

TRANSCRIPT

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the retirement housing sector

Mornington — 5 October 2016

Members

Mr Edward O'Donohue — Chair

Ms Nina Springle — Deputy Chair

Ms Margaret Fitzherbert

Mr Daniel Mulino

Ms Fiona Patten

Mrs Inga Peulich

Mr Adem Somyurek

Ms Jaclyn Symes

Participating Members

Ms Colleen Hartland

Mr Gordon Rich-Phillips

Staff

Acting secretary: Mr Patrick O'Brien

Witness

Mr Glenn Birrell.

The CHAIR — I would now like to welcome Mr Glenn Birrell. Thank you very much, Mr Birrell, for joining us today. Before I invite you to make some opening remarks I will just issue the same 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. The transcript will ultimately be made public and placed on the committee's website. We have received and read your submission. Thank you very much for that. We have allowed approximately half an hour for our time today. I invite you to make some opening remarks, and we will have questions thereafter. Thanks again for being with us.

Mr BIRRELL — Thank you for the opportunity to address this public hearing. My name is Glenn Birrell. I am the son-in-law of Jacqueline Acciaccarelli, who is a resident in a strata title village in Parkdale, for the benefit of the others in the room today. I feel privileged to have been selected to appear today as one of a relatively small number to be able to do so compared to the 750-plus submissions made.

When I received the email from Patrick O'Brien and later spoke with him about the process, he said to restrict the opening statement to 5 to 10 minutes. I sat back and said, 'How am I going to summarise my experiences and continuing journey in the retirement housing village sector over the past four years or so?'. My call to action was my mother-in-law, a retired schoolteacher for 30-plus years, and a fee hike for her of 127 per cent in the financial year 2011–12 in her village. I have researched and amassed more documents, written reports and spent over three and a half years in a battle — and that is the only way you could describe it — at the people's court or people's tribunal, VCAT, which is more than the time spent by me in investigating and prosecuting the majority of major criminal investigations undertaken during my previous life as a police detective and post as a private investigator.

There is a saying that butting your head against a brick wall only stops hurting when you stop. Well, I am not stopping. Justice will prevail. There is an element, and I must stress an element. Not all retirement villages are like some unfortunately that are run by rogue or cowboy operators who ride roughshod over potentially one of the most vulnerable sectors in our community, the elderly. They prey on them and they push them to the brink.

One lady in her 90s has left an indelible mark on me. In this journey to achieve fairness I reached out to the media. A *Current Affair* segment program was produced. This lady was interviewed, and she expressed her hardship, saying that she forgoes buying clothes so that she can eat. Her pension does not allow her to do both. She cannot afford entertainment, and the retirement village does not provide that, and she has got too much pride to be part of that process anyway.

The management company, after all, is showing her no compassion. In the same segment, the village manager openly admitted he provides no services, noting even the 24/7 emergency call system is monitored by a third party. His only task is to place invoices and letters into envelopes and place them in the residents' letterboxes. Requests, and repeated requests, for a list of services of the retirement village manager living on site have been ignored. At the retirement village company annual meeting on 31 August this year, it again increased its fees, from approximately \$428 to \$464 a month, or an increase of \$36 a month, almost 8.5 per cent.

But there is more. You now have to pay quarterly, while all the residents were previously obviously paying monthly; no say in that at all. Retirees are at different stages of their life, and we can see evidence of that in this room, and so too are there finances. How a pensioner moves from monthly to quarterly payments is a very big challenge for them. 'It is not our problem', says the management company, and debt collector notices are now being issued, despite there being arguably no power to do so under the retirement villages legislation.

The Retirement Villages Act and regulations, and the regulations which are contained in the CPI calculation and what it includes and what it does not, simply do not work. The system is failing. A significant number of people are currently living in retirement housing, if you can call it that, given some of the imposts and the challenges that face many of those living in the retirement housing sector.

