

# **Civil Proceedings Bill 2011**

**Report No. 8**

**Legal Affairs, Police, Corrective Services and  
Emergency Services Committee**

**November 2011**

## **Legal Affairs, Police, Corrective Services and Emergency Services Committee**

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### **Acknowledgements**

The committee thanks those who briefed the committee, made submissions, gave evidence and participated in its inquiry. In particular the committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

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<sup>1</sup> The committee consists of six members. Ms Carolyn Male MP, Ms Grace Grace MP, Mrs Julie Attwood MP and Mr Murray Watt MP were appointed to the committee at various times during the course of this inquiry to replace members pursuant to Standing Order 202.

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## Chair's Foreword

The title issue of this Bill, the rules relating to civil proceedings, were exhaustively consulted on within the legal community and the committee received correspondence from the Chief Justice recommending adoption of those provisions without amendment. As a courtesy to the judiciary, and as a recognition of practical realities, the committee recommends just that to the Parliament. The draft was forged out of the crucible of litigation experience, and the committee believes that if amendments ever become necessary, that fact will emerge from the same process.

The Bill also contains proposed amendments to a number of other discrete Acts, but only the issue of retirement village exit fees caused any substantial debate before the committee. There is a practice in the retirement village industry of charging exit fees whenever a resident, for whatever reason, ceases to live in their accommodation unit. It is very common for the owners of the villages to charge a full year's exit fees, whether the person ceases to be a resident on day one or day 364 of the relevant year. The amendment proposes, while not undoing contracts that are actually drawn that way, that exit fees under other and all future contracts should be calculated on a daily pro rata basis. So if you cease to be a resident on day 15 of year three, for example, you would pay exit fees calculated on three years and 15 days, not four years.

The retirement village industry vigorously opposed the proposed amendments. The industry is providing an essential service, and argued that the exit fee revenue is an important component of scheme profitability. The committee values and respects the contribution the industry makes. Nevertheless the committee considers that, in contracts of this kind, fairness should be an overriding value. It is reasonable to say that utter fairness is not a feature of every contract in every industry in the commercial reality in which we live. But this particular unfair arrangement can be fixed, so the committee supports the proposed amendments.

I commend the report to the House.



Hon Dean Wells MP  
**Acting Chair**

## Abbreviations

ACQ	Aged Care Queensland Incorporated
ARQRV	Association of Residents of Queensland Retirement Villages
Department	Department of Justice and Attorney-General
FLP	Fundamental legislative principle
QLS	Queensland Law Society
QRVSO	Queensland Retirement Villages Scheme Operators (represented by ACQ and RVA)
RVA	Retirement Villages Association Limited
RV Act	<i>Retirement Villages Act 1999</i>
Transcript, 26 October 2011	Departmental briefing to the Legal Affairs, Police, Corrective Services and Emergency Services Committee, <i>Examination of Civil Proceedings Bill 2011, Transcript of Proceedings, 26 October 2011</i>
Transcript, 28 October 2011	Public hearing of the Legal Affairs, Police, Corrective Services and Emergency Services Committee, <i>Examination of Civil Proceedings Bill 2011, Transcript of Proceedings, 28 October 2011</i>

## Recommendation

### Recommendation 1

**3**

The committee recommends that the Civil Proceedings Bill 2011 be passed.





## 1 Introduction

### 1.1 Role of the committee

The Legal Affairs, Police, Corrective Services and Emergency Services Committee (the committee) is a statutory committee established on 16 June 2011 by the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly (the Standing Orders).<sup>2</sup> The committee's primary areas of responsibility include Attorney-General and Justice (excluding Industrial Relations), Fair Trading, Police, and Community Safety.<sup>3</sup>

The Civil Proceedings Bill 2011 (the Bill) was referred to the committee on 24 August 2011, and the committee was required to report to the Legislative Assembly by 19 December 2011.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

On 28 September 2011 the committee received a letter from the Minister in charge of the Bill (Hon. Paul Lucas MP, Attorney-General, Minister for Local Government and Special Minister of State), noting that the Bill contained a number of time-critical and 'facilitative' amendments that it would be desirable to pass in 2011. The Attorney-General asked the committee to consider the Bill at the earliest opportunity with a view to it being reported on in time to be passed in 2011.<sup>4</sup> The committee agreed to this request, and brought forward the reporting date to 22 November 2011.

The committee was briefed by the Department of Justice and Attorney-General (the Department), and received eight submissions from stakeholders (for a list of submissions, see Appendix A). The committee held public hearings on 26 and 28 October and 4 November 2011 at Parliament House (for a list of witnesses, see Appendix C). Details of the witnesses who appeared are in Appendix C. The committee also received briefing material from the Parliamentary Library. Transcripts of hearings, submissions received and accepted by the committee and other material considered are available on the committee's webpage at [www.parliament.qld.gov.au/committees](http://www.parliament.qld.gov.au/committees).

### 1.2 Policy objectives of the Civil Proceedings Bill 2011

#### New law on civil proceedings

The Bill proposes the enactment of a new Civil Proceedings Act with the following objectives:

- implementing the recommendations of the Rules Committee for the repeal, reform or relocation of the provisions of the *Supreme Court Act 1995*
- modernising and simplifying provisions governing civil proceedings
- repealing the *Supreme Court Act 1995* and repealing obsolete provisions of the *Supreme Court of Queensland Act 1991*
- amending the *Supreme Court of Queensland Act 1991* so that it only contains provisions specific to the Supreme Court

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<sup>2</sup> Parliament of Queensland Act 2001, section 88 and Standing Order 194.

<sup>3</sup> Standing Orders, Schedule 6.

<sup>4</sup> Letter to the Acting Chair, Legal Affairs, Police, Corrective Services and Emergency Services Committee from Hon. Paul Lucas, Attorney-General, Minister for Local Government and Special Minister of State, dated 15 September 2011.

- amending the *District Court of Queensland Act 1967* and the relevant Magistrates Courts legislation to harmonise the provisions common to all three courts and to assist in the integration, consistency and effectiveness of the court registries
- making consequential amendments to references to the *Supreme Court Act 1995* and repealed provisions of the *Supreme Court of Queensland Act 1991*.

The civil proceedings amendments are contained in Parts 1 to 31 of the Bill.

### **Unrelated, miscellaneous amendments**

Part 32 of the Bill provides unrelated, miscellaneous amendments to the following Acts:

- *Associations Incorporation Act 1981* (to allow incorporated associations to transition to the Commonwealth legal regimes for corporations and Aboriginal and Torres Strait Islander corporations)
- *Births, Deaths and Marriages Registration Act 2003* (to require the person in charge of the disposal of a body to electronically lodge a cremation or burial notice)
- *Cremations Act 2003* (to prescribe requirements for crematoriums when labelling ashes)
- *Electoral Act 1992* (to clarify a provision that allows electoral enrolment on the day before polling, and to change the notice deadline to 6pm)
- *Information Privacy Act 2009* (to allow electoral roll information to be provided to State departments and authorities on a discretionary basis)
- *Justices of the Peace and Commissioners for Declarations Act 1991* (to allow Justices of the Peace and Commissioners for Declarations to record details of proof of identity documents)
- *Queensland Civil and Administrative Tribunal Act 2009* (to allow a member of the Queensland Civil and Administrative Tribunal to continue to sit after their term has expired in order to finalise a proceeding)
- *Retirement Villages Act 1999* (to require particular exit fees when a resident leaves a retirement village to be calculated on a daily basis)
- *Right to Information Act 2009* (to allow Queensland Government agencies to provide personal information to agencies of the Commonwealth and other States and Territories for law enforcement purposes).

### **1.3 Structure of this report**

The main purpose of the Bill, to propose the enactment of a new Civil Proceedings Act, is discussed in section 2.1 of this report.

The proposed amendments to the *Retirement Villages Act 1999* (the RV Act) were considered by the committee in depth, and are discussed in section 2.2 of this report.

In section 2.3, the committee discusses the scope of the Bill and its short title.

All other matters raised in submissions or during the committee's consideration are addressed in Appendix B, which sets out the departmental response to issues raised in submissions, and during the examination.

### **1.4 Consistency with fundamental legislative principles**

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The committee identified issues in the following areas:

- rights and liberties of individuals
- retrospectivity which affects rights and liberties or imposes obligations
- clear and unambiguous drafting
- the institution of parliament.

All the issues of fundamental legislative principle raised are covered in the discussion in section 2 or in Appendix B.

### **Explanatory Notes**

The Explanatory Notes to the Bill state that the Bill complies with fundamental legislative principles (FLPs), and do not seek to explain or justify any issue of FLP. As noted above, the committee identified a number of potential FLP issues. The committee considers that, in particular, the issue of retrospectivity in relation to the proposed amendments to the RV Act (discussed below at section 2.2.3.1) should have been explained in the Explanatory Notes.

For this reason, the committee considers that the Explanatory Notes do not comply with the requirement in section 23(1)(f) of the *Legislative Standards Act 1992* that the Explanatory Notes must include a brief assessment of the consistency of the Bill with FLPs and, if it is inconsistent with FLPs, the reasons for the inconsistency.

## **2 Examination of the Civil Proceedings Bill 2011**

### **Recommendation**

The committee recommends that the Civil Proceedings Bill 2011 be passed.

### **2.1 A new Civil Proceedings Act**

The Bill provides for the enactment of a new Civil Proceedings Act. Currently, the process for civil proceedings in the Supreme Court is governed by the *Supreme Court of Queensland Act 1991* (the 1991 Act) and the *Supreme Court Act 1995* (the 1995 Act).

The 1995 Act was the product of the *Statute Law Revision Act (No. 2) 1995* which consolidated the *Supreme Court Act 1921* and provisions from various other court related statutes (some over 100 years old). Over time, it became apparent that the 1995 Act had become in need of rationalisation and modernisation.

Section 118C(2)(a) of the 1991 Act requires the Rules Committee to 'advise the Minister about the repeal, reform or relocation of the provisions of the *Supreme Court Act 1995*'.<sup>5</sup>

The Rules Committee, with the assistance of the Office of the Queensland Parliamentary Counsel, developed and publicly consulted on a draft Civil Proceedings Bill to modernise and simplify

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<sup>5</sup> The Rules Committee is established by section 118C of the *Supreme Court of Queensland Act 1991* and comprises of the Chief Justice, (or a Supreme Court Judge nominated by the Chief Justice), the President of the Court of Appeal (or an appeal judge nominated by the President), two Supreme Court judges nominated by the Chief Justice, the Chief Judge (or a District Court Judge nominated by the Chief Judge), the Chief Stipendiary Magistrate (or a magistrate nominated by the Chief Stipendiary Magistrate), and a magistrate nominated by the Chief stipendiary Magistrate. The Rules Committee must advise the Minister about the repeal, reform or relocation of the provisions in the *Supreme Court Act 1995*, and may advise the Minister about any law giving jurisdiction to the Supreme Court, the District Court or the Magistrates Court.

provisions governing civil proceedings. The Bill incorporates and modernises procedural and substantive provisions from the 1995 Act and integrates civil procedure provisions from the 1991 Act.

The Rules Committee provided to the Attorney-General the following detailed advices concerning the Civil Proceedings Bill 2011, which have been tabled in the Legislative Assembly:

- *Advice of the Rules Committee pursuant to section 118C(2)(a) of the Supreme Court of Queensland Act 1991*
- *Advice of the Rules Committee pursuant to section 118C(2)(a) of the Supreme Court of Queensland Act 1991 specifically in relation to each section of the Supreme Court Act 1995.*<sup>6</sup>

Two submissions were received on the civil proceedings provisions in the Bill.

The Hon. Paul de Jersey AC, the Chief Justice, is the statutory chairman of the Rules Committee. The Chief Justice informed the committee that the Bill is the work of the Rules Committee, assisted by the Office of Parliamentary Counsel, and had his full support. He described the Bill as 'a potentially significant piece of legislation which will streamline the exercise by the State Courts of their jurisdictions'. The Chief Justice outlined the extensive consultation on the civil proceedings provisions undertaken before the parliamentary process, describing that consultation as 'comprehensive and productive'. He sought assurance that the Bill would be dealt with within the life of the current Parliament.<sup>7</sup>

The Queensland Law Society (QLS) informed the committee that it had been engaged and consulted in the development of the civil proceedings amendments and it supported that aspect of the Bill. The QLS considered that these amendments use clear and unambiguous language and are accessible to both the legal profession and the community. The QLS congratulated the drafters for preparing a Bill that 'not only modernises and simplifies civil proceedings, but that is also thoroughly researched and carefully considered'.<sup>8</sup> QLS President, Mr Bruce Doyle, said of the civil proceedings provisions:

*It is wholeheartedly supported by the Queensland Law Society. It is good law. There has been good consultation. We know the courts fully support it. It is logical and it is a good ordering of the law that is perhaps overdue. We commend the Rules Committee on its work and the consultation with the legal profession and other stakeholders.*

It is rare for draft law to be described in such glowing terms. The committee is unaware of any countervailing views on the civil proceedings provisions, or of any need for amendment of this aspect of the Bill, and endorses the work of the Rules Committee. The committee commends the civil proceedings provisions to the House.

