T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Subcommittee

Inquiry into the retirement housing sector

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Witnesses

Mr Geoff Bowyer, Beck Legal Bendigo,
Ms Rachel Lane, Aged Care Gurus, and
Mr Steven Sapountsis, President, Law Institute of Victoria.

The CHAIR — Our next witnesses are from the Law Institute of Victoria. I would like to welcome Mr Steven Sapountsis, president of the Law Institute of Victoria; Mr Geoff Bowyer — thank you very much for coming back, Geoff — and Ms Rachel Lane. Thank you very much for being with us today. Before I invite you to make some remarks I will just caution you 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.

By way of introduction, the committee appreciated very much the law institute's submission and evidence given before the committee early on in our deliberations. It has been put to us consistently at virtually every public hearing we have had that the quality of legal advice provided in relation to retirement village contracts in particular has not met the expectations of those seeking the advice. The committee appreciates that often legal and financial advice can be confused and that financial advice is a separate matter, but the committee wanted to give the law institute the opportunity to address this issue that has been raised time and time again with us to see whether that is something which LIV agrees with or whether it has a different perspective or whether there is anything that you are doing to address that issue, whether real or perceived.

Mr SAPOUNTSIS — Thank you, Mr O'Donohue, and thank you to the committee for inviting us to give some evidence this afternoon. I will speak in general terms about the education of lawyers and of the public; Mr Bowyer and Ms Lane will speak about more specific instances of contractual advice and what they anticipate from practitioners.

I might say, in terms of the general advice and what the law institute is doing, there is certainly what I call information asymmetry in the regulation and advice on retirement villages, whether it is aged care, supported residential services or any other facility. Part of that comes about because we are dealing with some complex legislation. We have heard evidence about this even this afternoon, and I think that is just a confirmation that we have four, five, six pieces of legislation, some with proscriptive and some with prescriptive requirements for contracts. What that has meant in the profession is that, for instance, there is a group of maybe four or five law firms that act for the providers of residential services who are on top of all the legislation and can get the necessary packs together. So they are in control of that information; they are familiar with all the legislation in there.

On the other side of it, though, when a prospective resident goes into an aged-care facility or a supported residential facility, they might get advice from someone who is not as familiar with the contract as the service provider is. So where does that leave us? I think it leaves us in two areas. One, broadly speaking, is the education of the community about what to expect when they are looking at residential and supported care services. That is a task for government, and it is something that the law institute is very happy to help with.

We had an instance of that in 2009 when we had a series of seminars called Life Legal, which were for the community but also open to lawyers, to give the community a flavour of what they should be expecting when they go into such a supported residential service. That at least alerts people to ongoing fees, ingoing fees and outgoing fees so you can have a rough idea of what those concepts mean, which then makes it easier for the practitioner who is looking at the contracts to put some figures forward and some meat around that. So generally speaking I think there is a call for that community information again. I recommend something like Life Legal.

There is also an obvious need for — I think the phrase would be — an upskilling of the legal practitioners who work in this field. For instance, if you look at our referral services, when members of the public want to be referred to someone for advice in this area our referral service would have 170-odd people who deal with retirement villages and the like and 70-odd practitioners who say they deal with the elder law thing. There is no particular qualification; that is a self-nominated categorisation. We would expect that there is some degree of expertise in those practitioners who have dealt with these sorts of contracts.

But we have not left it at that, and nor should we. There is some ongoing professional development, broadly speaking in two areas again. One is the contractual obligations that residents are getting themselves in for, and the other one is the financial considerations in there. Ms Lane actually presents one of those seminars; I think they are repeated each year. I think as this sector of activity grows, there is a need for greater information for lawyers in professional development for them to be able to cope with this complex legislation and explain it in terms that the prospective resident can understand.

There are some practical difficulties with anyone giving advice, and Mr Bowyer and perhaps Ms Lane might be able to explain this a little bit more. My own experience, for instance, is the advice that you are giving, no matter how much you have read the contract, is received by your clients at a time when they are particularly stressed and wanting to make an urgent decision about something. The consequences of you telling them about deferred management fees, capital gains sharing et cetera are problems for later on. So no matter how detailed your example might be, 'In 10 years time you might be looking at dropping $200 000 to $300 000' — no disrespect to our clients — that does not sink in because it is not an issue for now. Similar considerations apply when you try and detail other things about the management services agreements that you are often asked to sign as well. They are not appreciated until the problem arrives, the same as with some other contracts as well. What do we do when they arrive?

