T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the retirement housing sector

Melbourne — 28 September 2016

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Witnesses

Mr Geoff Bowyer, managing director, Beck Legal, Bendigo, and
Ms Carole Ainio, member, National Elder Law and Succession Law Committee, Law Institute of Victoria.

The CHAIR — Our next witnesses are from the Law Institute of Victoria, and I would like to welcome Ms Carole Ainio, elder law committee member, and Mr Geoff Bowyer, managing director of Beck Legal in Bendigo. Thank you both for your time today. Before I ask you to make some opening remarks, I will just caution that all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore you are protected from any action for what you say here today, but any comments made outside the hearing are not afforded such privilege. Today's evidence is being recorded. You will be provided with proof versions of the transcript within the next week. Transcripts will ultimately be made public and posted on the committee's website. We have allowed half an hour or so for our time today. Thank you again for joining us, and I invite you to make some opening remarks.

Mr BOWYER — Thank you. Firstly, I would like to say we really appreciate the Law Institute of Victoria being given this opportunity to make submissions to the parliamentary inquiry into the retirement housing sector. The LIV, if I call it that, has obviously had a rich history of providing previous submissions in regard to retirement village contracts. We basically have a number of issues we would like to address.

Firstly, based on the Property Council of Australia release of 22 September 2016, by 2026 there will be 5 million Australians over the age of 65, so it is a stunning demonstration of the ageing community we face in the context of this inquiry. There is from the Law Institute of Victoria's perspective an alarming number of pieces of legislation which in effect cover retirement living, ranging from the Retirement Villages Act to the Residential Tenancies Act, the Owners Corporations Act, the Supported Residential Services Act, the Health Services Act and the Aged Care Act of the commonwealth. For any resident or potential resident to try and be able to work their way through this labyrinth of legislation is very much a challenging situation.

I guess, in terms of the law, there is a rise of the self-represented litigant. There are a lot of people who simply cannot afford the cost of going to lawyers and, as such, have to rely heavily on Consumer Affairs Victoria, as an example, for information about retirement living. When you look at retirement living, they range from independent living units to serviced apartments under the Retirement Villages Act to not-for-profit retirement villages to supported residential services to rooming houses to residential parks to home-care packages and residential aged-care facilities. We think, as lawyers but also as consumers, that this is a great opportunity for clarification and perhaps a simplifying of the legislation which is in front of potential residents.

Certainly from our members' point of view, there appear to be three major issues which face any potential person going into retirement: those are the ingoing cost, the ongoing cost and the outgoing cost. They are three obviously separate components depending upon the type of facility they are going into. Obviously that facility may either be a freehold situation, where they acquire a unit and get title to it. It could be a leasehold unit, where they get a long-term lease. I often say to my clients, 'Well, you've only got 55 years', and they laugh at me because they are generally in their sixties. I say, 'Well, you've got to be optimistic', but they could range from 55 years to a lifetime. It could be a licence or, less frequently, it could be a company title. We just say that, in regard to again promoting those sorts of different types of aspect, we need to make sure that there is some consistency.

When you think about it, people come to us for legal advice. We cannot give financial advice. I often ask clients, 'Well, have you got an accountant?' or 'Have you been to a financial adviser?'. Sometimes they have and sometimes they have not. We think that for many people they rely very much on Centrelink for that advice, and they provide very, very useful advice. We just wonder whether Consumer Affairs Victoria or someone similar could do that. We were talking on the tram on the way up potentially about having some accreditation for financial advisers, particularly in terms of retirement planning, because it is not just about making sure you have got enough money but in terms of the overlap in terms of ability to have pension entitlements and the like. You really do need specialist advice in that regard.

