themselves"'.[256] Feelings of security are, thus, greater for freehold owners.[257] And the opposite has been shown to be true for leasehold owners. Dupuis and Thorns' research shows that leaseholders feel less secure than freehold owners. Having conducted interviews, they explain 'renting was generally seen as much more of a risky business with vulnerable tenants subject to the whims of the landlord and eviction a constant fear'.[258] The difference between the tenures was characterised by one interviewee in this way: 'When you own you know you're not going to get the rug whipped out from under you. In a rental property, in one minute and out the next'.[259] This characterisation

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250 Comments here are with respect to leasehold ownership of residential property in Australia.

251 Saunders (n 10) 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognised as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

252 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, 388. However, there are exceptions. Protected tenancies — discussed in Part III above — are such an exception, whereby the legislature effectively made the lease term indefinite by force of statute, for the benefit of these tenants.

253 Saunders (n 10) 99.

254 Saunders (n 10) 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense they are normally recognised as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

255 Saunders (n 10) 311.

256 Peter Saunders, 'The Meaning of "Home" in Contemporary English Culture' (1989) 4(3) *Housing Studies* 177, 188.

257 Of course, this will not always be the case. For some people home ownership is economically unsustainable. This is a different case altogether and means that for those people freehold ownership is unlikely to enhance home. See further Fox O'Mahony (n 25) 162; Ford, Burrows and Nettleton (n 238) 9, 151.

258 Dupuis and Thorns (n 79) 31.

259 Ibid 32.

could apply equally in Australia, where differences in the duration of tenure mean that freehold ownership generally provides greater security than under leasehold. Indeed, leasehold owners of residential property in Australia occupy their house for a relatively short duration, and on terms favourable to their landlord's ability to terminate their tenancy.[260]

Freehold ownership might also enhance the expression of identity, again because it is typically more stable. A longer duration of residence is more conducive to the development of self-identity in a place and that is why freehold ownership, with its indefinite duration, is better in this regard. Saunders states: 'tenants are less able than owners to express sense of self and belonging through their houses. They can identify with their families and neighbours but not with the house. This has nothing to do with the building itself, but is a function of tenure'.[261] Cuba and Hummon similarly explain: '[L]ong-term residence also contributes to place identity, particularly in building sentimental attachment and a sense of home. Duration of residence not only enhances local social ties, but it also provides a temporal context for imbuing a place with personal meanings'.[262]

An important qualification is that leasehold ownership does not preclude the feeling of security or self-identity or close relationships in a place. Leases can potentially provide necessary stability and control, leading to the home experience of security, self-identity and close relationships in a place. Mee's study of public housing tenants in Newcastle, New South Wales, shows this regarding security: '[M]ost tenants felt "at home" in public housing in ways that extended beyond the simple provision of a dwelling, to feelings of security, comfort and control'.[263] With greater housing stability than private tenants, public housing tenants had significant security according to this study.[264] The same can be said of those individuals occupying under a protected tenancy, as discussed in Part III.

For present purposes, this indicates that leasehold owners need not be insecure (or, similarly, feel inhibited in their ability to express identity in a place). Whether they feel so depends significantly on deliberative choices made by government, particularly in constructing rental laws in particular ways and distributing rights between landlords and tenants. Leasehold ownership can thus provide stability, security and self-identity. Whether or not it does so, however, depends on appropriate rental laws being developed for private tenants. They should enjoy more legal security, as for the public housing tenants in Mee's

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260 See generally Chris Martin, 'Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Term Agreements' (2018) 7(1) *Property Law Review* 184.

261 Saunders (n 10) 294.

262 Lee Cuba and David M Hummon, 'A Place to Call Home: Identification with Dwelling, Community, and Region' (1993) 34(1) *The Sociological Quarterly* 111, 115.

263 Kathleen Mee, '"I Ain't Been to Heaven Yet? Living Here, This Is Heaven to Me": Public Housing and the Making of Home in Inner Newcastle' (2007) 24(3) *Housing, Theory and Society* 207, 225. Residents of share houses in Inner Sydney also have positive home experiences: see McNamara and Connell (n 131) 88.

264 The contrast between public and private tenants, with the latter having a more precarious housing experience, was particularly noted: ibid 225.

study, which shows broadly that the conditions under leasehold ownership can be conducive to home (and are not inhibited by leasehold tenure itself). There is, accordingly, much scope to ensure home for leaseholders (and freeholders alike).[265]

This view understands the differences between tenures in Australia to arise not from inherent differences between the tenures themselves, but, rather, from Australian laws (and practice) which can thus be changed appropriately for home, if deemed necessary.[266] There are no inherent differences which make freehold ownership a superior tenure to leasehold ownership for the purposes of home, but only laws and policies which create this result.

2 *Control*

Rights of control are another difference between freehold and leasehold ownership.[267] Examples include the rights to control who has access and to make alterations.[268] Leaseholders' rights of control, such as these, are 'much attenuated' under leasehold according to Saunders,[269] and the same comments generally can apply in Australia. Leases of residential property in Australia, for example, typically require tenants to grant access for landlord inspections, not to make unauthorised alterations, and otherwise to maintain the premises. Freehold owners, by contrast, are under no such restrictions, although restrictions can arise otherwise, for example through planning laws.[270] Freehold ownership, therefore, more closely accords with 'that sole and despotic dominion', famously referred to by Blackstone.[271]

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265 It is useful to recall Kemeny's distinction between two types of rental systems in this context. Kemeny distinguishes between dualist and integrated rental systems. In dualist rental systems – of which Australia's is one – a clear distinction exists between public housing and private renting as to their terms of occupation. In integrated rental systems, by contrast, no such distinction exists. The distinction demonstrates that governments can determine the strength of rights afforded to tenants. See especially Jim Kemeny, *From Public Housing to the Social Market: Rental Policy Strategies in Comparative Perspective* (Routledge, 1995); Jim Kemeny, Jan Kersloot and Philippe Thalmann, 'Non-profit Housing Influencing, Leading and Dominating the Unitary Rental Market: Three Case Studies' (2005) 20(6) *Housing Studies* 855; Jim Kemeny, 'Corporatism and Housing Regimes' (2006) 23(1) *Housing, Theory and Society* 1.

266 In terms of appropriate legal change, long-term leases are often thought of as a way to provide tenants with greater stability (and hence security). However, this perspective has been challenged by Martin, who argues that long-term leases would not assist tenants and that (instead) tenancy laws should be changed to limit the grounds on which landlords can end leases (thus providing tenants with greater security in this way): see Martin (n 260) 184.

267 Saunders (n 10) 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognized as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

268 Rights to control, access and alterations are discussed in Saunders (n 10) 100–1.

269 Ibid 99.

270 Ibid 98.

271 William Blackstone, *The Commentaries on the Laws of England: A Reprint of the First Edition with Supplement* (Dawsons of Pall Mall, 1966). However, there are forms of freehold ownership which less resemble 'sole and despotic dominion'. Strata title falls into that category, in that strata title owners are

Turning to how all this impacts on home, leaseholders' 'attenuated' rights of control arguably inhibit their ability to manifest self-identity in home. Not being able to make certain alterations at all, or without permission, arguably has this effect.[272] Freehold owners, by contrast, generally 'have more freedom to alter those features of the dwelling that dissatisfy them'.[273] Thus they have the ability to express their identity through the possibility of modifying their environment and thus stamping their personality on their home. One respondent described her home as: '…a personal possession which has the stamp of your identity'.[274] Of course, leaseholders might be able to make some alterations (and have some rights of control). However, these are currently to a lesser extent in Australia than under freehold ownership. Residential tenancy legislation applicable in Australia restricts what tenants can do with their dwelling.[275] That probably reflects the practical reality that residential leases in Australia are for a relatively short duration, and thus Australian landlords have a more immediate interest in retaining control over the premises which might not arise if the tenancy were for a much longer duration.[276]

While this article agrees that Saunders' characterisation of differences between the tenures applies generally with equal force in Australia (and thus has been used to inform the discussion above), it is wary of a further related contention of Saunders that 'the rights of non-owners can never come to balance those of owners'.[277] This contention says that leasehold ownership is granted out of freehold ownership, ie, the fee simple estate, and thus leasehold ownership must therefore, always (to some extent) be subject to freehold ownership. It would not make sense, for example, for a leasehold owner to be permitted to make any desired alterations. This would eviscerate the freehold owners' rights.[278]

The article prefers to emphasise (instead) that there is much which could be done to strengthen the rights of leaseholders in Australia, such that their experience of home can come more to balance that of freehold owners. An

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subject to by-laws that restrict the owner in what they can do with their property (both as regards their private lot and common property). On strata title by-laws, see especially Sherry (n 4).

272 Even where not restricted, tenants 'are usually reluctant to spend large amounts of money on a rented dwelling': Luis Diaz-Serrano, 'Disentangling the Housing Satisfaction Puzzle: Does Homeownership Really Matter?' (2009) 30(5) *Journal of Economic Psychology* 745, 747.

273 Ibid.

274 Dupuis and Thorns (n 79) 38.

275 See *Residential Tenancies Act 1997* (Vic) s 64(1): 'A tenant must not, without the landlord's consent — (a) install any fixtures on the rented premises; or (b) make any alteration, renovation or addition to the rented premises'. However, Victoria has recently amended its residential tenancy laws to provide leasehold owners with power to make 'minor modifications', without the landlord's consent.

276 See Martin, who challenges the perspective that long-term leases would assist tenants and (instead) suggests that tenancy laws should be changed to limit the grounds on which landlords can end leases (thus providing tenants with greater security in this way): Martin (n 260) 184.

277 Saunders (n 10) 100.

278 Ibid: 'no landlord can afford to offer a *carte blanche* for its property to be altered without prior permission'.

appropriate balance between landlords' and tenants' rights is achievable by legislation.

So, the acknowledgement in this article – that freehold ownership is typically superior in Australia, because of superior rights of control – comes with an important override. None of this precludes leaseholders from the experience of home as self-identity. Through law reform, it is possible to ensure leaseholders can express their identity in a place, even if that is not to the same extent as freehold owners.[279] Laws can be made by government to enable leasehold owners to manifest self-identity in home, as recent reforms in Victoria demonstrate. These reforms, to that state's residential tenancy legislation, provide leaseholders with greater control over leased premises, including to keep a pet and make minor alterations without the landlord's permission.[280]

3 Ability to Dispose

The ability to dispose of the house is another difference between housing tenures,[281] including in Australia.[282] The right to dispose of their interest is a right freehold owners have. What this means is that freehold owners can realise, in monetary terms, the value of the house through disposal of the asset. Leaseholders – theoretically – also have a right to assign their interest. However, Australian leaseholders cannot practically exercise that right in exchange for financial gain. The short duration of their residential tenancy makes it commercially unappealing, albeit that a right to assign it exists.[283] This difference means that, again, freehold ownership might provide a superior home experience. Freehold owners might derive additional security knowing their homes are a financial investment that can be sold (and which will likely appreciate in value).[284] Freehold owners might also be more inclined to invest their identity in a home because they 'own' the house, and will be able to realise the value of any improvements through its disposal.[285] Leaseholders in Australia do not benefit in either way; they do not derive financial security because they cannot (commercially and practically speaking), as noted, assign their interest in the house for financial gain, and in turn this might make them reluctant to improve (and so manifest their identity in) the house. Diaz-Serrano explains that

279 Tenants can also make a home through 'acts of possession', where self is reflected in possessions rather than the physical house itself: Fowler and Lipscomb (n 130) 107–8.

280 See *Residential Tenancies Amendment Act 2018* (Vic). Victoria passed over 130 reforms to that Act under the *Residential Tenancies Amendment Act 2018* (Vic).

281 Saunders (n 10) 98–9:

> Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognized as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

282 Refer to relevant discussion in Part II.

283 Real property law contains fundamental rules against restraints on alienation.

284 Bright and Hopkins (n 25) 382–3: 'Ultimately, ownership of value brings the prospect of financial security'. And at 386: 'The overarching financial benefit of home ownership is the prospect of financial security: a long-term reduction in housing costs coupled with the safety of a foot on the housing ladder'.

285 Saunders (n 10) 303: giving the example of Council tenants who enter into ownership and thus change various aspects of their housing immediately on become freehold owners.

leaseholders 'are usually reluctant to spend large amounts of money on a rented dwelling'.[286] Saunders also makes the point: '[M]any tenants feel unwilling or unable to perform such labour on a house which they constantly remember is not their own'.[287] Again, this is not the result of inherent differences between the tenures. Rather, it is the result of Australian residential leases being for a relatively short duration, and hence commercially unappealing as an asset.[288]

D Two Critical Policy Implications

Two critical policy implications flow from home being a potentially superior experience under freehold ownership in Australia because of its greater stability and control. The first critical policy implication is that home ownership – of the freehold – ought to be realisable for as many Australians as possible. Particularly, laws should support home ownership of that tenure over investment in it solely for financial gain. Unfortunately, Australian laws exist which prefer investors seeking to acquire homes in pursuit of financial gain. Those laws provide tax concessions to Australian investors in residential property, and thus seem to go against the flourishing of aspiring owner-occupiers seeking (a house for) home.[289] The argument for policies supporting home ownership follows from the overall conclusion above: that home ownership under freehold tenure is desirable for its ability to realise home,[290] in a potentially superior way to leasehold, through its legal features discussed.[291]

The second critical policy implication is that appropriate residential tenancy laws should be developed to ensure leasehold owners can also experience home. Victoria has begun to make leasehold more stable and conducive to home under its residential tenancy legislation.[292] However, it could be said there is a general need to 'rehabilitate renting'[293] in Australia, because existing tenancy laws do not go far enough in ensuring home for leaseholders. This argument, for supporting home for leaseholders, follows from the conclusion above that leasehold does not

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286 Diaz-Serrano considers that even where tenants can make improvements, 'they are usually reluctant to spend large amounts of money on a rented dwelling': Diaz-Serrano (n 272) 747.

287 Saunders (n 10) 302.

288 This is noted here because it might impact on the experience of home derived under each type of tenure. However, it should not be taken that this article is thus in support of long-term residential tenancy agreements in Australia. On that point, see Martin (n 260).

289 Owner-occupiers in Australia also receive a tax concession for their 'main residence' (ie, a capital gains tax exemption). However, this obviously does not assist non-owners.

290 'Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other': Saunders (n 10) 99.

291 Although recent Australian governments have demonstrated a focus on the objective of stimulating investment in residential property, for much of the 20th century Australian governments sought to encourage home ownership by young Australians. 'The ideology of home ownership has been a central component shaping policies and practices in such countries as Britain, Australia, New Zealand and Canada': Dupuis and Thorns (n 79) 24.

292 See n 280.

293 'A more effective strategy may be to rehabilitate renting and reverse the discursive prejudices that have built up against it': Ronald (n 220) 253.

preclude home,[294] albeit that it might not (currently in Australia) be as conducive to home as freehold ownership. Leasehold is not inherently unstable and does not preclude leaseholders having some level of control,[295] should policymakers choose to ensure this in law.

V CONCLUSION

This article has been concerned with home in the housing context. It began by establishing a particular understanding of home as an experience. It then set out conditions necessary to attain home in law. Three key points have emerged. First, home is an experience separate from the physical structure of house. Included in that experience, ideally, is the feeling of security, the expression of identity, and relationships and family; all are necessary to human flourishing. Secondly, housing stability and housing control are essential conditions which laws should embody to ensure this experience called home. Stable housing underpins the feeling of security and self-expression, as well as relationships and family. The feeling of security results from individuals knowing they can stay in a place.[296] Self-expression and identity can also more easily occur over time, with memories then forming. Housing control is also essential to home, both to self-expression and identity, and to feeling secure. An appropriate level of control over home, for example, the ability to make alterations, facilitates creative self-expression, and housing control over who enters the dwelling space enhances the feeling of security. Thirdly, home can be realised regardless of housing tenure. However, freehold ownership of the fee simple absolute estate might be more conducive to home in Australia presently as compared to leasehold because of legal differences. Two critical policy implications flow from this. First, laws should support home ownership – of the freehold – for those who seek it for home over investment for financial purposes. Housing is unique in providing the place for home. Meanwhile, there are various other vehicles for investment purposes. Secondly, laws should also ensure home for leasehold owners. Leasehold tenure itself is not inherently unstable or unable to provide housing control. If it is unstable or lacks housing control, this is because of other conditions – social, economic and legal – which make it so, and which may need to change.

Regarding future research, it is suggested that the conditions for home set out herein might be used to evaluate laws' impact on home. Do any laws perpetuate an inferior experience of home, for some groups of people because they

294 'To suggest that home ownership creates ontological security does not entail denial of the possibility that non-owners may seek and achieve an equivalent sense of security through other channels. … the fact that home ownership enables ontological security does not mean that non-ownership prevents it': Saunders (n 10) 303.

295 It is only that *in comparison to* freehold ownership, leasehold in Australia is less stable and thus less conducive to 'home'.

296 As this article suggests, home as security is an important counterbalance to the growing problems of anxiety and other mental unwellness present in Australian society.

undermine these conditions? If so, how ought they be changed? Areas of Australian law which could usefully be examined from the perspective of home include migration law, repossession law, residential tenancy laws and public housing, equal opportunity laws and strata title laws.[297] Research exists in some of these areas overseas,[298] but the field remains comparatively open in Australia. Appropriate policy responses could usefully be developed in these areas to enhance home – the experience – in Australia.[299]

297 Regarding strata title, see Sherry (n 4).

298 On migration, see Fox O'Mahony and Sweeney (n 18). On repossession law, see Beverley A Searle, 'Recession, Repossession and Family Welfare' (2012) 24(1) *Child and Family Law Quarterly* 1.

299 As Fox notes, the home perspective advances law through 'the possibilities for developing new thinking … from a person-centred perspective': Fox O'Mahony and Sweeney (n 18) 290.

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ARTICLE TWO: ‘A NEW THEORISATION OF ‘HOME’ AS A THING IN PROPERTY’

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This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

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13 December 2022

A NEW THEORISATION OF 'HOME' AS A THING IN PROPERTY

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Laws are impacting on home in ways that undermine that experience for individuals. The implications of this are yet to be fully unpacked from a property law theory perspective. This article contributes here by theorising that laws, in impacting home, are simultaneously distributing that experience, to a greater or lesser extent, or not at all when they ought to be. To recognise this significant point – that laws are distributing home – is really to recognise that home, the experience, is a thing that is capable of being the subject matter of property. Further, it is a thing distributable by property. Theorising home in the way presented herein is not mainstream, but it is rational and justifiable. The theorisation is integral to the legitimacy of private property, based on personhood and human flourishing. It also offers a new framework for future legal scholarship to consider home – the experience – in property distributive terms. That is, to consider how laws distribute more or less of home to particular groups, thereby extending beyond a pure legal analysis of how laws impact on home.

I INTRODUCTION

'Ar scáth a chéile a mhaireas na daoine' ('It is in the shelter of each other that the people live')
– Keith Drury (b.1964) Belfast City Hall[1]

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[1] https://artuk.org/discover/artworks/ar-scath-a-cheile-a-mhaireas-na-daoine-244834/search/keyword:music/page/66/view_as/grid

Home is an important and growing area for legal research.[2] Scholarship in Australia,[3] and overseas,[4] makes clear that laws are impacting on home, in ways that undermine that experience for individuals. The implications of this are yet to be fully unpacked from a property law theory perspective. This article contributes here by theorising that laws, in impacting home, are simultaneously *distributing* that experience, to a greater or lesser extent, or not at all when they ought to be. To recognise this significant point – that laws are distributing home – is really to recognise that home, the experience, is a *thing* that is capable of being the subject matter of property.[5] (This expands on an existing point in property theory, which is that different things may be the subject-matter of

[2] Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford, 2007) 133.
[3] Only a few Australian legal scholars have considered home or related concepts in evaluating laws. See, eg, Margaret Davies, 'Home and State: Reflections on Metaphor and Practice' (2014) 23(2) *Griffith Law Review* 153 (Davies argues the concept of home potentially 'obscures violence and disempowerment', especially in relation to Indigenous peoples when home is associated with the state: 161 and 163); Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017) (Sherry's comprehensive analysis of strata by-laws in Australia reveals the impact they have on people's lives and experiences in their homes: see Chapter 5 on 'Privacy and personal autonomy'); 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, and Belinda Fehlberg, Kristin Natalier, Bruce Smyth, 'Children's experiences of 'home' after parental separation' , (2018) 30(1) *Child and Family Law Quarterly* 3 (regarding work in the family law context concerning children and home); and 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, and 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* 52, 55 (regarding older persons and home); and Larissa Behrendt, 'Home: The Importance of Place to the Dispossessed" (2009) 108 (1) *The South Atlantic Quarterly* 71 and Larissa Behrendt, 'Genocide: The Distance Between Life and Law' 25 (2001) *Aboriginal History* 132 (regarding the impact of colonial laws on Indigenous people in Australia); and Samuel Tyrer, 'Home in Australia: Meaning, Values and Law' (2020) 43(1) *University of New South Wales Law Journal* 340 ('Home in Australia'); Samuel Tyrer, "Assets for care' arrangements: The current state of the law (and its weaknesses) from the perspective of home' (2020) 28 *Australian Property Law Journal* 149 ('Assets for care arrangements: The current state of the law'); Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve 'Assets for Care' Disputes' (2020) 46(3) *Monash University Law Review* 204 ('Assets for care disputes – A proposal'); Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' – (2023) *UNSW Law Journal* in press ('Residential Tenancy Matters Involving Family Violence'); and Samuel Tyrer, 'Rooming Houses in Victoria: Home and the Nature of Property' – (2022) *Australian Property Law Journal* in press ('Rooming Houses and Home').
[4] Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 158, and overseas work cited therein.
[5] The point that different things can be the subject matter of property is made clearly by Joseph William Singer. See Joseph William Singer, *Entitlement: The Paradoxes of Property*, (Yale University Press, New Haven & London, 2000) 13-15.

property.[6]) Further, it is a thing distributable by property. Theorising home – the experience – as a distributable *thing* is key here and forms the basis of this article about the protection, and just distribution of home, by property. Property systems must be designed with home in mind, in other words. Whether that is routinely happening in Australia under its system of private property presently is an open question, as arguably there are instances of home not being protected and justly distributed by property.

This article is divided into five parts. Part I is this Introduction. Part II presents the new theorisation of home as a thing which can be the subject matter of property. It defines 'home' and 'property' for relevant purposes and makes the case for home's thing-hood. Further, it explains what the theorisation means for the design of private property systems. (The focus throughout is on home in a system of private property, as that is the predominant property system used in Australia with respect to housing. However, it is acknowledged that some people would consider that communal property systems would enable the experience of home, and thus flourishing and personhood.[7]) The state's responsibility for home – its protection and just distribution – is also theorised. Part III justifies the new theorisation on two bases. First, on the basis that home is a way to legitimise private property. It ensures personhood and human flourishing, which are key justifications for property itself. [8] Without home, these key justifications for

[6] Singer, above n 5, 13: 'Property is something we must collectively define and construct. It is not given to us whole; it does not emerge fully formed like Athena from Zeus's head. It is closer to a piece of music that unfolds over time.'

[7] Communal property systems and home are not explored in this article because it is unrealistic to expect such a system to emerge with respect to housing (and thus home) in Australia, given existing private ownership of houses. Therefore, other systems of property for housing are not explored. Further, no statement is made about whether communal or private property is preferable for achieving the experience of home through property. Discussion in this article of 'property' should thus be taken to refer to private property, unless stated or implied otherwise.

[8] Regarding the personhood theory of property, see Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957 ('Property and Personhood'), and Radin, *Reinterpreting Property* (University of Chicago Press, Chicago, IL, and London, 1993). Regarding the human flourishing theory of property, see Gregory Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (2013) Paper 653 *Cornell Law Faculty Publications* 1 ('Ownership and Obligations'); Gregory Alexander, 'The Social-Obligation Norm in American Property Law' (2008-2009) 94 *Cornell Law Review* 745 ('The Social-Obligation Norm'); Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, USA, 2018) ('Property and Human Flourishing'); and Gregory Alexander, Eduardo Penlaver, Joseph Singer, and Laura Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743. Also, see generally, Gregory

property arguably fall away, in the context of housing. That is hugely problematic. Housing is an essential form of private property in Australian society–that is, everyone needs it. As such, it is through housing that many people will find their respect for private property (or not). And they will do so on the basis that it affords personhood and human flourishing through the experience of home. Home thus ought to be theorised as a matter of property itself, to ensure private property's legitimacy on the basis of personhood and human flourishing. The second basis for the theorisation is its ability to align private property (as a the system of rules) with 'the everyday beliefs that people hold' about property.[9] Those everyday beliefs include a belief in the importance of home, as confirmed by recent empirical work.[10] Thus, to ensure home is (as much as possible) something achieved through property, as individuals desire, the theorisation expressly brings home – the experience –within property. Part IV is on the theorisation and future scholarship. Future scholarship may use the theorisation to articulate distributions of home, as a thing, that is capable of being the subject matter of property. If those distributions are un-just, this would prompt an evaluation of what legal changes are necessary. The basis for this kind of progressive property scholarship is home's theorisation as a thing.[11] Part V concludes the discussion.

II New Theorisation

The new theorisation being presented here is essentially that home, the experience, is capable of being the subject matter of property—a thing, in other words, which is regulated and distributed by property systems. The key concepts of 'home' and 'property' need to be unpacked, before proceeding further with this theorisation.

Alexander, and Eduardo Penalver, *An Introduction to Property Theory*, (Cambridge University Press, New York, 2012).

[9] Paul T Babie, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40(3) *Houston Journal of International Law* 797, 802.

[10] See Australian Housing and Urban Research Institute, The housing aspirations of Australians across the life-course: closing the 'housing aspirations gap', Report No 337 (2020) 3 ('AHURI Report – The housing aspirations of Australians'): 'Overwhelmingly, the key attribute households seek from their housing is 'safety and security'.'; and Jill Sheppard, Matthew Gray and Ben Phillips, 'Attitudes to Housing Affordability: Pressures, Problems and Solutions' (Report No 24, Australian National University College of Arts and Social Sciences, May 2017) 4: A relevant finding is that 'Australians are just as likely to buy housing for non-financial reasons (such as emotional security, stability, and belonging) as financial reasons (such as investment or financial security)': at 4.

[11] Ezra Rosser, 'The Ambition and Transformative Potential of Progressive Property' (2013) *California Law Review* 101(1) 107, 110.

A *Key concepts*

1 *Home*

Home is understood by the theorisation to be a 'multifaceted and subjective experience'.[12] That experience occurs in and through the house,[13] and it includes a feeling of security, the expression of self-identity, and relationships and family.[14] A feeling of security is that part of home which makes 'individuals feel secure.'[15] It comes from the permanency of home.[16] Australian's desire this security from home.[17] The expression of self-identity is that part of home which manifests 'individuals' self-identity'.[18] Through creative activities, such as gardening, individuals can express identity in a place, thereby creating home.[19] Again, Australian occupiers seek this identity dimension of home.[20] Finally, relationships and family are a part of home. It is in the place of home that relationships are built.[21] These experiential aspects of home are detailed in earlier work, which reveals law impacting on home in these various ways. It is home – the experience, as detailed in that earlier work – which is being theorised in this article as a thing in property theory. Theorising home separately to the house is necessary to consciously protect and distribute this experiential thing as valuable in and of itself, under property.[22]

2 *Property*

Property is understood – for present purposes – as a system of legal rules regulating relationships between persons, with respect to things.[23] Trespass rules

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[12] Tyrer, 'Home in Australia' above n 3, 362, 370. At 361. See also Fox, above n 2, 133-134.
[13] Tyrer, 'Home in Australia' above n 3, 341. See also Fox, above n 2, on which this article draws.
[14] Ibid, 349-358; see also Fox, above n 2, 146.
[15] Ibid, 349.
[16] Ibid, 350 and 362.
[17] Ibid, 350-351, and research cited therein.
[18] Ibid, 354.
[19] Ibid, 364.
[20] Ibid, 355-356 and research cited therein.
[21] Ibid, 357.
[22] Ibid, 347, citing Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580, 590 and Amos Rapoport, 'A Critical Look at the Concept "Home"' in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing, 1995) 29.
[23] Alexander and Penalver, above n 8, 2: See also, Paul Babie, 'Spontaneously Emerging New Property Forms Reflections on Dharavi' *University of Adelaide Law Research Paper* 2020-07, p. 6, citing 'the

are an example. These rules regulate relationships between persons, with respect to things (either land or goods), by mandating that non-owners do not interfere with an owners' things. As a consequence, trespass rules distribute things between persons. This – distribution of things – is another function of property and a direct consequence of it regulating relationships between persons with respect to things.[24] Waldron conceptualises property in this way i.e. in distributional terms.[25] He explains that: 'The concept of property is the concept of a system of rules governing access to and control of material resources.'[26] This understanding is helpful for at least two reasons. First, it allows property rules to be identified according to whether the rules have this function i.e. distribution. This avoids having to specify – in advance – which rules, for instance those such as trespass, which confer a right to exclude, are property.[27] Alexander and Penlaver explain how this distributional understanding of property 'is neutral as to exactly how rights are allocated (in customized bundles or standard blocks with essential features)'.[28] Essentially, rules are property (and ought to be debated as such) whenever they impact on people by distributing things. Beyond this, the specific rights conferred on people by the rules do not determine if they are property.

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foremost exemplar of property as social relations', Joseph William Singer, *Property Law: Rules, Policies & Practices* (Aspen, 5th ed, 2010) 2 (and other property as social relations theorists and the scholarship of Wesley Newcomb Hohfeld to which their work traces); Hanoch Dagan and Avihay Dorfman, 'The Human Right to Private Property' (2017) 18 *Theoretical Inquiries in Law* 1, 6-7, quoting Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 12; Margaret Davies, *Property: Meaning, Histories, Theories* (Routledge. Cavendish, UK, 2007) 13; and JE Penner, 'The "Bundle of Rights" Picture of Property' (1995) 43 *UCLA Law Review* 711, 771-772, quoting Arnold S. Weinrib, 'Information and Property' (1988) 38 *University of Toronto Law Journal* 117, 120. On the bundle of rights thesis, see further JE Penner, 'The "Bundle of Rights" Picture of Property' (1995) 43 *UCLA Law Review* 711, 712-715; Kevin Gray, Property in Thin Air, (1991) 50 *Cambridge Law Journal* 252, 252 and Michael A. Heller, 'The Boundaries of Private Property' (1999) 108 *Yale Law Journal* 1163, 1191-1192. On the extent of theoretical debate in property, see Alexander and Penalver, above n 8, 1 and The Hon Justice James Edelman, 'Foreword' (2019) 42(3) *UNSW Law Journal* 785, 785.

[24] Alexander and Penalver, above n 8, 5-6.

[25] Ibid.

[26] Jeremy Waldron, *The Right to Private Property* (Clarendon Press, first published 1988, reprinted 2002) 31. Waldron discusses material resources first, before moving on to discuss intangible property: see page 33. See also, Paul Babie, 'Sovereignty as Governance: An Organising theme for Australian Property Law' (2013) *UNSW Law Journal* 36(3) 1075, 1088-1089 and at 1108; and Jim Harris, *Property and Justice* (Clarendon Press, Oxford, 1996) 245 (quoting Waldron).

[27] On the right to exclude, see Thomas W. Merrill, 'Property and the Right to Exclude' (1998) 77(4) *Nebraksa Law Review*, 730, 730, as cited in Alexander and Penalver, above n 8, 3. See also, A. M. Honore, "Ownership" in *Readings in the Philosophy of Law*, ed, Jules L Coleman (1999) 557, 563-74, as cited in Alexander and Penalver, above n 8, 4. On property's distributional function, see Alexander and Penalver, above n 8, 5-6.

[28] Alexander and Penalver, above n 8, 5-6. See also Penner, above n 23, 774.

Understanding property in distribution terms is also helpful – second – because it reveals that property confers power. In distributing things to certain people, property excludes others from the use of those things. If those others need these things, they are then beholden to those with property rights in them to allow them use.[29] Cohen, in theorising this power dimension of property, referred to it as a conferral of sovereignty on private individuals by the state.[30] The theorisation sees property in this way. Further, it sees that the state – as the original sovereign – may need to alter property to prevent social problems.[31] This focus puts the theorisation within the school of progressive property theory, which is similarly concerned with property's power and distributional consequences.[32] In particular, within what Rosser calls '[a] thick version of progressive property' because it recognises the 'importance of property's allocative function and the related inextricability of property and distribution.'[33] This progressive property law scholarship expressly acknowledges any 'misdistribution of wealth that property law protects'.[34] And, in that way, it looks beyond discrete property rules, and to distributions of ownership, enforced by property as a whole system.[35] It is concerned with the 'denial of unearned privilege',[36] and 'to ensure that property law works for all, and not just for some.'[37]

Finally, the understanding of property advanced here – as a system of legal rules for distributing things – is not how individuals understand the term 'property'. Individuals understand the term property to refer to specific things, for example, a garden or house.[38] This understanding sees the garden or house as

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[29] Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 12. See also, Babie, above n 26, 1077.

[30] Cohen, above n 29, 12: referring to: 'The character of property as sovereign power'; and at 14: 'the recognition of private property as a form of sovereignty'. See also, Babie, above n 26, 1088-1089.

[31] On this point, see Babie, above n 26, 1107; and Paul Babie, 'Review Essay: Private Property Suffuses Life' (2017) 39 *Sydney Law Review* 135, 146. See also, Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 304 and at 294; and Margaret Davies, *Property: Meaning, Histories, Theories* (Routledge. Cavendish, UK, 2007) 111-112. See also, Rosser, above n 11, 167.

[32] See Alexander, Penlaver, Singer, and Underkuffler, above n 8, 744, as cited in Rosser, above n 11, 126. For a comprehensive discussion of this school of property theory, which comprises the work of different theorists, see Rosser, above n 11, at pages 108-125.

[33] Rosser, above n 11, 167.

[34] Ibid, 168.

[35] Ibid, 170 to 171.

[36] Ibid, 168.

[37] Ibid, 169.

[38] On the way individuals commonly understand property, see: Alexander and Penalver, above n 8, 2: 'Lay people tend to think of property as a relatively uncomplicated relationship between a person (the

'property', whereas on the theorisation's understanding 'property' would be the system of rules distributing the things i.e. the garden or house.

B *Home is a thing in which property is held*

The new theorisation is of home. It says that home is a *thing*, which is capable of being the subject matter of property, and hence which is capable of distribution by property. Two key and related ideas here are as follows: (i) home is a *thing*; and (ii) home is capable of distribution by property. Each idea is addressed in turn.

1 Home is a thing

The idea that home is a thing in property is certainly not mainstream. However, it is rational. It relies on an acceptance of the view that any *thing* can potentially be the subject of property.[39] As Singer writes:

> Property law defines entitlements and obligations that shape the contours of social relations. Property is something we must collectively define and construct. It is not given to us whole; it does not emerge fully formed like Athena from Zeus's head. It is closer to a piece of music that unfolds over time. Like music, property gets its sense of stability from the ongoing creation and resolution of various forms of tension. The tensions that inform property are the tensions inherent in social relations. The solutions to the problems of property conflicts lie in understanding the connection between property and human relationships.[40]

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owner) and a thing (the owned property).'; Harris, above n 26, 12-13; Davies, above n 31, 19; Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford Uni Press, Oxford UK, 2003) 11, and at 30; Penner, above n 23, 733-734; Michael A. Heller, 'The Boundaries of Private Property' (1999) 108 *Yale Law Journal* 1163, 1191-1192; Thomas C. Grey, 'The Disintegration of Property' in Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill, Boston, 2014) 30; and Harris, above n 26, 119.

[39] Theorists who have taken a broad (albeit slightly different) view of what things can be property include: Waldron, above n 26, 31: a thing is capable of regulation by property 'if it is a material object capable of satisfying some human need or want.'; and Singer, above n 5, 13-15; Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) *San Diego Law Review* 50 323, 345-346; Laura S. Underkuffler, 'On Property: An Essay' (1990) *Yale Law Journal* 100(1) 127, 128; and Thomas W. Merrill, 'Property and the Right To Exclude' (1998) *Nebraska Law Review* 77, 730, 737–39. Cf. Gray, above n 23, 252-307, as cited in Davies, above n 31, 80: "Kevin Gray has argued that in order to become property in law, a thing must be physically, legally, and morally excludable (Gray 1991). For instance, the oxygen we breathe and a publicly available view cannot become property because it is not physically practicable to exclude people from the use of such resources.'

[40] Singer, above n 5, 13.

Property is changeable, in this way.

Tangible things, such as land or motor vehicles, as well as intangible things, such as creative works of art or poetry may all be the subject of regulation by property.[41] Regarding intangible things, intellectual property is the classic example of such things being protected by law. It shows how intangible things – creative works – can be made the subject matter of property, because of laws' protection.[42] It is precisely through legal protection that these things come to be thought of in property terms, notwithstanding that they had not always been thought of as such.[43] Indeed, different things may unfold as the subject-matter of property over time as Joseph William Singer has theorised. Singer explains such changes in property with reference to changing social relations, whereby property rules must evolve to respond to new conflicts between individuals:

> The tensions that inform property are the tensions inherent in social relations. The solutions to the problems of property conflicts lie in understanding the connection between property and human relationships. Relationships sometimes form stable patterns, but they are also ongoing and constantly renegotiated. They may even end. Their beginnings and endings, their shape and character over time, are topics of intense human interest. And perhaps surprisingly, it turns out that the law of property is intimately connected with them. … property law establishes minimum terms for social interaction among individuals. In so doing, it identifies individual interests that will be granted legal protection and defines the contours of those interests by reference to an implicit conception of a defensible form of social life. In structuring property law, we must be attentive to the consequences of alternative property rules and regimes for the structure of social relations and of social life in general. Shaping property law with these goals in mind precludes the adoption of a grand theory that would allow rule choices to proceed in a fashion that reduces all questions to a single model. … More than we realize, the shape and content of property law define a form of social life. [44]

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[41] On intangible things in property, see Penner, above n 23, 771-772; and Thomas C. Grey, 'The Disintegration of Property' in Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill, Boston, 2014) 31.

[42] Michael Spence, *Intellectual Property* (Oxford University Press, 2007) 1. And see also pp. 6-7: for an outline of copyright, patent, trademarks, and database right regimes.

[43] Ibid, 43.

[44] Singer, above n 5, 13-15.

It follows that home, which similarly to intellectual property is an intangible thing, can similarly be accepted as a thing for property purposes too.

Indeed, what things will be protected by property is determined by the state, which makes law accordingly. Bentham recognised this with the observation that: 'Property and law are born together, and die together'.[45] In essence, this means that property (in the sense of things) exist as such because of laws made by the state.[46] Prominent property theorists have agreed, as revealed in the following statements: 'property is not a natural right but a deliberate construction by society',[47] the state 'creates private property through law',[48] property has no 'inevitable content',[49] 'property is created by law, rather than recognised by law. Whatever law says is or can be property defines the limits of property: it does not pre-exist law, but is entirely defined within law',[50] and '[p]roperty is not just something we protect or invade, recognize or reject; it is something we collectively construct. We must give it its meaning, both social and legal.'[51] Further, the 'mix of entitlements and obligation we can legitimately claim depends on the kinds of human relationships we can defend, nothing more and nothing less'.[52] It follows that the things in a property system are not fixed. Rather, the system may be expanded to include new things. Those things will define the boundaries of property systems.[53]

Returning to home, the new theorisation says this experience should be seen as (yet) another *thing*, capable of being the subject matter of property. Home

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[45] Hanoch Dagan and Avihay Dorfman, 'The Human Right to Private Property' (2017) 18 *Theoretical Inquiries in Law* 1, 2, citing Jeremy Bentham, *The Theory of Legislation* 113 (R. Hildreth trans., 2nd ed., 1914).

[46] Cf. The natural law view of property, which sees property as existing based on existing rights which should be protected regardless of how they came to be acquired or whether their distribution is fair. See Rosser, above n 11, 146, footnote 249, and generally.

[47] Charles A. Reich, 'The New Property' (1964) 73(5) *The Yale Law Journal* 733, 771: 'Property is not a natural right but a deliberate construction by society.' See also Rosser, above n 11, 146: 'But Charles Reich's seminal article, The New Property, deserves much of the credit for general scholarly acknowledgement of the centrality of the state in allocating property.'

[48] Babie, 'Review Essay: Private Property Suffuses Life' above n 31, 138.

[49] Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 814, as cited in Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property' (2013) 36(1) *UNSW Law Journal* 280, 284.

[50] Davies, above n 31, 16.

[51] Singer, above n 5, 215–16 as cited in Sherry, above n 49, 284.

[52] Ibid.

[53] Alexander and Penalver, above n 8, 2-3. See also, Davies, above n 31, 16. Note that the things conceptualised as a matter of property can also be referred to as 'property-objects': see Waldron, above n 26, 31. This is useful to distinguish them from property used in the sense of a system of rules.

should, in other words, become a 'property object'.[54] There is nothing extreme in this argument. The objects of property have altered over time, in line with what society considers should (or should not) be protected by property.[55] If some-*thing* – tangible or intangible – is in need of protection, it may become a property object. Reich recognised this when he famously argued for the protection of 'government largess' – income and benefits, occupational licenses, franchises and contracts – as essentially a form of new property.[56] Reich was seeking to ensure that individuals' access to these resources was guaranteed through property rights.[57]

Hegel, similarly, in his justificatory theory of property, argued that potentially any-*thing* could be subject to property as was necessary to protect

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[54] Waldron, above n 26, 31. This theorisation draws on Fox O'Mahony's conceptualisation of home. In *Conceptualising Home*, Fox O'Mahony sought 'to establish the foundations upon which a legal concept of home could be constructed.' (page 5). The argument throughout is that home should be considered in legal disputes and policy development. The theorisation presented here is in agreement, and, further, theorises that home – the experience – ought to be conceptualised as its own 'thing' the subject of property regimes. Practically, though, the way in which this is achieved follows Fox O'Mahony's work in seeking to insert 'home' into legal analysis in relevant contexts i.e. by the insertion of rights conducive to home. Fox O'Mahony's conceptualisation, it should be acknowledged, does not go so far as to say that home – the experience – is a thing capable of being the subject-matter of property, and which can be distributed. On the contrary, that might be inconsistent with passages which emphasise the subjective nature of home, and the difficulty with attributing the phenomenon to specific causes (which presumably includes laws). See Fox, above n 2, 145, citing Kimberly Dovey, 'Home and Homelessness' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 33, at 34. The closest Fox O'Mahony appears to come to recognising home – the experience – as a distinct thing, capable of protection by property, is in the discussion exploring – and questioning – 'the representation of property in land in the abstract, as an item of wealth, rather than as a material entity, to be used and enjoyed 'as a thing'—that is, as a home.' (page 254). While this passage does not go so far as to say that home – the experience – should be an object of property specifically, the discussion emphasises the home's use value, as a home, which is separate from its economic value. On this basis, rights to possession take on a particular importance i.e. because use of the home is so valuable for home's sake: see Fox, above n 2, 249-277.

[55] See, eg, Underkuffler, above n 38, 43: 'Human society is not static. Values will change; scientific and social discoveries will be made; crises of war, pestilence, and economic deprivation will require collective action. As human conditions and needs change, so will the bases on which prior property regimes were constructed. What may have been an appropriate configuration of property rights in one era may be an undesirable or intolerable burden in another.'

[56] Reich explains these 'forms of government-created wealth' as follows: 'The valuables which derive from relationships to government are of many kinds. Some primarily concern individuals; others flow to businesses and organizations. Some are obvious forms of wealth, such as direct payments of money, while others, like licenses and franchises, are indirectly valuable.' See Reich, above n 47, 734. See also 734-737.

[57] Reich, above n 47, 734. See also 734-737.

things reflective of self-hood.[58] Hegel's theory was, in basic terms, that property enables individuals to reflect themselves in external things (i.e. self-hood), therefore, any-*thing* so reflecting the individual could be property, including '[m]ental aptitudes, erudition, artistic skill, even things ecclesiastical (like sermons, masses, prayers, consecration of votive objects), inventions and so forth'.[59] Hegel continued:

> …Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, *by expressing them it may embody them in something external and alienate them…and in this way they are put into the category of 'things'*.[60]

Home should also be a thing of property on this basis, as it too is bound up with self-hood.[61]

Property's ability to embrace new forms of things is made clear by the new forms of rights which have emerged to protect those things. Novel forms of property can be seen in the human genome,[62] native title, water rights, pastoral leases and licenses,[63] cultural property,[64] and strata and community title.[65] Pastoral leases are an Australian example. These emerged following British settlement in Australia, as a way for property to protect the use of lands, beyond the formal settlement, by settlers.[66] Their creation represented a new form of property as the use of these lands was not previously recognised as property.[67]

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[58] Alexander and Penalver, above n 8, 62. Hegel Georg Wilhelm Friedrich and Know TM (translator), *Hegel's Philosophy of Right*, (Oxford, Clarendon Press, 1942) 40. And at 42, 45, and 49. Hegel's theory explores a particular justification for property (self-hood), but does not focus on what property is. His comments about what property is are in the context of his presenting a justification for property.
[59] Hegel Georg Wilhelm Friedrich and Know TM (translator), *Hegel's Philosophy of Right*, (Oxford, Clarendon Press, 1942) 40. Alexander and Penalver, above n 8, 62, citing Hegel in *Philosophy of Right.*
[60] Hegel Georg Wilhelm Friedrich and Know TM (translator), *Hegel's Philosophy of Right*, (Oxford, Clarendon Press, 1942) 41. Alexander and Penalver, above n 8, 62, citing Hegel in *Philosophy of Right.*
[61] As discussed later in Part III.
[62] Babie, above n 26, 1092. See also 1095.
[63] Ibid, 1107. And at 1090.
[64] Davies, above n 31, 125. See also, Underkuffler, above n 38, 110-111. See also, Kathy Bowrey and Nicole Graham, "The Placelessness of Property, Intellectual Property and Cultural Heritage Law in the Australian Legal Landscape: Engaging Cultural Landscapes" [2017] *University of Technology Sydney Law Research Series* 5.
[65] Sherry, above n 49, 282.
[66] Babie, above n 26, 1098.
[67] Ibid, 1099.

Importantly, for a thing to be protected as something in which property can be held, it must be conceptualised. That is, it must be able to be described so that property knows what exactly it is protecting.[68] Home can be conceptualised. Home, as mentioned, is an example that comprises a feeling of security, the experience of self-identity, and relationships and family. Further, it is clear that if laws embody certain conditions, housing stability and housing control among them, then this experience will be enhanced. Conversely, laws which undermine these conditions will undermine home.[69] Earlier work unpacks these points in theorising how property laws impact on home, and the conditions – housing stability and housing control – which property laws should embody to protect home.[70] Home can be conceptualised for property purposes, in aid of its protection, is what this earlier work shows. Home can thus be conceptualised as the subject-matter of property. This justifies its theorisation as a thing, which naturally prompts consideration of its distribution.

2 *Home is capable of distribution*

This is the second idea of the theorisation. It says that property laws, in impacting relationships people have with their homes, simultaneously distribute that experience.[71] A specific example of this occurring is seen in residential tenancy laws. Such laws can impact on whether tenants feel secure (a part of the home experience, as noted above), and which comes from knowing that one can remain

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[68] John Brewer and Susan Staves, 'Introduction', in John Brewer and Susan Staves (eds) *Early Modern Conceptions of Property* (Routledge, 1995) 12: 'In order for reification to work not only does the "thing" in question have to be conceptualized in such a way that it can become part of an administrable system of property law, but the state also must consider that the "thing" has sufficient value to be worth state protection."

[69] Tyrer, 'Home in Australia' above n 3, 361-374.

[70] Ibid.

[71] As Symes and Gray explain: 'All of us – even the truly homeless – live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people': see KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 4, cited in Fox O'Mahony, above n 4, 157, and in Tyrer, 'Home in Australia' above n 3, 348. Radin's personhood theory, which says that personhood is 'implicit in our law' has relevance here, in that it recognises that laws impact on intangible experiences here: see Alexander and Penalver, above n 8, 67, citing Radin, 'Property and Personhood' above n 8, 991.

in a place.[72] Relevant in this regard is whether these laws afford a secure tenancy – that is, a tenancy of adequate duration, and with limited termination grounds by the landlord. Tenants may feel insecure if these laws provide otherwise. Also impacting on whether tenants experience home, in the sense of self identity, are rights to control the home environment. Rights, for example, to make alterations to the premises, are relevant in this regard.[73] In these ways, residential tenancy laws may distribute the home experience to tenants to a greater or lesser extent, according to the specific rights conferred on landlords and tenants. Home is capable of distribution by property, is what this example demonstrates. And the residential tenancy laws example is an important one given 'that the private rental sector is a crucial part of housing in Australia and that many individuals rent for 10 years or longer. In the future, even greater demands will be placed on the private rental sector as demographic, economic and social factors combine to reduce access to both public housing and home purchase.'[74] Other examples of home being distributed by law can also be given. Recently, discrimination law has been held to apply to certain activities of owners-corporations, in the Victorian Supreme Court decision in *Black*.[75] This resulted in the owners corporation having 'to retrofit the common property for disability access', thereby improving the experience of home for occupiers.[76] Further discussion, regarding distributions of home, is contained later in part IV. Examples of other laws impacting on (and so potentially distributing) home also exist.[77] The

[72] Tyrer, 'Home in Australia' above n 3, 349, and 362, citing Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 9.
[73] Ibid, 364 and 370.
[74] Andrew Beer, 'Housing Investment and the Private Rental Sector in Australia' (1999) 36(2) *Urban Studies* 255, 255. See also pages 258, and 266-267. See also K Hulse, T Burke, L Ralston and W Stone, 'The Australian private rental sector: changes and challenges', *Australian Housing and Urban Research Institute*, Positioning Paper No. 149, July 2012, as cited in Lenny Roth, Private rental housing and security of tenure, NSW Parliamentary Research Service – e-brief, October 2015 and Consumer Affairs Victoria, 'Heading for Home: Residential Tenancies Act Review' (Options Discussion Paper for Residential Tenancies Act Review, February 2017) , 5 ('CAV Options Discussion Paper').
[75] (2018) 56 VR 1. See discussion in, Cathy Sherry, 'Does Discrimination Law Apply to Strata?' (2020) 43(1) *UNSW Law Journal* 307, 333-335.
[76] Sherry, above n 75, 335.
[77] Fox, above n 2, 3; and Fox O'Mahony, above n 4, 156. Other laws impacting home include: migration law, equal opportunity law, public housing law and crime, strata laws, mortgage law, and social security law, each of which could usefully be explored in future home research. On migration law, see Lorna Fox O'Mahony and James A Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37(2) *Journal of Law and Society* 285. On public housing and crime, see Chris Martin, 'One Strike, Three Strikes: Crime and anti-social behaviour in NSW public housing' (2016) 41(4) *Alternative Law Journal* 262. On strata laws, see Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge,

discussion in this part is merely intended to highlight home – the experience – as a thing capable of distribution by property (in the main example given, by residential tenancy laws).

An important acknowledgement is that home is capable of distribution by property only *in part*. Conditions outside of law, in impacting on home, mean that home's distribution is not fully within the control of property. Indeed, many factors impact on home, including conditions outside of law such as 'culture, built environment, and prevailing social and economic conditions. Achieving home is thus complex…'.[78] However, this must not deflect attention away from the reality that property, as a system, distributes the experience of home.

3 *Implications for the private property system*

Given that home is a distributable *thing* by property, it is relevant to theorise what this should mean for the design of private property systems. To start with, treating home as capable of being the subject matter of property would require a more expansive understanding of the concept of ownership. All individuals with rights to exclusively occupy a residential dwelling (i.e. freehold and leasehold owners) would simultaneously be entitled to possess home. Freehold owners would thus have all the usual rights to possess their land but, in addition, would be entitled to possess the experience of home in that place. Leasehold owners, similarly, would have their usual rights over premises, but, in addition, would also be entitled to possess the experience of home in that place.[79] (The leasehold

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2017). On mortgage law and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), see *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 and Brett Harding, 'The mortgagee's power of sale: The duty post MBF Investments Pty Ltd v Nolan' (2012) 21 *Australian Property Law Journal* 77. However, the present focus is theoretical—to conceptualise home as a matter of property and make a case for its *thing*-hood.

