LEGAL AFFAIRS, POLICE, CORRECTIVE SERVICES AND EMERGENCY SERVICES COMMITTEE

Members present:

Hon. D.M. Wells MP (Acting Chair)
Mr J-P. H. Langbroek MP
Mr J.P. Bleijie MP
Mr C.J. Foley MP
Mrs B.M. Kiernan MP

Staff present:

Ms A. Powell (Research Director)
Ms A. Honeyman (Principal Research Officer)

EXAMINATION OF THE CIVIL PROCEEDINGS BILL 2011

TRANSCRIPT OF PROCEEDINGS

FRIDAY, 28 OCTOBER 2011

Brisbane

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Committee met at 9.34 am

ACTING CHAIR: Good morning ladies and gentleman. I declare this public meeting of the examination of the Civil Proceedings Bill 2011 open. Thank you for your interest and for your attendance today. There being no members of the public present other than representatives of the Law Society and the justice department, I probably do not need to read this long spiel.

DOYLE, Mr Bruce, President, Queensland Law Society

DUNN, Mr Matt, Principal Policy Solicitor, Queensland Law Society

O'CONNOR, Ms Annie, Member, Queensland Law Society Elder Law Committee; Consultant, DLA Piper Australia

PENNISI, Ms Louise, Policy Solicitor, Queensland Law Society

ACTING CHAIR: I welcome the representatives of the Law Society—Annie O'Connor, Bruce Doyle, Matt Dunn and Louise Pennisi—to the parliament of Queensland. Committee members are familiar with the thrust of your submission. They are familiar with the judgement of Judge Robin QC. They understand obiter dicta and ratio decidendi. However, for the *Hansard* record you may like to take it from the top. Would you please proceed with the advice that you have for us.

Mr Doyle: Thank you for the opportunity to address you today. I am not going to duplicate what is in the written submission, but will put in perspective our approach to this bill.

ACTING CHAIR: Feel free to duplicate your previous thoughts. For the *Hansard* record it may be of assistance.

Mr LANGBROEK: Sometimes submissions and things that are tabled in parliament may not be seen by people. Unless they are actually put into the *Hansard* people do not necessarily look at them. If you would like to make any sort of explanation as to the Law Society's position I think more people would read it in *Hansard* than they may when it is put on com. docs.

ACTING CHAIR: There is a big difference between getting into com. docs and having your thoughts immortalised under absolute privilege in *Hansard*, so please proceed.

Mr Doyle: I will nevertheless be brief, because the part that I am addressing is the part with which we are in complete agreement. The first part of the legislation deals with what the label of the bill says—the Civil Proceedings Bill. 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.

The second part of the bill deals with the Retirement Villages Act, as you are aware. There are two things that the QLS is concerned about—that is, process and content. With regard to the process issue, the concern is that it is not good practice to include in a single-topic named bill a multitude of other unconnected amendments without a clear acknowledgement in the short title that it is directed to multiple purposes. There is a risk that legislation on a particular area will slip through. People interested in the area may not have been properly consulted and proper processes may not have been gone through. Ms O'Connor will go through that in just a moment.

Secondly, we have concerns about the content of the bill. That is what my colleague Ms O'Connor will address. At this point, I have had the easy bit. I will hand over to my colleague Annie O'Connor. Annie O'Connor is a former chair of the Queensland Law Society Elder Law Committee. She will speak about the Retirement Villages Act. She does so with great authority. She has been in practice since 1982. She has been involved in this area of law from the ground up. From the first time that there was special legislation on this—that is, in 1988—she has been involved in the area.

I would just like to emphasise, before I hand over to her, that in her personal experience and insofar as the Law Society is concerned we come at this from both sides. We represent residents and scheme operators—that is Annie's experience—so our interest in this is good law and is not as an advocate for one side or the other. With that I will hand over to Annie O'Connor.

Ms O'Connor: Thank you for giving us this opportunity. I just want to reinforce that we see the Retirement Villages Act as a regulatory framework. That is what I think the intention is. There are a multitude of provisions that apply to the day-to-day running of retirement villages. I am concerned that

there is creeping in and there has been creeping in some amendments that attempt to regulate it more than it should be, which does have the effect of affecting what I see as the basic principle of freedom of contract. It is a concern that lots of contracts are for varying schemes et cetera.

We might start off with the clarity of the proposed amendment. It is not clear and it is changing a proposition that has endured, I believe, since 1988. That is the pro rating of exit fees. I believe there are lots of schemes that do not provide for pro rata and there are some that do. This proposed amendment could have an effect on a number of schemes.

There are two aspects to this. One is what could be perceived as retrospective legislation. The other relates to moving forward, which I believe affects freedom of contract for various parties. With regard to the first part of it, the Civil Proceedings Bill states—and I will not go through the actual wording unless you want me to and dissect it in a statutory interpretative way—basically—

ACTING CHAIR: Please do.