Yes, there is a need for greater expertise amongst our lawyers. We are happy to put on some more professional development for that. But I suspect that there is this resistance to the appreciation of the full ramifications of the contractual obligations at the time someone is anxious to get into some supported accommodation, however described.

Ms LANE — Good afternoon. My name is Rachel Lane. I would agree there is a real lack of education, both within consumers but also within professional advisers, whether those advisers are financial advisers, lawyers, accountants or people who recommend people to move to a particular village or a different type of village. I have written a couple of consumer publications to try and assist in that education. It is something that I am very passionate about. I think people should be seeking both legal and financial advice when they enter into these contracts, whether that cost should be borne by the consumer or the operator or there is a sharing of that cost.

I oversee 26 financial advisers and 10 lawyers in terms of their education, their ongoing PD requirements and things like that. The issue that we do see a lot of for people going into retirement villages is that it is very difficult for them to identify the right financial adviser, because it is such a complex area, and it is such a niche and it changes all the time. The way in which calculations are performed to calculate the cost of a home care package or to calculate pension entitlement and eligibility for rent assistance — just those very basic rates and thresholds — changes four times a year, and then you have other ad hoc legislative change because retirement villages and land lease communities fall under state-based legislation rather than federal legislation. So it is a lot for professional advisers to keep on top of if it is not something they do every day.

From my point of view I think there should be a bar set, whether they are accountants, lawyers, financial advisers or people who want to provide advice, because consumers need to know that the person they are seeking advice from has the relevant education qualifications as well as experience. I think experience needs to be part of the qualification to have a particular designation attached to them, because you learn a lot more from real-life experience. I have been doing this since 2004, and I have learned a lot more from individual residents moving to individual retirement communities than I have from a textbook or any sort of formal education. That would be my view on that.

I also think there should be some form of document that the government or someone can provide to residents prior to entry around both what their rights are and what their responsibilities are, so understanding their right to cool off, their right to refunds, those types of arrangements, and their rights and responsibilities while they live in the community, because those vary from one to another — that is, whether they need to be involved in a residents committee, they need to be involved in a body corporate or they are not involved in those decisions at all. Likewise on their rights and responsibilities on leaving. I am not just talking about the financial calculations; I am talking about how long you need to contribute to the ongoing fees of running the village when you are no longer living there. Is it apportioned in a percentage term? Those types of things really do vary from one village to another.

I think at the moment the disclosure documents we have in Victoria are great. I attended a similar hearing to this in Queensland, and I know that they look at what we do down here and say, 'You guys have got it right'. For the most part, we do have very good disclosure documents. I just think that there are some things that we could add to that that would really help people in making those decisions.

Can I just say one last thing? When it comes to the deferred management fee, it is the biggest bone of contention and cause of confusion when it comes to retirement community contracts, whether the deferred management fee is being applied in a land lease community or a retirement village.

On the premise that the deferred management fee is part of the purchase price deferred to a future date, I think one way to create transparency around that particular transaction would be to disclose the price with a deferred management fee and a price without a deferred management fee. So say to the resident, 'Okay, your contract for this unit is $450 000 with a 36 per cent deferred management fee calculated over 12 years, whatever that model is. Alternatively, you can purchase that unit today for $650 000 and there is no deferred management fee at the end'. It would mean that operators would need to keep track of two prices. They would need to keep track of the original $450 000 price and the $650 000 price, but I do not think that that would be overly onerous. So capital gain could still be shared in that scenario. That to me would be a very simple but effective solution in creating a level of transparency around these deferred management fees that I do not think we necessarily have all the time at the moment.

The CHAIR — That is a really interesting suggestion. We have not heard that suggestion before. It is a really interesting idea.

Mr BOWYER — If I could feed off some of those points, I look at deferred management fees as a bit like a reverse mortgage. There was a period of time when reverse mortgages were really, really popular because you buy now but you pay later, and I think the idea of what you brought up, Rachel, is very much akin to finding out right up-front about what the real cost of this unit might be.

In regard to capital gains tax, obviously there are different formulas. Some go 50 per cent of a capital gain, 100 per cent of a loss; 100 per cent of a capital gain, 50 per cent of a loss. It is relatively confusing, that sort of scenario. I will hand up for you a couple of sheets, if I can table them.

