

Your Ref: Civil Proceedings Bill

Our Ref: Elder Law Committee / Litigation Rules Committee: 21000326/44

14 October 2011

Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
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Dear Research Director

CIVIL PROCEEDINGS BILL 2011

Thank you for the opportunity to provide comments about the *Civil Proceedings Bill 2011* (the Bill).

The Bill has been reviewed by the Society's Litigation Rules Committee and its Elder Law Committee and those Committees have contributed to this response.

The Bill is composed of two very distinct and disparate elements, namely:

- the civil proceedings amendments (Parts 1 to 31 of the Bill); and
- the other amendments (Part 32 of the Bill).

The Civil Proceedings Amendments

The Queensland Law Society has been engaged and consulted in the development of the civil proceedings amendments and is supportive of those aspects of the text of the Bill.

The Society commends the civil proceedings amendments which utilise clear and unambiguous language and are accessible to both the profession and members of the community. The Society would like to congratulate the drafters for preparing a Bill that not only modernises and simplifies civil proceedings, but that is also thoroughly researched and carefully considered.

The Other Amendments

The Bill contains in Part 32 amendments of various other legislation which do not form a part of the civil proceedings amendments and are distinct and disparate in nature.

The Society notes that the Bill is not styled 'and other Legislation Amendment Bill', as has been the practice when a Bill is directed toward a number of unrelated purposes. The danger in not making the dual purpose of the Bill clear from its title is that members of Parliament, the community, legal professionals and stakeholder groups may be misled into believing that the Bill is confined only to amendments related to its stated subject matter. A similar criticism could have been directed toward the *Local Government Electoral Bill 2011* passed by Parliament earlier this year, which amended in Part 12 a number of unrelated Acts and a regulation.

The Society is concerned that it is bad drafting practice to include within a single topic named bill a multitude of unconnected amendments without a clear acknowledgement in the short title that it is directed to multiple purposes. In the case of the Bill at hand the 'other amendments' are not relevant to the stated purpose of the Bill and treat it merely as a device. Accordingly, we are of the view that the Bill does not have sufficient regard to the institution of Parliament and is in breach of fundamental legislative principles. This breach is not acknowledged or justified in the Explanatory Memorandum.

Proposed Amendments of the Retirement Villages Act 1999

The Society notes that the Bill intends to amend the *Retirement Villages Act 1999* (RVA) as follows:

Division 8 Amendment of Retirement Villages Act 1999

238 Act amended

This division amends the Retirement Villages Act 1999.

239 Amendment of s 15 (What is an exit fee)

Section 15(2)—

insert—

'Notes—

1 Subsection (2) states the day at which the exit fee for a residence contract is to be worked out, and not the method of working out the exit fee.

2 Section 53A states how to work out the exit fee for a residence contract that is worked out under the contract having regard to the length of time the resident has resided in the unit.'

240 Insertion of new s 53A

After section 53— insert—

'53A How to work out particular exit fee for a residence contract

'(1) This section applies to an exit fee for a residence contract that is worked out under the contract having regard to the length of time the resident has resided in the accommodation unit to which the contract relates.

Example—

This section applies if the exit fee is 5% of the ingoing contribution payable under the contract after 1 year's residence in the unit and 6% of the ingoing contribution payable under the contract after 2 years residence in the unit.

'(2) If the contract was entered into before the commencement of this section, the exit fee must be worked out on a daily basis unless the contract provides a way of working out the exit fee that is not on a daily basis.

Example of how to work out the exit fee for a residence contract on a daily basis—
If—

(a) the exit fee is 5% of the ingoing contribution payable under the contract after 1 year's residence in the unit and 6% of the ingoing contribution payable under the contract after 2 years residence in the unit; and

(b) the resident resides in the unit for 1 year and 14 days, but not during a leap year; the exit fee is 5% of the ingoing contribution payable under the contract for the first year of residence plus $\frac{14}{365}$ of 1% of the ingoing contribution payable under the contract for the 14 days of the second year of residence.