Ms O'Connor: At the moment subsection 15(2) of the act provides when the calculation of the exit fee is to take place. There have been changes since 1988. Some schemes could say that the exit fee is calculated when a new resident moves into the departing resident's apartment. Say there was a gap of eight months. It would mean that the existing resident's exit fee would continue to be calculated up to the date that someone else was found. That was amended in 2001. It was decided that there would be a line in the sand and exit fees had to be calculated from when a person left. It was not in terms of pro rata, it was just to draw a line in the sand when that would be calculated.

As I say, I have been practising in this area for many years and it has only been since about 2005 that there have been challenges with how that is interpreted. I should also say at this stage—certainly the ones I have acted for; I have acted for residents and for scheme operators—that more often than not there is a certificate of independent legal advice required to be signed by a solicitor. The scheme operators say, 'We want you to go to a lawyer and we want you to have this certified.' We believe that is good law. They are changing their whole lifestyle. The elder law section has discussed this. It is a practice that should be encouraged. They have a 14-day cooling-off period by law anyway and it suits everybody. As I understand it, if a resident has a change of mind after 14 days most scheme operators are more than willing to change things because nobody wants an unhappy resident.

I turn now to the proposed amendment of the Retirement Villages Act, which is imposing a requirement that unless the exit fee is meant to be calculated on anything other than a daily basis then it is calculated on a daily basis. There was a consultation draft issued last year and the Law Society made a submission and proposed an amendment. That was an amendment to the act that provided that, unless the section provided for a daily basis, then it was calculated in accordance with what the documentation said, which would have been for a part of a year. That was after consultation and that was what was drafted. I might add at this stage that I have had a very cordial relationship with Mark Zgrajewski, who was with Fair Trading and who I think is now with the Attorney-General's department. We have been discussing these issues from the point of view of good law.

Looking at this proposed amendment which now says that, unless the exit fee is explicitly stated in a public information document or a residence contract how it is calculated, it must be worked out on a daily basis. The law is imposing a daily calculation. As I say, there are lots of contracts out there. This has the effect of retrospectively imposing on a contract a requirement that was not there when the contract was entered into many years ago. So, okay, this is what you have to say, 'Let's investigate what that wording says.' It would mean that there would be so much uncertainty. So I believe we should look at this legislation in two ways: one is the retrospective aspect of it and the second is the prospective aspect of it which is going to affect contracts moving forward which, again, I believe impacts on the freedom of contract. Have I explained our concerns?

ACTING CHAIR: I believe you have.

Mr LANGBROEK: Yes, you have. We have had a departmental briefing about it, too. We are now having a public hearing so you can put the Law Society's case. We will obviously discuss with you some of the things that have been explained to us.

ACTING CHAIR: You get the good cop before you get the hard cop. I call the deputy chair.

Mr LANGBROEK: Mr Doyle, I think other members of the committee—I know I certainly do—share your concerns about something being called the Civil Proceedings Bill when you subsequently could be looking under a number other acts—for example, the Electoral Act or the Retirement Villages Act or the QCAT Act—for a change that might happen. Many times in this place I have seen changes to other acts which mean, and should mean, that this bill's title should include additional wording so that it becomes the 'Civil Proceedings and Other Acts Amendment Bill'. Of course, that will be subject to what the committee decides. Also, it might lead to us perhaps having something more to say about the government's tendency to do this—I know that the government has amendments to a number of acts that it wants to bring before the parliament at certain times—and whether it is appropriate to do this. Having been a shadow minister for a number of years, to find something in an act that is an amendment to another act in a completely different area, I share the Law Society's concerns. We will be discussing that later.

Ms O'Connor: Up until now this sort of amendment would have involved consultation with stakeholders, which would be the ARQRV, the Retirement Village Association, Aged Care Queensland and the Law Society. This was not as a result of a consultation. I think the impact of it is quite severe.

Mr LANGBROEK: I think that might be because there has been a court case where Judge Robin made a very clear interpretation of the law. I will let the chairman start the cross-examination.

Ms O'Connor: Oh, dear!

Mr LANGBROEK: I am joking.

Mrs KIERNAN: Our learned friend on my left here, the chairman, is obviously going to talk about the law and the rulings. But my understanding from previous briefings—and the committee has discussed this matter—is that where a contract does not have an exit clause or some provision for exit and is silent, then this will basically come into effect. I picked up some concern about existing contracts in what you were saying. If existing contracts are silent, one would assume that the legislation will apply. You said that you have dealt extensively in this area. Can there be a revision of a contract or is it a whole-of-life contract? Is there a review of a contract? Do villages get the opportunity to go back to the person and say, 'We want to look at the terms and conditions'?

Ms O'Connor: No. A retirement village has to be registered. They have to put a public information document into the registry. That is set in cement. Sometimes operators have to change—different laws come in and they want to vary things or they might decide they want to change the scheme. It is stipulated in law—and this is again coming back to the regulatory framework of the Retirement Villages Act. But there has to be a place for variations of the contract. They have to notify every existing resident if they are going to change their scheme. So, if it affects them, they can.