## 2.2 Amendment of the Retirement Villages Act 1999

### 2.2.1 Background

#### 2.2.1.1 Retirement Villages Act 1999

Retirement village schemes in Queensland are governed by the RV Act. The main objects of the RV Act are:

- to promote consumer protection and fair trading practices in operating retirement villages and in supplying services to residents by:
  - ♦ declaring particular rights and obligations of residents and scheme operators; and

<sup>6</sup> The copies of these advices tabled in the Legislative Assembly on 17 October 2011, were updated by the Department, and confirmed by the Rules Committee, to reflect the numbering of the Bill as introduced.

<sup>7</sup> Hon. Paul de Jersey AC, Chief Justice, submission no 1, at 1.

<sup>8</sup> Queensland Law Society, submission no 5, at 1.

- ♦ facilitating the disclosure of information to prospective residents of a retirement village to ensure the rights and obligations of the residents and scheme operator may be easily understood; and
- to encourage the continued growth and viability of the retirement village industry in the State.

The RV Act also has the following additional objects:

- to encourage the adoption of best practice standards by the retirement village industry
- to provide a clear regulatory framework to ensure certainty for the retirement village industry in planning for future expansion
- to facilitate participation by residents, who want to be involved, in the affairs of retirement villages
- to provide for processes for resolving disputes between residents and scheme operators.

Section 7 of the RV Act defines a *retirement village scheme* as a scheme under which a person—

- enters into a residence contract; and
- in consideration for paying an ingoing contribution under the residence contract, acquires personally or for someone else, a right to reside in a retirement village, however the right accrues; and
- on payment of the relevant charge, acquires personally or for someone else, a right to receive 1 or more services in relation to the retirement village.

In order to operate, a retirement village scheme must be registered with the Office of Fair Trading.

Section 8 of the RV Act defines a retirement village scheme operator as a person who, alone or with someone else, controls the scheme's operation or purports to control the scheme's operation.

As at June 2011, there were 311 retirement village schemes registered in Queensland.<sup>9</sup> There are currently 28,000 residents and 8,000 people employed in these villages.<sup>10</sup>

#### 2.2.1.2 Exit fees

The Bill would amend the RV Act in relation to exit fees. An exit fee is the amount paid by a resident to the scheme operator upon the resident leaving the village, as prescribed in the residence contract between the two parties.

Exit fees are commonly calculated by multiplying the ingoing contribution paid by the resident upon entering the village by an exit fee percentage. This percentage typically increases the longer a resident stays in the village, and often increases in yearly increments, for example, after one year, 10 percent; after two years, 15 percent; after three years, 20 percent, etc. In some contracts, no matter when the resident leaves the village within any given year, the resident pays the exit fee based upon the percentage for that year. Under this type of calculation method, a resident leaving a village after one year and one day could be required to pay an exit fee based on two whole years of occupation (or, depending on specific terms of the contract, the first year plus part of the second year, such as a month or a quarter).<sup>11</sup>

While there is a variety of different schemes available, many retirement villages have total exit costs of between 35 and 50 percent of the sale price of the unit.<sup>12</sup>

<sup>9</sup> Department of Justice and Attorney-General, *Queensland Retirement Villages*, Discussion Paper dated August 2011, at 4.

<sup>10</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 6.

<sup>11</sup> Department of Justice and Attorney-General, Briefing, 17 October 2011, at 3.

<sup>12</sup> Dr K Richardson and Prof T Boyd, *The Great Migration: What parents and their kids need to know about retirement villages*, *The Verdict*, vol 1, 2011, pp 5-8, at 6.

Under an alternative method, commonly referred to as the 'daily pro rata' method, the exit fee percentage is calculated by reference to the actual number of days that the person has resided in the unit. Under the daily pro rata method, the exit fee in the above example would be calculated on the basis of one year and one day only.<sup>13</sup>

The amendments in the Bill would provide that, in relation to exit fees calculated on the basis of the length of time the resident has resided in the unit, the daily pro rata calculation method will apply:

- to existing residence contracts where the contract does not provide an alternative method (if it does, the alternative method prevails); and
- to all future contracts (this will not be able to be contracted out of).

The amendments would commence on proclamation, giving scheme operators time to revise their residence contracts to incorporate the mandatory daily pro rata calculation method into all future contracts.

### 2.2.1.3 *The significance of exit fees to the business model of retirement village schemes*

The QRVSO submitted that the exit fee is a 'key component of what residents pay for living in a village and enjoying the infrastructure'.<sup>14</sup> Exit fees constitute the primary source of income for scheme operators from which they pay the following:

- capital replacement fund contributions
- capital improvement costs
- the scheme operator's share of reinstatement costs
- the scheme operator's share of general services charges of vacant units
- compliance costs
- shortfalls in general services budgets
- corporate financing and operating costs.<sup>15</sup>

Another source of income for scheme operators is any share of capital gain that they are entitled to from the re-sale or re-lease of units in accordance with residence contracts.<sup>16</sup>

The maximum percentage of the exit fee is critically important – how long it takes to reach the maximum and how it is calculated if the resident leaves before the fee reaches the maximum – and there are numerous options in the marketplace at present. The proposed amendment affects only those residents whose fee has not yet reached the maximum.<sup>17</sup> The QRVSO provided the following example to illustrate a typical exit fee assessment, noting that in some cases the exit fee is less than 30 percent or is spread over a longer time period:<sup>18</sup>

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<sup>13</sup> Department of Justice and Attorney-General, Briefing, 17 October 2011, at 3.

<sup>14</sup> Mr Andrew Macintosh, Queensland Retirement Villages Scheme Operators, Transcript, 28 October 2011, at 8.

<sup>15</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 9.

<sup>16</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 9.

<sup>17</sup> Andrew Macintosh, Queensland Retirement Villages Scheme Operators, Transcript, 28 October 2011, at 8.

<sup>18</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 10.

Period of time between the commencement date and the exit date (ie period of occupation of the accommodation unit)	Exit fee percentage that applies
1 year or less	7.5%
2 years or less but more than 1 year	15%
3 years or less but more than 2 years	20%
4 years or less but more than 3 years	25%
more than 4 years	30%

The QRVSO told the committee that, when a retirement village operator sets up their business, they are aiming to establish a sustainable business and attract residents. At the beginning, they decide how to set financial options including matters such as unit prices, exit fee levels, calculation methods, capital gains sharing and other costs sharing, and whether or not they will take a development profit. The exit fee is but one part of this equation, and part of a 20 or 30 year commitment to financiers and investors.<sup>19</sup>

The QRVSO explained that, for the purposes of raising equity or obtaining bank finance, retirement villages are valued by a cash flow approach to assess the current market value of the proprietary rights attached to the scheme. The value of the proprietary rights is determined by calculating the level of income derived from exit fees and capital gain income over an investment horizon of at least 20 years. If future exit fees are reduced, the valuation of a retirement scheme will be reduced.<sup>20</sup>

#### 2.2.1.4 History of the exit fee provision in section 15 of the Retirement Villages Act 1999

Section 15 of the RV Act defines an exit fee as the amount that a resident may be liable to pay to, or credit the account of, a scheme operator under a residence contract arising from:

- the resident ceasing to reside in the accommodation unit to which the contract relates; or
- the settlement of the sale of the right to reside in the accommodation unit.

Subsection 15(2) provides that the exit fee must be calculated as at the day the resident ceases to reside in the accommodation unit to which the residence contract relates.

When the RV Act commenced, subsection 15(2) applied only to contracts entered into after its commencement. However, subsection 15(2) was amended in 2006 to make it apply retrospectively to residence contracts entered into before the commencement of the Act.

Since that time, some confusion appears to have arisen over the interpretation of section 15(2).<sup>21</sup> Section 15(2) seeks merely to fix the point in time when the formula for the exit fee must be applied. It does not provide the formula for how the exit fee must be calculated.

The amendments in the Bill now seek to prescribe how an exit fee is calculated for new residence contracts (that is, those contracts entered into after the commencement of the amendments in the Bill). The Bill also seeks to prescribe how an exit fee is calculated for existing contracts, where the contract does not already provide an alternative method for calculating the exit fee.

<sup>19</sup> Andrew Macintosh, Queensland Retirement Villages Scheme Operators, Transcript, 28 October 2011, at 8.

<sup>20</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 10.

<sup>21</sup> The Association of Residents of Queensland Retirement Villages submitted that the Act already provides for exit fees to be calculated on a daily basis, submission no 8A, at 2. The QRVSO submission addressed the previous amendment to section 15 made in 2006, submission no 7, at 10-12.

### 2.2.1.5 *Saunders v Paragon Property Investments Pty Ltd*

The issue of whether section 15(2) of the RV Act requires exit fees to be calculated on a pro rata daily basis became the subject of legal proceedings which were initiated in the Queensland Commercial and Consumer Tribunal<sup>22</sup> and then heard on appeal in the District Court.<sup>23</sup> This matter, *Saunders v Paragon Property Investments Pty Ltd* (the *Paragon* case), was one of the main impetuses for the proposed amendments to section 15(2).

The facts of the case are that a resident had occupied a retirement village for two years and one day. The residence contract imposed an exit fee which accrued at a rate of 5 percent of the sale price per year of residence. On that basis, the resident was charged an exit fee of 15 percent. The resident argued that the exit fee should be calculated pro-rata on a daily basis for the partial year of occupation.

The Tribunal dismissed the resident's application, agreeing with the retirement village operator's interpretation of section 15(2), that the exit fee was correctly charged on a yearly basis. The Tribunal found that section 15(2) did not prescribe the method of calculation of the exit fees, but only a point in time in a particular year at which exit fees were to be calculated.

The resident appealed to the District Court, where Judge Robin QC found in favour of the resident. However, the decision relates more to the District Court's determination of the period of time that the resident occupied the village (for two years rather than for two years and one day), rather than an interpretation of how section 15(2) operates. Though not strictly necessary, Judge Robin QC also considered whether section 15(2) of the RV Act should be interpreted as requiring exit fees to be calculated on a daily basis.

In the judgment, His Honour (at paragraph 18) suggested '*fairness is regarded as promoted by apportionment*' (of exit fees), and one of the objects of the *Retirement Villages Act 1999* is to '*promote fair trading practices*' in operating retirement villages. His Honour (at paragraph 14) did not consider a resident to be unduly advantaged if a daily calculation method was employed, but rather referred to the alternative, yearly calculation method as providing a windfall to operators.

Following on from this, His Honour saw no 'threat to viability' of a village under the daily calculation method, as he '*could not imagine any prudent operator designing a project whose profitability or viability depended upon windfalls*'. His Honour (again, at paragraph 18) was inclined to accept the daily calculation method applied to exit fees, unless an alternative method is expressly stipulated in the residence contract. Elsewhere, His Honour (at paragraph 19) referred to the daily method as the 'more natural' approach to calculating exit fees.

The Department advised that the case did not amount to a definitive ruling of law in relation to the circumstances in which a daily calculation method should be read into a residence contract. However, the Judge's view on the issue was clearly expressed, and the proposed amendment does adopt the important consumer fairness principle espoused in the case.<sup>24</sup> Further information on the *Paragon* case is in Appendix E.

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<sup>22</sup> *Saunders v Paragon Property Investments Pty Ltd* [2008] CCT VH002-06 (24 September 2008).

<sup>23</sup> *Saunders v Paragon Property Investments Pty Ltd* [2008] QDC 322 (19 December 2008).

<sup>24</sup> Department of Justice and Attorney-General, Letter, 27 October 2011, at 1-2.



## 2.2.2 Examination of the proposed amendments

### 2.2.2.1 *The clauses in the Bill*

The Bill contains two substantive clauses amending the RV Act:

- Clause 239 would insert two new notes into the existing section 15 of the RV Act, to clarify the meaning of existing section 15(2) and also to provide a reference to the proposed new section 53A dealing with how to calculate particular exit fees for a residence contract. The first note clarifies that subsection 15(2) only states the day at which the exit fee is to be calculated and does not require exit fees to be calculated on a daily or other basis. The second note explains the effect of the proposed new section 53A.
- Clause 240 would insert a proposed new section 53A into the principal Act. Proposed new section 53A applies to an exit fee which is to be calculated having regard to the length of time that the resident has resided in their accommodation unit. Subsection 53A(2) provides that, for an existing residence contract, the exit fee must be calculated on a daily basis unless the contract expressly provides an alternative method of calculation. Subsection 53A(3) provides that, for a future residence contract, the exit fee must be calculated on a daily basis and that this cannot be contracted out of.

### 2.2.2.2 *Overview of submissions*

Three submissions addressed the proposed amendments in the Bill concerning retirement village exit fees.

The QLS raised concerns on the grounds that the amendments breach the fundamental legislative principle requiring that legislation be clear and unambiguous and not have retrospective effect. The QLS also considered that the amendments breached the general legal principle of freedom of contract.<sup>25</sup> These issues are discussed below at sections 2.2.3 and 2.2.2.7.

A joint submission was made by Aged Care Queensland Incorporated (ACQ) and the Retirement Villages Association Limited (RVA) on behalf of Queensland Retirement Villages Scheme Operators (QRVSO). The QRVSO opposed the proposed amendments, advancing similar arguments to the QLS concerning clarity, certainty, retrospectivity, freedom of contract and market competition. The QRVSO also submitted that the amendments would have a negative impact on scheme operators' income from exit fees, and that commercial pressures would compel scheme operators to increase exit fees for future residents to maintain current levels of income and to sustain debt and equity arrangements. Further, the reduction in income would negatively affect the valuation of retirement villages, presenting a risk to the continuity of investment in the seniors housing market and impacting on the viability of the industry.<sup>26</sup>

After the hearing the ACQ provided additional information supporting its submission on the potential financial impact of the proposed changes, on a commercial-in-confidence basis. The RVA, on behalf of the QRVSO, also provided additional information on the pattern of turnover of residents.

