T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Subcommittee

Inquiry into the retirement housing sector

Melbourne — 16 November 2016

Members

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Ms Nina Springle — Deputy Chair
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Acting Secretary: Mr Patrick O'Brien

Witnesses

Mr Gerard Brody, Chief Executive Officer, and
Ms Amanda Storey, Director of Legal Practice, Consumer Action Law Centre.

The DEPUTY CHAIR — We might open this afternoon's session. I would like to welcome back everyone in the gallery and obviously our guests from the Consumer Action Law Centre, Gerard Brody and Amanda Storey.

Firstly, I would like to explain that the committee is hearing evidence today in relation to the inquiry into the retirement housing sector, and the evidence is being recorded. I would like to welcome the public to the hearings of the Standing Committee on Legal and Social Issues. All evidence taken at this hearing is protected by parliamentary privilege; therefore you are protected against any action from 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 allocated 45 minutes today for your section, so I invite you to begin your contributions.

Mr BRODY — Thank you, Deputy Chair, for the opportunity to discuss the consumer action submission to your inquiry and present our case for reform of the retirement housing sector. Put simply, our view is that the charging models for much of the retirement housing sector are open to exploitation, and resolving disputes between residents and managers or owners is lengthy, expensive and intimidating for many. If we want the best for this group of Victorians, then we must reform the retirement housing sector to be resident centred, and this will require some changes to current consumer protections and regulations.

We do understand, of course, that additional regulation would lead to increased costs for compliance — costs that are passed on to consumers — but the committee is also hearing from residents and their advocates of the cost burden to residents if nothing is done.

During these hearings some members of the committee have already pondered the unnecessarily complex contracts that seem to be standard fare in the sector. These are contracts that many lawyers find challenging. The result of this complexity has included families of residents trying in vain to extricate their loved ones from a village or park, often with exorbitant fees that residents never expected or understood.

Attempts to improve disclosure, while well intentioned, have failed to provide adequate protection. As the former CEO of the Commonwealth Bank and chair of the financial system inquiry, David Murray, recently said:

> Disclosure and improving consumer literacy have failed as effective interventions in complex markets. We need to have a greater focus on fair outcomes for consumers.

Standard form contracts, as opposed to standard form templates, would be a good start. Standard form contracts have been part of the sale of land environment for many years. This has not limited flexibility, but it has facilitated efficient and fair contracting.

Contracts typically outline a number of financial obligations of residents, including the vexed deferred management fee, which we have already heard from industry can be called anything from 'deferred payment' to an 'exit fee'. This fee is usually a percentage of the sale price. We understand the deferred management fees were initially designed to facilitate access to retirement housing. Residents did not need to make large, up-front payments. Today there does not seem to be such discounts up-front for contracts involving deferred management fees.

This charging model can exploit residents. This is because the cost of the contract is not certain from the outset. Further, residents naturally focus on the ingoing fee and perhaps the ongoing management fee. Despite disclosure, residents will discount the importance of an exit fee because it is a cost to be borne some time in the future, and it is unknown. Behavioural economists call this tendency present bias or hyperbolic discounting, justifying regulatory intervention. This model can lead residents to feeling like they are locked into these contracts. The cost of exiting is just too much and can limit choices when it comes to aged care.

Consumer action submits that the deferred management fee should be regulated to ensure they operate fairly and are less open to exploitation. This should include making the fee much more certain and capping it. We also think that there should be genuine choice about the charging model for rent retirement accommodation, something we have seen enacted in other sectors like aged care.

The legislative framework covering retirement housing is complex. There are possibly six acts of Parliament that cover the sector, which we do not suggest trying to unpick. But as you have also seen, many of the issues faced by residents are not dependent upon legislation that regulates their property. There are issues common to

all residents, and perhaps a practical response would be a common set of standards — a code of practice that prescribes clear standards under relevant legislation and beyond, a code that could be enforced and be easily understood by all. Such a code would be complementary to the establishment of free, accessible and fair dispute resolution in the sector. Even the industry agrees something must be done to assist residents when something goes wrong. We have to get it right. It cannot just be another complaints body without any teeth.

We believe an ombudsman scheme provides the best chance to give residents accessible justice. For this group of consumers, timely justice is of critical importance. They really do have no time to waste. Binding decision-making powers is vital to bring all parties to the table, and if it is funded by industry, there is greater incentive to resolve disputes quickly and improve practices. I think so many people are crying out for an ombudsman because the system is not working for residents. There is a vast power and financial imbalance between residents and operators, between a self-funded retiree or pensioner and a large corporate or an ASX-listed developer with multiple sites across Australia.

