T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the retirement housing sector

Melbourne — 16 November 2016

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Mr Ben Cording, Principal Solicitor, Tenants Union of Victoria.

The CHAIR — I open the Legislative Council Legal and Social Issues Committee inquiry into retirement housing. I would like to welcome Mr Ben Cording, the principal solicitor with the Tenants Union of Victoria. Mr Cording, before I invite you to make some opening remarks I will just caution that all evidence taken at this hearing is protected by parliamentary privilege; therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege. We have allowed about half an hour for our time today. I invite you to make some opening remarks, and thereafter the committee will have questions. Thank you very much for being with us today.

Mr CORDING — Thank you. I feel a little bit nervous. It is the first one I have done of these in terms of inquiries. I would like to pay my respects to the elders past, present and emerging, the people of the Kulin nation.

Visual presentation.

Mr CORDING — I will give you an overview of some of the issues I will touch on. It is difficult for me to be impartial about this because of the people that come to us. They obviously are the people that have problems and are experiencing issues. I believe those issues that we experience are far more widespread than those that attend. This cohort, or the people that live in these dwellings, are incredibly vulnerable, as are many other older persons, but we have serious concerns about the current framework and the balance between having enough financial incentive for people to be attracted to run these part 4A parks and ensuring that those are protected to make sure that there is safe accommodation and that they are not financially ruined. Eventually, at the end of the day, if the system does not operate, they will have poor health and be reliant on the state, and I think that that is not in anyone's interest for that to occur.

I will give you a rough overview of some of the things that I will try to address or that you may wish to ask questions about that perhaps you have not had time to consider. There are some things within the current legislation that can be easily fixed that have not been attended to. Such things include repairs to the site. Currently there is no clear process, which is the equivalent of other parts of the legislation. There are absolutely no clear rules within the legislation about essentially the slab underneath. I will just turn to the diagram I have written over here for a moment.

The part 4A dwellings, because of current engineering, are becoming increasingly complex. These dwellings are almost indistinguishable from houses that can be seen. They cover the bottom. You have supports at the bottom here, there is cross-bracing and then it sits on a concrete slab. These are self-supporting chassis, which means that they can be moved on the back of trucks. You can literally cut them in half and truck them — a bit like the old school portable dwellings, those sort of things.

The problem is that there is no clear statement in law about the obligations about the slab and who has to clear it. The problem is that there is an engineering relationship between the dwelling and the slab underneath. Unless you have the right slab underneath, you will find the dwelling will start to crack and fall apart. Often these are, despite being moveable dwellings, actually built on site. The slab is all there, and it is marketed as, 'Here, buy this new'. You can look a granny flat up on eBay, and the price will range roughly between about $50 000 to $150 000. You will now see dwellings in some of these part 4A parks costing in excess of $250 000. The great issue in this framework is not necessarily that it is a housing option. It has emerged, and it is actually quite a good one in some ways. The issue, as with all other retirement village styles, is the question of profit and what occurs.

I will turn to a brief narrative or what I would expect as being the summary of how people get into these part 4A dwellings. It is really about human behaviour in some ways. For people when they get old or they are widowed it is about human connection, and many of these people are lonely. So if you go from a house that you own in fee simple — outright, it is a great investment and it is an asset — you are essentially buying almost what is like a car. I would liken it in some ways to a used Falcon.

The misconception for some people — not all people — is that this is like an investment. It is not. It is a loss. I have spoken with other lawyers that deal with these, and they say, 'No, it's an investment'. That is because the park essentially has a monopoly over controlling the value of the dwelling because they control the site underneath, the site lease. If you have no site lease underneath, you will have to move this on the back of a truck and ship it out somewhere.

We know with councils increasingly, because of fire overlays and otherwise, you cannot just go and drop these on a bush block. Often with a lot of councils you have got to get permits. It is not very attractive. So you can go from approximately $250 000 new, live there for 10 years, need to go into aged care because your health has declined and you will find yourself looking at $50 000. That is probably an extreme example, but the economic loss and damage for the individuals that are 'investing' in these are incredibly dangerous.

Some people may die in these dwellings, which means that the economic loss is really for the estate, and I will make some comment about that. But the damage is that if they lose all their money on their sale or turnover when they go into aged care, where they have got higher needs and they have got the RADs and the other requirements of retirement villages, that is going to be a great hindrance. It is like people moving between tenancies. You have got a bond here and a bond there, so you are losing money here and then you have got to put a deposit there. So you are increasingly out of pocket. For me personally I am very concerned about this framework with what are called deferred management fees, and I believe the Consumer Action Law Centre will deal with that in more detail today. So that is some of the framework.