[78] Tyrer, 'Home in Australia' above n 3, 371. These factors, while outside of law strictly speaking, are related to law. They impact upon, and are impacted by, property law. Regarding social conditions, for example, it has been observed that these impact on Victoria's residential tenancy legislation which 'doesn't just define the relationship between landlords and tenants, but on a broader level is a representation of societal values. It is the vehicle through which we express what housing rights we believe people should have in times of personal or financial crisis.': Council to Homeless Persons, Submission to Consumer Affairs Victoria's 'Heading for Home: Residential Tenancies Act Review' (Options Discussion Paper for Residential Tenancies Act Review, February 2017) 5.

[79] Ibid, 344: 'Use of the term 'leasehold owners' (and the corresponding 'leasehold ownership') throughout this article, rather than the more commonly used 'tenant' (and 'residential tenancy'), is to emphasise the significance of leasehold as the basis for many people's home experience, and to

owner's property in home would obviously need to be balanced with the landlord's reversionary interest in the freehold estate. However, and generally speaking, the balance ought to favour the leasehold owner's property in home over the freeholder's reversion. The premises are presently the leasehold owner's home, and not the home of the landlord. Landlords can be presumed to possess home elsewhere (as either a leasehold or freehold owner of other premises for home).) Accepting home as some-thing in which property can be held – and so expanding ownership conceptions in this way – fits squarely within the kind of scholarship envisaged by the authors of *A Statement of Progressive Property*.[80] They argue: 'Values can generate moral demands and obligations that underlie judgments about the interests that the law should recognize as property entitlements.'[81] Home is a value that should translate 'as property entitlements' because it enables human flourishing and personhood.[82]

It is important to be clear about what exactly an entitlement to home would give individuals as a matter of law, and, conversely, what it would not.[83] It may not be helpful to give individuals a legal right to possess home (a right is understood here in the Hohfeldian sense that it imposes corresponding duties on others[84]). Such a right would place others under a (vague) corresponding duty not to interfere with individuals' experiences of home. Due to its vague nature, such a right may unduly restrict others' actions, and it may be difficult for the courts to enforce. The courts may encounter difficulty in determining when an individuals' home experience had been infringed, or, alternatively, merely been impacted by factors outside of any persons' control.[85] Further, and similarly, assessing the loss to individuals caused by home infringements would be difficult. As Fox O'Mahony has explained: 'Not only would the resource implications [of this] be absurdly high, but it would not be possible to conduct a case-by-case analysis on any fair grounds.' Accordingly, Fox O'Mahony suggests that 'a more

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overcome any cultural perception that leasehold is an inferior tenure by default.' On the doctrine of estates and ownership interests, see Harris, above n 26, 72.

[80] Alexander, Penlaver, Singer, and Underkuffler, above n 8, 743.

[81] Ibid (para 2.2).

[82] Refer discussion in Part III.

[83] The phrase 'entitlement to home' is used here to signify that there are grounds – morally speaking – for individuals to be conferred with specific rights conducive to home. On this use of 'rights' language, see Waldron, above n 26, 83.

[84] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 *Yale Law Journal* 16; and Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710.

[85] This acknowledges that home is subjective, and that many factors contribute to that experience. See Fox, above n 2, 4; and Tyrer, 'Home in Australia' above n 3, 371.

appropriate means of reflecting the reality of home interests in the legal context would be at a policy level, rather than in individual cases."[86] Another difficulty for courts would be determining if a right to home should prevail over other legal rights, such as the rights of creditors.[87] Thus, a general right to possess home – as a mechanism to protect home – seems problematic, for the above reasons. In the private law sphere, it might be expected that a right to home would frequently conflict with the private rights of others, for example, under contract.[88]

However, while it might not be possible to give individuals a legally enforceable right to possess home, for these reasons,[89] that can be – and in some cases already is being – achieved indirectly through the appropriate design of property laws. In particular, through the conferral of specific rights, in specific contexts, which would distribute to individuals' (aspects of) the experience of home.[90] Such rights would be consistent with those individuals having an entitlement to home. To illustrate, by way of an example, specific rights could be conferred in the lending context on mortgagors, which afford them additional time to repay before a mortgagee exercises a power of sale.[91] Such a right would

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[86] Fox, above n 2, 180.

[87] Ibid, 146. See especially Chapter 10, 'Home in a Human Rights Framework' starting on page 451.

[88] By contrast, a right to home applied in the public law context, as against governments under human rights instruments, is arguably not as problematic on this basis. It cannot be enforced directly against private citizens, and thus there is less scope for conflicts of rights disputes. Rather, a right to home in the public law context is enforced against government, as demonstrated under Australia's human rights statutes. The *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ss 4, 13(a), 38(1) requires 'public authorities' to afford a right to home (as do the statutory charters of rights existing in the Australian Capital Territory and in Queensland). The right has been successfully relied on by private individuals to restrain government action. See, in the Victorian context under the *Charter*, the *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, and *PJB v Melbourne Health* (2011) 39 VR 373. Cf. Fox, above n 2, 465 (on the ways in which the right to home, under the United Kingdom's human rights framework, may potentially apply in disputes between private citizens i.e. horizontally rather than vertically).

[89] Conflicts would, inevitably, arise between individuals advancing such a broad possessory right to home and other individuals with established proprietary rights, the reconciliation with which might be beyond the courts' role because it is not conceptually possible. These are valid objections and so it is probably true that courts can do little to ensure home as property if what this means is that individuals are to have a broadly enforceable right to home per se. But, as discussed further, that is not what is argued for when it is theorised that home is capable of being the subject matter of property.

[90] Waldron has recognised that rights which make one the owner of some-*thing* will differ according to the thing in question. See Waldron, above n 26, 30.

[91] Fox, above n 2, 28: 'Realistically, greater recognition of the occupier's home interest is not going to result in disregarding the creditor's interest but, at most, in striking a different balance between the claims, perhaps by requiring that the creditor is, in certain circumstances, required to suffer a delay in the enforcement of his legal rights over the property.'; and 471-481.

strike a 'different balance' between the mortgagor's 'home-interest' and the mortgagee's financial interest, according to Fox O'Mahony.[92] The home owner is allowed

> more time to organise their financial affairs, to make adequate arrangements regarding another property, or to ensure that the occupiers are not evicted from their home until some other specific date, such as the date at which any children living in the property reach the age of majority or are ready to leave full-time education.[93]

This recognises the place of home is important. It is security, identity and memories. These aspects may not be re-creatable elsewhere.[94] The mortgagee's power of sale is retained, however, and may be exercised in time, if the circumstances ultimately warrant this.[95] This example, from Fox O'Mahony's work, demonstrates how home may be protected via specific rights, in specific contexts.

Already, this is happening in some areas of law. Indeed, "home' is significant as a special type of property',[96] and not 'totally absent from legal spheres'.[97] Exemptions from capital gains tax, on the sale of a primary place of residence,[98] assist home by seeking to ensure that occupiers have sufficient proceeds, on a sale, to purchase another house for home. Likewise, tenants' rights under residential tenancy laws afford protection of 'the tenant's home interest'.[99] Prompted by the Covid-19 pandemic, these laws were amended in each state and territory, to prohibit tenant evictions, and rent increases, during the crisis.[100] The rights illustrate what it means to protect home as property, through specific

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[92] Ibid.
[93] Ibid, 28-29 and at 471-481.
[94] See, eg, Danie Brand, 'Returning Home?' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 317, 330.
[95] Fox, above n 2, 28 and 471-481.
[96] Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 *Journal of Law & Society* 580, 582. See also, discussion in D. Benjamin Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255, 257; and Megan J. Ballard, 'Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy' (2006) 56 *Syracuse Law Review* 277, 279.
[97] Fox, above n 96, 582.
[98] Ibid. See also, Radin, 'Property and Personhood' above n 8, 991: 'the personhood perspective is implicit in our law'.
[99] Fox, above n 2, 38.
[100] See, eg, *Residential Tenancies Act 1997* (Vic), ss 539 and 544, as inserted by *Covid-19 Omnibus (Emergency Measures) Act 2020* (Vic) (Chapter 4 – Amendment of Residential Tenancies Act 1997). These provisions were temporary and were extended throughout the course of the pandemic by the *Covid-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* (Vic) and *Covid-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic).

rights which distribute that experience. These rights – not to be evicted or receive a rent increase – distributed home as a physical shelter, as well as a feeling of security derived from knowing one may remain in their place.[101]

Returning to the issue of what an entitlement to home would give individuals as a matter of law, it can be said that individuals would receive specific rights, in specific contexts. The result of this would be a privilege of home for those individuals.[102] Those individuals would receive the experience of home but would not have any general legal right to call for home from the state or other individuals. Individuals would thus receive, in legal terms, a privilege of home (a privilege is understood here in the Hohfeldian sense that it is unenforceable).[103] However, the privilege would be supported by specific rights, conducive to home, conferred on them in specific contexts, such as under residential tenancy legislation. Property systems would be designed to protect home in this way, and, as such, this is an important part of what it means to theorise home as property. This approach also affords considerable flexibility in the design of private property systems. However, for individuals it provides no general legal right to home which might be relied on in all contexts.

In *Conceptualising Home*, Fox O'Mahony sought 'to establish the foundations upon which a legal concept of home could be constructed.'[104] Home should be considered in legal disputes and policy development are key arguments presented in this work. The theorisation is in fulsome agreement and, in adopting these arguments, has further theorised that home – the experience – ought to be conceptualised as its own 'thing' capable of being the subject matter of property. The way in which this should be achieved follows Fox O'Mahony, in seeking to insert 'home' into legal analysis in relevant contexts. However, it should be noted that Fox O'Mahony does not expressly say that home – the experience – is a distributable thing under property systems. While that may be implied, it might equally be inconsistent with the emphasis *Conceptualising Home* places on the subjective nature of home, and, in particular, on home not being a specific cause

[101] Tyrer, 'Home in Australia' above n 3, 349, and 362, citing Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 9.
[102] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 *Yale Law Journal* 16; and Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710.
[103] Ibid.
[104] Fox, above n 2, 5.

and effect phenomenon i.e. as a phenomenon attributable to specific things, such as laws, for example. The following passage is noted:

> When approaching the conceptualisation of an intangible and subjective phenomenon such as *home*, it is important to recognise that '[a]lthough we might study the *house* as a discrete variable, *home* is not an empirical variable whose meaning we might define in advance of careful measurement and explanation.' Dovey suggested that the most appropriate methodological response to these characteristics is to tailor the functions of *home* analysis, so that it seeks 'not to produce specific cause—effect relationships or explanations; it is rather to deepen our understanding of an intrinsically intangible phenomenon'.[105]

That said, there is discussion emphasising the home's use value, as a home, which is separate from its economic value.[106] This makes clear a concern for home – the experience – as a thing separate to the house, but which arises from use of the house. Rights to possession become particularly important, according to Fox O'Mahony, because use of the home is valuable for home's sake.[107] This appears to be the closest Fox O'Mahony comes to recognising home – the experience – as a distinct thing, capable of protection by property.

C *Objections*

It is necessary to address some of the possible objections to the home as property theorisation.

1 *Home is subjective*

Home is subjective, and thus cannot be conceptualised as required to be protected as a matter of property.[108] There are simply too many unknowns regarding what home is, and hence how it may be protected by law. This objection seeks to problematise home as follows: '*home* is essentially a subjective phenomenon, it is not easily quantifiable, and consequently the value of a home to its occupiers is not readily susceptible to legal proof.'[109] This objection – that home is subjective and so cannot be protected by property – is unsustainable. While home is subjective, it does not follow that it is indefinable. Home, on the contrary, is definable. Fox O'Mahony's work, and the particular

[105] Ibid, 145, citing Dovey, above n 54, at 34.
[106] Ibid, 254.
[107] Ibid, 249-277.
[108] Gray, above n 23, 252-307, as cited in Davies, above n 31, 80. Brewer and Staves, 'Introduction', in Brewer and Staves (eds) above n 68, 12.
[109] Fox, above n 96, 581. See also, Fox O'Mahony, above n 4, 158.

conceptualisation of home presented in earlier work and relied on herein, demonstrates this.[110] Once home has been conceptualised, and its meaning agreed upon, it becomes possible to theorise about the nature of laws which are necessary to protect it. Laws must embody housing stability and housing control – two key conditions – for home, as theorised in earlier work.[111]

Therefore, just because some-*thing* is difficult to define (because it is subjective, and thus capable of different conceptualisations) does not mean that its definition is impossible. Fox O'Mahony's seminal work 'discusses the meanings of home which have evolved from interdisciplinary research',[112] and has developed 'a legal concept of home…to inform the decision-making process where home is the scene or substance of legal disputes.'[113] It has noted that: '…despite the apparently 'unscientific' nature of attachment to home, a substantial body of literature has emerged concerning the concept of home in the social science disciplines in recent decades.'[114] Home is thus definable, and thus capable of protection in property terms. This is not to deny that arriving at a definition of home, on which most people agree, may be difficult. Indeed, there is room for debate about what aspects of the home experience should be protected. As such, this theorisation, while embracing a particular conceptualisation of home, also understands that this may not be the only conceptualisation of this experience, which people wish to protect. It is noted that law makes value judgments – about what to protect and how to define things – all the time. Such value judgments are par for the course, for law. Further, there are other things which are subjective but which no one would doubt really exist. Love, for example, is subjective.[115] Yet, it is a universal human experience. Love

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[110] Tyrer, 'Home in Australia' above n 3, drawing on Fox O'Mahony's seminal work conceptualising home.

[111] Ibid, 382: 'housing stability and housing control are essential conditions which laws should embody to ensure this experience called home. Stable housing underpins the feeling of security and self-expression, as well as relationships and family. The feeling of security results from individuals knowing they can stay in a place. Self-expression and identity can also more easily occur over time, with memories then forming. Housing control is also essential to home, both to self-expression and identity, and to feeling secure. An appropriate level of control over home, for example, the ability to make alterations, facilitates creative self-expression, and housing control over who enters the dwelling space enhances the feeling of security.'; and 361-374.

[112] Fox, above n 96, 581.

[113] Ibid.

[114] Ibid.

[115] Simon Watts and Paul Stenner, 'The subjective experience of partnership love: A Q Methodological study' (2005) 44 *British Journal of Social Psychology* 85, and sources cited therein; and Michael L

conceptions include of love as collaborative, active, intuitive, committed, secure, expressive, and traditional.[116] Spiritual experiences are similarly subjective. For example, some people's spiritual experiences are short, and for others they are 'lifetimes of awareness of something beyond the everyday world'.[117] Yet, again, none of this denies that those experiences occur for individuals.

Some people may be concerned about defining home. Some might be concerned that, in defining home, this might end out limiting that experience. As Dovey has written: '*home* is not an empirical variable whose meaning we might define in advance of careful measurement and explanation'.[118] Further, some may be wary that home's thing-hood under law risks oversimplifying home as a cause and effect phenomenon i.e. that if law is this way, then the home experience will result. Again, as Dovey has said, home analysis has sought 'not to produce specific cause-effect relationships or explanations; it is rather to deepen our understanding of an intrinsically intangible phenomenon'.[119] This appreciates that home is impacted by many factors, of which law is just one. Fox O'Mahony has concluded that: 'Any attempt to 'guess' or to 'predict' the particular meanings of home for an individual occupier must be approached with care.'[120] While the theorisation acknowledges these points, it still sees merit in theorising home – which requires that it be defined – for the purposes of developing laws conducive to that experience. The above points should not preclude a definition of home from being agreed upon, nor should they preclude reasonable debate about what property laws may encourage that experience.

2 *Home is intangible*

Home is intangible, and thus cannot be protected as a matter of property.[121] Again, this objection is unsustainable because it is simply not true. Just because some-*thing* is intangible – that is, it does not exist as a physical object in the

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Hecht, Peter J Marston, and Linda Kathryn Larkey, 'Love Ways and Relationship Quality in Heterosexual Relationships' (1994) 11 *Journal of Social and Personal Relationships* 25.

[116] Hecht, Marston, and Larkey, above n 115, 26-27.

[117] Marianne Rankin, *An Introduction to Religious and Spiritual Experience* (Bloomsbury Publishing Plc, 2009) 256. The book recounts a number of different individuals' spiritual and religious experiences.

[118] Dovey, above n 54, 34, as cited in Fox, above n 2, 180.

[119] Ibid.

[120] Fox, above n 2, 180.

[121] Fox, above n 2, 129. At page 129: 'While an occupier's interest in the property *as a home* may be intangible, that is certainly not an insurmountable hurdle to the recognition of a legally sufficient interest.'

material world – does not rule out its protection under law by property. The creation of intellectual property – copyright, patents, trademarks etc – demonstrates specific systems can be developed to propertise valuable intangible things, as noted.[122] More generally, as Brewer and Staves explain:

> Immaterial, even "non-existent" entities can be subjugated to property regimes, if they are believed to have value, if they can be clearly conceptualized, and if they can be "constructed" in such a way as to make property rights in them administrable. For instance, the laws of slander and libel have been made to protect something as immaterial as a businessman's "property in reputation."[123]

If reputation is a thing sufficiently worthy of protection, essentially as a form of property,[124] through law, why not home? All that would need to happen for this to occur is for home – the experience – to proceed through a 'process of reification and legitimation',[125] such that it comes to be valued, in the minds of lawmakers, as an object of property itself. Indeed, any conceptualised *thing* can be property once it is accepted as having 'sufficient value to be worth state protection', as noted earlier.[126] Further, home is arguably already being treated as property, although this is not generally acknowledged.[127] Residential tenancy law – in its protection of 'the tenant's home interest'[128] – demonstrates as much. Home (a *thing*) is being distributed by these laws, as noted, effectively as a 'property-object'. However, such explicit property terminology is rarely used with respect to the home experience. This is unfortunate, as it conceals that home is being distributed by laws. Theorising home becomes vitally important in that sense, to make clear its distribution by property, and to generate support for its protection via its *thing*-hood (both of these points are expanded on later).[129]

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[122] Spence, above n 42, 6-7: for an outline of copyright, patent, trademarks, and database right regimes.
[123] Brewer and Staves, above n 68, 10. See also Waldron, above n 26, 34 and 36.
[124] Cf. Harris, above n 26, 333: 'Defamation law protects people's reputations. Yet our judgments about conduct are not guided by the notion that reputation is something one owns.'
[125] Brewer and Staves, above n 68, 2.
[126] Ibid, 12.
[127] Radin's personhood theory comes close to acknowledging this when it says that personhood is 'implicit in our law'. This recognises that laws impact on intangible experiences, such as home, which this theorisation says enables personhood: see Alexander and Penalver, above n 8, 67, citing Radin, 'Property and Personhood') above n 8, 991.
[128] Fox, above n 2, 38.
[129] Refer discussion in Part IV.

To recap, the objection – that property cannot protect intangible things – turns out to be no objection at all. Intangible things can be protected by property, as the examples of intellectual property in respect of specific creations, reputation, the human genome, and cultural property – all intangible things protected by laws – demonstrated. Others who have sought to protect intangible things as property have also encountered this objection. Bentham, for example, encountered this objection in arguing that 'shares in companies and copyright' should be protected as property.[130] That did not stop these intangible things becoming – unquestionably now – a part of property. Objecting to propertisation, on the basis of intangibility, is thus, in and of itself, no objection at all.

3 *Home rights are not administrable by law*

This objection is that legal protections for home would not be practically administrable as a matter of law.[131] This objection would be valid if to legally protect home meant individuals would be conferred with a general right to home. Such a right would be difficult for courts to enforce, for the reasons previously noted.[132] However, while a right to home may be out of the question for such reasons,[133] home can be achieved indirectly through the appropriate design of property laws. Particularly, as has been argued, through laws which confer

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[130] Mary Sokol, 'Bentham and Blackstone in Incorporeal Hereditaments' (1994) 15 *Journal of Legal History* 287, 287.

[131] Fox, above n 2, 302: 'Another argument against the development of *home*-oriented protections has been the idea that this would create an administrative nightmare. Radin addressed this in her discussion of the failure to make explicit provision for personal property interests in the law of eminent domain. She suggested that, if it cannot be presumed that all individuals have sufficiently personal relationships with their properties to justify their protection as 'personal property'—for example, because some properties are held for investment—then it would be incumbent on the courts to investigate the nature and degree of the subjective attachment between specific individuals and their homes in any given case, where 'a subjective inquiry into each case slows down government too much'.', citing MJ Radin, *Reinterpreting Property* (Chicago, Ill, University of Chicago Press, 1993) 66.

[132] On this problem arising with new forms of rights, see Robert W. Gordon, 'Paradoxical property', in Brewer and Staves, above n 68, 104. In the context of analysing creditor-occupier disputes, Fox O'Mahony has explained that: 'It would be folly to suggest that the court should examine the specific effects of loss of home on individual occupiers and/or households when balancing their interests against the claims of the creditor. Not only would the resource implications be absurdly high, but it would not be possible to conduct a case-by-case analysis on any fair grounds.'': Fox, above n 2, 180.

[133] Conflicts would, inevitably, arise between individual's advancing such a broad possessory right to home and other individuals with established proprietary rights, the reconciliation with which might be beyond the courts' role because it is not conceptually possible. These are valid objections and so it is probably true that courts can do little to ensure home as property if what this means is that individuals are to have a broadly enforceable right to home per se. But, as noted above, that is not what is argued for when it is theorised that home is property.

specific rights, in specific contexts, on individuals entitled to home. The objection that home rights are not administrable by law is, as such, without basis. Instead, home's protection can be administered, practically, via a combination of rights in relevant contexts, to produce a privilege of home. Fox O'Mahony's thinking appears to be along these lines, in recognising that: 'a more appropriate means of reflecting the reality of home interests in the legal context would be at a policy level, rather than in individual cases.'[134] It is through changes at the policy level (i.e. legislation) where specific rights conducive to home, can be conferred on all occupiers.

4 *Home is an asset not an experience*

Home is an asset – a house – which can be traded, and is, as such, of economic value.[135] It is thus the physical asset which private property should protect, not the experience of home, which does not have such value. The experience of home is irrelevant to private property rights, according to this objection, which views home as just another asset class (i.e. house), to be valued in purely economic terms. To view home as anything more than this would be out of step with the dominant economic measure so frequently used to value things in Western societies. This 'home as financial investment' meaning of home has been identified and explained thus:

> The growth of the homeownership sector, particularly from the 1980s, combined with the rapid rise in the value of housing as an asset emphasised the potential meanings of home as a financial asset to be accumulated and passed on to future generations as inheritance.[136]

The theorisation does not deny the economic value of home. Indeed, economic value is an important reason people seek to become homeowners.[137] However, non-economic values, such as the experience of home, are

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[134] Fox, above n 2, 180.

[135] Tyrer, 'Home in Australia' above n 3, 346: 'The freehold owner can realise the monetary value of a house through its sale. The freehold owner can also borrow against the asset, thereby obtaining loan funds. Leasehold owners of residential property in Australia generally cannot do these things because the relatively short duration of their leases means that are not considered of value and hence tradeable for financial gain by the market.'; and Fox, above n 2, 249-277: noting the distinction between the home's use value as a home, which is separate from its economic value.

[136] Fox O'Mahony, above n 4, 159-160.

[137] Fox, above n 2, 147.

simultaneously valued by individuals.[138] Australians, for example, value home 'for non-financial reasons (such as emotional security, stability, and belonging) as [well as for] financial reasons (such as investment or financial security)', according to a recent survey conducted by the Australian National University.[139] Similarly, it has been found that 'safety and security' are fundamental aspects of housing for Australians, following an inquiry conducted by the Australian Housing and Urban Research Institute.[140] How is this research to be explained away by those who say the only value of home – to be protected by property – is economic i.e. its exchange value and not its use value as a home?[141] The answer is, it cannot. Australians value the experience of home, as the above research has demonstrated. The theorisation recognises this, and seeks to protect that experience accordingly through private property. It seeks to catalyse support for thinking that home – the experience – is important and should be explicitly considered in the design of property systems.[142] The objection to the theorisation – that society does not value the experience of home, but, rather, only home's economic value – is untenable on the basis of the above research.

However, for those who will persist with such an objection, this article poses a question: If society does not value the experience of home (an assertion contradicted by the above research), is this because home has been economised, such that its inherent experiential value has become unrecognisable? Has the focus been so intensely on economic value, that inherent value has inadvertently been lost and thus cannot be assessed until (re)understood?[143] '[C]ommodification coarsens subjects…, and it reduces our ability even to understand their value', explains Rose.[144] If that has happened in respect of home, then can it really be said that society does not value the home experience such

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[138] See generally, Fox, above n 2; and Fox O'Mahony, above n 4.

[139] Sheppard, Gray and Phillips, above n 10, 4: A relevant finding is that 'Australians are just as likely to buy housing for non-financial reasons (such as emotional security, stability, and belonging) as financial reasons (such as investment or financial security)': at 4.

[139] Fox, above n 2.

[140] AHURI Report – The housing aspirations of Australians, above n 10, 3: 'Overwhelmingly, the key attribute households seek from their housing is 'safety and security'.'

[141] See Fox, above n 2, 249-277.

[142] Fox O'Mahony, above n 4, 158: 'make the reality of home's meanings count where it matters most: in the governance of the real issues and challenges of property law and housing.'

[143] Fox O'Mahony makes such an argument, in pointing out that without a concept of home, 'the court [cannot] legitimately claim to balance the competing interests at stake' i.e. in a 'creditor/occupier dispute': see Fox, above n 2, 98.

[144] Carol Rose, 'The Moral Subject of Property' (2007) 48 *William and Mary Law Review* 1897, 1919. Bowrey and Graham make the same point, in the context of cultural heritage of Aboriginal and Torres Strait Island peoples: Bowrey and Graham, above n 64.

that it ought not to be theorised as property? Or, is it really that society can no longer perceive the inherent value of home – the experience – due to its economisation?[145] Perhaps society needs to actually experience home, before its theorisation under property is ruled out. Malloy's comments are appropriate to conclude this discussion:

> money…can only represent value in some respects, not in all respects. Money cannot express or interpret all social values and, therefore, it cannot be a universal medium for perfect exchange and substitution. For example, money cannot meaningfully capture important environmental values, the value of child bearing and child rearing, nor can it capture social values such as love, affection, and respect. Yet we know these values are important to many communities.[146]

'Malloy's theory [is] that failure to recognise non-financial values 'privileges the value of those things that are more easily quantifiable while conventionalising the habit of assuming the superiority of highly monetized relationships'.[147]

A related objection to home's theorisation is that existing property arrangements – leasehold and freehold tenures – already adequately protect home. That is, they confer proprietary rights to exclusive use of a place, thereby providing the location for home. While it is certainly true that these proprietary rights confer use of a space for home, the theorisation recognises the specific dimensions of home – security, identity and relationships – require property laws to be a certain way for home. It is not enough, in other words, to confer rights to possession, for home to manifest. This point is taken up again in Part III,[148] but suffice to say at this point that to ensure home is protected across tenures, an account is needed theorising home in property. Theorising home in property brings home to the fore and makes it an object of the system itself rather than an after thought which may or may not result (or may result in part) from existing property rights. Without the theorisation, existing differences in tenure (namely fee simple versus leasehold versus licence) mean that home will likely be experienced differently (and perhaps in a superior way in some cases) across

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[145] This is essentially Malloy's theory, as first considered by Fox O'Mahony in the context of home. See Fox, above n 2, 98, citing Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, Cambridge University Press, 2000) 19.

[146] Malloy, above n 145, 18-19, as cited and discussed in Fox, above n 2, 98.

[147] Fox, above n 2, 98, citing Malloy, above n 145, 19.

[148] This point underlines the whole of Fox O'Mahony's work on home. See, eg, Fox, above n 2.

tenures, as a result.[149] The theorisation seeks to overcome this, by ensuring home for all.

D *Responsibility for home*

Responsibility for home – for its protection and just distribution – rests with the state. If necessary, the state must take action to redress any problem of an inferior experience of home (i.e. unjust distributions of home under law). To step this out, human flourishing property theory holds that the state might ultimately be responsible for ensuring a just distribution of *things* essential to human flourishing.[150] Home is clearly a *thing*, albeit an intangible one. (Through its theorisation, above, it is clearly a *thing*, and a *thing* of value no less.) And it is a *thing* essential to human flourishing.[151] Accordingly, the state must, therefore, distribute home – the experience – justly so that all can receive it, where that is not already occurring naturally in a society.[152] This theoretical argument understands that the state must take action to address any lack of home—specifically, through appropriate law reform for the protection of home in and through property. Earlier work points the way in that regard, through its recommendations for practical options for law reform.[153] Additionally, the state may need to engage in more structural property reform, addressing issues of housing ownership by distribution (rather than merely altering existing property rules) to ensure human flourishing – through home – for all. Progressive property scholarship needs 'to go there' (i.e. look at distribution), so to speak, if it is to realise its goal of human flourishing (more on this in the next part).[154]

The state must also take action, for home, because reliance on the market, as a system to allocate home, will not be sufficient on its own. This is because home is not readily subject to measure in economic terms, and so its worth and inherent value in meeting human need can never properly be realised by the market with its focus on calculations of economic worth.[155] Accordingly, the state

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[149] Tyrer, 'Home in Australia' above n 3, 374-382, and generally.
[150] Alexander, 'Ownership and Obligations' above n 8, 6.
[151] Refer discussion in Part III.
[152] Alexander and Penalver, above n 8, 92. And at 95. Alexander, 'Ownership and Obligations' above n 8, 6-7.
[153] Tyrer, 'Assets for care arrangements: The current state of the law' above n 3; Tyrer, Assets for care disputes – A proposal' above n 3; Tyrer, 'Residential Tenancy Matters Involving Family Violence' above n 3; and Samuel Tyrer, 'Rooming House in Victoria: Home and the Nature of Property' – (2022) *Australian Property Law Journal* in press.
[154] Rosser, above n 11, 149 and 170-171. Refer footnote 248.
[155] Fox, above n 2, 97-98, and discussion therein of Malloy's work in: Malloy, above n 145; Robin Paul Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (Cambridge, Cambridge University Press, 2004); and Robin Paul Malloy, 'Equating Human Rights

will need to monitor the market and, only to the extent necessary, involve itself to ensure home.[156] Importantly, the state must not use markets to deflect attention away from what are in reality unequal distributions of home, including the unequal distributions of home highlighted in earlier work.[157] And make no mistake, the state is a party to the unequal distributions of home resulting from property law. The state actively enforces property rights – and so distributions of home – when it protects existing ownership interests. Cohen characterises the state as thus conferring 'sovereignty' on individual owners.[158] The state is not a passive observer to the property law system in this sense. Because of this, there is a strong argument that the state must ensure property – including home – is distributed equitably.[159] And, indeed, the state is ideally placed to do so. As Babie has written: 'the power retained by the state makes it possible to redress the asymmetry of choice and regulations.'[160]

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and Property Rights – The Need for Moral Judgment in an Economic Analysis of Law and Social Policy' (1986) 47 *Ohio State Law Journal* 163. Fox explains, at 97, that Malloy 'argues that, while economic efficiency is one factor which can be taken into account when thinking about law, law's concerns go beyond economic efficiency to include considerations of justice, fairness and morality; consequently, exchanges cannot be viewed purely in terms of efficiency maximisation, but must also be embedded in social and community values.' See also, Alexander and Penalver, above n 8, 109: on 'non-market values' and 'responding to market failure'.

[156] Alexander and Penalver, above n 8, 92. And at 95. Alexander, 'Ownership and Obligations' above n 8, 6-7.

[157] Tyrer, 'Assets for care arrangements: The current state of the law' above n 3;; Tyrer, Assets for care disputes – A proposal' above n 3; Tyrer, 'Residential Tenancy Matters Involving Family Violence' above n 3; Samuel Tyrer, 'Rooming House in Victoria: Home and the Nature of Property' – (2022) *Australian Property Law Journal* in press.

[158] As Cohen explains: 'the law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbour, the law thus confers on me a power, limited but real, to make him do what I want.': Cohen, above n 29, 12, as cited in Babie, above n 26, 1077.

[159] It is theoretically contested whether the state should involve itself in ownership (re)distribution. See further, Robert Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974). As explained in Singer, above n 5, 171-172: Nozick's is a historical model in which '[p]roperty rights initially acquired at a particular moment in time [Singer suggests these might be called 'magic moments'] by a legitimate method are fully in the control of the owner…Any actions that take property rights fairly acquired through the process of creation or transfer and redistributes them, by definition, interferes with property rights and constitutes wrongful deprivation. When accomplished by government action, through regulation, taxation, or otherwise, redistribution constitutes a form of oppression interfering with individual rights of property and liberty.'

[160] Babie, 'Review Essay: Private Property Suffuses Life' above n 31, 146.

E *Home for all*

In designing private property systems, the state must go further than just protecting home for existing freehold and leasehold owners (whose ownership would be expanded to encompass home, through modifications of existing rules, as theorised earlier in this Part). The state must ensure that home is distributed to *all* people, including to those who do not experience home currently because they have no house.[161] Such people have no physical shelter, which is necessary to fully experience home.[162] The state must address this if it is to protect home.[163] All people are entitled to home – the experience – under the human flourishing theory of property, as interpreted by the theorisation. Home is necessary for humans to flourish. It is linked to individuals' health and well-being,[164] and hence to their flourishing.[165] And human flourishing theory says that such things essential to human flourishing (including home, on the theorisation) should be distributed justly.[166] This justifies home for all. Without home for all, the flourishing justification for property begins to fall away, in the context of housing. Everyone needs housing, and home, to flourish, after all. And so, it is through housing that many people will find their respect for private property (based on flourishing) through the experience of home leading to flourishing.

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[161] Hegel's and Radin's personality theories 'do not go so far as to advocate that housing or home should be available to all': Lorna Fox O'Mahony and James A. Sweeney, 'The Idea of Home in Law: Displacement and Dispossession', in Lorna Fox O'Mahony and J.A. Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing Limited, 2011) 1, 5, citing A Ryan, *Property and Political Theory* (Blackwell, Oxford, New York, 1984) 124.

[162] Fox O'Mahony, above n 4, 161: 'the bricks and mortar provide a significant starting-point, since it is the physicality of the home, in combination with the social and personal meanings that accumulate over time, which supports the phenomenon of home. So, while shelter is the most obvious aspect of "home as a physical structure", the structure and materiality of the house also provides the location – the "place" – for the experience of home, as the locus for family life, the place of safety, privacy, continuity and permanence (or not, as the case may be).'; Fox, above n 2, 157.

[163] These people are 'roofless' in the sense that they lack a house, and, as a result, are 'homeless' in that they lack the experience of home: see Tyrer, 'Home in Australia' above n 3, 342, footnote 5. On the term 'rooflessness': see Peter Somerville, 'Homelessness and the Meaning of Home: Rooflessness or Rootlessness?' (1992) 16(4) *International Journal of Urban and Regional Research* 529, 531.

[164] Fox, above n 2, 109-122, and empirical studies cited: Home's loss has extreme psychological impacts, as Fox explains. and M Fried, 'Grieving for a Lost Home' in J Duhl (ed), *The Urban Condition – People and Policy in the Metropolis* (New York, Basic Books, 1963).

[165] It has already been said that all freehold and leasehold owners would be entitled to possess home, and that a more expansive concept of ownership would be required in that sense. See Tyrer, above n 12, 340-341: 'It articulates an understanding of what home ideally entails in that context, and so pushes beyond the traditional bounds of (home)ownership – either freehold or leasehold ownership – as restricted to house.'

[166] Alexander, 'Ownership and Obligations', above n 8, 6. Fox O'Mahony and Sweeney, above n 161, 5-6.

This supports the theorisation of home for all, under human flourishing property theory i.e. to ensure private property's legitimacy, in this way (this point is discussed further in Part III below).

Support for the theorisation of home for all can also be found in the personhood theory of property. Personhood theory understands that people must have property if they are to reflect personhood. And if property's goal is for all people to realise personhood, then clearly all people must have some property, following Waldron's argument.[167] Waldron states: 'We cannot argue, on the one hand, that property-owning is necessary for ethical development, and then, on the other hand, affect unconcern about the moral and material plight of those who have nothing.'[168] Personhood theory is understood in this way by the theorisation i.e. to require equitable distributions, to be coherent. Further, it is understood to require that all people must have home – the experience. This experience is a keyway in which people realise their personhood in society today. It follows, therefore, that the personhood theory – if it is to realise personhood for all – would do well to require home for all.

The theorisation of home for all is expressly emphasised as a key component of the theorisation also for practical reasons. It is included because, without it, all the theorisation would be doing is changing 'what fell within the property rubric' but not the structural aspects of property (i.e. distributions of

[167] Waldron, above n 26, 381: 'Any thesis about the inevitability of widespread propertylessness threatens the collapse of the sort of argument that Hegel [a personhood theorist] wants to put forward in favour of private property.' And at 389: 'Though his [Hegel's] account of the justification of property is deep, plausible, and attractive, his central mistake was his failure to see that private property can be justified as a right of personality only if it can be made available to every person on whose behalf that argument can be made out.' And at 4: "The interesting thing about the Hegelian approach is its distributive implication. If the argument works, it establishes, not only that private property is morally legitimate, but also that, in Hegel's words, 'everyone must have property'. … a general-right-based argument for private property establishes a duty to see to it that everyone becomes a property-owner. It is in effect an argument against inequality and in favour of what has been called 'a property-owning democracy'.' And at 343: 'Hegel's account of property in the *Philosophy of Right* provides us with the best example we have of a sustained argument in favour of private ownership which is GR-based, in the sense I have given that term. In this chapter, I am going to examine that account in some detail. The interpretation I shall offer highlights Hegel's theory of the importance of property for the development of individual freedom. I shall show that his argument, if taken seriously, requires not just that there should *be* an institution of private property in any society or that existing property entitlements should be respected, but—more radically—that property is something which it is important for every individual to have, so that there is a basis for overriding ethical concern if some people are left poor and property*less*.'

[168] Waldron, above n 26, 4.

ownership and wealth), noting that in Australia there still remains thousands of people without housing.[169] To ignore those structural distributions would be to ignore home for the propertyless. This kind of half solution would be very unsatisfactory and questionable on the basis that human flourishing and personhood would still be lacking as regards housing for many people.[170]

This aspect of the theorisation – of the home experience, for all – has urgent policy implications for the state. Foremost, it requires the state to actively pursue an end to homelessness. Vulnerable persons would be assisted to obtain affordable and secure housing, in which they might experience home. Alexander and Penlaver consider this in the context of human flourishing: 'we owe an obligation to those without such a space to help them obtain it.'[171] Alexander has written separately that: 'one cannot live a life that by any reasonable standard is well-lived without having available housing that is stable, safe, healthy, and affordable.'[172] Further, he continues, 'it is not ordinary for human beings to live on streets, on benches, or in cars, and it is certainly not acceptable.'[173] Meanwhile, there is a shortage of affordable housing in Australia, resulting in homelessness for many. 'There is a national shortage of just over 400,000 homes that are affordable for people who are homeless or living on the lowest incomes',[174] according to the St Vincent de Paul Society, a provider of homelessness services. Similarly, organisations, and individuals, including those with a lived experience of homelessness, have told a Victorian Parliamentary Committee (in their survey responses) that 'the key to preventing and ending homelessness is an adequate supply of safe, affordable, long-term housing'.[175] The state needs to do more to build the stock of affordable housing. Until it does, it is not ensuring home for all, calling into question whether Australia's system of private property can fairly be justified based on human flourishing. (The argument being made here is,

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[169] Rosser, above n 11, 148.
[170] Ibid; also at 170-171.
[171] Alexander and Penalver, above n 8, 127.
[172] Alexander, 'Property and Human Flourishing' above n 8, 295. However, limits of the human flourishing property theory in responding to homelessness are articulated (refer pages xvii, xxi, 296, 313 and 319).
[173] Alexander, 'Property and Human Flourishing' above n 8, 300.
[174] 'Homelessness in Australia', St Vincent de Paul Society (Web Page) <https://www.vinnies.org.au/page/Our_Impact/homelessness-in-Australia/>, citing Troy, D. Nouwelant, R., Randolph, B. 2019. Estimating need and costs of social and affordable housing delivery. UNSW. City Futures Research Centre. See also, *The Ache for Home* (Report prepared by the National Social Justice Committee of the St Vincent de Paul Society, Australia, 2 March 2016), 14 ('The Ache for Home').
[175] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into homelessness in Victoria – Interim Report* (4 August 2020) 13.

essentially, that home legitimises private property overall i.e. not just in housing, as discussed further below.)

Affordable housing is a priority area in the response to homelessness, as vast numbers of Australians – human beings – are currently homeless; some 116,427 human beings on any given night are without adequate housing. Of these persons, 20% (or 23,437) are Indigenous Australians and 30% are born overseas.[176] Vulnerable groups, this demonstrates, are the ones impacted most by a lack of home – the experience – in Australia, due to a lack of shelter. Ensuring those without housing obtain it is a critical first step on the path to the experience of home for all.[177] And the state must ensure this, as part of its responsibility for ensuring home for all, and thus human flourishing and personhood, as theorised. Increasing the supply of affordable housing is where this responsibility starts. Any housing built should be appropriate for 'the housing needs of different groups within the community', and 'a contextual response that genuinely seeks to meet those needs on a permanent basis.'[178] In addition, the state must pursue policies which prevent people from becoming homeless. Mental health and family violence services are key in this regard,[179] as these social problems lead to people becoming homeless. '[F]amily violence is the second largest contributor to homelessness in Australia', according to Homelessness Australia, the peak body in Australia for this issue.[180] The St Vincent de Paul Society, in a 2016 report, has also stated 'that domestic violence is a factor in 36 per cent of cases of

[176] 'Homelessness statistics', Homelessness Australia' (Web Page) <https://www.homelessnessaustralia.org.au/about/homelessness-statistics>. On the different definitions of homelessness, see Tamara Walsh, *Homelessness and the Law*, (The Federation Press, Sydney NSW, 2011) 3-4, and
Chris Chamberlain and David MacKenzie, 'Understanding contemporary homelessness: Issues of definition and meaning' (1992) 27 *Australian Journal of Social Issues* 274.

[177] Fox O'Mahony, above n 4, 161: 'the bricks and mortar provide a significant starting-point, since it is the physicality of the home, in combination with the social and personal meanings that accumulate over time, which supports the phenomenon of home. So, while shelter is the most obvious aspect of "home as a physical structure", the structure and materiality of the house also provides the location – the "place" – for the experience of home, as the locus for family life, the place of safety, privacy, continuity and permanence (or not, as the case may be).' Fox, above n 2, 157.

[178] *The Ache for Home*, above n 174, 18.

[179] On mental health and homelessness, see Alexander, 'Property and Human Flourishing' above n 8, 300. And at 315.

[180] Homelessness Australia, Submission No 144 to Parliament of Australia House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Homelessness in Australia*, 9 July 2020, 22.

homelessness.'[181] If the state can address these issues before they escalate, through services, it would be preventing people from becoming homeless, and potentially losing their place for the experience of home. Finally, the state must also ensure laws that create the conditions for home, for all, including housing security and housing stability, as theorised earlier.[182] Laws impact on, and distribute, home, through the conditions they embody, again, as earlier theorised.

Property systems do not operate in a vacuum. The theorisation has made this clear by highlighting the legal, social, and economic conditions which must be addressed, by the state, to achieve home for all. This multidisciplinary approach follows from the reality that home is impacted by many different factors.[183] Further, it recognises that 'we should not lose sight of property law's socio-economic context.'[184] As Rosser has written:

> progressive property scholarship seems especially focussed on the way in which property law determines the permeability of private property when faced with collective demands, but the distributive function of property is at least as important.[185]

Further again, this recognises that:

> Once acquisition and distribution are treated as a given as they traditionally are, the scope of property law is dramatically reduced. Indeed, as traditionally conceived, property law seems the wrong field in which to expend progressive energies because the possibilities of change seem so limited; the material that ordinarily falls under the "property" umbrella is unusually rule bound and mechanically applied.[186]

Rosser also says:

> Traditional property as a field is too limited—in its coverage and in its preference for stable rules—to provide a solid foundation for the substantive changes in property and in human relations that progressive scholars seek. It is only by broadening the conversation to include acquisition and distribution in a way that destabilizes societal assumptions regarding ownership that progressive property scholars can engage fully in the immense property-related challenges of racial advantage and economic inequality.[187]

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[181] *The Ache for Home*, above n 174, 5.
[182] Tyrer, 'Home in Australia' above n 3, 361-374.
[183] Ibid, citing Dovey, above n 54, 51-52.
[184] Rosser, above n 11, 157, citing Underkuffler, above n 38, 141.
[185] Rosser, above n 11, 157.
[186] Ibid, 170.
[187] Ibid.

Only by addressing all such factors can the state properly ensure that home exists for all – that is, that home is a thing for all.[188] If people are provided with shelter, but other conditions are left un-addressed, home may not result. To that end, the theorisation seeks to draw attention to how private property systems should be, as well as to the social and economic conditions which, it is argued, cannot be separated from how the property system operates. There is a need to look beyond property, strictly understood as legal rules, in other words.[189] Home's theorisation demonstrates that this is necessary, if the state is to ensure home for all.

Re-distributive measures would, in particular, be necessary for the state to pursue the social and economic measures discussed above (necessary to recognise home for all). This would be necessary to ensure that the state has adequate resources to create affordable housing, and provide related services. Regarding the form of such redistributive measures, they ought to occur indirectly via the taxation system, under which people contribute to the common good according to their means.[190] Additional affordable housing might be constructed with resources raised in this way. In Australia, consideration might be given to reintroducing an inheritance tax, on large estates, as occurs in several other common law jurisdictions, and as has been mooted.[191] Similarly, the removal of tax concessions applied to residential property investments – namely negative gearing and the discount on capital gains tax – are other possible taxation reforms.[192] This would recognise that these concessions may artificially drive up demand for housing for investment (rather than home) purposes,

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[188] In adopting a broad conceptualisation of home as a 'property-object' or thing, this article necessarily embraces an understanding of property as rules and policies (social, economic and legal policies) that impact on that thing for individuals. Only if property is conceived of broadly, in this way, can things of inherent value, such as home, truly be protected. The home as property theorisation depends on this expansive thinking about property, as does the protection of home.

[189] Rosser, above n 11, 170-171.

[190] Alexander and Penalver, above n 8, 123-124 and 127. See also Rosser, above n 11, 151.

[191] See, eg, John Mangan, 'House prices and demographics make death duties an idea whose time has come', *The Conversation* (online), 24 April 2019 <https://theconversation.com/house-prices-and-demographics-make-death-duties-an-idea-whose-time-has-come-114175>; and Frank Stilwell, 'Why we should put an inheritance tax back into the spotlight' *The Conversation* (online), 28 June 2011 <https://theconversation.com/why-we-should-put-an-inheritance-tax-back-into-the-spotlight-1634>. Through an inheritance tax, the state collects a contribution from what is a windfall gain in the hands of beneficiaries.

[192] *The Ache for Home*, above n 174, 17.

thereby increasing the cost of housing in Australia.[193] While these measures are described as re-distributive, the human flourishing theory of property as presented by Alexander would not characterise them in this way.[194] Rather, such measures would be characterised as in-built obligations, imposed on owners, as part of their ownership, under the social obligation norm.[195] That norm holds that owners have obligations to share their property with others, as this is necessary for the flourishing of themselves and others.[196] As such, owners of residential investment properties could be seen to have obligations, under the social obligation norm, to share their property (including income generated by it) with others whose situation requires support for their flourishing. This is the social obligation norm in action, as Alexander and Penlaver have explained: 'we can understand redistributive taxes as an attempt to compel people to comply with their moral obligations to share their surplus resources with those in need of additional resources for their own development as human beings capable of flourishing.'[197]

III Two Justifications

Two justifications for the new home theorisation are as follows.

A *Home legitimises private property*

Home legitimises private property. It legitimises private property in housing – namely, rights to possession under either freehold or leasehold tenure – such that it should be theorised as property. It does so by enabling personhood and human flourishing through this existing private property. However, as has been argued, all persons must experience home i.e., not just the propertied. Home – and thus personhood and human flourishing – must be afforded to all. If it is afforded to only some – the propertied – then people may not assent to the private property

[193] This possibility is acknowledged in the Senate Select Committee on Housing Affordability in Australia, 'A good house is hard to find: Housing affordability in Australia' (2008) page 46, para 3.44: and at pages 59-60, para 4.36: "This speculative demand for housing may be encouraged by some aspects of the taxation system, which makes investing in housing (and sometimes other assets yielding capital gains) more attractive than alternative investments.'

[194] Alexander, 'Property and Human Flourishing' above n 8, xix to xx.

[195] Alexander, and Penalver, above n 8, 124; and Alexander, 'The Social-Obligation Norm', above n 8, 819; and Alexander, above n 8, xv. See also, Rosser, above n 11, 114.

[196] Alexander and Penlaver, above n 8, 124 and 91; and Alexander, 'The Social-Obligation Norm' above n 8. See also, Rosser, above n 11, 114.

[197] Ibid, 92.

system more broadly. Why? Because that system would lack moral coherence.[198] It would be a system which benefits some, through home and housing, and not others. As Waldron explains: 'We cannot argue, on the one hand, that property-owning is necessary for ethical development, and then, on the other hand, affect unconcern about the moral and material plight of those who have nothing.'[199] The theorisation considers that property in housing should be a system that benefits all, through home, and thus through personhood and human flourishing, for all. 'People have to accept property for it to work in any meaningful way',[200] as Rose has written. Home for all – a key part of the theorisation presented herein – is thus intended as a way to ensure the legitimacy of the private property system in its entirety (i.e. not just vis-à-vis housing property), via housing. Home legitimises private property broadly speaking, is the argument being made. The argument sees that home legitimises private property overall (i.e. not just private property in housing) by enabling human flourishing and personhood in housing, which is a main form of property which people own, and so through which people come to understand and view the whole private property system. Therefore, housing property legitimacy is important to the system overall. If the system can justify housing as property (through home), then – in this way – it supports the legitimacy of not just housing property, but private property overall. This legitimacy argument is further unpacked, in relation to personhood and human flourishing below.

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[198] Waldron makes this same argument, for equitable distributions, for moral coherence, which the theorisation is drawing on here. In basic terms, he says that Hegel's personhood theory can only be sustained if all people have property necessary to experience personhood. This recognises the redistributive dimension of personhood theory. The theorisation expands Waldron's theorisation by saying that home – the experience – should be acknowledged as a form of property, which all people need to experience personhood. The theorisation also makes the same distributive argument in respect of human flourishing theory as applied to housing i.e. human flourishing theory can only be sustained if all people can flourish through home. In summary, all people need some property for flourishing and personhood, with home being a key way this occurs in modern society. Refer citations in footnotes 167 and 168 above.

[199] Waldron, above n 26, 4.

[200] Rose, above n 144, 1925.

1 *Personhood*

Personhood is the expression of self-identity through property.[201] As a theory of property, it is generally attributed to Hegel.[202] As Fox and Sweeney explain:

> For Hegel, the justification for private property was rooted in the role of property appropriation in the formation of identity. Property was identified [by Hegel] as a vehicle through which the individual could manifest himself as a human being in the world; by appropriating property, the person confers personal meaning onto the property and expresses his identity outwardly through exercising his will in relation to the property.[203]

Hegel himself famously observed: 'Not until he has property does the person exist as reason.'[204]

Similarly to Hegel, Radin's personhood theory recognised the importance of property to self-development.[205] 'The core of Radin's theory was the idea that an individual's attachment to particular property, for example their home, may be so strong that the particular property becomes constitutive of their personhood.'[206] Radin's particular contribution was in distinguishing different kinds of private property, along a continuum, ranging from that which constitutes personhood ('personal property'), to that with no relevance to the person ('fungible property').[207] And Radin observed 'that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment'.[208] It is thus property's ability to reflect personhood which gives it its legitimacy for personhood theorists.

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[201] Underkuffler, above n 38, 116: explaining the 'personality theories' of property generally recognise 'that physical objects and other resources can be critical to human attempts to construct cultures, preserve memories, inspire wonder, embody aspirations, and ultimately understand—in some way—the place of individuals in the human and natural worlds. Although such reasons for honouring claims for possession and control may be more subtle than purely material ones, they have long been traditionally associated with property claims and property rights.'

[202] Alexander and Penalver, above n 8, 57.

