

TRANSCRIPT

LEGISLATIVE COUNCIL ECONOMY AND INFRASTRUCTURE COMMITTEE

Inquiry into the Commercial Passenger Vehicle Industry Act 2017 reforms

Melbourne—Wednesday, 31 July 2019

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WITNESS

Mr Denis Nelthorpe, Chief Executive Officer, Westjustice

The CHAIR: Good afternoon and welcome. The committee is hearing evidence today in relation to the inquiry into the Commercial Passenger Vehicle Industry Act 2017 reforms. All evidence taken at this hearing is recorded by Hansard and is protected by parliamentary privilege. Today's hearings are also being broadcast live on the Parliament's website. Therefore you are protected against any action over what you say here today, but if you go outside the room and repeat the same things those comments may not be protected by this privilege. Before you begin, can you please state your name for the Hansard record, and allow us some time to ask questions. Welcome.

Mr NELTHORPE: My name is Denis Nelthorpe. I am the CEO of Westjustice, a community legal centre based in the western suburbs of Melbourne. Thank you for the opportunity to address you. I am going to limit my comments to the operation of the Fairness Fund, with one possible exception around some insurance issues.

In 2011 Westjustice—or in its earlier form, Footscray Legal Service—began operating a legal service because it became aware that a significant number of taxidriviers and some owner-drivers were being caught up in what I considered to be essentially a scam on insurance. Although we took a range of problems, most of our cases for the next four or five years were heavily based around trying to solve insurance within the taxi industry. The reforms included provisions to make significant changes to the insurance. By and large they have worked—although I have to say we have recently been approached by a number of drivers driving for Uber in circumstances where the insurance arrangements appear to have failed, and we are currently making inquiries. We do not propose to continue the legal service, so I am hoping whatever problem there is Uber can resolve it without needing to engage a legal service.

After we had been operating the legal service for about five years we made submissions and were engaged all the way through the reforms, and there was a small fund—the name of which I forget—before the Fairness Fund. It was a \$4 million fund. We assisted a small number of applicants, and the comment was made that those applications were considerably easier to deal with than some of the others. When the government and the department determined to operate the Fairness Fund, they contacted the legal service and asked whether we would agree to assist applicants to the fund to prepare their applications. That was for a substantially different group, because our service had largely dealt with drivers and owner-drivers—the term owner-driver was a bit of a misnomer because we actually discovered many owner-drivers did not own anything; I will not bore you with the details—but licence-holders were not a significant proportion of our clientele. However, we were aware that the proposed changes were going to leave a significant number of people in hardship, so we were happy to take on the task. I think we provided a report on our work with the Fairness Fund which has numbers.

But I would like to make three comments about the Fairness Fund. The first is that we were a legal service and we were always intending to operate in the mode of a traditional legal service, which was to focus heavily on those people who were in hardship and who clearly had a lack of access to the support they would need to make an application to the fund. That created a bit of a problem for us, in particular because legal centres—historically and now under our insurance—certainly are not intended to assist businesses with family trusts, and there had been some pressure to say even that where there were companies we would refer them off to the accountant or lawyers who set them up. We were not going to apply that in its entirety, because there are now cleaners who operate companies and if you excluded everyone who operated a company it would be a bit harsh. But we certainly felt that where there were family trusts and where there were significant corporate entities, whoever set those up would probably know more about the finances than we would anyway.

The second thing I want to say is that because we had agreed to assist applicants we felt that we should not wear two hats at once, so we were reluctant to buy into the way in which the fund was run. That certainly does not mean that we agreed with all the decisions they made. One decision they made that I thought was probably a mistake was that to some extent they encouraged anyone who wanted to to make an application, even if that application had little or no chance of success. Because we, from the very outset—for those people who we thought on the criteria as we understood them had no chance of success—were saying, 'Well, look, there's not a lot of point in making an application if it's got no chance of success'. When the department and KPMG

indicated that they, you know, did not want to discourage anyone, we took the view that we would say, 'Well, we still don't think you've got any chance of success, but we've got some documents that will help you prepare one if you want to put it in in your own right'.