Some of the other issues are what are called embedded networks. I understand that framework will also be in there. An embedded network is essentially a bulk water meter that comes in, and then they separately meter and they sell, but you do not have a freedom of contract here. So you are trapped with the park also being your utilities provider. That is currently being reviewed in other frameworks, but just so you are aware, embedded networks are a nightmare. The energy and water ombudsman does not have a particularly clear jurisdiction on that issue as well.

So this is a very, very complicated framework. The building act does also not particularly apply to part 4A except for plumbing. So you have also got some really significant questions about building regulations, emergency orders and other things that are covered under the building act.

Given the freedom of contract in other areas, we are increasingly finding that prescribed contracts are necessary to balance the rights of freedom of contract and what can actually protect people. I have seen a plethora of agreements that contain egregious terms, and it is very difficult — even for me with eight years of uni and all of that — to identify what the actual net cost is. It is a little star and asterisk. There is a formula saying, 'If you stay this long, your deferred management fee will be this amount'. The deferred management fee is based on the idea that you want to have cheap rent.

Perhaps I will turn to the example. I am aware I am eating up the time; feel free to interrupt if you have got any questions. If I turn to an example where someone has bought the house, and she might be well educated. This cohort is often ashamed because they are so well educated, and then in the terms of contract they feel embarrassed that they wished they had never entered it. Personally, in my opinion, I would never, ever put my parents, nor would I live, in one of these parks for the economic reasons I have outlined but also because there is an incredibly big risk or imbalance of power.

And this has been unanimous through all of the residential tenancy reviews because of the no-reason notice to vacate and the end-of-fixed-term notice. There are other notices within the legislative framework that can deal with behaviour — compliance orders, breach orders and saying: 'You're not doing the right thing. I want to move you out'. In this context what else is a part 4A park going to be used for? You are not going to be using the site for anything else unless there is a change of use. Perhaps you want to put a playground in or a swimming pool or something of that nature.

What this lends to is the threat — the threat of: 'We've had enough of you. I'm giving you a no-reason notice to vacate'. In the current framework there is a provision that talks about: if you have exercised your rights, you can say, 'You're just trying to kick me out because I exercised my rights'. But most parks, industries, estate agents and otherwise are smart enough to allow sufficient time. They leave it six months then kick them out, because there is no correlation, proximity or nexus to suggest that that is the case.

My concern, and I mean this respectfully to those in the industry that are very good operators, is that bullying is a real threat and it is very active. So my concern is how to protect people from that threat, because part 4A is unlike any other jurisdiction of tenancy. With tenancy, yes, you have got to put everything in a trailer and you have to move. This is your life savings; this is everything you have worked for, and someone can simply choose, by giving you a piece of paper, to diminish that value. So there is a strong relationship between bullying and the investment that has been put into these part 4A dwellings.

In terms of the current housing crisis, this framework might actually be quite good if you take away that profit issue. The people moving into these are not the vulnerable people. What I am seeing in my work is that you have got an increasingly lifelong — they rent their whole lives. What we are seeing is that people, because of reasons of loneliness or otherwise, or just for that support of having people around you — I believe that human beings need to be connected — are investing into these. That is okay, but the issue is that the demographic that can invest in these may dwindle, because the population that is renting for their whole life is increasing.

The way that it is effectively sold is that a real estate agent might knock on the door: 'Would you like an evaluation?'. They then say, 'Yes, we'll sell your house'. You get $400 000. You buy a dwelling for $250 000 and put $150 000 in the bank. You get your 3 per cent, and that generates about $7000. So you end up quite neutral. You end up going, 'Wow. This is a great idea. I have got lots of savings, I get lots of investment, so I have got more liquidity. So I can enjoy my retirement better'. But when it either comes to moving into aged-care support or it comes into the estate, it becomes incredibly complex because of the diminishment of value and also because the difficulty of selling that dwelling is controlled by the right. You cannot force a part 4A operator, once you have got a notice to vacate, to actually give the new person that buys a dwelling a site tenancy agreement. You cannot force them. So they just say, 'We don't want your dwelling'.

One of the other problems in the legislation is that with the dwelling there is a legislative provision that says the park can control the upkeep — a bit like council by-laws where they say, 'Your dwelling has got to be in keeping with the rest of it' — and that can be set by the park from time to time. So over time if you get very old housing stock — for example, a whole yard of things that are from 1970 — the park goes, 'We want to charge more money. We want this to be a better park. We want it to look better. We want to improve it. We're going to give you all notices to vacate, we're not going to give anyone new site leases and you've got to clear out all your dwellings'. It does not necessarily happen in that aggressive format, but that pressure to systematically move the dwelling out is there.