[203] Fox O'Mahony and Sweeney, above n 161, 2. See also, Alexander, and Penalver, above n 8, 57.

[204] Harris, above n 26, 232, citing G.W.F. Hegel, *Elements of the Philosophy of Right* (trans H.B.Nisbet, CUP, 1991) 73 (para 41 addition).

[205] Alexander and Penalver, above n 8, 66: 'The most influential contemporary property theory that draws inspiration from Hegel is Margarent Jane Radin's "personhood" theory.'

[206] Fox O'Mahony and Sweeney, above n 161, 3.

[207] Ibid, 3-4. See also, Alexander, and Penalver, above n 8, 66.

[208] Radin, 'Property and Personhood', above n 8, 957.

Home is the quintessence of personhood.[209] Through home, individuals can develop and express their identities; for example, by making physical changes to the home, such as painting it.[210] Individuals may also develop future identity in the place of home, by planning their futures in the place.[211] Home has thus been described as '*a centre for self-identity*, which offers a reflection of one's ideas and values, and acts as an indicator of personal status'.[212] Further, home is:

> the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.[213]

To be clear, it is home – the experience – which enables personhood in housing. The house – the physical shelter – does not in and of itself enable personhood. It is just a physical shelter, after all.[214] Individuals need to have the experience of home to experience personhood. This is because home, as theorised, includes the reflection of self-identity through home, which is essentially personhood. Importantly, this experience must occur in such a way that individuals' personhood can *actually* manifest in the place of home. (This is what legitimises private property in housing, based on personhood.[215]) It is thus vital to theorise home – the experience – as a matter of property. Property can then protect that experience, so that personhood (through home) *actually* manifests to legitimise property, in housing, in reality i.e. through the design of appropriate laws. In presenting these points, this article draws out the important insight that home – the experience itself – is necessary to protect, to ensure property's legitimacy based on personhood (and to ensure property's legitimacy in an overall sense given that housing is a main form of property which people own and so through which they come to understand and view the whole property

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[209] Fox O'Mahony and Sweeney, above n 161, 3. See also, Fox, above n 2, 286. And at 288.
[210] Tyrer, 'Home in Australia' above n 3, 370, citing Hazel Easthope, 'Making a Rental Property Home' (2014) 29(5) *Housing Studies* 579, 582, 593. See also Hannu Ruonavaara, 'Tenure as an Institution' in Susan Smith (ed), *International Encyclopaedia of Housing and Home* (Elsevier Science & Technology, 2012) 185, 186, quoted in Hazel Easthope, 'Making a Rental Property Home' (2014) 29(5) *Housing Studie*s 579, 583.
[211] Tyrer, 'Home in Australia' above n 3, 354-356; and Fox O'Mahony, above n 4, 163.
[212] Fox, above n 2, 24 (emphasis in original).
[213] Radin, 'Property and Personhood', above n 8, 992.
[214] The physical shelter combines with other factors to create home, as discussed by Fox O'Mahony: Fox O'Mahony, above n 4, 161; Fox, above n 2, 157.
[215] Home must be experienced by all, in this way. Refer discussion in Part II.

system). The theorisation thus incorporates home into private property and theorises home for all.[216]

Not everyone agrees with the personhood perspective of property, which is being used here to justify home's theorisation in property (as a way to justify property overall). A critique of the personhood perspective, from the discipline of psychology, is that individuals do not manifest their identity in things, or at least not to the extent suggested by personhood theorists. Not coincidentally, this critique is levelled at scholars advocating for the protection of home. The assertion has been made that home is not necessary to self-identity or personhood, or at least that home is overstated in that regard.[217] This article disagrees. Individuals do manifest themselves in things, including to a significant extent in their homes. Fox O'Mahony cites evidence of how deeply individuals are affected when deprived of their homes,[218] and which demonstrates that 'the embeddedness of occupiers in their homes is linked to health and well-being'.[219] Radin similarly considered that personhood could be sensed. 'On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.'[220] Babie's, Burdon's and Rimini's empirical research, on the meaning of property for individuals, has also demonstrated property's link to personhood. They observed that 'property, for all participants, was something closely tied to their sense of personhood and being. Indeed, what we found confirmed that Underkuffler's notion that "from our earliest moments of childhood, we feel the urge to assert ourselves through the language of possession against the real or imagined predations of others."'[221] It is also relevant to note that the personhood perspective recognises that there are natural limits to what constitutes property

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[216] Existing scholarship has addressed the link between home and personhood. See Fox, above n 2, 245-304.

[217] Stephanie M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107(7) *Michigan Law Review* 1093, 1096, and Barros, above n 96, 277, and Nestor M Davidson, 'Property, Well-being, and Home: Positive Psychology and Property Law's Foundations' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 47, 57., as cited in Tyrer, 'Home in Australia' above n 3, 358-359.

[218] Fox, above n 2, 109-118.

[219] Fox O'Mahony, above n 4, 157.

[220] Radin, 'Property and Personhood', above n 8, 959: 'One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.'

[221] Babie, Burdon and da Rimini, above n 9, 827, citing Underkuffler, above n 38, 1.

for personhood. It acknowledges that people can be too bound up with their things, in a way that is unhealthy.[222]

2 *Human flourishing*

Human flourishing is the other theoretical justification for property[223] relied on here to ground home's theorisation. Human flourishing is a pluralistic concept. 'There is no one way in which human beings flourish', as Alexander and Penlaver explain.[224] Human flourishing can thus be conceived of in different ways. Alexander 'conceives of human flourishing as including (but not limited to) individual autonomy, personal security/privacy, personhood, self-determination, community and equal dignity.'[225] He says: 'These values cannot be reduced to a single basic value because they are incommensurable'.[226] However, the 'core claim [of human flourishing theory] is that the vital purpose of property is to enable individuals to live a flourishing life.'[227] (The theory draws on Aristotle in this regard.[228]) The theory also recognises that humans are interdependent. Everyone is 'inevitably and inherently dependent on others to cultivate the necessary capacities' to achieve flourishing.[229]

Home, the theorisation understands, is necessary for human flourishing. Home is one of the 'resources necessary for physical survival',[230] and hence is essential to human flourishing on that basis. All people should, accordingly, be entitled to the shelter of home.[231] However, home as an experience is also necessary for human flourishing. (Intangible things may be necessary to flourishing, according to the theory.[232]) Home – the experience – contributes to flourishing through the feeling of security, the expression of self-identity, and relationships and family. All of these are afforded by home. Further, they

[222] Radin, 'Property and Personhood', above n 8, 961.
[223] Alexander, 'Property and Human Flourishing' above n 8, xxii and page 3.
[224] Alexander, and Penalver, above n 8, 88. See also, Alexander, 'Property and Human Flourishing' above n 8, 4.
[225] Alexander, 'Property and Human Flourishing' above n 8, xv. And at 5.
[226] Ibid, xv.
[227] Ibid, xiv.
[228] Ibid, xii. However, the theory is not Aristotelian: see xii.
[229] Ibid, xv.
[230] Alexander and Penalver, above n 8, 95.
[231] Alexander and Penalver, above n 8, 127.
[232] See discussion of education in Alexander and Penalver, above n 8, 96: referring to 'the long period of intellectual and moral training necessary to function as practically rational beings within modern capitalist societies'.

arguably correspond to Alexander's conception of human flourishing. The feeling of security corresponds to "personal security", self-identity to "personhood", and relationships and family to "community", under Alexander's understanding of human flourishing, noted above. Therefore, home – the experience – should arguably be a part of human flourishing on this theory. As such, it is important that this experience occurs so that human flourishing can result, to legitimise private property on this basis. The theorisation recognises this and is grounded on this basis. It will ensure that home (and thus human flourishing) actually manifests, to legitimise private property in housing, and overall, in reality i.e. through the design of appropriate laws. In making these points, this article draws out the important insight that home – the experience itself – is necessary to protect, to ensure property's legitimacy, based on human flourishing. The theorisation thus incorporates home into property and theorises home for all.[233]

By way of recap, the human flourishing and personhood theories of property ground home's theorisation. Home – the experience – enables both personhood and human flourishing,[234] and thus legitimises private property in housing on these bases, in turn legitimising private property generally given the significance of housing to how the private property system is perceived. Home legitimises property in this way. Recognising that provides a compelling justification for its theorisation as a thing for all in property i.e. to ensure that home actually manifests for individuals via property systems.

3 *Insights for home*

In designing private property systems for home, it is not enough (merely) for law to confer proprietary rights to possess a house as either a tenant or freehold owner. This is not enough to sustain home (and so personhood and human flourishing).[235] (House does not equal home is a refrain very much applicable to the design of property systems via-a-vis housing.) Rather, special care must be taken to design appropriate property laws which ensure home in the conditions they embody.[236] Included in the conditions law should embody, for home, are housing stability and housing control. These conditions have been theorised in

[233] Existing scholarship has addressed the link between home and human flourishing. See Fox O'Mahony and Sweeney, above n 161, 2; and Fox, above n 2, 245-303.
[234] Fox, above n 2, 245-303.
[235] This point underlines the whole of Fox O'Mahony's work on home. See, eg, Fox, above n 2.
[236] Tyrer, 'Home in Australia' above n 3, 361-374.

earlier work on home.[237] They are important to reiterate, as they will inform the specific rights conferred on individuals, in specific contexts, to protect home.[238] Home, and thus personhood and human flourishing, would then proceed to legitimate private property. (Recommendations for law reform in other work are all be directed towards that end—of home, and thus personhood and human flourishing, for the legitimacy of housing and private property).[239]

To say this – that laws must embody the conditions for home – is to contribute an important new gloss on the personhood and human flourishing property theories. Those theories justify why property exists, through elaborating the ends it serves. However, and generally speaking, neither theory comprehensively says what laws must be like to ensure property *actually* achieves the ends of each theory: personhood and human flourishing.[240] And, more particularly, neither theory says what laws must be like to ensure housing (as a particular type of private property) *actually* achieves those ends – of personhood and human flourishing – through *home*. Of course, both theories have a normative dimension in conceiving that laws should be a certain way. Radin's personhood theory understands that the law must be a certain way so that personhood (the investment of the person in the thing) can develop. Radin considers that it may be 'that government should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property.'[241] Radin also reveals her concern

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[237] Ibid.

[238] Home's theorisation means, practically speaking, that individuals would receive specific rights protective of home, conferred on them in specific contexts. Refer discussion in Part II under 'B. New theorisation'.

[239] Tyrer, Assets for care disputes – A proposal' above n 3; Tyrer, 'Residential Tenancy Matters Involving Family Violence' above n 3; and Tyrer, 'Rooming Houses and Home' above n 3.

[240] Indeed, that would be, arguably, an impossible task for any theory. This point – that theories are limited in providing the substantive detail and content of laws – is discussed in Alexander and Penalver, above n 8, 68 and 94. At page 68: 'It is one thing for a theory to justify private property in general terms; it is quite another for a theory to specify the types of private property rights that ought to exist.'. The same point is made by Waldron, above n 26, 61: 'A philosophical argument can determine only, as it were, the general shape of a blueprint for the good society. Even if we find that there are good moral grounds for preferring private property to collective property, we still face the question of what conception of private property to adopt. In other words, we still face the question of what detailed rights, powers, liberties, immunities, and so on should be accorded to owners at the level of concrete legal rules. Occasionally, the philosophical argument may indicate a particular answer to that question.' See also, discussion in Fox O'Mahony and Sweeney, above n 161, 5-6, and citation to A Ryan, *Property and Political Theory* (Blackwell, Oxford, New York, 1984) 124.

[241] Radin, 'Property and Personhood', above n 8, 990.

for laws protective of tenants,[242] and acknowledges that relationships between persons and things develop overtime.[243] Similarly, Alexander's human flourishing theory recognises that owners may have obligations to assist others (inherent in their ownership). This is encapsulated in the 'social obligation norm', which is a part of his human flourishing theory of property.

However, neither theory appears to give fulsome guidance on how property can achieve its ends – personhood and human flourishing – via housing specifically, through home. Therefore, it is important to begin to newly theorise, to fill this gap. Specifically, this article says that property laws relevant to housing should embody certain conditions for home, including housing stability and housing control.[244] Laws should, for example, enable individuals to remain in their homes over time (an example of housing stability), and to make changes to the place (an example of housing control), so as to build their identity and security in the place.[245] (This is one practical insight resulting from such theorising about the content of laws for home.)

An implication of what is being said here is that personhood and human flourishing should be considered content-based theories of property. They go must go beyond justification if they are to achieve their justificatory ends. And so, they must specify what property should be like to achieve those ends. The insight contributed here, however, is that personhood and human flourishing do not go far enough in explaining what property laws should be like for home (that is, their proponents do not always fully follow through and venture into content territory, albeit that the theories clearly have implications for content). Therefore, this article shows a need to theorise about what content is necessary for home, in terms of conditions that laws should embody for home, and thus personhood and human flourishing, in housing.

What is essentially being said here is that it matters what laws relevant to housing *actually* look like, if the ends of these theories – personhood and human flourishing – are ever to be achieved through housing, via home. The theorisation can be seen to extend the personhood and human flourishing perspectives, as applied to housing, by saying what laws should look like to enable home i.e., by

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[242] Ibid, 993: '[v]iewing the leasehold as personal property recognizes a claim in all apartment dwellers, not just poor ones.'
[243] Radin, 'Property and Personhood', above n 8, 988: 'People and things become intertwined gradually.'
[244] Tyrer, 'Home in Australia' above n 3, 361-374.
[245] Ibid, 362-370.

proposing laws must embody the two stated conditions for 'home'.[246] This kind of theorising must happen if those theories are ever to achieve their ends through housing. And it must happen, also, because it is vulnerable people who are typically impacted by a lack of home. This advance in thinking – that law must be a certain way for home (and hence for personhood and human flourishing in housing) – is catalysed through the home as property theorisation; in particular, through its isolation of home, the experience, as a specific *thing* in need of protection by private property.

Home is not just for existing owners, but, rather, must be realised by all for it to legitimate private property as a system, via housing, based on personhood and human flourishing.[247] This point, which has been made throughout, has significant structural implications for Australia's housing system. Among those discussed, was the need for the state to build more affordable housing, and to gain the resources to do so. Laws must be a certain way for home, yes. But the theorisation's structural implications for private property systems are, arguably, the more contentious and pressing aspects to address. They take the theorisation beyond an analysis of legal rules, and into the territory of ownership distributions,[248] and, even more broadly, to social and economic policies.

4 *Legitimacy of private property*

The legitimacy of private property in housing, and generally, is dependent on the theorisation being fully realised (in terms of its implications for legal rules, as well as for the property system structurally, as noted.) This is because the theorisation will enable personhood and human flourishing, through home. If home does not result – for all as theorised – then these ends, and so the legitimacy of private property, may be called into question for the reasons already discussed. A practical question now. Does home result for all individuals in Australia, currently? This article does not think so, when many individuals lack a place in

[246] This takes the point, from both theories, that laws must be a certain way for personhood and human flourishing and particularises it by saying what the nature of laws should be to ensure those ends in the specific context of housing, through home. Further, it is acknowledged that there may be other conditions laws must embody for home.

[247] Achieving home for freehold and leasehold occupiers, through laws, is a part of this. However, that alone will not be enough to legitimise property if, meanwhile, many others completely lack the experience of home because they lack housing i.e., are without adequate shelter.

[248] Rosser, above n 11, 170 to 171.

which to experience home i.e. they are homeless, and certain Australian property laws are such that the home experience is being undermined (even for those with housing).[249] There is a problem of a lack of home which, this article suggested, is a legitimacy problem for the private property system overall i.e. not just for property in housing (given that personhood and human flourishing may not be present). Afterall, what remains to ground the legitimacy of property if human flourishing and personhood are absent, at least for some, in respect of something as significant and universal as housing due to a lack of home, or worse, no house in which to experience home to begin with? Without home for all, 'is the institution of property morally worthy enough to command the respect and forbearance upon which it depends?'[250] 'People have to accept property for it to work in any meaningful way',[251] as Rose has written. The theorisation of home recognises this home problem, and its implications for private property's legitimacy. And it seeks to address it by ensuring the legitimacy of property systems, by incorporating home – the experience – for all.

B *Home reflects everyday beliefs about property*

The theorisation can also be justified on the basis that it will ensure property (i.e., the system of rules) is aligned to people's 'everyday beliefs' about property i.e., what people want from property. These 'everyday beliefs' are referred to in the literature as the 'the idea of property' (and draw on the idea of the 'living law' developed by Ehlrich).[252] Those 'everyday beliefs' or the 'idea of property', it is suggested here, include that private property includes home – the experience. People believe that home (the experience) will result from private property (or, more particularly, rights to possession of housing), in other words. Empirical evidence would appear to support this suggestion. Among their reasons for purchasing housing, Australians have cited 'emotional security, stability, and

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[249] Tyrer, above n 160; Tyrer, 'Assets for care arrangements: The current state of the law' above n 3; Tyrer, "Residential Tenancy Matters Involving Family Violence' above n 3; and Tyrer, 'Rooming Houses and Home' above n 3.

[250] Rose, above n 144, 1902.

[251] Ibid, 1925.

[252] Babie, Burdon and da Rimini, above n 9, 802, and 811 citing Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* 35-40 (1936). See also, Paul Babie, 'Spontaneously Emerging New Property Forms Reflections on Dharavi' *University of Adelaide Law Research Paper* 2020-07, pp. 8-12, and relevant works cited therein being Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, 1994) and Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 *Stanford University Law Review* 211.

belonging' i.e. home.[253] These Australians would appear to have assumed that home – the experience – will naturally flow from housing rights. If that is so, they have considered that home (the experience) and private property (i.e. housing rights) are one and the same. However, as this article has pointed out, it may not be the case that private property rights currently afford home, in reality, in all cases.

Recognising this – that home, the experience, is what individuals want from property, but that this might not follow from private property – is important. This insight affords policymakers an opportunity to redesign property systems so that they reflect what people want from property. The 'idea of property' – which this article suggests includes home – is being used here to investigate if property systems are serving people (as they should i.e. based on what people desire from property i.e. home) and, if not, to consider what changes may need to be made. The theorisation can thus be justified on this basis i.e. that it will ensure that home beliefs about property become the reality, in private property systems, via the elevation of home to the status of a *thing*. Property systems must then protect and ensure that *thing* for all individuals. The theorisation will align the private property system with people's 'everyday beliefs' about property in housing, as including home, in this way. While further empirical research is warranted to confirm the extent to which home is property according to the beliefs of everyday Australians, the theorisation can, in the meantime, be tentatively justified as ensuring these beliefs in property.[254] Finally, Babie's, Burdon's and Rimini's work is expressly acknowledged and drawn upon here, as they have promoted the 'idea of property' in property theory, and demonstrated its usefulness (albeit in a different way in their work).[255] They say

[253] Sheppard, Gray and Phillips, above n 10, 4: A relevant finding is that 'Australians are just as likely to buy housing for non-financial reasons (such as emotional security, stability, and belonging) as financial reasons (such as investment or financial security)'. Similarly, the Australian Housing and Urban Research Institute's 2020 report found that 'safety and security' are fundamental aspects of housing for Australians: see AHURI Report – The housing aspirations of Australians, above n 10, 3: 'Overwhelmingly, the key attribute households seek from their housing is 'safety and security'.'

[254] On empirical research in property law, see Susan Bright and Sarah Blandy (ed), *Researching Property Law* (Palgrave, UK, 2016). See especially Chapter 3, 'Socio-legal Approaches to Property Law Research' by Sarah Blandy, starting on page 24; and Chapter 4, 'The Empirical Approach to Research in Property Law' by Lisa Whitehouse and Susan Bright, starting on page 43.

[255] Babie, Burdon and da Rimini, above n 9, 802 and 838.

the 'idea of property' – what ordinary people think property is – will 'provide insight into many pressing social and political problems'.[256]

IV PRACTICAL USEFULNESS

The new theorisation will be practically useful – as a framework for future scholarship – in at least two main ways.

A *Articulating distributions of home*

This becomes possible through the theorisation's conceptualisation of home as a *thing*. (Home's *thing*-hood provides the language with which to speak of home – the experience – in property distributive terms.) Legal scholarship on home might, through the lens of the theorisation, consider how laws distribute more or less of home to particular groups (thereby extending beyond a pure legal analysis of how laws impact on home). In doing so, legal scholarship will first need to examine and establish how laws impact on home, before proceeding to the distributive analysis. Yet, thinking about home as a *thing* naturally prompts an articulation of its distribution. This kind of property scholarship fits squarely within the kind of scholarship envisaged by the authors of *A Statement of Progressive Property*, with their concern for 'just social relationships' and 'just distribution'.[257]

Articulating distributions of home, under property, is valuable work. It will reveal who in a society is receiving more or less (as the case may be) of the experience of home because of property. Patterns of disadvantage may emerge, whereby, for particularly vulnerable groups, aspects of home may be lacking. Indigenous Australians and those born overseas (who make up half of all Australia's homeless population), and tenants (who comprise vulnerable sub-groups, such as people on low incomes) come to mind.

Tenants, it has been argued, might experience less home than owners under freehold title, as a result of differences currently existing between these tenures.[258] Freehold owners are provided with unlimited duration of tenure, extensive rights of control, and the ability to dispose of the house for profit.[259]

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[256] Ibid, 802.
[257] Alexander, Penlaver, Singer, and Underkuffler, above n 8, 743-744.
[258] Tyrer, 'Home in Australia' above n 3, 375.
[259] Ibid.

'[G]reater security' may result from their unlimited duration of tenure.[260] Similarly, security may result from knowing that, as a freehold owner, one may dispose of the asset for monetary value.[261] They may thus experience home in a superior way to tenants[262] who, by contrast, may feel less secure (or insecure) because they typically have a short duration of tenure and live with the risk of eviction by a landlord[263] (in some cases on a 'no grounds' basis[264]).[265] It has been said that to 'never be sure whether ... you will be allowed to stay for another year ... is ok for a student, or for someone working ... but not for households'.[266] Tenants may also feel less able to develop identity (another part of home) in their place because of this, and because of restrictions on what they may change about the place (again, as compared to freehold owners, who typically do not encounter the same restrictions).[267] Restrictions imposed by landlords as a matter of contract, under residential tenancy agreements, on keeping pets, may also be inhibiting of the home experience as relationships, as residents are deprived of pets' companionship and related wellbeing benefits.[268] The Council to Homeless Persons has explained that: 'For many people, however, pets are important

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[260] Ibid, 376-377.
[261] Ibid, 380, citing Susan Bright and Nicholas Hopkins, 'Home, Meaning and Identity: Learning from the English Model of Shared Ownership' (2011) 28(4) *Housing Theory and Society* 377, 382-3 and 386.
[262] Ibid, 375. See also, Peter Saunders, *A Nation of Home Owners* (Unwin Hyman, London, 1990); and Ilan Wiesel, 'Mobilities of Disadvantage: The Housing Pathways of Low-income Australians' (2014) 51(2) *Urban Studies* 319, 325-326.
[263] Tyrer, 'Home in Australia' above n 3, 376-377. It is acknowledged that freehold owners may also feel insecure due to a risk of having their homes repossessed by a bank if their home is mortgaged and they experience financial instability: Fox, above n 2, 237. And at 238-239.
[264] In NSW, see *Residential Tenancies Act 2010* (NSW), ss 84 and 85. In Victoria, no grounds terminations have been abolished. Impacts of these are discussed in Consumer Affairs Victoria, 'Security of tenure: Residential Tenancies Act Review' (Issues Paper for Residential Tenancies Act Review, November 2015), 16.
[265] It is acknowledged that some tenants prefer the flexibility to leave which comes with having a short duration of tenure. See Chris Martin, 'Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Term Agreements' (2018) 7(1) *Property Law Review* 184 and Alan Morris, Hal Pawson, and Kath Hulse, 'I wouldn't want to buy even if I had the money.' The rise of renters by choice', *The Conversation* (online, 10 February 2020) < https://theconversation.com/i-wouldnt-want-to-buy-even-if-i-had-the-money-the-rise-of-renters-by-choice-130696>.
[266] Magnus Hammar, 'Naming and Shaming' (2007, January) *Global Tenant International Union of Tenants ' Quarterly Magazine* 1, 1, as cited in Dr Nathalie Wharton and Dr Lucy Cradduck, A Comparison of Security of Tenure in Queensland and in Western Europe' (2011) 37(2) *Monash University Law Review* 16, 16.
[267] Tyrer, 'Home in Australia' above n 3, 379.
[268] See discussion in Consumer Affairs Victoria, 'Rights and Responsibilities of Landlords and Tenants' (Issues Paper for Residential Tenancies Act Review, 2016), 22 ('CAV Issues Paper').

members of their household.'[269] Property may be distributing more of the experience of home to freehold owners, than to vulnerable tenants, in these ways. The following comment is relevant: 'Property is strongly implicated in various forms of social exclusion, both symbolic and material.'[270]

The distribution of home between freehold owners and tenants is something which residential tenancy laws can address and indeed must address given the increasing numbers of individuals who rent and for longer.[271] By affording tenants certain rights, these laws may enhance tenants' experience of home, as noted earlier.[272] For example, via the abolition of no reason notices to vacate,[273] a requirement that landlord's offer tenant's a minimum three year lease-term,[274] and tenant's rights to keep pets.[275] However, this article considers that there is also a structural issue to be addressed in property, as follows. Freehold ownership, because of the rights associated with that tenure, might be 'more conducive to home than leasehold'.[276] That essentially means that tenants receive less home than freehold owners, period. Short of abolishing the tenures themselves, it seems this can only really be addressed by ensuring more people have access to freehold ownership i.e. to distribute home justly in this way, given that tenure may be more conducive to home as argued in earlier work.[277] This means, practically, prioritising ownership of housing for home's sake, rather than for investment purposes. Governments ought to consider policies directed

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[269] See Council to Homeless Persons, Submission to Consumer Affairs Victoria's 'Rights and Responsibilities of Landlords and Tenants' (Issues Paper for Residential Tenancies Act Review, 2016) 5.

[270] Davies, above n 31, 116.

[271] Beer, above n 74, 255, 258 and 266-267. See also K Hulse, T Burke, L Ralston and W Stone, 'The Australian private rental sector: changes and challenges', *Australian Housing and Urban Research Institute*, Positioning Paper No. 149, July 2012, as cited in Lenny Roth, Private rental housing and security of tenure, NSW Parliamentary Research Service – e-brief, October 2015 and CAV Options Discussion Paper, above n 74, 5.

[272] Tyrer, 'Home in Australia' above n 3, 381.

[273] Victoria has abolished no reason notices to vacate, except in limited circumstances. See *Residential Tenancies Amendment Act 2018* (Vic), s 240 (Part 6 repealed).

[274] Further, tenants could be conferred rights to terminate during the fixed term. See further, Adrian Bradbrook, 'Rented Housing Law: Past, present and future' (2003) 7 *Flinders Journal of Law Reform* 1, 8-10.

[275] Victoria has introduced new provisions which – effectively – allow tenants to keep a pet. The tenant may keep a pet with the consent of the landlord (which must not be unreasonably refused), or by Tribunal order. See *Residential Tenancies Amendment Act 2018* (Vic), section 61 (New Division 5B inserted in Part 2). See also relevant discussion in CAV Issues Paper, above n 268, 22.

[276] Tyrer, 'Home in Australia' above n 3, 375, and sources discussed in that part.

[277] Ibid, 375-376 and at 381.

toward this end. A policy goal should be to assist tenants to become freehold owners, if they wish.

> Unfortunately, Australian laws exist which prefer investors seeking to acquire homes in pursuit of financial gain. Those laws provide tax concessions to Australian investors in residential property, and thus seem to go against the flourishing of aspiring owner-occupiers seeking (a house for) home.[278]

Presenting the problem of home, in such terms as above, characterises it for what it really is – a problem attributable, at least in part, to the institution of private property. The problem is minimised when the focus is solely on how discrete areas of law impact on home, rather than also considering its distribution.[279] Further, the role of the private property system may be obscured, such that the problem's real nature – as distributional and institutional – is not revealed. If the problem is seen for what it is, however, as a property system problem, then it can be argued that the state – as the arbitrator of private property systems – is responsible for addressing any unfair distributions of home. The state carries the responsibility for ensuring a just distribution of things essential to human flourishing,[280] including the experience of home, as theorised above.

To summarise, because home – the experience – is necessary for all humans to flourish, legal scholarship should be concerned with its distribution. Laws are implicated in its distribution, in unequal ways, as demonstrated. This impacts on vulnerable groups. There is scope for change in private property, both in terms of specific legal doctrines, as well as structurally in terms of ownership distributions.

B *Support for home*

From a property law theory perspective, and building on Fox O'Mahony's work, the theorisation will generate support for home.[281] The theorisation demonstrates that home is a real thing,[282] notwithstanding that it is 'an experiential, intangible and seemingly un-provable phenomenon'.[283] Drawing on

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[278] Ibid, 381.
[279] Rosser, above n 11, 170 to 171. Refer to footnote 235 and citations therein.
[280] Alexander, 'Ownership and Obligations', above n 8, 6.
[281] Fox O'Mahony, above n 4, at 157 and 167.
[282] Ibid, 157-158.
[283] Ibid.

research in other disciplines, as highlighted by Fox O'Mahony, makes this possible.[284] This work has paved the way for this article theorising home as a thing capable of being the subject matter of property, and previous work on the experience of home.[285] The theorisation has practical relevance in that it will enable scholars 'to interrogate specific legal doctrines and decisions'[286] from a home experience perspective, and to explore home's distribution as a thing under property.

V CONCLUSION

Home's theorisation reflects what is already happening under private property, in that property impacts home (a *thing*), thereby distributing it. The theorisation makes this explicit, by making the case for home's thing-hood. At its core, the theorisation's main goal is the protection and just distribution of home by property. An important point, made throughout, is that home is for *all* people, to ensure flourishing and personhood, and thus private property's legitimacy (not just vis-à-vis housing, but generally, given housing's relevance to all people). Implications for the state included that it must increase the levels of affordable housing stock in Australia (without a house, it is impossible to fully experience home), pursue policies to prevent homelessness, and develop laws which embody the conditions for home (namely, housing stability and housing control).[287] The state is responsible for all of this. The human flourishing theory of property provides a basis for this, in saying that the state must intervene, as appropriate, to ensure a just distribution of things essential to flourishing. Home is essential to human flourishing, according to the theorisation presented herein. The personhood theory also supports the just distribution of things, to ensure personhood, according to Waldron's analysis of Hegel.[288]

Regarding justifications for the theorisation – of home as capable of being the subject matter of property – it was argued that it would ensure human flourishing and personhood actually manifest through housing, thereby legitimising private property itself – through housing – on these bases. The theorisation is thus important for private property's legitimacy. Additionally, the

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[284] Fox, above n 2, 3-4, 24 and 134.
[285] Tyrer, 'Home in Australia' above n 3.
[286] Fox O'Mahony, above n 4, 158.
[287] These conditions, and their importance to home, are theorised in an earlier article. See Tyrer, 'Home in Australia' above n 3, 361-374.
[288] Refer above Part II, under 'E. Home for all'.

theorisation will ensure property aligns with what every day Australians want from housing property, which the theorisation suggested was home – the experience – based on relevant empirical research. Further research is warranted to confirm this suggestion, however.

Regarding the theorisation's usefulness, it provides a framework for articulating distributions of home. As between landlords and tenants, for example. Further, it will generate support for home – as an experience – requiring protection under private property.[289] The theorisation unpacked how that might occur, in terms of the design of private property systems.

Regarding future scholarship, the theorisation concludes by suggesting the following research questions be further explored: Is there a just distribution of home in Australia under private property law? What areas of law impact on, and distribute, home? Are these areas of law 'property' (i.e. a part of the private property system) because they regulate people's relationships with the *thing* of home?[290] Should they be characterised as such? Property's vastness, not to mention its importance as an institution affecting people's lives, is revealed by the theorisation of home herein.

[289] Fox O'Mahony, above n 4, 157 and 167.

[290] On the broadness of 'property' as a concept (and the legal rights included), see Davies, above n 31, 115-116. See also, Underkuffler, above n 38, 12; and Harris, above n 26, 146 and 149.

ARTICLE THREE: ‘‘ASSETS FOR CARE’ ARRANGEMENTS: THE CURRENT STATE OF THE LAW (AND ITS WEAKNESSES) FROM THE PERSPECTIVE OF HOME’

ARTICLE THREE: STATEMENT OF AUTHORSHIP

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This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:

Date:

13 December 2022

‘Assets for care’ arrangements: The current state of the law (and its weaknesses) from the perspective of home

Samuel Tyrer[*]

This article highlights that older Australians have lost their homes (and other assets) when so called ‘assets for care’ arrangements have not worked out. Further, it highlights that the existing law is inadequate to respond to this problem because it does not provide older persons with accessible remedies for their losses, that is, orders returning their assets, or for monetary compensation in lieu. The Australian Law Reform Commission’s 2017 Report titled Elder Abuse: A National Legal Response — and existing legal scholarship — has previously highlighted these points. This article usefully reviews that scholarship and distils its overall findings. It then makes a new normative claim, which is that the existing law — as a result of its noted inadequacy — potentially undermines the experience of home for older persons. Without access to remedies, older persons might not be able to afford another home in which to live, and in which to experience home — a feeling of security, the expression of self-identity, and relationships and family.

I Introduction

The concerns of this paper are vividly illustrated by the following story of Len. Len was an 82-year-old widower. He sold his original home after his wife’s death.[1] He purchased a new home, with a house and a separate granny flat. His daughter lived in the house. He lived in the granny flat. He transferred legal title to the property to his daughter. In exchange, he was cared for by his daughter.[2] Unfortunately, their relationship ultimately broke down. Len moved out of the granny flat. He thus lost his home under the arrangement. He may have been left without a home, but for the fact he was able to borrow funds to obtain new home (something which, at such an advanced age, may have undermined his sense of security in that home).[3] Len’s story is real (from the

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1 *Swettenham v Wild* [2005] QCA 264, [18] (Atkinson J).

2 Ibid.

3 Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29(4) *Journal of Law and Society* 580, 606, quoting RJ Lawrence, ‘Deciphering Home: An Integrative Historical Perspective’ in David N Benjamin (ed), *The Home: Words, Interpretations, Meanings and Environments* (Avebury, 1995) 60: ‘The “security” which allegedly results from owner occupation must be considered in the context of the “increasing proportion of owner-occupiers in Britain, North America, and other industrialized countries who are unable to meet their mortgage payments and eventually become depossessed’. See also Tina Cockburn, ‘Equitable Relief to Enforce Family

case of *Swettenham v Wild*).[4] Similar stories can be told in respect of other older persons in Australia.[5]

Indeed, this article highlights that older Australians (like Len) have lost their homes (and other assets) when so called 'assets for care' arrangements have not worked out.[6] Further, it highlights that the existing law is inadequate to respond to this problem because it does not provide older persons with accessible remedies for their losses, ie, orders returning their assets, or for monetary compensation in lieu. The Australian Law Reform Commission's 2017 Report titled *Elder Abuse: A National Legal Response* ('ALRC Report') — and the scholarship relied on in that report — has previously highlighted these points.[7] This article's main contribution to that scholarship is a normative claim, which is that the existing law — as a result of its noted inadequacy — potentially undermines the experience of home for older persons.[8] Particularly, it fails to empower older persons (financially) to establish another home by not providing them with accessible remedies, such that they might not be able to afford to establish another home[9] (in which the experience of home takes place).[10] Their experience of home is thus impacted and undermined by law. That is concerning because the experience of home — understood by this article to mean a feeling of security, the experience of self-identity, and relationships and family — is central to a person's wellbeing.[11] As such, the claim this article makes — that existing laws

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Agreements' [2008] (86) *Precedent* 41, 43.

4 *Swettenham v Wild* (n 1).

5 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, 2017) 206 [6.13] ('ALRC Report'): 'Stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense.' See also case studies in Part 3 of this article.

6 ALRC Report (n 5) 203–4 [6.3]. 'Assets for care' arrangements are sometimes also referred to as 'family agreements', 'private care agreements', 'personal services contracts', or 'lifetime care contracts', as explained in Seniors Rights Victoria ('SRV'), *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (Guide, 2012) 32 <http://seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf>. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

7 ALRC Report (n 5) 209–14 [6.27]–[6.47]; and especially Eileen Webb and Teresa Somes, 'What Role for the Law in Regulating Older Persons' Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements in Australia' in Ralph Ruebner, Teresa Do and Amy Taylor (eds), *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333.

8 On the experience of home, see Samuel Tyrer, 'Home in Australia: Meaning, Values and Law?' (2020) 43(1) *University of New South Wales Law Journal* 340.

9 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, 26, 50 ('What Role for the Law'). Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse through Assets for Care Arrangements?' (2016) 22 *Canterbury Law Review* 120, 123 ('What Role for Real Property').
In the context of remedies under the failed joint venture doctrine discussed below, see: 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, 164. ALRC Report (n 5) 213 [6.42].

10 Fox (n 3) 590: the physical home is 'the locus for the experience of home'.

11 On the experience of home, see Tyrer (n 8).

undermine this experience of home — provides a compelling justification for government to pursue news laws to assist older persons in 'assets for care' cases.[12] Separately, this article also serves as a current statement of the law on 'assets for care' arrangements, based on a comprehensive review of key legal scholarship in this area. It usefully summarises the key overall findings of that scholarship on the state of the law.

This article is divided into five parts. Part I is this Introduction. Part II examines 'assets for care' arrangements in detail, including their nature, prevalence and benefits. Part III details what can happen 'when things go wrong' under arrangements.[13] Older Australians have lost their homes and other assets as the case studies in this part demonstrate. Part IV presents a critique of the existing law from the ALRC Report, and the scholarship of Somes and Webb, and Barkehall-Thomas, which is — broadly — that the existing law fails to provide older persons with accessible remedies for losses (including of their homes) under these arrangements, and is thus inadequate.[14] Relevantly, lack of accessible remedies means that older persons might not be able (financially) to establish another home, and thus to experience home (security, identity and relationships) in that place.[15] This problem should be addressed through the introduction of new laws to give older persons appropriate legal redress in these cases. And that should happen urgently,[16] noting that for older persons — a potentially vulnerable cohort of Australians — the loss of home (and the related stability this place, and the experience, brings) is likely to be particularly devastating. Indeed, relocation changes can impact on health outcomes.[17] Further, as Webb has noted:

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12 The concept of home is useful because it 'enables us to identify those problems in need of policy attention; to develop a narrative to express them; and to generate support for solving them': Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 167.

13 ALRC Report (n 5) 206 [6.13]. The ALRC recommends that state and territory tribunals be given new jurisdiction to hear 'assets for care' claims for a low cost and accessible dispute resolution process. That proposal will be explored in a separate article on a new 'assets for care' jurisdiction, as it is beyond the scope of this article critiquing the current state of the law.

14 See especially, ibid 209–14 [6.27]–[6.47]; Barkehall Thomas, 'Families Behaving Badly' (n 9); Somes and Webb, 'What Role for the Law' (n 9); and Somes and Webb, 'What Role for Real Property' (n 9).

15 On the experience of home, see Tyrer (n 8) 341.

16 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* 52, 85; and Somes and Webb, 'What Role for the Law' (n 9) 25.

17 See, eg, Aviva Freilich et al, 'Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?: Summary' (Report, November 2014) <www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>, and studies cited therein:

> The impact of a change of residence, particularly a sudden or involuntary one, heightens the risk of physical and psychology health implications in both the short and longer term. Furthermore, relocation that takes place without regard to the person preferences of older people gives rise to feelings of powerlessness.

Rosemary Hiscock et al, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18(1–2) *Housing, Theory and Society* 50. And refer generally, Tyrer (n 8).

> Seniors are at a stage in their lives when tenure is especially important. Seniors place a high value on their home environment as they are less likely to be in full-time employment and consequently more likely to spend a greater time in their homes and in their neighbourhoods than at any other period in their lives.[18]

Further again, their advanced years most likely preclude them from entering the workforce to pay for another home.[19]

II 'Assets for care' arrangements

A Nature

'Assets for care' arrangements are occurring in Australia,[20] and in other similar societies, such as Canada.[21] They are not easily identifiable, however, as they are made between private individuals.[22] '[T]heir essence' is an exchange of 'assets for care'.[23] An older person transfers legal title to their home (or other assets) to another person, usually a friend or family member. In exchange, the older person is provided with care and accommodation by that other person ('the caregiver').[24] Arrangements can vary, however, as regards the parties and assets transferred.[25] The caregiver might, as noted, be a family member (such

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18 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, 59.

19 Ibid 59: 'From a financial perspective, if something goes wrong it is unlikely that seniors will be able to rebuild and recoup losses.'

20 See generally, ALRC Report (n 5) 203–14 [6.1]–[6.47].

21 Brian Herd, 'The Family Agreement: A Collision between Love and the Law?' (2002) 81 *Reform* 23, 26:

> 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.

22 Rosslyn Monro, 'Family Agreements: All with the Best of Intentions' (2003) 27(2) *Alternative Law Journal* 68, 68.

23 Somes and Webb, 'What Role for the Law' (n 9) 25. Somes and Webb, 'What Role for Real Property' (n 9) 121–2.

24 ALRC Report (n 5) 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.' See also Somes and Webb, 'What Role for Real Property' (n 9) 121–2: 'Assets for care arrangements are difficult to define. The essence is that an older person's family (usually an adult child) receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases care of, the older person as he or she ages'; Somes and Webb, 'What Role for the Law' (n 9) 25: 'Although there are many possible variations in the structure of these arrangements, their essence is that an older person's family receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases care of, the older person as he or she ages'; and SRV (n 6) 32: 'typically involve a transfer of an older person's property (usually the home) or other assets to a trusted family member in exchange for a promise of long-term care and support'. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

25 Somes and Webb, 'What Role for the Law' (n 9) 25: 'Although there are many possible variations in the structure of these arrangements, their essence is that an older person's family receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases care of, the older person as he or she ages'; and SRV (n 6) 31:

as a son or daughter, or niece or nephew), or a friend or acquaintance.[26] The assets transferred might be the older person's home (or proceeds from its sale), shares, or money.[27] The care provided by the caregiver can similarly vary; it might consist of food, nursing assistance, emotional or financial support, or accommodation; or a combination of these. Accommodation, if included, might be provided in a new home purchased as part of the arrangement, or in an existing home of the older person or the caregiver.[28] Renovations might be made, such as the construction of a 'granny flat'.[29] Arrangements can thus take different forms, with such variations affirming that 'the permutations of family agreements are "almost infinite".'[30]

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 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.

26 Somes and Webb, 'What Role for the Law' (n 9) 25: 'Of course, such accommodation arrangements are not entered into invariably with family members; in some cases such arrangements can be made with other relatives, friends or even acquaintances.'

27 Ibid: 'Not all older people own their own home but can be subject to family accommodation arrangements through contributions of savings, investments and other assets.'

28 Somes and Webb, 'What Role for Real Property' (n 9) 121–2:

> These arrangements may include the adult child moving in with the older person; a gift of the older person's home to the child; the purchase of a new home to accommodate a larger household; renovations to an existing home; the construction of an ancillary dwelling (granny flat) or where the older person simply occupies a room in an existing house.

Somes and Webb, 'What Role for the Law' (n 9) 25:

> Such arrangements include accommodation 'solutions' that range from the purchase of a new home to accommodate the larger household; the archetypal 'granny flat' where an older member or members of a family live in a self-contained extension; a separate structure on a family member's property; the construction of an additional story or some other form of renovation on an existing house.

29 Somes and Webb, 'What Role for Real Property' (n 9) 121–2:

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30 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 136 [4.4] ('*Older People and the Law*'), citing Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths, 2004) 260.

B Prevalence

In terms of their prevalence, the ALRC Report has noted that precise data on the number of arrangements is not available.[31] However, anecdotal evidence reveals that 'assets for care' arrangements are occurring in Australia. The ALRC Report, or more particularly the submissions made to its recent inquiry, contain such evidence.[32] The 2007 Report of the Commonwealth Parliamentary Committee Inquiry on *Older People and the Law* similarly contains anecdotal evidence that arrangements have been used in Australia, and that some arrangements have caused problems for older people.[33] In their 2012 guide for lawyers on 'assets for care' arrangements, Seniors Rights Victoria ('SRV') has stated:

> Financial abuse is the most prevalent form of abuse seen by SRV. This abuse most commonly manifests as financial loss arising from the disposal of an older person's assets in exchange for their future care and accommodation, often under pressure from another party.[34]

Further, that 'the most common form of financial abuse' arises from a breakdown of 'assets for care' arrangements.[35] Case law is a further source of anecdotal evidence — in addition to evidence from organisations working with older persons — that arrangements have been used in Australia.[36]

In the future, the use of arrangements might be expected to increase in Australia, particularly noting that Australia's ageing population is increasing, and, as such, the numbers of older persons who might potentially seek to enter arrangements.[37] Somes and Webb have observed: 'As the population ages, and

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31 ALRC Report (n 5) 204 [6.7]: 'The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.' See also Monro (n 22) 72: 'While the extent of informal family accommodation agreements is not fully known, experience and cases indicate that the agreements are often informal, and this attribute has ramifications for the longevity of the agreement.' In Canada, the problem of a lack of precise data has also been noted — see Margaret Isabel Hall, 'Care for Life: Private Care Agreements between Older Adults and Friends or Family Members' (2003) 2 *Elder Law Review* 1, 9: 'One challenge for a Canadian research is the paucity of hard evidence about care agreements.'

32 ALRC Report (n 5) 203–14 [6.1]–[6.47].

33 *Older People and the Law* (n 30) 138 [4.10]: 'In its submission National Seniors noted that "Australia is seeing an increase in family care agreements".'

34 SRV (n 6) 5. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

35 Ibid.

36 Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 *Reform* 29, 31: 'Anecdotal and case law evidence indicates that most case agreements fail because of relationship breakdowns.' Refer to the case studies discussed later in this article, which are drawn from reported cases involving disputes over property, following an 'assets for care' arrangement: *Swettenham v Wild* (n 1); *Callaghan v Callaghan* (1995) 64 SASR 396; *Field v Loh* [2007] QSC 350; and *Simpson v Simpson* [2006] QDC 83. Others have discussed these cases, and their work has informed the relevant discussion in Part III where cited: see Cockburn (n 3) and Monro (n 22).

37 Herd (n 21) 27:

> [V]arious factors suggest that family agreements, be they formal or informal, will increase in frequency in the near future. The factors suggesting this are:

the cost of housing rises in most Western nations, more and more older people will make the decision to reside with family. Rather a broad assumption. Such decisions are likely to be predicated on aspirations of mutual benefit.'[38]

C Benefits

Arrangements have a number of benefits, and, as such, 'can fulfil an important social purpose'.[39] For older persons, they are a way to 'remain in a familial and familiar environment';[40] family members or friends provide the older person with care, such that the older person can avoid institutional care.[41] Older persons thus receive care from persons close to them — rather than from strangers — which might be important to them 'for reasons of companionship and security',[42] and for maintaining independence.[43] Further, this familiarity 'can be such an important ingredient for happiness for most

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(1) The preference of older people to remain in a familial and familiar environment.
(2) The increasing financial independence of older people lending to greater financial choices in terms of how and who provides the care.
(3) The increasing inability of the aged care industry — hamstrung by, and historically dependent on, government funding — to accommodate and meet the demands of high quality care and, at the same time, remain viable.
(4) The increasing reluctance of government to pour money into what it sees as the bottomless pit of aged care.
(5) The government's preference, no doubt, to transpose responsibility further from itself to the family to ease the pressure both financially and from the relentless 'bad press' perspective it has had to confirm.

See also *Older People and the Law* (n 30) 137–8 [4.9], citing the Law Institute of Victoria's submission to the Inquiry:

> It was suggested however that the usage of family agreements will increase for a number of reasons: ... it is likely that family agreements — whether they are formal contracts or informal arrangements — will increase in the future given Australia's growing ageing population and that many older persons will arguably prefer to remain in a familiar and familiar environment and have a choice in terms of how and who provides them with care.

ALRC Report (n 5) 204 [6.7]: 'The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.'

38 Somes and Webb, 'What Role for the Law' (n 9) 26.

39 ALRC Report (n 5) 203 [6.3].

40 Herd (n 21) 27.

41 Committee on Legal Issues Affecting Seniors, *Private Care Agreements between Older Adults and Friends or Family Members* (BCLI Report No 18, British Columbia Law Institute, March 2002) 8–9 ('BCLI Report'): 'Fear of institutional care- the "nursing home" — is certainly a significant motivation for seniors seeking out private care agreements with family members or friends.'

42 Hall, 'Care for Life' (n 31) 1: 'A senior may prefer a live in caregiver for reasons of companionship and security, although regular home care visits might be objectively sufficient, and may prefer to have a friend or family member providing care and support (as opposed to a stranger).'

43 Herd (n 21) 25.

older people'.[44] Webb has thus concluded that arrangements 'can be the source of a considerable amount of ontological security',[45] noting security is an aspect of the experience of home.[46]

From the perspective of family members and friends, arrangements can enable the provision of care — by them — to older persons, where that might not have been possible otherwise because of 'the demands of paid employment'.[47] However, with an arrangement they may be able to give up employment — and so provide care to the older person — as they will have received assets under the arrangement.[48] Relatedly, arrangements are a way for older persons to financially assist 'younger family members and friends ... while (at the same time) providing for the senior's own needs.'[49] The logic here is that the arrangement gives the older person the comfort that they will be cared for as they age, and thus they may feel comfortable providing an early inheritance.[50] This also means inheritances are preserved, rather than dissipated on professional care costs.[51]

In Australia, this last point is likely to be seen as a particular benefit of arrangements. Indeed, the preservation (and possibly early provision) of inheritances is beneficial in current circumstances, where many younger Australians are struggling to enter home ownership because of rapidly increasing house prices, and thus an inheritance might be the difference between them buying a home, or not.[52] Somes and Webb have made the point:

> With housing affordability declining and an ageing population, family agreements involving shared property and/or pooled resources are common place and will become more so. This is not to be discouraged; the benefits of multi-generational living arrangements are many and include the provision of companionship, mutual support, *and financial and housing security*.[53]

Eventually, governments may also view arrangements as beneficial, in

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44 Ibid.

45 Webb (n 18) 66.

46 On the experience of home, see Tyrer (n 8) 349.

47 BCLI Report (n 41) 8; and Herd (n 21) 24.

48 BCLI Report (n 41) 8.

49 Ibid.

50 Although, in reality, providing an early inheritance may undermine the older person's security. See Somes and Webb, 'What Role for the Law' (n 9) 24: 'Such arrangements effectively "tap" into anticipated inheritances, generally known as inheritance impatience and may undermine an older person's housing and/or financial security.'

51 Hall, 'Care for Life' (n 31) 1; BCLI Report (n 41) 8; and Herd (n 21) 25.

52 The same observation has been made with respect to Canada. See BCLI Report (n 41) 7:

> Escalating property values in urban centres such as Vancouver have created a context which is conducive to private care agreements, and we may expect to see their use increase. Rising house prices make it more likely that younger adults will find it difficult to break into the market, increasing the likelihood of assistance from older family members and friends. At the same time, this property market has dramatically increased the 'house wealth' of seniors who, otherwise, have few assets and low income. The now extremely valuable family home is an irreplaceable once-in-a-lifetime windfall, courtesy of market forces few would have foreseen. The senior who is house rich but cash poor may be attracted to a scheme to purchase needed care with non-liquidated property, 'saving' the house for the senior (while alive) and for the caregiver (the transfer of quasi-inheritance).

53 Somes and Webb, 'What Role for Real Property' (n 9) 123 (emphasis added).

particular as a way for them to pass responsibility for aged care to the private sphere (that is, 'internalising care' within the family) and thereby 'reducing the financial burden on consolidated revenue'.[54]

D Financial elder abuse?