The impact on the business model of retirement village schemes is discussed below at section 2.2.2.6.

The third submission was received from the Association of Residents of Queensland Retirement Villages (ARQRV), which represents 9,000 of the 42,500 residents living in retirement villages in Queensland.<sup>27</sup>

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<sup>25</sup> Queensland Law Society, submission no 5, at 3-6.

<sup>26</sup> Queensland Retirement Villages Scheme Operators, submission no 7.

<sup>27</sup> Association of Residents of Queensland Retirement Villages, Transcript, 28 October 2011, at 18.

The ARQRV supported the proposal to require the exit fee to be calculated on the daily pro rata method but considered that the method should apply to every year of occupation not just to the second and subsequent years. The ARQRV also submitted that the daily calculation method should be mandatory for all existing contracts.<sup>28</sup> These matters are discussed below at section 2.2.2.4.

### 2.2.2.3 Policy objective of the amendments

Hon Paul Lucas MP, the Attorney-General, Minister for Local Government and Special Minister of State, informed the House in his introduction speech on the Bill that the amendments will provide *'fairness and certainty for retirement village residents in how their exit fee will be calculated, and afford an even playing field for all villages in relation to the method used to calculate this fee'*.<sup>29</sup>

The ARQRV considered that there are urgent problems being caused by exit fee calculations, stating that a large proportion of the approximately 4000 complaints that it receives annually from concerned residents and their families relates to the calculation of exit fees. The ARQRV considered that it is in the interests of residents and village operators alike that exit fees be calculated fairly, as it preserves the reputation and future viability of the industry.<sup>30</sup>

*This is particularly important in the current climate where villages are struggling to sell units, and are facing increased competition from other forms of retirement living that do not charge exit fees at all.*<sup>31</sup>

The QRVS0 submitted that the current legislation on the calculation of a resident's exit fee has not resulted in a large number of formal complaints from exiting residents. The QRVS0 stated that, where such complaints have occurred, formal mediation processes on the interpretation of the contracts have been resolved in favour of the scheme operator in the majority of cases.<sup>32</sup>

The consumer fairness principle underlying the amendments in the Bill is similar to the principle espoused in the *Paragon* case. The Department advised that one of the objectives of the amendment is to clarify any doubts raised as to how the *Paragon* judgment should be interpreted as applying to existing contracts.<sup>33</sup>

In response to a question from the committee, the Director-General of Justice and Attorney-General stated:

*We do not think it is heavy-handed in the sense that we are trying to give certainty from a point forward. We know there is a gap for some contracts. Therefore, if there is a gap then surely the opportunity should be provided to people to have some sort of fairness in terms of how the fees might be calculated if the contract is silent. So we are trying to enable in a consumer protection way individuals who have signed up to something that is silent actually having an understanding of how the fee will be calculated when they exit.*<sup>34</sup>

<sup>28</sup> Association of Residents of Queensland Retirement Villages, submission no 8 and submission no 8A.

<sup>29</sup> Queensland Legislative Assembly Record of Proceedings (Hansard) 24 August 2011, at 2614 (Hon. Paul Lucas MP, Attorney-General, Minister for Local Government and Special Minister of State).

<sup>30</sup> Association of Residents of Queensland Retirement Villages, submission no 8A, at 2.

<sup>31</sup> Association of Residents of Queensland Retirement Villages, Opening Statement, at 1.

<sup>32</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 7.

<sup>33</sup> Mr David Ford, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 9.

<sup>34</sup> Mr Philip Reed, Director-General, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 9.

The Director-General of Justice and Attorney-General expressed the aim of the proposed amendment in a straightforward manner when he told the committee:

*What we are trying to ensure is that if somebody leaves part way through a year they are not actually being forced to pay a full year's fees. It is as simple as that.*<sup>35</sup>

#### 2.2.2.4 *Pro rata calculation method to apply in first year and be mandatory for all existing contracts*

As noted above, the ARQRV submitted that the daily pro rata calculation method should apply to every year of occupation, not just to the second and subsequent years as inferred by the calculation example provided in the Bill. The ARQRV also considered that the daily calculation method should be mandatory for all existing contracts.<sup>36</sup>

The Department advised that the standard fee structure under which a scheme operator receives a full year's exit fee in the first year, even when a resident vacates after less than one year, ensures that the scheme operator receives a meaningful profit on every residence contract and this is critical to the viability of retirement village businesses.<sup>37</sup>

The Department also advised that changing the proposal in the Bill so that it applied a daily pro rata calculation method to every existing contract, including those that already provide another calculation method, would be undoing the bargain already made between the parties. The Department considered that such a change would result in negative financial impact for operators, who would have determined the exit fee percentage and calculation method in the light of the other terms of the contract. However, the department noted that the negative impact would be difficult to estimate.<sup>38</sup>

The committee notes that different factors apply to the first year of occupation, and accepts the Department's recommendation not to make the daily pro rata calculation method apply to every year of occupation or to make this method mandatory for all existing contracts.

#### 2.2.2.5 *Number of contracts and people affected by the proposed amendment*

The Department told the committee that it did not know how many contracts may be affected by the proposed amendment, but that there is a gap in some contracts to which the amendment will apply. The Department considered that most contracts already have an exit fee calculation mechanism on the face of the contract and therefore would not be affected. The more recent a contract is, the more likely it is to have such a provision included.<sup>39</sup>

The committee asked the QRVSO about the number of people in its members' villages potentially affected by the proposed amendment. In a supplementary submission on behalf of the QRVSO, the RVA told the committee that, while life expectancy increases as time passes, the entry ages of residents into retirement villages has been increasing at a faster rate. The table below shows the average life expectancy of entrants into Queensland RVA member villages at the time of entry (using contemporary Australian Bureau of Statistics life expectancy tables) and how this has changed over the past 25 years. Compared with 25 years ago, people are entering villages four years later, on average, relative to life expectancy.<sup>40</sup>

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<sup>35</sup> Mr Philip Reed, Director-General, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 8.

<sup>36</sup> Association of Residents of Queensland Retirement Villages, submission no 8, and submissions no 8A (Opening Statement), at 1.

<sup>37</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 23-24

<sup>38</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 25.

<sup>39</sup> Mr David Ford, Department of Justice and Attorney-General, Transcript 26 October 2011, at 9.

<sup>40</sup> Retirement Villages Association Limited, submission no 7B, at 1.

Year	Average Entry Age	Future Life Expectancy
1985	67.8	15.7
2010	78.0	11.7

Source: Australian Bureau of Statistics; RVA member data

The RVA stated that, in Queensland, typically around ten percent of residents leave a retirement village in any one year. The RVA has 15,000 residents, meaning 1,500 people leave its villages each year. The RVA explained that it is commonly presumed (wrongly) that residents remain in retirement villages until they die. The vast majority (70 percent) leave for other reasons – to move into a nursing home, another village, back with family or into the community.<sup>41</sup>

The average length of stay in RVA villages as at 2010 was seven years, however, 40 percent leave in five years or less. This means that on average approximately 600 residents leave RVA's Queensland villages within this period. In serviced apartments, the length of stay is lower (3.5 years), and higher in independent living units (8 years).<sup>42</sup>

The RVA estimates that 60 percent of contracts in Queensland retirement villages have exit fee percentages that take longer than five years to maximise, and they are not calculated on a daily basis. This means that the proposed amendment would apply to an estimated 360 (that is, 60 percent of 600) contracts. The RVA estimates that, if these contracts are not changed in other ways so as to compensate for the lower exit fee, RVA operators' annual exit fee income will reduce by approximately \$2 million (\$5,500 per contract), and the village valuations will suffer a reduction of at least 2 percent.<sup>43</sup>

On the basis of the information provided by the RVA, the amendment would potentially apply to 2.4 percent of RVA residents, being 360 out of a total of 15,000 residents. By way of a hypothetical exercise, if that figure were to be applied evenly to the rest of the industry, in broad terms that may represent 1000 of the 42,500 people current living in retirement villages.

#### 2.2.2.6 *Impact on the retirement village scheme business model*

According to the QRVSO, the Queensland retirement village industry is currently valued at over \$3 billion and, in 2010-11, produced an estimated \$105 million in exit fees.<sup>44</sup>

The QRVSO submitted that the proposed amendment would have an impact on the RV business model. The ACQ submitted that retirement village schemes operate on a low margin, and the operators have to wait many years for their investment to be realised. Furthermore, the operators derive no value from village operations and have to cover vacant unit charges from construction until sold and vacant units after a three month period.<sup>45</sup>

The QRVSO explained that banks and investors invest in villages on the basis of their long-term value, which is based on expected fee income, and that scheme income is likely to be reduced as a result of only being able to calculate exit fees on a daily basis in future.<sup>46</sup>

<sup>41</sup> Retirement Villages Association Limited, submission no 7B, at 1.

<sup>42</sup> Retirement Villages Association Limited, submission no 7B, at 1.

<sup>43</sup> Retirement Villages Association Limited, submission no 7B, at 2.

<sup>44</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 6.

<sup>45</sup> Aged Care Queensland Incorporated, submission 7, at 8.

<sup>46</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 10.

The QRVSO contends that this loss of income will affect the valuation of schemes. The QRVSO told the committee that a large operator of 26 villages would lose approximately \$1 million a year in income as a result of the proposed amendment, which would reduce the valuation by one or two percent. The valuation of this operator is \$1.2 billion, so that would equate to a valuation reduction of \$12 million.<sup>47</sup>

The ACQ also submitted that the loss of value from the proposed amendment will have a broader impact on housing for the elderly and an economic impact on the State. The ACQ stated that retirement villages provide a valuable housing choice for older Queenslanders which may be reduced if the 'modest' financial incentives to maintain and invest in the retirement village industry are changed. Furthermore the ACQ argued that:

- reduced capitalisation value is a loss to the Queensland economy
- the majority of ACQ member villages are Care sites including many integrated sites; any realised profit is returned to the charitable sector
- many ACQ member villages operate in regional Queensland where market forces have less influence and opportunities are more limited than in the more populous areas of the State.<sup>48</sup>

The Department advised that it would be difficult to accurately predict the impact on a retirement village business model, given the length of resident occupancy and the time of departure within a year is unknown until the resident actually leaves. The Department contended that profitability would also be affected by the beneficial impact of the amendment on increasing the confidence of retirees considering entering a village.<sup>49</sup>

The Department advised that the proposed amendment will affect only the calculation of the exit fee in the marginal final year to which the exit fee applies.<sup>50</sup> Operators have no idea when a particular resident will leave the village, and therefore can never accurately predict the exit fee. Also the financial impact of the proposed change will be different depending on when a resident leaves the village.<sup>51</sup>

The Department advised the committee that it had undertaken no detailed modelling of the potential impact of the amendment on operators because it does not have the empirical data on which to do so. However, it expected that, on the anecdotal information it has, there will be relatively few existing contracts affected by the proposed amendment, and that the impact on the industry will be contained. The Department considered it likely that, of those villages that are affected, the majority of residents will be affected because they have the same standard contract.<sup>52</sup>

*At the end of the day our belief is that the impact on the economics of the village is likely to be at the margin rather than hugely significant, which is why we do not support the view that has been put forward in the submissions that it would have a significant impact on the valuation of the villages nor on the economics of the villages.<sup>53</sup>*

#### 2.2.2.7 Freedom of contract and effect on market competition

The QLS submitted that the proposed amendment to make calculation on the daily pro rata method mandatory for future contracts would breach the general legal principle of freedom of contract. The

<sup>47</sup> Mr Andrew Carins, Transcript, 28 October 2011, at 8.

<sup>48</sup> Aged Care Queensland Incorporated, submission no 7, at 6-10.

<sup>49</sup> Department of Justice and Attorney-General, Letter, 3 November 2011, at 4.

<sup>50</sup> Mr David Ford, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 10.

<sup>51</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 14.

<sup>52</sup> Mr David Ford, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 10.

<sup>53</sup> Mr David Ford, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 10.

QLS considered that the amendment may cause scheme operators to increase the ingoing contribution paid by residents upon entering a village, to cover the loss of profit caused by the reduction in exit fees payable.<sup>54</sup>

The QRVSO submitted that the amendment will reduce the present healthy market competition which exists due to the varying exit fee models offered across different villages. The QRVSO considered that a 'one size fits all' mandatory daily basis regime would therefore ultimately disadvantage residents.<sup>55</sup>

In relation to freedom of contract, the Department advised that the purpose of the amendment is consumer protection, that it is not uncommon for the law to change, particularly to enshrine consumer protections, and that all future contractual arrangements must comply with new laws. The Department noted that, as such, the principle of freedom of contract is always subject to laws and changes to those laws.<sup>56</sup>

The Department advised that the amendment will only affect one aspect of the overall retirement village scheme, and is therefore unlikely to reduce the many and varied types of schemes available. The department contended that having a consistent exit fee calculation method would make it easier for residents to compare different schemes, impart greater confidence to potential residents, and therefore have a positive impact on competition.<sup>57</sup> The Department argued that a greater sense of confidence would influence profitability.<sup>58</sup>

The Department considered that the effect on residents is likely to be determined by market forces. Individual operators may be unwilling to make radical changes to their contract offers for fear of pricing themselves out of the market.<sup>59</sup>

### 2.2.3 Issues of fundamental legislative principle

#### 2.2.3.1 Retrospective effect

The QLS submitted that the amendment that would require the exit fee to be calculated on the daily pro rata method for existing contracts is retrospective in its effect and therefore breaches the fundamental legislative principle of not adversely affecting rights and liberties, or imposing obligations, retrospectively.<sup>60</sup> The committee also identified that this provision raised issues of fundamental legislative principle.

