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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Mr Joseph Nunweek, Lawyer, WEstjustice.

The CHAIR — I declare open the Legislative Council's legal and social issues committee public hearing into the retirement housing sector. I would like to welcome Mr Joseph Nunweek, a lawyer with WEstjustice. Thank you very much for joining us. Before we start I would just like to 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 against 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 a proof version of the transcript within the next week, and transcripts will ultimately be made public and posted on the committee's website. We have allowed half an hour for our time today. Thanks very much for being here, and we have received and noted your submission and some of the issues you have raised there. I invite you to make some opening remarks, and thereafter we will have questions.

Mr NUNWEEK — Thank you very much. As a quick introduction to our organisation, WEstjustice community legal centre was formed last year as a result of a merger between Footscray Community Legal Centre, Western Suburbs Legal Service and the Wyndham Legal Service. The short of it is that we provide legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas. We run a consumer law and a tenancy law practice as part of that. One of our interests alongside the actual casework and community legal education we do is to work on reform projects based on the casework experience we see.

Our submission to this inquiry was born out of concurrent work we were doing on a Residential Tenancies Act review as well as an Australian Consumer Law and Fair Trading Act review, both of which trigger aspects of the retirement living situation right now. Subsequently to the written submission we put in in June, we also provided a new submission on the Residential Tenancies Act for the final of their issues papers on alternate forms of tenure that primarily concerned residential parks covered under part 4A of the Residential Tenancies Act right now. Our recommendations in the retirement living paper and that paper are not to be taken sequentially, and I thought I would use these opening remarks this afternoon to provide our general tiers of importance.

The first comes in terms of independent oversight, particularly a supervisory ombudsman for the sector. It was very useful to have Debbie McClure speak to the New Zealand experience before, and I have a sense from what she describes that Ryman Healthcare may have imported some of that culture into their practice here, even without the same framework. As she said, the Retirement Villages Act 2003 structure in New Zealand does require an independent supervisor responsible for overseeing statutory disputes and issues relating to the Act. The operators of the village are required to be registered with the registrar, and statutory supervisors are responsible for, among other things, ensuring that village operators provide full disclosure about the village they are running. They determine how much can be loaned financially on a property, they determine how much an operator may withdraw from a retirement village entity without risking their entity's financial stability and they do have enforcement power, for example, to restrain transfers of interests in a village or to remove managers or appoint statutory managers in their place on application to the courts.

It means that the New Zealand arrangement right now solidly tries to protect residents from misappropriation as well as investors who place financial stakes in these dwellings. Our understanding is that preventative action from regulators outweighs instances of punitive actions for wrongdoing, and it is very effective in terms of preventing the worst-case scenarios of fraud and embezzlement.

By the same token, in terms of the actual resolution of complaints by users of the sector in terms of retirement living, particularly those covered by Victoria's Retirement Villages Act or the Residential Tenancies Act as they stand, we strongly echo the submissions of partners in the sector, including Consumer Action, the Council on the Ageing, Housing for the Aged, as well as Justice Connect Seniors Law. We believe that there would be real value in an industry-funded external ombudsman that is in the position to receive and deal with complaints brought by residents of these villages and parks who have already gone through IDR and found it to be wanting and also to identify systemic issues that may come with that.

In our experiences and what we have seen from examples such as the Telecommunications Industry Ombudsman, the Financial Ombudsman Service and of the Energy and Water Ombudsman of Victoria, these EDR schemes are a really useful alternative to adversarial court situations, where the consumer may not have the financial means for legal proceedings; where the amount of their claim would be outweighed by legal costs,

or where it is perhaps not even a monetary claim, where it is specific performance relating to maintenance or repairs; where the preservation of the relationship is important to one or both parties, and for people who intend to live in these villages or parks for the rest of their lives, that is important; or where the dispute would benefit from flexibility in its resolution.