I would also like to table a report that three community legal centres, including consumer action, commissioned earlier this year, reviewing consumer and tenant experience at the Victorian Civil and Administrative Tribunal. The report was conducted independently but found that there are very substantial barriers that inhibit tenants and consumers from accessing VCAT, and it made 22 recommendations for improvement.

In conclusion, older Victorians have unique vulnerabilities, so when it comes to their most important asset — their home — we should err in the favour of residents. We need good laws to protect their investment, their housing security and affordability, and their families, who often have to untangle the mess left behind.

Finally, I should explain how consumer action came to be involved in this issue. Unlike most organisations involved in this inquiry, we are not primarily involved in housing or elder issues. We advocate on systemic issues that are brought before our specialist consumer legal practice or our phone-based financial counselling service. Because of our limited resources, we simply cannot assist everyone who comes through our door. So we seek to work with industry, regulators and government in order to prevent the harmful practices our centre sees from occurring in the first place. In our experience, retirement housing disputes are incredibly resource intensive and very expensive to run because of the complexity of the cases. Residents deserve a specialist body to take on much of this heavy lifting. On this note, I will pass over to my colleague Amanda Storey, who is the director of our legal practice, to outline our experience in seeking justice for residents through litigating retirement housing cases.

Ms STOREY — Thank you, Gerard. I am Amanda Storey. I am one of the directors of legal practice at Consumer Action Law Centre, and I have the carriage of our two flagship retirement housing cases, which are referred to in our submission to this inquiry and were also referred to in the parliamentary motion which resulted in this inquiry. One of the cases is against the landlord of the Dromana Holiday Village, in which our client sought to challenge a 63 per cent rent increase, which was maintained over four years. The other case was against the landlord of Willow Lodge over-50s resort, in which 14 clients sought to challenge the deferred management fees contained in their leases.

We took on the Dromana Holiday case and the Willow Lodge case because the conduct in those cases raised systemic issues which affected hundreds of disadvantaged and elderly residents in their respective villages. We took on the Dromana Holiday Village case because the invalid rent increase and gross overcharging by the landlord for the Dromana Holiday Village affected approximately 210 to 220 residents. The overall rent for the village was increased from $542 000 to $861 000 in one year, which is a 63 per cent increase, and that was maintained for four years. The tribunal found that the landlord had been unreasonable and had plucked the figure of $861 000 out of thin air — that was their finding. The rent increase for the last four financial years was therefore invalid and the landlord has overcharged those residents by $1.2 million.

We took on the Willow Lodge case because our centre was concerned that deferred management fees charged by that village did not offer a genuine discount on the operational costs of managing the village. The DMF term in their contract required residents to pay 4 per cent of the park home sale price over five years to a maximum of 20 per cent. The Willow Lodge village has approximately 400 demountable homes and 600 residents. Each of the residents owns a unit but rents the land on which it stands. They therefore pay rent, and Willow Lodge receives approximately $3 million in rent for this year alone.

We acted for the 14 clients who claimed that the deferred management fee contracts were unfair. To put it another way, our clients asked: how can the landlord justify charging our clients $250 000 to $50 000 when they leave the village when they already receive $3 million in rent for this year alone to operate a caravan park in an industrial area in Bangholme? This was a very hard case to run because deferred management fees are only regulated by the terms of the contract and some general consumer protections. There is nothing specific regulating deferred management fees. The case was settled prior to trial, and the landlord agreed to reduce or waive the deferred management fees for our 14 clients' contracts. We therefore estimate we saved our clients $210 000 in deferred management fees.

After the case was settled, Willow Lodge amended its deferred management fee term in its new contracts to require incoming residents to pay 2 per cent of the park home sale price over 10 years to a maximum 20 per cent. That is 2 over 10 as opposed to 4 over 5.

Based on our experience of running these two flagship cases, consumer action considers that VCAT is not an appropriate forum for people to resolve their retirement housing disputes. This is long, complex, hard-fought and extremely resource intensive. To use the Dromana Holiday Village case as an example, that case was heard over a three-day hearing, and our client was represented by a QC, a junior barrister and a senior lawyer, with additional litigation support by junior legal staff. Our client also had an expert accounting witness give evidence for a half day in addition to filing a 49-page expert report. Our client and her daughter have already given evidence before this tribunal about their experience of being cross-examined by the barrister for the landlord.