Both the QLS and the QRVSO expressed concern that the provision would alter the bargain entered into at the time of the contract between the resident and the scheme operator by imposing a calculation method that was never intended at that time. The QRVSO stated:

*Amendments that have the potential to operate to change a bargain previously made with full disclosure between operator and resident are of grave concern to the Operators...<sup>61</sup>*

The QLS stated that, while generally an important element, the exit fee is 'but one aspect of the overall bargain struck between the RV operator and resident, as permitted under the RV Act'.<sup>62</sup>

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<sup>54</sup> Queensland Law Society, submission no 5, at 5.

<sup>55</sup> Mr Andrew Carins, Transcript, 28 October 2011, at 7.

<sup>56</sup> Department of Justice and Attorney-General, Report, 8 November 2011, at 1.

<sup>57</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 17-18.

<sup>58</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 15.

<sup>59</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 16.

<sup>60</sup> Queensland Law Society, submission no 5, at 5.

<sup>61</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 15.

<sup>62</sup> Queensland Law Society, attachment to submission no 5, at 1.32.

The Department contended that, arguably, the amendment does not adversely affect rights and liberties, or impose obligations, retrospectively because it does not change a term in an existing contract. The department argued that, rather, the amendment inserts a necessary term which is otherwise missing from contracts where the exit fee has yet to be calculated. The Department argued that the amendment merely removes the uncertainty in the situation where a residence contract provides that the exit fee is to be calculated by reference to the resident's length of stay in their unit, but does not specify whether the basis of the calculation is daily, weekly, monthly, or some other interval.<sup>63</sup>

The amendment does not apply to exit fees already calculated. By inserting a missing term, the provision alters contracts already entered into. The change will only operate prospectively, by 'crystallising' in the future when residents vacate their units. Notwithstanding this prospective operation, the provision affects existing rights, and the committee therefore considers that it applies retrospectively. The committee is satisfied that retrospective application of the amendment is justified in this case to achieve the policy objective of consumer fairness.

The committee acknowledges that there will always be specific instances at the margins where it is not clear whether the provision applies. However, the committee is satisfied that, on balance, the amendment is likely to reduce problems and confusion over the calculation of exit fees by reference to a resident's length of stay in their unit.

#### 2.2.3.2 *Clarity and uncertainty*

The QLS expressed concern about the drafting of the proposed new section 53A(2), which requires the exit fee to be calculated on a daily pro rata basis where the contract does not prescribe another calculation method. The QLS submitted that this provision breaches the fundamental legislative principle that legislation should be clear and unambiguous.

The QLS stated that in some retirement village schemes, the practice is not to draft exit clauses with reference to calculation on a daily basis, but rather to calculation on a yearly or staged basis where the fee is determined by the year of residence (ie where 'two years' means in the second year of residence). Also, in some scheme contracts, exit fees are not expressed as a 'fee for services' (which the QLS considered may be properly rated on a daily basis), but rather as an element of the entry fee which is delayed until a resident exits from the village. In this way, the fee can be seen as part of the fixed costs of buying into the village.<sup>64</sup>

The QLS was concerned that there will be significant litigation about whether the proposed amendment will apply to this type of exit clause, that is, whether this type of clause provides 'a way of working out' the exit fee not on a daily basis:<sup>65</sup>

*I think our particular concern is that the way the provision is drafted sets a threshold issue about which there will be dispute. If it does introduce that threshold issue, then it is retrospectively changing the way that existing clauses that have some drafting in them will be considered in that regard. If the term that is used is simply saying 'a way', if that is the threshold and if the courts find that you need a certain level of specificity for there to be 'a way', then there will be current clauses that have drafting in them that will have to be considered in a light other than that which they were drafted on, rather than there being nothing at all in the clause.*<sup>66</sup>

<sup>63</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 12.

<sup>64</sup> Queensland Law Society, submission no 5, at 4.

<sup>65</sup> Queensland Law Society, submission no 5, at 4.

<sup>66</sup> Matthew Dunn, Principal Policy Solicitor, Queensland Law Society, Transcript, 28 October 2011, at 6.

The QLS submitted that significant delay, cost, and prejudice may arise for existing residents in trying to determine whether their exit fee must or must not be calculated on a daily basis.<sup>67</sup> The QRVSO submitted that the amendment will not achieve its objective of reducing uncertainty regarding exit fees and will instead result in continued legal uncertainty and disputes about the way exit fees are to be correctly calculated for residence contracts entered into before the commencement of the provision.<sup>68</sup>

The Department advised that the different types of alternative calculation method were considered in preparing the Bill, and that the daily pro rata calculation method will not apply to the two examples cited by the QLS. If a contract expressly provides a calculation method such as weekly or monthly, or that the exit fee is a fixed amount, then the default method cannot apply. The Department advised that, given the many variations in the wording of residence contracts, it would be problematic to be more specific in the Bill about what wording would (and would not) prescribe a calculation method other than on a daily basis. The Department advised that no changes to the amendment as presently drafted appear warranted.<sup>69</sup>

The committee encourages the Department to keep under review the implementation of the proposed changes, and any disputes over interpretation that may arise.

### *2.2.3.3 Clear drafting – example in Bill of method of calculating exit fee*

As noted earlier, the Bill seeks to insert a note in the RV Act providing an example of how to work out an exit fee for a residence contract on a daily basis (proposed new section 53(2)). The example includes a hypothetical contractual exit fee term, and is provided to illustrate an exit fee which is calculated by reference to the length of the resident's stay in their unit.

The QLS and the QRVSO submitted that the example is contradictory in how it practically demonstrates the daily basis calculation method and therefore needs revision. The QLS also suggested that a second example may be needed to illustrate situations where a non-daily calculation basis is presently used, that is, situations where the default daily method would not apply.<sup>70</sup>

The Department noted the concerns of the submitters about the examples in the proposed amendments in the Bill but advised that the examples are accurate as presently drafted.<sup>71</sup> Further information addressing the detail of the example in the proposed new section 53A(2) is provided in **Appendix B**.

The committee acknowledges both the utility and limitations of using examples in legislation and the difficulty in devising a broadly-applicable example that nonetheless illustrates the detail of an issue effectively. The committee encourages the Department to monitor whether confusion arises over the meaning of the examples in practice.

### **2.2.4 Conclusion**

The committee supports the proposed amendments to the RV Act in the Bill.

The committee heard differing views on the drafting of the proposed amendments and encourages the Department to monitor their impact closely.

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<sup>67</sup> Queensland Law Society, submission no 5, at 4.

<sup>68</sup> Queensland Retirement Villages Scheme Operators, submission no 7, at 15.

<sup>69</sup> Department of Justice and Attorney-General, Letter, 3 November 2011, at 4, and Report, 3 November 2011, at 9.

<sup>70</sup> Queensland Law Society, submission no 5, at 3-4.

<sup>71</sup> Department of Justice and Attorney-General, Letter, 3 November 2011, at 4.



The committee accepts that the proposed changes may impact on the exit fee income of scheme operators. The scheme operators' representatives provided the committee (in confidence) with a number of analyses seeking to demonstrate the amount of lost income and a projected negative impact on capitalisation value of schemes of one to two percent.

Some loss of income by the operators is a natural consequence of implementing a measure designed to ensure that consumers are treated fairly. The Department does not support the view that there will be a significant impact on the valuation of villages or the financial viability of the villages as a result.

The residents' representatives told the committee that there is an 'urgent problem' needing to be addressed in the level of disputes over the calculation of exit fees. One organisation representing scheme operators provided information suggesting that the proposed amendment would potentially affect around 2.4 percent of residents in its member villages. If this were applied across the sector, that would represent about 1000 of the total 42,500 people currently living in retirement villages. If that is the case, then the committee considers it worthwhile to implement a consumer protection measure such as the proposed amendments for those people. Whatever the case, the committee considers that fairness is an overriding criterion and, even if that were the only reason for supporting the proposed amendments, the committee regards that as decisive.

The committee is not persuaded that the proposed amendments will have a significant impact on the retirement village industry, whether in loss of value and industry confidence or enhanced consumer confidence as variously submitted, and there is no doubt that improved certainty in the interpretation and application of exit fee clauses would benefit all parties in a number of ways.

### **2.3 The scope of the Bill and the short title**

As outlined in section 1.2, the Bill contains a number of unrelated, miscellaneous amendments to nine principal Acts. Notwithstanding that the majority of the Bill's content is directed towards the objective of revising the statutory provisions on civil proceedings, the inclusion of the unrelated amendments makes the Bill an omnibus Bill.

Omnibus Bills are typically used as a legislative vehicle to facilitate the convenient passage of a number of small, disparate amendments, none of which would justify a stand alone Bill in their own right.

Omnibus Bills can give rise to a number of concerns:

- Scrutiny of the policy issues is difficult, especially if timelines are truncated. There is a chance that substantive and important issues will be buried in the size and complexity of the Bill and therefore overlooked by stakeholders and members of Parliament.
- Debate is truncated with unrelated policy issues that would have been the subject of separate debate in the House being compressed into one debate.
- Members are not able to support or reject different parts of the Bill on the readings of the Bill (despite the fact that they may do so during the consideration in detail stage).

Miscellaneous provisions bills containing only minor, technical or inconsequential amendments have generally been considered acceptable. However, the former Scrutiny of Legislation Committee expressed concern at the move towards bills containing provisions of a more substantial nature.<sup>72</sup>

While most of the miscellaneous amendments in the Bill are of a minor, technical or inconsequential nature, the amendment to the RV Act is highly contentious.

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<sup>72</sup> Scrutiny of Legislation Committee Alert Digest Issue No. 2 of 1998, at 6.3.

The QLS expressed concern that the short title of the Bill does not alert the public or the Legislative Assembly to the fact that the Bill is directed towards multiple, unrelated purposes. The QLS considered that the short title of this Bill ought to have been styled 'Civil Proceedings and Other Legislation Amendment Bill', as has been the practice for Bills making a range of miscellaneous textual amendments to a range of principal Acts. The QLS stated:<sup>73</sup>

*The danger in not making the dual purpose of the Bill clear from its title is that members of Parliament, the community, legal professions and stakeholder groups may be misled into believing that the Bill is confined only to amendments related to its stated subject matter.*

The QLS noted that the other amendments in the Bill are not relevant to the stated purpose and treat the Bill merely as a legislative vehicle. The QLS submitted that accordingly the Bill does not have sufficient regard for the institution of Parliament.<sup>74</sup>

The Department sought advice from the Office of the Queensland Parliamentary Counsel (OQPC), which drafts all Bills. The OQPC did not agree with the QLS's contention that the Bill does not have sufficient regard to the institution of Parliament. OQPC advised:

- It is the usual practice not to include 'and Other Legislation Amendment' in the short title of a Bill for a principal Act, even if the Bill includes amendments to other Acts. This practice is only used in the short title of a Bill for an exclusively amending Act.
- The OQPC considers that the absence of the word 'amendment' in the short title alerts Parliament and users to the fact that the Bill is for a new principal Act.
- The long title for Bills such as this one includes a list of affected legislation, and the Bill's table of contents and explanatory notes are additional indicators of the Bill's scope.
- Clause 212 of this Bill amends the long title of the new Civil Proceedings Act by removing the repeal and amendment details when the bill is passed.
- If the short title included the suggested words, it too would need to be amended on assent otherwise the new principal Act would be inappropriately named.<sup>75</sup>

The RV exit fee amendment and other items originated in a draft Fair Trading and Other Legislation Amendment Bill that was publicly consulted on in 2010 by the Department of Employment, Economic Development and Innovation (which had responsibility for fair trading policy before this function was subsumed into the Department of Justice and Attorney-General). The Department explained that the 2010 draft Bill has now been broken into three pieces, with some amendments in this Bill, others in the Criminal and Other Legislation Amendment Bill 2011 (which is also currently before the committee) and other amendments that have not yet been introduced.<sup>76</sup>

The Department told the committee that the RV amendments and other amendments were attached to the Civil Proceedings Bill for the expediency of progressing them quickly, because the Bill was one with a reasonable chance of being passed in 2011.<sup>77</sup> The Department described the miscellaneous amendments as being 'of a facilitative nature', aimed at providing greater consumer protection or improved effectiveness of existing legislative schemes. The Department stated that the amendments are not substantial enough to each constitute a stand alone Bill, but due to their beneficial impacts are considered desirable and, in some cases, urgent, to be passed at this time.<sup>78</sup>

<sup>73</sup> Queensland Law Society, submission no 5, at 2.