The CHAIR — Please.

Mr BOWYER — This is real-life stuff. Obviously I have redacted the actual village. If you look at the fees, I will take you through them. This is what people come to us with all the time. It is what is required under the disclosure legislation. But you can see that there are a number of variables there. If you look at basically the top line, you see year 1, year 2, year 5 and year 10. They are the four scenarios. You will see there are projections as to what the sale price will ultimately be. On the third line you will see 'Estimated next ingoing contribution'. You will see the various ranges there. Then you will see 'Minus estimated departure fee', which is really that deferred management fee, as our learned gentleman said over there, whether it is at 2 per cent a year — most of the ones I see are 6 per cent a year capped for six years, but they vary.

Then you have got a range of other costs there. Reinstatement or renovation: a lot of consumers do not understand, 'Well, that must be like a tenancy. You have just got to put it in the same condition in which you bought it'. But it means nothing like that at all. It means if in 10 years time the whole trends have changed, you have got the right to do a home rescue on it and significant costs can associate with that.

When you look at the disclaimer and the fine print right at the bottom, which is as set out in the regulations, it says, 'The estimated additions and deductions are provided for illustration purposes only and may not be relied on by any person. The centre and the manager accept no responsibility or liability for any inaccuracy'. That begs the question: if you cannot rely on it at least to a reasonable level, what is the point of putting this document out there?

The other thing I would say about this is that surely — to pick up Rachel's point — when people are making these decisions, generally they are not making them in isolation. It could be a spouse or a partner. It could be family members who are concerned about their inheritance. I would have thought that if this was in electronic form, a simple Excel spreadsheet so you could change the variables, people could go away and readily see them. I would have thought that this sort of disclosure information could be on a USB. What I regularly find is that I see a client come in with a daughter and they have got a son in Queensland, one in New South Wales and one in the bush. They have a bundle of documents like this, and they have got to make a decision within a relatively short period of time. If it could be electronically transmitted with a variable spreadsheet, again that would be something which would make a significant difference.

In terms of the issue about education, absolutely Rachel and Steve agree with that. The Law Institute of Victoria has obviously done a lot of accreditation. This is a very narrow area, so it is not like some business law specialist, which covers a range of areas. This is a very narrow area. But what we have found with Victoria Legal Aid, for example, is that they require our family lawyers and criminal lawyers to be accredited. I do not

think the Law Institute of Victoria would have any difficulty working, for example, with Consumer Affairs Victoria to come up with a baseline accreditation process so that the CAV website could have all that information on it.

Equally important is financial advice. I think a similar sort of regime — accreditation — could be done. You may work with CPA Australia with regard to that, along with Consumer Affairs Victoria. I think, again, at least people when they looked at the Consumer Affairs Victoria website they could have a level of confidence that those people have passed muster, and as Rachel said, with the changes that can happen up to four times a year, if you had an accreditation process every three or four years at least then you would know that people are keeping up to speed. I think that is important.

As I mentioned last time, I do think that dispute resolution via Consumer Affairs Victoria is pretty meaningless, even though I have become an accredited mediator, in the sense that it does not necessarily get an outcome. VCAT, and we discussed this outside, may be a no-cost jurisdiction, but the reality is that a lot of the retirement villages would come with legal representation. It is not only the cost of legal representation, which is difficult, but also the whole aura of the process.

That is why the Law Institute of Victoria favours more a referral to the ombudsman. The resident would then have the opportunity of giving a statement and putting their concerns in a confidential environment. The ombudsman would then go and do an investigation and come up with a determination. I think you would find that far more effective. So I think there are a range of things we can do, and I do agree that at the highest level what you need to understand is that when people come to see us they do so on a basis similar to like getting advice about a guarantee. The whole idea of the Retirement Villages Act is to encourage people to get legal advice, not for the sake of getting lawyers involved but to ensure that the complex lease arrangements are understood et cetera. I would have thought that having a mandatory requirement that covers relocatable houses, as we have talked about previously, is just as important as retirement villages.

The CHAIR — I really appreciate those comments, and I think the accredited specialist idea is one to really explore in more detail.