In relation to exit fees, a public information document covers everything of that nature. For instance, a contract might list how the exit fee is calculated. It will say something like 'four years and part of a year', and it will tell you what that is—that is five per cent of the new ingoing contribution or what that person paid. Again, this goes back to freedom of contract. You cannot have one contract for every single transaction. But there is a requirement that that contract cannot be varied without agreement, and it is not likely to be because, if you are varying that contract, it might impact upon 300 other residents in the village. So that does not often happen.

With an exit fee, it would normally say, 'For four years, X amount. For five years, X amount.' So it does stipulate that. My concern about the wording is that, in a contract that might have been entered into seven years ago, if you have not got something that says 'provides a way of working out the exit fee that is not on a daily basis', that to me is quite unclear. You get lots of provisions. Perhaps it might say, 'Four years or more, but less than five years.'

Mrs KIERNAN: But does it not say, 'If the contract is entered into after the commencement of this section, the exit fee must be worked out on a daily basis'?

Ms O'Connor: Yes, that is the prospective aspect of it. But there is also a retrospective aspect of it that says, '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.' That is my concern. I believe it is quite unclear how you would work out what would satisfy that wording unless the contract provides 'a way of working out the exit fee that is not on a daily basis'.

As I see this legislation, it is open for the committee to say, 'We are moving forward and we are listening to what various stakeholders are saying.' But, if I can home in on the retrospective aspect of it, it is not clear. As I say, what does amount to 'a way of working out the exit fee'? Is it sufficient that it says, 'Four years and more but less than five'? Is it enough that it says, 'Four years or part thereof?' It is that aspect that is requiring operators to have thought, 'Five years ago I should have put in the PID something that says, "This is how we would work it out if it was four years and three days or three months and 12 days or something".' If we can talk about that retrospective aspect in this discussion first, that is my concern.

Mrs KIERNAN: So it is the time, not necessarily the percentage, that has been put in these clauses.

Ms O'Connor: No. With this, the whole concern, I believe, from other stakeholders is that they are suggesting—it was obiter in Judge Robin's decision that it should be on a daily basis. It was, Mr Chairman. He is smiling. I just think that, for clarity, this has to be worked out appropriately. I repeat: what is really being asked of operators? This goes back 20 years. As I say, it is only in the last six or seven years that this matter has become vital. I do not know if I have answered your question. There are different schemes. You can have different percentages. That is not being discussed here. There is no requirement to stipulate that. But it is more whether it is going to be calculated on a daily basis. Operators and residents alike, I believe, have believed it is as it is in the contract.

ACTING CHAIR: In the Paragon case a little old lady moved out after, I think, two years and one day, and the retirement village operators wanted to charge her a whole year's exit fees. I put it to you that what the Law Society is defending is the right of retirement village operators to charge little old ladies a whole year of exit fees even if they are there for just one day of the third year or one day of the fourth year or whatever. Is that not so?

Ms O'Connor: I think that that case, too, related to how the days were actually calculated.

ACTING CHAIR: That is true. But the net result of the Law Society's submission, is it not, is that retirement village operators can charge little old ladies a whole year's exit fees even if they are there for only two years and one day or five years and one day or whatever?

Ms O'Connor: We are not concerned with personalities. I know that there are a lot of people a lot younger than me in retirement villages. I know that the Saunders and Paragon case involved an elderly lady. We are concerned with freedom of contract and what an agreement says. We would not condone—of course, nobody would say that. If someone agrees to pay that amount—there are lots of contracts. I am a commercial lawyer. There are lots of contracts that would seem perhaps very unfair or inequitable.

ACTING CHAIR: Sure, but subsection 2 covers that. It states—

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.

In other words, if the retirement village operators have written in that they get a whole year's exit fees and somebody has signed up for it upfront already, then they have them cold and it does not matter what happens to the little old lady, whatever her personality might be. If she signed up for it, this legislation is not going to take away that sanctity of contract, is it?

Ms O'Connor: I agree, but what I am concerned about is how this is going to be interpreted—'provides a way of working out the exit fee'. As I say, some of these contracts have been in existence for many years. I suspect that a lot of scheme operators are now revisiting their contracts and saying, 'We should make sure that we are covered or that that is extremely clear.' But who is going to say that there has to be a way of working it out? How is 'a way' going to be interpreted? How precise does that have to be?

ACTING CHAIR: It is a question of fact for the court.

Mr LANGBROEK: I think what it is saying is that, if in your existing contracts there is a mechanism for working out the exit fee, we are not changing that. It is not a matter of working it out; they are the words that have been used. If there is a very clear indication of what the exit fee is, that is not going to be changed. But, if it should be an unconscionable way of working it out, which has obviously happened in a case that was determined by Judge Robin QC, do not think that you will be able to get away with it because it will potentially be actionable and another court may well find in the same way as he did.