<sup>74</sup> Queensland Law Society, submission no 5, at 2.

<sup>75</sup> Department of Justice and Attorney-General, Report, 3 November 2011, at 1-3.

<sup>76</sup> Mr Damian Sammon, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 4 to 5.

<sup>77</sup> Mr Philip Reed, Director-General, Department of Justice and Attorney-General, Transcript, 26 October 2011, at 5.

<sup>78</sup> Department of Justice and Attorney-General, Report, 8 November 2011, at 4.

The committee is not satisfied with the explanation provided about the short title of the Bill. The Parliament and stakeholders should be able to tell quickly from the short title that a Bill contains a number of miscellaneous amendments. The committee is also concerned that an omnibus Bill such as this one included a highly contentious amendment (to the RV Act), going against the convention that miscellaneous amendments grouped in a single legislative vehicle should be confined to minor, technical and inconsequential matters.

## Appendices

### Appendix A – List of Submissions

Sub #	Submitter
1	Hon. Paul de Jersey AC, Chief Justice
2	Australian Funeral Directors Association Limited
3	Office of the Information Commissioner
3A	Supplementary submission on proposed amendment to <i>Electoral Act 1992</i>
4	Australian Federal Police
5	Queensland Law Society
6	The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology Business School
7	Aged Care Queensland Incorporated & Retirement Villages Association Limited (joint submission on behalf of Queensland Retirement Villages Scheme Operators)
7A	Aged Care Queensland Incorporated & Retirement Villages Association Limited (joint submission on behalf of Queensland Retirement Villages Scheme Operators) – additional material provided 15 November 2011 on a commercial-in-confidence basis
7B	Retirement Villages Association Limited – additional material provided on 16 November 2011 on behalf of Queensland Retirement Villages Scheme Operators (resident entry age, longevity, length of stay and impact of the proposed amendment)
7C	Aged Care Queensland Incorporated – collated financial impact information (financial content provided on a commercial-in-confidence basis)
7D	Retirement Villages Association Limited – AVEO Live Well exit fee impact information provided on a commercial-in-confidence basis
8	Association of Residents of Queensland Retirement Villages
8A	Association of Residents of Queensland Retirement Villages – opening statement

## Appendix B – Summary of departmental comment on issues raised in submissions and during the examination

Topic	Witness submission or issue raised by committee	Departmental comment
Civil Proceedings General	Submission 1 – Hon. Paul de Jersey AC, Chief Justice Outlines extensive consultation undertaken by the Rules Committee in relation to the Civil Proceedings component of the Bill. Supports the amendments.	n/a
Scope and title of Bill	<p>Submission 5 – Queensland Law Society (QLS)</p> <p>On pages 1-2 of its submission, the QLS raises concerns about the name of the Bill:</p> <ul style="list-style-type: none"> <li>• that the Bill is not styled 'and other Legislation Amendment Bill';</li> <li>• that members of Parliament, the community, legal professionals and stakeholder groups may be misled into believing the Bill is confined only to amendments related to stated subject matter;</li> <li>• that this is bad drafting practice;</li> <li>• that the Bill does not have sufficient regard to the institution of Parliament and is in breach of fundamental legislative principles.</li> </ul> <p>The amendments to the <i>Retirement Villages Act 1999</i> (the RV Act) are not mentioned in the title of the Bill, and the QLS believes this may be misleading to stakeholders and the general community by not alerting them to the RV Act amendments contained therein.</p>	<p>The Department received advice from the Office of the Queensland Parliamentary Counsel (OQPC):</p> <p>OQPC undertakes the drafting of all Queensland Government Bills.</p> <p>OQPC confirmed that it is its usual practice not to include "and Other Legislation Amendment" in the short title of a Bill for a principal Act even if the Bill includes amendments to other Acts.</p> <p>This is to be contrasted with OQPC's usual practice to include those or similar words in the short title of a Bill for an exclusively amending Act. OQPC considers that the absence of the word "amendment" in the short title alerts Parliament and users to the fact that the Bill is for a new principal Act.</p> <p>OQPC pointed out that the long title for Bills like the Civil Proceedings Bill include a list of affected legislation.</p> <p>The long title for the Civil Proceedings Bill clearly alerts Parliament and others to the fact that, in addition to matters comprising the principal Act, the Bill is for an Act that repeals a named Act and amends several named Acts and makes minor and consequential amendments of Acts mentioned in a schedule.</p> <p>By virtue of the <i>Reprints Act 1992</i>, section 40, the Civil Proceedings Act as reprinted would not include the repealed, or other amendments, when commenced. Rather, the amendments would be consolidated into the reprints of the affected legislation. For this reason, clause 212 of the Civil Proceedings Bill proposes to amend the long title by removing the repeal and amendment details.</p> <p>If the short title included "and Other Acts Amendment", it would be necessary to include an amendment removing those words on assent, otherwise the principal Act would be inappropriately named.</p> <p>Accordingly, OQPC advised that it does not support the QLS's view that the Bill's short title does not have sufficient regard to the institution of Parliament and is in breach of fundamental legislative principles. OQPC also drew the Committee's attention to the Bill's table of contents and explanatory notes as additional indicators of the Bill's scope.</p> <p>A communication strategy for the Retirement Villages Act amendments was implemented, which included updated content on the Office of Fair Trading website and release of a Smart Business Bulletin.</p>

Topic	Witness submission or issue raised by committee	Departmental comment
<p>Associations incorporation</p> <p>Background</p>	<p><i>Associations Incorporation Act 1981</i></p> <p>The Bill would amend the <i>Associations Incorporation Act 1981</i> (AI Act) to allow associations incorporated under that Act to transition seamlessly to the <i>Commonwealth Corporations Act 2001</i> or <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>. Corporations incorporated under the repealed <i>Religious Educational and Charitable Institutions Act 1861</i> (RECI Act) will also be able to transition to either of the <i>Commonwealth Acts</i> (a savings provision in the AI Act has enabled these corporations to retain their legal status under the RECI Act).</p> <p>There is presently no mechanism under the AI Act to effect such a transition. This means that an association must separately incorporate a company limited by guarantee, transfer its existing assets and membership to the new entity, and then wind up the association. Such a process is complex and can be prohibitively expensive due to transfer duty and capital gains tax costs.</p> <p>The amendments provide for the chief executive or Minister (for associations incorporated under the AI Act and the RECI Act, respectively) to authorise the transfer. Once this authority has been obtained, the association may apply for the actual transfer under the relevant <i>Commonwealth corporations legislation</i>. Transfer duty and capital gains tax are not payable under this transfer process.</p>	
<p>Requirement to lodge a copy of a 'special resolution' and issue of structure and lack of constitutional provisions</p>	<p>Submission 6 – Australian Centre for Philanthropy and Non-profit Studies (QUT Business School)</p> <p>On page 2 of its submission, QUT stated in respect of some RECI Act corporations:</p> <ul style="list-style-type: none"> <li>• The requirement to lodge a copy of the special resolution to transfer may prove difficult due to their structure and lack of constitutional provisions.</li> <li>• It may be preferable to either: <ul style="list-style-type: none"> <li>- allow for ministerial approval to the change of legal structure rather than requiring a special resolution; or</li> <li>- extend the provisions of section 132 of the AI Act to cover migration to a company limited by guarantee.</li> </ul> </li> <li>• Section 132 of the AI Act allows for a regulation to exempt RECI Act corporations from specified provisions of the AI Act.</li> </ul>	<p>To resolve any issue in relation to 'special resolutions' the proposed amendments have included a definition of 'special resolution' for RECI Act corporations.</p> <p>The definition states that a <i>special resolution</i>, of the RECI Act corporation, means a resolution passed at a general meeting of the RECI Act corporation by the votes of % of its members who are present and entitled to vote on the resolution.</p> <p>It is likely that only large RECI Act corporations would seek to become incorporated as a company limited by guarantee. Such RECI Act corporations are likely to have in place the structures and constitutional provisions required to make this transfer. The provisions in the Bill will help to ensure members of such RECI Act corporations are informed of the proposal to change the status of the organisation.</p> <p>It is therefore not considered necessary to extend the provisions of section 132 of the AI Act to RECI Act corporations.</p>

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Associations incorporation education and information strategy	<p>On page 2 of its submission, QUT stated that, given the technical nature of the migration provisions, the best way to achieve the proposed amendments would be a coordinated education and information strategy undertaken jointly by ASIC and the Queensland Office of Fair Trading.</p>	<p>While it is not known how many associations may wish to take advantage of the proposed amendments, Professor Myles McGregor-Lowndes of QUT has previously estimated that only approximately 100 associations might wish to do so.</p> <p>It is fair to presume only larger incorporated associations would wish to make the transition to the <i>Corporations Act 2001</i>. These larger associations would have sufficient corporate knowledge, including access to legal advice, to be able to navigate the technical nature of the migration provisions.</p> <p>The provisions are straightforward and the application requirements are set out in detail and will be complemented by an approved application form which will be available on-line from the Office of Fair Trading's website.</p> <p>Once authority to transfer incorporation has been given the next step would be for the association to comply with ASIC requirements for incorporation under the <i>Corporations Act 2001</i>. ASIC would be able to provide all necessary assistance in relation to that step.</p> <p>In view of the number of incorporated associations (some 22,000) it is considered that an education strategy based on providing information on OFT's website, with a link to the ASIC website, would be appropriate. Officers from the Office of Fair Trading Business Licensing Division would also be able to provide advice in relation to technical aspects of migration.</p> <p>A comprehensive Communication Plan in relation to the amendments has been developed to create awareness of the changes to the legislation. This includes:</p> <ul style="list-style-type: none"> <li>• a feature on OFT's website about the amendments;</li> <li>• A feature in the Smart Business Bulletin (distributed to over 26,000 subscribers);</li> <li>• Social media posts (Facebook and Twitter);</li> <li>• Media release;</li> <li>• Ensuring all publications relating to associations are current; and</li> <li>• Letters to targeted stakeholders including – <ul style="list-style-type: none"> <li>○ Queensland Council of Social Services Inc</li> <li>○ Centre for Philanthropy and Non-profit Studies, QUT</li> <li>○ McCullough Robertson Lawyers</li> <li>○ Queensland Law Society</li> <li>○ Neumann &amp; Turnour, Lawyers.</li> </ul> </li> </ul> <p>The submission for a coordinated education and information strategy to be undertaken jointly by ASIC and the Queensland Office of Fair Trading has been noted, and Fair Trading will approach ASIC to establish if there is scope for cost effective collaboration in making stakeholders aware of this change and potential benefits.</p>

Topic	Witness submission or issue raised by committee	Departmental comment
Associations incorporation examples of associations	Committee request for types and examples of the larger incorporated associations that may wish to apply to transfer to the Commonwealth <i>Corporations Act 2001</i> regime.	<p>The types of incorporated associations likely to apply to transfer to the <i>Corporations Act 2001</i> (CA) under the proposed amendments are large charitable associations considering expansion of their operations into other jurisdictions or substantial clubs with large and complex gaming and liquor revenues. To do this under the current Queensland regime would require the association to either embark on a costly and time-consuming transfer process, or register for an Australian Registered Body Number under Part 5B.2 of the CA (and therefore become subject to two regulatory regimes simultaneously).</p> <p>This limitation has significantly hindered a number of charitable incorporated associations, whose concerns were raised with the Office of Fair Trading (OFT) by their lawyers. One such association is a Queensland community-based organisation operating community and residential aged care, rehabilitation services, childcare and retirement living. In addition, the Office of Liquor and Gaming Regulation is aware through discussions with club representative bodies of large clubs where the interaction of the AIA, the <i>Liquor Act 1992</i> and the Commonwealth tax law has created significant compliance difficulties which may be simplified by the transition which would be enabled by this amendment.</p>
Associations incorporation non-compliance	Committee concerns about associations that have been non-compliant with the AIA seeking to transfer.	<p>A note to proposed new section 106F indicates that a transfer is subject to section 601BM of the <i>Corporations Act 2001</i>, which provides that registration does not affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members) or render defective any legal proceedings by or against the body or its members.</p> <p>In addition, under the proposed amendments, the chief executive has discretion to refuse an application to transfer (proposed new section 106D). If matters of concern about the management of the association are known to the OFT, such as would be revealed from annual reports lodged with the office, the chief executive may require the association to provide further information or documents to address those concerns prior to deciding the application (proposed new section 106C).</p>
<b>Funeral industry</b>		
Background	<p>Earlier in 2011, it was reported in the media that a funeral director had transported bodies from Brisbane to Rockhampton for cremation and provided false information in a Death Registration Application form lodged in the Register of Births, Deaths and Marriages about where the cremation occurred. This highlighted the need for measures to ensure verification of Death Registration Applications by funeral directors about where a burial or a cremation has occurred to ensure the accuracy of the records and identify discrepancies which may warrant further investigation. Reports also appeared in the media about the conduct of a funeral director who provided the ashes of a deceased person to the family of the deceased in a container with no identifying information. This has highlighted the need to require identifying information be placed on containers holding ashes.</p> <p>The Bill would amend the <i>Births, Deaths and Marriages Registration Act 2003</i> (BDMR Act) to provide that the person in charge of a crematorium or a cemetery must lodge either a cremation or burial notice which will be used to verify the information provided by the funeral director or other person who arranges for the disposal of the body. The amendment will also require the notice from the crematorium or cemetery to be lodged electronically with the Register of Births, Deaths and Marriages. (There would be limited exceptions for locations or other circumstances where electronic lodgement is not possible.) This will improve the integrity of the death registration process with minimal disruption to service delivery.</p> <p>The Bill would amend the <i>Cremations Act 2003</i> to provide that a person in charge of a crematorium must label ashes in accordance with the requirements prescribed under a regulation. These new regulations cannot be finalised until the Bill is passed. Although there has been some consultation with industry on the form and detail of the labelling requirements, it is proposed to consult further with industry before drafting the necessary amendments to the <i>Cremations Regulation 2003</i>.</p>	