The other thing that that framework provides is that it means that the park has an overbearing position to potentially buy the dwelling at a reduced rate. 'No, we're not going to give you a new site, but we'll buy it for 30 grand'. So there is a real problem with the bargaining position. There is a provision that says that they should not obstruct the sale, but if you look at consumer affairs, that is a 300-penalty unit prosecution, so about 40 or 50 grand. The problem is if you look at the rates at which consumer affairs prosecutes, it is incredibly low. I have never seen a prosecution for that. If you give someone a notice to vacate for a spurious reason, there is a particular legislative framework that says if you try to re-let that place out within six months after you have booted someone out, that is an offence, but if you look at the rates of consumer affairs prosecution in that space, I believe that they are under-resourced to do it and I believe that the evidence to prove it makes the litigation risky, if we can put it that way.

I am aware I have spoken a lot, so I will probably close there and let you ask questions if you would like based on that.

The CHAIR — Thanks, Mr Cording. I suppose I will just ask the first question: how would you fix this situation that you have described — the security of tenure issue and the enforceability?

Mr CORDING — The easiest way is to remove the no-reason notices to vacate and the end-of-fixed-term notices to vacate. That is 317ZG and 317ZH, I believe.

The CHAIR — What would be the effect of that?

Mr CORDING — The effect of that is it means that the legislative provisions would mean that whenever someone is to be kicked out of the park, there would have to be a justification for it. So if I exercise my rights to challenge them on an embedded network charge or a service fee, I would no longer be at threat or risk of them alleging that I had no right to that site. I had a right unless I had done something wrong, or the park has to justify that it is going to change use. So within the caravan park framework, which is part 4, there is a change-of-use provision that says, 'If you're going to do something different, you need to prove that'. So it reverses the onus, and what that does is it preserves the tenancy.

One of the other issues in that framework is the question of death. Within normal tenancy, tenancy terminates 28 days from death. Within part 4A there is no such provision, and it is currently ambiguous as to whether or not a family member can say, 'Well, the site tenancy continues, and we want to sell the dwelling and assign the

lease'. I see no reason to do that, because the park is at no disadvantage, because they are still going to get the same rent as if the person was alive. So again there is this question of continuity, that death — unfortunately and with respect to people that are old, we all die — is really the advantage. That drives the industry, because they know that there is a net estate up for grabs and at the end of the day it is just people that are already living their lives that are going to miss out.

I, being the son of baby boomers, am incredibly concerned about that, because the financial inheritance I get is the financial base from which I will access the market. Currently even if people — some of my friends — are double income, working hard, no kids, they still cannot buy a house. So this is a very real issue of translation of debt. Either the money is going to go to private operators, people that are probably in the market, or it is going to go to people's children. I have genuine concerns about the viability and the long-term impact — I am sure that various doctors and academics will describe this issue — of going, 'If you're not getting that translation of money to the next generation, they are going to be increasingly locked out of the market, and it will exponentially increase the translation of the number of people that are lifelong tenants'.

The CHAIR — Just to follow up this other question I will ask about consumer affairs, you said they rarely if ever prosecute. What do you see as the answer to that? Is it just beefing up — —

Mr CORDING — Increase resources, probably more clear provisions about what the actual offence would be. There is currently a provision within the Residential Tenancies Act that allows for infringement notices, which provides for a reverse onus. Usually an infringement will be about one-fifth of the penalty units, so it is a real penalty. If it was a 50 grand fine, it might be a 10 grand fine, but that is enough to get industry compliance. My opinion is that it is so well known that prosecution is so rare and so difficult that people do not take those offences seriously. You go through a red light, you might get $300, $400 bucks; it is a serious offence. Here we are talking about people's homes. The irony is that for a basic prosecution through the Magistrates Court you have got to have incredible affidavits of service and proof of evidence; in the VCAT environment you show a little registered post number, and that is it, or you say, 'I gave it to them by hand'. That is a radically different standard for what is in peril. So I have serious concerns around that.