The regulator, CAV, has powers — it issues protocols, as we have heard this morning — but it will not use its enforcement powers. There are continual breaches of the Retirement Villages Act, and I challenge you to find recent prosecutions. You have enacted legislation that has powers, so why do you not use them. They revert to mediation, and that only works if both parties agree.

In the village in which my mother-in-law resides, they attempted mediation and said, 'It's too hot in the kitchen here. We're out'. CAV's response was, 'Sorry to hear about your plight; off to VCAT you go'. It is very difficult for these people to then have to try and stand up against the bully, which I suppose is the point we heard earlier in relation to dispute resolution, which you may want to ask more questions of me in relation to and I may be able to address those.

That leaves VCAT, which is not the people's tribunal; it is simply the domain of solicitors and barristers. I spent 3½ years there and achieved very little, other than to watch the blood drain from the faces of the elderly residents who attended that hearing day in, day out over many months, which achieved nothing for them.

I am frustrated, because I have tried to help these people, but there does not seem to be anybody in government or in its departments that is doing any heavy lifting. Lobbying politicians has been unsuccessful to date. I have been to ministers and I have been to local members, but hopefully the tide is turning, as shown by this inquiry and public hearings. So as I say, I am frustrated, but I am resolved to right the wrongs. It is in my DNA, and I will continue to push for a fair and equitable system. Why take action? The retirement housing sector is not only the biggest growing sector in Victoria but also in Australia. It is big business and very profitable. More equitable arrangements are required for those retirees and operators. It needs new legislation, regulation, a new regulator, a new arbiter, funding and robust resources.

I will mention my top 10 from my experience of the retirement housing sector. I will not cover these in depth as my written submission is before you to allow you time to ask more questions of me. No. 1 is a complete overhaul of the Retirement Villages Act and the regulations, which should be done in tandem with the current review of the overlap between that act and regulations and the Owners Corporations Act. No. 2 is greater transparency in financial audits — and I mean effective audits and accountable audits. No. 3 is the licensing of retirement village operators and No. 4 is the overhaul of service agreements — the 2014 amendments simply did not go far enough. No. 5 is new legislation to address the diversity of retirement housing types. Providing regulation of deferred management funds and mandating maintenance and sinking funds. No. 6 is effective and efficient dispute resolution procedures. No. 7 is the capacity to appoint and remove the retirement village manager in strata title villages. No. 8 is the removal of CAV as the regulator; its decisions are not binding, and other than providing guidance it serves no purpose. No.9 is the establishment of an office of retirement housing; and, coupled with that, no. 10, the creation of a retirement housing ombudsman.

The CHAIR — Mr Birrell, thank you very much for your comprehensive analysis and submission. I just have two questions. First of all, why do you think it is that CAV do not use all the powers they have at their disposal? Secondly, what justification does the operator you referred to provide to justify an 8.5 per cent management fee increase?

Mr BIRRELL — In relation to the first one, some of my former colleagues in Victoria police are in consumer affairs. I have tried to reach out to them. I compiled a brief of evidence in relation to the failings of this village, and the repeated breaches of various sections of the legislation. When I say 'a brief of evidence', that is based on 30-odd years of doing this type of work — ample evidence on which for them to act. They prefer to look at an education model, even with past breaches. In the case of this village, they had a breach in 2011 for failing to have an annual general meeting, they committed the breach again in 2013, and they gave them another warning. That is not satisfactory. It says to them they can do what they like with basic immunity: 'They're not going to prosecute you. Go your hardest; we don't care'. And that is what I am finding. I do not understand why they will not do it. There must be a return to the carrot and stick approach. Good villages should be rewarded; those that are not should be brought up to standard. It is as simple as that. And in relation to your second question?

The CHAIR — Increased fees?