Right now individuals who have issues or groups who have issues in their villages or parks will need to go through the Victorian Civil and Administrative Tribunal's Residential Tenancies List or the Civil Claims List. Now, by their very nature it can be quite adversarial sometimes. It can be long. The older people who deal with these environments can find them intimidating, and they can have procedural burdens which are quite onerous — for example, with a large and complex matter it will generally be held at King Street in the city and not in any of the regional areas. You will have situations where two dozen older people with a range of mobility and health issues are asked to turn up for what may simply be an adjourned or interlocutory matter on the day. So we really strongly believe that an Ombudsman would allow a greater amount of ease to deal with matters in the sector.

I do note that there have been suggestions from some who have submitted that these sorts of Ombudsman are more appropriate for broad sector issues, and they attempted to distinguish the need for an Ombudsman for utilities or the banking and financial sector from the older housing and retirement living sector. The exponential growth speaks for itself. I understand that already about 184 000 Australians are in retirement villages. That may not count some of these residential or caravan parks, and that rate according to the Property Council is going to increase by 7.5 per cent by 2025. So you are already looking at a very substantial sector of people who would benefit from an Ombudsman scheme.

The other tier below would simply be a matter of reforming some of the legislation right now. Obviously others will submit about the Retirement Villages Act needing some reform in terms of provision for standardisation in contracts, but there may also be grounds to look at it again in terms of eviction processes, what is required in terms of internal dispute resolution, the operation of residents committees and things to that effect. We have a particular focus, given that we have run a tenancy program primarily on Part 4A of the Residential Tenancies Act as it stands. Now, that was introduced in 2011, due to the gradual evolution of caravan parks and the fact that you are seeing more and more of these caravan parks redeveloped to provide for long-term over-55s residential lifestyle living. It was a fix, but it was a fix that was not suitable in a number of ways. There are a number of gaps in terms of the Residential Tenancies Act's coverage of the sector still, in terms of everything from registers and oversight to provisions for what people may need as they age and face health issues, as well as clarity around what sorts of deposits you make on the way in, what your rental service fees are for during your time and what sorts of exit or deferred management fees you pay on the way out.

More practically there are issues I would say with the fact that more or less a lot of people who live in these parks see themselves as home owners rather than residential tenants, and in lay purposes, given that they have spent hundreds of thousands of dollars on these moveable dwellings, they actually are home owners. Additionally, simply the way that it has been crammed into the Residential Tenancies Act, it is all subsections of one section — section 206; and you tend to have older residents who are looking for legal help in looking for section 206ZW, which becomes a bit of a bureaucratic self-parody for people trying to navigate legislation by themselves. So we strongly believe that that should form its own piece of legislation, but residents in these parks we would also envisage have the same recourse to a higher Ombudsman that current people in residential villages do.

Our last plank would simply be one of outreach and education, and in a way any reforms that come about from these inquiries or current reforms to the legislation will simply occur. Any changes do need to be communicated to the parties in the sector. However, we have noticed that even agreements right now under the current Residential Tenancies Act often do not pass muster in terms of much of what they say, and parties do not necessarily understand their obligations. We have had casework at WEstjustice where we have had to go all the way to VCAT, causing time and cost on all sides, for something that was very self-evident in the law but that, due to a lack of understanding in the sector, the parties we were up against simply did not appreciate.

We think there are things like ongoing auditing of contracts in the sector by CAV, not simply to go pinging them with fines but perhaps simply to walk through what they are doing right now which they cannot actually enforce and what they may want to consider is of no effect, alongside ongoing village visits, and perhaps regular retirement living seminars addressed at older people who are looking at moving and/or buying into the sector

that are run independently of operators. So that is effectively my opening address in terms of the areas we would like to see change in.

The CHAIR — Thank you very much, Mr Nunweek, for that presentation and very thorough analysis of your suggested reforms. Just taking it back to, I suppose, a simpler level, first of all, of the people you see in your practice, how many do you think are fully apprised of their rights and understand the contracts they are contemplating or indeed, if they have come after execution, have signed?