If I can turn briefly to VCAT for a moment, with the Supreme Court appeals that I have been involved in, one of the problems with the access to the forum is that if you go through VCAT, it costs you $61.50; you get the litigation done. But if you win that, and that is a detriment to the park, so you have got 140 units and you win, say, $1000 or so for everyone, that is $480 000. Straightaway you can expect the caravan park will go and grab an SC, which has happened to us, you get dragged straight through the Supreme Court and by the time they have filed you are looking at between 20 to 40 grand of liability if they refuse to settle and you think that there is risk. So you have got a cohort that is incredibly vulnerable. The current Appeal Costs Act, which protects people if you win at VCAT, is capped at 50 grand. In most of the appeals that I have been involved in, you can easily blow $100 000 and, guess what, you are probably going to lose your asset — you are probably going to lose your unit. VCAT does not work, in my opinion, for this strategy or this cohort. One, they are reluctant to participate; and two, even if they do, there is an overbearing pressure on them to not be able to advocate for their rights, because you go straight from VCAT into the Supreme Court costs jurisdiction, and you do not have adequate protection. In that context particularly I would strongly advocate for a retirement villages or older persons ombudsman — that framework. I have worked in prison environments; I have worked in disability environments. The intervention of commissioners to give, I guess, a preliminary indication to say, 'This is a real problem and my view is that you are breaching the law', is incredibly powerful, and that will probably deal with some of the ambiguities that exist in law.

Currently in the residential tenancies framework it consumes 66 per cent of all matters — the residential tenancies list — of VCAT. It is incredibly busy — 60 000 cases. Now, the way that that is funded is that the interest off everyone's bonds gets transferred into a fund, and that largely pays for the VCAT list. With retirement villages it obviously exists already within the part 4A space. There is a massive access to revenue if people are more intelligent about DFMs or RADs, and rather than going into private pockets it actually funds the advocacy and the needs of the consumer. There is currently 66 per cent of those matters, and 7 per cent of those applications are by tenants. In this case I would expect that maybe 100, at max, would be from part 4A, and they are incredibly vulnerable. So in terms of the framework, the advocacy framework needs to radically change as well.

The CHAIR — Thank you for those answers.

Ms SPRINGLE — You talked a little bit about your experience with advocating for people in this particular situation. How long would you say would be the average time it takes to actually solve these problems?

Mr CORDING — 'Solve' is a strong word.

Ms SPRINGLE — Yes, okay.

Mr CORDING — No, that is okay. There is no class action in VCAT, and the difficulty from a strategic point of view is you might get one person, and it is in the park's interest to settle that matter as quickly as possible. VCAT notoriously will not make, 'Here's one issue, and it applies to the whole park; I will make the orders for the whole park'. Each individual has to come. So in a case like a deferred management fee, it depends on how parties approach it. If they go, 'We just don't want this to proceed', it will settle, and it will be very quick. If it is, 'We're going to dig our heels in', and you have got 30 people doing it, the game is on, and that could go on for two years. So VCAT's expectations in terms of once something is filed are it should be about six weeks, but it is really dependent on the parties and the complexity of the issue.

For example, I believe Shanny Gordon, Housing for the Aged Action Group, may have dealt with this. There was a dispute about fences between boundaries of the sites. It went into VCAT. VCAT apparently said, 'We don't have jurisdiction'. Despite having very general powers to deal with anything to do with part 4A parks, they just said, 'No jurisdiction'. So VCAT is also notoriously unpredictable. That could have been a very complex issue, but it got shut down for what I would submit as being arbitrary reasons. The dispute in the VCAT context is not the bulk of the issue; the bulk of the issue, in my opinion, is the vulnerability to exploitation because of the bullying and the value issue.

One of the other things, to address one of your earlier questions, would be around the valuation. I think it is appropriate that when people value these they are often valued as if they are on site — so it is next to the beach; a dwelling next to the beach is of course going to be far more attractive than out the back of grandma's house. If that is the case, one of the other major things I advocate for is that these dwellings should have off-site valuations and a projected value, say, after 10 years. So, 'This is what the dwelling is now; in 10 years I expect this'. And this is regardless of wherever it is situated. That independent valuation would create a much wiser or informed decision about entering into these agreements. If people want to do it, that is fine, but I think the distortion between this being a chattel and looking like a house, but in fact being a liability, is absolutely fundamental to inform the consumer of what they are getting into, because once you have sunk your money into this it is very difficult to get out.

Mr MULINO — I am just wondering how familiar you are with the advocate model in some jurisdictions, including South Australia, and what your thoughts are about its effectiveness.

Mr CORDING — To be frank, I am not that familiar with it. I am familiar with what we deal with in Victoria in terms of, I know with community members and other information and advocacy — certainly, again, Shanny is probably a good example of some of that frontline 'Let's talk'. But ultimately, many of these very complex issues can be very expensive. We have had ones where dwellings have subsided — so, that slab underneath has not been the appropriate slab, and all the dwellings have been moving. They are very, very complicated, and eventually you will end up in litigation of some form.