Mr BIRRELL — In relation to the increased fees, there is no resolution to that. This is why I am frustrated. I look at these people who I have got a lot of respect for. Some of those people have come from very senior jobs, and they all have contributed to society, whether they are being parents, mothers, fathers. We have got a retired naval engineer and people who have served their country. My own mother-in-law spent 27 years as a school primary teacher. What a value-add to the community! They do not get any respect there. They just increased by 8 per cent. The 8 per cent in this village has been largely brought about by a decision in 2012 to introduce a charge — which has not been applied since the village was established in 1987 — of rent. They increased the rent last year from approximately \$19 500 to this year \$21 500. They argue, and VCAT are not

prepared to look at it, that rent is part of an employment cost and therefore is outside the CPI increase. I put it to you: is there any rental property that was rented last year for \$19 500 last year where you could go to the tenant and say, 'This year you are going to have a \$2000 increase'. It would not happen.

Where do these people go? You can lodge an application with CAV. They will say, 'Hang on. No, that is outside of the CPI calculation. Go away'. Or they might say, 'Let's have a bit of a talk around the table'. Now, they may or may not turn up to that discussion, and if they do turn up, they will make some suggestions that perhaps they should do the right thing, but they will not prosecute them. So that is your answer. They can do as they please. So we need a new model. It is broken, and it needs to be fixed.

Ms SPRINGLE — Do you have a model in mind?

Mr BIRRELL — I have looked at a number of villages, and coincidentally at the moment my parents are looking at retirement villages and I have been in and assessed a few of them. I think there are some good examples out there. I still think that the fact sheets have got a way to go. It is a free market, and I do not think we should discourage that. I note some concerns of the people here, but this is still a lovely village. There is a difference; you need to distinguish between inner metro and outer metro.

In inner metro I look at the Ryman village — the Weary Dunlop village. It is taking a very different approach, the same as this village, in that — and sadly these are probably not the right words — you need one-stop shops, and this is where the new future of retirement housing needs to be. You should be able to move into independent living — move to, say, serviced living and then move to aged care and respite care. Villages such as Weary Dunlop offer that.

But when it comes to the fact sheet, which was brought in as an improvement, there is still a lot of confusion. A lot of that falls back on the family members to try to work their way through that. At Weary Dunlop for instance, or with that particular model, they have a 20 per cent deferred management fee. They keep all the gain. Here I hear they keep half the gain. It is very difficult for people in their senior years to then try and do a calculation. I compared Weary Dunlop, which is the Ryman Health Group I think it is called, and the Lend Lease one down at the Classic Residences. They are what I call the future. That is the way I see it anyway, because I do not think you will have these sprawling unit types, because you do not have the land in inner cities.

I think what you will see is high-rise, as in apartment-type living. That is the way to go, where you can get 400 people living in the same space where you might have 20 units. Because the sector is growing. The amount of people living longer is well known, so it is going to happen. That is the model I think it is going to move to, but it has to be the complete package. The difficulty with retirement villages — —

Ms SPRINGLE — Sorry, when you say the complete package you mean that transitional — —

Mr BIRRELL — Yes, transitional. I think for inner Melbourne, apartment types will be the way forward because there is not the room there. Also, when you get into your senior years — I did not hear any of the residents talking about that here, but this is a vast complex — how do they get from their properties at the far end of this complex to, say, the community room for their evening meal, for instance, and those types of facilities? I tend to think that. But, as I said, there still needs to be some work done around the model and how you look at that deferred parment, because it is very hard to compare apples to apples at the moment with the way it is.

Mrs PEULICH — I do not have a lot of faith in bureaucracies or sometimes even politicians getting reforms right. So my concern is that you are advocating a complete overhaul — you know, a toss-the-baby-out-with-the-bathwater approach to fixing up some of those issues. Sometimes that can take years to get right, to finesse, to bed down, so I am a bit more cautious. You mentioned that there is an emphasis on education first of all rather than on legislation and cracking down. That sort of underpins a lot of the complaints mechanisms that operate in various sectors — the softly approach and the mediation through to enforcement on the other end.