Financial elder abuse is the 'illegal or improper use of funds or other resources' of older persons.[55] Arrangements thus do not fall within the definition of financial elder abuse merely by their nature, and emphasising that most arrangements are initiated by older persons themselves (that is, not a stereotypical avaricious friend or relative)[56], and can be — in the ways noted above — beneficial from the perspective of older persons. It follows that arrangements are 'not inherently a form of elder abuse'.[57] (Somes has argued for existing problems to be characterised through the lens of older persons' vulnerability, rather than through an elder abuse paradigm.)[58] In this regard, it is relevant to note the tension between 'dignity and autonomy, on the one

54 Herd (n 21) 27.

55 Webb (n 18) 64. Webb explains that the WHO's definition of financial elder abuse is broad; it encompasses abuse committed by 'strangers and institutions', as well as person's close to older persons. Other forms of elder abuse include psychological, sexual and emotional abuse. For a discussion on the relationship between elder abuse and human rights law, see SRV (n 6) 20. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

56 BCLI Report (n 41) 9: 'Many care agreements are in fact initiated by seniors anxious to stay in their homes'; and Hall, 'Care for Life' (n 31) 1: 'Most legitimate care agreements seem in fact to be initiated by the senior who- unaware of the "what ifs" or pitfalls- might see the care agreement as simultaneously attaining a number of important objectives.'

57 ALRC Report (n 5) 206 [6.12], citing 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 (Article 4):

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

See Kyle (n 57) 9:

> Seniors Rights Victoria experience agrees that these agreements are 'not inherently a form of financial abuse or exploitation.' In fact, making this kind of association about an exchange of assets for care may discourage older people from getting advice as it infers that one would only need to obtain advice and formalise an agreement if one were in negotiation with an abuser. People tend to trust their family and feel that seeking advice indicates a level of suspicion which if communicated would hurt feelings and harm relationships.

SRV (n 6) 31:

> A transfer of assets between an older person and their adult children or other family members is not, of course, inherently abusive. Problems generally only arise because arrangements have not been properly thought through, the situation has changed, and there is no written documentation.

The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

Hall, 'Care Agreements' (n 36) 30:

> these are not problems associated with intentional exploitation or abuse by caregivers but problems that will typically arise where the parties have not considered the full range of implications of a 'care agreement' and the long term living relationship it entails.

58 Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform in Failed Family Accommodation Arrangements' (2019) 12(1) *Elder Law Review* 1.

hand; and protection and safeguarding, on the other. Autonomy and safeguarding, however, are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.'[59]

Further, stereotyping arrangements as inherently abusive by caregivers should be avoided as this 'is extremely unfair to caregivers, who may have given up significant opportunities in order to provide services of real value to their older friends or relatives.'[60] When arrangements end this is not always because of any financial abuse. An arrangement might end, for example, as a result of the caregiver's financial difficulties, such as losing their place of residence (and so naturally also impacting the older person).[61]

Stereotyping arrangements as abusive can also cause harm to older persons. SRV has explained: 'making this kind of association about an exchange of assets for care may discourage older people from getting advice as it infers that one would only need to obtain advice and formalise an agreement if one were in negotiation with an abuser.'[62] Without advice, older persons might enter into arrangements that are against their interests, or which do not sufficiently protect their interests.[63] The abuse stereotype should thus be avoided. Of course, this article acknowledges that financial elder abuse can occur in the context of these arrangements, such as where the caregiver steals money from the older person while living with them, or where they do not provide the care they promised to provide, in exchange for the older persons' assets.[64] Finally, there is 'the grey area between thoughtless practice and

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59 Rosalind F Croucher, 'Elder Financial Abuse: Insights from the ALRC's Elder Abuse Inquiry' (Speech, Blue Mountains Law Society: 2017 Succession Law Conference, 17 September 2017) <www.humanrights.gov.au/about/news/speeches/elder-financial-abuse-insights-alrcs-elder-abuse-inquiry>.

60 BCLI Report (n 41) 9.

61 Hall, 'Care Agreements' (n 36) 31:

> A caregiver's financial setbacks may result in significant problems for the senior. The caregiver may lose (what is now) his or her home, leaving the senior with no place to live and no means of support.

62 Kyle (n 57) 9. See also ibid; and ALRC Report (n 5) 206 [6.12].

63 Ibid.

64 *Older People and the Law* (n 30) 142 [4.27]:

> In regard to financial abuse or mistreatment, the Victorian Government observed that 'there is potential for abuse of informal arrangements' and that there is 'a clear crossover here with the issue of financial abuse'. The Committee heard that there are a number of possible scenarios where the older person can suffer detriment in relation to a family agreement, including:
>
> - A family member uses the opportunity presented by living with the older family member to take financial advantage of the older family member;
> - A family member gains access (as nominee) to the older family member's Centrelink payments and does not account for their use;
> - A family member gains unrestricted access to and misuses the older family member's bank account and/or other assets;
> - A family member obtains rent-free accommodation by living in the home of the elderly person, but without providing any benefit in return; and
> - A family member arranges the sale of the older family member's home contrary to their best interests, forcing them to live elsewhere.

outright theft'[65] which, as discussed below in Part 3, can occur when a caregiver unfairly retains an older persons' assets following the breakdown of an arrangement.

What one finds, then, is that arrangements can be beneficial for older persons and their caregivers. This affirms that: 'Families remain a primary source of support for older people and intergenerational living arrangements can and do provide financial and lifestyle benefits for families.'[66] However, the reality is that some arrangements do not turn out that way, as we will see in the next Part.

III 'When things go wrong'[67]

Arrangements can fail even though they might have started out successfully. When that happens 'there can be serious consequences for the older person', including the loss of their home (or other assets) which they have transferred under the arrangement,[68] and which the caregiver might thus retain unfairly. This Part details reasons why arrangements fail and presents case studies of the consequences for older persons when they do.

A Reasons arrangements fail

Arrangements generally fail because the older person's and the caregiver's relationship breaks down.[69] Commonly that is caused by the parties circumstances changing in ways they have not anticipated and following which they cannot agree a way forward.[70] The older person's care needs might increase, or the caregiver's relationship status might change. Other examples of changes to circumstances include the caregiver having to move to a different location, or predeceasing the older person. These changes can result in disputes between the parties, and the arrangement ending.[71] Monro has

65 SRV (n 6) 7. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

66 Somes and Webb, 'What Role for the Law' (n 9) 27.

67 ALRC Report (n 5) 206 [6.13].

68 Ibid 203–4 [6.3]: '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.'

69 Hall, 'Care Agreements' (n 36) 31: 'Anecdotal and case law evidence indicates that most case agreements fail because of relationship breakdowns.'

70 Monro (n 22) 70:

> failure to consider the long-term consequences of the agreement at the time of forming it often leads to disputes and the breakdown of the relationship between the parties. The events which can lead to the development of disputes include changes in the health of the older person which require the relative to provide a greater level of care, the desire of the relative to move homes, the breakdown of the relative's marriage, or the isolation of the older person from the communities in which they were previously living.

See also Hall, 'Care Agreements' (n 36) 30; Hall, 'Care for Life' (n 31) 2; and BCLI Report (n 41) 10.

71 ALRC Report (n 5) 206–7 [6.15], citing Monro (n 22) 70. See also Hall, 'Care Agreements' (n 36) 30.

explained: 'A failure to consider the long-term consequences of the agreement at the time of forming it often leads to disputes and the breakdown of the relationship between the parties.'[72]

Arrangements also fail because of particular 'psycho-dynamics' — or emotional tensions — which can arise under arrangements between friends or family members.[73] Unmet expectations, in particular, can lead to relationships — and hence arrangements — failing. Hall has explained:

> Especially where senior and caregiver are parent and child, both parties may enter the relationship with unrealistic and emotionally charged expectations of how the living relationship will play out. When expectations are not met, relationships can deteriorate and become unhappy and unhealthy for both parties, who may not see a way out.[74]

Another 'triggering event' that can occur is the sense of being controlled. The older person might feel controlled by the caregiver; for example, because the caregiver has placed restrictions on the older person driving, or in the home environment.[75]

B Consequences for older persons

The consequences for older persons — when arrangements fail — are discussed below. Case studies are also presented for context.

1 Loss of home (or other assets)

Older persons can lose their homes and other assets, which they have transferred under arrangements.[76] Particularly, if the relationship between the parties has become toxic, or if the assets are particularly valuable (financially or non-financially), the other party might deny the older person has any rights in the assets. They can seek to do so, noting they will have legal title to the assets following the transfer to them by the older person.

To further understand how older persons can lose their assets — including their homes — it is also relevant to note that older persons will potentially have no contractual rights on which they can rely.[77] Arrangements 'are often made orally' and 'often ... without legal advice',[78] and might not be binding as contracts.[79] Monro has even gone so far as to state: 'It is a well-established principle that family agreements are not usually contractual in character or intended to create legal relations.'[80] Similarly, older persons potentially will

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72 Monro (n 22) 70. See also Hall, 'Care Agreements' (n 36) 30; and Hall, 'Care for Life' (n 31) 2.

73 Hall, 'Care Agreements' (n 36) 31; and BCLI Report (n 41) 10.

74 BCLI Report (n 41) 10. See also Hall, 'Care Agreements' (n 36) 31.

75 Hall, 'Care Agreements' (n 36) 31; and BCLI Report (n 41) 10.

76 ALRC Report (n 5) 203–4 [6.3]. See also Hall, 'Care for Life' (n 31) 1.

77 SRV (n 6) 47: 'If there are clear difficulties with proving intention to create legal relations and the terms of the agreement are uncertain, an action in contract may not be suitable.'

78 ALRC Report (n 5) 206 [6.13]. See also Hall, 'Care for Life' (n 31) 2. Hall, 'Care Agreements' (n 36) 29.

79 ALRC Report (n 5) 206 [6.14]: 'When things go wrong, a failure to clearly document the agreement may mean that the agreement is unenforceable.' See also Monro (n 22) 68; Hall, 'Care Agreements' (n 36) 32; and *Older People and the Law* (n 30) 139 [4.15].

80 Monro (n 22) 68.

have no proprietary rights *expressly* conferred on them by arrangements.[81] In the case studies referred to below, none of the older persons expressly reserved such rights to themselves under their arrangement. The transfer of assets under arrangements can thus appear as a 'gift',[82] such that older persons have no clearly enforceable legal rights to 'their assets'. This explains how older persons can so easily lose their homes and other assets under arrangements.

The ALRC Report has explained:

> The key problem underpinning many family agreements is that the older person is typically giving up the certainty of registered legal title in one property (usually their home) in exchange for rights in relation to a new property and/or expectations of care and support. Those rights and expectations are often not explicitly discussed and agreed precisely within the family. The older person's rights with respect to the new property are typically not recorded on the title. As a result, the situation is one where the older person has forgone registered legal title in one property and may or may not have certain rights in contract or equity in the new property.[83]

2 Case studies

Submissions referred to in the 2007 Report of the Commonwealth Parliamentary Committee Inquiry on *Older People and the Law* confirm that there have been cases in which older Australians have lost their homes, or otherwise been exploited under arrangements. In particular, submissions of the Queensland Elder Abuse Prevention Unit,[84] State Trustees Ltd[85] and the

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81 The device of a life estate is unlikely to be used to protect older persons under informal arrangements, made without advice. However, that is not to say that the life estate could not be used as a protective device to protect older persons. As Hall has commented:

> Retention of a life estate would give the senior greater security, especially *vis* a *vis* third parties, than the lump sum transfer which typifies the care agreement ... The life estate does not *replace* the need for a detailed contract, however, where the parties wish to proceed with a care agreement. Retention of a life estate does not in itself resolve any of the 'what ifs' inherent in the long term care relationship, which may be provided for in a detailed contract.
>
> Hall, 'Care for Life' (n 31) 7.

82 Hall, 'Care Agreements' (n 36) 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, although it may be possible for the senior to have the 'gift' set aside on the basis of undue influence, unconscionability, or a resulting trust, or where the senior can show imperfect knowledge of the gift (that there was no intention to transfer full ownership).

83 ALRC Report (n 5) 210 [6.29].

84 *Older People and the Law* (n 30) 142–3 [4.28]:

> The Queensland-based Elder Abuse Prevention Unit (EAPU), which operates an information and support Helpline service for those who suffer elder abuse, informed the Committee that a number of reports of financial abuse received by the service over 2002-06 related to family agreements:
>
> > A number of financial abuse calls involve informal (verbal) family agreements. Unfortunately, calls where the son or daughter reneges on the assessment are common, often claiming the money/asset was given as a gift with no strings attached. The older person who could have been funding their own retirement may find themselves thrown onto the welfare system with no ability to recover the money other than through an expensive civil action. In some calls [sic] the older person may not only find themselves without cash or assets but the 'gifts'

Victorian Office of the Public Advocate[86] highlighted this problem, which has also been confirmed more recently by the ALRC Report. The case studies below seek to contextualise the problem for present purposes.

Barry, 85 years old

Barry lost his family home under an arrangement. Had he not been able to move in with one of his children, he might have been left without shelter. The ALRC Report explained:

> Barry, an eighty five year old man transferred his unencumbered home in the ACT to one of his adult children, Angela. Angela had promised to build a granny flat for Barry and take care of him until his death. There was no written agreement, however Barry had been living in his granny flat on Angela's property for approximately 5 years. Angela remarried and advised Barry that the arrangement could not continue and demanded he leave his home. Barry was devastated by Angela's actions, however was able to go live with another child, Stephanie and did not want to seek any legal recourse against Angela as he was 'too old and it was too hard' and he felt so ashamed about what had happened to him.[87]

Barry's scenario is from Legal Aid ACT's submission to the ALRC.

Len, 82 years old

Len lost his home under an arrangement. He was a widower who having sold his original home purchased a new home in Queensland, which he transferred to his daughter. Len continued to live in a separate granny flat on the Queensland property. Len's relationship with his daughter ultimately broke down, leading Len to move out of the granny flat. He thus lost his home under the arrangement. Len obtained alternative housing by borrowing funds. However, borrowing funds — especially at an advanced age — might undermine the experience of home by making individuals feel insecure.[88] Len's situation is from the case of *Swettenham v Wild*.[89]

Callaghan, 77 years old

Callaghan lost his home under an arrangement. He had been living with his daughter and granddaughter in a home which he purchased, but which was registered in the daughter's name. However, his daughter sold the home while he was away on holidays. This followed tensions in their relationship caused

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[sic] have adversely affected their pension entitlements.

85 Ibid 142–3 [4.28]: 'State Trustees Ltd indicated that, in its experience, family agreements " ... are an area of considerable risk to older people; they can result in significant depletion of the older person's assets for minimal tangible benefit".'

86 Ibid 143 [4.29]: 'The Victorian Office of the Public Advocate also indicated that it has " ... had experience of informal arrangements that have resulted in the exploitation of the older person".'

87 ALRC Report (n 5) 209 [6.26].

88 Fox (n 3) 606, quoting Lawrence (n 3) 60: 'The "security" which allegedly results from owner occupation must be considered in the context of the 'increasing proportion of owner-occupiers in Britain, North America, and other industrialized countries who are unable to meet their mortgage payments and eventually become depossessed'. See also Cockburn (n 3) 43.

89 *Swettenham v Wild* (n 1).

by Callaghan's new relationship.[90] Callaghan's situation is from the case of *Callaghan v Callaghan*.[91]

Mrs Field, 76 years old

Mrs Field lost money under an arrangement. Mrs Field was a widow who transferred $184,000 to a family from her church, who used the money to purchase a home where they all lived. Mrs Field was eventually asked to leave, but the money was not returned to her. She thus not only lost a significant sum of money, but also her place of living. Had she not been able to live with her children, she might have been left without shelter.[92] Mrs Field's situation is from the case of *Field v Loh*.[93]

Barbara and John

Barbara and John lost money under an arrangement. They had come to live at their son's home in Queensland, after selling their home in New Zealand. They transferred $170,000 to their son, to be used to extend the Queensland home for them. However, the son purchased a boat with the money. Barbara and John moved out of the son's home, but the money was not returned to them.[94] Barbara and John's situation is from the case of *Simpson v Simpson*.[95]

As seen in the cases of Barry, Len, Callaghan, Mrs Field, and Barbara and John, older Australians have lost homes and money — significant assets — when arrangements have not worked out, as the above case studies so clearly demonstrate. And, of course, there are flow on non-financial consequences associated with such losses. Regarding the loss of the home, in particular, a non-financial consequence is that the experience of home — security, memories and identity — will be impacted.[96] As Fox has noted, the physical home is 'the locus for the experience of home'.[97] It follows that not all of the consequences for older persons when assets are lost are readily apparent.

IV Inadequacy of existing law in overcoming loss of home

Existing law is inadequate to address the loss of home (or other assets) by older persons; it provides 'a lack of legal recourse for the older person'.[98] Existing law — for present purposes — is understood to constitute the following doctrines: estoppel, undue influence, unconscionable conduct, resulting trusts and the failed joint-venture doctrine.[99] It is these doctrines that

90 Monro (n 22) 70.
91 *Callaghan v Callaghan* (n 36).
92 Cockburn (n 3) 43.
93 *Field v Loh* (n 36).
94 Cockburn (n 3) 43.
95 *Simpson v Simpson* (n 36).
96 On the experience of home, see Tyrer (n 8) 340.
97 Fox (n 3) 590.
98 Somes and Webb, 'What Role for Real Property' (n 9) 123. At 120: 'There has been much discussion about the inadequacy of the present legal regime regarding Assets for Care arrangements.'
99 ALRC Report (n 5) 210 [6.31].

older persons typically must rely on to seek return of their assets given that, as noted, most will not have any contractual or proprietary rights expressly conferred on them under arrangements.[100] Relying on the ALRC Report, and on the work of Somes and Webb, and Barkehall-Thomas, the discussion below explains the particular inadequacies of the existing law.

A Inaccessible

Existing law is inaccessible to older persons, who face significant obstacles to seeking redress under the above doctrines. In particular, cost is an obstacle in that older persons may not have the necessary funds to initiate proceedings in the Supreme Courts, in which these actions are generally heard.[101] The Supreme Courts are expensive legal forums in which to seek a remedy.[102] According to the ALRC Report: 'action in the superior courts of the states and territories costs tens of thousands of dollars in legal fees and, even if successful, only a fraction of those costs are recoverable.'[103] This is likely to be a particular barrier for older persons who, if they have transferred their significant assets under an arrangement, might not have sufficient resources left with which to fund litigation.[104] Indeed, the Older Persons Rights Service in Western Australia has 'witnessed many cases where older people have lost their family home or life savings with no chance for redress.'[105] The Cairns Community Legal Centre Inc has similarly explained:

> by their nature, family agreements under an 'assets for care' arrangement involve the older person making either significant contributions or transferring title in property to the other person. Accordingly, when the arrangement breaks down, the older person is not usually in a position to be able to finance proceedings in a higher court for the matter to be determined.[106]

Another related factor contributing to the laws' inaccessibility is that legal aid funding is not usually available to older persons in these cases.[107] It has thus been said that the Supreme Court is 'arguably the most inaccessible jurisdiction in the country'.[108]

The existing law is also inaccessible for older persons because of the time it takes to run a Supreme Court proceeding. The ALRC Report has explained: 'such actions are lengthy processes that may take many years to be

100 Somes and Webb, 'What Role for Real Property' (n 9) 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.' See also ibid 210 [6.29]–[6.31].

101 The Supreme Courts have inherent jurisdiction in those matters. See also ALRC Report (n 5) 207–8 [6.20].

102 Ibid 207–8 [6.20]–[6.24]. At [6.20]: 'pursuing litigation in these cases can be prohibitively costly' and 'unsatisfactorily lengthy'.

103 Ibid 208 [6.21], citing Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008).

104 ALRC Report (n 5) 208 [6.22].

105 Ibid 208 [6.21].

106 Ibid 208 [6.22].

107 Ibid 208 [6.23], n 25.

108 Ibid 208 [6.23], citing Caxton Legal Centre Inc, Submission No 67 to Australian Law Reform Commission, *Elder: Abuse: A National Legal Response* (2 September 2016).

resolved.'[109] Older persons might, because of this, be deterred from bringing a claim, or, alternatively, they might bring a claim but not live to see it resolved. Delays can also be hugely problematic for older persons, noting that they might require the funds provided by a remedy to establish another home.[110] The ALRC Report has thus noted: 'where an older person has lost their home and has limited funds, they need access to a remedy quickly.'[111] Indeed, a remedy might be the difference between them establishing another home, or becoming homeless.

Proceedings in the Supreme Courts are adversarial, and this too makes the existing law inaccessible for older persons. In particular, the adversarial nature of a dispute in the Supreme Courts can deter older persons from initiating a claim, especially noting that claims must be made against their friends or family members who have received their assets. The ALRC Report has explained: 'Older people may also be fearful of the social and emotional costs of litigation, given the family context of the dispute. Litigation may exacerbate family breakdown, or lead to a loss of access to grandchildren, which may result in the older person being reluctant to take legal action.'[112] Somes and Webb have similarly explained: 'it is rare for an older person to commence proceedings against a child.'[113] That is to say nothing of the emotional reserves required to pursue a claim in an adversarial forum, which is itself a further barrier to seeking redress.[114] Finally, it should be noted that older persons may not be aware that they have a claim under the existing law;[115] the equitable doctrines referred to above have developed in case law,

109 ALRC Report (n 5) 208 [6.24].

110 Somes and Webb, 'What Role for the Law' (n 9) 26, 50: 'the remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation.' Somes and Webb, 'What Role for Real Property' (n 9) 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 or care.' Ibid 213 [6.42]: 'Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.'
In the context of remedies under the failed joint venture doctrine discussed below, see: Barkehall Thomas, 'Families Behaving Badly' (n 9) 164.

111 ALRC Report (n 5) 208 [6.24].

112 Ibid 209 [6.25].

113 Somes and Webb, 'What Role for Real Property' (n 9) 151 n 144. See also ALRC Report (n 5) 209 [6.25].

114 Somes and Webb, 'What Role for Real Property' (n 9) 127: 'They must first possess the emotional and financial resources to undertake litigation'. At 151 n 144: 'Put simply, even if the older person could afford to pursue matter in the courts it is rare for an older person to commence proceedings against a child. Also, the emotional and physical impact of such a course is better avoided.' See also ALRC Report (n 5) 207–8 [6.20].

115 Hall, 'Care for Life' (n 31) 2: 'Moreover, to the senior who has "given away her house" which now "belongs" to someone else, it is probably not intuitively apparent that anything can be done about it posing a significant barrier to legal access.'

and so may not be well known, even by lawyers.[116] A lack of knowledge of legal rights can thus operate to further undermine older persons' access to justice.

Not surprisingly — in light of the above points — the literature has concluded in relation to the existing law that: 'the older person has little to no realistic legal recourse';[117] 'very few older people make it to the door of the court';[118] 'the legal regime is inadequate to protect the interests of the older adult where such an arrangement breaks down',[119] and 'that these actions [in equity] are stressful, expensive, lengthy and hard to make out.'[120]

B Ill-fitted

Existing law is 'ill-fitted'[121] to 'assets for care' cases — this is the second critique of the existing law in the literature. 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 despite there being clear wrongful conduct'.[122] Each cause of action requires different elements to be shown.[123] This complexity might impede older persons' ability to successfully seek a remedy. Each cause of action is discussed below to demonstrate the difficulties which can arise for older persons in 'assets for care' cases, in relying on doctrines which have generally been developed for other contexts, and not specifically for 'assets for care' cases. Reliance is placed throughout this Part on the ALRC Report, and on the work of Somes and Webb, and Barkehall-Thomas.

1 Estoppel

Estoppel holds parties to representations they have made, to ensure other parties who have relied on the representation suffer no detriment. Estoppel has been argued in 'assets for care' cases.[124] The caregiver is said to have made a representation that care will be provided, and the older person is said to have transferred their assets, in reliance on this representation.[125] The caregiver thus ought to be held to their representation — to provide care— according to this argument, lest the older person suffer the detriment of having transferred their assets for no gain. In *Pobjoy v Reynolds* [2013] NSWSC 885, an older person

116 Somes and Webb, 'What Role for the Law' (n 9) 25: 'even if an older party seeks legal advice, many practitioners are unaware of the legal landscape to be traversed, in particular the often complicated matrix of equitable actions and remedies.'

117 Somes and Webb, 'What Role for Real Property' (n 9) 151.

118 Monro (n 22) 72.

119 Somes and Webb, 'What Role for the Law' (n 9) 26.

120 See SRV (n 6) 43. The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

121 Somes and Webb, 'What Role for Real Property' (n 9) 122.

122 Ibid 127.

123 Ibid, citing *Muschinski v Dodds* (1985) 160 CLR 583 (Deane J). See also ALRC Report (n 5) 207 [6.20]: 'Proof, presumptions and remedies pose significant issues in such cases.'

124 ALRC Report (n 5) 213 [6.45]. See also Somes and Webb, 'What Role for Real Property' (n 9) 126.

125 ALRC Report (n 5) 213 [6.44]. See also Barkehall Thomas, 'Families Behaving Badly' (n 9) 165–72.

was successful in making an estoppel claim in the 'assets for care' context.[126] However, older persons will not always succeed in estoppel in these cases.[127] A particular difficulty they may encounter is in proving that a representation — to provide care — was made by the caregiver.[128] Representations in these cases can be vague, and thus difficult to prove. In particular, sometimes the 'criteria regarding the scope of the arrangement is not explicitly expressed', or 'there is vastly conflicting evidence amongst family members as to expressions of intention and entitlement.'[129] Older persons will obtain no relief under this doctrine, unless they can clearly show a representation was made that care would be provided, and, further, what was included in that representation.[130]

2 Undue influence

Undue influence can be relied upon to set aside transactions which are tainted by an abuse of power. Older persons relying on this doctrine — to set aside 'assets for care' arrangements — must demonstrate the other party's 'ascendency or domination' over them.[131] Further, that this 'ascendency or domination' caused them to enter the arrangement.[132] However, that may be difficult for older persons in these cases. '[I]n most instances the parties have entered into the arrangement voluntarily, anticipating that the arrangement will be for their mutual benefit.'[133] As such, the 'ascendency or domination' element may not be present, in which case older persons will obtain no relief

126 Somes and Webb, 'What Role for the Law' (n 9) 38. In that case, Mrs Pobjoy — a 79-year-old pensioner and the plaintiff — had contributed a total of $121,437.80 to her daughter and son-in-law, who then purchased a property. Mrs Pobjoy lived in the property, receiving care as contemplated by the parties. However, '[r]elationships deteriorated' and the arrangement broke down. Mrs Pobjoy sought a remedy for her contribution on the basis of estoppel, as the home was to be sold following family court proceedings. All estoppel elements were made out: representation, reliance, and detriment. Accordingly, the New South Wales Supreme Court awarded Mrs Pobjoy repayment of her contribution, secured by a charge over the property. See *Pobjoy v Reynolds* [2013] NSWSC 885, [4]–[6].

127 See, eg, *Knox v Knox* (New South Wales Supreme Court, Young J, 16 December 1994) as discussed in Barkehall Thomas, 'Families Behaving Badly' (n 9) 169:

> In *Knox* the son did not induce his parents' expectation, and Young J (as he then was) held that although the plaintiff acquiesced in his parents' expenditure, the facts did not show that he had knowledge of his parents' expectations of an interest in the property. So, although not all cases of extended family living arrangements will lead to the possibility of an estoppel claim, some may well.

128 Somes and Webb, 'What Role for the Law' (n 9) 37; and Barkehall Thomas, 'Families Behaving Badly' (n 9) 165.

129 Somes and Webb, 'What Role for the Law' (n 9) 37, citing Barkehall Thomas, 'Families Behaving Badly' (above n 9) 165. See also Somes and Webb, 'What Role for Real Property' (n 9) 126.

130 See also discussion of estoppel in SRV (n 6) 45.

131 The 'ascendency or domination' can be proven on the facts, or automatically presumed from the nature of the parties' relationship. However, in these cases it will ordinarily need to be proven on the facts because 'the relationship between an adult child and an elderly parent has not been deemed to be an automatic special relationship': Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499, 507. See also: *Johnson v Buttress* (1936) 56 CLR 113 (Dixon J); and ALRC Report (n 5) 211 [6.34]–[6.35].

132 *Barclays Bank plc v O'Brien* [1994] 1 AC 180.

133 Somes and Webb, 'What Role for the Law' (n 9) 36. See also ALRC Report (n 5) 211 [6.34]–[6.35]; and Susan Barkehall Thomas, 'Parent to Child Transfers: Gift or Resulting

under this doctrine. However, in those cases where the doctrine is successfully relied upon, older persons' assets would generally be returned to them as part of the rescission of the arrangement.[134]

3 Unconscionable conduct

Unconscionable conduct can also be relied upon to set aside transactions which are tainted by an abuse of power. Older persons relying on this doctrine — to set aside 'assets for care' arrangements — must demonstrate that they were under a 'special disability'. Further, that the caregiver took 'unfair advantage' of their 'special disability'.[135] The 'special disability' must be recognised by law. As 'age' is one such 'special disability' recognised by law, it should not be problematic for older persons to demonstrate this element. However, it can be difficult for older persons to establish that the older party took 'unfair advantage' of their 'special disability'. Most older persons in these cases, as noted, enter into arrangements voluntarily.[136] As such, it may not be possible to show 'unfair advantage', in which case no relief will be obtained under this doctrine.[137] However, in those cases where the doctrine is successfully relied on, the older persons' assets would generally be returned to them as part of the rescission of the arrangement.[138]

4 Resulting trusts

Resulting trusts are trusts which arise by operation of law. They reflect what the law presumes is the parties' intentions as to ownership of property in particular scenarios. A particular scenario in which a resulting trust can arise is where parties have contributed to the purchase price of a property. In that scenario, parties are presumed to hold the property jointly in proportion to their contributions. A resulting trust arises such that the party with legal title holds it on trust for the other party in equity, in the relevant proportions.[139] This is called a 'purchase money resulting trust', and it may be relevant in 'assets for care' cases.[140] Older persons might rely on it to claim ownership of a property, in equity, notwithstanding that the caregiver is the registered title holder.[141]

Trust?' (2010) 18(1) *Australian Property Law Journal* 75, 77, 79.

134 Somes and Webb, 'What Role for the Law' (n 9) 36. See also discussion of undue influence in SRV (n 6) 46.

135 *Blomey v Ryan* (1956) 99 CLR 362, 405 (Fullagar J); and *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (Mason J). See also: Fiona R Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29(2) *Monash University Law Review* 336; Somes and Webb, 'What Role for the Law' (n 9) 33–5; and ALRC Report (n 5) 212 [6.36]–[6.37].

136 Somes and Webb, 'What Role for the Law' (n 9) 36. See also ALRC Report (n 5) 212 [6.36]–[6.37].

137 *The Commercial Bank of Australia Ltd v Amadio* (n 33). See also discussion in SRV (n 6) 44: 'Running a case on grounds of unconscionability, for example, may not help where a parent has voluntarily (but ill-advisedly) transferred land or provided their son or daughter with the purchase price for a property that is then registered in their child's name.' The guide was funded by the Victorian Legal Services Board and authored by Louise Kyle.

138 See also general discussion of unconscionable dealing in SRV (n 6) 47.

139 Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 319–20 [4.75].

140 Somes and Webb, 'What Role for the Law' (n 9) 41:

However, the scope for older persons to rely on purchase money resulting trusts is limited. Such trusts are — to be clear — only arguable in respect of arrangements where the older person has directly contributed to the purchase price of property.[142] Not all arrangements fall into this category. In fact, most probably do not. Arrangements where the older person has contributed money to renovate a property will not, for example, attract a 'purchase money resulting trust', as this is not strictly a contribution to the purchase price of property.[143] Somes and Webb have explained: 'a resulting trust will only take into account a very narrow criteria, and although may secure initial money contribution, will not take into account the wider circumstances and contributions made by a party.'[144] Even where such a resulting trust prima facie applies, it can be rebutted — and thus will not arise — by the other party proving that the older person intended their contributions to be a gift (that is, that they did not intend to retain a share in the property purchased and contributed to).[145] Older persons may thus encounter difficulties relying on this doctrine, as a gift may be exactly what they intended at the time of making the contribution.[146]

Resulting trusts will also not apply, if the presumption of advancement applies. The presumption of advancement applies as between parents and their children, such that a parent's (that is the older person's) contributions to their child — including to the purchase price of property — are presumed to be a gift to their child. No resulting trust thus arises — and so the older person obtains no share in the property — unless the presumption of advancement can be rebutted (with a resulting trust then applying).[147] For older persons, rebutting the presumption of advancement can be difficult as it requires evidence of a contrary intention, that is that no gift to their child was intended. The older person bears the evidentiary burden.[148]

In summary, resulting trusts will arise only in particular 'assets for care' cases, and thus cannot routinely be relied on in 'assets for care' cases. Even

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

See also ALRC Report (n 5) 210 [6.32]: 'If an older person contributes money towards the purchase of a property and this is not reflected on the title, they may be able to claim that the property is held on "resulting trust" for them in proportion to their contribution.'

141 Somes and Webb, 'What Role for the Law' (n 9) 41.

142 Ibid. See also ALRC Report (n 5) 210–11 [6.32]–[6.33]; and *Calverley v Green* (1984) 155 CLR 242.

143 Somes and Webb, 'What Role for the Law' (n 9) 41.

144 Ibid.

145 Ibid. See also relevant discussion in SRV (n 6) 44.

146 Somes and Webb, 'What Role for the Law' (n 9) 41.

147 Barkehall-Thomas,'Parent to Child Transfers: Gift or Resulting Trust?' (n 133) 78.

148 Somes and Webb, 'What Role for the Law' (n 9) 41. See also ALRC Report (n 5) 210–11, [6.32]–[6.33]. Regarding reform of the presumption of advancement in Australia, see Barkehall-Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (n 133).

where they do arise, they may be rebutted by the other party demonstrating that a gift was intended, such that the older person does not retain a share in the property.[149]

5 Failed joint venture doctrine

This doctrine can prevent a party obtaining an unintended windfall by their retention of property — where that would be unconscionable — following a failed 'joint relationship or endeavour'.[150] As Deane J has expounded:

> the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so.[151]

Older persons have successfully relied on this doctrine in 'assets for care' cases.[152] Older persons must demonstrate that there was a 'joint relationship or endeavour', which involves characterising the 'assets for care' arrangement as such.[153] In *Swettenham v Wild*,[154] Atkinson J accepted that a joint arrangement existed, whereby the daughter provided her father with 'the support and comfort of living in a family environment'.[155] In exchange, the father contributed most of the purchase price and borrowed money for a home registered in the daughter's name.[156] Older persons must also, separately, demonstrate that it would be unconscionable for the caregiver to retain the property relevant to the arrangement. In the *Swettenham v Wild* case, the court held it would be unconscionable for the daughter to retain the father's contribution to the purchase price of a property. Accordingly, the daughter had to return her father's contribution to him.[157]

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149 Somes and Webb, 'What Role for the Law' (n 9) 41.

150 *Muschinski v Dodds* (n 123) 619–20 (Deane J):

> [T]he principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so.

The principle was accepted in *Baumgartner v Baumgartner* (1987) 164 CLR 137. See also ALRC Report (n 5) 212–13 [6.38]–[6.42].

151 *Muschinski v Dodds* (n 123) 619–20 (Deane J), and accepted in *Baumgartner v Baumgartner* (n 150). See also ALRC Report (n 5) 212–13 [6.38]–[6.42].

152 Somes and Webb, 'What Role for the Law' (n 9) 39; Somes and Webb, 'What Role for Real Property' (n 9) 126; and Barkehall-Thomas, 'Families Behaving Badly' (n 9) 154.

153 Barkehall-Thomas, 'Families Behaving Badly' (n 9) 161–2.

154 *Swettenham v Wild* (n 1).

155 Ibid [42], cited in Barkehall-Thomas, 'Families Behaving Badly' (n 9) 155–6.

156 *Swettenham v Wild* (n 1) [42], cited in Barkehall-Thomas, 'Families Behaving Badly' (n 9) 155–6.

157 Ibid.

Older persons more frequently rely on this doctrine in 'assets for care' cases, than they do other doctrines.[158] That follows. Arrangements can be fitted within the concept of a 'joint relationship or endeavour'. However, this doctrine — like the others — is ill-fitted to 'assets for care' cases. In particular, as regards remedies some courts — in applying the doctrine — have preferred to award monetary compensation to older persons, limited in amount to their initial contribution under the arrangement.[159] However, it would be preferable for older persons that — prima facie — they receive a proprietary interest in any property acquired as part of an arrangement,[160] thereby sharing in any capital uplift in the value of property which has occurred over the duration of the arrangement.[161] This may be necessary for older persons to (financially) establish another home.[162] As Somes and Webb have commented, older persons can be 'subject to the prospect of an uncertain and often insufficient award to enable them to "start again"'.[163]

There are potential difficulties, then, for older persons in relying on the existing law. Mostly, the difficulties arise in fitting the facts of 'assets for care' cases within the established doctrines. It may not, consequently, be possible for older persons to successfully rely on existing doctrines to obtain a remedy. Even where it is possible to do so, there may be problems in obtaining an appropriate form of remedy, as the discussion of the failed joint venture doctrine has illustrated.

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158 Somes and Webb, 'What Role for the Law' (n 9) 39: 'By and large assets for care situations are resolved relying on the concept of the "failed joint endeavour" principle'; Somes and Webb, 'What Role for Real Property' (n 9) 126: 'More commonly, assets for care situations are resolved relying on the concept of the "failed joint endeavour" principle'; and Barkehall-Thomas, 'Families Behaving Badly' (n 9) 154: 'The *Muschinski* joint venture approach is the more dominant one in recent cases.'

159 Barkehall-Thomas, 'Families Behaving Badly' (n 9) 154–65. ALRC Report (n 5) 213 [6.42]. See also Somes and Webb, 'What Role for Real Property' (n 9) 127.

160 Ibid.

161 Ibid.

162 Barkehall Thomas, 'Families Behaving Badly' (n 9) 164; and ALRC Report (n 5) 213 [6.42]:

> Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.

See also generally Somes and Webb, 'What Role for the Law' (n 9) 26: 'any relief is, for the most part, insufficient for the older person to "start again".' At 50: 'the remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation'; and Somes and Webb, 'What Role for Real Property' (n 9) 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 or care.'

163 Somes and Webb, 'What Role for Real Property' (n 9) 127. At 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 or care.' See also Somes and Webb, 'What Role for the Law' (n 9) 26: 'any relief is, for the most part, insufficient for the older person to "start again".' At 50: 'the remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation.'

V Conclusion: Existing law undermines home

Existing law is inadequate to overcome the loss of home (or other assets) by older persons; it is inaccessible and ill-fitted to the 'assets for care' context. This article demonstrates this reality using available evidence and existing scholarship; in particular, the ALRC Report and work of Somes and Webb, and Barkehall-Thomas. As flagged in the Introduction and based on the critique of existing law presented thus far, this article also contributes a normative claim, being that the existing law can undermine home — the experience — for older persons. By not providing older persons with accessible remedies — when their homes (or other assets) are lost — the existing law thereby fails to empower older persons to purchase, or lease, another home.[164] If, as a result, older persons cannot afford to establish another home (in which the experience of home takes place),[165] it can properly be said that their experience of home will have been impacted and potentially undermined by law.[166] It is fair to say that the experience of home is under real threat because of the inadequacy of the existing law. This demonstrates a key point: existing laws can undermine home — the experience — for some individuals, being older persons in this study of 'assets for care' arrangements.

Future work should example what new laws might be introduced to assist older persons in 'assets for care' cases. In particular, to empower them to obtain a remedy so as to (hopefully) go on to obtain another home, in which to experience home. In that regard, the Australian Law Reform Commission has recently recommended a new assets for care jurisdiction be introduced for

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164 Somes and Webb, 'What Role for the Law' (n 9) 26: 'any relief is, for the most part, insufficient for the older person to "start again".' At 50: 'the remedies awarded to older people where family accommodation arrangements fail are often insufficient for them to start again and obtain new accommodation.' Somes and Webb, 'What Role for Real Property' (n 9) 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 or care.'In the context of remedies under the failed joint venture doctrine discussed below, see: Barkehall Thomas, 'Families Behaving Badly' (n 9) 164:

> To deny plaintiffs the opportunity of obtaining a proportion of the increase in value of the property substantially benefits the defendants, in circumstances where, in the author's opinion, it was not always intended that such benefit be obtained. The minimum equity rule puts older plaintiffs in a worse financial position than if they had not begun the joint venture. They traded their ownership for a life interest, plus companionship and care. When the relationship breaks down they now have to pay for accommodation and care, but don't have the equivalent value to spend on care.

ALRC Report (n 5) 213 [6.42]: 'Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.'

165 Fox (n 3) 590: the physical home is 'the locus for the experience of home'. See also Tyrer (n 8).

166 It is acknowledged that this type of concern underlies some of the existing literature. See especially Somes and Webb, 'What Role for Real Property' (n 9) 152: refer to '[t]he significance placed on housing and financial security in one's later life'.

state and territory tribunals to resolve these disputes.[167] Such a proposal should be pursued by governments but could be usefully unpacked in future work.

167 ALRC Report (n 5) 13, 214–22 [6.48]–[6.80] (recommendation 6-1): 'State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.'

ARTICLE FOUR: ‘A PROPOSAL TO GIVE STATE AND TERRITORY TRIBUNALS JURISDICTION TO RESOLVE ‘ASSETS FOR CARE’ DISPUTES’

ARTICLE FOUR: STATEMENT OF AUTHORSHIP

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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) *Australian 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.

ARTICLE FIVE: 'A PROPOSAL TO GIVE THE MAGISTRATES' COURT OF VICTORIA JURISDICTION TO RESOLVE RESIDENTIAL TENANCY MATTERS INVOLVING FAMILY VIOLENCE'

ARTICLE FIVE: STATEMENT OF AUTHORSHIP

This paper will be published in 2023 as Samuel Tyrer, 'A Proposal to Give the Magistrates' Court of Victoria Jurisdiction to Resolve Residential Tenancy Matters Involving Family Violence' (2023) 46(1) *University of New South Wales Law Journal* (forthcoming).

This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:

Date:

13 December 2022

A PROPOSAL TO GIVE THE MAGISTRATES' COURT OF VICTORIA JURISDICTION TO RESOLVE RESIDENTIAL TENANCY MATTERS INVOLVING FAMILY VIOLENCE

SAMUEL TYRER

Family violence victims face a problem under Victoria's Residential Tenancies Act 1997 ('RTA'). Victims must apply to access its protections in the Victorian Civil and Administrative Tribunal ('VCAT') which is a separate jurisdiction to where they apply for intervention orders under the Family Violence Protection Act 2008 (Vic) ('FVPA'), ie, the Magistrates' Court of Victoria ('MCV'). This may result in victims having to navigate a completely different jurisdiction, ie, VCAT if they access the RTA's protections there. This makes the process unnecessarily complex, and it may even deter some victims from accessing the RTA's protections for a safe home. Victoria's 2016 Royal Commission into Family Violence identified this problem, and this article advances and unpacks a recommendation it made to consider legislative reform to simplify processes for victims. The research presented herein, while focused on Victorian law, may also inform potential approaches to law reform in other Australian jurisdictions.

I INTRODUCTION

The COVID–19 pandemic has brought many challenges for the state to address, among them increasing levels of domestic violence within homes.[1] Circumstances made it difficult for victims to escape violence as they were locked-down and isolated in the same home as the violent perpetrator, literally 24-hours a day at the height of the pandemic in some Australian states.[2] For victims, being isolated in the home with a violent perpetrator is a terrifying proposition. Their physical and psychological safety is put at risk as is, relatedly, their experience of home. Victims may be forced to leave the home. The COVID–19 pandemic has thus highlighted the pre-existing problem of family violence and homelessness, the focus of this article. Victims' experience of home is a particular focus.

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1 See Kerry Carrington et al, *The Impact of COVID–19 Pandemic on Domestic and Family Violence Services and Clients*: *QUT Centre for Justice* (Research Report, November 2020); Norman Hermant, 'Domestic Violence Surging amid COVID-19 Lockdowns, Research Shows', *ABC News* (online, 25 June 2021) <https://www.abc.net.au/news/2021-06-25/coronavirus-covid-lockdowns-and-domestic-violence-data/100237406?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web>.

2 Carrington (n 1) 15, 17, 19-20; Hermant (n 1).

Victims suffer violent abuse. This is contrary to a positive experience of home. Fox explains: 'when the home becomes a place of danger, the positive associations of home – as a place of safety, of security, of control over oneself and one's environment – become subverted, and the effect can be psychologically very damaging'.[3] This is 'the darker side of home as a common site of domestic violence and fear within families'.[4] This is not how it should be. Homes should be places of shelter, inside which ideally takes place an experience of 'home' as a sense of security and of loving relationships.[5] Home, in this sense, is essential to individuals' flourishing.[6] However, it is destroyed or at least undermined for family violence victims, as noted. Victims may even have to flee their homes, to protect their lives and those of their children,[7] in which case they lose both the shelter and experience of home; homelessness in both of these senses is the price they pay to obtain safety.[8] While many victims leave their home, it should be acknowledged that for those who do not, a problem of homelessness may still exist in that the violence they experience destroys their experience of home.[9]

Family violence and homelessness is a complex and significant problem; family violence 'is the single biggest cause of homelessness in Victoria'.[10] Law is by no means capable of

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3 Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) 162 <https://doi.org/10.5040/9781474200554> ('*Conceptualising Home*'). See also Council to Homeless Persons, Submission No 920 to Royal Commission into Family Violence (May 2015) 6, 8 ('CHP Submission to RCFV'); *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) 22 ('RCFV Summary Report').

4 Fox, *Conceptualising Home* (n 3) 162.

5 On this particular theorisation of the experience of home: see Samuel Tyrer, 'Home in Australia: Meaning, Values and Law?' (2020) 43(1) *University of New South Wales Law Journal* 340, 349–58 <https://doi.org/10.53637/GGOS1001> ('Home in Australia'). See also Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580, 590 <https://doi.org/10.1111/1467-6478.00234> ('The Meaning of Home'): the physical home is 'the locus for the experience of home'; Fox*, Conceptualising Home* (n 3) 145–6.

6 As theorised in earlier work on the experience of home and the human flourishing theory of property espoused by Gregory Alexander: see Samuel Tyrer, 'A New Theorisation of "Home" as a Thing in Property' (2022) 49(2) *University of Western Australia Law Review* 191 ('A New Theorisation'). See also Fox*, Conceptualising Home* (n 3) 109–22 and empirical studies cited therein on the importance of home to psychological wellbeing.

7 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 2, 38 ('*RCFV Report: A Safe Home*'); Kellie McDonald, 'Tenancy and Domestic Violence: New Tenancy Reforms Strengthen the Rights of Domestic Violence Victims' (2019) 53 (March) *Law Society Journal* 78, 78.

8 Relevantly, the loss of home as an experience (homelessness) and loss of home as shelter (rooflessness) has been distinguished: see Peter Somerville, 'Homelessness and the Meaning of Home: Rooflessness or Rootlessness?' (1992) 16(4) *International Journal of Urban and Regional Research* 529 <https://doi.org/10.1111/j.1468-2427.1992.tb00194.x>. 'People distinguish between the absence of "real home" (ironically meaning a failure to experience home in an *ideal* sense) and the lack of something which can be *called* home for them (meaning lack of abode).': at 530–1 (emphasis in original). Somerville argues 'that there is much more to homelessness than the minimal definition in terms of rooflessness': at 536.

9 Of course, this does not preclude victims from still having some 'positive attachment' to their home; indeed, such an attachment 'may be part of the reason why battered wives do not easily give up their homes in order to escape the violence, although further research is required in order to test such a hypothesis': see Somerville (n 8) 535.

10 CHP Submission to RCFV (n 3) 3.

offering a comprehensive response to this problem. However, it may assist victims to re-establish both the place and experience of home, which is this article's concern. Protections for victims contained in Victoria's *Residential Tenancies Act 1997* (Vic) ('*RTA*') may assist in this regard by affording victims in leased homes control and stability in respect of home in various ways. Laws must embody control and stability for individuals to experience home, as theorised in earlier work.[11] The RTA's protections do so by allowing victims to apply for orders to end their lease, so they can leave an unsafe home (and ideally make a new home elsewhere).[12] Alternatively, victims may apply for orders for a new lease of their existing home with the perpetrator excluded, so they can remain living in their existing home safely (and thus retain home and related connections to their community).[13] Other protections in the RTA, discussed later in this article, similarly support victims in leased homes to re-establish both the place and experience of home. However, victims may find it difficult to access these protections in practice.[14]

To access these protections victims must currently apply in the Victorian Civil and Administrative Tribunal ('VCAT');[15] however, doing so remains problematic.[16] Victims' applications for intervention orders under the *Family Violence Protection Act 2008* (Vic) ('*FVPA*') are made separately in the Magistrates' Court of Victoria ('MCV').[17] As such, application to VCAT pursuant to the RTA protections forces victims to navigate a different jurisdiction, thereby adding complexity to the process.[18] This may deter some victims from accessing the RTA's protections.[19] To redress this deficiency in the available protections,

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11 Tyrer, 'Home in Australia' (n 5) 361–70.

12 *Residential Tenancies Act 1997* (Vic) ss 91V(1)(a), (2) ('*RTA*'); Angela Spinney, Witness Statement No 58 to Royal Commission into Family Violence (20 July 2015) [36] ('Spinney Witness Statement to RCFV'). See also *RCFV Report: A Safe Home* (n 7) 38.

13 *RTA* (n 12) ss 91V(1)(b), (2), 91W(1A), (6); *RCFV: A Safe Home* (n 7) 77.

14 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 112, 124–5 ('*RCFV Report: Financial Security*').

15 The Victorian Civil and Administrative Tribunal ('VCAT') has practically exclusive jurisdiction to hear victims' (and other persons') *RTA* applications. While the Magistrates' Court of Victoria ('MCV') and County Court of Victoria have (a limited) jurisdiction to hear *RTA* applications where the dispute exceeds VCAT's jurisdictional cap for the hearing of these matters (currently up to forty thousand dollars), this rarely (if ever) occurs: *RTA* (n 12) ss 447, 509–10. Parties do not make *RTA* applications in the Supreme Court in its inherent jurisdiction as it is a costly jurisdiction in which to litigate.

16 *RCFV Report: Financial Security* (n 14) 112, 124–5.

17 *Family Violence Protection Act 2008* (Vic) s 42 ('*FVPA*'). Or applications are made in the Children's Court of Victoria ('CCV') in circumstances involving a child: at s 42; *Children, Youth and Families Act 2005* (Vic) ss 515(2), 3(1) ('*CYFA*'). See also *RCFV Report: Financial Security* (n 14) 112, 124–5.

18 *RCFV Report: Financial Security* (n 14) 112, 124–5.

19 The fact VCAT receives relatively low numbers of applications from victims under the *RTA*, as compared to the number of applications victims make in the MCV under the *FVPA*, may be indicative of this, although the Commission did not conclude as such and other reasons may explain this discrepancy: *RCFV Report: Financial Security* (n 14) 112. See also Judicial College of Victoria, Submission No 536 to Royal Commission into Family Violence 10 n 19 ('JCV Submission to RCFV'); Justice Connect Homeless Law, Submission to Royal Commission into Family Violence (May 2015) 27–9 ('Justice Connect Homeless Law Submission to RCFV'); Victorian Civil and Administrative Tribunal, Submission No 164 to Royal Commission into Family Violence 1, 3 ('VCAT Submission to RCFV').

this article argues that the Parliament of Victoria ought to confer a new jurisdiction upon the MCV, along with existing victims' intervention order applications pursuant to the *FVPA*, to adjudicate victims' applications for protection under the *RTA* ('the new jurisdiction').[20] This would simplify processes for victims, who could apply jointly, following one process, to MCV so as to access protections under the *FVPA* and the *RTA*.[21] This would expand accessibility to *RTA* protections for home for the victims of family violence, thereby supporting their experience of home. Further, to the extent expanded accessibility results in more victims accessing the *RTA*'s protections for home, it will ensure the law better protects home. This means that the experience of home can be enhanced by laws.[22] This overall point is demonstrated through this article's discussion of the *RTA*'s protections directed to assisting victims with re-establishing the place and experience of home.