Ms LANE — The only other thing I want to add is just about my personal experience of my grandmother moving to a retirement village. One of the benefits that the deferred management fee offers is that people who cannot afford a market price can pay a much lower amount going in and pay a much higher exit fee, and that has always been the intention of the deferred management fee model. Ultimately the deferred management fee is an affordable housing product, so in her case at the retirement village that she moved to she could not afford the market price. The deferred management fee was 100 per cent over six years, and it was in line with compensating the operator for what they were foregoing in terms of what they could do with that capital up-front and what they would have received as an exit fee at the end. I know that not all operators can or want to engage in those types of arrangements, largely for tax reasons — for-profit operators pay tax on the deferred management fee — but it is something that I think should be encouraged in the not-for-profit sector in order to allow affordable housing.

Likewise, whether you are a not-for-profit or a for-profit, if you are charging a deferred management fee and you have someone who has the capacity to pay an amount up-front with no deferred management fee at the end, that person does not require an affordable housing product, so why are we forcing them into a deferred management fee arrangement, which often has negative pension consequences because they are forced to net money from the sale of their former home, which becomes an assessable asset? And it has negative consequences when they leave the village if they subsequently need to move into aged care. They have not been able to preserve the value of that asset, because of the deferred management fee, and increasingly we are seeing retirement village residents simply priced out of residential aged-care beds, which is very sad.

The other thing that happens is they end up paying what I call a double DMF, so they may have paid, say, $450 000 to move into the retirement village. They come out with $300 000, and the price of the residential aged-care bed is $450 000. They obviously cannot afford that. They pay the $300 000 from the village, and they then need to pay 6 per cent interest on $150 000. They cannot fund that from their cash flow, so it gets deducted from the $300 000 they have paid. So it is very much identical to the deferred management fee. It is just that there is a known interest rate around it. So again, having an option where that resident can pay $650 000 up-front and take $650 000 back would alleviate people who are in that particular scenario.

Mr BOWYER — And, Rachel, the other thing I have noticed is that different villages have different policies. If you have to leave for ill health and the rental still continues on. Some villages will have a six-month cap, and others will go on until the unit is sold. So I think that is probably an area also that often does not get listed on that particular diagram but which can have fundamental consequences.

Ms LANE — I think that that ultimately should be part of the legal advice that residents receive in that rights and responsibilities table around: after you leave the village, what are your rights? So can you appoint your own real estate agent? Can you set the price for which your unit sells? Can you get your own tradespeople to refurbish or reinstate? Can you argue that the reinstatement should or should not take place? What are your rights and what are your responsibilities and how long do they last? Do you need to continue paying the ongoing charges forever? Do you pay them for 42 days? Are you entitled to a guaranteed refund of your exit entitlement within six months?

People look at retirement communities in totality. They do not know that when they go to an Aveo village, for example, that is a retirement village, and if they go to a Lifestyle Communities property, they are actually comparing apples and oranges from a contract point of view, from a rights point of view and from a responsibilities point of view. If they could get that information, it might just help them make a better decision about which one is the right one for them.

Ms HARTLAND — You have made so many good points. It has been really interesting. The thing that has come across in a lot of the evidence is the complexity of the contracts, that there is no standard contract and that even within some villages you may have eight or nine different forms of the same contract, depending on when you arrive. What would your suggestions be about having a standardised, simple-to-understand contract?

Ms LANE — Myself personally, I do not like it. I do not think it is relevant. If somebody has moved in on contract A and a different resident moves in on contract B, it is kind of like aged-care residents, where they say, 'How much do you pay as a means-tested fee?'. 'Oh, but I only pay' — it is completely irrelevant. I understand the desire to remove complexity, but I think complexity comes from the fact that people have choices, and I think that of overriding importance is providing choices to retirement village residents rather than pigeonholing everybody, and that is the contract, because I think that is how we have got to the current state we are in with the deferred management fee. At some point in time everyone decided that that is what everyone should do, and now there is very little or no flexibility within that model.

I do not know that it would really matter if there were 20 different contracts in a retirement village. As long as each of the 20 residents that were committed to each of those 20 contracts understood that contract and agreed with the terms of the contract, my argument would be: why does it matter? Why would we want to remove choices to both operators and residents around what they pay, how they pay it and when they pay it? I am not inclined to agree to it.