If we are looking at the existing system, you have got mediation and you have got VCAT, which was intended to be a low-cost platform for citizens to gain justice. Obviously things have moved on from there. Is there anything that can be done to build in additional steps or fill in gaps within the existing system rather than advocating a complete overhaul, which, again, could take 10 years to get right, if we are lucky? Any comment?

Mr BIRRELL — I am a little bit more optimistic. I do not think it will take 10 years.

Mrs PEULICH — I have been in Parliament for 20 years, and I am telling you I am not that optimistic.

Mr BIRRELL — But the point I am making is that you need an office of retirement housing. It may be an adjunct to the existing office of housing, but you need that. CAV is not the answer unless they are given a significant shake-up. I wrote to the then minister, Mr O'Brien, when he was in power, and he just simply fobs it off — not prepared to do the hard yards. In the village in which my mother-in-law lives there are about 28 residents, but there is only one village that falls within the local member's area. That is 28 votes. That is no biggie. Do not listen.

I think there is a need for an overhaul. I take on board that the challenges are that you need effective resolution. You do need an ombudsman for this and a properly staffed one because that will be your immediate step, and then you build the infrastructure around that. Once the ombudsman is in place, you can get some binding decisions. You cannot get one out of CAV. It will not turn around and make a decision that is fair — and I am not saying just to the residents but also to the owners. These people do not have time on their side, as sad as that is. Why does somebody in their mid-70s want to spend two or three years in VCAT? Why do they want to waste their time going along to mediation at CAV and they come away and say, 'Please do it'?

Mrs PEULICH — Mr Birrell, what is the nature of most of the complaints? Are they contractual?

Mr BIRRELL — They are contractual as well. That is one of the things I think still needs to be resolved. We have got service agreements in place where you are in breach if you die. What is going on there?

Mrs PEULICH — I consider that to be very serious.

Mr BIRRELL — Yes, so they need to be made simpler, and they need to be made more equitable to get that balance back.

Mrs PEULICH — So education is an important part of the process, but you are saying we also need to beef up on the enforcement.

Mr BIRRELL — We certainly need more of the carrot and stick, because we do too much paying platitudes to these things and not taking effective action.

Mrs PEULICH — One last question: you said there was a need to mandate sinking funds. Could you just talk around that little bit more?

Mr BIRRELL — I think that strata title villages may become a thing of the past. The one that I refer to in which my mother-in-law resides got too hot for the retirement village manager, who was filling both hats. He was also the owners corporation manager. It was appointed when there was a body corporate of one. We have still got a lot of these strata title villages in the system. What I mean by that is that when they were built, they set up a sister company. They had a body corporate of one, and they voted the sister company — the same director and the same people, but a different name — to be the management company. Now they are entrenched. How do you get rid of them? You cannot get rid of them because you have got this complicated sum: well, we have got 25 people in here, and some have been here a few years. Who is going to pay out the deferred management fund to the buyer, if you like, to replace them? So we have that particular issue that we cannot deal with. Sorry, going back, what was your question?

Mrs PEULICH — Mandating sinking funds.

Mr BIRRELL — In relation to this village, the management company decided in 2009 it no longer wanted to be the owners corporation manager, and it was only at that time when an independent or a third-party owners corporation was incorporated that the full level of decay of that village was uncovered. Over \$300 000 worth of repairs were required. They have just absolved themselves of that. They have had no problems in collecting their deferred management fee for the 20-odd years prior, but they have not put any money aside. There is a need for that. There are a lot of these villages that are in decay, that need to be repaired and that have owners corporations in place but have no sinking fund and no maintenance fund. How are they going to get up to standard? They do not meet standards in relation to things like trips and falls, railings, balustrades and lighting, all of which, when these villages were built in the late 1980s and early 1990s, were not required. This

management company has decided, 'We'll step back and now hound them for not having grappling hooks on the roof and not running an effective OHS committee'. These are people who are retirees. They cannot manage that type of process.