In regard to the disclosure information we do believe that the relatively recent changes in 2013 have been very, very good when it comes to people falling under the Retirement Villages Act, but, very much similar to the excellent submission by WEstjustice, I have quite a few people now facing a situation where they are moving into relocatable homes. Again, as we asked on the tram on the way up here: are they really relocatable homes? I mean, they are in the sense they are plonked onto foundations and connected, but they are not really — in my mind or rarely in my 30 years experience — ever relocated as such. We think it is an artificial distinction frankly between relocatable homes, which fall under the Residential Tenancies Act, and a lot of retirement

villages, which fall under the Retirement Villages Act. The level of disclosure obligation under a relocatable homes scenario is significantly less in my view from my experience in that regard. I think that well could be an area where you could focus on.

In terms of those ongoing fees, certainly a range of issues arise there. Particularly — I cannot name obviously the operators, but I certainly can say that — there are some well-known national operators who basically have a very confusing scale of additional services which are offered, particularly for people who might start to be on the verge of high-care maintenance as opposed to the robust people who generally initially start off in retirement villages. Again I think that is an area where there needs to be a close look at.

The issue of deferred management fees is for many people a vexed one. I say to a lot of my clients, 'Well, you're used to living in a house. You know what the outgoings are. You have got to pay the rates; you have got to pay the repairs'. When you sell the house really over and above a lawyer fee and the commission fee that is it, but when you go into a retirement village deferred management fees can range from 3 per cent a year to 4 per cent a year. Some are capped at five years, which would mean 20 per cent of the end price after all the capital gains tax is taken into consideration, or up to 25 per cent. It is a significant slug. The Law Institute of Victoria can see both sides of it. We have got to make sure it is affordable for people to go into retirement villages, but we question whether there should be some regulation on the maximum amount of it and also the calculation of it in terms of whether it is after capital gains tax calculations or the like.

Some other issues which we see that need to be addressed are the capital gains tax for many potential residents is not clearly understood, and the calculation process is not clearly explained, particularly again in that relocatable space. I have to commend the legislature in terms of the requirements for examples in regard to the Retirement Villages Act, but that is not the case when it comes to the relocatable homes environment. They are certainly going to take the money out, but there is no calculation or examples of it.

We see that with the dispute resolution process — and I am sorry we were not here for Ms Glass's presentation — there is a range of different avenues for that depending upon which type of facility you go into. We think the Victorian Ombudsman would be and should be the appropriate basically dispute resolution avenue which exists. For example, I have seen this personally with my late mother. She went into a facility which came under commonwealth legislation, and if she had a complaint to make, that could be put in anonymously and could then be either resolved by mediation or potentially determined. But I find in most retirement villages, whether they are relocatable or whether they are falling under the aegis of the Retirement Villages Act, there is significant concern and anxiety by residents to raise issues. I have seen it happen where they are seen to be a complainer, and that changed the nature of their ongoing relationship in a retirement village. I have had issues relating to the provision of heating and cooling under relocatables, where we basically had to rely upon the provisions of the Residential Tenancies Act, and there was significant backlash by the operator coming out of that.

So we think that the Victorian Ombudsman has a very good track record. We question whether it should be dispute mediation or whether in fact it should be a determination, because one of the issues of the alternative of going to VCAT sometimes is that it is often for a lot of residents a difficult environment. Whilst VCAT has endeavoured to make it a non-courtroom environment, increasingly it is seen as that, and we think that the Ombudsman is seen as a much more neutral environment. We just question whether in fact rather than mediation the Ombudsman, as the office often does, makes a determination about what is fair and appropriate in all the circumstances.

Basically the last point I want to make is we think that generally speaking there needs to be this idea of simplifying the process for residents going in and going out. An example which has recently come to my mind is that some retirement villages, if you are, for example, reaching a stage where you have got to go into high care, have differing standards for determining about the high care. Some will say they will appoint a medical practitioner. Obviously we resist that and want to have at least the right of the resident to have their own independent medical practitioner, in addition to maybe a neuropsychiatrist, for example, in terms of dementia.

But allowing for that issue, which I think needs to be addressed, the final one would be that sometimes some retirement villages say that if you vacate your unit, they have got a right to charge rental for up to 6 months or 12 months after your departure. I have got one situation at the moment where it is ongoing. It could easily result, if some retirement villages are not able to find a buyer, in a two-year ongoing charge of $254 a week, and you can see how that could rapidly erode whatever is left after the deferred management fee is paid et cetera.