Ms HARTLAND — But how would you deal, then, with that secondary question about the complexity? Having seen a number of the contracts — I have been in Parliament for 10 years, and I am not a lawyer, but I cannot understand what half of those contracts are saying. So for someone who has absolutely no experience and is in that situation where suddenly they have to move and they are presented with this 70-page contract, what can we do to make, if not a standard contract, something much simpler?

Ms LANE — I think improving the disclosure standards around the contract is what is needed. I mean most retirement village operators do not want to offer 20 different contracts in a village. It is ultimately a legacy issue for the operators. There are some operators who have different contracts because it allows them to take different types of residents. There are some retirement villages that have rental units that are available and permanent units, and there are some retirement villages that have strata title units and leasehold units.

Again my fear would be that if you standardise the contract or say that there must be a one-size-fits-all per village, you would remove that choice from the resident. I am less concerned about the consequence to the operator, because ultimately, as was pointed out, they have quite good legal representation when it comes to those contracts, but you want the residents to have flexibility on their side as well.

Mr BOWYER — Obviously under the amendments which came in in 2014 they forced standard form contracts already. I had the pleasure, or mispleasure, of a former member of this house, Jim Kennan, giving me the task over the four years I spent in government to change the public transport lease — then it was the

Victorian railways lease — from 84 pages to less than 12 pages, via plain English, with the Victorian law commissioner.

As a lawyer — Steven will tell you — it was a tortuous process. We certainly got down to 12 pages, but the problem is that if you get such a simplistic document, then there is lack of certainty about its interpretation. So I am absolutely of the view that it is all about the disclosure regime, knowing full well that these leases are generally going to be, at best, a mutual reflection of the interests of both parties, but more often than not the landlord, the owner, is going to have a level of more power than the incoming resident. But with the proviso that if there is good dispute resolution — and let us frankly admit it, if the ombudsman is involved — again, in the four years I spent in government, every time the ombudsman came to Victorian transport we jumped because we knew we were going to get reported in Parliament, whereas if it just ends up often at Consumer Affairs Victoria or VCAT, it is not of such great consequence. I agree: I do not believe we should be doing any more for standard forms but doing much more for disclosure.

Ms LANE — I think an ombudsman is much more accessible. If you look at the aged-care complaints commissioner and the number of people who access that service and receive really good information, I think something similar in the retirement community space would be accessed, whereas if you put in a hurdle of VCAT or a similar type of hearing, even though VCAT is not a court, to most people's minds VCAT and the AAT are a form of court and they are concerned about the outcomes of it, but they are also concerned about the cost of going through that process.

Mr SAPOUNTSIS — Ms Hartland, I wonder if I can give the committee something else to think about. We have heard the comments about standard form contracts and difficulties with them as well. At the heart of the matter for different solicitors giving advice is protecting their clients' rights. To my mind there may be two or three essential rights you need protected. There is the tenure, for instance, your financial obligations and your entitlement when you leave. I wonder if there is some merit in considering whether we should preserve those rights in the piece of legislation, that regardless of what the contract says, there are certain basic rights that the tenant has and in some ways it does not matter what you do on the edges with all your contracts as well.

For instance, in other conveyancing and property areas now we have in standard form contracts certain warranties from one side to the other. A lot of the business contracts have warranties in there as well. It might be too hard to get warranties in this sort of thing, but as I say, there might be some merit in considering the preservation of those basic rights somewhere else.

The CHAIR — A good point.

Mr MULINO — That is an interesting idea. I think there are some areas like insurance contracts, where I think some core rights are protected.

Mr SAPOUNTSIS — Yes, the Insurance Contracts Act gives you at least two basic rights. There are obligations on both sides, but yes, that is right. One of our difficulties, of course, is that we have got state and commonwealth legislation impinging on this area of jurisdiction, but there is no reason why you could not have a Victorian piece of legislation which is for those facilities covered by Victorian legislation. For instance, no eviction without cause, or whatever it is, might be something worth considering.

The CHAIR — Yes. Thank you.

Mr MULINO — I had one question on the legal side and one question on the financial side. On the legal side I found it interesting that you talked about the market structure of legal advice and that providers are generally receiving advice from four or five firms that have a lot of specialists in this area whereas residents are often receiving advice from probably smaller outfits that are dipping into this area. Are there any other areas of legal practice where you see a similar kind of market structure?