'(3) If the contract is entered into after the commencement of this section, the exit fee must be worked out on a daily basis.'

The Society wishes to express some significant concern regarding the amendments proposed to the RVA contained in the Bill.

We are concerned that these amendments breach fundamental legislative principles and will lead to legal uncertainty about the method of calculating exit fees for residence contracts entered into prior to the commencement of the amendments.

Fundamental Legislative Principles

The *Legislative Standards Act 1992* sets out in section 4 the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. To comply with these principles legislation must have sufficient regard for the rights and liberties of individuals, including:

- not adversely affecting rights and liberties, or imposing obligations, retrospectively; and
- being unambiguous and drafted in a sufficiently clear and precise way.

The Explanatory Memorandum for the Bill states that:

The Bill is consistent with fundamental legislative principles.

This is clearly not the case and the QLS is concerned that proposed section 53A to be added to the RVA is ambiguous and not drafted in a sufficiently clear and precise way and also does adversely affect the rights and liberties of individuals retrospectively.

Clear Drafting

Proposed section 53A(2) applies to a residence contract entered into prior to the commencement of the section and states:

... the exit fee must be worked out on a daily basis unless the contract provides a way of working out the exit fee that is not on a daily basis.

The Society understands that in some retirement village schemes:

- the exit fee (in some schemes called a “deferred management fee”) is clearly expressed to be a fee payable by the resident to the scheme operator “for services provided” by it to the resident during his /her residency and payment for which (by the resident to the scheme operator) is deferred until the resident exits the accommodation unit; and/or
- calculated on a pro rata daily basis from and to the time the resident enters and exits the accommodation unit respectively

The Society notes however that in other retirement village schemes:

- the practice is not to draft exit clauses in residence contracts on a daily basis but rather on a yearly or staged basis where the resident’s fee is determined by the year of residence, ie 2 years means in the second year of residence; and/or
- exit fee clauses are expressed to create not a ‘fee for providing services’ which may be properly rated on a daily basis but rather one element of the ‘entry fee’ which is delayed until a resident’s exit from a village. Just as the payment of stamp duty on the sale of residential property comes due in full upon transfer regardless of the length of ownership, the payment of the exit fee may likewise be an agreed fixed fee and likewise part of the fixed costs of buying into a retirement village.

We are concerned that there will be significant litigation about whether the latter types of exit clauses appropriately provide a way of working out the exit fee not on a daily basis. Significant delay, cost and prejudice may arise for existing residents in trying to determine whether their exit fee clause must or must not be constructed on a daily basis. The threshold level for construction of an exit fee clause will ultimately have to be set by the courts and the Society sees that there is a far greater utility in improving the drafting prior to it being made into legislation. This could be achieved by the addition of a further example which demonstrates when a clause based on length of time of residence will not be calculated on a daily basis.

Additionally the example provided in proposed section 53A appears to be misleading as it apportions the payment for the second year for the 14 days of residence over 1 year when the scenario clearly states that the extra 1% is payable ‘... after 2 years residence in the unit’. It is arguable from the text that any of the following calculations could be applied from the example:

- (1) $(\text{Ingoing Contribution} \times 5\%) + ([\text{Ingoing Contribution} \times 1\%] \times 14/365)$; or
- (2) $(\text{Ingoing Contribution} \times 6\%) \times 379/730$; or
- (3) $(\text{Ingoing Contribution} \times 5\%) + ([\text{Ingoing Contribution} \times 5\%] \times 14/365)$; or
- (4) $(\text{Ingoing Contribution} \times 5\%)$.

Retrospectivity

The Society has concern about the retrospective nature of the proposed clause 53A(2) as the clause is directed toward any residence contract signed before the commencement of the section. As such the new section will impose itself on a wide variety of Exit Fee clauses that were drafted before a mandatory pro rata regime was considered and, in fact, at a time when the prevailing view was quite the opposite, namely that an Exit Fee would only be applied pro rata if the Exit Fee formula expressly provided for it. The proposed section essentially requires that the drafters of those existing formulas should have taken

into account something which did not need to be a consideration or concern for them at the time their work was done.