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Amendment of the <i>Births, Deaths and Marriages Registration Act 2003</i>	<p>Submission 2 – Australian Funeral Directors Association (AFDA)</p> <p>In paragraphs 3 and 4 of the submission, the AFDA expressed concern about new requirements in the Bill for electronic lodgement of cremation and burial notices:</p> <ul style="list-style-type: none"> <li>• that regional and rural operators should not be permitted to be exempt from electronic lodgement of cremation or burial notices</li> <li>• that infrastructure to allow such lodgement should be deemed a priority for the Government to ensure compliance.</li> </ul>	<p>The exemption from electronic lodgement only applies where the Registrar reasonably considers it would be impractical because:</p> <ul style="list-style-type: none"> <li>• the crematorium or cemetery is located in an area that does not allow for electronic lodgement; or</li> <li>• other exceptional circumstances do not allow for electronic lodgement</li> </ul> <p>This exemption is necessary to allow for areas where there is no internet access, or for exigent circumstances – for example, where the technology is temporarily inoperable. Queensland Government infrastructure is not relevant to the exemption.</p>
Amendment of the <i>Cremations Act 2003</i>	<p>Submission 2 – Australian Funeral Directors Association (AFDA)</p> <p>In paragraphs 5 to 8 of the submission, the AFDA expressed concern about new requirements in the Bill for the person in charge of a crematorium to label ashes in accordance with requirements prescribed under a regulation:</p> <ul style="list-style-type: none"> <li>• that the cremation facility number must be placed on cremated remains containers as a legislative requirement</li> <li>• that some information should be printed on the ashes container and some recorded and retained at the crematorium</li> <li>• that the ashes container labelling include: full name of deceased; usual or last known address; date of birth; name and address of crematorium; date of cremation; cremation facility number</li> </ul>	<p>Subject to the passage of the Bill, it is intended that amendments will be made to the Cremations Regulation 2003 prescribing the new labelling requirements.</p> <p>It is intended there will be further consultation with the funeral industry stakeholders before the amending regulation is made.</p> <p>The AFDA proposals for labelling will be taken into account in settling those requirements.</p>
<i>Electoral Act 1992</i>		
Background	<p><i>Electoral Act 1992</i></p> <p>The Bill would make technical amendments to section 106 of the <i>Electoral Act 1992</i> (Electoral Act) which allows persons who were not enrolled, to enrol and vote up to the day before polling day. The amendments:</p> <ul style="list-style-type: none"> <li>• clarify that such enrolment is intended for a person who is not already enrolled for any electoral district</li> <li>• remove a reference to voting by 5.00pm where some voting centres may be open until 6.00pm</li> <li>• allow the enrolment notice to be provided to the Electoral Commission Queensland (ECQ) because “an electoral registrar for the district” as stated in the current provision, will not be present at the pre-poll centres.</li> </ul> <p>The Bill would also amend section 61(2) of the Electoral Act to provide for a regulation making power to specify the departments and State public authorities that may receive electoral roll information and the purposes for which the information may be received. The section currently provides discretion to the ECQ as to when information on the electoral roll will be provided to departments and State public authorities. This results in uncertainty as to the circumstances in which this information will be made available.</p> <p>This proposed amendment is consistent with the approach under the Electoral and Referendum Regulations 1940 (Cth).</p>	

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Electoral roll information sharing	<p>Submission 3A – Office of the Information Commissioner (OIC) The OIC supported clause 228(2) which inserts '(c) for a purpose prescribed under a regulation' into column 4 of section 61(2) of the Electoral Act. Currently this column provides:</p> <p style="padding-left: 40px;">Circumstances in which information is to be given</p> <p style="padding-left: 80px;">(a) on request by the department or State public authority; and</p> <p style="padding-left: 80px;">(b) without charge.</p> <p>The OIC supported the addition of '(c) for a purpose prescribed under a regulation' as a further cumulative limiting requirement, as this would prevent breaches of the Information Privacy Principles/National Privacy Principles (by ensuring that access would be for a lawful purpose, and secondary use and disclosure could be permitted through the regulation).</p>	n/a
<b>Right to information and privacy</b>		
Background	<p><i>Information Privacy Act 2009 and Right to Information Act 2009</i></p> <p>The Bill would amend section 138 of the <i>Right to Information Act 2009</i> (RTI Act) to align it with section 62(3) of the <i>Ombudsman Act 2001</i> and provides that the Information Commissioner will not have to seek approval from the Minister for leave applications, but rather may take leave in accordance with the entitlements that were determined by the Governor in Council at the time of her appointment.</p> <p>The Department advised that Information Commissioner is conscious of the need for her Office to show the highest standards of openness and accountability. She will ensure that there are effective means to ensure accountability. Her leave will be approved by either the Privacy or the RTI Commissioner and processed through the software system that manages personnel administration for the Office of the Information Commissioner. This will act as a check that salary is paid in accordance with approved conditions and leave. The Information Commissioner has written to the Auditor-General, explaining the intended internal accountability processes and has advised that the Auditor-General has confirmed these processes are appropriate</p> <p>The Bill would also amend section 154 of the RTI Act and section 148 of the <i>Information Privacy Act 2009</i> (IP Act) to provide that the Information Commissioner may approve leave for the Right to Information Commissioner and the Privacy Commissioner.</p> <p>The Bill would also broaden the definition of 'law enforcement agency' in Schedule 5 of the IP Act so that Queensland agencies will be able to provide personal information to other jurisdictions' agencies (for example, the Australian Federal Police) in specified circumstances, including where it is necessary for the investigation of offences or the enforcement of a law relating to the confiscation of the proceeds of crime.</p>	
	Submission 3 – Office of the Information Commissioner Supported the amendments relating to leave for statutory officers, agencies providing personal information to other jurisdictions and Justices of the Peace recording information.	n/a
	Submission 4 – Australian Federal Police Supported the amendments permitting Queensland Government agencies to provide personal information to Commonwealth agencies and other States and Territories for law enforcement purposes.	n/a

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Justices of the Peace and Commissioners for Declarations		
Background	<p><i>Justices of the Peace and Commissioners for Declarations Act 1991</i></p> <p>Under current procedures, Justices of the Peace (JPs) and Commissioners for Declarations record limited information about identification documentation they have sighted in the performance of their duties. This can raise difficulties should an issue subsequently arise about documents that they have witnessed.</p> <p>To remedy this, the Bill would allow JPs and Commissioners for Declarations to record details of any identification documentation (including actual document numbers) sighted by them in the performance of their duties. Currently, their logbooks record the date, document witnessed, name of deponent, identification sighted (e.g. driver licence) and the location of signing.</p>	
Checks and balances, meaning of 'proof of identity' document, ability of JP to refuse service	<p>The Committee sought further information on:</p> <ul style="list-style-type: none"> <li>• The checks and balances that would apply to the proposed power for JPs to retain details of POI documents.</li> <li>• the meaning of a proof of identity (POI) document referred to in clause 235 of the Bill.</li> <li>• The scenario was of a JP refusing service because a person will not permit their POI documents to be copied or their details recorded. This was raised as an issue of concern for rural communities where JP services may be limited.</li> </ul>	<p><i>Checks and balances</i></p> <p>Clause 235 of the Bill provides for Justices of the Peace (JPs) to copy or record details of proof of identity (POI) documents sighted by them when attesting documents, for the purpose of being satisfied that persons whose signatures they witness are who they claim to be. It does not provide for copies to be taken of the documents being witnessed. The proposed amendment has arisen in response to requests from JPs who wish to have this information available should the documents they have attested later be called into question, for example, before a court.</p> <p>The proposed amendment requires that a JP who records information under the section must take reasonable steps to ensure the information is kept in a secure way. The JP Branch in the Department intends to issue guidelines concerning the recording and secure storage of confidential POI information. The JP Branch also conducts workshops regarding best practice in witnessing documents where information and document security matters would be canvassed.</p> <p><i>Proof of identity document</i></p> <p>The term POI (referred to in clause 235 of the Bill) is not defined and would be interpreted according to its ordinary meaning, namely, a document from an authoritative source that provides evidence of a person's identity. Obvious examples are a driver licence, birth certificate or passport. A POI document does not include the document to which the JP attests. The type of POI document with which a JP may be satisfied would vary according to the circumstances and the nature, significance and consequences of the document being attested. For example, a JP who witnesses a bank guarantee for a person they have never met before may have different requirements to a JP who has detailed knowledge of the person whose signature is being witnessed.</p> <p>Where POI documents have a commonly understood meaning and the legislation does not require stated POI documents to be provided, it is the Department's view that the term does not need to be defined. The JP Branch in the Department intends to issue guidelines in these matters to assist and inform JPs and persons using their services.</p> <p><i>Refusal of service, especially where limited availability of JP services</i></p> <p>The Bill does not alter the current position in this regard. At present, there is nothing to prevent a JP from requesting details or copies of a person's POI documents and declining to provide a JP service if they are not provided. In these circumstances, the services of another JP would need to be sought.</p> <p>As to the availability of JPs, there are approximately 89,000 registered JPs in Queensland and the details of approximately 14,000 of these JPs are publicly available. JPs are frequently located in: courthouses (83 Magistrates Courts locations); Queensland</p>

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		<p>Government Agency Program (QGAP) locations (78 offices in rural and remote areas of Queensland); and police stations.</p> <p>They can also often be located in pharmacies, post offices and other similar 'core businesses' in communities. The JP Branch in the Department will also pass a person's request for JP services in a particular locality on to JPs whose details are not publicly listed if a member of the public is unable to locate a JP through their own endeavours.</p> <p>Therefore, the Department does not expect that the amendment will, in practice, result in an adverse impact on JPs services availability in the community.</p> <p>The Information Commissioner's submission to the Committee on the Bill has acknowledged the genuine purpose of this amendment to ensure the integrity of affidavits and attestations and has noted the protections provided by the clause regarding the use and storage of this information.</p>
Queensland Civil and Administrative Tribunal	Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act)	
Background	<p>The Bill would amend the <i>Queensland Civil and Administrative Tribunal Act 2009</i> to enable members and acting members to continue to exercise jurisdiction to finalise proceedings after their terms of appointment have expired. This will ensure continuity for matters before the Queensland Civil and Administrative Tribunal, by preventing any disruption that may otherwise be caused by expiry of a member's appointment. The appointments of over 100 members are due to expire on 30 November 2011.</p> <p>No submissions were received on this matter.</p>	
Retirement village exit fees		
Clear drafting	<p>Submission 5 – Queensland Law Society (QLS)</p> <p>The QLS raised concerns (pages 3-4 of the submission) with the drafting of the amendment to the <i>Retirement Villages Act 1999</i> (RV Act) which requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method (the proposed new section 53A(2) of the Act).</p> <p>The QLS considered that this amendment breaches the fundamental legislative principle of having legislation which is clear and unambiguous.</p> <p>The QLS noted exit fees may be calculated in different ways in different retirement villages. In some villages where the fee is calculated by reference to the resident's length of occupancy, the fee is already calculated on a daily basis (sometimes called the 'daily pro rata method'), but in other villages an alternate basis is used – for example, whole years. The QLS also note in other villages the exit fee is a fixed amount, and is not calculated by reference to how long the resident has occupied their unit.</p> <p>The QLS considered that their two examples of where a non-daily basis is presently used are instances in which disputes between the resident and the scheme operator may arise about whether the proposed default daily calculation method should apply.</p> <p>During the public hearing on the Bill, the QLS maintained their concern about the wording of the proposed new section 53A(2) of the Act.</p>	<p>These types of alternate calculation methods were considered in drafting of the amendment. Accordingly, the two examples provided by the QLS are clearly stated in the Bill to be excluded from application of the default daily calculation method.</p> <p>First, if the residence contract expressly prescribes a calculation method other than daily (say, weekly, fortnightly, monthly, quarterly or yearly), then there is no scope for the default method to apply. This should not be confused with the other amendment in the Bill, making the daily calculation method mandatory for all future contracts and incapable of being contracted out of.</p> <p>Secondly, if the residence contract provides the exit fee is a fixed amount, then the default method can also not apply, because the threshold requirement stated in the Bill of the exit fee being calculated by reference to the length of the resident's occupancy is not made out.</p> <p>Given the many variations in the wording of residence contracts; both within and between villages, it may be problematic to be more specific in the Bill as to what wording in contracts would (and would not) prescribe a calculation method other than a daily basis. In addition, the inclusion of examples of exit fee provisions which would negate application of the default daily basis may be seized upon as setting a 'precedent' by which the wording of actual contractual terms may be judged.</p>