Mr SAPOUNTSIS — You might see it in — franchising comes to my mind straightaway. So the franchisors will have a selection of perhaps a dozen or so firms that specialise in that too, and the franchisees will generally be more disciplined as to where they get their advice from. But having said that, there are certain firms that will specialise in giving franchisee advice and there will be certain firms — for instance, Mr Bowyer will say that he has given advice to a large number of prospective residents in these places. But that is not a dissimilar market in some ways.

Mr MULINO — I guess my question is: if there are other areas where there is a similar market structure, have there been examples of other areas of legal practice where upskilling, stronger CPD and some of the strategies that we have thought about or that you have suggested today have worked?

Mr SAPOUNTSIS — Franchising is perhaps not a bad example too, leaving aside there being a sort of franchisee organisation that helps with professional development for lawyers; it is also a networking thing, so there is a fair bit of professional development there too. Of course the other thing you have is that a backup for everyone is the franchising code, which perhaps is part of that thing I was thinking about of preservation of certain basic rights as well.

Mr BOWYER — But, Daniel, yes, to answer your question another way, we have accreditation. I am a business law specialist, which covers franchising in particular; we have retail tenancy specialists, and similarly to retirement villages, most of the major shopping centres are controlled by — I could put a ring around six firms who do all of those sorts of activities, but we have got any number of accredited retail specialists who are very deep in that issue and spend all their time down at the tribunal arguing those cases. This is really narrow — retirement villages. That is why I think it might be a little bit akin to what legal aid did. They said, 'Well, look, obviously not everyone is going to become an accredited specialist with the Law Institute of Victoria. We're happy to work with the Law Institute of Victoria to build an accreditation model'. I think with CPA Australia a similar model could work.

Mr MULINO — One quick question on the financial side of things, because in a lot of ways it is just as important as the legal — both are essential to get rounded advice in this area. I agree that something like this is very difficult to use, and also given it has got so many assumptions embedded in it, it is hard to rely on. I like the idea of requiring reporting with and without the DMF as one possible way forward here. We have received some advice from a professor of actuarial studies who came up with quite an interesting way of potentially standardising reporting across a wide range of products by using a set of similar assumptions across a wide range of products around longevity and so forth and then basically trying to come up with a rental equivalent or some kind of measure of what different products might look like. There is no simple way forward here, but it did strike me that that approach also was quite interesting in that it might come up with a way of comparing apples and oranges in a way that might be comprehensible by people — a star rating in a sense. Do you think something like that might be a useful supplement to or component of the disclosure documents that are required under law?

Mr BOWYER — It is very aspirational; I agree with that. There are just so many different types of building products used. Relocatable homes are generally made of non-brick-type material; there are weatherboard homes — all of that sort of stuff. I like the principle, but I think there are a lot of variables. I certainly think the issue about capital appreciation, and obviously you will see in this document they have made assumptions about capital growth, is something that could realistically be based upon Australian Bureau of Statistics historical increases in value — that sort of stuff — but most of the operators I see use their own best guesstimates of how properties are going to increase, and equally they go on their own historical knowledge about what the refurbishment costs of these units are, because most of the big operators have been in business for 20, 30-plus years, so they have got good data as to what the restoration and renovation costs are.

Mr MULINO — Something I think might work is having an Excel spreadsheet, plugging in different assumptions and seeing how it is all sensitive to different assumptions. I guess if you have got a good relationship with a financial planner, you should be able to sit down for half an hour with a couple of different options and work through how different assumptions might lead to different outcomes. I mean ultimately something like that might work.

Ms LANE — That is something that my business does. We provide a free service through a 1300 number to people who are looking at moving to a retirement community, and we can tell them what the costs will be so that they can compare apples and oranges or stay at home because they do not like either the apple or the orange. We do that at the cost of the operators, so the operators pay a fee for us to take the information about what their units cost, what their general service charges are, what their refurbishment costs are and what their deferred management fee model is so that we can provide that information to people that are looking at moving into those communities free of charge. It is a program that took us the best part of three years to build and many, many thousands of dollars in software development costs to get it to be able to deal with the complexities. We also calculate people's pension entitlements, eligibility for rent assistance and what their exit entitlement will be.

So there is a lot that feeds through it, but there is no reason why, if you have access to the intellectual property and can afford to pay for the development, those tools cannot, do not or should not exist. They do exist, but it is just a very expensive exercise to develop them.