With the mediation, again I raise the issue about going, 'You are only going to fix the individual that has come forward'. You are not necessarily going to get that direction, whereas I think an ombudsman would have inquisitorial powers. They would have the ability to negotiate and give indication — and enough that it would not depend on the resident to continue to push that agenda. Certainly consumer affairs in some of the rooming house spaces have taken a similar approach of going, 'If you're the person that is sticking your hand up and running the fight, you will be victimised in some way'. Again, not all operators are bad, but certainly those that are causing an issue — naturally there are going to be some challenges there in terms of the relationship of living with the person who has got such an amount of power.

Mr MULINO — A number of submissions have argued in favour of an ombudsman, but I suppose the sense that I have gained from some of the evidence that we have seen is that a lot of people who have issues would even find that process is daunting. There is probably an argument for strengthening the internal dispute resolution processes before it even gets to that stage, and one of the arguments in favour of an advocate might

be that if you have got somebody in your corner, you might be more willing to raise it even at that internal dispute stage and try and resolve things before it even gets to that level of formality.

Mr CORDING — Certainly that is what we always try in the first instance. I mean, that is our legal obligation, to ensure costs and risks are minimised. My opinion, in most cases, is it does not work. It depends on the type of issue, but on some of the issues where residents are willing enough — because it is serious enough and significant enough — they will take it to task. But as I said, I think there are fundamental flaws in the scheme of where things go from VCAT and the costs involved. So certainly mediation can be helpful, but as with all things, there is no obligation to resolve it, and if the practical issues are not resolved, then the resident is the one that usually will suffer for it most.

Mr MULINO — One other question: in the most recent tranche of amendments there were some obligations around disclosure and some requirements to disclose some contractual elements in a highly simplified way, and we have seen similar things in other areas of regulation, mostly at the federal level, for example, in relation to ensuring some mortgages and whatnot. I am just curious: do you think that has been effective?

Mr CORDING — It is helpful. When the amendments came through there was a flurry of stress about the translation, so there were no transitional provisions for people who would overnight go from being covered by part 4 to part 4A. There were certain provisions saying you must have a site tenancy agreement, so everyone got them shoved in their face, saying, 'You've got to sign this. You've got to sign this or I'm going to kick you out' — again, the use of the power to do that. Those are helpful. I think they do not go far enough — would be my opinion. I think that certainly some of the movements in the retirement village space, where you have absolute ceiling threshold caps regardless of the fees, are important. The disclosures about what they get have been problematic in the sense that some say you have got a rec hall, but the rec hall is half built and never gets finished. So there are always going to be problems, but have they been helpful? Yes. Do they go far enough? My opinion is no. And is there a need for caps and easy-to-understand simple English terms? Yes, because the current provisions — if you look at 206F and S, they talk about disclosure of any fee, and if you do not disclose the fee, you cannot charge.

In that particular space you can have this incredibly complex formula of this over this over this; you are not going to understand that you are being sold this dream. So I think it needs to be very clear and unambiguous about both the justification for the fee — again, which I will defer to CALC to talk about — but also what that is for. So there are some legislative issues about interpretation of what rent is. That put to one side, I think it is really a question of the profit gains. The legislature is a primary function that will protect people, so if you want to talk about disputes or otherwise, it is this opportunity to recognise that this has a massive social impact not just on the aged but the rental population as a whole.

The CHAIR — Mr Cording, if I could just tease out a bit further your point about the revenue from the bonds held, am I correct in saying that what you are saying is that an ombudsman or some sort of advocate or some sort of other dispute resolution process could be funded from the bonds held and the reduction in the number of VCAT matters that the residential tenancies — —

Mr CORDING — I do not know if they would be exclusive, but yes, I think that in terms of doing some exploratory work about if there are financial models available using the massive amount of DMFs, because currently if there is any money — the DMF, which is paid at the end as compared to the beginning, like with RADs, is a revenue source. So any large sum of money that is sitting around is something that either can go into the pockets of those that are running a business as an incentive to get them in the industry — but I do not think there is any shortage, and it should be market competition — or it can go into funding efficient dispute resolution so people are happy to participate in these types of spaces and say, 'You know what? Part 4A — I would love to live there. I do feel I know what I am signing up for, and it is a space that when I need to transition and my health declines I will have that resource available to me and re-funded'. So it funds the dispute, and it gives them enough translation so they are not dependent on the state in terms of their health. I think there are models out there that are available. It may be a crossover between retirement villages because there are a lot of deposits in that space, and the deposits in part 4A, if there are bonds paid, are already, obviously, lodged. They are required to under the current legislative framework.

The CHAIR — Thank you for clarifying that. Mr Cording, thank you so much for your evidence this morning and your obvious passion for the people you represent.

Mr CORDING — Thank you.

Witness withdrew.