This article draws on the 2016 Final Report of Victoria's Royal Commission into Family Violence ('the Commission'), which highlighted the difficulties faced by victims in navigating two jurisdictions in order to access the protections of the *RTA* and the *FVPA*.[23] Consistent with the recommendation of the Report, this article argues for MCV to receive the proposed *RTA* jurisdiction.[24] However, and to be clear, the Commission's recommendation was for the Victorian Government to consider this reform. The Commission did not, as this article does, recommend it be implemented.[25] The Commission also did not, it follows, comprehensively set out the key features of the reform to be implemented in amending legislation; this article seeks to fill this gap.[26] This article also acknowledges the reform would not comprehensively address the problem of victims having to navigate multiple court systems. For example, victims would still need to separately navigate the family law court system if they wish to obtain parenting orders (on who any children will live with) or property orders (on the division of assets acquired by parties to a relationship subject to the Act) pursuant to the *Family Law Act 1975* (Cth).[27] Similarly, victims would still need to navigate the County Court of Victoria or Supreme

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20 The Commission first recommended consideration of this reform by the Victorian Government: see *RCFV Report: Financial Security* (n 14) 126. Recommendation 119 was in the following terms: 'The Victorian Government consider any legislative reform that would limit as far as possible the necessity for individuals affected by family violence with proceedings in the Magistrates' Court of Victoria to bring separate proceedings in the Victorian Civil and Administrative Tribunal in connection with any tenancy related to the family violence [within two years].' See also related discussion at 112, 124–5.

21 *RCFV Report: Financial Security* (n 14) 112, 124–5.

22 See generally Fox, *Conceptualising Home* (n 3); Tyrer, 'Home in Australia' (n 5); Tyrer, 'A New Theorisation' (n 6)

23 *RCFV Report: Financial Security* (n 14) 112, 124–5.

24 Ibid 126. See above n 20.

25 Ibid 126. See above n 20 for recommendation 119 extracted in full.

26 In recommending that the Victorian Government consider the proposed jurisdiction for MCV, the Commission left open the door for this further work which it understood would have funding implications: see below Part III.

27 *Family Law Act 1975* (Cth) ss 64B, 79. For useful discussion of the family law system from the perspective of home as experienced by children, see 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.

Court of Victoria if they need to bring a civil claim for testator family maintenance or there has been serious criminal offending necessitating a prosecution in those courts.[28] The proposed reform would not, as such, completely resolve the broader problem of victims having to navigate different and complex jurisdictions, but it would go some way to simplifying those processes for victims by combining the tenancy and intervention order system in MCV, which this article argues is relevant to victims' experience of home in housing.

In addition to this Introduction, the article contains four parts. Part II outlines the benefits of reform, which includes access to justice for victims and potential efficiency gains in case handling. Extending accessibility of the *RTA*'s protections to victims in MCV would improve access to justice. Victims could apply to MCV to access protections under the *RTA* and *FVPA* at the same time, and following the same process, which is not possible currently as *RTA* applications must be made separately to VCAT.[29] Part III sets out details, including outlining key features of the proposed reform, and thus building and expanding on the Commission's work. In setting out these details, the article provides guidance to policymakers in developing enabling legislation for the reform by providing a blueprint for that legislation. The proposed enabling legislation would confer jurisdiction on MCV to hear relevant applications made by victims under the *RTA* according to the specific processes set out, while also retaining VCAT's existing jurisdiction to hear these applications.[30] While approached from a Victorian law perspective, this part – on key features of the proposal – has relevance to other Australian jurisdictions in which victims face a similar problem of having to navigate two separate jurisdictions to access protections in tenancy and intervention order legislation.[31] The research presented may thus inform potential approaches to reform in those jurisdictions which would need to also take into account their own unique tenancy and intervention order legislation.[32] Part IV concludes and acknowledges that – in addition to the law reform advanced in this article – other policy responses are necessary to address family violence, including to ensure affordable housing is made available to victims for shelter upon leaving violent homes.[33]

Regarding terminology, this article refers to individuals who have experienced family violence as 'victims'. Use of the term 'victims' emphasises that these individuals are persons against whom a wrong has been committed in respect of 'which the justice system has an obligation to respond'.[34] However, other terms may be used including 'victim/survivors' or 'survivors' to emphasise that these individuals are not defined by the violence they have survived.[35] This article also uses the term 'family violence'. This term

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28 JCV Submission to RCFV (n 19) 9–10.

29 *RCFV Report: Financial Security* (n 14) 112, 124–5.

30 To be clear, the proposal is for both MCV and VCAT to have concurrent RTA jurisdiction as regards victims matters: see below Part III(A)(2)(d).

31 That is, all Australian jurisdictions except Western Australia. Note that this problem exists to a lesser extent in some jurisdictions: see below Part II(C).

32 See below Part II(C).

33 *RCFV Report: A Safe Home* (n 7) 82, 84, 90–2 (recommendations 14–20).

34 Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (Report, March 2015) 13.

35 Ibid.

is taken to include physical, economic and emotional or psychological abuse by a person toward a family member.[36] A 'family member' may be a person's spouse, someone the person has an intimate relationship with, or a relative.[37] It may also be someone like a family member based on the social and emotional connection between the persons.[38] 'Family member' is thus given a broad meaning, encompassing persons who enjoy a close connection, regardless of blood-ties or whether they are traditionally thought of as 'family'.[39] It is not a requirement that violence occur in the home for it to be 'family violence', although that may be where 'family violence' typically occurs. This understanding of 'family violence' and 'family member' is taken from the *FVPA*, which is Victoria's centrepiece legislation on this social problem. It recognises that family violence comes in different forms. The Victorian Law Reform Commission has explained:

> Recognising the broad nature of family violence is particularly important because it identifies unacceptable behaviour and validates the experiences of victims, who may have experienced many different types of violence. A broad definition of family violence is also important to ensure that people are able to obtain legal protection through an intervention order.[40]

This article uses the term 'family violence' as explained above for consistency with the *FVPA*. However, other terms may be used, including 'domestic violence'. Having defined relevant terms and the problem of victims having to navigate two jurisdictions in Victoria to access protections under the *RTA* and *FVPA*, this article turns to explore a possible reform option.

II A NEW JURISDICTION FOR MCV – KEY BENEFITS

This Part outlines the case for the proposed reform for MCV to receive *RTA* jurisdiction. This reform would improve access to justice for victims, and potentially result in efficiency gains via victims' *RTA* and *FVPA* matters being handled in a single jurisdiction.[41]

A Benefits

1 Access to Justice for Victims

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36 *FVPA* (n 17) ss 5–7. 'Family member' is also defined broadly: at s 8.

37 Ibid s 8.

38 Ibid.

39 Ibid.

40 As explained in its report recommending that this legislation be introduced in Victoria: see Victorian Law Reform Commission, *Review of Family Violence Laws* (Report No 185, March 2006) 20 ('*VLRC Report*').

41 The Commission considered both aspects; access to justice for victims and whether efficiencies would result from the proposed expansion of MCV's jurisdiction. However, the Commission did not go so far as to endorse this proposed reform. In particular, it was unsure whether efficiencies or delays would result in practice: see *RCFV Report: Financial Security* (n 14), 112, 124–5. This reform would to some extent simplify processes for victims, but victims would still need to navigate other systems in other courts such as the family law court system in the federal courts: see above Part I.

Access to justice would be improved for victims by extending the accessibility of the *RTA*'s protections to them in MCV.[42] This would be the reform's principal benefit. Victims could apply in MCV to access protections under the *RTA* and *FVPA* at the same time, and following the same process,[43] which is not possible currently as *RTA* applications must be made separately in VCAT.[44] The process of accessing protections would thus be made easier for victims, as MCV would become a 'one stop shop' for the hearing of *RTA* and *FVPA* matters.[45] This follows the Commission's general recommendation to, if possible, provide for victims 'to have all their legal issues determined in the same court'.[46] More victims may access the *RTA*'s protections for home in MCV under this proposed streamlined process than has been occurring in VCAT.[47]

Because MCV would hear victims' *RTA* and *FVPA* matters together, victims would only need to attend one hearing, before the same judicial officer.[48] Victims would thus only need to tell their story once.[49] This too would be a significant improvement on the current approach whereby, because these matters are heard across VCAT and MCV, victims may have to attend multiple hearings, ie, a hearing in each jurisdiction before different judicial officers,[50] which may exacerbate the trauma of victims as 'they have to navigate another system' and may need to 're-tell their story' in each jurisdiction.[51] In any case, the current

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42 The proposal is for both MCV and VCAT to have concurrent *RTA* jurisdiction regarding victims matters: see below Part III(A)(2)(d).

43 See also *RCFV Report: Financial Security* (n 14) 112, 124–5.

44 See above n 15.

45 A single jurisdiction for the hearing of victims matters, ie, a 'one stop shop' model, has been the ideal recommended in various law reform reports: Australian Law Reform Commission, *Family Violence: A National Legal Response* (Final Report No 114, October 2010) 149 ('*ALRC Report*'); *VLRC Report* (n 40) 182 [6.38]. The MCV's Family Violence Court Division, discussed later in this section, has been described as 'the closest example of a "one stop shop" model for victims of family violence in Australia': *ALRC Report* (n 45) 1499.

46 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 3, 158 ('*RCFV Report: Court-Based Responses*'). See also *ALRC Report* (n 45) 149; *VLRC Report* (n 40) 182 [6.38].

47 See above n 19.

48 *RCFV Report: Financial Security* (n 14) 124–5. A single judicial officer to hear all victims' matters represents best practice: see Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence (June 2015) iv ('MCV and CCV Submission to RCFV'). Best practice includes '[i]ntegrated cross jurisdictional approaches to family violence cases to enable a single judicial officer (where appropriate) to determine the range of proceedings that a family experiencing family violence may encounter'; and a specialist approach where '[l]egal issues relating to family violence can be dealt with in the one court and possibly in the one hearing': *VLRC Report* (n 40) 182 [6.38].

49 *RCFV Report: Financial Security* (n 14) 112, 124–5.

50 Ibid.

51 Ibid 112. See also *RCFV Report: Court-Based Responses* (n 46) 133. '[T]he need to re-tell one's story multiple times or to correct misunderstandings caused by limited information sharing can greatly exacerbate the stress associated with court hearings for victims of family violence'. 'As things stand, it is necessary for some affected family members to re-tell their story in multiple forums or proceedings. For example, the victim may have to seek an FVIO to exclude the perpetrator from the home, and give evidence against the perpetrator in criminal proceedings for breach of an earlier order.': at 158. 'The Commissions consider that fostering the seamlessness of the court process in this way has significant benefits for victims of family violence. This approach also minimises victims' exposure to multiple proceedings in different jurisdictions, thereby avoiding

approach involving two jurisdictions is arduous for victims to navigate.[52] The proposal to ensure a single judicial officer in MCV could hear victims' *RTA* and *FVPA* applications would improve their experience of the justice system in this way.[53] Again, more victims may access the *RTA*'s protections in MCV as a result than occurs in VCAT currently.[54] In addition to improving access to justice as discussed, this reform would benefit victims in other ways as discussed in the next section.

2 Specialist Expertise and Support

Pursuant to this reform, victims' applications for protection pursuant to the *RTA* could be heard in MCV's Family Violence Court Division ('FVCD') which is staffed by specialists and support workers in family violence. Magistrates sitting in that division are assigned to it based on their family violence expertise, and the division's staff also have this expertise.[55] Victims would thus have their matters heard by specialists with an 'understanding of the dynamics of family violence and the issues faced by applicants and respondents'.[56]

Second, victims would also gain access to the FVCD's specialised support services and specially designed premises. Support services and referrals are available to help victims navigate court processes and address their experience of family violence.[57] Specially designed premises have 'separate waiting areas' for victims, to ensure victims are separate from the perpetrator,[58] and facilities are available for victims to give their evidence via 'alternative arrangements' such as audio-visual link or from behind a screen in court, again to ensure that victims are separate from the perpetrator.[59] This recognises that '[v]ictims of family violence seeking the protection of the courts must be and feel safe within the court environment'.[60] Further, 'the trauma and anxiety that accompanies the court process is

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the personal and financial impacts of repeated proceedings and consequent reiteration of the same facts before different courts.': Australian Law Reform Commission, *Family Violence: A National Legal Response* (Summary Report No 114, October 2010) 21 ('*ALRC Summary Report*'). 'The benefits of the enhanced jurisdiction are significant. It creates a more seamless system for victims of family violence – including children – to allow them to access as many orders and services as possible in the court in which the family is first involved; removes the need for the child and the family to have to navigate multiple courts; reduces the need for victims of family violence to have to repeat their stories; and consequently reduces the likelihood that people will drop out of the system without the protections they need.': at 23.

52 *RCFV Report: Financial Security* (n 14) 112, 124–5.

53 Ibid 124–5.

54 See above n 19.

55 *Magistrates' Court Act 1989* (Vic) s 4IA(6) ('*MC Act*'); MCV and CCV Submission to RCFV (n 48) iii, 10, 30.

56 MCV and CCV Submission to RCFV (n 48) 30.

57 Ibid iii, 10.

58 Ibid 33.

59 Ibid 10.

60 Ibid 49. On the experience of victims in court: see *VLRC Report* (n 40) 221 [6.141]; Court Services Victoria, Submission No 646 to Royal Commission into Family Violence (29 May 2015) 14–15 ('CSV Submission to RCFV').

heightened where victims know they will be in close proximity to the perpetrator and his supporters'.[61]

Third, victims would benefit from the FVCD's focus on perpetrators' behavioral change. Perpetrators would be ordered to attend counselling (as part of the Family Violence Court Intervention Program) if required by the *FVPA*, thereby engaging them in a process to rehabilitate and change their behaviour.[62] Ideally, perpetrators cease their violent behaviour after counselling, thus enhancing victims' safety vis-a-vis the perpetrator.[63] Counselling thus benefits victims, as well as perpetrators. As part of this reform, the FVCD could be empowered to order perpetrators to attend counselling, as it may do currently when hearing victims' *FVPA* applications.[64] Finally, as the FVCD's recent expansion demonstrates, it could administer matters under the jurisdiction proposed here if it is appropriately funded and resourced.[65] The next section considers how this reform might also result in case handling efficiencies, in addition to benefiting victims in the ways already noted.

3 Efficiencies

Because of MCV's expertise, its hearing of victims' *RTA* applications could result in these applications being processed more efficiently than occurs currently in VCAT. Magistrates

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61 MCV and CCV Submission to RCFV (n 48) 50. Supports for victims in court represents best practice, including '[s]afety and support for victims to ensure that victims have a positive court experience, have access to appropriate services and feel physically safe while attending court': at iv.

62 Ibid 10–11; *FVPA* (n 17) ss 129–30. The program aims to increase men's 'accountability and promote the safety of women and children': MCV and CCV Submission to RCFV (n 48) 10; and to 'increase accountability of those men who have used violence toward family members': at 11.

63 MCV and CCV Submission to RCFV (n 48) 11. A goal of the program is to 'enhance the safety of those women and children who have experienced family violence'. Programs focusing on perpetrators are vital in effectively responding to family violence: see Centre for Innovative Justice (n 34) 34–5. Engagement with perpetrators before intervention orders are made is also important for victims' safety: MCV and CCV Submission to RCFV (n 48) 32. 'Failing to engage with respondents before the making of intervention orders increases the safety risks of women and children. MBCPs are the only intervention currently available in Victoria for men who use family violence. In this context, the Court accepts that MBCPs that meet the NTV minimum standards, together with appropriate sanctions and therapeutic responses, are a valuable component of Victoria's integrated response to family violence.' The term MBCP refers to 'men's behaviour change program': at 10; and NTV refers to an organisation called 'No To Violence' which works with men who use family violence: at 30.

64 *FVPA* (n 17) ss 129–30.

65 In this regard, it is relevant to note that Victorian Government funding has made it possible in recent years to expand the FVCD, from when it first began operating in 2005. MCV received $130 million over four years in the 2017 State budget to expand the FVCD following the Commission's recommendations for its expansion: Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2019) 12 . New specialist FVCD's have subsequently been opened in Shepparton in September 2019, in Ballarat in November 2019, in Moorabbin in March 2020, and in Heidelberg and Frankston in May and June 2021, respectively. In the 2021/22 State budget, further funding was received for other Magistrates' Court venues to become FVCD: Victorian Government, 'Extend the Functions of Family Violence Court Division Courts to Other Courts', *Family Violence Recommendations* (Web Page, 11 October 2021) <www.vic.gov.au/family-violence-recommendations/extend-functions-family-violence-court-division-courts-other-courts>. See also MCV and CCV Submission to RCFV (n 48) iv.

sitting in the FVCD are assigned based on their family violence expertise, as noted.[66] This expertise may help them to process family violence applications faster than judicial officers in other Victorian administrative and court jurisdictions, for example VCAT whose judicial officers process *RTA* applications currently but otherwise do not (unlike magistrates) routinely hear family violence matters.[67] This has been explained: 'Specialisation facilitates a depth of understanding of family violence among practitioners and personnel involved in those matters, which results in more consistent and effective processing of cases.'[68] The scholarship reveals that elsewhere specialisation has yielded efficiencies.[69] In the Australian Capital Territory ('ACT'), for instance, the Magistrates' Court's specialisation in family violence has been shown to have improved the efficiencies with which cases are handled.[70] Improvements in efficiency may correlate with the extent to which judicial officers with expertise identify issues (that non-experts may not) in hearing matters and thus may order or refer parties to relevant agencies, thereby ensuring such issues do not develop into entrenched social problems with significant costs for government. As has been explained:

> Efficient case handling delivers savings elsewhere in the court and broader service system – for example, more effective legal intervention early in a case can reduce the likelihood of a family becoming involved in the child protection system, and cases where effective offender /perpetrator programs form part of the outcomes can reduce the likelihood courts [sic] having to deal with subsequent breaches and related criminal offences. A compassionate, supportive court system provides families affected by family violence to [sic] have their stories heard, to be provided with appropriate advice and support, and to be afforded considered decision making by the courts when imposing orders.[71]

In addition, the proposal could result in more efficient case handling by reducing the number of judicial officers involved in hearing victims' cases. Protection applications

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66 *MC Act* (n 55) s 4IA(6); MCV and CCV Submission to RCFV (n 48) iii, 10, 30.

67 This is not saying that VCAT members processing *RTA* applications do not have expertise in hearing family violence cases, which they do. Rather, the point being made is that judicial officers in MCV, because they may hear many more applications made by victims (under the *FVPA* for intervention orders) than judicial officers in VCAT (under the *RTA* for tenancy orders), may have greater expertise in the hearing of protection applications made by victims. This may result in MCV's judicial officers being able to process victims' applications more efficiently than VCAT's can currently. See further *RCFV Report: Financial Security* (n 14) 124. 'Unlike the Magistrates' Court, VCAT has not traditionally been a forum in which these [family violence] matters are adjudicated and VCAT members may not have particular expertise in this area.'

68 MCV and CCV Submission to RCFV (n 48) 34. 'Specialisation can improve consistency and efficiency in the interpretation and application of laws, as a result of shared understandings and the awareness and experience of a smaller number of decision makers. Specialists can identify and solve problems more quickly and effectively and can develop and promote best practice that can then be mainstreamed to drive change in the system more generally.': see ALRC Summary Report (n 51) 34. 'Cases can be resolved more quickly and efficiently as a result of specialist staff.': *VLRC Report* (n 40) 182 [6.38] n 644.

69 *VLRC Report* (n 40) 182 [6.38], citing Keys Young, *Evaluation of ACT Interagency Family Violence Intervention Program* (Final Report, February 2000) 78.

70 Ibid.

71 MCV and CCV Submission to RCFV (n 48) 34. 'The CCV is uniquely placed to make appropriate interventions in the lives of these children and their families to reduce the risk of them progressing to more violent behaviours and in doing so, to break the cycle of intergenerational family violence.':

under the *RTA* and *FVPA* could be heard by a single judicial officer in MCV, unlike currently where two judicial officers hear those applications, sitting separately, across VCAT (for the *RTA*) and MCV (for the *FVPA*).[72] Arguably, this is not an efficient use of judicial resources or time. It means each judicial officer must take time to, separately, familiarise themselves with all the same facts and evidence related to the same family violence. By avoiding this double-up, and instead utilising a single judicial officer in MCV, the proposed jurisdiction could make case handling more efficient and, relatedly, reduce victims' wait times in application processing.

Notwithstanding potential efficiencies outlined above, MCV will likely require additional funding and resourcing to operate the jurisdiction proposed. This is because any cost savings derived from the possible efficiencies noted, while beneficial, are unlikely to fully offset MCV's costs of hearing additional matters. If MCV is not provided with appropriate levels of funding, the hearing of victims' matters may be delayed; possibly to a greater extent than any delays which may currently be experienced by victims in VCAT. The Commission noted this concern, saying the hearing of matters in MCV 'may not result in a significantly more streamlined process and, in some cases, may create additional delays'.[73] MCV should thus be given additional resources as part of the proposal to ensure this does not occur and that it can process victims' protection applications in a timely way. This is critical as victims' physical safety may depend on orders being made promptly. For example, orders made pursuant to their *RTA* applications to exclude a violent perpetrator from the home under a lease or to terminate their lease so they can freely leave the home.

In outlining the proposal's benefits, this section has considered how it would enhance access to justice for victims and potentially result in case handling efficiencies. This is important as the scholarship demonstrates the importance of victims having a positive experience of the justice system – understood broadly to include court staff, police, judicial officers, and lawyers – although in reality their experiences have been mixed.[74] In the family violence context victims who have negative justice system experiences are 'less likely' to access its protection in the future,[75] and may suffer further violence in this way.[76] For victims, negative experiences may include, for example, their experiences being

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at 3. 'In the long run, the efficiency gains through specialisation may produce better outcomes that result in substantial savings elsewhere in the system – for example, earlier and more effective legal intervention may result in fewer cases requiring child protection agencies to intervene, and fewer demands on medical and psychological services. For these reasons, specialists are more likely to be effective in addressing family violence, and in their ability to make the system more efficient as a whole.': *ALRC Summary Report* (n 51) 34.

72 *RCFV Report: Financial Security* (n 14), 112, 124–5.

73 Ibid 124.

74 JCV Submission to RCFV (n 19) 7, citing Lucinda Jordan and Lydia Phillips, *Women's Experiences of Surviving Family Violence and Accessing the Magistrates' Court in Geelong, Victoria* (Report, November 2013) 22–3, 25.

75 JCV Submission to RCFV (n 19) 7, citing Gerald T Hotaling and Eve S Buzawa, *Forgoing Criminal Justice Assistance: The Non-Reporting of New Incidents of Abuse in a Court Sample of Domestic Violence Victims* (Report, January 2003) <https://doi.org/10.1037/e300602003-001>.

76 JCV Submission to RCFV (n 19) 7, citing Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' 30 *Sydney Law Review* 439, 440.

trivialised by others, not being heard through the process,[77] or a lack of safety due to ill-equipped facilities that lack waiting rooms for victims separate to those for the perpetrators.[78] Victim protective responses by the justice system are critical in such areas for these reasons. While the proposed reform is not the whole solution when it comes to improving the justice system for victims, it represents an improvement. However, improvements can also be made in other ways. For example, by promoting education and awareness of family violence by justice system staff and officers to ensure responses to victims are appropriate.[79] In addition, the responses of agencies and services outside of the justice system and courts are also critical. Former Chief Federal Magistrate John Pascoe has written: 'The need for support of parties and children before, during, and after the litigation process, and in particular greater support in accessing crisis accommodation and refuges, demands an integrated approach by state and territory governments.'[80] Further, 'we know from practice and research that affected parties are best assisted through proper communication and cooperation between agencies that are both within the court system and in the government and non-government sectors'.[81] This article makes these points to demonstrate an awareness of victims' justice system experiences more broadly, and the importance of improvements being made to ensure those experiences are positive, and the role played by agencies and services outside of the justice system in assisting victims.

The next section acknowledges the home experience, as a further benefit of the proposal.

B Relevance to Home

The proposal would benefit victims regarding their sense of home by expanding the accessibility of the *RTA*'s home protections in MCV. The *RTA*'s protections arguably enhance victims' experience of home in the specific ways described in the next part, thereby resulting in victims experiencing safety, security and identity through the place of home, either in a new home or in their existing home without the perpetrator. Fox makes the relevant point here that the house is 'the locus for the experience of home'.[82] By making it easier for victims to access the *RTA*'s home protections in MCV, the proposal arguably helps them obtain the home experience. This is how the proposal benefits home. For victims, this is vitally important. Home affords security, which helps victims 'to regain a sense of safety and recover from the trauma they have experienced'.[83] Home can be used as a narrative to advocate for the proposal,[84] in addition to the other arguments set out

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77 JCV Submission to RCFV (n 19) 7.

78 CSV Submission to RCFV (n 60) 10.

79 Advances have been made in this regard. The Judicial College of Victoria runs family violence training for court officers and staff to promote understanding of family violence. Topics have included, for example, 'Understanding Financial Abuse in Domestic Relationships': JCV Submission to RCFV (n 19) 10.

80 John Pascoe, 'Family Violence, Homelessness and the *Family Law Act 1975* (Cth)' (2010) 33(3) *University of New South Wales Law Journal* 895, 896.

81 Ibid 904–5.

82 Fox, 'The Meaning of Home' (n 5) 590.

83 *RCFV Report: A Safe Home* (n 7) 74. See also *RCFV Report: Financial Security* (n 14) 111.

84 Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 167 <https://doi.org/10.1108/IJLBE-11-2012-0024> ('Home: From Theory to Practice'). 'The concept of home provides the vocabulary, and the

above. The relevance of the proposal to other Australian jurisdictions is the focus of the next section.

C Relevance to Other Australian Jurisdictions

The proposed reform has relevance to other Australian jurisdictions in which victims' access to tenancy protections may be similarly complicated. Victims may – as in Victoria – need to navigate two separate jurisdictions to access certain tenancy protections, and intervention order protections, in New South Wales ('NSW'), South Australia ('SA'), Queensland ('Qld'), Tasmania ('Tas'), the Northern Territory ('NT') and the ACT.[85] In Western Australia ('WA'), this problem does not exist as the Magistrates' Court hears tenancy and intervention order matters.[86] The reform proposal is a possible way to overcome this complexity for victims – to the extent it exists in those jurisdictions – by creating a single jurisdiction for hearing victims' relevant tenancy and intervention order matters. However, those jurisdictions would need to consider their own unique tenancy and intervention order legislation as noted above in Part I.

To establish that the problem exists in these other Australian jurisdictions, an analysis was undertaken of their relevant legislation. However, this revealed that it will not always be the case that victims in NSW, SA, Qld, Tas and NT will have to navigate two jurisdictions. In some cases, the relevant court hearing their intervention order applications will be able to also hear their tenancy applications depending on their type or an application may be unnecessary to access the protection. In NSW, victims do not have to apply in any jurisdiction to terminate leases in cases of family violence, as they may declare that this has been their experience and proceed to terminate by notice to the landlord and each co-tenant.[87] Similarly, victims do not have to apply to any jurisdiction to exclude perpetrators from leases of their home as this happens automatically on the court making a final family violence intervention order.[88] However, to access other tenancy protections victims need to apply to the relevant state tribunal, in addition to the court for intervention order protections.[89] Accordingly, victims must navigate two jurisdictions in such cases which is

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theoretical framework, for articulating the human claims of vulnerable people, with fragile claims to adequate housing, more coherently. It enables us to identify those problems in need to policy attention; to develop a narrative to express them; and to generate support for solving them.'

85 See *Residential Tenancies Act 1997* (ACT) s 76; *Family Violence Act 2016* (ACT) s 16; *Residential Tenancies Act 2010* (NSW); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 50; *Residential Tenancies Act 1999* (NT); *Domestic and Family Violence Act 2007* (NT) s 30; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); *Domestic and Family Violence Protection Act 2012* (Qld) s 32; *Residential Tenancies Act 1995* (SA) ss 24, 89A; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20; *Residential Tenancy Act 1997* (Tas); *Family Violence Act 2004* (Tas) ss 16–17.

86 See *Residential Tenancies Act 1987* (WA) s 12A; *Restraining Orders Act 1997* (WA) s 24A(3).

87 The form of the declaration, and the grounds entitling them to do so, are set out in sections 105, 105B–105D of the *Residential Tenancies Act 2010* (NSW). A similar provision applies in WA: *Residential Tenancies Act 1987* (WA) ss 60, 71AB. A landlord may seek a review of the validity of the notice of termination: at s 71AC.

88 *Residential Tenancies Act 2010* (NSW) s 79.

89 See, eg, ibid s 217 (disputes about database listings); *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s 50.

the problem the proposed reform seeks to address. In SA, Qld, Tas and the NT, the position is slightly different. Relevant courts hearing victims' intervention order applications have been empowered to hear particular types of tenancy applications of victims, although not all.[90] Victims thus may not have to apply in a separate jurisdiction to access these tenancy protections from where they apply for intervention orders. However, the relevant courts have not been empowered to hear all tenancy applications made by victims and so if the protections victims seek to access fall within this category, they will need to apply separately to the relevant state tribunal (or in Tasmania the Residential Tenancy Commissioner) with the relevant jurisdiction.[91] Again, the proposed reform could address this problem of victims having to navigate two jurisdictions. In the ACT, the position of victims is that they must navigate two separate jurisdictions to access tenancy and intervention order protections as, similarly to the position in Victoria, no provision has been made for exceptions or the relevant court to hear victims' tenancy matters.[92]

Whether approaches in other jurisdictions could be implemented in Victoria, as an alternative to the reform proposed herein, is relevant to consider. The NSW approach, whereby victims may terminate leases by declaring in a notice to the landlord and each tenant that they have experienced family violence, is particularly notable as this saves victims from having to navigate any court or tribunal jurisdiction whatsoever to obtain this protection.[93] A similar provision applies for victims' benefit in WA.[94] However, while it is beneficial from the perspective of victims, this approach is not one that could be implemented to facilitate victims' access to all tenancy protections; for example, protections against their being liable to landlords for rent accrued by perpetrators. In this, and in most other cases, judicial oversight is necessary to ensure fairness to all parties. Allowing victims to declare their entitlement to such protections would not allow for this. This is why the proposed reform is to confer jurisdiction on courts to hear victims' tenancy protections, and not generally to allow victims to declare their entitlement to protections as an alternative approach in all cases. However, that approach could be adopted in the particular circumstances in which it applies, to ensure victims' immediate access to the protections entitling them to terminate leases in cases of family violence, ie, without the need for a court or tribunal application and hearing first. This ensures victims may break their leases without consequences to obtain safety.

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90 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 3, 25 (victims may apply to exclude a perpetrator from the lease in the court that makes their intervention orders); *Domestic and Family Violence Protection Act* 2012 (Qld) s 139; *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ss 245, 321, 323; *Family Violence Act 2004* (Tas) ss 16–17; *Domestic and Family Violence Act 2007* (NT) s 23. These laws operate to simplify processes for victims by conferring tenancy jurisdiction on courts hearing victims' intervention order applications, as is proposed herein for Victoria. These laws thus demonstrate the viability of this reform approach. As these laws only confer jurisdiction on relevant courts to hear particular types of tenancy applications made by victims, the proposed reform remains relevant.

91 See, eg, regarding protections relating to residential tenancy database listings: *Residential Tenancies Act* 1999 (NT) s 134; *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) s 460; *Residential Tenancies Act 1995* (SA) s 99L; *Residential Tenancies Act* 1997 (Tas) s 48ZF.

92 *Residential Tenancies Act 1997* (ACT) ss 76, 85A–85B; *Family Violence Act 2016* (ACT) s 16.

93 *Residential Tenancies Act 2010* (NSW) ss 105, 105B–105D.

94 *Residential Tenancies Act 1987* (WA) ss 60, 71AB.

The above discussion has identified that the problem exists in other jurisdictions, to a lesser extent in NSW, SA, Qld, Tas, and NT than in the ACT and Victoria. The problem does not exist in WA at all. For victims in these jurisdictions, the reform proposal could assist to simplify processes. The relevant laws in other jurisdictions are not discussed further in this article, given its focus on Victoria and, specifically, on the reform proposed for consideration in Victoria by the Commission. An evaluation of other jurisdictions' laws to determine whether they are effective from victims' perspectives could be the subject of future research.

The reform proposals' key features to be implemented in new legislation in Victoria are the focus of the next part.

III NEW LEGISLATION TO GIVE MCV JURISDICTION: KEY FEATURES

The previous Part outlined the case for MCV to receive the proposed new *RTA* jurisdiction and the justice benefits for victims brought about by the ensuing efficiencies. This Part sets out key features of the proposed jurisdiction that, it is argued, would be appropriate to implement in enabling legislation. It formulates a blueprint for that legislation, thereby building and expanding on the Commission's work to provide policymakers developing such legislation with guidance and a recommended framework approach. It is acknowledged that the proposed framework represents a particular approach to implementation of the jurisdiction, and that there may be other approaches. This Part, while approached from the perspective of Victorian law, is relevant to other Australian jurisdictions which have not already streamlined the hearing of victims' tenancy and intervention order applications in a single jurisdiction and may consider doing so.[95] As to structure, three sections follow. The first proposes the jurisdiction that is to be conferred on MCV. The second and third sections explore, respectively, the orders that could be made by MCV and various procedures for it hearing matters.

A Jurisdiction

The proposed enabling legislation would confer jurisdiction on MCV so that it could hear victims' *RTA* applications.[96] That would be its main purpose. The Children's Court of Victoria ('CCV') might also be conferred with this jurisdiction to ensure that victims who wish to have their *RTA* applications processed in the CCV rather than MCV, in circumstances where the CCV (rather than MCV) is already hearing their intervention order application under the *FVPA* because it concerns a child, may elect to do so. The CCV and MCV have concurrent jurisdiction to hear *FVPA* applications currently, and so it would be logical for them to also have concurrent jurisdiction to hear *RTA* matters, so these could be heard in both jurisdictions along with *FVPA* matters.[97] If the CCV were conferred with the

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95 SA, ACT and NSW: see above Part II.

96 Victims' *RTA* applications which MCV could hear are particularised in this section. Jurisdiction would only need to be conferred in respect of these, and not victims' applications under the *FVPA* which MCV already has jurisdiction to hear: *FVPA* (n 17) s 42.

97 Ibid. The CCV may hear *FVPA* applications where the family violence intervention order ('FVIO') is sought by a parent on a child's behalf, where it is alleged that the child is the victim of family violence, or where the child is the respondent, ie, alleged to have perpetrated the family violence: at

RTA jurisdiction in addition to MCV as recommended, the proposed legislation would need to address the issues outlined in this part in respect of the CCV. While this part refers to the MCV or the court for ease of reference, it should be taken to also include reference to the CCV as the points relate to both regardless of which may be given jurisdiction.

1 Types of Applications

The proposed enabling legislation would need to set out which types of applications, made by victims under the *RTA*, the court would have jurisdiction to hear.[98] This section presents five possible application types the court may hear: first, termination of lease applications; second, new lease applications; third, objection to termination applications; fourth, apportionment of liability applications; and fifth, tenancy database applications. This section also recommends that these applications be capable of being heard by the court where made by victims of personal violence as defined in the *Personal Safety Intervention Orders Act 2010* (Vic) ('*PSIO Act*') in addition to victims of family violence, for the reasons set out below in section (f).

(a) Termination of Lease Applications

Currently, victims may apply in VCAT for orders terminating a lease without incurring a financial penalty. Victims who have been, or are currently being, 'subjected to family violence' by another party to the lease may make these applications.[99] MCV would receive jurisdiction to hear these applications under the proposed legislation.[100] Victims would benefit from MCV being able to hear these applications, in addition to VCAT as currently.[101] Pursuant to these applications, victims may leave violent homes by lease termination orders.[102] These orders also ensure their financial liability ceases and so does not operate as a barrier to them leaving. The Commission explained: 'Recent research confirms that a lack of money was the most significant barrier to women leaving an abusive relationship.'[103] Victims are also supported to obtain the experience of home described at the outset, including a feeling of security and loving relationships as, by ending their lease

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ss 45(d), 146; *CYFA* (n 17) ss 3(1) (definition of 'proper venue'), 515(2). See also MCV and CCV Submission to RCFV (n 48) 3, 5.

98 The *RTA* also contains protections for victims relevant to home, but for which an application for orders is not needed, and thus which are not relevant to discuss in detail for present purposes. For example, a right for victims to make certain modifications to the premises: see *RCFV Report: Financial Security* (n 14) 125.

99 *RTA* (n 12) ss 91V(1)(a), (2).

100 The Commission recognised MCV should hear these applications under this reform: *RCFV Report: Financial Security* (n 14) 125. See also, Justice Connect Homeless Law Submission to RCFV (n 19) 42.

101 Refer to discussion of 'VCAT's Existing RTA Jurisdiction': see below Part III(A)(2)(d).

102 Victims may want to leave a home because they '[do] not feel safe remaining in the home and would prefer to move to temporary accommodation out of the perpetrator's reach': *VLRC Report* (n 40) 319–20 [9.27].

103 *RCFV Report: Financial Security* (n 14) 95, citing Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Research Report, WIRE Women's Information, August 2014) 22. See also *RCFV Report: Financial Security* (n 14) 93, 95, 97, 117, 127; Lucinda Adams and Antoinette Russo, Witness Statement No 59 to Royal Commission into Family Violence (15 July 2015) [57] ('Adams and Russo Witness Statement to RCFV').

early to leave a violent home environment,[104] they can remove themselves from an environment undermining of that experience. However, expert evidence given to the Commission explained: 'The existence of choice is important. For some women, it may be that they no longer feel that it is safe for them to remain at home, or their home makes them so unhappy that they wish to leave and start afresh. … Many women will [however] want to stay.'[105]

Victims are supported regarding their experience of home in yet another way. They are put in a better financial position to obtain a new home (ie, lease) elsewhere as compared to if these orders terminating their lease and releasing them from future liability under it had not been made and they continued to be financially liable under the lease or liable for penalties for its early termination.[106] In other words, these orders recognise – as the Commission did – that it is important not to burden victims with financial liabilities as these 'limit their ability to obtain safe alternative housing'.[107] The Commission's Report draws out this link between financial wellbeing and the ability to obtain a home.[108]

In hearing applications, MCV would be required by the proposed legislation to apply the *RTA*'s existing provisions applied by VCAT currently. This would ensure consistency in the law applied within each jurisdiction. Judicial officers would thus need to be satisfied that family violence has occurred,[109] and of certain other matters, including that the victim would suffer greater hardship if the lease were not terminated than the landlord would if the lease were terminated.[110] Judicial officers would also consider other matters, including whether an intervention order or notice had already been made excluding the perpetrator from the premises under the *FVPA*.[111] Judicial officers would not be permitted to order victims to pay compensation for the termination to the landlord,[112] and would need to specify when the lease terminates, ie, the date.[113]

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104 *RTA* (n 12) ss 91V(1)(a), (2).

105 Spinney Witness Statement to RCFV (n 12) [36]; *RCFV Report: A Safe Home* (n 7) 38.

106 Other barriers exist which make it difficult for victims to obtain a new safe home and these must be addressed in responding to family violence. The lack of affordable housing is highly problematic and, although beyond the laws' capacity to comprehensively address, is something governments must address through sustained investment in this area. 'Women who leave their homes have trouble finding safe, suitable and affordable alternative accommodation and, in some instances this can lead to homelessness.': *RCFV Report: A Safe Home* (n 7) 37.

107 *RCFV Report: Financial Security* (n 14) 124. See also at 113, citing Justice Connect Homeless Law Submission to RCFV (n 19) 22; Adams and Russo Witness Statement to RCFV (n 104) [56].

108 See above n 108.

109 Family violence could be demonstrated by victims showing they are protected by a relevant intervention order or a safety notice, or by adducing relevant evidence of such violence having occurred. The Act also recognises notices and orders from other jurisdictions: *RTA* (n 12) ss 3(1) (definition of 'non-local DVO'), 91V(3); *National Domestic Violence Order Scheme Act 2016* (Vic) ss 4 (definition of 'non-local DVO'), 5–6 ; *National Domestic Violence Order Scheme Regulations 2017* (Vic) reg 5.

110 *RTA* (n 12) ss 91W(1), (1B).

111 Ibid s 91W(3).

112 Ibid s 91X(2).

113 Ibid s 91W(5).

Jurisdiction to hear matters relating to goods left behind at the premises (by the victim or other tenants) could also be conferred on the MCV, as these matters may arise in the context of lease terminations.[114] For example, victims may apply for orders that goods be stored, noting these applications are made to VCAT currently.[115]

(b) New Lease Applications

Currently, victims may apply in VCAT for orders for a new lease of their home in their name and which excludes the perpetrator; the new lease replaces the existing lease of premises.[116] Victims who have been, or are currently being, subjected to family violence by a party to an existing lease may make these applications.[117] The premises in respect of which these applications are made must be the victims' home,[118] but the victim does not need to be officially listed as a tenant on the lease.[119] MCV would receive jurisdiction to hear these applications under the proposed legislation.[120] Victims would benefit from being able to make these applications in MCV, in addition to VCAT as currently.[121] Pursuant to these applications, victims may 'remain in or return safely to their homes',[122] and thereby 'avoid homelessness', as a result of orders for a new lease in their name excluding the perpetrator.[123] The perpetrator loses their proprietary right to reside in the home, as they are removed from the lease, while the victim remains on the (new) lease.[124] Thus, 'the responsibility for leaving the family home [is attributed] to the perpetrator of family violence'.[125] These applications are a part of 'a move towards helping women and children

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114 Justice Connect Homeless Law Submission to RCFV (n 19) 42.

115 *RTA* (n 12) s 395. For relevant application types concerning goods left behind, see pt 9.

116 Ibid ss 91V(1)(b), 91W(1A), (6).

117 Ibid ss 91V(1)(b), (2), 91W(1A), (6) and (8).

118 Ibid ss 91V(1)(b), (2).

119 Ibid s 91V(2)(b).

120 The Commission recognised MCV could hear these applications under such a reform: *RCFV Report: Financial Security* (n 14) 124. See also Justice Connect Homeless Law Submission to RCFV (n 19) 42.

121 Refer to discussion of 'VCAT's Existing *RTA* Jurisdiction': see below Part III(A)(2)(d).

122 *RCFV Report: A Safe Home* (n 7) 77. The VLRC originally recommended these provisions empowering victims to make new lease applications to ensure victims could remain at home in their existing premises under a lease in their name: see also *VLRC Report* (n 40) 329–30 [9.56].

123 Adams and Russo Witness Statement to RCFV (n 104) [34]. '[L]egal representation in relation to housing and tenancy might be beneficial. This is particularly in relation to the creation application provisions in the *Residential Tenancies Act 1997* (Vic) **(*Residential Tenancies Act*)** aimed to support victims of family violence to avoid homelessness…'. See also CHP Submission to RCFV (n 3) 4–5, 18.

124 John Billings, Jacquellyn Kefford and Alan Vassie, *Victorian Civil and Administrative Tribunal: Residential Tenancies* (ANSTAT No 233B.01, September 2020) 31: 'The Tribunal is empowered to give tenancy rights (and associated duties and obligations) to the applicant and others specified in the application and remove tenancy rights (and the associated duties and obligations) from the respondent tenant and other parties to the existing tenancy agreement. If the Tribunal only orders that the tenancy terminate, it terminates on the date the Tribunal specifies. If the Tribunal terminates a tenancy and orders the landlord to enter into a new tenancy agreement, the existing tenancy agreement terminates on the signing of the new tenancy agreement (s 233B(5) & (6)).' 'This has the effect of stopping the perpetrator from being a tenant or having any rights over the tenancy': Spinney Witness Statement to RCFV (n 12) [39.2].

125 *RCFV Report: A Safe Home* (n 7) 77.

[and other victims] to stay in their homes when it is safe to do so' and this is referred to as the 'staying safely at home' or 'safe at home' approach.[126] The Commission explained how this 'allows victims to stay in their home and community',[127] and thus to mostly avoid 'losing connections with family and friends and other supports, school networks, employment, and participation in the community'.[128] The law, by helping victims to retain these connections, is actually empowering victims to experience home. That is, the ideal experience of loving relationships in a place and a related sense of security, as noted earlier. This experience is essential to victims' recovery from violence. The Commission explained: 'Secure and affordable housing is an essential foundation if victims of violence are to regain a sense of safety and recover from the trauma they have experienced.'[129] Particularly for women who have been abused, home is vitally important, for it provides 'the source of their locations in the community, the focus of their children's relationships with the social worlds of the schools and school friends and the sites of their family stability'.[130] In addition, by protecting victims, the vast majority of whom are women who have suffered violence at the hands of men, Victoria's residential tenancy laws comply with the requirements of international human rights law. '[T]he UN Special Rapporteur on violence against women has recommended that all States should "provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved"'.[131] Expanding accessibility of these legal protections to MCV would benefit victims and their experience of home.

At this point, it is important to acknowledge that the 'safe at home' approach requires more than just tenancy law protections in the form of orders for a new lease. Victims require additional things to feel safe to remain at home. The scholarship reveals that a strong justice system response is required, whereby intervention orders stopping perpetrators from approaching victims are actually enforced against perpetrators in practice.[132] Diemer, Humphreys and Crinall have explained that, based on their research, '[s]tronger safety

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126 Ibid 39. However, the 'safe at home' approach has also received criticism as has been noted: see Kristin Diemer, Cathy Humphreys and Karen Crinall, 'Safe at Home? Housing Decisions for Women Leaving Family Violence' (2017) 52(1) *Australian Journal of Social Issues* 32, 34 <https://doi.org/10.1002/ajs4.5> and scholarship cited therein.

127 *RCFV Report: A Safe Home* (n 7) 77. For discussion on this point: see also at 75. See also CHP Submission to RCFV (n 3) 18; Spinney Witness Statement to RCFV (n 12) [31].

128 See above n 128.

129 *RCFV Report: A Safe Home* (n 7) 74. 'Safe and affordable housing is essential for family violence victims' recovery. However, there are a range of issues related to tenancy and residency agreements that can disproportionally affect victims. The financial implications are often severe.': *RCFV Report: Financial Security* (n 14) 111.

130 Elizabeth Branigan, *'His Money or Our Money?' Financial Abuse of Women in Intimate Partner Relationships* (Report, 2004) 31, cited in *VLRC Report* (n 40) 319 [9.25].

131 *VLRC Report* (n 40) 324 [9.41]. 'The UN Model Strategies also provide that protection orders should include "removal of the perpetrator from the domicile".' See also Diemer, Humphreys and Crinall (n 127) 34; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

132 Diemer, Humphreys and Crinall, (n 127) 44; 'Second, it relies upon ensuring that a perpetrator is removed and kept away. This relies in turn upon an appropriate justice response to family violence.': Spinney Witness Statement to RCFV (n 12) [39.2].

measures and a tighter enforcement system are needed if staying "safe at home" is to be a genuine option for more women and their children who want to separate from a violent and abusive partner'.[133] In other words, a new lease for victims excluding the perpetrator is not enough to make them feel safe to stay if the perpetrator is able to flout intervention orders and return to the home easily. The justice system response should thus be a priority focus for governments given 'the majority of women who have experienced family violence would prefer to remain in their own homes',[134] in addition to purely legal responses under the *RTA*, such as the reform advanced herein.

Returning to the proposal, judicial officers hearing victims' applications for a new lease would need to be satisfied that family violence has occurred,[135] and that the premises is actually the victims' home.[136] So long as the premises is their home, the victim need not demonstrate any proprietary right to reside there, ie, they need not be a tenant on an existing lease.[137] Judicial officers would also need to be satisfied of certain other matters before ordering a new lease, including that the victim's hardship if a new lease were not ordered would be greater than the landlord's if the new lease were ordered to replace the existing lease.[138] Judicial officers would also consider other matters, including whether an intervention order or notice excluding the perpetrator from the premises had already been issued under the *FVPA* as this may suggest it is similarly appropriate to order a new lease in the victim's name to the exclusion of the perpetrator.[139] Any new lease ordered would be for a term equivalent to the term remaining under the existing lease,[140] and be on the same terms as the existing lease; rent, for example, would remain the same.[141] The existing lease would terminate on the new lease being signed.[142]

(c) Objection to Termination Applications

Currently, victims may apply in VCAT for orders to stop a landlord terminating their lease. Specifically, victims may apply for orders to invalidate a landlord's notice to vacate. These notices are served on tenants by landlords who wish to terminate their lease with a tenant. However, the result of orders invalidating these notices is that landlords are stopped from terminating the lease.[143] MCV would receive jurisdiction to hear victims' applications for these orders under the proposed legislation.[144] Victims would benefit from being able to make these applications in MCV, in addition to VCAT as currently.[145] Pursuant to these applications, victims may retain their home, ie, the physical shelter, and the home

133 Diemer, Humphreys and Crinall (n 127) 44.
134 *VLRC Report* (n 40) 320 [9.27].
135 See above n 110.
136 *RTA* (n 12) s 91V(2).
137 Ibid s 91V(2)(b).
138 Ibid ss 91W(1A), (2).
139 Ibid s 91W(3).
140 Ibid s 91W(4)..
141 Ibid s 91W(4).
142 Ibid s 91W(6).
143 Ibid s 91ZZU.
144 Justice Connect Homeless Law Submission to RCFV (n 19) 27, 29; VCAT Submission to RCFV (n 19) 42.
145 Refer to discussion of 'VCAT's Existing *RTA* Jurisdiction': see below Part III(A)(2)(d).

experience which occurs through that medium,[146] through the above orders stopping the landlord terminating their lease. Hence these applications are important to protect home. Accessibility of these applications is particularly important to victims, noting that they are vulnerable to landlords terminating their lease. Landlords may seek to terminate their leases because, for example, the violent perpetrator has caused damage to the premises.[147] Victims should not lose their home in that way, through no fault of their own, and the law recognises this. VCAT hears victims' applications for orders to stop terminations currently, as noted, and if MCV were to receive this jurisdiction as proposed here it would apply the same provisions of the *RTA* for consistency.[148] Judicial officers in MCV would thus need to be satisfied of family violence and that the landlord's proposed termination has resulted from the perpetrator's wrongdoing (not the victim's), such that the victim should not lose their home by the lease terminating.[149] The landlord's notice to vacate would be invalidated in these circumstances, as noted above.[150]

(d) Apportionment of Liability Applications

Currently, victims may apply for VCAT orders to excuse them from liability to the landlord that would ordinarily be shared between themselves and a perpetrator who is their co-tenant.[151] Victims make these applications where the perpetrator has damaged the premises or accrued rent after the victim has left such that the perpetrator should be made wholly or partly liable for liabilities to the landlord by an order to this effect, thus excusing the victim from such liability.[152] These orders displace the principle of joint and several liability of co-tenants by apportioning these liabilities to the perpetrator.[153] MCV would receive jurisdiction to hear applications for these orders under the proposed legislation.[154]

Victims would benefit from MCV being able to hear these applications, in addition to VCAT as currently.[155] Pursuant to these applications, victims may leave an unsafe home environment through orders excusing them from liability for the perpetrator's

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146 Fox makes the point that house is 'the locus for the experience of home': Fox, 'The Meaning of Home' (n 5) 590.

147 Tenants Union of Victoria, Submission No 767 to Royal Commission into Family Violence (28 May 2015) 6 ('Tenants Union of Victoria Submission to RCFV'). 'For example, if a perpetrator of family violence deliberately causes damage to the rental property, this may lead to a Notice to Vacate being given to all tenants.'

148 *RTA* (n 12) ss 91ZZU, 91ZZV.

149 Ibid s 91ZZU.

150 Ibid s 91ZZV.

151 Ibid s 91X.

152 Ibid; *RCFV Report: Financial Security* (n 14) 113, 124; Adams and Russo Witness Statement to RCFV (n 104) [57]; Justice Connect Homeless Law Submission to RCFV (n 19) 9, 22–5; 'However, if victims simply abandon their rental property, they can accrue a debt as a result of outstanding rent and damage to the property, and be blacklisted on a residential tenancy database, making it very difficult for them to rent in the future.': McDonald (n 7) 78.

153 See above n 153.

154 The Commission recognised MCV could hear these applications under such a reform: *RCFV Report: Financial Security* (n 14) 125. See also Justice Connect Homeless Law Submission to RCFV (n 19) 42.