As has happened in the past with amending the act, maybe operators were able to get away with charging people for eight months of an empty unit simply because that was the way that was interpreted then, but subsequently it was amended because operators may well have seen this as a way to get people to enter into contracts who subsequently face charges they did not expect to. To me it seems to be clarifying matters. We have certainly had indications of that from the department. No-one is seeking to change what the exit method fee is or the working out. The 'working out' are words to clarify that, if there is a description in there of what the exit fee is, no-one is seeking to change that.

Ms O'Connor: First of all, I would like to reinforce my impartiality here. It is not me who wants to get away with it.

Mr LANGBROEK: No, no.

Ms O'Connor: I do think it is a little unfair, but I know how many applications go to the tribunal from residents and from groups. I can see that this is completely changing the onus of proof, for want of a better word. It is all very well to say, 'You can go to court.' First of all, everything first goes to mediation. As I have said, in a contract the calculation is forever. It is only when six months or six years later people have made applications because it must be on a daily basis.

This is the retrospectivity aspect. I am not talking about how it will be changed for the future, but I have to say that most residents are quite understanding and they knew that it was not calculated on a daily basis. That is a fact—it is as far as the residents I have dealt with are concerned. If you are going to change this to 'a way of working out', it means that every contract is going to go back and have to be looked at. I just do not know how you are going to determine it. So it is a tribunal member who is going to decide whether this is a way of working it out.

Mr Dunn: One of our issues is that of 'a way' being a threshold issue that will have to be met and it will be interpreted as such, and that 'a way' might end up having quite a different meaning to 'any way' in the particular clause.

Mr LANGBROEK: Unless there is a specific way—

Mr Dunn: That is the issue—

Mr LANGBROEK:—put in their contract.

Mr Dunn: Is there simply 'a way'? And how much drafting and how much specificity do you need to have in the clause for it to be 'a way' as opposed to being 'any way' of working out the exit fee that is not on that level? The thrust of our submission is that these contracts came into existence at a time when these issues were not within the minds of either party. They were drafted in a particular way with a common understanding as to what the terms meant and now they are being interpreted in light of developments and changes and being reinterpreted in a way they were never intended to be drafted for. We have concern that there may then be some challenges. There may be a threshold of what is 'a way' and how much detail needs to be provided in that. We think that will then lead to a number of tribunal matters and a lot of litigation around whether it is sufficient to be 'a way' or not in the circumstances.

ACTING CHAIR: The courts are really good at interpreting simple English with common sense. This is not a complex legal issue. What constitutes a way of working out a sum if there is a clause in the contract that looks like that, surely the courts will identify it, will they not?

Ms O'Connor: But it will go to the tribunal first. There are not many matters that go on to a court.

ACTING CHAIR: Sure. The tribunal is, in my respectful view, full of people who are very competent at this sort of thing.

Mr BLEIJIE: With respect to subclause 2, you were just talking about 'provides a way of working out'. Can we break it down? The Acting Chair raised the case of a little old lady who was in a retirement village for two years and one day and was charged for three years. If there is a contract on foot at the moment which provides 'a way' of an exit fee which is that, if you are there for three years but you leave in two years and one day, and it is clear with that effect and everyone has entered into it knowing what they are doing, then this will not change it, will it? Because that provides that if you are in there—

Ms O'Connor: That is the degree of particularity that, as I say, now no doubt people will be aware of. Yes, you are right. In my experience there is particularity in expressions like four years and more, and four years but less than five years. That is my concern: the degree of particularity that now may be required as compared—

Mr BLEIJIE: You were talking about 'provides a way'. Are you concerned that the situation will be that, after this, if it goes through in the way it is drafted you will have some current contracts that are on foot which do not provide any way of an exit fee? So they will go through as a daily basis under this, but then you will get arguments with ambiguous clauses where people say it does mention an exit fee and that is what you are concerned about.

Ms O'Connor: Yes.

Mr BLEIJIE: This is going to create a mammoth tribunal where people are arguing whether the exit fee provides 'a way' or any way.

Ms O'Connor: Every contract has to provide an exit fee if they are charging an exit fee. My concern is the degree of particularity that has been given to that.

Mr BLEIJIE: So the case that the honourable Acting Chair raised of the little old lady staying two years and one day, if it is set out that is what everyone has signed up to, then this will not change that; is that correct? Despite what that case heard, if it is set out currently, this clause will not change that and it will not change it to a daily basis?

Ms O'Connor: No. I believe the case that the honourable Acting Chair mentioned did say that it should have been calculated as if it were for the whole of the year.

Mr LANGBROEK: But he then found that the lady had only been there for two years.

Ms O'Connor: That was because there was a discussion of how the days were calculated.