It is simply unrealistic for an elderly unrepresented litigant to run this type of case alone without legal support. The barriers to obtaining justice or even just to getting to a final hearing are just too high. It should not be this hard for an elderly resident to get an explanation from her landlord about why the rent has increased by 63 per cent. Prior to our centre acting in the Dromana Holiday Village matter, two other residents went to VCAT and withdrew their claims because it was too hard and too expensive for them to continue.

The retirement industry says that there is no need for an ombudsman as residents can take their matter to VCAT. What they are really saying is, yes, everyone can go to VCAT, but if you want to win or even get to a final hearing, you will need a full team of lawyers and barristers plus expert witnesses, plus the courage to be cross-examined by a landlord, plus the physical health to wait the 12 months for a determination. This type of justice is only available to very few Victorians. Both of these cases I think demonstrate that having a matter resolved at VCAT is expensive and highly technical. Older Victorians would be better served with an alternative mechanism for having their retirement housing disputes heard and resolved.

The DEPUTY CHAIR — Thank you very much for your contribution today. I just wanted to pick up on something you said, and I am not quite sure if I misheard you. You said something about the vast array of legislation that pertains to this issue. Did you say it should not be unpicked or it should be unpicked?

Mr BRODY — We are actually suggesting that it probably should. It is a significant piece of work to unpick six pieces of legislation, so what we are saying essentially is perhaps it would be easier, as we have seen in other jurisdictions, to introduce a clearer code of conduct which would set out standards beneath that legislation and perhaps extend the rights in that legislation.

Industry codes of conduct are used across many industry sectors to really set out clearly the standards of conduct covering things like sales practices, contracts and sometimes even how complaints are handled and can also be used as a good benchmark when it comes to a dispute resolution forum about how that dispute should be resolved.

The DEPUTY CHAIR — Having said that, do you think there are areas in the current legislation that apply to this issue that do need amending or reform?

Mr BRODY — Sure. To be clear, we do. For example, we think that there needs to be greater regulation of deferred management fees, as a key example. At the moment, as Amanda mentioned, it is entirely up to the contract to regulate deferred management fees, and that means essentially that you rely on what the village or park owner wants to put in their contract and market forces to limit the costs in that regard. We think and our experience is that that is not sufficient to ensure that those sorts of charges are fair and reasonable and we would need regulation to make that fair and reasonable for residents.

Ms STOREY — The only thing I would add to that is that the onus is on the resident to show that it is fair and reasonable not the actual landlord as well. That is a very large evidentiary onus. They are the ones who are determining the fees in their contracts and they are the ones who have access to their operational costs, so it seems a bit perverse that it is the resident that needs to prove that the fees are fair and not the other way around.

The DEPUTY CHAIR — Earlier we heard from another group that they would advocate for a ministerial overview of this sector, and I notice that you have talked about maybe expanding the role of the commissioner for senior Victorians or establishing a new body. Would a ministerial appointment be something you would support, or do you think there would be something better suited to the role?

Ms STOREY — I think when we look at the situation at the moment, the primary gap is a fairer forum to resolve disputes, and that is why we have been advocating for an ombudsman service. In terms of the broader policy setting and oversight if you like, there are benefits in having things like commissioners or other bodies that have an active mandate to ensure good outcomes in a particular sector. One of the risks, I think, about having a particular minister responsible for an area is: what is their purpose? Is it about consumer protection or is it about industry development? They can be different things. We would say that it is important that the minister for consumer affairs retains interest in ensuring good consumer outcomes across all sectors in the economy.

The DEPUTY CHAIR — I have just one more question about legal advice and how that intersects with the dispute resolution process. We have heard from a lot of submissions and also people coming to speak with us that, one, not everyone gets legal advice and when they do get legal advice it is often not from someone who really understands the nuance around these contracts and, two, obviously the disputes resolution process is lacking. Could you just give me your thoughts on those two issues?

Ms STOREY — Sure. I guess there are a couple of components to that question. One is residents seeking legal advice. I think it would depend on how affordable that legal advice was and also the expertise. In my work with the Willow Lodge Village case we spoke to many residents there and some did get legal advice but no-one advised about deferred management fees. They did not advise how it would work. They did not advise 'You are buying, hypothetically, a $250 000 dwelling. It is going to be approximately $50 000 as a ballpark when you leave'. That type of advice just was not provided to the people that I spoke with.