In terms of a maintenance fund, yes, it is necessary. I think some of the newer models — some of the leaseholds, like the Ryman group, Lendlease and a few of the others — are putting in place maintenance funds. They are putting back, and that is the thing. They are putting back some of those deferred management fees into those villages.

Ms PATTEN — Thank you, Mr Birrell, for your continued passion and advocacy in this area. When reading your submission I was very pleased that you were around to be doing that work, because it was significant. Just on that sinking fund and your notion that a strata title model is probably something that is going to become obsolete in the future, I was just wondering whether in that case we would be better to move those strata title properties back within traditional legislation around body corporates and within our traditional strata title legislation that does insist on sinking funds and that does have a structure for any body corporate rate increases. So rather than somehow exempting these bodies through retirement legislation, we would actually return those ones to existing legislation. I think that probably meets Mrs Peulich's concerns about trying to reinvent everything.

Mr BIRRELL — Unfortunately what has happened in the retirement village in which my mother-in-law is living is that because they have continued to hike the fees, they have depressed the value of the units. I put that in the submission. So we have got a situation in that village now where there are eight strata title units, eight of which have now been leased. So now you have got a hybrid model. One of the terms of reference spoke about the diversity of retirement housing models. That is not being addressed under the current legislation.

In terms of your question and in terms of whether we can move them back under the owners corporation structure, I think that will be challenging. I think what needs to be done is that work that I understand is being done in terms of the review of the gaps in the current retirement village legislation, by looking at reference (2), should be incorporated. I think that is a better way to go. For example — and I know the point you are talking about — if you look at bank accounts, you have got to have specific bank accounts which the fees go into. It makes it very simple. They become like a trust account, and then the money is out of that. It is a very simple calculation. In the village my mother-in-law is in, there are 25 line items. It is not rocket science. I do not know why people do not get it. Money goes in and money goes out. There should be a nil-none balance at the end of the year. That is where the work needs to be done, and those provisions, you are quite correct in saying, exist under the owners corporation. That retirement village act is just lagging.

Ms PATTEN — I just have one quick question. I noticed in your submission that at one stage — we were talking about an 8 per cent increase — but back in 2012 there was a 120 per cent increase. I just wondered what sort of amount was your mother-in-law expecting to pay as a monthly fee? What percentage of her income? She obviously had worked that out.

Mr BIRRELL — My mother-in-law went into a no-frills retirement village. She made a decision about that. She said, 'I don't want the hairdressing salons. I don't want visiting doctors. I don't want the grounds that are there'. She thought a couple of hundred dollars a month was reasonable, and that is what she was being charged at the beginning. Just quickly, and I know we are pressed for time, when you look at the 127 per cent increase, some of that was due to the behaviour of the actual retirement village manager themselves, because they took it out of an enterprise bargaining, where you had a manager who was being paid under that process, and they took it into the aged-care award model, so that brought some knock-on effects.

But they have taken it one step further, and they have now introduced things like fully paid accommodation. So all the rent is paid, all the utilities are paid — electricity, light, gas, water — and pushed all those costs, whereas previously it was only a percentage of those and, if you are being fair, only a percentage, but there is nowhere to take that fairness argument. So in terms of answering your question, she felt that a couple of hundred dollars — she has been a widow for over 50 years; single woman, single pension — was what she could afford. It is just through stealth that they have increased it by 127 per cent. Does that answer your question?

Ms PATTEN — Yes.

Mr MULINO — I have just a follow-up question. One of the most common complaints we have received is about large unilateral fee increases across a range of different accommodation types. I am just wondering: what particular mechanism do you think would work best to contain fee increases and make them as transparent as possible?

Mr BIRRELL — There are two parts to that. I suppose the first thing is that what would contain them is obviously putting in place effective measures so that they are properly regulated and audited as to what they can and cannot increase and by what percentage. The challenge with the current legislation under the retirement villages act is that the auditing powers there are farcical, basically. There is one section — 34(5), I think it is — and you cannot challenge even the independent report that the owners have to pay for. If you ring the auditor, he will not take your calls. If you send a list of questions to the auditor, he will not answer them.