155 Refer to discussion of 'VCAT's Existing *RTA* Jurisdiction': see below Part III(A)(2)(d).

wrongdoing.[156] These orders mean victims may leave without fear of continuing to carry this liability upon leaving, which may operate as a barrier to them leaving. The Commission received evidence that these orders 'would reduce one barrier victims of family violence face when leaving violent relationships [and homes]: the fear that they will be held legally responsible for damage they didn't cause or rental arrears accrued after they have fled'.[157] In addition, victims may obtain a new home elsewhere, as they are placed in a better financial position compared to if these orders excusing them from liability to the landlord for the perpetrator's wrongs had not been made. 'The Commission heard evidence that victims of family violence living in private and public rental accommodation are often burdened with compensation claims and debts that limit their ability to obtain safe alternative housing.'[158]

As discussed above, once judicial officers are satisfied that family violence has occurred, they could then make these orders.[159] Applications for these orders could be made by victims at the same time as they make other types of *RTA* applications or separately, which is important as issues of their liability to the landlord may only manifest subsequent to other types of applications having been made.[160]

(e) Tenancy Database Applications

Currently, victims may apply in VCAT for orders prohibiting a landlord or their agent from listing them on a tenancy database.[161] Victims may also apply to VCAT for orders requiring their name be removed from a database on which they have already been listed.[162] These databases list persons who have previously breached the *RTA* or a lease, for example for non-payment of rent or damage to premises,[163] and are viewed by landlords to decide to whom not to rent their premises.[164] They can thus have a significant impact on whether listed victims can obtain housing, which is why it is important that victims can apply to

156 '[V]ictims of family violence are not held legally liable for debts that are properly attributable to perpetrators of family violence': *RCFV Report: Financial Security* (n 14) 113. See also at 124; Justice Connect Homeless Law Submission to RCFV (n 19) 24.

157 Adams and Russo Witness Statement to RCFV (n 104) [57]. See generally, *RCFV Report: Financial Security* (n 14) 93, 95, 97, 117, 127; Tenants Union of Victoria Submission to RCFV (n 148) 4; Justice Connect Homeless Law Submission to RCFV (n 19) 5, 22–5.

158 *RCFV Report: Financial Security* (n 14) 124. See also at 113, citing Justice Connect Homeless Law Submission to RCFV (n 19) 22; Adams and Russo Witness Statement to RCFV (n 104) [56]; 'However, if victims simply abandon their rental property, they can accrue a debt as a result of outstanding rent and damage to the property, and be blacklisted on a residential tenancy database, making it very difficult for them to rent in the future.': McDonald (n 7) 78.

159 *RTA* (n 12) s 91X(1)(a).

160 Anstat, Victorian Civil and Administrative Tribunal: Residential Tenancies (September 2020) [233C.01], page 35: 'There is often insufficient evidence concerning how liabilities between the parties will crystallise once the tenancy ends, or what claim may follow after the landlord has inspected the vacant premises. It may be more appropriate that once the tenancy ends, any dispute as to liability be the subject of a later application to the Tribunal.'

161 *RTA* (n 12) s 439L(2A).

162 Ibid.

163 *RCFV Report: Financial Security* (n 14) 113.

164 Justice Connect Homeless Law Submission to RCFV (n 19) 25.

stop or remove listings against them.[165] Indeed, this is particularly important for victims who are vulnerable to being listed due to the violent perpetrator breaching the lease.[166] MCV would receive jurisdiction to hear these applications under the proposed legislation, in addition to VCAT as currently.[167] This would benefit victims in at least two ways. First, victims would not be adversely impacted by listings in their search for housing, to the extent relevant orders are made. Second, victims' home experience would also be protected by these orders, noting the home experience under consideration here takes place through the place of home and thus requires shelter,[168] which these orders would help victims obtain. These orders would do so by ensuring victims are not precluded from obtaining a new (leased) home due to listings of breaches for which they were not responsible.[169]

(f) Victims of Personal Violence

Personal violence is violence which occurs in relationships outside of the family context, thereby distinguishing it from family violence.[170] Victims of this form of violence receive protection under the *PSIO Act*, under which they may apply for intervention orders in the MCV similarly to how such orders are applied for by family violence victims under the *FVPA*.[171] Such victims can also apply to access *RTA* protections separately in VCAT, again, similarly to family violence victims as discussed above.[172] Personal violence victims thus, again like family violence victims, have to apply in two jurisdictions to access relevant protections, ie, MCV for intervention orders and VCAT for *RTA* protections. So that they need only navigate a single jurisdiction in future, the recommendation is for MCV to be empowered under the proposed legislation to hear the above *RTA* protection applications which personal violence victims may make, in addition to the *FVPA* applications which it may already hear. Personal violence victims make *RTA* applications in VCAT infrequently at present and so it is not expected this would impose a significant resource burden on MCV.[173]

2 Ancillary Issues

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165 *RCFV Report: Financial Security* (n 14) 113; ibid.

166 *RCFV Report: Financial Security* (n 14) 113; Justice Connect Homeless Law Submission to RCFV (n 19) 25. See also 5, 22; Tenants Union of Victoria Submission to RCFV (n 148) 6–7; CHP Submission to RCFV (n 3) 14; 'However, if victims simply abandon their rental property, they can accrue a debt as a result of outstanding rent and damage to the property, and be blacklisted on a residential tenancy database, making it very difficult for them to rent in the future': McDonald (n 7) 78.

167 Refer to discussion of 'VCAT's Existing *RTA* Jurisdiction': see below at Part III(A)(2)(d). See Justice Connect Homeless Law Submission to RCFV (n 19) 42.

168 Fox, 'The Meaning of Home' (n 5) 590: the physical home is 'the locus for the experience of home'.

169 See above n 167.

170 Anstat, Victorian Civil and Administrative Tribunal: Residential Tenancies (September 2020) [233A.03], page 27.

171 *Personal Safety Intervention Orders Act 2010* (Vic) s 15.

172 *RTA* (n 12) ss 91V(2)(a)(ii) and 91V(2)(b)(iii)(B)., 91X, 91ZZU, 439L(2A).

173 Anstat, Victorian Civil and Administrative Tribunal: Residential Tenancies (September 2020) [233B.04], page 33.

As part of conferring jurisdiction, the proposed legislation would need to address several ancillary issues. This section discusses four such issues and provides recommendations for how they could be resolved in that legislation. The issues are as follows: first, financial limits on jurisdiction; second, pre-conditions to jurisdiction; third, the 'proper venue' in MCV; and fourth, VCAT's existing *RTA* jurisdiction. Each issue is discussed in turn.

(a) Financial Limits on Jurisdiction

Whether financial limits should be applied to MCV's jurisdiction is the first issue. If applied, these limits would mean MCV could only hear *RTA* applications up to a certain financial amount. As this would mean it could not hear all victims' *RTA* applications, ie, those above the set amount, it is not recommended that a financial limit be applied. Instead, it is recommended MCV be able to hear all applications regardless of their value. This is different to what is currently provided under the *RTA*, which gives MCV a limited jurisdiction to hear *RTA* applications valued above a certain financial value, ie, forty-thousand dollars.[174] This financial limit would need to be disapplied under the *RTA* jurisdiction proposed for MCV here.

(b) Pre-Conditions to Jurisdiction

Whether applicants would need to satisfy any pre-conditions to enliven the MCV's proposed jurisdiction is a further issue. In Qld, a jurisdiction in which victims can already apply in the Magistrates' Court to have their tenancy applications resolved alongside their intervention order applications for a streamlined process, a pre-condition applies.[175] The Court's tenancy jurisdiction is enlivened only if victims have made both intervention order and tenancy applications in the Court.[176] In other words, this is a pre-condition to the Court exercising tenancy jurisdiction, and this incentivises victims to make both applications simultaneously.[177] However, it restricts the Court's ability to hear victims' tenancy applications as some victims may not wish to apply for intervention orders, or may have already done so, at the time of making their tenancy application. These victims may not be able to satisfy the pre-condition, and thus the Court may not have jurisdiction to assist them with tenancy matters. For these reasons, this approach is not recommended for Victoria. It would frustrate the aims of the proposed jurisdiction for MCV to assist all victims through MCV's expertise and support services being applied in *RTA* matters. Further, it may cause confusion for victims who may not understand that, to enliven the jurisdiction, they would need to – if the Queensland approach were followed contrary to what is recommended here – apply for intervention and tenancy orders simultaneously.[178]

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174 See above n 15.

175 *Domestic and Family Violence Protection Act 2012* (Qld) s 139.

176 See ibid s 139(1).

177 However, such an incentive is unnecessary to the extent that victims may naturally prefer to have their related matters heard together for convenience.

178 If the proposed jurisdiction is also conferred on the CCV as recommended in the opening to this part, there may be merit in the enabling legislation taking a different approach for the CCV and requiring victims to have made an intervention order application in the CCV simultaneously with any *RTA* application. This would ensure that the CCV's *RTA* jurisdiction only engages in relevant circumstances involving a child as is already the case for its *FVPA* jurisdiction, and the relevant

These victims may thus inadvertently forfeit their ability to apply to the Court in tenancy matters through a lack of understanding caused by complexity.

(c) Proper Venue

Defining the 'proper venue' in MCV in which victims may make *RTA* applications and have them heard is yet another issue to be addressed in the proposed legislation. It is recommended that the 'proper venue' be defined as MCV's FVCD or the Neighbourhood Justice Division, as this would ensure consistency with the 'proper venue' for applications under the *FVPA*,[179] such that victims could then make *RTA* and *FVPA* applications together in the same 'proper venue'. This would be the default 'proper venue' under the legislation. MCV could also be given a power to determine a different 'proper venue' as it may for the *FVPA* jurisdiction currently.[180] MCV could thus determine that this is the civil registry or its generalist court division if the MCV's FVCD or Neighbourhood Justice Division are not available to hear a case; for example, due to resourcing constraints or these default venues not being located in the relevant area where a matter needs to be heard.

(d) VCAT's Existing RTA Jurisdiction

VCAT has existing *RTA* jurisdiction and whether this jurisdiction is to be retained for victims if MCV is given jurisdiction to hear their *RTA* matters, as recommended, is an issue that would need to be clarified. Retaining VCAT's existing *RTA* jurisdiction (including for victims' matters) such that it would operate concurrently with any equivalent jurisdiction given to MCV is recommended.[181] This will ensure VCAT can continue to resolve victims' *RTA* applications and take into account their family violence arguments in applications initiated by others, for example, a landlord. This is important, noting that victims may need to raise family violence arguments in landlord initiated VCAT matters, for example, for the termination of a lease (ie, application for a possession order).[182] In those cases, VCAT would only be able to hear these arguments if its *RTA* jurisdiction with respect to family violence matters were retained, as recommended. If it were not, the victim would need to make a separate application in MCV on family violence grounds, while the VCAT matter is adjourned pending MCV's decision. As this would unnecessarily complicate the process and delay victims' matters being processed due to two jurisdictions being involved, this is not recommended. In other words, VCAT's existing jurisdiction ought to be retained so as to operate concurrently with the proposed jurisdiction for MCV. Alternatively, the

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requirements would thus be picked up. This is consistent with the Court's purpose as a Children's Court, as currently, the Court can only receive intervention order applications in circumstances involving a child: see above n 17.

179 *MC Act* (n 55) s 4IB.

180 *FVPA* (n 17) s 42; ibid s 3 (definition of 'proper venue').

181 Rather than the proposed *RTA* jurisdiction being conferred exclusively on MCV, with VCAT's *RTA* jurisdiction removed in respect of victims.

182 See especially *RTA* (n 12) s 91ZZV.

proposed jurisdiction for MCV could operate exclusively, so as to replace VCAT's jurisdiction, but for the reasons given this is not recommended.[183]

Following the recommendation here for VCAT's existing jurisdiction to operate concurrently with the *RTA* jurisdiction proposed for MCV, there would be a risk of conflicting orders being made.[184] In separate proceedings concerning the same premises, MCV and VCAT may both make orders if neither is aware of the other's proceeding raising this risk of conflict. To ensure this does not happen, it is recommended that the following mechanism be included in the enabling legislation. The MCV would be required (and appropriately authorised) to notify VCAT of its RTA proceedings.[185] If VCAT is hearing *RTA* proceedings concerning the same premises, it would then be required to adjourn these until MCV's proceedings resolve.[186] The risk of conflicting orders being made is thus overcome. It makes sense to require MCV to notify VCAT of its *RTA* proceedings (and not the other way around) as MCV will have fewer *RTA* proceedings overall as the proposal is for it to hear only victims' *RTA* applications, whereas VCAT's existing jurisdiction is to hear all *RTA* applications regardless of whom they are made by.[187] Thus, the requirement to notify of these proceedings would be easier for MCV to comply with than for VCAT.

B Orders

The types of orders MCV could make and an approach for their enforcement are both key issues that would need to be addressed in the proposed legislation. This section considers

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183 This discussion has benefitted from and drawn on the discussion of exclusive and concurrent jurisdiction in Victorian Law Reform Commission, *Disputes Between Co-owners* (Report No 136, 31 December 2001) 65 [4.21] ('*Co-Owners Report*'); Samuel Tyrer, 'A Proposal to Give State and Territory Tribunals Jurisdiction to Resolve "Assets for Care" Disputes' (2020) 46(3) *Monash University Law Review* 204, 235–8 ('Jurisdiction Proposal to Resolve Assets for Care Disputes').

184 The general risk of conflicting orders in the context of overlapping jurisdictions has been noted: see JCV Submission to RCFV (n 19), 12–13. 'There are overlapping and interrelated jurisdictions between the courts, especially first instance proceedings in VCAT, Magistrates' Court, Children's Court, Federal Circuit Court and the Family Court. This can have the effect of increasing confusion around court orders or leading to conflicting or inconsistent court orders, particularly if lines of communication and information sharing between the courts are not effective. The courts cannot rely on individuals bringing relevant information from one proceeding to another.'

185 'While several judicial officers commented that the courts would benefit from the systematic sharing of more important information there are some legislative and resource constraints on jurisdictions sharing information. Thorough examination of the legislative framework is required so that enabling legislation can ensure the effective sharing of information and interconnectivity between the courts.': ibid 13.

186 This mechanism has been proposed in a different context: see Tyrer, 'Jurisdiction Proposal to Resolve Assets for Care Disputes' (n 184) 239–42.

187 See above n 15.

both issues – types of orders and their enforcement – in turn and makes useful recommendations to guide policymakers.

1 Types of Orders

The proposed legislation would need to include a power for MCV to make orders. MCV could be conferred with a power to make any orders VCAT may make in the above *RTA* applications.[188] This would ensure consistency in the types of orders made by each jurisdiction and it would avoid having to list those out in the legislation. MCV could also receive power to make any other orders 'it considers appropriate' if this additional flexibility is considered necessary; for example, to enable MCV to make less usual orders, such as that an application originally commenced in MCV be transferred to VCAT for hearing if appropriate.[189] MCV's existing functions or powers under common law or statute could be preserved by stating in the proposed legislation that they are not limited in any way.[190]

2 Enforcement

The proposed legislation would need to clarify how MCV's orders are to be enforced. MCV's existing enforcement processes could be applied, such that orders it makes in *RTA* matters would be enforced through those. This would mean that monetary orders, for example, orders that a tenant pay money to a landlord, would be enforced by a warrant to seize property.[191] Further, non-monetary orders, for example, orders for a new lease to be entered into by parties, would be enforced according to their terms, with persons who breach their terms liable to a fine or imprisonment,[192] or contempt of court action for non-compliance with a court order.[193] Enforcing MCV's orders following its existing approach would ensure the Court's enforcement approach remains consistent regardless of the type of civil matters its hears. Different enforcement processes apply in respect of VCAT, however, orders are enforced in the Supreme Court, County Court or MCV depending on the type of orders made; that is, VCAT does not, unlike MCV, enforce its own orders.[194] This different enforcement approach in VCAT means that parties to *RTA* matters will be treated differently for enforcement purposes, depending on whether their matter is heard in MCV or VCAT following the approach recommended here. However, this is a necessary trade-off for pursuing consistency in the enforcement processes within the Court by its

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188 For example, orders terminating a lease or for a new lease in place of an existing lease. MCV should receive all of VCAT's existing functions and powers in the hearing of relevant matters. See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 57C(2) ('*VCAT Act*').

189 See, eg, ibid s 57C(1)(b).

190 See, eg, ibid s 57C(2).

191 *MC Act* (n 55) s 111.

192 Ibid s 135.

193 Breach of a court order constitutes a form of contempt known as 'disobedience contempt': Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 108, 120 n 72, citing *Moira Shire Council v Sidebottom Group Pty Ltd [No 3]* [2018] VSC 556.

194 Non-monetary orders are enforced in the Supreme Court: *VCAT Act* (n 189) s 122. Monetary orders are enforced in the MCV, County Court or Supreme Court: at s 121.

existing enforcement processes continuing to apply there, rather than mirroring VCAT's for *RTA* matters of victims.

C Procedures

The proposed legislation would need to set out procedures for the hearing of *RTA* matters in MCV. This section considers various procedures that could apply and makes recommendations for their particular application in the proposed legislation, as follows: first, the rules of procedure; second, the *Civil Procedure Act 2010* (Vic) ('*CPA*'); third, the rules of evidence; fourth, involvement of interested parties; fifth, appeals; sixth, re-hearings; seventh, the timing for hearings; eight, costs; ninth, related applications; and tenth, alternative dispute resolution.

1 Rules of Procedure

Rules of procedure govern the conduct of proceedings by parties before courts. Different rules apply to proceedings being heard in a court's civil or criminal jurisdiction. As *RTA* applications are civil jurisdiction matters, if they were heard in MCV as proposed, the civil procedure rules would apply. This could be stated in the proposed legislation for clarification, and to ensure it is clear that the same civil procedure rules apply regardless of the type of civil matters MCV is hearing.[195] That said, the proposed legislation or new court rules could modify these rules if necessary to achieve a particular policy objective relevant to hearing victims' *RTA* applications.[196] Ensuring victims' psychological and physical safety in proceedings is a relevant policy objective in this context and, as such, the following procedures could be set out in the legislation to achieve this:

- Victims may give their evidence via alternative arrangements, such as by audio-visual link.[197]
- Victims may have access to a support person throughout the hearing.[198]
- Victims may not be cross-examined by a perpetrator, or only with leave of the court.[199]
- Victims may benefit from closed court orders to prevent their 'undue distress or embarrassment'.[200]
- Victims may not be required to affect service on the perpetrator or other parties (MCV should affect service on behalf of victims instead).[201]

In other court and tribunal matters, special procedures are applied to protect victims,[202] and to help them feel safer to participate in proceedings compared to if such procedures were not specified.

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195 See, eg, ibid s 57C(3)(b).
196 See, eg, ibid s 57C(3).
197 See, eg, ibid sch 1 pt 17 cl 73B; *FVPA* (n 17) s 69.
198 See, eg, *VCAT Act* (n 189) sch 1 pt 17 cl 67A; *FVPA* (n 17) s 69(1)(c).
199 See, eg, *VCAT Act* (n 189) sch 1 pt 17 cl 73A; *FVPA* (n 17) s 70.
200 See, eg, *FVPA* (n 17) s 68; *Open Courts Act 2013* (Vic) s 30(2)(d).
201 See, eg, *FVPA* (n 17) s 48.
202 In VCAT and MCV: see *VCAT Act* (n 189) sch 1 pt 17; *FVPA* (n 17) ss 48, 68–70.

2 Civil Procedure Act 2010 (Vic)

The *CPA* contains further rules for the conduct of proceedings applicable to all Victorian court jurisdictions, including MCV.[203] The rules require parties to, for example, use 'reasonable endeavours' to attempt to resolve their dispute before a hearing unless this is not in the interests of justice.[204] Requiring victims to use 'reasonable endeavours' to resolve their dispute with a perpetrator is likely to traumatise victims and produce unfair outcomes due to the imbalance of power in the parties' relationship;[205] court oversight is necessary to fairly resolve these matters.[206] Thus, it is recommended that the *CPA* not apply, and that this be stated in legislation.[207] MCV would thus hear *RTA* applications without the *CPA* applying, consistently with the approaches taken in other contexts.[208]

3 Rules of Evidence

Rules of evidence determine which evidence is admissible in courts and are, generally speaking, quite technical. The rules are not, therefore, necessarily appropriate to apply in proceedings where an urgent outcome is required, such as in family violence cases, as this technicality may result in the court taking additional time to resolve matters and make orders. In turn, this risks victims' safety and wellbeing as victims depend on orders being made promptly to escape violent perpetrators. For this reason, it is recommended that the rules of evidence not apply and for this to be stated in the proposed legislation, consistently with the approaches taken in other contexts.[209]

4 Involvement of Interested Parties

As other parties may be impacted by *RTA* proceedings in MCV, these parties should have an opportunity to be heard by joining the proceedings and making submissions. The Commission explained: 'the landlord and any other tenants would need to become parties

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203 *Civil Procedure Act 2010* (Vic) s 4(1) ('*CPA*').

204 Ibid s 22.

205 Sarah Dobinson and Rebecca Gray, 'A Review of the Literature on Family Dispute Resolution and Family Violence: Identifying Best Practice and Research Objectives for the Next 10 Years' (2016) 30(3) *Australian Journal of Family Law* 180, 181. '[M]ediation requires negotiation between parties on equal footing and the presence of family violence – characterised by coercion and control – is typically indicative of a significant power imbalance'.

206 Refer to discussion of 'Alternative Dispute Resolution': see below section 10.

207 See, eg, *CPA* (n 204) s 4(2).

208 The *CPA* also does not apply in VCAT: ibid s 4(3); in certain contexts in MCV in respect of *FVPA* proceedings: at s 4(2)(a); and in respect of certain proceedings MCV hears in circumstances where VCAT lacks jurisdiction: at s 4(2)(ja).

209 The rules of evidence do not apply in VCAT, and do not apply in specific contexts in MCV in respect of family violence matters. In MCV, it is provided that 'in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary': *FVPA* (n 17) s 65(1). However, certain provisions of the *Evidence Act 2008* (Vic) expressly apply, for example the ability for witnesses to use an interpreter in giving evidence under section 30: *FVPA* (n 17) s 65(2). In VCAT, the Tribunal 'is not bound by the rules of evidence' except if it chooses to apply them: *VCAT Act* (n 189) s 98(1)(b). The rule against self-incrimination also does not apply, however a direct use immunity is included: at s 105.

to the proceeding'.[210] This includes the perpetrator and potentially others. It is thus recommended that the Court be required by the proposed legislation to notify interested parties of the proceedings and provide them with information on how to join the proceedings. Victims could be requested to provide the Court with the details of interested parties at the time of making an application. However, if victims do not know these details, for example because they do not have a copy of the lease containing these parties' details, MCV could still proceed to hear matters and, at the first hearing, request that other parties, such as the landlord, provide these details to the Court. Alternatively, the Court's registry could make relevant inquiries to obtain interested parties' details and notify them prior to a hearing.

5 Appeals

A process for appeals of MCV orders would need to be clarified in the proposed legislation. MCV's existing appeals processes could be applied for consistency, meaning that MCV's final orders would be appealable to the Supreme Court on a question of law within 30 days after the order is made,[211] or with leave to appeal outside of this time.[212] All MCV's orders would thus be appealable in the same way. Additionally, this would ensure an appeals process which is broadly consistent with VCAT's appeals process, whereby its orders are similarly appealable to the Supreme Court – the Trial Division of the Supreme Court, or the Court of Appeal if VCAT's President or Vice President made the order.[213]

6 Re-hearings

Re-hearings are generally conducted as if the original hearing had not taken place and are usually only available in limited circumstances. In MCV, for example, currently a person may seek a re-hearing if they 'did not appear in the proceeding'.[214] In VCAT, a person can seek a re-hearing in similar circumstances, including in *RTA* matters.[215] It is recommended that the proposed legislation provide similarly for consistency.

7 Timing for Hearing

Setting a time within which MCV must hear victims' applications would assist to ensure they are heard promptly so victims can obtain the necessary orders to ensure their safety, wellbeing and experience of home, as discussed above. In VCAT, the Tribunal must hear victims' urgent *RTA* applications within 3 days of receipt, or the next day if that timeframe

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210 *RCFV Report: Financial Security* (n 14) 125. See also at 124.
211 *MC Act* (n 55) s 109. See, eg, *VCAT Act* (n 189) ss 57C(3)(j), (4).
212 *MC Act* (n 55) s 109(4).
213 *VCAT Act* (n 189) s 148. In VCAT, leave to appeal is required in all cases, which is not the case in MCV where leave to appeal is not required if an appeal is made within the stated time: at s 148; *MC Act* (n 55) s 109.
214 *MC Act* (n 55) s 110.
215 *VCAT Act* (n 189) s 120.

cannot be met.[216] It is recommended that a similar timeframe be applied in respect of MCV's proposed hearing of these matters for consistency.

8 Costs

Costs may be awarded in civil litigation by the court making orders for the losing party to pay the successful party's costs.[217] Alternatively, each party may bear its own costs of the proceeding if such cost orders are not made. The approach of each party bearing responsibility for their own costs is recommended here as it would ensure parties (especially victims) are not deterred from accessing protections by the risk of adverse costs orders.[218] This approach is also consistent with the approach to costs in *FVPA* proceedings in MCV,[219] and in VCAT proceedings generally.[220] A way to achieve the recommended approach to costs is for the legislation to include a presumption that '[e]ach party … must bear the party's own costs of the proceeding',[221] followed by relevant exceptions providing for costs to possibly be ordered in 'exceptional circumstances',[222] or if a person's application 'was vexatious, frivolous or in bad faith'.[223]

9 Related Applications

A key benefit of the proposal is that the Court would be able to hear related applications together, including *RTA* and *FVPA* matters as noted. It is thus recommended that this be clarified as possible in the proposed legislation which could thus state that parties' related applications 'may be heard together if the court thinks fit', either on the Court's own motion or following a party applying.[224] A provision in this form exists in the *FVPA*,[225] to clarify that related applications may be heard together.

10 Alternative Dispute Resolution

Parties may be ordered by the court to attend alternative dispute resolution ('ADR') processes under its existing powers, as a way to avoid the need for, and thus costs of, a full hearing. It is recommended that, while the proposed legislation retain MCV's power to order parties to ADR (ie, mediation or pre-hearing conference),[226] it be clarified that these processes will not be used in family violence cases unless exceptional circumstances exist,

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216 *RTA* (n 12) s 91V(7).

217 This is known as the principle 'costs follow the event'.

218 Parties may be deterred from accessing legal protections by costs.

219 In *FVPA* proceedings in MCV, '[e]ach party to a proceeding for a family violence intervention order under this Act or a proceeding for the variation, extension or revocation of a recognised DVO must bear the party's own costs of the proceeding': *FVPA* (n 17) s 154(1).

220 Costs are not generally awarded in VCAT unless justified in particular circumstances: *VCAT Act* (n 189) s 109.

221 *FVPA* (n 17) s 154(1).

222 Ibid s 154(3)(a).

223 Ibid s 154(3)(b).

224 See, eg, ibid ss 63(1)–(2).

225 Ibid. See also relevant discussion in MCV and CCV Submission to RCFV (n 48) iii, 10.

226 MCV's existing powers to order parties to pre-hearing conferences and mediations could be cross-referenced under the new legislation: *MC Act* (n 55) ss 107, 108.

such as that the victim wishes to engage in ADR or the relevant mediator is trained in the use of ADR in family violence cases; the use of ADR may be considered to determine if it is appropriate in such cases.[227] However, in most family violence cases these circumstances will not exist and ADR will generally not be appropriate due to the imbalance of power in the parties' relationship and a lack of court oversight of these processes which means victims may be exploited by the perpetrator.[228] This is why it is recommended that it be clarified that ADR will not generally be used in these cases. This clarification could be provided in a practice note issued by the court.

IV CONCLUSION

This article proposes the conferral of jurisdiction upon the MCV to allow it to hear victim applications made under the *RTA*, thereby expanding the accessibility of the protections found there. As victim applications for intervention orders can already be made in MCV under the *FVPA*, implementation of this reform would enable these to be heard jointly with *RTA* applications, following the one process. The *RTA*'s protections for a safe and secure experience of home would be readily accessible to victims in MCV in this way. Other benefits would also flow. Victims would gain access to MCV's comprehensive support services in relation to their *RTA* applications. Further, the joint processing of *FVPA* and *RTA* applications in MCV and their hearing by expert magistrates might result in case handling efficiencies. The case for this reform is strong for these reasons, which draw and build on the Commission's work and recommendation for the Victorian Government to consider such a reform. This article has contributed beyond the Commission's work by detailing further arguments in favour of the proposed jurisdiction and proposing its key features to be implemented in legislation, thereby providing guidance to policymakers in this regard.

Of course, this reform provides no legal panacea for the treatment of family violence. It is, though, a significant means of improving Victoria's civil law for victims.[229] It is also recognised that other policy responses are required to address family violence. Preventative responses are required to ensure violence does not occur in the first place,[230] including education 'to dismantle harmful attitudes towards women, promote gender equality and encourage respectful relationships'.[231] Remedial responses are also required while family violence persists, including responses which equip agencies and courts to take action to

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227 'It is also in response to the voices of victims, who in some instances choose to undergo FDR [family dispute resolution] for a number of reasons': Dobinson and Gray (n 206) 182. 'The continuation of these efforts is also supported by research showing the benefits of FDR for victims of violence that can occur when service providers are specially trained and the process is tailored to their needs.': at 182.

228 Dobinson and Gray (n 206) 181. '[M]ediation requires negotiation between parties on equal footing and the presence of family violence – characterised by coercion and control – is typically indicative of a significant power imbalance'.

229 Civil law responses to family violence have benefits and limitations. See further *VLRC Report* (n 40) 60–2 [3.38]–[3.44].

230 *RCFV Summary Report* (n 3) 6, 11, 38. See also CHP Submission to RCFV (n 3) 4.

231 *RCFV Summary Report* (n 3) 11. See also at 38.

ensure victims' personal safety,[232] and improve the availability of affordable housing.[233] These responses demonstrate the magnitude of the task to comprehensively address family violence, which is beyond the scope of this law-reform article.[234] It is a task which must extend beyond a purely legal response and which requires the whole of society to work together to address. The Commission explained:

> Preventing family violence is essential for the health and wellbeing of our community and requires widespread cultural change. There are no 'quick fixes': a long-term perspective and sustained effort and investment are needed. This is one of the most complex and intractable problems confronting the Victorian Government and the Victorian community. If we do not tackle the problem of family violence at its source and become better at preventing it from occurring in the first place, communities and the systems that support them – police, courts and other services – will continue to be overwhelmed. We need to give as much attention to prevention as we do to the other parts of the family violence system. Leadership from the Victorian Government is essential, but action by the government alone will not be sufficient. To create a culture of non-violence and gender equality, ordinary Victorians must come together to change attitudes and behaviours. Everyone in the community has a role to play – individuals and all types of organisations.[235]

Victims' lives and wellbeing depend on this multi-disciplinary and multi-dimensional approach. Following the proposal set out herein for the *RTA*'s home protections to be made accessible to victims in MCV would be a useful contribution.

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232 Ibid 10. See also at 19–20. See also CHP Submission to RCFV (n 3) 4; '[s]tronger safety measures and a tighter enforcement system are needed if staying "safe at home" is to be a genuine option for more women and their children who want to separate from a violent and abusive partner': Diemer, Humphreys and Crinall (n 127) 44.

233 Adams and Russo Witness Statement to RCFV (n 104) [79]. 'The availability of affordable housing for people is an essential part of an effective family violence response. The shortage of affordable housing presently is a structural deficiency in the housing and homelessness system. It is a major structural issue that requires significant investment, not only in the form of public housing, but in a range of difficulty things, including rapid re-housing, making private rental more accessible and better programs to keep people in the housing that they are already in.'

234 See *RCFV Summary Report* (n 3) 14. 'The Commission's strategy is not reliant on one central initiative: it depends on many initiatives. It is vital that these are coordinated and integrated rather than implemented in a piecemeal manner.'

235 *RCFV Summary Report* (n 3) 38. 'At the core of the Commission's recommendations, therefore, is a call for a long-term approach—one that is bipartisan, requires all parts of government to work together, and involves the entire community. It must include people with experience of family violence and expertise in the responses needed; it must be reflective about policy and program successes and failures; and it must be able to adapt to new knowledge and circumstances.': at 16.

ARTICLE SIX: ‘ROOMING HOUSES IN VICTORIA: HOME AND THE NATURE OF PROPERTY’

ARTICLE SIX: STATEMENT OF AUTHORSHIP

This paper was published in 2022 as Samuel Tyrer, 'Rooming Houses in Victoria: Home and the Nature of Property' (2022) 30(2) *Australian Property Law Journal* 108.

This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:

Date:

13 December 2022

Rooming houses in Victoria: Home and the nature of property

*Samuel Tyrer**

This article presents a case study of Victorian rooming house laws contained in the Residential Tenancies Act 1997 (Vic). The study evaluates those laws — which protect vulnerable rooming house residents in various ways — from the perspective of home. That is, to determine whether these laws enable residents to experience home, which is defined herein as ideally a feeling of security, the expression of self-identity, and relationships in and through place according to existing home scholarship. The overall finding reached is that Victorian rooming house laws may enhance residents' experience of home in some respects, while in other respects they may inhibit or fail to protect that experience. Reforms are proposed to address this deficiency of home, and observations made regarding home and the nature of property from a property theory perspective.

I Introduction

Victoria's rooming house laws under the *Residential Tenancies Act 1997* (Vic) ('rooming house laws' or '*RTA*') may impact on home, an experience which individuals have in housing.[1] They may enhance that experience. Or, they may inhibit or fail to protect that experience.[2] Disadvantaged rooming house residents suffer a lack of home when this happens. This is not inevitable. Rooming house laws, like all property laws, can be reformed to protect the home.[3] This would enhance human dignity for residents by affording them a positive experience of home. By so expanding current thinking about rooming house laws to include home — the experience, this article positions 'the experiences of occupiers — particularly vulnerable occupiers' front and centre.[4] It also — relatedly — seeks to identify rooming house law reforms for home. Progressive property scholarship informs this piece. It says property systems impact individuals and exist to — among other things — enhance

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1 On home and property, see especially Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) ('*Conceptualising Home*'). See also Samuel Tyrer, 'Home in Australia: Meaning, Values and Law?' (2020) 43(1) *University of New South Wales Law Journal* 340 ('Home in Australia').

2 Tyrer, 'Home in Australia' (n 1) 361–74.

3 'Choices about property entitlements are unavoidable, and, despite the incommensurability of values, rational choice remains possible through reasoned deliberation': Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) 94(4) *Cornell Law Review* 743, 744 [3].

4 Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 161 ('The Meaning of Home').

their flourishing.[5] Fox O'Mahony's seminal home scholarship also informs this piece. It draws the link between property laws and the experience of home.[6] Roark's legal scholarship also explores this link.[7] Specifically, he considers how property impacts poor people — the under-housed and under-propertied — in their ability to form identity and community in housing.[8] The rules favour 'property holders over those who are poor',[9] he argues, thereby creating a discourse in which the poor are seen as 'different'.[10] The discourse may 'shape our policy views and outcomes';[11] for example, by laying blame for their plight upon the poor themselves, as a result of their being 'different'.[12] Such discourses resulting from property shape how the poor are perceived, and need to be unpacked and changed as part of addressing housing problems faced by the poor, Roark argues:

> We need to change our discourse so that property winners are appreciated as the beneficiaries of a system that all of society props up. To the extent that people in that system do not get the benefits of a property system, they are better understood as victims rather than losers.[13]

Roark's argument here is that 'the law shapes social approaches to housing for impoverished persons by the way it talks about property'.[14] Other scholarship has also examined the law's impact on home and housing.[15]

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5 'Values promoted by property include life and human flourishing ...': see Alexander et al (n 3) 743 [2.3]. Regarding the human flourishing theory of property specifically, see Gregory Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (Paper No 653, Cornell Law Faculty Publications, 2013) 1; Gregory Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) *Cornell Law Review* 745; Alexander et al (n 3); Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012).

6 See especially Fox O'Mahony, *Conceptualising Home* (n 1). See also Fox O'Mahony, 'The Meaning of Home' (n 4); Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580.

7 Marc L Roark, 'Under-Propertied Persons' (2017) 27(1) *Cornell Journal of Law and Public Policy* 1 ('Under-Propertied Persons').

8 Ibid 9–11, 31.

9 Ibid 6.

10 Ibid 5–6.

11 Ibid.

12 Ibid 9, discussing Teresa Gowan's work in Teresa Gowan, *Hobos, Hustlers, and Backsliders: Homeless in San Francisco* (University of Minnesota Press, 2010).

13 Roark, 'Under-Propertied Persons' (n 7) 8.

14 Ibid 11.

15 See, eg, Lorna Fox O'Mahony and James A Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37(2) *Journal of Law and Society* 285; Beverley A Searle, 'Recession, Repossession and Family Welfare' (2012) 24(1) *Child and Family Law Quarterly* 1; Susan Bright and Nicholas Hopkins, 'Home, Meaning and Identity: Learning from the English Model of Shared Ownership' (2011) 28(4) *Housing, Theory and Society* 377; 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; Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017); 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; 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* 52.

In referring to home, this article is referring to an experience which individuals have in housing which may, of course, include rooming houses. This experience is understood here — drawing on earlier work — to be an experience ideally including a feeling of security, the expression of self-identity and relationships.[16] A feeling of security recognises that: 'Homes can make individuals feel secure.'[17] Security flows from the stability and control they afford occupiers.[18] The expression of self-identity recognises that through homes, individuals can manifest their identity.[19] Individuals can 'engage in creative activities expressive of identity in home' for example 'renovations, gardening, painting and decorating'.[20] Relationships are a further dimension of home, in recognition of the fact that it is in homes that relationships form.[21] Homes are where people 'return to be nourished by each other, in community with each other'.[22] This understanding of home is used to make an assessment of whether the rooming house laws enhance home or not. The methodology used to make that assessment is unpacked later in this article.

The research presented herein is important from the perspective of residents. Residents are directly impacted by rooming house laws, as they bear on their ability to feel safe and secure, express themselves and build community in and through their home. Laws bear on their home experience, in other words. Residents who do not feel secure and stable in a place are unlikely to be able to participate in public life in all its dimensions, that is, 'social, cultural and political',[23] thereby demonstrating the significant impacts of a lack of home for flourishing. While this article focuses on evaluating laws from the resident perspective, the research does have relevance to society at large for at least two reasons. First, because the evaluation of rooming house laws yields valuable insights regarding the society making those laws. Drawing on Roark's scholarship, it may be argued that the content of these laws reflects society's perceptions of the residents to whom they apply; the logic here is that, in a democratic society, laws reflect the collective will of the society.[24] Based on the conclusions drawn in this article regarding Victoria's rooming house laws failing to assist vulnerable rooming house residents to live safely and securely in particular respects, it may be argued these laws reveal a society in which certain people — the poor — are deemed not worthy

16 Home was theorised in this way, in earlier work, drawing on Fox O'Mahony: see Tyrer, 'Home in Australia' (n 1); Fox O'Mahony, *Conceptualising Home* (n 1).

17 Tyrer, 'Home in Australia' (n 1) 349.

18 Ibid 362, 370.

19 Ibid 354.

20 Ibid 364.

21 Ibid 366.

22 Ibid, citing Irwin Altman and Carol W Werner, 'Introduction' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) xix.

23 Raquel Rolnik, 'Place, Inheritance and Citizenship: The Right to Housing and the Right to the City in the Contemporary Urban World' (2014) 14(3) *International Journal of Housing Policy* 293, 298.

24 Roark argues that the property laws a society constructs inform that society's collective identity, as well as the identity of the homeless persons who are regulated by the laws he evaluates: see Marc L Roark, 'Homelessness at the Cathedral' (2015) 80(1) *Missouri Law Review* 53, 55–60, 72 ('Homelessness at the Cathedral').

of the same protections enjoyed by property owners.[25] Victoria's rooming house laws reveal how this society treats vulnerable persons (and hence its social identity), as well as the identity of those residents to whom they apply, that is, as other.[26] Roark has made these points previously in relation to laws impacting homeless persons in parts of the USA, and this article applies the same analysis here to Victoria's rooming house laws.[27] Roark's perspective is valuable as it looks not only at the direct effect of legal rules, but also at their overall impact in a society by unpacking the discourses the laws construct about certain people and considering how these discourses may undermine efforts to assist these people through policy.[28] Second, the research has broad social relevance as the undermining of home — the experience — by laws results in costs for the state. A lack of home does not just impact residents, in other words.[29] Laws that do not adequately protect vulnerable rooming house residents' experience of home may result in social problems that fall to the state to address. If, for example, the laws do not adequately protect residents from arbitrary eviction, the state may incur costs in addressing the poor health outcomes and financial difficulties that have been shown to occur for vulnerable people following evictions.[30] Not protecting home under laws has consequences for the state, which underscore the broad relevance of this research on Victoria's rooming house laws, that is, beyond the immediate effect these laws have on residents. Fox O'Mahony has made such points to justify the relevance of laws impacting home previously.[31]

This article is divided into four parts. Part I is this Introduction. Part II provides an overview of rooming houses in Victoria and sets out key legislation regulating the sector. Part III focuses on home — the experience — in rooming houses and the *RTA*. The methodology for assessing the *RTA*'s impact on home is set out. With that, it is argued that the *RTA* shapes residents' experiences of home, and, while affording a base level of protection for home, could be reformed in various ways to enhance that experience. Part IV concludes by reflecting on the nature of property. Property is a powerful institution for realising human dignity by its protection of home,[32] as

25 'Society elevates certain sectional interests over others (in this case, the interests of homed-persons and merchants over homeless persons); it seeks to cover up the existence of the homeless, denying or transmuting the seeming contradictions that the homeless represent to the accepted community image; and it communicates to citizens that homelessness and poverty fatigue is an acceptable attitude towards the poor, naturalizing and reifying bias towards these citizens. In short, collective identity emerges as a natural outgrowth of controlling space': ibid 79–80. See also Roark, 'Under-Propertied Persons' (n 7) 6. See at 7 referring to the 'ownership-centric view' of property, and how it overlooks 'the people that are impacted by the property system, but have no participation in it'.

26 Roark, 'Homelessness at the Cathedral' (n 24) 55–60, 72; Roark, 'Under-Propertied Persons' (n 7) 5–6.

27 See above n 24. See also Roark, 'Under-Propertied Persons' (n 7).

28 Roark, 'Under-Propertied Persons' (n 7) 5–6.

29 See especially Fox O'Mahony, *Conceptualising Home* (n 1).

30 Matthew Desmond and Rachel Tolbert Kimbro, 'Eviction's Fallout: Housing, Hardship, and Health' (2015) 94(1) *Social Forces* 295 (a study of the impacts of eviction on low-income urban mothers). See also Fox O'Mahony, *Conceptualising Home* (n 1).

31 Fox O'Mahony, *Conceptualising Home* (n 1).

32 This point, and its relevance to the legitimacy of private property, has been theorised in earlier work: see Samuel Tyrer, 'A New Theorisation of "Home" as a Thing in Property'

evidenced by the *RTA's* various home protections discussed. These demonstrate that home, rather than being a thing which sits outside of property, is actually an object of property (and specifically of rooming house laws).[33] Home is a thing under property, in other words. Home thus ought to be valued within the property system,[34] including by rooming house laws. The future development of rooming house laws must take account of home for these reasons. However, these laws are not a panacea for home for rooming house residents.[35] Other policy responses are also vital to address the root causes of why people may be forced to live in rooming houses. In this regard, domestic violence, mental ill-health and a lack of affordable housing,[36] are all causes of people becoming homeless and having to rely on rooming houses, and thus must be addressed by governments,[37] alongside the law reform advocated for in this article.

II Rooming houses in Victoria

A Rooming houses: Overview

Rooming houses are 'the only accessible housing option for many people'.[38] Residents live with other persons they do not know.[39] Residents share common areas, including bathrooms, kitchens, laundries, and possibly their rooms.[40] Residents thus 'do not get the premises to themselves'.[41] Rooming houses, it

(2022) 49(2) *University of Western Australia Law Review* 191 ('A New Theorisation of "Home" as a Thing in Property'). This piece applies the theorisation further, using the case study of rooming house laws. On the link between home and property, see especially Fox O'Mahony, *Conceptualising Home* (n 1). See also, Fox O'Mahony, 'The Meaning of Home' (n 4); Fox (n 6); Tyrer, 'Home in Australia' (n 1).

33 Again, this point has been theorised in earlier work, arguing that the experience of home is a thing capable of being the subject matter of property. This piece applies that theorisation in the specific context of Victoria's rooming house laws (as a discrete area of property), and as a framework to argue for their reform: see Tyrer, 'A New Theorisation of "Home" as a Thing in Property' (n 32).

34 Ibid.

35 Tyrer, 'Home in Australia' (n 1) 361.

36 Robin Goodman et al, *The Experience of Marginal Rental Housing in Australia* (AHURI Final Report No 210, July 2013) 4.

37 On lack of affordable housing driving the rooming house sector, see *Rooming House Standards Taskforce* (Chairperson's Report, September 2009) 1–2 ('*Chairperson's Report*'). On responding to domestic violence and mental ill-health, see Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria* (Final Report, 4 March 2021) xxi ('*Inquiry into Homelessness in Victoria*').

38 Colleen Power and Peter Mott, 'A Tale of Two Cities: Legal Protection for Rooming/Boarding House Residents in Victoria and New South Wales' (2003) 7 *Flinders Journal of Law Reform* 137, 148.

39 Council to Homeless Persons, *Council to Homeless Persons Rooming House Project 2014: The State of Rooming House Reform in Victoria* (Report, 2014) 4 ('*Rooming House Project Report*').

40 Chris Martin, 'Boarding Houses in New South Wales: Growth, Change and Implications for Equitable Density' (Shelter Brief No 64, Shelter NSW, July 2019) 2–3 ('*NSW Boarding Houses Report*'). See also *Rooming House Project Report* (n 39); Consumer Affairs Victoria, *Alternative Forms of Tenure: Parks, Rooming Houses and other Shared Living Rental Arrangements* (Issues Paper, August 2016) 9–10 ('*Alternative Forms of Tenure*'); Goodman et al (n 36) 10.

41 Martin, *NSW Boarding Houses Report* (n 40).

follows, are an 'often uncomfortable, unpredictable and unsafe' environment, but they 'may be relatively affordable'.[42] In terms of legal arrangements, the operator and each resident enter into separate licence agreements. These licence agreements do not confer proprietary rights on residents, meaning residents do not obtain exclusive possession of premises (as they would, for example, under a lease).[43] Rather, operators retain exclusive possession of premises, and thus control, in this way.[44] This facilitates their letting of the premises to multiple different residents. Rooming houses can thus operate as 'shared accommodation' under these arrangements.

Rooming houses are 'marginal rental accommodation'.[45] It has been estimated that 70,000 people live in rooming houses across the nation.[46] And that number is likely to have increased in line with Australia's population growth since 2011 when that estimate was made. People spend, on average, 30 months in a rooming house, according to the Peninsula Community Legal Centre ('PCLC').[47] This reliance on rooming houses may be attributed, particularly in capital cities, to there being limited alternative affordable housing options available.[48] Indeed, there is a 'severe shortage of public housing and lack of affordable private rental housing'.[49] This means that rooming houses are home for many people, and for long periods of time. It is thus timely and relevant to consider whether home is realisable under existing laws regulating the sector.

In terms of realising the experience of home, particular challenges arise in the rooming house context not all of which may be addressed by law. This underscores the importance of other policy responses being pursued, alongside law reform. The sharing of facilities, specifically in this context, may make it difficult to experience certain dimensions of home.[50] Sharing may impede individuals' ability to design spaces in rooming houses, thereby making it difficult for them to reflect individual identity.[51] Individual identity

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42 Ibid 29.

43 *Chairperson's Report* (n 37) 5. In Victoria, rooming house laws are contained in the *Residential Tenancies Act 1997* ('*RTA*') (rather in a standalone Act as is the case in NSW).

44 Ibid. On control by operators, see Martin, *NSW Boarding Houses Report* (n 40) 2; Goodman et al (n 36) 10; Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 10.

45 Chris Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (2009) 22(3) *Parity* 29, 29 ('Marginal Rental Accommodation and the Residential Tenancies Legislation'). See also Goodman et al (n 36) 10.

46 'This paper argues that the national rooming house population was about 70,000 at the time of the 2011 Census, compared with 16,830 identified by the ABS in 2006': Chris Chamberlain, 'How Many People in Boarding Houses?' (2012) 25(1) *Parity* 7, 7 ('How Many People in Boarding Houses?').

47 Peninsula Community Legal Centre, 'Open the Door! The Resident's View of Life in a Rooming House' (Research Report, May 2020) 3.

48 Ibid. See also Goodman et al (n 36).

49 Peninsula Community Legal Centre (n 47).

50 The sharing of facilities is also a challenge for regulators in designing appropriate laws. 'Issues stemming from the shared living characteristics of these accommodation models, the nature of residency rights, and ownership of dwellings in a park environment pose particular challenges for residents, operators and regulators': see Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 9.

51 Tyrer, 'Home in Australia' (n 1) 354–6, 364–6. Radin's personhood justification for property is underlaid by this individual identity manifested in things: see Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Standford Law Review* 957, 959–60. Other

is understood here as an identity separate from other residents. It is different to communal identity. Communal identity is shared identity developed with other residents, and may form in shared spaces, such as rooming houses, as discussed in Part III.[52] Home as a feeling of security is a further dimension of home that may be difficult to experience in rooming houses due to sharing. Residents share with other residents they do not know and have not chosen to live with.[53] If other residents have behavioural issues, including those manifesting as physical violence, as may occur in this context, this undermines home as security.[54] A lack of privacy, cleanliness or maintenance are also issues arising from sharing potentially contrary to home.[55] In interviews conducted by the Australian Housing and Urban Research Institute ('AHURI') with residents on their experiences, one resident summarised the experience in this way: 'You have to share a bathroom, you have to share a kitchen, you've got to clean up after yourself and there's always problems because you're living with other people, and other people you don't know.'[56] These issues may lead to residents having to leave the rooming house, thereby undermining security, identity and relationship — in short, undermining home as defined above. Challenges for home arise due to sharing in rooming houses, in these ways. However, sharing in other contexts may produce rich experiences of home. Share housing in privately leased premises may produce rich home experiences.[57] And First Nations people have rich connections to places developed communally.[58] The difference here is that, unlike in rooming houses, in these places the sharing is not necessarily with 'unrelated people'.[59]

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scholars have challenged this personhood perspective: see Stephanie M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107(7) *Michigan Law Review* 1093; D Benjamin Barros, 'Home as a Legal Concept' (2006) 46(2) *Santa Clara Law Review* 255; Nestor M Davidson, 'Property, Well-Being, and Home: Positive Psychology and Property Law's Foundations' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 47.

52 On shared identity in share-houses, see Sophie McNamara and John Connell, 'Homeward Bound? Searching for Home in Inner Sydney's Share Houses' (2007) 38(1) *Australian Geographer* 71.

53 *Rooming House Project Report* (n 39). See also Tenants Union of Victoria, Submission to Consumer Affairs Victoria, *Alternative Forms of Tenure: Parks, Rooming Houses and Other Shared Living Rental Arrangements* (August 2016) 23 ('*TV Alternative Forms of Tenure Submission*'). The Tenants Union of Victoria is now known as 'Tenants Victoria'.

54 'The behaviour of other residents in rooming houses is important for the safety and quality of life for all residents.': Goodman et al (n 36) 31. For a relevant case study, see Northern and Western Homelessness Networks, *A Crisis in Crisis: The Appalling State of Emergency Accommodation in Melbourne's North and West* (Report, 15 February 2019) 9.

55 Goodman et al (n 36) 28, 30–1.

56 Ibid 31.

57 Sophia Maalsen, 'I Cannot Afford to Live Alone in this City and I Enjoy the Company of Others: Why People Are Sharing House in Sydney' (2019) 50(3) *Australian Geographer* 315, 319, citing Sue Heath et al, *Shared Housing, Shared Lives: Everyday Experiences Across the Lifecourse* (Routledge, 2018).

