

Our reference: 541035/1, 1767293

Your reference: 11.1.3c



**Queensland
Government**

Office of the
Director-General

Department of
Justice and Attorney-General

The Honourable Dean Wells MP
Acting Chair
Legal Affairs, Police, Corrective Services and
Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Wells

I refer the Legal Affairs, Police, Corrective Services and Emergency Services Committee's (the Committee) examination of the Civil Proceedings Bill 2011 (the Bill).

I enclose a written report prepared by the Department of Justice and Attorney-General (DJAG) on stakeholders' submissions on the Bill.

Further to my letter dated 27 October 2011, in which I addressed a number of issues raised by the Committee during recent hearings on the Bill, I provide the following additional information for the Committee's consideration.

Justices of the Peace amendments

Section 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.

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone (07) 3239 3520
Facsimile (07) 3239 3474
Website www.justice.qld.gov.au
ABN 13 846 673 994

The Committee sought further information on checks and balances that would apply to the proposed power for JPs to retain details of POI documents. The draft provision 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 DJAG 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.

During the Committee hearings, clarification was sought as to the meaning of a POI document referred to in clause 235 of the Bill. This term is not defined and would be interpreted according to its ordinary meaning, namely, a document from an authoritative source that evidences 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.

Where POI documents have a commonly understood meaning and the legislation does not require stated POI documents to be provided, it is DJAG's view that the term does not need to be defined. The JP Branch in DJAG intends to issue guidelines in these matters to assist and inform JPs and persons using their services.

The scenario was also raised during the Committee hearings 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. However, 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.

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 Government Agency Program (QGAP) locations (78 offices in rural and remote areas of Queensland); and police stations.

They can also often be located in pharmacies; post offices and other similar 'core businesses' in communities. The JP Branch in DJAG 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.

Therefore, DJAG does not expect that the amendment will, in practice; result in an adverse impact on JPs services availability in the community.

As the Committee is aware, 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.

Associations incorporation Act 1981 (AIA) amendments

The types of incorporated associations likely to apply to transfer to the *Corporations Act 2001* (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).

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 *Liquor Act 1992* and the Commonwealth tax law has created significant compliance difficulties which may be simplified by the transition which would be enabled by this amendment.

With respect to concerns about associations that have been non compliant with the AIA seeking to transfer, a note to proposed new section 106F indicates that a transfer is subject to section 601BM of the *Corporations Act 2001*, 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.

In addition, under the proposed amendments, the chief executive has discretion to refuse an application to transfer (section106D). 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 (section106C).

Retirement village amendments

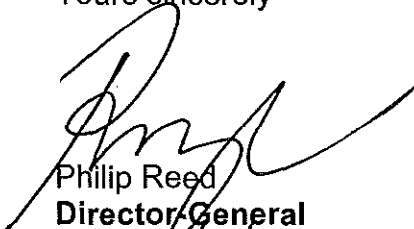
The concerns about the examples in the proposed amendments and in particular, the concerns raised by stakeholders in submissions to the Committee have been noted, although the examples are accurate as presently drafted.

In relation to whether the wording of the proposed new section 53A(2) should be revised to provide more assistance as to how the exit fee terms in existing residence contracts should be interpreted, no changes to the amendment as presently drafted appear warranted. Given the wide variance in contractual terms within and between villages, it is not possible to provide more specific interpretive advice on an issue which must be decided on a case-by-case basis.

At the briefing on 26 October 2011, the Committee requested information about the likely impact of the proposed retirement villages amendment on the business models of retirement village operators. Operator stakeholders have provided in their submissions some estimates of possible financial impacts on village profitability. The impact of the amendments on a village's business model would be difficult to accurately predict, given the length of resident occupancy and the time of departure within a year is unknown until the resident actually leaves. As such no detailed cost modelling of the potential impact of the amendment on operators was undertaken. Profitability would also be affected by the beneficial impact of the amendment on increasing the confidence of retirees considering entering a village.

I trust this information is of assistance to the Committee.