The last point I will just say before I pass to Carole is a lot of retirement villages charge a renovation fee as opposed to a restoration fee. Particularly I find it difficult to understand how in the relocatable space that concept could be allowed when really a tenant only has to maintain the premises in fair wear and tear, but some retirement operators say, 'No, we're going to totally put in new appliances and equipment. There's nothing wrong with the old ones, but they are frankly going to make it more difficult for us to find an ingoing tenant'.

Ms AINIO — Just to introduce myself, my name is Carole Ainio, and until just a couple of weeks ago I was in-house counsel with FTL Judge & Papaleo, which is a professional administrator company appointed by VCAT to manage the affairs of people unable to manage their own affairs due to cognitive impairment. Many of our clients under administration orders would have been in these sorts of circumstances, so it was part of my role to review various documentation on behalf of clients who were anticipating leaving their home and going into a retirement village or, at the other end, were now needing to go into accommodation which provided necessary levels of aged care.

The problem then was getting the money back in a timely manner, because otherwise they would be paying virtually twice. If in fact it was a contract that depended on the unit being resold or the lease being resold — whichever — so either a proprietary interest or a non-proprietary interest, then there could be a substantial time lapse. If the resident going into aged care now has been assessed as having to pay a refundable accommodation deposit, obviously somebody is missing out on their money, and it is the resident who is going to pay the cost of that.

So a faster way of moving the outgoing money back to the former resident is what is needed, but I appreciate that there is a cost of that to the independent living provider until they have onsold the unit and, according to a lot of the information that I read in various submissions from various people, it appears that in some cases at least that cost can be spread across the entire retirement village community, which seems to create unfairness to other residents. So it seems to me that there are a number of different areas where there are inequities, and I think that clarification, reform of the legislation, should address all of those and make it a lot clearer.

The other difficulty in particular that I found in my particular application is that there were usually at least three different contractual documents that had to be read in order to work out whether what the facility was saying had to be paid now by way of the outgoing contribution was correctly based. The issue arose a number of times when the resident had not been there for very long — circumstances had changed healthwise — and I really could not see that a huge amount of money by way of total refurbishment was necessary if someone had only been there 12 to 18 months. I think the main benefit in total refurbishment is to the provider in being able to onsell this accommodation with brand-new appliances et cetera. So I question that.

I think dispute resolution needs a lot of addressing for various reasons. Many people may not feel confident, may not feel empowered, so the anxiety around the complaint process needs to be taken out of the equation for them. From my experience working with an administrator over 10½ years, I think it boils down to the need to balance older people being able to retain independence whilst having safe, appropriate, affordable housing and also being able to retain a realisable asset to be able to purchase the best, most appropriate accommodation for them at the next stage if that becomes necessary. So they still need something left at the end that can buy them better aged-care accommodation. But I also acknowledge that not-for-profit organisations will need government funding and for-profit organisations have to make a profit, so it is a balancing act.

The CHAIR — Thank you, both, for your articulation of some of the issues that confront us as a committee in the complexity of the regulatory regime and the dispute resolution regime as they currently exist. I would just like to ask a couple of questions. First of all, I take the point about VCAT and how that can be intimidating and expensive for people. Have either of you had much to do with Consumer Affairs and their dispute resolution process, or have your clients engaged with Consumer Affairs, and what feedback have you received?

Mr BOWYER — Certainly more with the small business commissioner, which effectively is in a similar vein. I think that the great thing about the small business commissioner or consumer affairs is that it is a low-cost jurisdiction, and as long as you can have that scenario replicated in consumer affairs I would not have an issue with it. It is just that I suppose perception is sometimes the reality, if I could say, Ed. The Ombudsman is seen as absolutely fearless and independent. I am not saying for a moment that consumer affairs is not that, but the Ombudsman is seen as effectively often the champion who does not report back to a government minister per se and is seen by lots of aged people I speak to — and I do an ABC radio show pretty much every

Wednesday, and I refer a lot of people to the Ombudsman for that reason — as appearing to have that independence.