Mr NUNWEEK — Unfortunately one thing that we wish we would see more of is people coming in for preliminary advice before saying they are thinking about buying into a residential park or something to that effect. What we get are people who did not take any meaningful advice at the time and have questions about it three, four or five years down the road. I am not aware of anyone who has come to our centre for initial legal advice before buying in. However, people do go to things like retirement expos, where these are pitched to them as retirement lifestyle options, and they may use word of mouth from friends. One impression I do have is that while there may be some expertise in terms of retirement villages and how you enter into that legislation, experience and knowledge in the private legal sector of the Residential Tenancies Act, including part 4A, is awfully thin on the ground. So I am not sure how many practitioners out there would immediately, off the cuff, be able to give quick and effective advice on part 4A as it stands.

The CHAIR — As a follow-up to that, I am not sure if you heard Consumer Affairs Victoria give their evidence earlier, but they were making the observation that following the changes in 2013 that I think came into effect in 2014 a number of the issues around information and the like have been addressed with the provision of fact sheets and the like. Do you have a sense of whether that is true or not from your perspective?

Mr NUNWEEK — We have primarily seen residents who have moved into complexes prior to that time. I do not know what sort of retrospective steps were taken at an operator-by-operator level to give people a reappraisal of their rights and options after that. I would make the note that disclosure can be very useful in terms of a one-sheet precis; it can sometimes be undermined by the complexity and the details of the contracts that follow. So you may have, for example, a useful disclosure form but a 50-page non-standard contract that the person then goes into. On the one hand it can lead them to perhaps an assumption that the disclosure involves everything important they need to know and will simply be repeated in the contract, which is not the case; on the other, there may be aspects of that agreement that do actually moderate the effect of those disclosure statements.

What I think would enable better information alongside that disclosure would be more standard-form contracts, not necessarily for every model in the sector but for the identifiable models to have something that is more analogous to what Consumer Affairs Victoria does with the Residential Tenancies Act and similarly what the Law Institute of Victoria has set up for commercial leases where there may be significant money changing hands and significant decisions to be made but it still can fit into a standard pro-forma contract.

Mr MULINO — Is it fair to say that your organisation has dealt with around 700 clients in this area over the last five years?

Mr NUNWEEK — That note from the precis will be most likely talking about 700 people helped or represented through our general tenancy service. I would say our figures for the equivalent time of the past couple of years have been around about 12 different clients in three different villages in the area. We will have a little bit of a contagion effect where one person comes in with a question, a second person brings that up and it spreads from there.

Mr MULINO — This may be something that is best taken on notice, but I would be interested in any data you can provide in relation to trends and also the kinds of dispute breakdown — —

Mr NUNWEEK — That is a question I will probably take on notice. I am happy to break down the data and perhaps provide a summary of the systemic trends and where they fit into our categories and how we define them as issues.

Mr MULINO — There has already been a bit of a discussion around the policy of mandating legal advice in New Zealand and some of the benefits that might arise from that. I am just wondering what your thoughts are — and this is going to be very difficult to quantify — but clearly even if you have mandated legal advice,

you are likely to have disputes down the track just given the nature of long-term relationships and the complexity of the kinds of relationships we are talking about. I guess I am just trying to think it through. Mandating legal advice: do you think it is going to deal with most of the complaints we are seeing these days?

Mr NUNWEEK — I do not know if it is necessarily going to deal with the ongoing issues that people get where there is a dispute around interpretation of the contract or a dispute around how maintenance of facilities is being kept up. It may not deal with the basis on which someone may be terminated or evicted from the property. Given that this is a long time for a person to live in a village — it could be 20 or 25 years down from their initial legal advice — I think these things will still come up even with effective legal advice at the start. That is not to say that effective legal advice is not an essential idea, but I do not necessarily know if it would be all curative or all preventative.

Mr MULINO — No, and look, nothing is likely to be, but it could be a useful element of a reform package.

Mr NUNWEEK — A side issue I would have about that is making sure that that is done cost-effectively. We note that often people are downgrading to move into these situations. A general profile of people we have seen moving into residential parks, for example, is that they may have sold a family home and will not necessarily be buying something of the same amount at that level, they may be recent divorcees who are now finding themselves living as a single person and with a reduced income for the first time in their lives. I think it would be important that in any model for how legal advice comes at the start it would be affordable and not something that people are put off from doing because they see it as another financial burden on top of the initial outlay.