Yours sincerely



Philip Reed
Director General

Enc. 3/11/11

Legal Affairs, Police, Corrective Services and Emergency Services Parliamentary Committee:
Initial summary of issues raised in submissions on the Civil Proceedings Bill

Issue	Witness submission	Departmental advice
Civil Proceedings		
General submission on Civil Proceedings Bill	<p>001 – The Hon. P de Jersey AC, Chief Justice</p> <p>Outlines extensive consultation undertaken by the Rules Committee in relation to the Civil Proceedings component of the Bill.</p>	Stakeholder supports Bill
Concerns about name of Bill	<p>005 – 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"> • that the Bill is not styled ‘and other Legislation Amendment Bill’; • 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; • that this is bad drafting practice; • that the Bill does not have sufficient regard to the institution of Parliament 	<p>The Department has 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</p>



Issue	Witness submission	Departmental advice
	<p>and is in breach of fundamental legislative principles.</p>	<p>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 points 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</p>



Issue	Witness submission	Departmental advice
		<p>include an amendment removing those words on assent, otherwise the principal Act would be inappropriately named.</p> <p>Accordingly, OQPC has advised that it does not support the Society'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 would also draw the Committee's attention to the Bill's table of contents and explanatory notes as additional indicators of the Bill's scope.</p>
Funeral Industry		
<p>Amendment of the <i>Births, Deaths and Marriages Registration Act 2003</i></p>	<p>002 – 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"> • that regional and rural operators should not be permitted to be exempt from electronic lodgement of cremation or burial notices • that infrastructure to allow such lodgement should be deemed a 	<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"> • the crematorium or cemetery is located in an area that does not allow for electronic lodgement; or • other exceptional circumstances do not allow for electronic lodgement <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.</p> <p>Queensland Government infrastructure is</p>

Issue	Witness submission	Departmental advice
	priority for the Government to ensure compliance	not relevant to the exemption.
Amendment of the <i>Cremations Act 2003</i>	<p>002 – Australian Funeral Directors Association (AFDA)</p> <p>In paragraphs 5-8 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"> • that the cremation facility number must be placed on cremated remains containers as a legislative requirement • that some information should be printed on the ashes container and some recorded and retained at the crematorium • 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 	<p>Subject to the passage of the Bill, it is intended that amendments will be made to the <i>Cremations Regulation 2003</i> 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>
Right to Information and Privacy		
Amendments relating to leave for statutory officers, agencies providing personal	003 – Office of the Information Commissioner	Stakeholder supports Bill

Issue	Witness submission	Departmental advice
information to other jurisdictions and Justices of the Peace recording information.		
Amendments permitting Queensland Government agencies to provide personal information to Commonwealth agencies and other States and Territories for law enforcement purposes.	004 – Australian Federal Police	Stakeholder supports Bill
Associations Incorporation		
Requirement to lodge a copy of a ‘special resolution’ and issue of structure and lack of constitutional provisions	<p>006 – Australian Centre for Philanthropy and Non-profit Studies (QUT Business School)</p> <p>On page 2 of its submission, QUT state in respect of some RECI Act corporations:</p> <ul style="list-style-type: none"> • The requirement to lodge a copy of the special resolution to transfer may prove difficult due to their structure and lack of constitutional provisions. • It may be preferable to either: <ul style="list-style-type: none"> - allow for Ministerial approval to the change of legal structure rather than requiring a special resolution; or - extend the provisions of section 132 of the <i>Associations Incorporation</i> 	<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 $\frac{3}{4}$ 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</p>



Issue	Witness submission	Departmental advice
	<p><i>Act 1981</i>(AI Act) to cover migration to a company limited by guarantee.</p> <ul style="list-style-type: none"> Section 132 of the AI Act allows for a regulation to exempt RECI Act corporations from specified provisions of the AI Act. 	<p>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>
Education and information strategy	<p>006 – Australian Centre for Philanthropy and Nonprofit Studies (QUT Business School)</p> <p>On page 2 of its submission, QUT states 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>