I think there were some consequences of encouraging people to make an application even if it could not succeed. The first is that I think it encouraged a belief that there was some chance of getting money from the fund even if you patently did not meet the criteria. The second is that I think it encouraged applications as a campaign tactic. I do not think anyone can criticise that. I clearly met people, quite sophisticated people, who said, you know, would I help them make an application in circumstances where they could not possibly have succeeded. The one problem with that was that I think it delayed processing those people who had applications that were always going to succeed. So our view was that we would advise them if success was unlikely and say, 'You can still make one. You can either go to your accountant or lawyer, or you can make it in your own right. We'll provide you with some documents to assist, but we won't actually do it for you'.

The third thing I want to mention is what I consider to be a serious failing of the fund, one which we had alerted the department to at the time of the first small fund, and that was the failure to reach agreement with either Centrelink or the ATO as to how they would deal with those funds. In reality the decision of the ATO did not really become final, as far as I can see, until effectively after the application process had been completed. Now, saying to someone, 'Yes, we're going to give you \$270 000' without saying, 'And the tax department, the tax office, is going to take a third of it' is in my view unhelpful and probably unfair. It created all sorts of problems.

We received further funds, as I have said in the submission, to negotiate for about 50 of the most desperate of the licence holders. We actually had arguments with some of the banks, who said, 'Well, they've got \$250 000'. We said, 'No, they've got \$250 000, less what they end up owing the tax office'. It is also worth pointing out that because of the time lines for making a tax return and the time lines of the fund many of the successful applicants were not going to receive a tax assessment on those funds for a period of 12 months or 15 months after they received the monies. Now, to say, when they have got massive debts to financial institutions, that they should put \$80 000 into a fund and leave it there to see what they end up owing the tax office was, I thought, pretty unrealistic.

We effectively negotiated some arrangements with the banks to pay down the debt but allow the loan account to be reopened if they needed to reborrow the money to pay the tax office, but it is fair to say that the funds were often given on the basis of what someone owed. We would negotiate with the bank but have to say to them, 'Look, there's an almost certain likelihood that you're going to get a bill for anything up to \$80 000 to \$100 000 in 12 or 15 months time'. And there is a difference between 'You might have a tax liability' and 'You've got a tax assessment'. I cannot help thinking that there would be some justification for reopening the fund to allow for a payment of the tax assessment that came out of it. I should say that the clients I am talking about are often people who have lost everything or, if they are lucky, have retained their own home. If you are 60 to 65 and we have managed to negotiate away your debt but you then get a tax bill for \$80 000 or \$100 000—realistically you are not going to earn that driving a taxi. I do not want to be too unkind but KPMG were no doubt paid a small fortune to help with it, and I would have thought that getting the tax implications of it right was something that ought to have occurred.

I should also add that there was a problem with Centrelink. Some of our clients were surviving on tax benefit A, but they were told that once they received those funds, they would no longer receive it, and their income dropped by the amount they were getting from the tax benefit, which is a significant amount of money, particularly if you are in hardship. So the failure to get that right was, I think, at a minimum, really unfortunate. I might add that I also find the idea that those monies were taxed as income—we have a small number of clients who applied to the fund as leasing the government \$30 000 licence, but the vast majority were people who had purchased a licence, and the monies they received in virtually every instance was related to the loss of the asset. So I think leaving that question of the tax office—the likelihood of making a request for payment—was a really significant failure.

Aside from that, we found the process reasonable, but there were certainly significant numbers of people within the industry who could not have completed the process without our assistance. We certainly had a significant number of clients who essentially lost everything. Now I have said at a previous inquiry we did not lobby on how they dealt with those funds. I have to say I think making the funds available as a priority to the people who

bought a licence in the last five or 10 years in my view would have been probably a fair and more sensible thing to do, but I understand why that was not done. So overall we have provided the report on how we assisted people. I am happy to answer any questions.

The CHAIR: Thank you very much.

Mr BARTON: Denis, hi. You are someone who really understands the deprivation that has happened to these people, who truly understands. We are talking about a migrant community where English is not their first language. Your report is very good, and it is quite staggering—some of the numbers. You managed to help 155 people, I believe.