58 See, eg, WEH Stanner, *White Man Got No Dreaming* (Australian National University Press, 1979) 230.

59 Goodman et al (n 36) 11.

A further challenge to home is that many private rooming houses are business-run for a profit.[60] Their operators may behave in ways that are contrary to home, for example, by contravening existing laws protecting residents, to achieve higher profits.[61] The Victorian Government's *Rooming House Standards Taskforce Chairperson's Report* of 2009 (the '*Chairperson's Report*') identified such a 'business model ... predicated on opportunistic targeting of vulnerable individuals and ... a deliberate strategy of operating on the fringe of legality'.[62] Thus, a particular challenge for home is operators' profit motive where it leads to non-compliance with rooming house sector laws, undermining home. Research has confirmed that operators' management and control of premises, 'a defining feature' of marginal rental accommodation,[63] depending on how those rights are exercised, impacts on residents' '"home" life'.[64]

In articulating these challenges, the article acknowledges particularly the reliance placed on the AHURI's 2013 report titled *The Experience of Marginal Rental Housing in Australia* ('*AHURI Report*').[65] The *AHURI Report* presents the findings of primary research on what residents need to feel 'safe, secure and contented with life in rooming houses' (and conversely on what undermines this sense).[66] Five features are articulated, being 'security, with respect to management', 'room size and standard', 'amenity of their room', 'amenity of shared spaces' and 'behaviour of other residents'.[67]

B The sector

The rooming house sector in Victoria is made up of different built forms.[68] The sector comprises 'traditional rooming houses' and 'new model — small rooming houses'.[69]

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60 *Chairperson's Report* (n 37) 3–4.
61 Ibid.
62 Ibid 4.
63 Goodman et al (n 36) 8.
64 Ibid 10.
65 Goodman et al (n 36).
66 Ibid 28.
67 Ibid.
68 *Chairperson's Report* (n 37) 5–7. See also Tony Dalton, Hal Pawson and Kath Hulse, *Rooming House Futures: Governing for Growth, Fairness and Transparency* (AHURI Final Report No 245, August 2015) 13–20; Goodman et al (n 36) 23–5.
69 *Chairperson's Report* (n 37) 6; Dalton, Pawson and Hulse (n 68) 18–20; Goodman et al (n 36) 23–5; Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 35. Victoria's rooming house legislation does not itself distinguish between these different built forms. Rather, these are terms drawn from 'policy documents and sector parlance': see Martin, *NSW Boarding Houses Report* (n 40) 22.

1 Traditional rooming houses

Traditional rooming houses are 'purpose-built'.[70] They accommodate many people.[71] Anywhere from 20–60 people may live in a traditional rooming house.[72] Traditional rooming houses are 'predominantly located in the inner suburbs'.[73] In Victoria, the Gatwick in St Kilda was an infamous example, given the violence and other social problems which plagued some residents' lives.[74] The Gatwick is now closed, having been sold to Channel 9 and re-developed on the 2018 season of its TV series *The Block*.[75] As an interesting literary aside, the rooming houses frequented by the main character in George Orwell's novel *Down and Out in Paris and London* are filled with marginalised people suffering similar social problems.[76]

Marginalised people have historically been accommodated in traditional rooming houses.[77] De-institutionalisation in the late 1980s led to such people leaving institutions and coming to live in rooming houses, which continues to this day.[78] Residents commonly depend on social security payments and may be 'coping with drug and alcohol issues and mental and physical disabilities'.[79] As well as 'the "traditional boarding house" clientele' that is, 'single men on low incomes',[80] residents of traditional rooming houses include women.[81]

Traditional rooming houses are in decline. No longer do these places meet 'community expectations regarding privacy', given how extensively residents must share facilities.[82] Another reason for their decline is that operators are selling the premises, motivated by the 'gentrification of inner suburbs and cost of maintaining premises'.[83] While some traditional rooming houses have been upgraded, with 'new floors and kitchenettes' and 'less sharing of facilities',[84]

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70 *Chairperson's Report* (n 37) 6. See also Chamberlain, 'How Many People in Boarding Houses?' (n 46) 8; Dalton, Pawson and Hulse (n 68) 18.

71 Ibid.

72 Chamberlain, 'How Many People in Boarding Houses?' (n 46) 8.

73 *Chairperson's Report* (n 37) 6. See also Chamberlain, 'How Many People in Boarding Houses?' (n 46) 8; Dalton, Pawson and Hulse (n 68) 18.

74 Candace Sutton, 'Hell Hotel: Real Story of The Block's New Site', *News.com.au* (online, 4 August 2018) <https://www.news.com.au/lifestyle/relationships/hell-hotel-real-story-of-the-blocks-new-site/news-story/e8d814440ed9d412b76b7bbcc17418fa>. See also *Chairperson's Report* (n 37) 6.

75 Sutton (n 74).

76 George Orwell, *Down and Out in Paris and London* (London Secher & Warburg, reprinted 1966).

77 Power and Mott (n 38) 138. See also Bill Grimshaw and Colleen Power, 'Rooming House Legislation in Victoria: A History' (2004) 17(2) *Parity* 8, 8.

78 Power and Mott (n 38) 138. See also Grimshaw and Power (n 77).

79 Power and Mott (n 38) 138. See also Grimshaw and Power (n 77); Goodman et al (n 36) 3.

80 Dalton, Pawson and Hulse (n 68) 18.

81 Eg, women resided in The Gatwick in St Kilda: see Calla Wahlquist, 'Gatwick Hotel: Women who Lived at Rooming House Jailed after Sale to Channel Nine', *The Guardian* (online, 21 November 2018) <https://www.theguardian.com/australia-news/2018/nov/21/gatwick-hotel-women-who-lived-at-rooming-house-jailed-after-sale-to-channel-nine>.

82 *Chairperson's Report* (n 37) 6.

83 Ibid.

84 Dalton, Pawson and Hulse (n 68) 18.

their rents may be higher.[85] These so called 'upgraded traditional rooming houses' have 'a mixed clientele, including some international students'.[86]

2 Small suburban rooming houses

A new model of rooming house, located in the suburbs, has emerged in recent years.[87] New model small suburban rooming houses are not purpose-built.[88] Rather, they are existing suburban homes, which have been modified to house more people.[89] They are problematic to regulate. Appearing as ordinary residential homes from the outside, regulators may struggle to identify them and thus similarly any non-compliance by their operators.[90] (By contrast, traditional rooming houses are 'easily identifiable features of their local communities').[91]

Small rooming houses may accommodate from 4–9 people.[92] However, there exists 'a handful of medium-sized properties with 10-19 bedrooms'.[93] People from diverse backgrounds are accommodated in small suburban rooming houses,[94] including international and domestic students, low-income workers, divorced people, travelers, interstate residents and older women.[95] Small suburban rooming houses are prevalent particularly in Melbourne,[96] developed 'in response to Melbourne's tight rental market'.[97] Their profit driven operators have turned ordinary homes into rooming houses, some of which are sub-standard, and successfully rented these to people in desperate need of housing.[98]

C Residents

Residents of rooming houses come from diverse backgrounds. Many are 'vulnerable, socially excluded and economically disadvantaged'.[99] There is

85 Ibid 20.
86 Ibid.
87 *Chairperson's Report* (n 37) 6–7. See also Dalton, Pawson and Hulse (n 68) 19–20.
88 *Chairperson's Report* (n 37) 6–7. See also Dalton, Pawson and Hulse (n 68) 19–20; Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 35.
89 *Chairperson's Report* (n 37) 6.
90 *Chairperson's Report* (n 37) 6–7. See also Chamberlain, 'How Many People in Boarding Houses?' (n 46) 8; Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 35.
91 *Chairperson's Report* (n 37) 6.
92 Chamberlain, 'How Many People in Boarding Houses?' (n 46) 8.
93 Dalton, Pawson and Hulse (n 68) 19.
94 Ibid 20.
95 Ibid 21. Mary Gearin, 'Victoria's Housing Agencies to Boycott Worst-Rated Rentals amid Conditions "I Wouldn't Let my Dog Live in"', *ABC News* (online, 1 March 2020) <https://www.abc.net.au/news/2020-03-01/worst-housing-providers-boycotted-by-melbourne-homelessness-age/12008182>.
96 Dalton, Pawson and Hulse (n 68) 19.
97 *Chairperson's Report* (n 37) 1.
98 Ibid.
99 Rachel Macreadie, 'Rooming House Operators Bill 2015' (Research Note No 1, Parliamentary Library and Information Service, Parliament of Victoria, February 2016) 3. See also Department of Human Services, *Proposed Residential Tenancies (Rooming House Standards) Regulations* (Regulatory Impact Statement, August 2011) 14–16 ('*Rooming House Standards Regulatory Impact Statement*'); Power and Mott (n 38) 138; Grimshaw and Power (n 77); Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 34.

the stereotypical single man of middle age.[100] However, diversity among residents has increased, according to the *Chairperson's Report*.[101] Residents include younger people, families and children, international students,[102] aged pensioners and single mothers,[103] as well as those referred to under the 'Small suburban rooming houses' discussion. Following from this diversity, residents may be vulnerable on different bases and it is no longer possible to speak of typical residents, that is, single men.[104] As homelessness services have relied on rooming houses for crisis accommodation, this is yet another resident cohort.[105]

There are few reliable statistics on residents.[106] Australian Bureau of Statistics ('ABS') data, released in 2011, puts the number of residents at 16,830 nationally in 2006,[107] with 3,355 residents in Victorian rooming houses.[108] Chamberlain explains that the ABS data should be approached with caution, and he advances 'a more reliable method for counting boarding houses'.[109] Chamberlain's concern is that ABS data relies on census collectors to identify rooming houses, which may not properly occur as some rooming houses may be invisible on the streetscape. Chamberlain explains: 'Most suburban rooming houses are small, family homes that cannot be distinguished from other houses in the same street.'[110] Further: 'Field visits across Melbourne revealed that most of these houses looked no different from other properties in the same street. Census collectors misclassify many of these rooming houses as private dwellings for reasons that we now understand.'[111]

Chamberlain's alternative method relies on council data on registered rooming houses, with physical inspections to identify those rooming houses which are not registered.[112] This method demonstrated 'the number of rooming houses, and their residents, in Melbourne had been increasing', contrary to what the ABS had reported.[113] In 2011, there were 12,568 rooming house residents in Melbourne alone,[114] while nationally there were approximately

100 *Chairperson's Report* (n 37) 9.
101 Ibid. See also Dalton, Pawson and Hulse (n 68) 21.
102 *Chairperson's Report* (n 37) 9–10.
103 Macreadie (n 99) 4.
104 *Chairperson's Report* (n 37) 9.
105 Ibid. The Report recognised that rooming houses should not be used to accommodate families and children: see at Recommendation 22 on alternative accommodation for families and children. Families and children were still being accommodated in rooming houses some years later: 'while there is general understanding that rooming houses are unacceptable options for families, referrals were still being made there, due to a lack of affordable housing options': see *Rooming House Project Report* (n 39) 34–5.
106 *Rooming House Project Report* (n 39) 8. See also Dalton, Pawson and Hulse (n 68) 14.
107 Chamberlain, 'How Many People in Boarding Houses?' (n 46).
108 Ibid.
109 Ibid. See also Dalton, Pawson and Hulse (n 68) 14.
110 Chamberlain, 'How Many People in Boarding Houses?' (n 46) 7–8.
111 Ibid 9.
112 Ibid 7. See also discussion of Chamberlain's work in Dalton, Pawson and Hulse (n 68) 14.
113 Dalton, Pawson and Hulse (n 68) 14. See also Chamberlain, 'How Many People in Boarding Houses?' (n 46).
114 Chamberlain, 'How Many People in Boarding Houses?' (n 46). See also discussion of Chamberlain's work in Dalton, Pawson and Hulse (n 68) 14.

70,000 rooming house residents in 2011.[115] These high figures affirm the relevance of this research on residents' home experience in rooming houses under existing law.

D Legislation regulating the sector

1 Brief history

Historically, no legislation existed regulating rooming houses in Australia. Rooming houses (or more specifically, operator-resident relationships) were thus regulated by the common law. This operated to the disadvantage of residents, as the common law does not contain specific home protections.[116] For example, it does not protect residents against arbitrary evictions by operators or rent increases without proper notice.[117] Further, the common law does not specify minimum standards for premises or impose obligations on the operator with respect to privacy or repairs.[118] Absent such protections, operators — as the more powerful party — were able to dictate the terms of rooming house agreements.[119] Terms were 'offered [by operators] on a take-it-or-leave-it basis'.[120] This resulted in rooming houses being treated 'very much like B&B's' instead of places of 'long-term accommodation',[121] causing housing insecurity and impacting home.

Eventually, to overcome disadvantage caused by the common law, new residential tenancies legislation was recommended for introduction in Australia.[122] The Commonwealth Government's *Law and Poverty in Australia: Second Main Report* ('*Law and Poverty Inquiry*') of 1975 stated that new legislation should apply to 'boarders, roomers and lodgers' who

115 Chamberlain, 'How Many People in Boarding Houses?' (n 46).

116 These points were made in respect of Australian landlord-tenant law in Adrian Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Australian Government Publishing Service, 1975) 2, and in Ronald Sackville, *Law and Poverty in Australia: Second Main Report* (Australian Government Publishing Service, 1975) 59. They apply equally in respect of rooming house residents 'who, although perhaps not tenants in a technical sense, share many of the characteristics of tenants': see Sackville (n 116). For background on residential tenancies in Australia, see Marcia Neave, 'Recent Developments in Australian Residential Tenancies Laws' in Susan Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Hart Publishing, 2006) 233; Matthew Anibal Fuentes-Jiménez and Paul Babie, 'The Residential Tenancy Agreement as an Exception to the Indefeasibility of Title' (2021) 29(1) *Australian Property Law Journal* 51; Chris Martin, 'A Brief History of Australian Residential Tenancies Law Reform: From the Nineteenth Century to COVID-19' (2020) 33(5) *Parity* 4.

117 Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45). See also Natalina Nheu and Hugh McDonald, *By the People, for the People? Community Participation in Law Reform* (Report, November 2010) 62.

118 Nheu and McDonald (n 117).

119 Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45). See also Nheu and McDonald (n 117).

120 See above n 119.

121 Power and Mott (n 38) 145.

122 Adrian Bradbrook, 'Rented Housing Law: Past, Present and Future' (2003) 7(1) *Flinders Journal of Law Reform* 1, 4; Adrian J Bradbrook, 'Creeping Reforms to Landlord and Tenant Law: The Case of Boarders and Lodgers' (2004) 10(3) *Australian Property Law Journal* 1, 1 ('Creeping Reforms to Landlord and Tenant Law'). See also Fuentes-Jiménez and Babie (n 116) 53–5.

'share many of the characteristics of tenants'.[123] New tenancies legislation was introduced in Victoria in 1980.[124] However, it only applied to protect tenants, and not also boarders and lodgers contrary to the *Law and Poverty Inquiry* report recommendation.[125] Rooming house residents in Victoria thus continued to be disadvantaged by the common law until 1990.

In 1990, Victoria introduced legislation to protect rooming house residents, with the *Rooming Houses Act 1990* (Vic) ('*Rooming Houses Act*').[126] Victoria was the first Australian jurisdiction to introduce this legislation.[127] In 1997, the *Rooming Houses Act* was replaced by the *RTA* which consolidated Victoria's tenancies legislation and 'was deemed by many to be an improvement' in rooming house legislation.[128] In 2012, the *Residential Tenancies (Rooming House Standards) Regulations 2012* (Vic) ('*Rooming House Standards*') were introduced, prompted by Leigh Sinclair's and Christopher Giorgi's tragic deaths in a rooming house fire in 2006, caused by poor conditions.[129] The *Rooming House Standards* thus 'focus on improving privacy, safety and amenity for rooming house residents'.[130] Among other reforms introduced around this time were penalty increases under the *RTA* and changes to building and health regulation.[131]

2 Legislation

Victoria's rooming house sector is regulated by different Acts,[132] spanning the areas of building, health and tenancy.[133] An overview of the different Acts is provided below, acknowledging that this overview draws significantly on the legislative overview contained in the *Chairperson's Report*.[134]

(a) RTA

The *RTA* prescribes the rights and duties of rooming house operators and residents.[135] A threshold question to the *RTA* applying is whether premises is a 'rooming house'. For the purposes of the *RTA*, a 'rooming house' is a building with four or more occupants, with one or more rooms for rent.[136]

123 Sackville (n 116) 59–60, cited in Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 1.

124 Power and Mott (n 38) 137–8. See also Grimshaw and Power (n 77) 8.

125 See above n 124.

126 On the meaning of 'rooming house' and 'resident' under that Act, see *Fisher v Aboriginal Hostels Ltd* [1998] VSCA 130.

127 Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) 53. On deficiencies with this legislation, see Grimshaw and Power (n 77).

128 Power and Mott (n 38) 139.

129 *Rooming House Project Report* (n 39) 9.

130 Department of Human Services, *Minimum Standards in Rooming Accommodation* (Fact Sheet) <https://providers.dffh.vic.gov.au/minimum-standards-rental-accommodation-fact-sheet-word> ('*Minimum Standards in Rooming Accommodation*').

131 See generally *Chairperson's Report* (n 37); *Rooming House Project Report* (n 39).

132 *Chairperson's Report* (n 37) 12.

133 Ibid 12–13.

134 Ibid.

135 Power and Mott (n 38) 141.

136 *RTA* (n 43) s 3(1) (definition of 'rooming house'). A building may also be a rooming house if the Minister has made a declaration to this effect under s 19(2) or (3): at s 3(1) (definition of 'rooming house').

Therefore, if a building has less than four occupants it is not a 'rooming house' and so is not regulated by the *RTA's* rooming house provisions. The *RTA's* various home protections for rooming house residents would not apply to residents in such places.[137]

The *RTA* confers rights and imposes duties on operators towards residents (and vice-versa) as noted.[138] The *RTA* regulates specifically the rent and bond payable,[139] repairs,[140] entry to residents' rooms,[141] the number of people in rooms,[142] termination of residency rights,[143] and standards for premises.[144] The *Rooming House Standards*, introduced in 2012 and made under the *RTA*, also apply to operators.[145] The 11 standards 'focus on improving privacy, safety and amenity for rooming house residents',[146] and are discussed in greater detail in Part III.

For boarders and lodgers (that is, those who are not tenants with exclusive possession under a lease) in Victoria, the rooming house provisions are the only statutory occupancy protections which may apply. Yet, these protections only apply to 'rooming houses' as defined by the *RTA*. That is, to premises where there are four or more occupants (or to premises declared by the Minister to be rooming houses).[147] If, by chance, residents come to live in shared premises with less than four persons, the definition of rooming house and the related protections for residents do not engage. This means those residents receive no statutory protections, and are instead subject to the common law[148] and its disadvantages identified above.[149] This is problematic for these excluded residents (often referred to as boarders and lodgers) and threatens their experience of home. Similar problems have arisen in New South Wales ('NSW'), as identified in a 2020 review report of the *Boarding Houses Act 2012* (NSW) ('*Boarding Houses Act*'). The NSW government

137 This creates a gap in coverage, whereby premises effectively operated as rooming houses but with less than four residents are not covered by the *RTA*. Residents of these premises will not be protected by the *RTA's* rooming house protections for residents discussed in below Part IV: see Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 8. See also *Rooming House Project Report* (n 39) 21; Walsh (n 127) 46; Power and Mott (n 38) 146.

138 Power and Mott (n 38) 141.

139 On rent, see *RTA* (n 43) ss 99–106A. On bonds, see at ss 95–8.

140 On repairs, see ibid ss 129–35.

141 On rights of entry, see ibid ss 136–142A.

142 Residents may occupy their room either exclusively under an exclusive occupancy right (see ibid s 92A) or on a shared basis under a shared room right (see ibid s 92B).

143 On termination of residency rights, see ibid ss 142M–142ZZA.

144 On rooming house standards, see ibid ss 120A, 142B; *Residential Tenancies (Rooming House Standards) Regulations 2012* (Vic) ('*Rooming House Standards*').

145 As recommended by the *Chairperson's Report* (n 37) Recommendations 1, 2.

146 Department of Human Services, *Minimum Standards in Rooming Accommodation* (n 130).

147 *RTA* (n 43).

148 Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45).

149 This creates a gap in coverage, whereby premises effectively operated as rooming houses but with less than four residents are not covered by the *RTA*. Residents of these premises will not be protected by the *RTA's* rooming house protections for residents discussed in Part IV below: see Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 8. See also *Rooming House Project Report* (n 39) 21; Walsh (n 127) 46; Power and Mott (n 38) 146.

report identified those residents potentially falling outside of existing statutory occupancy protections under its *Residential Tenancies Act 2010* (NSW) and *Boarding Houses Act*.[150] Relying on the analysis in the NSW report, as adapted for Victoria, this article identifies those persons in Victoria who may similarly fall outside Victoria's statutory occupancy protections for rooming house residents and tenants under the *RTA*.

Excluded boarders and lodgers — those not protected by Victoria's *RTA* — may include those:

- in small rooming houses with three or less residents. Such premises are not a 'rooming house' within the *RTA* as they do not meet the residency threshold for four or more, as noted. Therefore, the rooming house protections do not apply.[151] Such premises — outside the *RTA's* regulatory ambit — have been operating in Victoria, as confirmed by evidence from Tenants Victoria and the Council to Homeless Persons ('CHP');[152]
- in the home of a private owner.[153] Residents living in the home of a private owner are unlikely to be renters ('tenants' in the *RTA's* old terminology)[154] protected by pt 2 of the *RTA* as these arrangements are unlikely to confer 'exclusive possession' as required for a residential rental arrangement ('tenancy agreement' in the *RTA's* old terminology). Further, there may not be a written lease.[155] Further again, the rooming house protections will not apply to these residents unless the residency threshold (four or more residents) is satisfied; and[156]
- in the home of a 'renter' ('tenant' in the *RTA's* old terminology) with a residential rental agreement, but who are not themselves named in that agreement or a separate agreement as a sub-tenant.[157] Residents in this

150 NSW Government, *Boarding Houses Act 2012 — Statutory Review* (Report, August 2020) 14, 19 ('*NSW Statutory Review*').

151 Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 8. See also Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 43; Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45) 30; *NSW Statutory Review* (n 150) 14.

152 *TV Alternative Forms of Tenure Submission* (n 53) 20; Council to Homeless Persons, Submission to Consumer Affairs Victoria, *Alternative Forms of Tenure: Parks, Rooming Houses and Other Shared Living Rental Arrangements* (August 2016) 4 ('*CHP Alternative Forms of Tenure Submission*').

153 Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 43; *NSW Statutory Review* (n 150).

154 Terminology changes were introduced throughout the *RTA* by the *Residential Tenancies Amendment Act 2018* (Vic) ('*Residential Tenancies Amendment Act*') which was proclaimed to commence on 29 March 2021 by Victorian Government Gazette No S42, Wednesday, 27 January 2021. The Amending Act's commencement had been extended by the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) pt 4.3 s 50 ('*Emergency Measures Act*'); *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic) div 2, s 11 ('*COVID-19 Commercial and Residential Tenancies Legislation Amendment*').

155 *NSW Statutory Review* (n 150) 14, 26. Exclusive possession is required to evidence a 'residential rental agreement' under pt 2 of the *RTA* (n 43). See *Janusauskas v Director of Housing* [2014] VSC 650.

156 *NSW Statutory Review* (n 150) 14.

157 Ibid 14, 19.

> scenario may not be renters as these arrangements may not confer exclusive possession, such that a residential rental agreement is created attracting protection under pt 2 of the *RTA*. Further, there may not be a written lease.[158] Further again, these residents will not be protected as 'rooming house' residents unless that definition's residency threshold is satisfied, that is, four or more residents.[159]

Residents living in shared premises in the above circumstances may be outside the *RTA's* home protections on the basis they are neither renters nor rooming house residents.[160] Future reform might expand the *RTA's* scope to afford them basic occupancy protections.[161] Indeed, as Bradbrook has argued, 'all licensees of residential premises have a similar need of legislative protection'.[162]

Other jurisdictions have already sought to expand their legislation to ensure a broader range of occupancy forms are covered, and thus their residents protected. The Australian Capital Territory's ('ACT') occupancy principles under pt 5A of the *Residential Tenancies Act 1997* (ACT) ('*Residential Tenancies Act*') apply to all boarders and lodgers with no residency threshold, affording them protection as regards the condition of premises, quiet enjoyment, and terminations.[163] NSW has also recently announced future reform to its *Boarding Houses Act*, which will be extended to apply to residents under 'shared accommodation arrangements'.[164] The Act will be

158 Ibid 14, 26.

159 Ibid 14; Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 43.

160 The analysis presented in this section has followed that in the *NSW Statutory Review* (n 150), which identified such gaps in respect of relevant NSW legislation. See also Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 43–4.

161 'States and Territories might extend coverage by legislating generally for all renters otherwise excluded. This is the approach of the ACT with its occupancy provisions. The advantage of this approach is that it achieves complete coverage; the disadvantage is that unless the legislation allows for further, more specific regulation of the different types of accommodation covered, the rights and protections tend, because of their generality, to be modest. The ACT occupancy provisions do allow for further specific regulation by providing for the creation of "standard occupancy terms" for different types of occupancy agreements but no standard occupancy terms have yet been implemented there': Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45) 31. See also Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 43–4; Goodman et al (n 36) 5, 102.

162 Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 8. This approach is discussed in Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45) 31:

> States and Territories might extend coverage by legislating generally for all renters otherwise excluded. This is the approach of the ACT with its occupancy provisions. The advantage of this approach is that it achieves complete coverage; the disadvantage is that unless the legislation allows for further, more specific regulation of the different types of accommodation covered, the rights and protections tend, because of their generality, to be modest. The ACT occupancy provisions do allow for further specific regulation by providing for the creation of 'standard occupancy terms' for different types of occupancy agreements but no standard occupancy terms have yet been implemented there.

163 Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45) 31.

164 NSW Government, 'Increased Protections for People Living in Shared Accommodation' (Media Release, 12 August 2020); *NSW Statutory Review* (n 150) 18, Recommendations 1, 2.

re-named the 'Shared Accommodation Act' and no longer apply to just those in 'boarding houses' as defined.[165] A new definition of 'shared accommodation arrangement' is to be developed, with residents under such arrangements to be afforded the new Act's protection regardless of the nature of the premises (rooming house, private lodging, or otherwise) in which they live.[166] This would protect a greater range of residents.[167] The new Act could — in particular — protect residents in private homes and 'informal share housing arrangements'.[168] Victoria could consider a similar reform to protect residents of shared accommodation generally. The *RTA* could be amended to include a new residual category of tenure in respect of 'shared accommodation', with new occupancy principles to be developed and applied to residents in such accommodation.[169] These new occupancy principles could be developed in reference to Victoria's existing rooming house protections, as well as the general occupancy principles applicable in NSW under its *Boarding Houses Act* and in the ACT under its *Residential Tenancies Act*. Victoria's existing rooming house protections ought to be retained alongside the new 'shared accommodation' category given they have been 'tailored specifically' to the rooming house context.[170] This reform in Victoria is justified on the basis that it would protect residents not currently protected as either renters or rooming house residents, and would thus benefit the experience of home for these residents.[171] The potential need to reconceptualise the *RTA* so that it applies 'to cover emerging models of shared housing arrangements' was flagged recently

165 See above n 164.

166 *NSW Statutory Review* (n 150) 18.

167 Ibid.

168 Ibid 19.

169 See Martin, 'Marginal Rental Accommodation and the Residential Tenancies Legislation' (n 45) 31:

> States and Territories might extend coverage by legislating generally for all renters otherwise excluded. This is the approach of the ACT with its occupancy provisions. The advantage of this approach is that it achieves complete coverage; the disadvantage is that unless the legislation allows for further, more specific regulation of the different types of accommodation covered, the rights and protections tend, because of their generality, to be modest. The ACT occupancy provisions do allow for further specific regulation by providing for the creation of 'standard occupancy terms' for different types of occupancy agreements but no standard occupancy terms have yet been implemented there.

170 'Law reform to this effect might be pursued in one of two ways. One is that States and Territories might extend coverage by legislating specifically for each category of marginal renter otherwise excluded. Something of this approach can be seen in the recent legislative history of each of the States. The advantage of this approach is that the legislation can be tailored specifically to the different sectors of the rental housing system; the disadvantage is that no State yet has found the will to pursue this approach so that complete coverage is achieved. Alternatively, States and Territories might extend coverage by legislating generally for all renters otherwise excluded. This is the approach of the ACT with its occupancy provisions. The advantage of this approach is that it achieves complete coverage; the disadvantage is that unless the legislation allows for further, more specific regulation of the different types of accommodation covered, the rights and protections tend, because of their generality, to be modest. The ACT occupancy provisions do allow for further specific regulation by providing for the creation of "standard occupancy terms" for different types of occupancy agreements but no standard occupancy terms have yet been implemented there': see ibid.

171 Ibid. See also Bradbrook, 'Creeping Reforms to Landlord and Tenant Law' (n 122) 8; *Rooming House Project Report* (n 39) 21; Walsh (n 127) 46; Power and Mott (n 38) 146.

in Consumer Affairs Victoria's ('CAV') review of the *RTA*.[172] Future research could usefully explore the details of such a reform.[173] However, its details are beyond the scope of this article on home under Victoria's existing rooming house laws.

(b) Australian Consumer Law and Fair Trading Act 2012 (Vic)

The *Australian Consumer Law and Fair Trading Act 2012* (Vic) ('*ACL and FT Act*') applies the Australian Consumer Law in Victoria.[174] Further, it repeals and re-enacts with amendments Victoria's previous consumer protection law.[175] The *ACL and FT Act* is relevant to rooming houses because it contains provisions parties may rely on to enforce consumer Acts, including the *RTA* and its rooming house provisions. Courts may award civil remedies where the *RTA's* provisions — including those on rooming houses and the *Rooming House Standards* — have been contravened or may be contravened.[176] These aspects of the *ACL and FT Act*, regarding enforcement, are discussed in detail in Part IV.

(c) Rooming House Operators Act 2016 (Vic)

The *Rooming House Operators Act 2016* (Vic) establishes a licensing scheme for rooming house operators, administered by the Building Licensing Authority. Operators must be licensed. Operators who operate a rooming house unlicensed commit an offence under the Act.[177] Operators with licenses are entered in a register.[178] Operators must satisfy a 'fit and proper' person test to become licensed.[179]

(d) Public Health and Wellbeing Act 2008 (Vic)

The *Public Health and Wellbeing Act 2008* (Vic) ('*PHWA*') 'aims to ensure the protection of public health', including in the provision of rooming house

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172 Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 44.

173 Details could be developed from the NSW Government report: *NSW Statutory Review* (n 150) which sets out key features of a new 'Shared Accommodation Act' for NSW.

174 *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 1(f), pt 2.2 ('*ACL and FT Act*'); *Director of Consumer Affairs v Srinivasan* [2014] VSC 271, [30] ('*Director of Consumer Affairs*'). The *Australian Consumer Law* is a national scheme applying across all Australian jurisdictions by virtue of each jurisdiction introducing their own laws applying the scheme (known as an applied law scheme): see *Australian Consumer Law* (Web Page) <http://consumer.gov.au/australian-consumer-law>. See also 'Australian National Uniform Law Schemes and Associated Legislation', *Australasian Parliamentary Counsel's Committee* (Web Page) <https://pcc.gov.au/>. In Victoria, s 8 of the *ACL and FT Act* applies the *Australian Consumer Law* text which is found in sch 2 to the *Competition and Consumer Act 2010* (Cth) and regulations made under s 139G of that Act: see *ACL and FT Act* (n 174) ss 7, 8.

175 *ACL and FT Act* (n 174) s 1(h); *Director of Consumer Affairs* (n 174). The previous state consumer protection law was the *Fair Trading Act 1999* (Vic).

176 *ACL and FT Act* (n 174) ss 201, 216; *RTA* (n 43) s 507A; *Director of Consumer Affairs* (n 174) [30]–[33].

177 *Rooming House Operators Act 2016* (Vic) s 7.

178 Ibid s 43.

179 Ibid s 16(2).

accommodation.[180] Rooming houses are required to be registered with the relevant local council and further, must comply with health standards.[181] The health standards are contained in the *Public Health and Wellbeing (Prescribed Accommodation) Regulations 2020* (Vic) made under the *PHWA*. The standards address overcrowding,[182] maintenance and cleanliness,[183] water supply including drinking water,[184] sewerage discharge,[185] waste collection and disposal,[186] and toilet and bathing facilities.[187] Breaches of the standards are offences,[188] as is failing to register a rooming house with local council.[189] Depending on the breach, local councils have responsibility for taking enforcement action in respect of particular breaches. This may include prosecution,[190] or alternatively, the issuing of infringement (for 'prescribed offences'),[191] improvement or prohibition notices.[192]

(e) Building Act 1993 (Vic)

The *Building Act 1993* (Vic) and related instruments (the *Building Regulations 2006* (Vic) and Building Code of Australia) are relevant to the design and construction of rooming houses.[193] For example, requirements exist regarding smoke alarms and sprinklers.[194] Local councils have enforcement responsibility.[195] The Chief Fire Officer of the Metropolitan Fire Brigade or Country Fire Authority also have enforcement powers in this area.[196]

III Home in rooming houses

This part evaluates the *RTA* from the perspective of home, assessing specifically whether it adequately protects home — the experience — for rooming house residents. The evaluation has been informed by the *AHURI Report*'s articulation of key features that improve security and safety for residents — in other words, their sense of home — as informed by interviews conducted with residents.[197]

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180 *Chairperson's Report* (n 37) 12. This was written in respect of the predecessor legislation to the *Public Health and Wellbeing Act 2008* (Vic) ('*PHWA*'), the *Health Act 1958* (Vic) (now repealed), but remains valid in respect of the *PHWA*.
181 *Chairperson's Report* (n 37) 12.
182 *Public Health and Wellbeing (Prescribed Accommodation) Regulations 2020* (Vic) reg 11 ('*PHW Regulations*').
183 Ibid regs 13–14.
184 Ibid regs 15–16.
185 Ibid reg 17.
186 Ibid regs 18–19.
187 Ibid reg 20.
188 *PHW Regulations* (n 182).
189 *PHWA* (n 180) s 67.
190 Ibid s 219.
191 Ibid s 209(2). See also *PHW Regulations* (n 182) reg 24.
192 *PHWA* (n 180) ss 194, 219(2)(b).
193 *Chairperson's Report* (n 37) 13.
194 Ibid.
195 Ibid.
196 Department of Human Services, *Minimum Standards in Rooming Accommodation* (n 130).
197 Goodman et al (n 36) 28.

A Home as an experience

As defined earlier, home is understood here — drawing on earlier work — to be an experience, including ideally a feeling of security, the expression of self-identity, and relationships.[198] While this is a particular understanding of home and it is acknowledged that there may be others,[199] it is appropriate to use this particular understanding to evaluate home under Victorian rooming house laws. This understanding generally aligns with how home is understood in Western nations according to social sciences research.[200] That is, as an experience which takes place in a house.[201] Rooming houses — being houses — are thus capable, theoretically speaking, of being places of and for home. Indeed, rooming houses may be the only place available for home, for vulnerable residents unable to afford mainstream rental.[202] That said, rooming houses are generally unpleasant and temporary places in which to live.[203] Those persons living in them are also seen as homeless due to this accommodation being so precarious.[204] Against that background, home — the experience — is not the positive experience for many residents,[205] which it is for many other Australians in mainstream housing, that is, private rental or freehold ownership. Indeed, these places 'are commonly regarded as something other than a "home"'.[206] In this context, home might not be pursued as a policy goal, especially if the focus is on assisting people to obtain alternative accommodation.[207] Home might also not be pursued as a policy goal in rooming houses because home is challenging to realise in these places, as noted earlier. Residents may be particularly affected by other residents' drug, alcohol, or behavioural issues.[208] This article argues it is not inevitable that residents should have an inferior home experience. Property laws — the focus of this piece — can and do assist in improving home in rooming houses, alongside important social policy responses such as outreach services.[209]

198 Tyrer, 'Home in Australia' (n 1) 341.

199 Aboriginal cultures have a rich understanding of 'homeland', albeit one that does not align with Western notions of home: see Stanner (n 58).

200 Fox (n 6) 590; Fox O'Mahony, *Conceptualising Home* (n 1).

201 House is 'the locus for the experience of home': Fox (n 6) 590.

202 The Salvation Army Adult Services, *No Room to Move? Report of the Outer West Rooming House Project* (Report, April 2011) i; *Chairperson's Report* (n 37) 9.

203 Peninsula Community Legal Centre (n 47); The Salvation Army Adult Services (n 202) 17.

204 *Chairperson's Report* (n 37) 10, citing Chris Chamberlain and David Mackenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27(4) *Australian Journal of Social Issues* 274, 274–97. On definitions of homelessness, see Walsh (n 127) 3.

205 According to Goodman et al (n 36), 'overwhelmingly, the interviews with rooming house residents undertaken for this research found that their experience of safety and security was an issue for them': at 25.

206 Martin, *NSW Boarding Houses Report* (n 40) 3.

207 Both policy goals ought to be pursued, ie, improving the experience of home for residents currently living in rooming houses, while also assisting them to obtain alternative accommodation. On relocation of residents, see Goodman et al (n 36) 3.

208 *Chairperson's Report* (n 37) 9–10; Goodman et al (n 36) 31.

209 On outreach services, see The Salvation Army Adult Services (n 202); Goodman et al (n 36) 6, 106.

B Relevance of the *RTA*

The *RTA* shapes residents' experience of home. It does so by regulating the relationship between operators and residents.[210] And it is important that the *RTA* regulates this relationship. How operators behave towards residents is particularly relevant to home,[211] with the *AHURI Report* finding 'that the adequacy and appropriateness of management was a key indicator of the level of overall satisfaction of renters'.[212] Operators may — for example — seek to access residents' rooms under the *RTA* but only in limited circumstances thereby recognising that this may impact on residents' privacy and security, and thus home as discussed in below '(e) Privacy of rooms'.[213] Property — the system of rules regulating relationships between persons in relation to things[214] — may impact on home, therefore. This link between property and home is demonstrated in Fox O'Mahony's scholarship.[215] Fox O'Mahony has noted: 'It is difficult to overstate the everyday important of home in law.'[216] And further: 'The significance of land law as an "instrument of social engineering"' has been noted.[217]

To evaluate the *RTA's* provisions from the perspective of home, they are assessed in this part against two conditions which promote home, being stability and control.[218] Stability — 'the state of being able to remain in current housing'[219] — promotes feelings of security.[220] Stability also promotes self-identity and relationships, as both need stability (in the sense of being able to remain) to develop in places overtime. Regarding self-identity, 'individuals who know they can remain in a place (i.e., who have housing stability) are more likely to see their identity in the place and, further, engage in creative activities expressive of identity in home'.[221] Regarding relationships, 'laws can enhance ... close relationships though ensuring housing stability. The logic here is that relationships form over time, in a place. The home is a common place for these relationships to form.'[222] Stability creates home in these ways.[223] Laws which embody stability, that is, which enable residents to remain in a place, are thus said to promote home.

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210 'A traditional view of regulation is that it involves two parties: regulators and regulatees. Regulations are rules or directives that require regulatees (whether individuals or organisations) to act in particular ways and, more generally, aim to shape their behaviour': Dalton, Pawson and Hulse (n 68) 2.

211 Goodman et al (n 36) 10.

212 Ibid 2.

213 Ibid 28.

214 Alexander and Peñalver (n 5) 2.

215 See especially Fox O'Mahony, *Conceptualising Home* (n 1). See also Fox O'Mahony, 'The Meaning of Home' (n 4) 156; and Fox (n 6) 580.

216 Fox (n 6) 581.

217 Ibid 581, quoting KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 4.

218 Tyrer, 'Home in Australia' (n 1) 362–70.

219 Ibid 362.

220 Ibid 350, citing Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 9.

221 Tyrer, 'Home in Australia' (n 1) 364.

222 Ibid 366.

223 Ibid 362–7.

Control is the other condition for home. Control — 'the ability to control the home space in terms of what alterations or improvements might be made to it' — promotes home in various ways.[224] Control promotes home as identity in this way, as it enables residents to make changes to physical spaces to reflect their individual identity.[225] Control also creates home as a feeling of security by enabling residents to choose who comes into their spaces.[226] Laws which embody control, that is, which enable residents to control home spaces, are thus said to promote home. Stability and control — as previously theorised conditions for home[227] — are applied as litmus tests for determining if *RTA* provisions promote various dimensions of home (or not) for rooming house residents. This is the methodology used here for assessing the *RTA's* impact on home.

C Home dimensions

1 A feeling of security

A feeling of security is a key part of the experience of home which may be promoted by the *RTA*. The *RTA* promotes a feeling of security for residents by helping them to remain in the rooming house because they are protected — in various ways discussed below — by the *RTA*.[228] Of course, the discussion assumes operators will comply with the *RTA*, which it is acknowledged is not always the case as discussed below.[229] Further, it is acknowledged that residents and CAV are not always able to take enforcement action under the *RTA* in response to non-compliance, again as discussed below.[230] These problems undermine the effectiveness of the *RTA* at protecting home.

(a) No arbitrary evictions

The *RTA* protects residents by precluding their arbitrary eviction by operators. Operators can thus only end a residency on set grounds, and after having given the resident any required notice and having obtained a possession order from the Victorian Civil and Administrative Tribunal ('VCAT') requiring the resident to leave.[231] Because of this process against arbitrary evictions, which affords stability, residents may derive a feeling of security.[232]

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224 Ibid 370.

225 Ibid, citing Hazel Easthope, 'Making a Rental Property Home' (2014) 29(5) *Housing Studies* 579, 582, 593.

226 Tyrer, 'Home in Australia' (n 1) 370, citing Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 9–10. On the importance of privacy and control for rooming house residents, see also Goodman et al (n 36) 28.

227 Tyrer, 'Home in Australia' (n 1) 362–70.

228 Operator non-compliance with the *RTA's* (n 43) provisions renders them ineffective protection in those cases, thereby undermining home, as is noted throughout this piece. See *Chairperson's Report* (n 37) 25.

229 Ibid.

230 Ibid.

231 Power and Mott (n 38) 143–4.

232 A separate process applies under which residents may be suspended from a rooming house by an operator. Operators may give residents a notice to leave for serious acts of violence or for endangering others' safety on 'managed premises'. A rooming house is 'managed premises': *RTA* (n 43) ss 367–8. Residents must leave the premises if they receive such a notice, as their residency is suspended: at s 370. Residency resumes 2 business days later,

In more detail, the *RTA's* eviction process, which operators must follow to terminate a residency, is as follows. The operator must first serve a notice to vacate for a permitted reason under the *RTA* (refer to Table 1 below).[233] The resident may choose to leave the premises voluntarily at this point by the end of any notice period. If they choose to do so, their residency ends on the date they leave.[234] However, the resident is not obliged to leave at this point and is 'entitled to challenge the notice at a VCAT hearing'.[235] They may choose to stay, especially if they consider the operator has not satisfied a permitted reason for serving a notice to vacate. In that case, the operator would need to obtain a possession order from VCAT to lawfully evict the resident.[236] This involves the operator applying to the Tribunal for relevant orders. The resident is only required to leave if VCAT makes a possession order and following the police executing a warrant of possession.[237] The resident must leave on the date specified in any possession order.[238] This process protects residents against arbitrary evictions, which have declined as a result.[239] And as noted, residents may derive a feeling of security on the basis that this process enables them to remain in the rooming house unless VCAT orders otherwise.

Table 1: Permitted reasons for operators to serve a notice to vacate on a resident include:

Permitted reasons for termination	**Notice period**	***RTA* provision**
End of fixed term *rooming house agreement*	28 days	s 142ZA
'Serious damage' to the rooming house by the resident or their visitor	Immediately	s 142ZB

or after the Victorian Civil and Administrative Tribunal ('VCAT') has heard a corresponding application for a possession order: at ss 371, 374. See discussion in Consumer Affairs Victoria, 'Heading for Home: Residential Tenancies Act Review' (Options Discussion Paper, Residential Tenancies Act Review, February 2017) ('CAV Options Discussion Paper') 178–80; Tenants Union of Victoria, Submission to Consumer Affairs Victoria, *Tenants Union of Victoria Response to Heading for Home Residential Tenancies Act Review Options Discussion Paper* (February 2017) 64 ('*TV Heading for Home Submission*').

233 *RTA* (n 43) s 142M. The table adopts the formatting of a similar table in Power and Mott (n 38) 144.

234 *RTA* (n 43) s 142M.

235 '[T]he issue that many tenants leave after receiving a notice to vacate, not realising that they are entitled to challenge the notice at a VCAT hearing': *TV Heading for Home Submission* (n 232) 61. See also Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 171:

> Some stakeholders expressed concerns that landlords can give a notice to vacate to terminate the tenancy when they believe the tenant has breached the terms of the agreement, without any independent review. This can result in tenants unnecessarily leaving a tenancy, and in some cases becoming homeless.

The discussion in these works was in relation to tenants, but applies equally to rooming house residents.

236 Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 171; Power and Mott (n 38) 144.

237 Power and Mott (n 38) 144.

238 *RTA* (n 43) s 142N.

239 Power and Mott (n 38) 145.

Safety of other residents, nearby occupiers, the operator (or their agent), or their contractor or employee, endangered by the resident or their visitor	Immediately	s 142ZC[240]
Serious threats or intimidation by the resident of the operator (or their agent), or their contractor or employee	14 days	s 142ZD
Serious interruption by the resident or their visitor of other residents' quiet and peaceful enjoyment of the rooming house	Immediately	s 142ZE
Non-payment of rent by the resident for 7 days.	2 days	s 142ZF
Non-compliance with VCAT order by the resident.	2 days	s 142ZG
Successive breaches (that is, 3 times) of same *RTA* duty by the resident.	2 days	s 142ZH
Use of room for an illegal purpose (permitted) by the resident.	2 days	s 142ZI
Sale of rooming house	60 days	s 142ZJ
Repair or demolition of rooming house	60 days	s 142ZK
Refusal of licence under the Rooming House Operators Act 2016.	120 days	s 142ZR

(i) Recent improvements

The *Residential Tenancies Amendment Act 2018* (Vic) (the '*RT Amendment Act*') made amendments to the *RTA* which have further strengthened residents' rights against arbitrary evictions.[241]

New 'reasonable and proportionate' requirement: Before making a possession order (resulting in a resident's eviction and potentially homelessness),[242] VCAT must be satisfied that doing so is 'reasonable and proportionate'.[243] In assessing this, VCAT is to consider a number of factors including whether or not the resident's breach in respect of which termination

240 A notice cannot be given on this basis if the operator has given a notice to leave under s 368 of the *RTA* (n 43) (the suspension process, as discussed in above n 203).

241 The *Residential Tenancies Amendment Act* (n 154) was proclaimed to commence on 29 March 2021 by the Victorian Government Gazette No S42, Wednesday, 27 January 2021. The Act's commencement had been extended by the *Emergency Measures Act* (n 154) and the *COVID-19 Commercial and Residential Tenancies Legislation Amendment* (n 154).

242 Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 173.

243 *RTA* (n 43) s 330(1)(f).

is sought is trivial, was caused by others or has been remedied.[244] The application of the 'reasonable and proportionate' requirement will likely limit the making of possession orders as it empowers VCAT to consider the particular circumstances of each case. Tenants Victoria, in advocating for this requirement, noted:

> Eviction should only ever be a last resort, it should be proportionate and it should be fair. A reasonableness requirement would ensure that eviction only occur where it is the most suitable course of action given the circumstances. This would work to assist longer and more secure tenancies and provide vital protections to the most vulnerable tenants.[245]

This reform is beneficial for home. With the likelihood of less possession orders being made, it means less residents will lose their homes, thus promoting stability. Residents may feel more secure on this basis, knowing evictions cannot occur unless 'reasonable and proportionate'. The 'reasonable and proportionate' requirement is an improvement for the above reasons, overlaying the existing law regulating VCAT's making of possession orders. It responds to concerns 'that VCAT ... have adequate discretion to take into account hardship that may be experienced by the tenant [or resident], and other courses of action that may preserve the tenancy [or residency]'.[246]

Notices to vacate may only be issued for permitted reasons: Operators can only serve notices to vacate on residents for one of the permitted reasons under the *RTA* (refer to Table 1 above). This affords stability, and thus security, to residents, as operators cannot ask them to leave without grounds. Previously, operators could ask a resident to leave without giving a reason. Operators could utilise what was known as a 'no reason' notice to vacate, which facilitated their asking residents to leave at their whim. This was contrary to home as a feeling of security, as residents could be asked to leave for no reason at all,[247] and, in this way, the law was arguably opposed to stability. Residents were also at risk of receiving a 'no reason' notice to vacate (being asked to leave) in retaliation for exercising other rights under the *RTA*.[248] Again, this was contrary to home as security as it undermined the *RTA's* protections and thus stability.[249] The recent reforms abolished 'no reason' notices to vacate, such that operators must have a basis for seeking a resident's eviction.

(ii) Illegal evictions

Illegal evictions may occur notwithstanding the above *RTA* protections. Tenants Victoria has observed: 'residents are particularly vulnerable to illegal evictions; we frequently hear reports from residents who have been served notices for attempting to ask for repairs or asserting their rights in other

244 Ibid ss 330A(b), (c), (e).
245 *TV Heading for Home Submission* (n 232) 61.
246 Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 173.
247 Ibid 199–201; *TV Heading for Home Submission* (n 232) 72.
248 Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 169, 200. See also *TV Heading for Home Submission* (n 232) 72.
249 See above n 248.

ways'.[250] In recognition of this, the *RTA* contains a criminal enforcement process. Operators commit a criminal offence if they force residents to vacate, or cause them to abandon their room by doing something intended or designed to cause the resident to vacate.[251] Interfering with the residents' other rights under the *RTA* may fall within this categorisation as something designed to cause the resident to vacate. These offences may be prosecuted by the Director of CAV, a person authorised by the Director, or a police officer.[252] While in theory this process should deter non-compliance, offences may not be prosecuted due to residents not reporting (and thus giving evidence against) operators because they fear operators.[253] CAV 'is only able to respond if it receives a complaint'.[254] A further potential barrier to prosecuting these offences is resourcing. CAV must be adequately resourced to undertake rooming house inspections.[255] Whether CAV limits its investigations to registered rooming houses,[256] or whether its investigations also extend to unregistered rooming houses, is also unclear.[257] Many problematic rooming houses are unregistered.[258] For these reasons, the relevant offences may be an ineffective deterrent in practice due to their not being prosecuted. Non-compliance may thus continue. This undermines home where it encourages operators not to comply with the *RTA's* protections for home.[259]

(b) Duration of tenure

The *RTA* does not specify a fixed duration of tenure for rooming house residents,[260] and thus protects residents in this way. Residents can end their

250 *TV Heading for Home Submission* (n 232) 64.

251 *RTA* (n 43) ss 142R(1), (2)(d).

252 Ibid s 508.

253 *Chairperson's Report* (n 37) 25.

254 Ibid 23.

255 'Unfortunately, in 2013, as part of the review of consumer protection, the Auditor General highlighted significant deficiencies in CAV's compliance activities. Of the 24 inspections rooming house inspections (sic) audited not one compliance officer gained entry to the property and seven were recorded as taking only one minute to complete (Victorian Auditor General 2013). CAV is working to address issues raised in this report': *Rooming House Project Report* (n 39) 15.

256 Ie, those registered with local councils as required under the *PHWA*, and thus entered onto CAV's rooming house register: see *PHWA* (n 180) ss 67, 73A; *RTA* (n 43) ss 142D–142L.

257 'Consumer Affairs are only able to enter premises to inspect minimum standards where a property is registered as a rooming house with the local council': *Rooming House Project Report* (n 39) 12. On system enforcement difficulties in respect of unregistered rooming houses, see Dalton, Pawson and Hulse (n 68). The fact that they are unregistered means that can easily escape enforcement action for non-compliance. Unregistered rooming houses, as the report notes, present particular risk to residents: see Dalton, Pawson and Hulse (n 68) 42.

258 'operating outside the current registration and regulatory regimes': *Chairperson's Report* (n 37) 3.

259 'advocates argued that in its current form the industry is attractive to amoral and opportunistic operators who wilfully ignore the regulatory regime and their obligations to residents': ibid 25.