Mr LANGBROEK: Which comes back to your point about interpretation of words and Mr Dunn's words about interpretation of words which we have seen in the PAMDA act, where we talked about interpretation of words by contracts with the attachment of the warning statements which the Law Society spoke to us about in that bill. I certainly take the point that when we get interpretation of words in courts, if we can clarify that, and, Ms O'Connor, that is exactly why the department is here to hear your submission and hopefully give us a response. If we can make clauses in legislation clearer that is exactly what we are here for.

ACTING CHAIR: Mr Doyle, does the Law Society subscribe to the doctrine of precedent?

Mr Doyle: Indeed, Acting Chair.

ACTING CHAIR: It was a trick question, of course. Did not the Paragon case stand for the proposition that, where there was no method set out in a contract, the default position was the daily basis payment? In other words, I am putting to you that all this amendment is doing is giving effect to the judgement, admittedly in obiter, of Judge Robin QC, who in my respectful position is one of our most brilliant District Court judges

Mr Doyle: I might defer to the expert.

Ms O'Connor: In our submission we mentioned that in great detail.

ACTING CHAIR: Yes, the submission signed by your CEO, Noela L'Estrange, says that it is retrospective. With very great respect, I have never disagreed so strongly with Noela since we were on opposite sides in a university debating club 30-odd years ago. I am putting it to you that it is not at all retrospective. It is in fact merely the department suggesting a form of words which gives effect to the existing common law.

Ms O'Connor: This is an extract from our submission on 10 December 2010 where the actual drafting of the exit fee section 15(2) was that the status quo prevailed, but it did say that a scheme operator may decide to impose an exit fee on a daily basis if it is clearly stated. In our submission, if I may read it to you, it says—

Some suggest that the passages concerning the operation of Section 15(2) are not obiter dicta. For this contention they seem to rely on His Honours later decision regarding the costs of the appeal ...

So this comment came out on the costs of the appeal.

ACTING CHAIR: It does not matter whether it is obiter dicta or ratio—

Ms O'Connor: It is not precedent.

ACTING CHAIR: It is the last thing that the highest court that has considered the matter has said on the subject. The law is, is it not, under the doctrine of precedent the last thing that the highest court that has considered the matter has said on the subject?

Ms O'Connor: I do not think that is precedent, is it? I defer to your knowledge there, but I think obiter dictor is its strong recommendations but it is not precedent.

ACTING CHAIR: I do not think there is anybody here who would instruct a barrister to go into the Magistrates Court or QCAT and argue that the obiter of Judge Robin was not the law. They might want to argue that the law should be overturned but they would not say that it was not the law. Consequently, the proposition that what the department is proposing to do with this is to overturn the existing law is not correct. The existing law is simply what is being put into statute; it is just that the proposal is to change it from common law to statute. Does any other member have a question?

Mr Dunn: I wanted to comment there that, in terms of applying a formula where there is no formula, that is certainly one issue. 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 a 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.

You are indeed correct that, if there is no exit clause provision in the contract, then this will apply as it is. Our concern is in relation to contracts where there is drafting around an exit clause and what is going to satisfy the test of there being 'a way' and if that is going to set a threshold issue.

ACTING CHAIR: Do any honourable members have further questions? If not, I thank the Law Society for your advice on this on many issues. It is always appreciated. The impartiality that you referred to, Ms O'Connor, is especially appreciated. That is why the Law Society's assistance in legislative matters is always so valuable.

Mr Doyle: Thank you.

CARINS, Mr Andrew, General Manager, Renaissance Retirement Living

LYONS, Mr Robin, Partner, Minter Ellison Lawyers

MACINTOSH, Mr Andrew, Queensland State Manager, Operations, Retirement—Aveo; Chairman, Retirement Village Association Queensland Regional Committee

TAYLOR, Ms Geri, Policy and Retirement Living Manager, Aged Care Queensland

TEUDT, Ms Kim, General Manager Retirement Living, Churches of Christ Care

ACTING CHAIR: We now have the representatives of Aged Care Queensland and the Retirement Village Association Ltd. Welcome, ladies and gentlemen. Have you been to one of these events before?

Mr Carins: No.

ACTING CHAIR: I had better read you the preliminary bits then. The legal affairs committee is a statutory committee of the Queensland parliament. As such, it represents the parliament. It is an all-party committee which adopts a nonpartisan approach to its inquiries. I will introduce the committee members: Murray Watt, member for Everton; John-Paul Langbroek, the deputy chair; Betty Kiernan, member for Mount Isa; and Jarrod Bleijie, member for Kawana. I am Dean Wells, member for Murrumba.

The bill we are considering was introduced into the parliament and referred to the committee for a report to the House. The committee advised the public of its examination of the bill in the printed media. The committee held a public meeting with officials from the department of justice on this bill on Wednesday, and we will be talking to the officials again subsequently. I stress that the committee is undertaking an examination on behalf of the parliament and has, as yet, made no recommendations nor put forward any proposals.