There are two issues I just want to raise, and, Carole, I picked them up from what you said. A lot of work has been done over the years to make sure that standard form leases have been prepared and standard form contracts of sale have been prepared in conjunction with the Real Estate Institute of Victoria or whoever it might be, and certainly consumer affairs. In my experience most documentation I receive from retirement villages goes to 70 to 80 pages, which clearly is a very daunting prospect for any potential tenant and effectively forces them — and I am not talking against it in any way or suggesting they should not necessarily be getting legal advice — but it really puts them in a vein that they are forced to get legal advice because of the complexity of the documentation. It may well be an opportunity for the Attorney-General to mandate or the minister for small business to mandate that there should be common form documents prepared, because at least that way people would understand when they are looking at the different offerings that they can compare apples to apples.

The other point which I pick up too, Carole, is that there is no point in having such a rigorous regime that it is not economic for any retirement village operator to operate. I can only talk about the Bendigo region. There is definitely a shortage of retirement village space — whether there should be some incentives or some encouragement for local councils to basically provide set zoning opportunities for aged-care and retirement villages to make it more attractive. It may well be a way in which we are going to encourage operators to come into the space and to produce affordable retirement village options for ageing Australians.

The CHAIR — I think that is a very good point. I think the planning element of it is something we need to consider as a committee and which we have only really just touched on thus far. Just on the issue of legal advice, and I take up your point about standard form leases and contracts and the like and whether that would be applicable in this sort of environment, we heard evidence earlier from a New Zealand operator that it is mandatory in New Zealand to obtain legal advice in advance of signing a contract. I suspect, and either of you might be able to shed light on this, that some people come and get advice when they are presented with a 70 to 80-page document and some others probably just sign it hoping that it is all in order without fully understanding what it says and the consequences of some of the clauses. Do you have a view on mandating a prospective purchaser having legal advice before they sign any agreement?

Mr BOWYER — My view is that I am never one in favour of absolutely mandating that obligation, but I think it is a bit like guarantees — for example, banks; you have to have a clear warning that this is a document which has significant financial and legal implications, and we recommend that you get independent legal and financial advice. I certainly had that scenario in several cases where people have come having not sought the legal advice, particularly at the formative stages of having a unit developed. It is a bit like a building agreement in many respects. The operator has not followed the specification, or the finish has not been satisfactory. I had one recent case where a person was going in who had significant disability and required a number of modifications to the unit. The operator undertook to do those, and yet they were not done to a standard which passed Archicentre or for that matter an occupational health and safety inspector.

Getting back to your point, I think on balance I would favour perhaps putting it more on the operator to provide an avenue where they provide at least a level of subsidy for legal advice going in. I would think as a private practitioner that generally for someone coming in to get that legal advice — an initial interview, a review of the documents, detailed letter of advice and some amendments — they are not going to walk out of most law firms under $800 to $1000. For some people that is a high hurdle when you have got the entry costs at that level.

Ms AINIO — If I might just add onto that, I also sit on the national law council of Australia's elder law committee. That committee was initiated as a response to elder abuse. From my point of view, having seen numerous instances of clear elder abuse by the time the client came to us as an administration client and there was not very much that could be done at that stage, one of the things that was evident to me was that the person may not have sought legal advice when they ought to have sought legal advice for various reasons — being too trusting, of a particular generation where you would not spend the money and so forth. This brings to mind the law institute's Life Legals program, which was up and running a few years ago but is not currently very active. The whole point of that was to talk to older people out in the community to make them aware of where they could access legal advice so that they would be more likely to do that.

Mr MULINO — We have heard a lot about the wide range of contracts in existence at the moment and how this is very confusing both in terms of the length and complexity of individual contracts but also the sheer range

of different offerings. I am just wondering whether your members have provided any feedback on particularly problematic clauses that they see as being common in their experience of providing advice.