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<p>Clear drafting – examples in Bill</p>	<p>Submission 5 – Queensland Law Society (QLS)</p> <p>The QLS raised concerns with the example in the Bill under the new section 53A(2), in support of the amendment in relation to the daily basis method of calculating the exit fee (pages 3-4 of the submission).</p> <p>First, the QLS suggested that a second example is needed to illustrate examples of where a non-daily basis is presently used, to thereby assist in showing instances where the default daily method would not apply.</p> <p>Secondly, the QLS suggested that the existing example is contradictory in how it practically demonstrates the daily basis calculation method, and therefore needs revision.</p>	<p>In relation to the first issue, the Bill already provides two threshold requirements which must be satisfied before the default method applies – the exit fee must be calculated by reference to the length of resident occupancy, and there must not be another calculation method expressly provided for in the residence contract. As such, there is already sufficient clarity within the Bill itself about when the amendment does not apply without the need for additional illustrative examples.</p> <p>In relation to the second issue, the concern of the QLS appears to arise from the words ‘5%... after 1 year’s residence... and 6%... after 2 year’s residence’ in the early part of the example, as they note this is capable of being calculated in various ways other than on a daily basis. However, the example goes on to clearly show how the daily basis method operates. The words noted by the QLS are intended to illustrate a calculation method which relies upon the length of the resident’s occupancy of their unit, nothing more (and this part of the example is actually lifted from a separate, earlier example under the new section 53A(1), on that exact point). Nevertheless, these concerns raised by stakeholders in their submission to the Committee have been noted.</p>
<p>Clear drafting – examples in Bill</p>	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>During the public hearing, the QRVSO raised concerns with the examples attached to the amendments to the RV Act (the proposed new sections 53A(1) and 53A(2) of the Act).</p> <p>Both examples include the same hypothetical contractual exit fee term, which is there solely to illustrate an exit fee which is calculated by reference to the length of the resident’s occupation in their unit. However, the QRVSO submitted that this example appears to illustrate a contractual exit fee term which prescribes a daily calculation method.</p>	<p>Although the example under the proposed new section 53A(1) and then repeated as part of the example under the proposed new section 53A(2) does not purport to invoke a daily calculation method, the concerns raised by stakeholders in their submission to the Committee have been noted.</p>
	<p>Submission 8 – Association of Residents of Queensland Retirement Villages (ARQRV)</p> <p>The ARQRV submission at page 1 raises concerns with the example in the Bill, under the new section 53A(1), in support of the amendment illustrating a residence contract where the exit fee is calculated by reference to the length of the resident’s occupancy of their unit. This example also appears under the new section 53A(2), as precursor to a broader example.</p> <p>The ARQRV submitted that the example is incorrectly drafted. The example is intended to be 5% for the first year occupation, increasing to 6% for the second year, meaning under a daily basis calculation method a resident leaving during the second year would pay the full 5% plus part of the additional 1% in the second year. The ARQRV interpreted the example to mean a resident in similar circumstances could be liable to pay 11% (being the 5% plus the 6%), or at least part of that 11%.</p> <p>During the public hearing, the ARQRV also suggested the correct calculation in the circumstances should be 5% plus 14/365 x 6%, not the 5% plus 14/365 x 1% as drafted.</p>	<p>In relation to the issue raised in their written submission, the ARQRV has misinterpreted the example. Although it is possible a residence contract could prescribe an exit fee which is 5% in the first year and 11% in the second, this is not what the example in the Bill provides.</p> <p>In relation to the issue raised at the public hearing, the ARQRV has misinterpreted how a daily basis calculation method applies. Under this method, a full two years of occupation would result in 6% applying. Where occupation is more than one year but less than two years, the 6% will be reduced accordingly to between 5% and 6%. To arrive at this percentage, the full 5% would apply, and must be added to that part of the additional 1% in the second year which correlates to the part of the second year in which the resident has been in occupation. As such, 5% plus 14/365 x 1% is the correct calculation.</p>

Topic	Witness submission or issue raised by committee	Departmental comment
Creation of uncertainty	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>At pages 7 &amp; 15, the QRVSO raised concerns with the amendment to the RV Act which requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method (the proposed new section 53A(2) of the Act).</p> <p>The QRVSO submitted that the amendment will create uncertainty about the interpretation of existing residence contracts, thereby generating more retirement village disputes between residents and operators, and causing stress to residents should the amendment result in a change to their residence contract.</p>	<p>Application of the default daily basis method is dependent upon two threshold requirements being satisfied – firstly, the exit fee must be calculated by reference to length of resident occupancy, and secondly (and most critically), this default does not apply where there is an alternate method of calculation expressly prescribed in the residence contract.</p> <p>As such, this amendment does not change a term in an existing contract, but rather inserts a term where this term is otherwise missing. If a residence contract provides the exit fee is to be calculated by reference the resident's length of occupancy in their unit, but then does not specify whether the basis of this calculation is daily, weekly, fortnightly, monthly, yearly or some other interval, this aspect of the contract is uncertain. Unless the calculation method could be derived from the other terms of the contract, the uncertainty would remain and the parties would need to negotiate as to what method should apply, or go to QCAT for a ruling as to what the method should be. Accordingly, the amendment actually removes uncertainty in this situation.</p>
Retrospectivity	<p>Submission 5 – Queensland Law Society (QLS)</p> <p>At page 5 of its submission, the QLS raised concerns with the substance of the amendment to the RV Act which requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method (the proposed new section 53A(2) of the Act).</p> <p>The QLS considered that this amendment breaches the fundamental legislative principle of not adversely affecting rights and liberties, or imposing obligations, retrospectively.</p> <p>The QLS noted that at the time when existing residence contracts were drafted, the view of the industry was that a daily basis calculation method would only apply where this method was expressly stated in the contract. The QLS is concerned the amendment would alter the bargain between the resident and scheme operator by imposing a calculation method which was never intended at the time that bargain was struck.</p> <p>The QLS also considered that the amendment may cause scheme operators to increase the ongoing contribution paid by residents upon entering a village, to cover any loss of profit (that is, reduced exit fee amounts) occasioned by the amendment. The QLS is further concerned the amendment will give residents who have already left a village and paid an exit fee a cause of action to seek redress from the operator if a daily basis method was not employed in calculating this fee.</p> <p>The QLS recommended that instead of prescribing how exit fees are to be calculated, any amendment to the exit fee provisions in the RV Act should be directed at interpreting exit fee clauses in residence contracts.</p>	<p>Application of the default daily basis method is dependent upon two threshold requirements being satisfied – firstly, the exit fee must be calculated by reference to length of resident occupancy, and secondly (and most critically), this default does not apply where there is an alternate method of calculation expressly prescribed in the residence contract.</p> <p>Arguably then, this amendment is not truly retrospective as it does not change a term in an existing contract, but rather inserts a term where this term or an alternative term, is otherwise missing, for contracts that have not yet been calculated. If a residence contract provides the exit fee is to be calculated by reference to the resident's length of occupancy in their unit, but then does not specify whether the basis of this calculation is daily, weekly, fortnightly, monthly, yearly or some other interval, this aspect of the contract is uncertain. Unless the calculation method could be derived from the other terms of the contract, the uncertainty would remain and the parties would need to negotiate as to what method should apply. The amendment merely removes the uncertainty in that what method should apply. The amendment does not purport to apply to exit fees already calculated.</p> <p>In relation to whether the amendment may prompt operators to increase ingoing contributions, it is suggested that any such result could not be directly attributed to this amendment. The amendment does not affect contracts which expressly state the basis for calculation, and therefore profit expectations for those contracts would be unchanged. For contracts to which the amendment does apply, the basis for calculation was uncertain anyway with no expressed method of calculation, and this must be considered when an operator's profit expectations are estimated. Ultimately, it will be market forces which decide whether (and by how much) operators may increase ingoing contributions.</p> <p>In relation to whether past residents may have a new cause of action where a non-daily basis method had been used to calculate their exit fee, it is highly unlikely this could eventuate. For such residents, the exit fee was calculated having regard to the RV Act as it stood at that time, which did not include the presently proposed amendment. Only existing contracts presently on foot are caught by the amendment, as any wider application to already-determined contracts would have necessitated there being specific provisions in the Bill to such effect.</p>

Topic	Witness submission or issue raised by committee	Departmental comment
Retrospectivity	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>The QRVSO raised concerns at pages 7 and 15 of its submission about the amendment to the RV Act which requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method (the proposed new section 53A(2) of the Act).</p> <p>The QRVSO submitted that the amendment will operate retrospectively to alter existing residence contracts, thereby unfairly changing a bargain struck between the resident and operator, which had been made with full disclosure of the contract terms. As such, the QRVSO considered that the amendment will create uncertainty about the terms of contracts, and as a result business confidence in the retirement village industry will be undermined.</p>	<p>In relation to the recommendation of the QLS about the better form of amendment being how to interpret exit fee clauses rather than prescribing exit fee calculation methods, the amendment only prescribes a method where any other method is not capable of being ascertained, and therefore interpretation alone would not assist in resolving the issue. As a general rule, contracts must comply with relevant laws (including the RV Act in the case of residence contracts), but the interpretation of individual contracts (even contracts made pursuant to a specific Act) is a matter for contract law.</p> <p>See above.</p>
Freedom of contract	<p>Submission 5 – Queensland Law Society (QLS)</p> <p>At page 5 of the submission, the QLS raised issues concerning the substance of the amendment to the RV Act which makes it mandatory for the exit fee under all future contracts to be calculated on a daily basis, with this incapable of being contracted out of (the proposed new section 53A(3) of the Act).</p> <p>The QLS considered that this amendment breaches the more general legal principle of freedom of contract, and may ultimately prompt scheme operators to increase ingoing contributions or otherwise adjust residence contracts to negate any loss of profit (that is, reduced exit fee amounts) occasioned by the amendment. QLS recommend the amendment be removed from the Bill, so it may be subjected to consultation and economic modelling to determine its likely impact on the viability of the retirement village industry.</p>	<p>It is not uncommon for laws to change, particularly to enshrine consumer protections, and all contractual arrangements made following such changes must therefore comply with the laws in place as at that time. As such, 'freedom of contract' is always subject to laws and changes to those laws, and this amendment to the RV Act is no different to any other like restriction designed to ensure a fairer and more certain marketplace.</p> <p>In relation to whether the amendment will result in financial disadvantage for future residents (in terms of increased ingoing contributions or other adjustments to residence contract terms), this is likely to be determined by market forces, as individual operators may be unwilling to make radical changes for fear of pricing themselves out of the market. In particular, operators have no idea when residents will leave the village, and therefore could never accurately predict the exit fee (except where it is a fixed fee, which is a calculation method unaffected by this amendment). The financial impact on villages will also be affected by the time within an increment period when a resident leaves. For example, the impact on operators will be less if a resident leaves just prior to a new increment period.</p> <p>In relation to whether the amendment should be subjected to consultation and economic modelling before proceeding, it is important this consumer protection initiative be implemented as soon as possible. As noted above, as the exit fee income stream for a village would be difficult to accurately predict by the operator (given the length of resident occupancy is unknown until the resident actually leaves), the impact of the amendment could not be accurately determined until it has been in force for some time. A greater sense of confidence felt by retirees entering villages will also be a factor influencing profitability.</p>