260 'Unlike residency rights under Part 3 of the RTA, which are not time specific and can be ended at any time provided the appropriate notice period has been given ...': Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 144.

residency 'at any time', by giving 2 days' notice to the operator,[261] or 14 days if the resident seeks to end a fixed term residency agreement.[262] This flexibility may actually create a feeling of security noting that residents may need to leave on short notice due to interpersonal conflicts occurring, for example, as a result of sharing facilities.[263] This flexibility promotes stability for residents, in that they can more easily leave an unstable environment, if that situation arises. Tenants Victoria explains:

> Tenancy agreements, particularly with fixed-terms, can trap tenants in unfavourable living arrangements that the tenant has little control over. Unlike other forms of tenure a resident in a rooming house has less autonomy over their living space. Residents do not have control over who they live with or how many people they share their accommodation with. Rooming house residents often have complex needs and may have conflict with other residents. If the resident is under a tenancy agreement it can be more difficult to leave an undesirable situation or find more suitable housing because notice periods are longer and there may be lease-breaking costs.[264]

Residents may also need to leave on short notice for other reasons, including after seasonal employment, or university semester (for international students), has ended.[265] Martin has noted the '"easy in easy out" character' of rooming houses may be of benefit to such persons over mainstream rental.[266]

(c) Maintenance of premises

The *RTA* protects residents by requiring operators to maintain rooming houses. Operators thus have a duty to maintain rooming houses (and their facilities) in good repair.[267] This benefits home where it leads residents to feel they can stay (because the house is maintained), thereby promoting stability and security. The *AHURI Report*, based on research with residents, has demonstrated this view that maintenance leads to security (and conversely that a lack of maintenance undermines security),[268] and thus informed the argument here.

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261 *RTA* (n 43) s 142W(1). Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 144.

262 *RTA* (n 43) s 142W(2). Fixed term residency agreements have replaced the use of residential rental agreements in rooming houses (except in respect of self-contained apartments in rooming houses), as their use was potentially causing injustice to residents. 'The higher amounts of bond that are permitted under a tenancy agreement can contribute to the compensation operators can claim where a vulnerable rooming house resident breaks a tenancy agreement': see Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 145.

263 *TV Alternative Forms of Tenure Submission* (n 53). See also Victoria Legal Aid, Submission to Consumer Affairs Victoria, *Alternative Forms of Tenure: Parks, Rooming Houses and other Shared Living Rental Arrangements* (August 2016) 8–9; Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 145.

264 *TV Alternative Forms of Tenure Submission* (n 53) 23.

265 VCAT, Submission to Consumer Affairs Victoria, *Alternative Forms of Tenure: Parks, Rooming Houses and other Shared Living Rental Arrangements* (August 2016) 6; WestJustice — Western Community Legal Centre, Submission to Consumer Affairs Victoria, *Residential Tenancies Act Review — Fairer, Safer Housing* (September 2016) 23; Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 145.

266 Martin, *NSW Boarding Houses Report* (n 40) 29.

267 *RTA* (n 43) s 120.

268 Goodman et al (n 36) 30.

However, as Tenants Victoria has observed: 'there is a high degree of non-compliance with the duty to maintain rooming houses'.[269] This undermines home as security where it leads residents to feel they must leave poorly maintained premises. Tenants Victoria conducted rooming house visits in 2016 and found that '54 per cent of registered rooming houses ... had issues with repairs and maintenance, cleaning, or fire and electrical safety'.[270] The PCLC similarly found that 'breaches of the regulatory framework are commonplace and poor conditions continue to be a real concern in a significant number of rooming houses across Melbourne's south east'.[271] The PCLC found that:

> over 40% of privately registered rooming houses operate in a significant state of disrepair and lack of maintenance. Residents report broken locks, broken doors and windows, a lack of working smoke alarms and dirty or unusable shared facilities such as mould, pests, a lack of heating, and non-working power points, stoves and toilets.[272]

Some specialist homelessness services, because of such appalling conditions, have objected to using rooming houses as crisis accommodation.[273]

In recognition that operators may breach the maintenance obligation, the *RTA* contains civil enforcement processes.

Repair process: Residents can take action to affect the necessary repairs arising from a lack of maintenance. The action that may be taken differs according to whether repairs are 'urgent' or 'non-urgent'.[274] Urgent repairs may be undertaken by residents themselves, with the operator then liable for the residents' reasonable costs.[275] Residents may also seek to have the operator undertake the urgent repairs at the operator's cost by applying to VCAT for relevant orders in certain circumstances, for example, if the resident cannot themselves afford the cost of the repairs.[276] VCAT may order that the urgent repairs be undertaken by the operator.[277] Urgent repairs is defined to include 'a serious roof leak'[278] and works necessary to repair damage making a rooming house 'unsafe or insecure', including 'mould or damp ... related to the building structure'.[279]

Non-urgent repairs may not be undertaken by residents themselves. Residents may apply to the Director of CAV, who may investigate and report on whether non-urgent repairs are required for the operator to comply with the

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269 *TV Alternative Forms of Tenure Submission* (n 53) 25.
270 Ibid 22.
271 Peninsula Community Legal Centre (n 47). On poor conditions in rooming houses, see also *Chairperson's Report* (n 37) 7, 21; *Rooming House Project Report* (n 39) 18, 21; Northern and Western Homelessness Networks (n 54); Dalton, Pawson and Hulse (n 68) 39; Peninsula Community Legal Centre (n 47); *TV Alternative Forms of Tenure Submission* (n 53) 25.
272 See above n 271.
273 Northern and Western Homelessness Networks (n 54) 2.
274 Power and Mott (n 38) 142.
275 *RTA* (n 43) s 129.
276 Ibid s 130.
277 Ibid s 133(1)(a).
278 Ibid s 3(1) (definition of 'urgent repairs').
279 Ibid.

good repair requirement.[280] The Director may negotiate with the operator to affect repairs if satisfied there is a breach of the good repair requirement,[281] but cannot compel the operator to undertake the repairs. Residents may also seek to have the operator undertake the non-urgent repairs by applying to VCAT for relevant orders.[282] VCAT may order that the non-urgent repairs be undertaken by the operator.[283] Finally, before proceeding with either option (that is, application to the Director of CAV or VCAT) the resident must give the operator an opportunity to undertake the repairs by serving a notice of repair on the operator.[284]

Breach of duty process: This process enables residents to pursue operators for a breach of duty. This process applies here because operators are, as noted, under a duty to maintain the rooming house in good repair.[285] If the operator has breached that duty, the resident may proceed as follows. First, the resident or their agent may serve a notice on the operator, requesting that the breach be remedied (in the case of a breach of the duty to maintain this will invariably be a request for repairs) within the *required time*.[286] The required time is 3 days in respect of breaches of the good repair duty in rooming houses.[287] The operator may comply by undertaking the repairs. However, if the operator does not comply, the resident can apply to VCAT for relevant orders.[288] Following this second step, VCAT may order the operator to remedy the breach (compliance orders), pay compensation (compensation orders), and refrain from committing similar breaches.[289]

In theory, these civil enforcement processes should deter operator non-compliance. Arguably, they do not do so effectively however because residents are reluctant to use them, meaning consequences do not follow for operators.[290] Residents may be reluctant to use these processes due to fear of operator retribution, the 'cost and complexity' of pursuing rights,[291] a lack of knowledge of their rights or their general vulnerability. These mechanisms may thus not effectively deter operators from breaching their maintenance duty. This undermines home where it results in some operators breaching their maintenance duty, which the evidence above from Tenants Victoria and PCLC demonstrates has occurred in practice.

(d) Standards for privacy, safety, security, and amenity

The *Rooming House Standards* protect residents by prescribing standards for privacy, safety, security, and amenity in rooming houses.[292] The *Rooming*

280 Ibid s 131.
281 Ibid s 131(3)(b).
282 Ibid s 132.
283 Ibid s 133(1)(a).
284 Ibid ss 131(1)(a), 132(1)(a)(i).
285 Ibid s 120.
286 Ibid s 208.
287 Ibid s 3(1) (definition of 'required time').
288 Ibid s 209. VCAT must hear these applications urgently, in some cases: see at s 209A.
289 Ibid s 212.
290 *Chairperson's Report* (n 37) 25.
291 Ibid. See also *Rooming House Project Report* (n 39) 21–2.
292 *RTA* (n 43) ss 142C, 511.

House Standards, contained in regulations made under the *RTA*,[293] must be adhered to by operators:

- For security and privacy — locks on doors to residents' rooms,[294] window coverings,[295] privacy latches on shared toilet and bathroom doors,[296] securely fixed external windows without key,[297] and entrances with locks, illumination and a window peephole or intercom system.[298]
- For amenity — power outlets (at least two) in a room,[299] food preparation areas with sink, oven, cooktop, refrigerators, and cupboard,[300] dining facilities with a specified number of chairs for residents and table,[301] laundry wash trough or basin with hot and cold water, space and plumbing for a washing machine, and a clothes line or clothes drying facility,[302] ventilation,[303] and lighting.[304]
- For safety — emergency plans and procedures,[305] electrical requirements,[306] gas safety checks,[307] and electrical safety checks.[308]

These standards benefit home, to the extent they improve rooming house conditions, and lead residents to feel secure because they can stay (that is, obtain stability) on this basis. The *AHURI Report* on residents' experiences yet again generally informs and confirms this view. It found that privacy and amenity were among the key features leading residents to feel safe and secure.[309] However, this sense of home is undermined when operators breach the standards. The 'minimum standards have made little difference to the quality and amenity of rooming houses', according to 56% of panel members interviewed by AHURI (with 33% disagreeing and 11% remaining neutral).[310] In recognition that operators may breach the standards, the *RTA* contains civil and criminal enforcement processes.

Regarding civil enforcement processes, residents can pursue operators for a breach of duty. This process will apply here if operators are under a duty to

293 Ibid.
294 *Rooming House Standards* (n 144) reg 6.
295 Ibid reg 8.
296 Ibid reg 10.
297 Ibid reg 21.
298 Ibid reg 22.
299 Ibid reg 7.
300 Ibid reg 11.
301 Ibid reg 12.
302 Ibid reg 13.
303 Ibid reg 17.
304 Ibid reg 18.
305 Ibid reg 15.
306 Ibid reg 16.
307 Ibid reg 19.
308 Ibid reg 20.
309 Goodman et al (n 36) 28, 30.
310 Dalton, Pawson and Hulse (n 68) 39, cited in Peninsula Community Legal Centre (n 47). On poor conditions in rooming houses, see also *Chairperson's Report* (n 37) 7, 21; *Rooming House Project Report* (n 39) 18, 21; Northern and Western Homelessness Networks (n 54); Dalton, Pawson and Hulse (n 68) 39; Peninsula Community Legal Centre (n 47); *TV Alternative Forms of Tenure Submission* (n 53) 25.

comply with the standards.[311] First, the resident or their agent may serve a notice on the operator, requesting that the breach be remedied (in the case of a breach of any duty to comply with the standards this will invariably be a request to comply with whatever standards are alleged to have been breached) within the *required time*.[312] The required time is 3 days in respect of a breach of any duty to comply with the standards in rooming houses.[313] The operator may comply by adhering to the standard. However, if the operator does not comply, the resident can apply to VCAT for relevant orders to compel compliance.[314] VCAT must hear these applications urgently, that is, within 5 business days after the application is made.[315] This civil enforcement process may not effectively deter operator non-compliance. For the reasons given, residents may not be willing or able to take the required action, such that no consequences follow for non-compliance. Home is undermined to the extent that this encourages operator non-compliance with the standards in practice, as the evidence from AHURI above suggests has occurred in many cases.

Regarding criminal enforcement processes, the *RTA* makes it an offence for operators not to comply with the standards.[316] Prosecution of this offence is by the Director of CAV, a person authorised by the Director or a police officer.[317] The Director of CAV may also investigate whether an operator has breached the standards, as an alternative to prosecution,[318] and if they do, must produce a written report of their investigation.[319] Offences may be an ineffective deterrent to non-compliance in practice, if they are not prosecuted for the reasons given including because residents do not report offences because of their fear of eviction by operators.[320] Again, this undermines home to the extent it encourages operator non-compliance with the *RTA's* standards for home.

(i) No cleanliness standard

No cleanliness standard exists in respect of rooming house common areas and facilities under the *RTA*.[321] Premises may thus become unclean, as neither

311 *RTA* (n 43) s 120A. It is not entirely clear that operators are under a 'duty' to comply with the standards (as opposed to a requirement to comply), such that the breach of duty process may apply. This is because s 120A (unlike other sections) does not expressly state that contravention of the standards may be dealt with as a breach of duty. However, that appears to be the case from s 209A(ab) which contemplates the breach of duty process applying for a breach of the standards under s 120A.

312 Ibid s 208(1).

313 Ibid s 3(1) (definition of 'required time').

314 Ibid ss 209, 212.

315 Ibid s 209A(ab).

316 Ibid ss 142B, 508.

317 Ibid s 508.

318 Ibid s 131A(1)(b).

319 Ibid s 131A(2)(b).

320 *Chairperson's Report* (n 37) 25.

321 The *RTA* requires residents to keep their room 'reasonably clean': *RTA* (n 43) s 114. However, it is silent on who — operators or residents — is responsible for cleaning common areas and facilities. Further, while reg 13 of the *Public Health and Wellbeing Regulations 2009* (Vic) requires rooming house owners to maintain bedrooms and common areas 'in a clean, sanitary and hygienic condition', Tenants Victoria says '[t]here is widespread non-compliance' with this obligation and that operators often use house rules 'to

operator nor residents voluntarily assume cleaning responsibility. The PCLC has commented on 'the overall lack of cleanliness and poor hygiene practices in the rooming house environment'.[322] Cleanliness was particularly an issue in kitchens and bathrooms.[323] In an interview conducted by the PCLC, a resident indicated that: 'Other residents are messy in the toilet and shower. One resident urinates on the floor.'[324] 'I clean up around the house only to come back in half an hour and find it's messy again.'[325] This may undermine home as it undermines stability. Residents may not feel able to remain in such unclean premises, thereby inhibiting security, identity, and relationships (in short, home) from developing in the rooming house. The *AHURI Report* on residents' experiences again informs this view. It found that cleanliness was relevant to whether residents felt safe in rooming houses.[326] Further, it found 'that some owners and managers did not make arrangements for common areas to be cleaned and maintained adequately'.[327] To overcome this issue, and protect home, cleanliness should be addressed in the rooming house standards.

The PCLC has called for a new standard requiring operators to undertake: 'Weekly cleaning of communal areas and residents' rooms.'[328] This new standard is reasonable to impose on operators.[329] Operators have control over the entire rooming house premises. Residents do not. Further, residents may struggle to apportion cleaning responsibility between themselves given they have not chosen to live together and thus may have no functioning relationship.[330] Further again, residents often face considerable hardships, such that imposing cleaning responsibility on them would be unfair.[331]

(e) Privacy of rooms

The *RTA* protects residents by affording them privacy in their rooms. Operators can thus only enter residents' rooms for a specified reason under the *RTA*,[332] and must give advanced notice of their entry (except in particular circumstances in an emergency or where providing services or where residents

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pass [these] cleaning responsibilities on to residents': *TV Heading for Home Submission* (n 232) 46; *TV Alternative Forms of Tenure Submission* (n 53) 24. A final point is that these cleanliness standards, under the public health regulations, cannot be enforced by residents against operators, as they are not framed as statutory obligations as between the parties. Rather, they are enforced by local councils.

322 Peninsula Community Legal Centre (n 47) 25.

323 Ibid.

324 Ibid.

325 Ibid.

326 Goodman et al (n 36) 28, 30.

327 Ibid 31.

328 Peninsula Community Legal Centre (n 47) 6.

329 Council to Homeless Persons, Submission to Consumer Affairs Victoria, *Heading for Home: Residential Tenancies Act Review* (February 2017) ('*CHP Heading for Home Submission*') 21. Cf Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 112 (option 8.16) which proposed that residents would be 'responsible for cleanliness in their room and any common areas'.

330 *CHP Heading for Home Submission* (n 329) 21.

331 Ibid.

332 *RTA* (n 43) ss 136–9. Residents whose property is damaged during the operators' entry can also seek compensation: at s 141.

agree).[333] Further, in the ordinary course, entry is generally only permitted between 8pm and 6pm,[334] and, routine inspections are only permitted once every 4 weeks.[335] The privacy and control these protections afford residents is relevant to home. Residents may feel (at least to some extent) secure because they can remain (relatively) undisturbed in their rooms, thus feeling they have more control over the space. Smith explains: 'When individuals control space and have privacy needs met, feelings of comfort and freedom are possible. This freedom implies being able to relax and do as one wishes.'[336] Privacy and control may thus lead to relaxation and security for residents. AHURI's research with residents again demonstrates that this is the case,[337] and thus informs the argument here.

However, some operators do not comply with the above entry requirements.[338] In recognition of this, the *RTA* contains civil and criminal enforcement processes to address non-compliance. Regarding the civil enforcement processes, residents can take action in VCAT to restrain operators who have previously unlawfully exercised a right of entry from exercising a future right of entry for a time.[339] This civil enforcement process may not effectively deter operator non-compliance. For the reasons given, residents may not be willing or able to take the required action, such that no consequences follow for non-compliance. Home is undermined to the extent this encourages operators not to comply with the entry requirements.

Regarding criminal enforcement processes, the *RTA* makes it an offence for operators to enter a residents' room without following the *RTA* process.[340] Offences may be an ineffective deterrent to operator non-compliance in practice, if they are not prosecuted for the reasons given including because residents do not report offences because they fear eviction by operators.[341] Again, this undermines home as it may encourage operators not to comply with the *RTA's* entry requirements.

(f) Security of property

The *RTA* protects residents' property in their room. Operators are thus required to maintain the security of residents' property in their room.[342] (Residents' property in common areas is not similarly protected, however.) For residents, this may create additional privacy and control, and thus the security of home.[343] However, some operators do not comply. In research conducted by the Northern and Western Homelessness Networks, one resident has

333 Ibid s 136.
334 Ibid ss 136(d), (e).
335 Ibid ss 136(e), 137(e).
336 Sandy G Smith, 'The Essential Qualities of a Home' (1994) 14(1) *Journal of Environmental Psychology* 31, 32, cited in Tyrer, 'Home in Australia' (n 1) 351.
337 Goodman et al (n 36) 28.
338 'The landlord at the rooming house cause much trouble. She would open tenant's rooms and go through personal belongings, stealing valuables': Northern and Western Homelessness Networks (n 54) 5.
339 *RTA* (n 43) s 142.
340 Ibid s 142A.
341 *Chairperson's Report* (n 37) 25.
342 *RTA* (n 43) s 123.
343 Goodman et al (n 36) 28.

commented: 'I also felt scared to leave the room unoccupied as things had been stolen from the house.'[344] Arguably, the operator of that rooming house had breached their duty to ensure the security of residents' property.

In recognition of this, the *RTA* contains a civil enforcement process. Residents may pursue operators for a breach of duty. This process may apply here because operators are under a duty to ensure the security of residents' property in their rooms.[345] The resident or their agent may serve a notice on the operator, requesting compliance within the *required time*.[346] The required time is 3 days in respect of breaches of the duty to ensure the security of residents' property in their room.[347] However, if the operator does not comply, the resident can apply to VCAT for relevant orders.[348] This civil enforcement process may not effectively deter operator non-compliance. For the reasons given, residents may not be willing or able to take the required action, such that no consequences follow for operator non-compliance. Home is undermined to the extent this means the *RTA's* protections for home regarding security of residents' property are not adhered to by operators' in practice.

(g) Increases in room capacity require residents' consent

Operators are required by the *RTA* to obtain the consent of all residents in a room before increasing its capacity to accommodate additional residents.[349] This consent must be obtained to lawfully increase a room's capacity.[350] Operators must also give residents notice of the reduced rent payable if a room's capacity is to be increased if the residents' consent.[351] These protections may enhance residents' ability to remain in the premises as they know they will not be forced to live with others, thereby producing stability and a feeling of security. This also enhances security by affording greater levels of privacy and control which, as noted, AHURI's research has confirmed are relevant to residents feeling 'safe and secure'.[352]

In recognition that operators may not comply, the *RTA* contains a criminal enforcement process. The *RTA* makes it an offence for operators to force residents to share with others (beyond a room's original capacity) without their consent.[353] Prosecution of this offence is by Director of CAV, a person

344 Northern and Western Homelessness Networks (n 54).
345 *RTA* (n 43) s 123.
346 Ibid s 208.
347 Ibid s 3(1) (definition of 'required time').
348 Ibid ss 209, 212.
349 Ibid ss 94B–94D. Residents — upon entering a rooming house — may take up residency in a shared room with others, in which case they have a shared room right: at s 92B. Alternatively, they may take up residency in a private room by themselves, or with others such as a domestic partner in which case they have an exclusive room right: at s 92A.
350 Ibid ss 94B–94D.
351 Ibid s 94C(1)(h). If a resident believes any rent reduction is insufficient, they may contact the Director of CAV to request an investigation and report: at s 102(1A). Residents may apply to VCAT for an order to reduce the rent on the basis that it is excessive, following the Director's report: at ss 103, 104. The Director of CAV may also carry out their own investigation without being prompted by a resident: at s 102A(1)(b).
352 Goodman et al (n 36) 28.
353 *RTA* (n 43) s 94B.

authorised by the Director, or a police officer.[354] Offences may be an ineffective deterrent to operator non-compliance in practice, if they are not prosecuted for the reasons previously given. Again, this undermines home where it encourages operators not to comply with the *RTA's* protections for residents regarding room capacity.

(h) Rent increases only once every 12 months

Operators are only allowed to increase rents once every 12 months.[355] Increases made more frequently than this are invalid.[356] For residents, this ensures the rent payable will remain the same for at least a year. This may promote a feeling of security, to the extent it enables residents to remain in the rooming house for at least the 12 months for which rent is set. This security is an important aspect of home.[357] In terms of the amount by which rent may be increased, the *RTA* protects residents against 'excessive' increases. Residents have a right to challenge increases they believe to be 'excessive' in VCAT after having applied for and received a report from the Director of CAV on whether a rent increase is 'excessive'.[358] VCAT can reduce the rent if it agrees the proposed rent increase is 'excessive'.[359] This may deter operators from proposing 'excessive' rent increases. Residents may obtain some security regarding rent amounts on this basis.[360] However, this protection against 'excessive' rent increases does not guarantee affordable rents. First, residents may not bring civil actions in VCAT challenging 'excessive' rent increases for the reasons previously given, such that operators are not deterred from charging 'excessive' rent. Second, whether rent is 'excessive' is determined with reference to comparable rents.[361] If a proposed increase is comparable, it will not be excessive.[362] This is so notwithstanding that it may be unaffordable for vulnerable rooming house residents.[363]

From a resident perspective, rents are thus generally high notwithstanding the above protections.[364] Tenants Victoria explains: 'Affordability of rents in

354 Ibid s 508.

355 Ibid s 101(5A).

356 Ibid s 101(6).

357 Tyrer, 'Home in Australia' (n 1) 349–54.

358 *RTA* (n 43) ss 102, 103. The Director of CAV can also report on whether a rent increase is excessive on their own initiative: at s 102A.

359 Ibid s 104.

360 Rent is linked to security of tenure ie, 'the degree of certainty a person has about their residential circumstances': Consumer Affairs Victoria, *Security of Tenure* (Issues Paper, November 2015) 8.

361 'Trying to dispute an excessive rent increase at a tenancy tribunal was considered by some of those interviewed as ineffective, because the onus is on the tenant to show that rent is high compared with similar properties of a similar type in the area. Thus the rate of increase in itself is not a factor if the proposed rent is comparable with others in the current market': Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (AHURI Final Report No 170, July 2011) 62.

362 Ibid.

363 On the problem of rooming house rents being unaffordable for residents, see Peninsula Community Legal Centre (n 47) 3, 6.

364 The Registered Accommodation Association of Victoria, which represents operators, takes a different view. See Registered Accommodation Association of Victoria, Submission to

rooming houses is an increasing issue. Whilst often toted as an affordable housing option this is generally not the reality.'[365] The PCLC similarly notes: 'excessive rents are becoming an increasing problem'.[366] The PCLC has called for 'a comprehensive rent control scheme'.[367] Evaluation of such a scheme is beyond the scope of this article.

(i) Bond amounts limited

The *RTA* protects residents by limiting how much bond operators can charge. Operators may not charge a bond of more than 14 days rent (or 28 days rent in respect of a fixed term rooming house agreement).[368] Operators must also lodge any bond amount charged with the Residential Tenancies Bond Authority.[369] Operators who charge more than the allowed bond amount commit a criminal offence, with prosecution by the Director of CAV, a person authorised by the Director, or a police officer.[370] These protections afford residents certainty regarding amounts they will be charged, and thus stability and potentially secure feelings on this basis.

(j) House rules

House rules are rules made by operators to regulate 'the use and enjoyment of facilities and rooms'.[371] As these rules may restrict what residents can do in the house, they may impact on the home experience.[372] The *AHURI Report* explains: 'The extent of management control and intrusion into peoples' lives [which may occur through rules set by management] has significant bearing on perceptions of freedoms and overall wellbeing and satisfaction for people living in marginal rental accommodation.'[373] The CHP similarly explains how residents are 'vulnerable to rules and conditions which affect their quiet enjoyment'.[374] For example, residents use of heaters may be restricted, or 'the times they can use certain communal facilities such as bathrooms, kitchens and laundries'.[375] Inevitably, such rules may impact on the home experience in negative ways. Against this background, the PCLC has proposed a new rooming house standard, whereby operators would need to provide '24-hour access to adequate heating, cooling, cooking and washing facilities'.[376]

Consumer Affairs Victoria, *Response by the Registered Accommodation Association of Victoria (RAAV) to Consumer Affairs Victoria Options Paper for the Review of the Residential Tenancies Act* (24 February 2017) 7.

365 *TV Alternative Forms of Tenure Submission* (n 53) 19.

366 Peninsula Community Legal Centre (n 47) 3.

367 Ibid 6.

368 *RTA* (n 43) s 96.

369 Ibid s 406.

370 Ibid ss 96, 508.

371 Ibid s 126.

372 Indeed, residents are under a duty to observe all house rules: ibid s 119.

373 Goodman et al (n 36) 10.

374 *CHP Alternative Forms of Tenure Submission* (n 152) 5.

375 Ibid.

376 Peninsula Community Legal Centre (n 47) 6. Standards on heating and insulation were previously considered for inclusion in the *Rooming House Standards* but not ultimately included: see Department of Human Services, *Rooming House Standards Regulatory Impact Statement* (n 99) 33.

In recognition that problematic house rules may be imposed, the *RTA* contains a civil enforcement process for residents to challenge rules. Residents may challenge 'unreasonable' house rules in VCAT.[377] VCAT may declare invalid a house rule it considers to be unreasonable.[378] What is 'unreasonable' is not defined and this may create difficulties for residents in terms of operators then more easily being able to impose unreasonable rules due to ambiguity around what 'unreasonable' means.[379] This lack of definition may also create difficulties for residents bringing claims — challenging a house rule as 'unreasonable' — in VCAT. The CHP considers legislation 'should, at a minimum, provide guidance about what rules are reasonable, and what rules would impact on resident's quiet enjoyment of the property'.[380] The CHP also draws attention to the fact that vulnerable residents may not take action in VCAT due to their 'fear of retaliation and or eviction'.[381]

2 Expression of identity

The expression of identity is another key part of the experience of home. However, it may be difficult to realise in rooming houses.

Individual identity: In rooming houses, residents share spaces with those they do not know or have chosen to live with.[382] Residents may not, therefore, be able to design those spaces to reflect their individual identity.[383] Also potentially precluding residents from designing spaces to reflect individual identity are house rules made by operators.[384] This is why it may be difficult to realise home as individual identity in rooming houses. To be clear, this problem may be attributable to the sharing of facilities in rooming houses rather than any inadequacy of the *RTA*, that is, of property law.

In rooming houses, residents may reflect individual identity in their room if they occupy it on an exclusive basis. However, not all residents occupy their rooms exclusively. Only those that do may have more scope to express individual identity. They control their room, to the exclusion of other residents, such that they can make changes to it.[385] However, those residents must still obtain the operator's prior written consent to install fixtures, which may impact their ability to reflect identity.[386] Further, as noted, not all

377 *RTA* (n 43) s 128. For a case example, see *Benham v Housing First Ltd (Residential Tenancies)* [2018] VCAT 1282. In that case, the Tribunal found the relevant houses rules prohibiting overnight guests were not unreasonable: see at [60], [88].

378 *RTA* (n 43) s 128(3).

379 *CHP Alternative Forms of Tenure Submission* (n 152) 5.

380 Ibid.

381 Ibid.

382 *Rooming House Project Report* (n 39). See also *TV Alternative Forms of Tenure Submission* (n 53) 23.

383 Tyrer, 'Home in Australia' (n 1) 354–6, 364–6. Radin's personhood justification for property is underlaid with this individual identity manifested in things: see Radin (n 51). Other scholars have challenged this personhood perspective: see Stern (n 51) 1093; Barros (n 51) 255; Davidson (n 51).

384 Refer to discussion at above Part '(j) House rules'.

385 Residents may occupy their room either exclusively, under an exclusive occupancy right: *RTA* (n 43) s 92A. Alternatively, residents may occupy their room on a shared basis, under a shared room right: at s 92B.

386 Ibid s 115. 'The requirement for landlord approval applies to all modifications, with an exception for changing locks in response to family violence. Stakeholders noted that this

residents have the benefit of exclusive room occupancy. Residents commonly share their room with others. There may thus be difficulties with experiencing this aspect of home.

Communal identity: Communal identity has been shown to have formed in shared living arrangements. Persons develop a shared identity as a group. This has occurred, for example, in share houses in Inner Sydney.[387] Many indigenous cultures also have a strong communal identity living in groups.[388] Urban slums are yet another example of shared living which may produce community and identity, although these are not 'a situation which ought to pertain'.[389] Similarly, as places of shared living, communal identity may similarly form in rooming houses. Communal identity may develop through the connections formed between residents. For a minority of residents interviewed by the PCLC, this may indeed have been the case as 'making friends' was for them a favourable aspect of rooming house life.[390] For others this was not the case, suggesting that communal identity on this basis does not develop for all residents. For the many residents interviewed by the PCLC, 'there were no "best aspects" of living in a rooming house'.[391] The reality of rooming houses is that residents are living with other residents they do not know,[392] and thus with whom they may never develop a connection and communal identity. It is also relevant to note that the sharing which takes place in rooming houses is different to that which occurs in private rental. Residents in private rental (that is, tenants) usually have no scope to choose the other persons they live with because, as noted earlier, tenants control the premises, that is, have exclusive possession, and thus control over who comes onto the premises, which is not the case for rooming house residents.[393] Similarly, the sharing in Indigenous cultures which may produce communal identity is

prohibition impacts on a tenant's ability to make their rental property feel more homely and reflective of their personal tastes': Consumer Affairs Victoria, 'CAV Options Discussion Paper' (n 232) 114.

387 McNamara and Connell (n 52).

388 Stanner (n 58).

389 Paul Babie, 'Spontaneously Emerging New Property Forms: Reflections on Dharavi' (Research Paper No 2020-07, University of Adelaide Law, 2020) 26. See also at 14–17. Babie reflects on what Dharvi in Mumbai, India, which is 'Asia's largest urban slum' (at 1), reveals about how property systems emerge informally among people while also pointing out that 'the very fact of its existence draws attention to the pernicious effect of neoliberal capitalism' (at 26).

390 Peninsula Community Legal Centre (n 47) 25.

391 Ibid.

392 *Rooming House Project Report* (n 39) 4.

393 'Leasing arrangements distinguish rooming or boarding houses from shared houses. Residents of a share house have exclusive possession of the entire rented premises, whereas residents of a rooming or boarding house only have exclusive possession to their room. They exercise no control over who else lives in the premises with them': *Chairperson's Report* (n 37) 5. On control by operators, see Martin, *NSW Boarding Houses Report* (n 40) 2; Goodman et al (n 36) 10; and Consumer Affairs Victoria, *Alternative Forms of Tenure* (n 40) 10.

different on the basis members are connected by virtue of their birth and culture. The *AHURI Report* makes the overall point being made here that:

> sharing amongst those living in marginal rental housing is distinctive from other housing forms in that unrelated people, often strangers, are brought together under one roof or in one space through a relationship with a manager who decides the rules for their joint use of spaces and facilities.[394]

3 Relationships

Relationships are another key part of the experience of home. Relationships are strengthened and secured in the place of home.[395] Relationships require common spaces, such as lounge rooms and dining rooms, in which to develop.[396] The *RTA* does not require operators to provide these spaces. Operators have thus turned communal areas — lounge and dining rooms — into extra bedrooms, to accommodate additional residents and generate more revenue.[397] Where this has occurred, relationships are inhibited from developing as residents are effectively confined to their rooms.[398] (Further, this may make residents want to leave, that is, because they are not developing connections to others, thereby undermining the stability and security of home). Home is undermined by the *RTA* in this way. The PCLC has proposed a new Rooming House Standard requiring operators to provide '[a]dequate communal social space'.[399] Home as relationships depends on such a standard being introduced.

The *RTA* does require operators to provide dining facilities, in the form of a table and chairs in a 'common area'.[400] However, this does not guarantee adequate communal spaces. The 'common area' could (presumably) be the kitchen itself rather than a separate dining or lounge room. Further, this does not guarantee enough chairs. The minimum number of chairs required is equivalent 'to the maximum number of residents that can be accommodated in a resident's room in the rooming house'.[401] So, if the maximum number of residents that can be accommodated in a resident's room is 2, then only 2 chairs are required. There might be 10 or more persons living in the rooming house but, still, only 2 chairs would be required in this scenario under the

394 Goodman et al (n 36) 11.

395 Tyrer, 'Home in Australia' (n 1) 357, citing Carole Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8(2) *Journal of Architectural and Planning Research* 96, 98.

396 As has been observed, '[w]hen a rooming house lacks common living areas, residents are often effectively bound to their rooms. Living areas can help reduce isolationism, allowing residents to interact with other residents and guests': Department of Human Services, *Rooming House Standards Regulatory Impact Statement* (n 99) 33 (Proposed 'living area' standard). See also Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Report, 1999) 9–11, 49, cited in Department of Human Services, *Rooming House Standards Regulatory Impact Statement* (n 99) 33 (Proposed 'living area' standard).

397 *Chairperson's Report* (n 37) 7.

398 Department of Human Services, *Rooming House Standards Regulatory Impact Statement* (n 99) 33 (Proposed 'living area' standard). While a communal space requirement (specifically for a 'living area') was considered for inclusion in the *Rooming House Standards*, it was ultimately not included.

399 Peninsula Community Legal Centre (n 47) 6.

400 *Rooming House Standards* (n 144) reg 12.

401 Ibid reg 12(a).

existing regulations. This is not conducive to home and may result in residents avoiding gathering for a meal (and thus not experiencing relationships) due to a lack of chairs and space. The *RTA* is not adequate from the perspective of home as relationships. Operators' authority to arrange premises and spaces within them means they can determine 'the dynamics of sharing' (and thus relationships in this way), an important point made in the *AHURI Report*.[402] Regulation could go some way towards addressing this by giving residents 'a voice in decisions that impact on their living circumstances',[403] and by specifying adequate communal space as noted.

4 Summary

The *RTA's* various protections for residents may promote home as a feeling of security. However, home as security is undermined by the lack of a cleaning standard. Residents may feel the need to leave premises due to them being unclean. Home is also undermined by the *RTA* in other ways. Home as relationships is undermined by the *RTA* not requiring operators to provide residents with adequate communal spaces. Those spaces are necessary to build relationship with other residents. Regarding the *RTA's* civil and criminal enforcement processes, these also arguably undermine home. Because residents may fear taking action against operators or reporting them to the regulator, CAV, these processes may not be utilised, thereby perpetuating operator non-compliance undermining the *RTA's* various home protections. Recognising this, the *Chairperson's Report* recommended that consideration be given to reforming the *RTA's* civil enforcement processes to empower third parties to take action against operators (given that residents may not do so due to fear).[404] No such reforms have been made to the *RTA*. Third parties thus cannot, under the *RTA*, take enforcement action in their own right (that is, separately from residents) against operators.[405] However, they may be able to

402 Goodman et al (n 36) 11.

403 Ibid 12.

404 *Chairperson's Report* (n 37) 25–6. Recommendation 9 was for 'State Government consider legislative change to allow for third-party action to be taken under the RTA in relation to rooming house issues where a representative body can establish standing before VCAT': at 26. In developing such reforms, consideration would need to be given to which third parties would be so empowered and in respect of which operator contraventions of the *RTA*. Contraventions of the maintenance duty and standards could certainly be included, as third parties may be able to gather evidence of these contraventions from the common areas on visits to residents. These contraventions impact significantly on residents' safety, wellbeing, and home experience: see *Director of Consumer Affairs* (n 174) [9]–[10]. However, it may not be appropriate for third parties to take enforcement action in respect of other contraventions, in particular those impacting specific residents, as this may inadvertently identify the resident to the operator against their will. Further, it may not be possible for third parties to become aware of specific contraventions impacting individual residents in their rooms, and thus be able to gather the required evidence to take enforcement action. A further overarching issue that would need to be determined is whether third parties should be able to commence criminal prosecutions (as a kind of third-party regulator) or only civil actions.

405 The *RTA* does not empower third parties to take enforcement action in their own right. However, it does enable them to assist residents by acting as their 'agent' in VCAT. If residents are reluctant — because they are fearful — to pursue action against operators, this approach will not assist as to act as agent requires resident consent and involvement in the proceeding.

do so under the *ACL and FT Act*, under a generally less known enforcement process.

D Enforcement of home by third parties — *ACL and FT Act*

Existing mechanisms in the *ACL and FT Act* empower third parties — which may include tenant advocates — to enforce the *RTA's* protections for rooming house residents, in their own right. These mechanisms do not appear to have been utilised for this purpose, however, possibly due to a lack of knowledge that they exist (they are, after all, in separate legislation to the *RTA*).[406] In drawing attention to them, this article suggests that they may usefully be relied on in future by third parties to protect home in rooming houses for residents.

The provisions are found in the *ACL and FT Act*, as noted. Third parties may rely on these provisions to take civil enforcement action for contraventions of the *RTA's* statutory protections for home, for residents, outlined above.

1 Application for injunction

Third parties may apply for injunctions against rooming house operators who contravene or propose to contravene the *RTA's* rooming house provisions.[407] Section 201 of the *ACL and FT Act* empowers the court to make injunctions 'in such terms as the court considers appropriate',[408] including for contraventions or proposed contraventions of the *RTA*.[409] The Director of CAV[410] or 'any other person' may apply for these injunctions.[411] Within the categorisation of 'any other person', third parties may be able to apply for these injunctions. Injunction applications may be made to a 'court'. 'Court' is not defined for the purposes of this section, and so presumably includes all courts in Victoria, that is, the Victorian Supreme Court, County Court, and Magistrates' Court of Victoria.[412] The VCAT may also be able to hear these injunction applications.[413] Third parties may prefer to seek an injunction in

406 No case law was identified in which third parties had relied on the relevant provisions in the *ACL and FT Act* (n 174) — being ss 201, 216 — to enforce the *RTA's* rooming house provisions. See also *RTA* (n 43) s 507A.

407 'A court may grant an injunction, in such terms as the court considers appropriate, if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute — (a) a contravention of a provision of this Act': *ACL and FT Act* (n 174) s 201(1). This section can also be relied on to apply for such injunctions in respect of contraventions or proposed contraventions of the *RTA*: *RTA* (n 43) s 507A; *Director of Consumer Affairs* (n 174) [32]. Section 507A(2) of the *RTA* provides for this, and makes clear the reference to 'this Act' in s 201(1) of the *ACL and FT Act* may be read as a reference to the *RTA*.

408 *ACL and FT Act* (n 174) s 201(1).

409 Ibid. See also *RTA* (n 43) s 507A(2); *Director of Consumer Affairs* (n 174) [32].

410 As in *Director of Consumer Affairs* (n 174).

411 *ACL and FT Act* (n 174) s 201(2).

412 'Court' is defined but not for the purposes of pt 8.2 of the *ACL and FT Act*, in which ss 201 and 216 are located: ibid s 3(2) (definition of 'court').

413 The *ACL and FT Act*, in a separate provision to s 201 under which these injunctions are made, refers to findings made by the 'the court *or VCAT*' (emphasis added) in proceedings under s 201: ibid s 216(3). This indicates that injunction applications under s 201 may be

VCAT, where there is minimal risk of adverse costs awards being made against them due to it generally being a no costs jurisdiction.[414]

In *Director of Consumer Affairs v Srinivasan* [2014] VSC 271 ('*Director of Consumer Affairs*'), the Director of CAV applied for an injunction under s 201 against a rooming house operator who had contravened the *RTA* by not complying with the *Rooming House Standards*.[415] The Supreme Court granted the injunction. The operator was thus restrained from failing to comply with the *RTA* by failing to comply with the *Rooming House Standards*.[416] This case is an example of s 201 of the *ACL and FT Act* being used to enforce the *RTA's* rooming house provisions, albeit the action was brought by the Director not a third party. Further, it was the first case to consider enforcement of the *Rooming House Standards*.[417]

2 Application for orders

Third parties may also apply for orders against rooming house operators who contravene the *RTA's* rooming house provisions. Section 216 of the *ACL and FT Act* empowers the court to make 'any order it considers fair',[418] upon being satisfied that: (i) a contravention of the *RTA* has occurred;[419] and (ii) that loss or damage has been suffered (or may be suffered) as a result.[420] The types of orders the court may make include orders for compensation for loss or damage, or declaring that a contravention has occurred.[421] It is not expressly stated in s 216 who may apply for orders.[422] However, it may be implied from an interpretation of surrounding provisions that the Director of CAV or 'any other person' may apply for these orders.[423] Applications for orders may be made to a 'court'. 'Court' is not defined for the purposes of this section, and

made to VCAT, in addition to a 'court' as strictly defined.

414 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109 ('*VCAT Act*').

415 *Director of Consumer Affairs* (n 174) [35]; *RTA* (n 43) s 142B.

416 'I consider that on the facts of this case, the injunction should be limited to conduct ie in contravention of the RT Act because it is in contravention of the standards ie to limit the injunction to a repetition of the proved conduct. To give effect to this intention, and to make it clear how and to what extent only the Regulations are imported into the RT Act, I will enjoin the defendant from conduct which fails to comply with the *Residential Tenancies Act 1997* by failure to comply with Part 2 of the *Residential Tenancies (Rooming House Standards) Regulations 2012*': *Director of Consumer Affairs* (n 174) [64].

417 Ibid [2].

418 '(1) In any proceedings for an offence against, or a contravention of, this Act, the court may make any order it considers fair if the court finds that — (a) the person against whom the proceedings were brought has contravened a provision of this Act; and (b) another person (the injured person) has suffered or may suffer loss or damage as a result of the contravention of this Act': *ACL and FT Act* (n 174) s 216. Section 216 is applied by s 507A of the *RTA* (which makes clear the reference to 'this Act' in s 216(1) may be read as a reference to the *RTA*), such that it can be relied on to apply for orders for contraventions of the *RTA*. See *Director of Consumer Affairs* (n 174) [32].

419 *ACL and FT Act* (n 174) s 216(1)(a); *RTA* (n 43) s 507A(2).

420 *ACL and FT Act* (n 174) s 216(1)(b); *RTA* (n 43) s 507A(2).

421 *ACL and FT Act* (n 174) ss 216(2)(e), (h); *RTA* (n 43) s 507A(2).

422 Cf *ACL and FT Act* (n 174) s 201(2) which says the court may grant an injunction on application of 'any other person'.

423 The Director or 'any other person' can bring injunction proceedings under s 201. In those injunction proceedings, the court can make orders under s 216 in addition to granting an injunction. This demonstrates the provisions — the injunctions power (s 201) and orders power (s 216) — were intended to operate together and be accessible to the same persons.

so presumably includes all courts in Victoria that is, the Victorian Supreme Court, County Court, and Magistrates' Court of Victoria.[424] The VCAT may also be able to hear applications for these orders.[425] Third parties may prefer to seek these orders in VCAT, where there is minimal risk of adverse costs awards being made against them due to it generally being a no costs jurisdiction.[426]

In *Director of Consumer Affairs*, the Director of CAV also applied under s 216 for orders declaring that the rooming house operator had contravened the rooming house provisions.[427] The Supreme Court made orders declaring the operator had contravened the *RTA* by contravening the *Rooming House Standards*.[428]

The above enforcement mechanisms under the *ACL and FT Act* — injunctions under s 201 and orders under s 216 — could arguably be relied on by third parties to enforce the *RTA's* rooming house protections. Residents may also utilise these processes and potentially also seek damages under s 217 of the *ACL and FT Act*.[429] These processes are in addition to enforcement processes under the *RTA* for residents, which cannot be relied on by third parties in their own right as discussed above.

IV Conclusion: Reflections on the nature of property

This article understands the rooming house laws to form part of property. They are property in the broad sense that they form part of the system of rules regulating relationships between persons in relation to things, albeit that they do not create proprietary interests for residents (they create a statutory licence in respect of the premises only).[430] Therefore, the rooming house laws reveal much about property. First, they reveal that property regulates things which may be tangible (that is, the rooming house premises), or intangible (that is, the home experience which takes place therein and as argued here is impacted

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It follows that both provisions should be interpreted to confer standing to apply upon the same persons ie, the Director and any other persons as already provided expressly in s 201 but not expressly stated in s 216. To interpret the legislation otherwise would produce the absurd result that the Director or 'any other person' may apply for an injunction under s 201 and as part of that proceeding also obtain orders under s 216, but may not commence proceedings for the same orders by applying directly under s 216.

424 'Court' is defined but not for the purposes of pt 8.2 of the *ACL and FT Act*, in which ss 201 and 216 are located: *ACL and FT Act* (n 174) s 3(2) (definition of 'court').

425 Applying a similar interpretation of provisions as set out at above n 409, whereby ss 216, 201 ought to be interpreted as accessible to the same persons and in the same jurisdictions. In s 216, therefore, the reference to 'the court' should thus be interpreted to include the VCAT.

426 *VCAT Act* (n 414).

427 *Director of Consumer Affairs* (n 174) [13].

428 'I also observe that the proposed form of declaration correctly in my view identifies the contravention as being a contravention of the RT Act, by contravention of the Regulations (in the relevant respects). I will utilise a parallel form of wording for the injunction that is sought. For the reasons I will now express, connection of the proscribed behaviour to contravention of the Act (as opposed to the Regulations) is of critical importance in relation to the grant of an injunction': ibid [55].

429 These civil damages actions 'may be brought before VCAT or in any court of competent jurisdiction': *ACL and FT Act* (n 174) s 217(3).

430 Alexander and Peñalver (n 5) 2.

by the *RTA*).[431] Second, and relatedly, they reveal that home — the experience — is capable of being the subject-matter of property.[432] Theorising home in this way — as an object of property — is the subject of earlier work, with this article confirming that theorisation in respect of Victoria's rooming house laws.[433] Third, the rooming house laws reveal that property can be designed to protect home (or not), depending on design choices made. This is an empowering realisation. It recognises that property can protect human dignity via its protection of the experience of home — a fundamental human experience.[434] And property should do so in respect of particularly disadvantaged individuals, such as rooming house residents. Rooming house residents do not have proprietary rights in respect of their home, as do owners — that is, those occupying their home under a lease or fee simple estate which gives owners, among other things, the right to exclude others.[435] Residents are thus dependent on the state to intervene in the form of rooming house laws — to ensure they receive legal protection conducive to home. Developing Australian property laws in favour of home is an essential part of realising the internationally recognised right to adequate housing. The right requires the state to afford persons shelter, and to also go beyond this to ensure their 'security, peace and dignity' in that place.[436] The latter aspects are achieved in part — by laws realising home, the experience — for residents. Home thus ought not to be overlooked. The point that property law is relevant

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431 Tyrer, 'A New Theorisation of "Home" as a Thing in Property' (n 32).

432 Ibid.

433 Ibid.

434 Ibid.

435 Tyrer, 'Home in Australia' (n 1) 374–81.

436 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent': *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1). See Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UNESCOR, 6th sess, UN Doc E/1992/23 (13 December 1991) paras 1, 7–8. 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks': see also *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(1)–(2) ('*ICCPR*'). Statutory charters of rights which afford a right against arbitrary interferences with home in some Australian jurisdictions: 'A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with': see in Victoria, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(1). See in ACT, *Human Rights Act 2004* (ACT) s 12, which provides:

> Everyone has the right —
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> (b) not to have his or her reputation unlawfully attacked.

See in Queensland, *Human Rights Act 2019* (Qld) s 25 which provides:

> A person has the right —
>
> (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
>
> (b) not to have the person's reputation unlawfully attacked.

to international human rights law (specifically the right to home) is often overlooked,[437] but underscores the important of this work on how rooming house laws can be improved for home.

Fourth, the rooming house laws reveal that property must result in behavioural change if it is to protect home.[438] Rooming house laws offer formal home-protections for residents. However, those protections may not be effective in practice because of the noted issues with non-compliance and enforcement. Laws may even undermine home when they do not protect home in practice by obscuring individuals' lack of home by the 'protective presence' of the statute.[439]

Fifth, and finally, the rooming house laws reveal that factors other than property impact on home.[440] For example, other residents' behaviour may impact on the experience of home.[441] One resident interviewed by the Northern and Western Homelessness Network commented as follows: 'During this time, there was another extremely violent couple who regularly beat each other: also connected to substance abuse issues. As a person who had lived with domestic violence, this was deeply traumatic.'[442] In such a traumatic environment, the experience of home — security, identity and relationships — is unlikely to have been possible. Property may struggle to address such issues, which call for a social policy response. Property is thus limited in realising home, underscoring the importance of a multidisciplinary approach.[443] Property laws can only go so far in ensuring home is the key point being made.[444] Other problems — outside of law — must be addressed by governments, including the lack of affordable housing which is driving the rooming house sector,[445] and domestic violence and mental ill-health which both cause homelessness.[446] Walsh makes the similar point that housing shortages lead people into marginal accommodation, such as rooming houses, and that '[t]he law's role in this, as opposed to that of policy, is limited but

437 According to Neave (n 116), 'legal writing on landlord and tenant law often ignores the broader human rights implications of housing issues': at 236.

438 On law modifying behaviour, see Lawrence M Friedman, *Impact: How Law Affects Behavior* (Harvard University Press, 2016) 1, cited in Babie (n 389) 25.

439 Such a claim about law obscuring social injustice aligns with the critical legal studies movement, with its focus on law as power and politics: see, eg, Peter Goodrich, Costas Douzinas, and Yifat Hachamovitch, 'Introduction: Politics, Ethics and the Legality of the Contingent' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (Routledge, 1994) 1. 'The conceptualization of law as a system of rules or as a strictly normative order was displaced by conceptions of law as power and more specifically by the politicization of all aspects of legal practice': at 12.

440 Tyrer, 'Home in Australia' (n 1) 371–4.

441 Northern and Western Homelessness Networks (n 54); Goodman et al (n 36) 31.

442 Northern and Western Homelessness Networks (n 54) 9.

443 Tyrer, 'Home in Australia' (n 1) 371–4. See also at 371, citing Travia and Webb (n 15) 55.

444 Tyrer, 'A New Theorisation of "Home" as a Thing in Property' (n 32). See also generally Ezra Rosser, 'The Ambition and Transformative Potential of Progressive Property' (2013) 101(1) *California Law Review* 107.

445 *Chairperson's Report* (n 37); Goodman et al (n 36).

446 *Inquiry into Homelessness in Victoria* (n 37).

important'.[447] Similarly, this article makes no suggestion that rooming house laws (or their reform) can do all that is necessary to protect residents' home experience.

Because rooming house laws (that is, property) impact home, however, they must be addressed along with a range of policy responses that go beyond law. Those other policy responses are also necessary to protect that experience. Increasing the supply of affordable housing, and responding to mental health and family violence are also vital policy responses in achieving home.[448] In advocating for such responses, this article seeks to embrace a progressive property scholarship which is truly transformative in the sense that it seeks to go beyond narrow examinations of property rules to argue for policy changes that, although not appearing to be immediately relevant to property, are relevant in that they may have broader re-distributive implications.[449] This kind of transformative thinking is called for in the rooming house context, along with law reform.

447 Walsh (n 127) 70.

448 On these responses, see *Chairperson's Report* (n 37); *Inquiry into Homelessness in Victoria* (n 37); Goodman et al (n 36).

449 On (the need for) such transformative thinking in progressive property theory, see Rosser (n 444) (highlighting 'acquisition and distribution concerns': at 170) and (proposing an alternative to being 'buried in the minutiae of property law rules and the details of regulatory change': at 115). See also Alexander and Peñalver (n 5) 95.

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