Mr BOWYER — Daniel, the other thing about that is if there are — and there is, I think — a retirement villages operators owners organisation, then that would be the basis on which common costs could be built in to build a model like that rather than each independent operator.

Ms LANE — You really do need the legal advice, because cost is only one piece of the puzzle. What we would not want to do is incentivise consumers to go for the cheapest but not understand their legal obligations under that price; likewise, we do not want them to go for the most expensive with the expectation that that somehow gives them greater rights and fewer responsibilities, because that is not true either. They really have to be hand in glove in terms of, 'This is what it's going to cost going in, while you live there and when you leave, and these are your rights and responsibilities before you move in, while you live there and after you move out'. That really is what I think consumers should be receiving, whether it is from a financial adviser or a lawyer; wherever that comes from that is what needs to be delivered.

Mr BOWYER — I am smiling only because I had a client, Rachel, just three days ago who came in and said, 'I want to move into this retirement village, and I'm going in there'. I said, 'What about your husband?'. She said, 'He doesn't want to come. He's been living at home for 17 years, and he loves his garden', and she said, 'Frankly, my neighbours from all this time have moved out, I'm just going to be frightfully lonely and I want to move'. You just about need a counsellor to say, 'Well, that's not something I can particularly help you with'. It is that separate personal issue which the family have got to discuss, and hopefully they can reach a satisfactory conclusion.

The CHAIR — Taking that one step further — I think you touched on this, Geoff, when we met last time — the children often do not understand the DMF and what the ramifications are of that as well. There is probably no way you can encapsulate it or deal with them, but you would encourage, I suppose, anyone signing contracts to explain what the contractual obligations — —

Mr BOWYER — In my practice areas — I do not know what the others' are — it is a bit like independent legal advice. I ask the children at some point in time to leave us alone just to talk about, 'This is not about how much of the inheritance you leave; you've got to make the call upon what's best in your circumstances'.

Ms LANE — That is right. Ultimately we do not want to infantilise older people. Older people have the right to make their own decisions, and there is a conflict of interest in children being involved in these decisions, because they do look at the value of the future estate. So I think we just need to be able to present the right information in the right way to enable the consumer group, which is many and varied people who move into retirement communities, to make an informed choice. I do not think we need to be saying, 'Your children need to be involved in this decision', because children can put pressure both ways. They can put pressure for mum or dad or both to move out of the family home because they think that it would be better for them to live in a retirement community, and mum or dad or both are not ready to go. Likewise, they can put pressure that mum or dad stay in the family home because mum or dad have brainwashed their children to believe that the family home is going to be the kids' inheritance and they see it as a way of protecting that nest egg.

I think ultimately where the capacity exists, the decision really does need to be — and all those external forces will come to bear anyway. We are not going to be able to get rid of them. But I certainly do not think we want to create a system where parents have to explain their decision to their children or even have the children involved in that decision. It is ultimately a value proposition for those people, and children or any external party cannot weigh that scale.

I am always telling the lawyers and the financial advisers, 'Our job is to explain the rights, responsibilities and the cost. It's the client's job to weigh the scale on whether they believe that that is a value-for-money transaction'. 'Is it fair? Is it reasonable? Do you want that? For that price and those terms and conditions, do you want that product?'. Everybody else just has to stand back at that point.

The CHAIR — I suppose post that point, post the decision being made, post the contracts being executed, you would want parents to explain to their children what they have entered into so that at some future point

down the track, if the children are dealing with these issues, they do not have unrealistic expectations or they understand what the contractual obligations are?

Ms LANE — I just do not think older people are answerable to their children.

The CHAIR — No, no.

Ms LANE — I just think they have got the right to make that decision. I understand that the children may be surprised. We see it all the time, that the children are surprised that that is the decision that their parents made, knowing what the cost would be. But it does put a pressure on the parents to justify that decision, and I just do not think they should have to do that. I just think they should be allowed to make that decision for themselves.

Ms HARTLAND — Can I follow up on that, because it is one of the things that we have heard several times. In fact, a friend told me a horrifying story this morning. Her father moved into a village on Saturday and died the next Saturday. Their dealings with the village have been just atrocious in terms of all of those issues about how long can it be vacant for, no attempt to actually sell it and now they are talking about it having to be refurbished, although he was actually only in there for a week. They are talking about $60 000. I totally take your point about it being the parents' decision about what they do, but what do you do then to assist the adult child who is then left to sort out all those problems with the village?