This prior prevailing view and the legislature's intention in that regard is clearly reflected in the evolution of Section 15 of the Act. The Commercial and Consumer Tribunal applied section 15 in accordance with that view in each of the matters of *Cossey & Pye v Australian Property Custodian Holdings Ltd* VH005-06 & VH001-07. The only other significant judicial comment about the issue was obiter by Robin J in the matter of *Saunders v Paragon Property* [2008] QDC 322 (08/2930) Brisb Robin QC DCJ 19/12/2008. Robin J's comments in obiter ultimately had no bearing on his decision and important aspects of his obiter were not the subject of argument before him and as obiter the comments could unfortunately not be tested on appeal.

This has the potential to alter the nature of the bargain between residents and scheme operators and may inevitably lead to an increase in incoming contributions to cover shortfalls in operating revenue contributed by exiting residents.

The Society also has concern about whether the retrospective effect of the proposed section may also provide additional rights to legal action for residents who have at any time exited a scheme and not had their fee calculated on the daily basis. The absence of transitional arrangements for these changes provides little guidance on the application of the provisions to past payments and we are concerned that it will be arguable that former residents may have actions against their former scheme operators.

For these reasons the QLS has grave concern about the use of retrospectivity in the proposed clause 53A(2) and urges the Committee to recommend that any change to exit fees is simply limited to interpreting agreements rather than setting how the fees are to be worked out.

Freedom to Contract

In addition to the stated concerns the Society holds regarding proposed section 53A(2), we are also concerned with the way proposed section 53A(3) seeks to limit the freedom of the parties to form a residence contract. The effect of this provision is to deem that all contracts formed after the commencement of the section have exit fees worked out on a daily basis. This removes the fundamental right of parties to the contract to negotiate terms which suit them and will probably ultimately lead to an increase in the Ingoing Contributions, reduction of Capital Appreciation participation percentages and increase in rates of Exit Fees proposed by scheme operators to compensate in their financial viability modeling for schemes for the uncertainty of operation of the daily rate.

The Society cautions against encroaching on the freedom to contract.

Objects of RVA

The objective of the RVA is to ensure both:

- to promote consumer protection and fair trading practices in operating retirement villages and in supplying services to residents; **and**
- to encourage the continued growth and viability of the retirement village industry in the State.

Amendments made to the Act need to have regard to both of these objects providing an appropriate balance between residents and certainty for industry. Ultimately, if measures erode the viability of schemes in the retirement village industry it will be residents who will be displaced or left disadvantaged.

It is suggested that amendments of these nature need to be supported with economic modeling of the likely impacts on the viability of the industry and the security of residents.

Consultation

The Explanatory Memorandum for the Bill notes that the Society was consulted and made submissions with respect to the proposals included in the consultation version of the *Fair Trading and Other Legislation Amendment Bill 2010* released late in 2010. The amendments in the Bill now are stated to come from the consultation received at that time.

This is somewhat surprising as the QLS submission in response mentioned in the consultation counseled strongly against the proposal and against limiting the freedom of individuals to come to a bargain. A copy of the QLS submission lodged with the Department is provided for the benefit of the Committee. We particularly note the comments from paragraphs 1.22 to 1.33 which explicitly deal with the background and issues associated with working out exit fees on a daily basis.

The Society was not consulted on the current amendments incorporated into the Bill.

Proposal

The Society proposes that the amendments to the RVA be removed from the Bill and be the subject of further consultation with industry, residents and other stakeholders which includes the economic modeling of the effect of the amendments on the viability of the industry.

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Thank you for the opportunity to provide comments and submissions to the proposed legislation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Principal Policy Solicitor, Mr Matt Dunn on 3842 5889 or via email on 3842 5889.

Yours faithfully

Noela L'Estrange
Chief Executive Officer