In the unlikely event of the need to evacuate, follow the attendants—but I would suggest you use that door there. In accordance with standing order 208, any person admitted to this hearing may be excluded at the discretion of the chair or by order of the committee. You have probably heard in the media that you are allowed to tell lies to parliament. That is not true. To tell a fib to parliament is a contempt of the parliament and very serious penalties can follow as a result of that—not that I suggest you are going to do anything like that. I can also give you some good news, though, that you are speaking now with absolute privilege and nobody can sue you for what you say here. If you do say anything defamatory, do not say it outside. Who would like to speak first?

Mr Carins: Thank you, first of all, for taking our submission and for hearing us today. We intend to individually have two or three items of submission that we want to put first. I wanted to clarify the time frame around that. We were of the understanding that it is about 10 minutes, but is there any leeway on that?

Mrs KIERNAN: No.

Mr LANGBROEK: We have you here until 11.

Mr Carins: As long as we keep it concise and focused then.

Mr LANGBROEK: Sure.

Mr Carins: I will give a very short summation covering the key issues. I will be followed by Andrew Macintosh who is going to give a business and financial perspective. Kim Teudt is going to give you a summary from a church and charitable perspective, particularly with respect to affordability options. We will conclude the introduction with a legal perspective from Robyn Lyons. If we can, at the end Geri Taylor will give a short summary of what we have spoken about—if that suits your purposes. We understand that you will want to ask questions as well so we are very mindful of that.

We represent the two peak bodies—Retirement Village Association and Aged Care Queensland—which represent jointly the majority of registered retirement village operators in Queensland. Essentially, I put to the committee that the operators hold three key areas of concern with our reading of the bill with respect to the proposed amendments and as they relate specifically to the calculation of exit fees. Firstly, we just ask that the committee understands that exit fees are only one component of the financial structure of retirement villages—albeit a significant component—and it is the whole finance and services package which constitutes the total offering to residents in their selection of a retirement village. Changing one component will impact on the offering of other components.

Secondly, we ask that the committee be committed to avoiding a one-size-fits-all prescriptive approach. We seek the committee's endorsement of the continuation of a range of contractual offerings for residents to ensure choice, certainty of contract and a focus on disclosure, which the industry is committed to. Thirdly, we ask that the committee understands the serious implications on residents and operators through the introduction of any retrospective amendments or any wording that may be interpreted as having a retrospective application. To this end, we have provided suggested wording in our written

submission for your consideration and possible insertion in the act, specifically, that unless the contract expressly provides that the exit fee is to be calculated on a pro rata daily basis, it need not be calculated on a pro rata daily basis. I will hand to my colleague, Andrew Macintosh.

Mr Macintosh: When an operator sets up their business, as Andrew was saying, they first decide how will they set these financial options—such as unit prices, exit fee levels, calculation methods, capital gains sharing and other cost sharing, whether or not they will take a development profit. All of this starts at the beginning and is set into a 20- or 30-year commitment to financiers, investors and others. The idea is that you want to attract incoming residents and you want to be able to sustain your business, so in the end you kind of are setting up something which is terribly important and is the foundation of what you are doing. Exit fee is part of that obviously but it is not the whole story.

Critically important to exit fee income is the maximum amount of percentage, how long it takes to reach the maximum and how it is calculated if they leave before it reaches the maximum—and there is every kind of option that you can think of out there. Some max at one year, some might max at 10 years, others are charging 30 per cent, some might charge 20 per cent—all of those various options are there for people to choose what they want to do. This amendment of course affects those whose exit fee has not maximised before they leave, and that varies enormously between operators. For the larger operators, it might be something around the 45 or 50 per cent mark but that is changing over time and it is difficult to nail. Nonetheless, it is still a significant issue clearly for operators if we have this amendment.

Vacant units for operators earn no income, so it is just like any other business where you have unused assets. In some way, you have to price what you do to consumers coming in, you have to take that cost into account so that, in the end, you are producing a profit, you are a sustainable business, you can pay your financiers and what have you. How vacant units are accounted for is an issue in this kind of situation.

Banks and investors invest in villages on the basis of their value, and it is a long-term value—as I said, over 20 to 30 years—on the basis of exit fee income, capital gains sharing and the like, and other income that might be received over that time. So if we change one of those components in the system, then operators will have to, in accordance with their financiers and other commitments they have to their owners, if you like, make another change. So they are going to have to increase the exit fee, reduce the time taken for the exit fee to max out or make some other change in their financial operation to take account of that.

In the end, operators have to remain viable and they are going to have to restore their income if this amendment goes through. We have worked out that some operators will lose exit fee income. A large operator of 26 villages will lose about a million dollars a year they have calculated in exit fee income as a result of this amendment. That might take one to two per cent off the valuation. That is a valuation of $1.2 billion, so you are talking about a $12 million hit in terms of valuations. Is this something that the government wants to do in terms of the state of the property market as it is at the moment, and to maintain an industry that needs to be viable? A viable operator is a good operator. Does the government want to put financial pressure on operators causing them to change what future contracts might be? This means that, for the sin of passing this piece of legislation, future residents will pay more for the privilege, where operators have already set in stone what their set of financial options are.