Mr NELTHORPE: We helped 155 with the application. But if I could also say: we offered a very limited service with the debt negotiation. We also helped about 25 to 50 people with a smaller grant from the department, who negotiated after they received the moneys.

Mr BARTON: If I could just go to the ATO funds. I could not agree with you more about these people getting this money, getting the payment from the Fairness Fund, and then they were pressured by the banks to pay down their debts. Nobody was telling them to pay their tax.

Mr NELTHORPE: Well, I would go further than that. It is clear that two things happened. One, the banks—including the bank that had the vast majority of these—did not understand the fund. I actually had one bank tell me they were going to repossess the licence. I said, ‘Well, you can do that so long as you understand that if you do it, the amount that would have gone with the licence to the fund won’t be available because of the dates you obtained it. But hey, if you want it’. And they said, ‘Well, in that case we had better not do that, had we?’. So the banks had little or no understanding. The other thing is that the bank that had the most of these loans told me that it found it impossible to apply the hardship provisions that apply to consumer loans to their small business loans. And the task of negotiating those debts—and I have been doing that sort of work for 30 years—was incredibly difficult because the bank just did not know what it was doing.

Mr BARTON: Denis, we have been working with the Australian Taxation Office for the last couple of months. The message from the government was very clear: that the Fairness Fund was to assist people to transition into the new regime. I do not have the exact numbers—you might know this—but the reality is many people had their licences taken off them. There was no transition. So we have argued with the ATO that that should really be classified as part of a transition payment which was not taxed and not part of the Fairness Fund.

Mr NELTHORPE: I should add that some of our clients are not going to get the money because they do not have anything.

Mr BARTON: Yes. At this stage the lawyers are all arguing about it up in Canberra, but the problem was the language that was used by the government down here in terms of the Fairness Fund. I think everybody in here is aware that the Ombudsman gave a very scathing report about the rollout of the Fairness Fund separate to how the actual Fairness Fund was applied. We know there were about 5000 people who owned licences—around 3500 taxi people and the rest were made up of hire car operators. I know you say that there was a strategy, perhaps as a campaign, to pursue money through there, but only about 1200 people applied and less than half were successful, I understand.

Mr NELTHORPE: We were approached by numerous people, and some who were not from a non-English speaking background, who would have known that they could not possibly succeed. There was one person who asked us for assistance who owned 40 licences or something and who clearly had a massive business. Now I am not criticising that, but if you looked at the criteria you were not going to succeed. Look, I do not want to be overly critical of that, but I think it would have been better and fairer in the long run—but there would have been political heat—to be more willing to say to people, ‘We don’t think you’ve got any chance of succeeding’. It was meant to be a hardship fund, and losing assets is not the same thing as financial hardship. No-one wants to lose assets, but there is a difference.

Mr BARTON: One of the things that concerned me is that there are people who did not apply who really should have applied. I see in part of your report that the average length of a Fairness Fund application submitted on behalf of clients was 120 pages, with an average 13 supporting attached documents.

Mr NELTHORPE: Of the people we saw that we assisted all the way through, I would say 120 out of 155 were in reasonably serious circumstances. I would imagine there must have been at least double or treble that number who were in hardship and who for some reason did not see us. People had their own reasons as to why they did or did not see us. I also think that if at the end of that 155 there were at least 50 in desperate financial straits who saw us, I would estimate there must have been at least another 100 who we did not see who were in that situation. So, for instance, we saw some people—and one family comes to mind in particular—where they saw us after the bank had pressured them into selling the house. There is no doubt in my mind that had they seen us before they sold the house, the house would never have been sold.

Mr BARTON: How many people—the ones that you dealt with—have lost their homes?

Mr NELTHORPE: I cannot say for sure, but I certainly know there were at least half a dozen.

Mr BARTON: Yes. One of the problems we have also got now is the delayed impact, right? We now have an oversupply in the industry. No drivers can make any money. We actually had a very sad story last Friday where a chap rang us in absolute devastation, where the bank has just served him to repossess his house. These guys did not make an application to the Fairness Fund, but the impact of the reforms is now coming home to roost.