Topic	Witness submission or issue raised by committee	Departmental comment
Freedom of contract	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>Pages 6 and 7 of the QRVSO submission raised concerns with the amendment to the RV Act which makes it mandatory for the exit fee under all future contracts to be calculated on a daily basis, with this incapable of being contracted out of (the proposed new section 53A(3) of the Act).</p> <p>The QRVSO submitted that this amendment breaches the general legal principle of freedom of contract, and will thereby reduce the present healthy market competition which exists due to the varying exit fee models offered across different villages. The QRVSO considered that the ‘one-size-fits-all’ mandatory daily basis regime imposed by the amendment will therefore ultimately disadvantage residents.</p>	<p>See above.</p> <p>In relation to whether the amendment will disadvantage residents by limiting the variation possible between different retirement village schemes, this amendment only affects one aspect of the overall scheme. As such, the many and varied types of schemes available is unlikely to be reduced – and, in fact, having a consistent exit fee calculation method will make it easier for potential residents to compare and contrast these differing schemes. The amendments will also likely give a greater sense of confidence to retirees entering villages and therefore have a positive impact on competition.</p>
Decrease in village valuation	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>At pages 6, 10 &amp; 15 of their submission, the QRVSO raised concerns with the amendment to the RV Act which makes it mandatory for the exit fee under all future contracts to be calculated on a daily basis, with this incapable of being contracted out of (the proposed new section 53A(3) of the Act).</p> <p>The QRVSO submitted that this amendment will reduce the valuation of retirement village schemes, as such valuations are based upon expected exit fee income (that is, the profit component in operating a village), and this income is likely to be reduced as a result of only being able to calculate exit fees on a daily basis in future. The QRVSO stated that approximately 65% of all future contracts will be affected by the amendment, and quote one scheme operator who claims they expect to lose \$10,000 per contract under the new mandatory daily basis regime, resulting in a drop of 1% in the overall value of their village. QRVSO noted that operators will have no choice but increase exit fees to maintain current profit levels, which will therefore disadvantage future residents.</p> <p>The QRVSO suggested that if consumer protection is the goal of the amendment, it is unnecessary to achieve this by changing the Act to mandate a daily basis calculation method. Rather, residents whose contracts do not provide for daily calculation could merely vacate their unit prior to the next increment period commencing (that is, instead of vacating at one year and one day, they could vacate at one year exactly or earlier).</p>	<p>Unless the exit fee is a fixed amount (and therefore not affected by the amendment), the exit fee income stream for a village would be difficult to accurately predict by the operator, given the length of resident occupancy is unknown until it actually concludes. As such, any estimate of the impact of this amendment on actual exit fee income could only be based on numerous assumptions, which may or may not eventuate. The true impact could therefore only be known once the amendment has been in force for some time.</p> <p>In relation to whether the amendment will result in financial disadvantage for future residents (in terms of increased exit fees), this is likely to be determined by market forces, as individual operators may be unwilling to make radical changes for fear of pricing themselves out of the market. Again, as operators have no idea when residents will leave the village, and therefore could not accurately predict the exit fee they would receive, it would be difficult (and arguably artificial) for operators to increase exit fees in a way which would cover any possible loss occasioned by the amendment.</p> <p>In relation to the QRVSO suggestion that residents whose contracts do not provide for daily calculation could still avoid paying a higher exit fee rate by vacating their unit prior to the next increment period commencing, this wrongly assumes residents have total control over when they actually leave the village. Residents forced to vacate due to illness, or when the resident dies in situ, are common situations for which a planned leaving date is not possible.</p>
Change from the original amendment	<p>Submission 7 – Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association</p> <p>At pages 10 to 15 of its submission, the QRVSO raised concerns with the change to the exit fee amendments from those originally proposed (in the draft Fair Trading and Other Legislation Amendment Bill 2010) to what has ultimately appeared in the present Bill.</p> <p>Originally, the amendment provided a daily basis calculation method would only apply where the residence contract expressly provided for such a method, and the exact calculation formula was also detailed. The present amendments mandate a daily calculation method for existing residence contracts where no alternate method of calculation is prescribed (the proposed new section 52A(2) of the Act), and also mandate this method for all future contracts but make this unable to be contracted out of (the proposed new section 52A(3) of the Act).</p>	<p>As first drafted (and included in the draft Fair Trading and Other Legislation Amendment Bill 2011), the amendment was designed to remove the uncertainty created by the wording of the existing section 15(2)(a) of the RV Act. That section prescribed the date upon which the exit fee was to be calculated (being when the resident vacated their unit), but some residents believed the section went further and mandated a daily basis calculation method. Subsequent to this, the ARQRV and other residents found support for this reading of the section in comments made in the case of <i>Saunders v Paragon Property Investments Pty Ltd</i>, a 2008 District Court appeal from a retirement village dispute. However, there were differing views between operators and residents about the meaning and precedent value of the case.</p> <p>Strong feedback was received from some residents including the ARQRV on the original amendment in the draft Fair Trading and Other Legislation Amendment Bill 2011,</p>



Topic	Witness submission or issue raised by committee	Departmental comment
	<p>Although the QRVSO maintained that the original amendment required re-working to add clarity, it preferred the original amendment over those presently proposed in the Bill, as the original amendment would retain the existing freedom of contract in relation to how the exit fee is calculated.</p>	<p>indicating a need to enshrine the daily basis calculation method for all future residence contracts. Doing so will provide certainty and fairness for residents in relation to how their exit fee is determined, particularly in situations where a resident would otherwise be liable for an entire additional year of exit fees despite leaving the village at some time during the year.</p> <p>The intent of the original amendment is retained within the present Bill, in the form of a Note under section 15 to explain the purpose of this section.</p>
Pro rata calculation method in the first year	<p>Submission 8 - Association of Residents of Queensland Retirement Villages (ARQRV)</p> <p>The ARQRV submission raised in page 1 the example in the Bill, under the new section 53A(2), in support of the amendment which requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method. Presumably, their issue would also extend to the new section 53A(3), which relies upon the same example.</p> <p>While the ARQRV supported the amendment to enshrine the daily basis calculation method, it considered that this method should apply to every year of occupation, not just the second and subsequent years as inferred by the example.</p>	<p>The example is of a residence contract which provides for an exit fee of 5% for the first year, increasing to 6% in the second year. Under the example, a resident whose contract provides for daily calculation of the exit fee, and who vacates their unit after one year and two weeks would be liable to pay the full 5% plus 14/365 of the additional 1% in the second year.</p> <p>The ARQRV submitted that if a resident under the same contract vacated at, say, 14 days into their first year of occupancy, they should only be liable to pay 14/365 of the 5%. This submission is contrary to the ordinary way in which actual like exit fee provisions (even those which use a daily basis calculation method) are drafted and applied – being the resident would be liable to pay the full 5% regardless of when they vacate during that first year. This fee structure ensures the scheme operator receives a meaningful amount of profit on every residence contract (which explains why most exit fee percentages start relatively high, then increase by relatively small increments), and is critical to viability of retirement village businesses.</p> <p>In support of its submission, the ARQRV referred to the case of <i>Saunders v Paragon Property Investments Pty Ltd</i>, a 2008 District Court appeal from a retirement village dispute. In that case, the resident had occupied their unit beyond the first year, and therefore the matter now raised by the ARQRV was never a live issue for the Court to consider, and could not therefore be captured within the subsequent ruling.</p> <p>The issue raised by the ARQRV has been noted.</p>
Mandatory daily basis calculation method to all existing contracts	<p>Submission 8 - Association of Residents of Queensland Retirement Villages (ARQRV)</p> <p>At the public hearing, the ARQRV raised concerns with the exit fee amendments to the RV Act on the basis they did not give full effect to the comments made in the District Court decision of <i>Saunders v Paragon Property Investments Pty Ltd</i>. The ARQRV submitted that these comments require all residence contracts, not just future contracts, to apply a daily calculation method, and the proposed new section 53A(2) should be changed to mandate this method for all existing contracts.</p>	<p>The proposed section 53A(2) requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method (the proposed new section 53A(2) of the Act). Changing this provision to apply a daily pro rata calculation method where the contract already provides another calculation method would be undoing the bargain made between the parties.</p> <p>Altering this bargain retrospectively would result in a negative financial impact for operators (though difficult to estimate), who would have determined the exit fee percentage and method of calculation in consideration of the other terms of the contract. This proposal is to be contrasted with the new section 53A(3) in the Bill which applies prospectively. This provides operators with an opportunity to make any necessary adjustments to the other terms of their standard contracts to accommodate the mandated daily basis calculation method, and thereby maintain existing profit margins.</p>

**Appendix C – Witnesses at public hearings****Wednesday 26 October 2011**

<b>Witnesses</b>
<p>Department of Justice and Attorney-General</p> <ul style="list-style-type: none"> <li>- Mr Philip Reed, Director-General</li> <li>- Mr David Ford, Deputy Director-General, Liquor, Gaming and Fair Trading</li> <li>- Mr Terry Ryan, Deputy Director-General, Justice Services</li> <li>- Ms Jennifer Lang, Acting Assistant Director-General, Strategic Policy, Legal and Executive Services</li> <li>- Ms Imelda Bradley, Director, Strategic Policy</li> <li>- Mr Damian Sammon, Director, Fair Trading Policy</li> <li>- Ms Linda Woo, Executive Director, Office of Regulatory Policy</li> </ul>

**Friday 28 October 2011**

<b>Witnesses</b>
<p>Queensland Law Society</p> <ul style="list-style-type: none"> <li>- Mr Bruce Doyle, President</li> <li>- Ms Annie O'Connor, Member, Elder Law Committee; Consultant, DLA Piper Australia</li> <li>- Ms Matt Dunn, Principal Policy Solicitor</li> <li>- Ms Louise Pennisi, Policy Solicitor</li> </ul>
<p>Aged Care Queensland Inc. and Retirement Villages Association Limited (on behalf of Queensland Retirement Villages Scheme Operators)</p> <ul style="list-style-type: none"> <li>- Mr Andrew Carins, General Manager, Renaissance Retirement Living</li> <li>- Mr Andrew Macintosh, Queensland State Manager, Operations, Retirement-AVEO; Chairman, Retirement Villages Association Queensland Regional Committee</li> <li>- Ms Geri Taylor, Policy and Retirement Living Manager, Aged Care Queensland</li> <li>- Ms Kim Teudt, General Manager Retirement Living, Churches of Christ Care</li> <li>- Mr Robin Lyons, Partner, Minter Ellison Lawyers</li> </ul>
<p>Association of Residents of Queensland Retirement Villages</p> <ul style="list-style-type: none"> <li>- Mr Les Armstrong, President</li> </ul>

## Department of Justice and Attorney-General

- Mr Philip Reed, Director-General
- Ms Jennifer Lang, Acting Assistant Director-General, Strategic Policy, Legal and Executive Services
- Ms Linda Woo, Executive Director, Office of Regulatory Policy
- Ms Imelda Bradley, Director, Strategic Policy
- Mr Damian Sammon, Director, Fair Trading Policy
- Mr Mark Zgrajewski, Principal Legal Officer

**Friday 4 November 2011****Witnesses**

## Department of Justice and Attorney-General

- Mr Philip Reed, Director-General
- Mr David Ford, Deputy Director-General, Liquor, Gaming and Fair Trading
- Ms Jennifer Lang, Acting Assistant Director-General, Strategic Policy, Legal and Executive Services
- Ms Imelda Bradley, Director, Strategic Policy
- Ms Linda Woo, Executive Director, Office of Regulatory Policy
- Mr Damian Sammon, Director, Fair Trading Policy
- Mr Mark Zgrajewski, Principal Legal Officer

**Appendix D – Details of written material provided by the Department of Justice and Attorney-General**

All written material provided to the committee by the Department of Justice and Attorney-General is available on the committee's website at: [www.parliament.qld.gov.au/committees](http://www.parliament.qld.gov.au/committees).

- ♦ Letter from the Director-General attaching initial briefing on the Bill and copies of advice from the Rules Committee about the Bill, dated 17 October 2011
- ♦ Letter from the Director-General regarding issues raised by the committee during the briefing by the Department of Justice and Attorney-General on 25 October 2011, dated 27 October 2011.
- ♦ Letter from the Director-General providing the Department of Justice and Attorney-General's comments on matters raised in submissions and issues raised by the committee, dated 3 November 2011.
- ♦ Letter from the Director-General of DJAG attaching comment on the Bill's compliance with fundamental legislative principles, dated 8 November 2011.
- ♦ Letter from the Director-General of DJAG on a drafting issue raised by Office of the Information Commissioner, dated 15 November 2011.

### **Appendix E - *Saunders v Paragon Property Investments Pty Ltd***

**Facts:** The resident had occupied the retirement village for two years and one day. The residence contract imposed an exit fee which accrued at a rate of 5 percent of the sale price per year of residence and, on that basis, the resident was charged an exit fee of 15 percent. The resident argued that the exit fee should be calculated pro-rata on a daily basis for the partial years of occupation.

**Tribunal Decision:** The Tribunal held that the resident's interpretation involves "*reading in*" the words "*on a daily pro rata basis*" to the actual words in s15(2) and the necessary pre-conditions for so doing were not satisfied in the circumstances. Accordingly, the Tribunal agreed with the retirement village operator's interpretation of s15(2), being that the exit fee was correctly charged on a yearly basis of 15 percent based on three years' occupation, the extra day being counted as a full year (rather than 10 percent, then the full year rate as adjusted to one day ie on a pro rata daily basis for the period of occupation in the third year, as contended by the resident).<sup>79</sup> The Tribunal dismissed the resident's application. It found that s15(2) did not prescribe the method of calculation of the exit fees, but only a point in time in a particular year at which exit fees were to be calculated.

**District Court Decision:** The resident appealed to the District Court, where Judge Robin QC found in favour of the resident. He ordered a refund of \$9,900 to the resident which had been wrongly retained as an "exit fee". The decision relates more to the District Court's determination of the period of time that the resident occupied the village rather than an interpretation of how s 15(2) should operate. Judge Robin QC held that the resident had been in occupation for two years rather than two years and one day because the day on which the resident ceased to reside in the village was not the first day of her third year but the last day of her second year. This conclusion was based on His Honour's interpretation of the meaning of the word "from" after examining the case law in the area. His Honour concluded that the word "from" excluded the date of commencement of the resident's ownership. Even though not strictly necessary, Judge Robin QC also considered the issue whether s15(2) of the Retirement Villages Act should be interpreted as requiring exit fees to be calculated on a daily basis. He held that "*[i]n my opinion, the alternative approach, that this is a provision requiring apportionment, is also open, indeed is the more natural one*".<sup>80</sup>

**Supreme Court Appeal (Discontinued):** The retirement village operator lodged an appeal in the Supreme Court of Queensland. However, this was discontinued after the operator received advice that the Supreme Court would not need to address the issue of the interpretation of s15(2) but would determine the issue based on the period of occupation.

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<sup>79</sup> McCulloch Robertson Lawyers, *Should exit fees be calculated on a daily pro rata basis?*, In-house publication on "Retirement Living", 6 October 2008, p 1; R Lyons, *Recent developments in retirement villages law*, Retirement Villages Association – Queensland Conference Paper 2009, Minter Ellison, 30 July 2009, at 6.

<sup>80</sup> *Saunders v Paragon Property Investments Pty Ltd* [2008] QDC 322 (19 December 2008), at 14, paragraph 19.