Ms LANE — Ultimately there is not really any financial planning advice involved at that point; that is pure legal advice. That is where I think there is a specialty in law to help, whether it is to mediate that dispute or take that dispute through the relevant channels. Again, an ombudsman might be a good solution in terms of saying that contractually there may be an obligation to refurbish, but is it fair and reasonable to expect that that obligation exists within the first — —

Ms HARTLAND — Two years or — —

Ms LANE — That is right. It is kind of like throwing darts in the dark. You have got to draw a line somewhere. Where that line is I am not exactly sure, but I think there needs to be a reasonableness around the contract so that people are not in that situation, because that is completely unfair.

Ms HARTLAND — We have heard a number of stories about when they took that refurbishment. You think that that is steam cleaning the carpets and giving it a paint, but no, it is taking the kitchen out and taking the bathroom out, replacing them and then the adult children being left with a bill of $100 000 for something that mum or dad have been in for a year.

Ms LANE — There tend to be two words that the industry use which sound very similar but have very different connotations. The industry use 'reinstatement' and 'refurbishment'. Reinstatement is what most people think refurbishment is, which is basically put it back the way you found it — so a lick of paint, any damage that you have done repaired and steam cleaning carpets. Refurbishment means bring it up to today's standard, whatever that standard is. People do not understand that those two words have very, very different connotations.

The problem is that they think that every retirement village contract — in some ways, with land lease communities you do not get that issue, because people own their home, so they get all of the capital gain. If they want to paint their walls purple, they suffer financially as a consequence of that, or if they do not want to bring it up to date in 15 years time, then financially they bear the fruit of that decision. But in retirement village contracts those two words, for a prospective resident you are talking about a difference in reinstatement of $1500 or $2000, something like that, versus refurbishment, which can easily be $60 000 by the time you pull out all the carpet and put in a new kitchen and a new bathroom. So it is very different.

Mr BOWYER — If you look at that chart, you will see in the fourth line down, 'Minus estimated reinstatement or renovation costs', so they leave the door open there. I think that is where — I do not want to use legal jargon — the term contra proferentem concept should be. If they have only been there for 12 months, then surely it is going to be more reinstatement rather than renovation would apply. If you have a determining tribunal, if they want to call expert evidence, they can, and that would overcome the problem.

My practice always is to give written advice to the clients before they come in. So I get the contracts and give them the written advice. They generally provide that electronically to their children — I have no issue about that — so the children generally know what is going on. Generally once I have had the pleasure of meeting the

children, who often have the powers of attorney, financial and medical, I say, 'Look, I just want to spend 15 or 20 minutes with mum'. I had one case where point-blank the children refused that proposal, and I thought, 'Okay, we have a looming problem here'. But by and large most children respect the view that the parents have that final say.

Ms LANE — And I think that issue around 'Is it reinstatement? Is it refurbishment?' could be dealt with in an document that outlines the rights and responsibilities. Perhaps you classify the term 'reinstatement', classify the term 'refurbishment' and get an estimated cost of that.

Ms HARTLAND — If you did not have a standard contract, but you had a glossary of terms within the contract; that is interesting because I had not thought of that — and of course those two words are completely different.

Mr SAPOUNTSIS — We have probably strayed a little bit from what we were going to talk about today too. No, it is all right. But if I just pick up another general point as well. I suspect the answer to this issue we have just been discussing is Mr O'Donohue's point about advising someone, because the issues we are talking about now are usually dealt with by the executor or the children of the resident. My own view, for what it is worth, is that they should be aware of what the contract says beforehand if possible. Of course they cannot take the advice or give the instruction on behalf of the parent, but there is no harm in making them aware of what the contract says at some stage because they are the ones that will be dealing with the dispute. That probably would be helped by a glossary, but everyone probably would be as well.

Ms HARTLAND — Love a glossary.

Mr SAPOUNTSIS — Yes.

Ms LANE — Yes.

The CHAIR — Mr Sapountsis, Ms Lane and Mr Bowyer, thank you very much for your preparedness to come back before the committee. I think given the issues we have encountered since the first time and second time, it has been most helpful hearing from the Law Institute of Victoria again, so thank you very much.

Mr SAPOUNTSIS — Thanks for having us.

Witnesses withdrew.