



# **Elder Law in Australia**

2ND EDITION

Rodney Lewis



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# Elder Law in Australia Second Edition

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# Foreword

This second edition of *Elder Law in Australia* is published at a time when our population is ageing. There is an expectation that by 2056 23% to 25% of the population will be 65 years and over with relative increases in the numbers of elderly persons suffering from dementia. There is a greater and increasing need for assistance in how to navigate a system of care for the elderly that is not free from complexity.

The first edition of *Elder Law in Australia*, published in 2004, contained a survey of the system of care on a national basis. That survey is maintained in this edition with additional information and analysis. On the topic of 'Policymaking' (Chapter 2) there are new and invaluable sections on community care and eligibility for support services. This is supplemented by the new sections on care funding in relation to the classification of care recipients, the delegation of authority (Chapter 3 'Legislating for Elder Law' and Chapter 11 'Delegation and Capacity') and accommodation bond agreements (Chapter 10 'Care and Accommodation for Elders').

The incisive handling of the vulnerability of the elderly in the first edition is continued in this edition. There are clear explanations, with excellent examples, of conduct that may be 'unconscionable' or that may amount to undue influence on the elderly person. There are new examples in the complicated areas of equitable estoppel and the intergenerational transfer of business assets (Chapter 4 'Promises, Promises').

Chapter 5 'Privacy and Confidentiality Issues' and Chapter 6 'Discrimination' deal with matters pivotal to a dignified lifestyle for the elderly. They are replete with information that will assist family members and friends as they strive to ensure that dignity of their loved ones is respected.

The topics of euthanasia and withdrawal of treatment are dealt with carefully and delicately in Chapter 8 'Issues of Life and Death' with reference to some recent controversial cases. There are many other important areas of discussion including 'Financial Issues' (Chapter 12), 'Making Wills' (Chapter 13) and 'Challenging Wills' (Chapter 14).

The breadth of the work is a credit to its author, Rodney Lewis, who is a pioneer in this developing area of the law. This second edition confronts some of the most difficult areas of law and equity with an exquisitely practical approach to make it the handbook of choice for any lawyer, indeed for anyone, with an interest in understanding and navigating this complex subject.

*The Honourable Justice PA Bergin*  
Chief Judge in Equity  
14 July 2011

# Preface

It is almost exactly seven years since I last sat down to write the preface to the first edition of this book. At one level it would be fair to say that a very great deal has changed in elder law during that time. The parliaments of the states and territories have not ceased to tend to the wants and needs of the elders in their respective electorates. Old statutes have been amended or have given way to their replacements.

In the meantime the courts of the eight states and territories, as well as of the Commonwealth, have been producing decisions in cases relevant to elder law on what could fairly be described collectively as a daily basis.

At another level it would be equally fair to say that nothing much has changed, even with all the fine sentiments expressed and words carefully crafted, to address the continuing plight of people who fall foul of the aged care system in this country. The complaints system continues to be unable to address the needs of vulnerable elders as individuals with serious issues and problems in nursing homes, while the law is also falling short in reaching out to them and rendering its remedies readily accessible to them and their families.

When I was approached by my publisher, LexisNexis, to prepare materials for a second edition of *Elder Law in Australia*, I knew the task was going to be formidable, but at the time I did not really appreciate that a second edition would be just as hard to complete as the first edition. I discovered that it was necessary to look at every case to see whether it had been subsequently dealt with by the courts and to check every statute to see whether it had been revisited by its parliament for amendment or even repeal. In short, I had to check and assess for relevance every line of the first edition.

Throughout this project, not to mention the preparation of the first edition, I have had the benefit of the generous and loving support of my wife Noni, who has worked in aged care as a registered nurse for over 20 years. It is she who has willingly and without complaint forgone untold hours on weekends, and nights without company, to allow me to see this project through to completion.

The first edition has had good support from the legal profession around Australia, for which I am very grateful. I hope that this second edition will prove to be of value to my colleagues in their everyday practice of the law. It is also my hope that this work will be used as a textbook for the teaching of Elder Law. The legal problems which are dealt with in the book, seen from my viewpoint, are becoming more and more common, and thus I believe will

require the attention of more and more lawyers who hitherto may not have considered this field of law in which to practise.

This assurance I can give to my reader, that at all times I have tried to write about the law in a way which will be found to be interesting and hopefully clear, even to those who are not lawyers. In that respect, I hope that this book will find some use in the libraries not only of lawyers but also of accountants, financial advisers and health professionals, all of whom will from time to time very likely encounter one or more of the issues described in the book, involving or concerning a client.

In general, the format of the book is little changed from the first edition, although the chapter on 'Life and Death' has been reorganised in what I hope is a more coherent manner. Chapters 13 and 14 have sustained a significant impact from the introduction of the Succession Act 2006 (NSW) and from the case law which has occurred in New South Wales shortly following its introduction as part of the national scheme for uniform laws in this area. Chapter 4 now has a section on intergenerational disputes concerning family business, which I hope will be found useful to legal practitioners. I have not, however, set out to deliberately discard subject matter such as decided cases which may be seven years older, just because there are newer cases in the field. I take the view that each of those cases which I have retained remains a good illustrator of the legal issue which it contains and describes.

In closing I should also like to thank the good people in publishing and in editing at LexisNexis Butterworths for their very kind support and their patience with me over the extended period which this project has taken. My grateful thanks also to her Honour Justice Patricia Bergin, Chief Judge of the Equity Division of the Supreme Court of New South Wales, who has generously found the time to write a foreword to adorn the book.

*Rodney Lewis*

October 2011

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