Then the follow-on as to how you would actually resolve it, if they are not getting the advice or the advice is not adequate, they are actually kind of in the same position, and then you are going to be stuck with our current model, which is going to VCAT, which is quite resource intensive.

Mrs PEULICH — Thanks very much for your evidence. Clearly VCAT has failed as a people's court, so perhaps maybe VCAT needs to be reformed. There are similar stories in relation to a number of sectors.

In your submission you say that too many regulations will certainly affect future investment that is going to be required, given the growth of the demographic and the need as a result of an ageing population. With a number of the reforms you recommend, are there any cost estimates in terms of the impact of these on the sector?

Mr BRODY — We have not gone to that detail. As a small legal centre, we have not — —

Mrs PEULICH — You did say the costs would be passed on to consumers.

Mr BRODY — Sure, yes.

Mrs PEULICH — No idea?

Mr BRODY — I mean, that is with any sort of new regulation. If there is a cost, then — —

Mrs PEULICH — Absolutely, but you make a recommendation for a whole list of them. Perhaps you can give us the top two or three as far as you are concerned.

Mr BRODY — Probably the two reforms that we would like to see as primary are the regulation of deferred management fees so they are fairer and more reasonable and do not sort of lock people in, as we described in our evidence; and a new retirement village ombudsman, or retirement housing ombudsman, that would resolve disputes between residents, park owners and managers.

Mrs PEULICH — You do not think that a dispute resolution body could exist under a commissioner for senior Victorians of some sort?

Mr BRODY — We are open to the precise model, and I think — —

Mrs PEULICH — That we have got so many ombudsmen, I think, in itself is a real problem. We have got ombudsmen galore — an ombudsman for everything.

Mr BRODY — We deal at our centre with many ombudsmen across different industry sectors, and in fact I would say that the existence of industry ombudsmen has been the biggest step forward in consumer protection in the last 30 years in Australia. Having a free and accessible place to resolve disputes actually not only benefits consumers of those sectors but also the industry because they are able to get insights into how to improve their services, how to reduce complaint levels — which cost them as well — —

Mrs PEULICH — But you did not say that it would be free. You said it would be funded by industry, so how would it be free?

Mr BRODY — I am saying it is free for the resident — the consumer.

Mrs PEULICH — I see. I have another question. Can you just explain to me how the deferred management fee works, how the 63 per cent was arrived at and how that impacts on a year-to-year basis on the resident?

Ms STOREY — Sure. They are two different cases. I will start with the 63 per cent. That in effect is rent. They call it annual park fees in this contract.

Mrs PEULICH — So the rent is based on the market value of the property?

Ms STOREY — No. How the village is set up, like many villages, is that you go in and buy the dwelling and then you rent the land on which it sits. The rental clause in this contract was not regulated by any legislation such as the retirement villages or residential tenancies or owners corporations legislation, so they had a very creative way — there was a gap and their rental clause is very complex. Effectively the landlord guesses what they think it will cost to operate the village for the next financial year. They then divvy up between the 220 other sites what that proportion of the rent would be. How it worked in that case is it went from $542 000 as the projected cost of running the village.

Mrs PEULICH — Annually?

Ms STOREY — And with my client paying about $2600 a year. Then it went to $861 000, and she was paying approximately $4250 per year. So that is the projected amount which was then declared for each subsequent year.

Mrs PEULICH — So how is it actually worked out?

Ms STOREY — The evidence was that it was never worked out. So the landlord's evidence was that he effectively just picked a number.

Mrs PEULICH — And that affected how many residents all up?

Ms STOREY — Between 210 and 220. Did you want an explanation as to deferred management fees as well?

Mrs PEULICH — Yes.

Ms STOREY — Yes, sure. That has a different model. So with Willow Lodge they are regulated by the Residential Tenancies Act; they are a part 4 and part 4A park. In those cases again they come in and buy the dwelling. That is not necessarily from the landlord; that is often an outgoing resident. So they pay their fees for that dwelling, which would range between, say, $128 000 and $248 000 in our client's case. So they stay there in the village until whenever they want to leave.

Mrs PEULICH — That is per year?

Ms STOREY — So they move in and they pay rent in addition to that, and in the background there is this accruing deferred management fee, which they do not make any payments on until they exit, which is why it is often called an exit fee. When the residents move in there is no estimate as to what that would be because it is based on the sale price, and you do not know how long you are going to be there. You could be there 2 years, you could get unwell, you might not like the village, or you could be there for 20. But in that contract it would accrue at 4 per cent of the sale price — a future determined price — and that would then stop at five years to a maximum 20.