We have said it is a key component of what residents pay for living in the village and enjoying the infrastructure. In a market based economy out there, we know that strong competition is about product offerings. We know it increases product offerings and drives down prices. We also know that residents want confidence—that the contract they sign is what they want and what they can afford. So we need to have very good disclosure—it is not that we have bad disclosure at the moment. Disclosure of the key issues that residents are concerned about can be improved, and we have been working with the residents, our various associations, to improve that and produce a redrafted PID. In the end, we should not be tinkering with the market economy the way it is but we should be improving disclosure so residents can make a choice and compare offerings and select accordingly. We would now like to talk about retirement village affordability, with Kim Teudt.

ACTING CHAIR: Before you proceed, the member for Mount Isa wants to ask a question.

Mrs KIERNAN: I think you are giving us a lot of information. I am not from the legal fraternity; I am from the bush. I want to have the opportunity to ask questions. Mr Carins, you mentioned that it would impact on other components. To what degree?

Mr Carins: What we are talking about here in the financial offering to residents is that there is the entry fee, there are the fees they pay along the way for the daily operation of the village and then there is the exit fee component. Couple that with the respective share of capital growth that is given, and that is a discretionary issue as well.

Mrs KIERNAN: So the component is a financial implication?

Mr Carins: Absolutely.

Mrs KIERNAN: Picking up on your point, Mr Macintosh, you said that, basically, this could have a million dollar impact. What percentage of people—I am not overly familiar with retirement villages—would actually leave their homes in a retirement village in any given year for it to be costed out as a million dollar impact?

Mr Macintosh: I do not have with me that number of residents exiting, but I can obviously obtain that statistic.

Mr Carins: Could I just address that by saying that every resident will leave at some point, and the chances of them leaving on their anniversary date are somewhat slim.

Mrs KIERNAN: There are probably various ways that residents would leave a retirement village. My understanding is that if people go into a retirement village it is to the end of life. They do not move flats on a whim. So I would be assuming that they are pretty long-term, stable tenants.

Mr Macintosh: Generally that is the case. So we are looking at some unusual examples, perhaps.

Mrs KIERNAN: I am interested in the $1 million price that you have put on that. What does that equate to? Do we have mass exodus from villages?

Mr Macintosh: No, we do not have mass exodus from villages but we do have churn. One trend we have noticed is that people are coming in later. Back in the eighties people were coming in at age 60 or 65. In the nineties we saw that age move to the 70s. At the moment we are seeing late 70s and in some cases early 80s. The people who moved in in the 1980s and 1990s—we still have some residents in some of our villages who moved in at that time—are staying 10, 20 or 30 years.

Mrs KIERNAN: I have had family in villages, so I do understand—some of them have been long term and some of them have been short term—that they are going in later. It obviously impacts on families that contracts have been entered into and then they are having to sort out what happens after that exit that families do not want—that is, leaving this world for another world. I still would be really interested in the turnover. What are we talking about here? Thank you.

Mr LANGBROEK: Can I ask Mr Macintosh about the submission by Aged Care Queensland where it talks about the exit fee calculation. It does not seem to me that in this legislation there is any talk about necessarily changing exit fee percentages—whether it is for one year or less, two years or less or three years or less—but it is trying to clarify to get away from the question 'Was it two years and one day?' If it was two years and one day, under the current table that is here it would have been three years or less but more than two years. So we are actually getting away from the Judge Robin QC case and are more about saying, 'We want to clarify that if you leave after two years and 122 days you will pay two years and 122/365ths of an exit fee.' But it is not trying to change the percentages. Unless you are suggesting that a lot of the $1 million is made up of lots of people who leave after small components of the third, fourth of fifth year, I am hard-pressed to see how that is going to make such a massive difference.

Mr Macintosh: The difference is that where you have a contract that says that they will be paid not 122/365ths but 365/365ths and that by legislation becomes 122/365ths, then you have that number of days—about 240 I think it is—

Mr LANGBROEK: Yes, that they are now going to lose.

Mr Macintosh:—divided by 365 multiplied by the exit fee which is lost. We are well aware of that. The sorts of numbers I was talking about have come from financial analysis certainly by our internal accountants and people who look after the model, but that would be the economic impact for that 26-village—

Mr LANGBROEK: I think now we are actually talking potentially, though, about what is government policy, and obviously the minister who brought this in believed that it should be on a daily basis and not as per the table that is described here.