One consideration could be, for example, for a specialised service to provide some of this towards the beginning of the arrangement. There are community legal centre models, and certainly one that I understand still exists in Queensland provides advice around the manufactured home sector up there. Usefully they do that for the contracts of the lease where people move into residential parks but they also advise on your contractual rights if you are actually buying a structure which you expect to be fit for purpose for 40 or 50 years.

Mr MULINO — I suppose one of the aspects of regulation which we are probably going to spend a lot of time on is the contract and whether the legislative constraints around that are appropriate. It is a sector which is very diverse at the moment and, as we have discussed already today, that does reflect a very diverse set of underlying needs, requirements and preferences. I certainly would not claim to be a legal expert, but from what little I know across a range of different areas we see a range of different legislative approaches in some areas, we have quite tight constraints in others, and the law basically sets out certain clauses which must be in or must not be in certain contracts. I guess I am just interested in your thoughts on how you see this tension between the need to maintain some flexibility in a sector that is going to grow and, if anything, become more heterogeneous as more and more of society enters these kinds of arrangements. Do you think it is enough to have in legislation some requirements around certain clauses that should be included and certain clauses that should not be included, or do you think we should be more prescriptive?

Mr NUNWEEK — I think the inclusive model for things that should or should not be included is the most essential one in order to minimise harm first of all. When I talk about harm minimisation I think first of security of tenure. Security of tenure is quite open-ended under the Residential Tenancies Act right now, and security of tenure can also include associated things like one's right to have carers or family members stay with you and occupy a dwelling or something like that. The second part of that in terms of minimising harm would be making sure that people are not taken for a ride in terms of some of these ingoing and outgoing fees.

The priorities to me would be that there is some opportunity for residents to balance an ingoing contribution if they do make one against how much their rent or service fees would be. But rent and service fees at any rate should fundamentally be about maintenance and upkeep first and foremost. There are two opportunities, for example, in the residential park model for an operator who also provides the moveable dwellings to make money from the initial purchase of the dwelling and on the deferred management fee on the way out. Our view is that rent or fees during that time should primarily be about ensuring maintenance and upkeep and should not become another line of profit.

In terms of the exit fees we would suggest capping. In other words, basically we are thinking of legislative points for some restrictions. On the actual notion that contracts be absolutely standard form — one for retirement villages, one for residential parks — I accept there will perhaps be developments, including as more

villages are, for example, moving towards supplementing what they already have with an aged or palliative care service. I think the most important thing for any inquiry to get by way of an outcome is that people are secure in their homes and that they are able to know, with considerable security, what their outlay is to be at the beginning and the end of that process.

Ms HARTLAND — Obviously you cover huge amounts of the western suburbs. I am presuming that you see people in villages, rooming houses and retirement villages. The thing that has come up several times is the fact that many of these different types of housing are under different acts and there is no conformity. Could you talk a little bit more about why you think an ombudsman — ombudsperson, whatever — would be a good move?

Mr NUNWEEK — My belief is first and foremost that the process for resolving these disputes at the moment at VCAT is a pretty challenging fit. To give a couple of anonymous examples, there was one where a person had been charged rent increases for the past four or five years that were not done in accordance with the Residential Tenancies Act. The characteristics of her situation, that she had purchased a home and it was freestanding on leased land, were very much RTA applicable. We wrote explaining our view of things and explaining that this rent had not been charged appropriately. We were not able to get a response. The tenant was exceedingly anxious and apprehensive about going towards VCAT. She had never been to court in her life. She felt it was a lot like getting into trouble. We tried to give her all the reassurances we could, but on that day this operator who had never actually played ball with his until we got to the tribunal had hired a lawyer. The lawyer came up very belligerently to us and the client and said, 'What do you think you are doing? Isn't this going to create a mess for the rest of the village?'.