For villages there is no set formula. Villages can set whatever formula they like in relation to deferred management fees. That is why you have seen in the Willow Lodge example that they have now changed it to 2 per cent for up to 10 years. So it is up to the landlord to set how they would like those fees to accrue, but they are normally paid upon exit.

Ms SYMES — Coming back to your suggestion of having a standard contract similar to the sale of land, I put that to a small operator, who basically said, 'A standard contract would not work for us. If we had the same standard contract as the larger providers, then we would not be able to compete because it is all of the additional things that we add into our contract that make us competitive'. I am just wondering what you think about that.

Mr BRODY — I guess the point with our standard contract is that the different types of contractual rights that people have when they enter these are varied. So there are different models — leases, licences, freehold and so forth — and that, in our submission, adds to the confusion on the consumer's part and limits the ability to get the legal advice and insight because even the lawyers have difficulty advising on these complex contracts.

I guess we would say that a standard form contract would make it simpler for consumers to understand what they are purchasing. There would be a sort of agreed set of standards up-front what is in that contract. In fact it should help many of the providers in terms of their legal expenses on drafting of contracts and so forth.

Of course you will have some variances in contracts, and even in the sale of land there are special conditions and so forth, so that if there is a further benefit that is offered in a contract, then that could be provided or annexed. But in terms of a base of rights and obligations under the contract, our submission is that it would be simpler for both sides if there was a standard form contract.

Ms SYMES — I am just going back to your regulation of deferred management fees. You talked about a total cap. What other percentage restrictions or something — are you clear on what you think that regulation should look like?

Mr BRODY — Look, we have not gone to the lengths of deciding what that cap should be or what those percentage tiers should be. We do think that that would require expert analysis, engagement with the sector and really understanding the costs behind their business models. We think that should be independently reviewed and determined, but what happens at the moment is that industry can set that themselves without any sort of basis about what is driving those costs and what settings. We think that is the point we are making: it is open to exploitation by particular providers.

The DEPUTY CHAIR — I have perhaps one more question before we wrap up. Just going back to access to legal advice in terms of when you are going in and signing your contract, do you think it would be beneficial to have something like they have in New Zealand, which is sort of mandatory legal advice that has to be sought before contracts are signed? Also, what are your thoughts around a specialisation in getting legal advice from someone who actually has a depth of knowledge around these sorts of contracts?

Mr BRODY — I do not know if we have turned our mind to sort of a mandatory legal advice process. I mean, that probably would depend on a number of factors, including the appropriateness and adequacy of that advice, the affordability of that advice and so on. In our experience — and I think Amanda would agree — there is a gap at the moment in terms of the availability of that legal advice in the marketplace. If there are lawyers with expertise in these sorts of contracts, then it is usually lawyers that act for industry, not your average lawyer that acts for an elderly person seeking legal advice from their local lawyer, if you like.

Ms STOREY — In my experience of speaking to residents particularly at Willow Lodge, a lot of their motives to move to the village would vary, but a lot of the reasons were location specific. They grew up in one area of town their whole lives, so they are not going to move to the other side of Melbourne. So often you are

dealing with regional areas within Melbourne and suburban areas, so you are often going to see — as Gerard pointed out — your suburban solicitor if you are going to get legal advice, but as we have alluded to, this is the frontend to the issue, and there is still the backend about the dispute resolution. So even if the advice is correct and if you cannot resolve subsequent disputes — which might not even be what is in that contract; it could be something different or something that was unforeseen — then that still needs to be addressed.

The DEPUTY CHAIR — In terms of those disputes, from your experience — in terms of levels of clients that you would see that are involved in or wanting to go into a dispute because of the issues that they are having — is there any difference in levels between not-for-profit and for-profit villages?

Mr BRODY — I am not sure we have got evidence in that respect. The cases that we have taken have definitely been against providers that are operating for profit, and I guess we would say that is where we see more significant problems. But that said, whoever the provider is, what is needed is an affordable forum for that dispute to be resolved, and it might not be to go to the depth of the contract. That might not be the purpose of the dispute. It might be something to do with the amenity of the house or the service of the manager or something more simple, and even now it can be difficult resolving those disputes.

The DEPUTY CHAIR — I would like to thank you for your contribution this afternoon and spending the time in here with us, and your Hansard transcripts will be available in the next couple of weeks. Thank you so much.

Mr BRODY — Thank you very much.

Witnesses withdrew.