So you call out for help. Okay, where do we go for help? We go to ASIC. ‘No, we don’t regulate retirement villages. Sorry, can’t help you’. So you write back to them and say, ‘But surely this is conduct unbecoming of a registered auditor? Surely he should answer his phone or answer a letter?’. ‘No, no, no. That doesn’t fall within those guidelines’. So you go to CAV. ‘Well, there’s no template for how that audit should look and what should be in it, so we can’t help you’.

We need to borrow some of the things that already exist, as was your point, Fiona, in relation to what is already existing within the owners corporation: where they do have to comply, they have to provide records which should be accessible. Does that answer your first part? Does that answer your question or not?

Mr MULINO — Yes. I think it is just a matter of trying to dig down, and this follows up also on some of the points that Mrs Peulich made. I think with fee increases it is just going to be interesting to think about some of the particular mechanisms that we might think about in terms of legislative reform.

Mr BIRRELL — I agree. It is a challenge. I can speak, I think, intimately from the experience that I have had — I have been doing my work for a very long time in terms of investigating fraud and so forth — you can generally sniff out pretty quickly what is going on. Now, with some of those charges that have been applied not only by this village but by other villages that have asked me to look at their accounts, it is not rocket science. You can see something is going on. Like in this village, for instance, the administration manager charges for administration services, and they charge \$7000 in one month. So you ask the question, ‘How do you expend \$7000 in one month?’. ‘Oh, that is amortised over the whole year’. ‘So, what — so you’re charging an advance? And how do you charge that — is it on an hourly rate, a number of hours?’. ‘Oh no, we don’t have to answer that. We don’t need to tell you’. A lot of that is going on.

So I think some of these fee increases are legitimate and can be explained, and some, I think, are gilding the lily, if you like, just to extract more fees. They are not happy enough with the deferred management and other fees that they receive. I guess it is a challenge, but I think you need a proper auditing regime and one that is followed up. Again, I challenge people here to tell me of a retirement village which CAV has gone into in the last 10 years and audited their accounts. They do not. So it is the old story — if you are asleep at the wheel, they will play and they will increase their fees with impunity because they know they are not going to be chased or prosecuted.

Mrs PEULICH — Just in relation to auditing, the department is not going to go and try and find work for itself because consumer affairs has got complaints right up to the back teeth. It does not matter which sector. Consumer affairs is not necessarily going to go and look for complaints to investigate because they have got complaints right to the back ears. It is one of those departments that attracts all sorts of complaints from all sorts of sectors. But your concerns about auditing practices and management practices may be legitimate. Would a recommendation from this committee for the Auditor-General to have a look at the sector to see what the acceptable practices are and what the acceptable charges may be helpful?

Mr BIRRELL — It would be helpful, but it needs to have a follow-through enforcement arm. That is the challenge. I understand what you are saying

Mrs PEULICH — Some of those recommendations will come out of it.

Mr BIRRELL — Having worked in a policing environment for 20-plus years, there is no shortage of work to be done. There is no limit in terms of the number of complaints you would receive. It is very difficult when

people — the residents and the owners — challenge the validity of them and then put the complaint through and are told nothing comes out of it. Does that mean we give up and do not try?

Mrs PEULICH — But if we have a look at the system-wide administration to see what are the acceptable practices and where are the excesses, where are the deficiencies, I think that is probably necessary before we can come in with some specific recommendations. Would you agree?

Mr BIRRELL — Yes, I would tend to agree with that, but there is existing legislation that is there. It would be good if there were a few penalties because that will smarten up their footwork pretty quickly as well. That should reduce the offending, and that is why the Ombudsman would be good because they can make a decision on these complaints.

The CHAIR — Mr Birrell, I am sorry we are out of time, but thank you very much for your evidence today and your detailed submission. As I said at the introduction, a draft version of the Hansard transcript will be with you in a week or so. Thanks again for being with us.

Witness withdrew.