She got the result she wanted to. It was a very straightforward decision by the tribunal saying, 'This is patently covered by the Act'. But it took a few months to get there. It took a long time for payment to be made, and then the one resulting thing that I simply do not think would happen under an Ombudsman model is that they then sent her a letter saying that they were proposing to apply retrospective rent rises to claw back everything that she had just been compensated for. Now. that is thoroughly illegal, I think, both in terms of the appropriateness of contracts under Australian Consumer Law but also under the RTA. So we wrote to them again and they effectively admitted that they were just frustrated with how she had carried on and this was a warning shot for her to leave well enough alone. I think an Ombudsman would have made that entire experience less stressful for her as someone who was going ahead. By its very nature it does not reward or allow for adversarial cross applications and tough talk by lawyers. It comes up with fixed arrangements for how people will deal with each other in a respectful way in future.

A similar one was a person who had mobility issues. She was now 90 and in a retirement village, and it was simply a maintenance decision which may not have meant much to the operators but effectively she was not someone who could get around the complex particularly easily and it meant that her trip to the common area went from being about 5 minutes indoors to 15 minutes walking around an outside park during the winter. They had simply decided that it was not a priority to fix an area that was a safety issue at that time because they had this alternative.

All she really wanted was for that concern to be fairly addressed and for options to be created to give her that flexibility to move around, and in the end she simply felt like going through the VCAT Civil List, which is often dealing with the appointment or de-appointment of managers and very large transaction fees, felt like too much for what she wanted to do. She had been through the IDR scheme and it was not getting her anywhere, but the next step of having to provide pleadings or anything like that, it all felt too difficult to her, not least of all because, I would imagine, an effective older persons ombudsman would be able to do phone teleconferencing. VCAT, because it is a tribunal system, does prefer to have bodies in the room, and that room would probably be in King Street, and it would be quite a trek for her.

Ms HARTLAND — Can you talk about what the cost was of that case?

Mr NUNWEEK — Because we were acting for residential park residents who go to VCAT the fees are waived. That is assuming that it is a situation that the community legal centre is able to assist with. It is very possible as a pensioner to have the fees waived; what is not so easy is finding legal support to do so. We were fortunate that we had time, capacity and relatively simple matters that dealt directly with the RTA and did not come to wider questions around contract law that would be perhaps better dealt with with a private solicitor. So if you are paying for a private solicitor's time, that is exceedingly expensive. There is a risk, however small, that

VCAT may require costs of an unsuccessful party, and that may be a chilling effect to older residents. Lastly, there is also the risk that if something is a significant case for the sector and it does get appealed to the Supreme Court of Victoria, you could then face costs if a decision that you paid no fees for at VCAT was subsequently successfully challenged.

Ms HARTLAND — So have you seen examples of where people have made complaints, won their case and then they are bullied out of the park or out of their accommodation?

Mr NUNWEEK — To pick up on that thread before where I described the quite shocking and upsetting proposal from one operator that they were going to charge retrospective rent, that person ultimately felt disappointed and uncomfortable enough in the environment of the village that they have decided to move on. They are currently in the process of trying to advertise their home there for sale, and they are going to look for a different retirement option somewhere else. They are not entirely happy about the decision. They would describe it as saying that it feels like it is time because they feel awkward talking to the management. They describe a sense of feeling as if, you know, they are persona non grata a little bit. It is their decision, but it is a decision that may not have come to that if the matter could have been resolved more flexibly at a lower level.

There are protections in place. While there is a no-reason notice that can be given under the Residential Tenancies Act for anyone to leave with 365 days notice, if that was issued in response to a park resident purporting to exercise a right, it would probably be declared invalid. But it is still a frightening thing for an older person. I mean, if I am to receive a notice to vacate my home tomorrow, I just move on to the next tenancy. I am young enough and I have got a lot of options as to where to go, but I do not have a lot of capital or assets put down in one particular place where I expected to see out my days.

The CHAIR — Thanks so much, Mr Nunweek, for your evidence today.

Mr NUNWEEK — Thank you very much, and I will provide to the committee that data regarding the question on notice as well.

The CHAIR — Thank you very much, and a transcript of the evidence will be with you shortly.

Witness withdrew.