Mr NELTHORPE: And I think in one of the discussions we had with the banks—in fact a really significant discussion that is worth mentioning here—we asked the banks this question: ‘You lent in good faith. The borrower borrowed in good faith, although you either lent against the licence or in a lot of instances you lent against their house. If the government puts up the money to enable you to get the loan repaid, are you entitled to expect 100 cents in the dollar or should you wear some of the pain so that the borrower, who has lost as much as or more than you are going to lose, is not left effectively destitute aside from being debt free?’. And the initial response I got to that was, ‘We made a loan. We want it all back’. And we took that further and said, ‘So you are happy to have a public debate about’—because if the banks had not had access to the fund, they would have lost a huge amount of money.

Mr BARTON: That is right.

Mr NELTHORPE: So one of the things that it sort of raises for the future is having a fund like this in another industry and saying to the banks, ‘Well, we’ll put the fund up, but we reckon that you should limit what you take to two-thirds—66 cents in the dollar’. Because as a matter of public interest I do not actually think it is fair for a financial institution to say, ‘Well, we want 100 cents in the dollar. We don’t care about the tax liability, we don’t care where it came from, we just want our money back’. It is like, ‘No, it’s not as simple as that’. Now, to be fair, in the end the people we were negotiating for by and large did get a discount because of where the money came from, but I have to say it took a bloody long time.

The CHAIR: Tim, do you have any questions?

Mr QUILTY: It is more of a comment than anything else. As an accountant who has worked for the tax office, the ATO is very willing and eager to engage, to get on the front foot with these things, and when they are being planned the ATO will negotiate with the government and talk about how to structure them to get the result they are after. So I think it is quite poor that that was not done before rolling the scheme out. That is all I have to say on it.

Mr NELTHORPE: Yes, well, I certainly agree with that.

Mr BARTON: I just want to say—it is only because I know you are aware of the devastation of this industry—it has just been heartbreaking what has happened to these people. I see, of the 155 people that you supported with their submissions, you sent around 40, I think it is, off to social workers because you had serious concerns about their welfare.

Mr NELTHORPE: And one of our clients committed suicide two days after seeing us, so we did see the very worst side of this. Look, whatever you think of those reforms, if you are going to do those sorts of reforms to small businesses, you would have to expect, leaving aside the financial damage, it would be pretty astonishing if it did not wreak that sort of havoc on ordinary people. And I guess maybe that is another sort of lesson for the future—that whatever the justification for reforms, particularly where you are talking about small business or very ordinary people, the notion that there should be services, social workers and psychologists to assist people with the emotional trauma that reforms cause should be part of the package. Because there was always going to be significant—

Mr BARTON: Hardship.

Mr NELTHORPE: emotional trauma as well as financial trauma.

Mr BARTON: Just one last question, Denis, sorry. We are certainly aware—well, it has been brought to us—that we have had two brothers in identical financial circumstances; one got a payment from the Fairness Fund, one did not. How does that happen?

Mr NELTHORPE: Well, it obviously depends on their circumstances. One of the things I should have mentioned, one thing that happened that I thought was pretty unfortunate, was that if the loan was paid down, someone was perceived not to be in the same level of hardship as if the loan had not been paid down. Now, in some instances the loan was paid down because of the forced sale of their home. My view is that that was a pretty harsh interpretation of financial hardship.

Mr DAVIS: Shocking.

Mr NELTHORPE: We had one family caught by that, and I might add that the same family had been put in a bad position by the bank. So I think that notion that because the loan was paid down you are in less financial hardship—it depends on how it was paid down. And we certainly thought that was not helpful.

The CHAIR: No other questions?

Mr DAVIS: No, I just compliment you on some of the points that you have made. Frankly, the hardship has been extreme for so many.

Mr NELTHORPE: Well, thank you for that. I do have to say that, given the difficulty I had in negotiating with some of the banks with my background, it must have been pretty damn tough for some of the people who did not come through us, I would have to say.

Mr DAVIS: Who were out on their own.

The CHAIR: Denis, on behalf of the committee I would like to thank you for your time and contribution. You will receive in a few weeks time a copy of the transcript for your approval and the correction of any typographical errors. Thank you very much.

Mr NELTHORPE: I am happy to answer any other questions anyone has later.

The CHAIR: Thank you.

Witness withdrew.