Issue	Witness submission	Departmental advice
		<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"> • a feature on OFT's website about the amendments; • A feature in the Smart Business Bulletin (distributed to over 26,000 subscribers); • Social media posts (Facebook and Twitter); • Media release;



Issue	Witness submission	Departmental advice
		<ul style="list-style-type: none"> • Ensuring all publications relating to associations are current; and • Letters to targeted stakeholders including – <ul style="list-style-type: none"> ○ Queensland Council of Social Services Inc ○ Centre for Philanthropy and Non-profit Studies, QUT ○ McCullough Robertson Lawyers ○ Queensland Law Society ○ Neumann & Turnour, Lawyers. <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>
Retirement Villages		
Naming of the Bill	<p>005 – Queensland Law Society (QLS)</p> <p>The QLS take issue with the title of the Bill (pages 1-2 of the submission), believing it breaches the fundamental legislative principle of having sufficient regard to the institution of Parliament.</p>	<p>This issue is dealt with above. A communication strategy for the RV Act amendments was implemented, which included updated content on the Office of Fair Trading website and release of a Smart Business Bulletin.</p>

Issue	Witness submission	Departmental advice
	<p>The amendments to the <i>Retirement Villages Act 1999</i> (the RV Act) are not mentioned in the title of the Bill, and QLS believe this may be misleading to stakeholders and the general community by not alerting them to the RV Act amendments contained therein.</p>	
Clear Drafting	<p>005 – Queensland Law Society (QLS)</p> <p>QLS raise concerns (pages 3-4 of the submission) with the drafting 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>QLS believe this amendment breaches the fundamental legislative principle of having legislation which is clear and unambiguous.</p> <p>QLS note 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</p>	<p>These types of alternate calculation methods were considered in drafting of the amendment. Accordingly, the two examples provided by QLS are clearly stated in the Bill to be excluded from application of the default daily calculation method.</p> <p>Firstly, 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</p>



Issue	Witness submission	Departmental advice
	<p>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. 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>QLS believe 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, QLS maintained their concern about the wording of the proposed new section 53A(2) of the Act.</p>	<p>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>
Clear Drafting – example in Bill	<p>005 – Queensland Law Society (QLS)</p> <p>QLS take issue 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>Firstly, QLS suggest a second example is needed to illustrate examples of where a</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</p>



Issue	Witness submission	Departmental advice
	<p>non-daily basis is presently used, to thereby assist in showing instances where the default daily method would not apply.</p> <p>Secondly, QLS suggest the existing example is contradictory in how it practically demonstrates the daily basis calculation method, and therefore needs revision.</p>	<p>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 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>
Retrospectivity	<p>005 – Queensland Law Society (QLS)</p> <p>At page 5 of its submission, QLS take issue 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</p>	<p>As discussed above, application of the default daily basis method is dependent upon two threshold requirements being satisfied. Most critically, this default does not apply where there is an alternate method of calculation expressly prescribed in the residence contract.</p>



Issue	Witness submission	Departmental advice
	<p>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>QLS believe this amendment breaches the fundamental legislative principle of not adversely affecting rights and liberties, or imposing obligations, retrospectively.</p> <p>QLS note 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. QLS are 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>QLS also believe the amendment may cause scheme operators to increase the ingoing contribution paid by residents upon entering a village, to cover any loss of profit (that is, reduced exit fee amounts) occasioned by the amendment. QLS are further concerned the amendment will give residents who have already left a village and paid an exit fee a</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 specific, narrow situation and 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</p>



Issue	Witness submission	Departmental advice
	<p>cause of action to seek redress from the operator if a daily basis method was not employed in calculating this fee.</p> <p>QLS recommend 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>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> <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</p>



Issue	Witness submission	Departmental advice
		<p>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>
Freedom of Contract	<p>005 – Queensland Law Society (QLS)</p> <p>At page 5 of the submissions, QLS raises 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>QLS believe 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</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</p>

Issue	Witness submission	Departmental advice
	<p>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>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>