Mr BOWYER — Well, as mentioned, that whole idea of renovation and restoration is one. Quiet enjoyment is another. Certainly in Westjustice I have seen this instance where, unlike a lease — if you want to get repairs done under a lot of leases, the landlord cannot unreasonably withhold his consent. In most retirement villages they have absolute carte blanche ability to say no to any modification to the premises, which is even particularly more galling in the relocatable space where the actual premises are owned or in the freehold title space where, again, the actual premises are owned. So they are two areas which generally, I have seen, often cause concern.

The other area which I have seen on a number of occasions is the issue about visitors. There is a wide range of margin between some retirement villages which will allow you to have a visitor there for one, two or three weeks, as opposed to having a live-in relative there for three to six months. Again, there might be good reason why it might be three to six months, because the actual resident may be ageing. They may not need high-level care, but they may need company. But again, more often than not that is within the absolute discretion of the operator — whether it agrees to allowing a person to stay beyond the mandatory prescribed time.

The other one, I suppose, is pets. Again, pets are one where increasingly — again, I refer to my dear recently departed mother. She was in a facility where they had a number of pets which came in — dogs and cats. 'Harmless animals' is the best way of describing it. But there are quite a few facilities which have a statement that says pets are not allowed but the manager may, on a request basis, allow you to have pets. I think, particularly when there is a lot of evidence around that pets are a companion, a way of keeping an emotional link going, that is another area in which I see a wide variation. Again, I think that is why if you had a level of attempt to have a standard form-type contract, there could be a robust debate about the various merits of those sorts of clauses.

Mr MULINO — As the Chair mentioned, we have heard evidence about the New Zealand regulatory arrangements, where legal advice is mandated in certain circumstances. You have also referred to the fact that many of these decisions could be well informed by financial advice, given that it is often somebody's entire assets. I am just wondering how you see the interplay between legal and financial advice in practice.

Mr BOWYER — I will go first on that. I think that the Centrelink opportunity is a good one, but I think that is an opportunity for Consumer Affairs Victoria to move into that space — to be providing that financial advice on a case-by-case basis. It might be means tested or whatever. Carole and I are both of the view particularly that there has to be an interplay between the financial adviser and the legal adviser, and the other overlaying part often is the beneficiaries, because unfortunately, I have to say, in many cases the beneficiaries see the sale of the house as the last remaining inheritance nest egg. I always try to make sure that when I am giving advice I give it in the absence of the children or the uncles and aunties or whatever it might be, because sometimes, I have to say, I have seen cases where undue influence has affected the type of facility that people are guided into.

Ms AINIO — We were talking on the tram coming up, and I have thought about this for quite some time. This may not really be referable to this inquiry, but I think there is an increasing need for what I call collaborative professional practice, so that you have got the legal and the financial and someone with Centrelink expertise, because it all is intertwined. I have a colleague who was seeing clients for legal advice when they were redoing wills, and he talked to them about powers of attorney, downsizing and all those sorts of options and then sent them to someone else for the financial advice on how to rearrange their affairs, and that person then sent them back to him for the legal parts.

When he realised this was happening a lot he went off to get the accreditation so he could offer financial advice. He is a very sensible person. He has got a very robust practice now. It is a model for what I see as being what is needed. There is more than the legal advice, there is more than the financial advice and interwoven in all of that is Centrelink, usually. I mean, there are a lot of self-funded retirees, but with the rules changing or threats of it being changed in superannuation and so forth, people need to be on top of all of that all of the time, and I suspect they will need to seek advice more frequently. So collaborative practices between professionals, I think, would be a really good model. I do not know how we would bring that about.

Ms HARTLAND — I think you have said everything that I would have asked you about, so thank you very, very much, and I think you have also validated a lot of what I have heard from residents.

Ms AINIO — Thank you.

Mr BOWYER — On behalf of the Law Institute of Victoria, we would just like to thank you for the opportunity, and we remain open to getting involved in any drafting of any documentation or feedback on any proposed legislation. Thank you.

The CHAIR — Thank you both very much for your preparedness to be here and again for your submission and for that offer to stay engaged. Thank you very much.

Ms AINIO — Thank you very much.

Witnesses withdrew.