Issue	Witness submission	Departmental advice
Decrease in village valuation	<p>007 – Aged Care Queensland (Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association)</p> <p>At pages 6, 10 & 15 of their submission, QRVSO take issue 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>QRVSO assert 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. QRVSO state 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 note operators will have no choice but increase exit fees to maintain</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</p>



Issue	Witness submission	Departmental advice
	<p>current profit levels, which will therefore disadvantage future residents.</p> <p>QRVSO suggest 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>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>
Freedom of contract	<p>007 – Aged Care Queensland (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 takes issue 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>QRVSO assert this amendment breaches the</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 disadvantage residents by limiting the variation possible between different retirement village schemes, this amendment</p>



Issue	Witness submission	Departmental advice
	<p>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. QRVSO believe the 'one-size-fits-all' mandatory daily basis regime imposed by the amendment will therefore ultimately disadvantage residents.</p>	<p>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>
Creation of uncertainty	<p>007 – Aged Care Queensland (Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association)</p> <p>At pages 7 & 15, QRVSO takes issue 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>QRVSO assert the amendment will create</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,</p>



Issue	Witness submission	Departmental advice
	<p>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. During the public hearing, QRVSO maintained their concerns about the certainty of this amendment.</p>	<p>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>
<p>Clear Drafting – example in Bill</p>	<p>007 – Aged Care Queensland (Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association)</p> <p>During the public hearing, QRVSO took issue 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, QRVSO assert this example appears to illustrate a contractual exit fee term which prescribes a daily calculation</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>

Issue	Witness submission	Departmental advice
	method.	
Retrospectivity	<p>007 – Aged Care Queensland (Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association)</p> <p>QRVSO raises concerns at pages 7 & 15 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>QRVSO assert 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, QRVSO believe 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>As noted above, 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 is otherwise missing. 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 specific, narrow situation, and is therefore unlikely to</p>



Issue	Witness submission	Departmental advice
		have any impact on business confidence in the retirement village industry.
Change from the original amendment	<p>007 – Aged Care Queensland (Queensland Retirement Village Scheme Operators (QRVSO), comprising Aged Care Queensland Incorporated and the Retirement Villages Association)</p> <p>At pages 10-15, QRVSO take issue with the change to the exit fee amendments from what was originally proposed (in the Fair Trading and Other Legislation Amendment Bill 2011) 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 Association of Residents of Queensland Retirement Villages 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 Association of Queensland Retirement Village Residents on the original amendment in the draft Fair</p>



Issue	Witness submission	Departmental advice
	<p>Although QRVSO maintain the original amendment required re-working to add clarity, they prefer this amendment over those presently proposed, as it retained the existing freedom of contract in relation to how the exit fee is calculated.</p>	<p>Trading and Other legislation Amendment Bill 2011, 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>It should be noted 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>
Clear Drafting	<p>008 – Association of Residents of Queensland Retirement Villages (ARQRV)</p> <p>The ARQRV submission at page 1 takes issue 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 assert the example is</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</p>

Issue	Witness submission	Departmental advice
	<p>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 interpret 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 $14/365 \times 6\%$, not the 5% plus $14/365 \times 1\%$ as drafted.</p>	<p>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 $14/365 \times 1\%$ is the correct calculation.</p>
Pro rata in the first year	<p>008 – Association of Residents of Queensland Retirement Villages (ARQRV)</p> <p>The ARQRV submission raises 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</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 assert that if a resident under the same contract vacated at, say, 14 days into their first year of occupancy, they</p>



Issue	Witness submission	Departmental advice
	<p>extend to the new section 53A(3), which relies upon the same example.</p> <p>While the ARQRV support the amendment to enshrine the daily basis calculation method, they believe this method should apply to every year of occupation, not just the second and subsequent years as inferred by the example.</p>	<p>should only be liable to pay 14/365 of the 5%. This assertion 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 their assertion, the ARQRV reference 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>



Issue	Witness submission	Departmental advice
Mandatory daily basis calculation method	<p>At the public hearing, the ARQRV took issue 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 assert 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>