Mr Macintosh: Previous minister Lawlor back in late 2010 came to the view that when people enter into contracts those contracts should prevail and that residents should compare what is out there before entering into those contracts. But the amendment that he put forward, which is obviously not the amendment we are talking about today, effectively clarified—I guess reinforced—the meaning in the act that we have all had, that if the contract specifies on a pro rata basis then fine, but if it does not then what is specified in the contract? That is what we are saying is our position, that is, why should that not prevail on the basis of full disclosure, on the basis that operators have a variety of offers and that the market economy is based on choice and competition. Why should that not prevail? Why should government structure something specifically relating to what an offering might be, given the various other components of it and the power that choice has in the economy?

Mr LANGBROEK: We will look forward to the department's response as to whether that is necessarily the policy or whether it was something that was written in that came out of that court case.

Mr Macintosh: As I said, Lawlor's amendment was put forward, there was a change in minister and now a different policy has been put forward.

ACTING CHAIR: You do understand that the clause says—

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.

So your perception that existing contracts are going to be changed is not correct, if indeed that is your perception.

Mr Macintosh: No, it is not my perception; I am talking about future contracts.

Mr Lyons: I am not sure I agree with that. I am a lawyer and I act regularly for the associations. The lack of specificity about whether a contract provides the formula to calculate on a daily basis is the problem, because currently a range of clauses in contracts have been formulated in the context of existing legislation. The existing legislation does not seek to provide a method of calculating exit fees. It simply says at what date exit fees need to be calculated. This bill even acknowledges that by the note it is going to insert into section 15(2), which is—

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.

So it acknowledges in its own draft that the current act does not seek to impose a method of calculating—daily basis or otherwise—or any form of pro rata. So all existing residence contracts in the marketplace have exit fees formulas drafted by lawyers like me in a legislative environment that did not seek to impose on them a method of calculating. So there was no need to go to the lengths of saying, 'For the avoidance of doubt, this formula we are providing does not provide for daily basis calculation or any form of pro rata.' The difficulty with the current formulation of the legislation is that there will be incessant arguments about whether or not any particular formula in any particular existing contract does or does not specify a formula that requires daily calculation.

ACTING CHAIR: Why do you believe that?

Mr Lyons: The very example that is sitting in the bill at the moment is a classic example of it, because I do not believe that the example given in this legislation actually does require daily basis calculation. The notes to proposed new section 53A(2) state—

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 ...

That is the example given in the legislation. I read that as a lawyer and I take that formula to mean, 'Okay. If the resident has been there for one year then their ingoing contribution is five per cent. It is not until they are there for two years that it goes to six per cent.'

ACTING CHAIR: This is just an example of a form of words which would constitute a way of working out the exit fee—

Mr Lyons: On a daily basis.

ACTING CHAIR:—that would set aside the daily basis. This is just an example—

Mr Lyons: That would set aside the daily basis. But the example then goes on and shows that it is calculated on a daily basis, as if the act were to require it.

ACTING CHAIR: I understood every word that you said in the last sentence, but I did not understand the last sentence.

Mr Lyons: What I am pointing out is that the example that has been given in the bill suggests that the formula that has been provided in the example requires a daily basis calculation.

ACTING CHAIR: Why?

Mr Lyons: In paragraph (b) of the note it then explains how the exit fee would be calculated applying the new section 53A(2).

Mr WATT: Can I interrupt here. I agree with you, Mr Lyons—

Mr Lyons: And in fact, I think this note is actually disadvantaging the resident. I think in this example the operator could only charge five per cent. And this example is suggesting that they can also charge an extra 14 days.

Mr WATT: I agree with you that it is an example of calculating on a daily basis, and that is what the introductory words of the example say, but I disagree with you when you, I suppose, deny that it is an example of calculating it on a daily basis. I suppose my reading of it is that the mere fact that part of it refers to calculations on some part of 365 days is what takes it to being a daily basis, rather than saying 'over a set of months' or 'over an additional year'. The fact that it is pinned on the number of days out of 365 is what, to me, makes it a daily basis charge.

Mr Lyons: But the formula does not actually refer to that. To me, paragraph (a) of the note sets out the formula that would be sitting in the contract.

Mr WATT: Yes.

Mr Lyons: Paragraph (b) then sets out the calculation. The formula that is sitting in the contract does not talk about a daily basis. It simply says that the exit fee does not become six per cent until the resident has resided for two years, and they have not. So this example is actually giving the operator a benefit that they do not deserve, in my opinion. I guess what I am trying to illustrate in my discussion right now is that these are the arguments that will be happening in QCAT and in the District Court. It will cost operators and residents time, money and a great deal of distress, because this drafting is not sufficiently clear and unambiguous and it absolutely breaches one of the fundamental legislative principles—that legislation has to be clear, unambiguous and precise, and it is simply not. Regardless of what the government's policy is—

ACTING CHAIR: I am finding this terribly difficult. This is only an example; this is not a legislative prescription of how it has to be done. It is saying, 'Here is an example of how you can work it out on a daily basis,' and, in the earlier section, 'Here is an example of how it can be worked out not on a daily basis.' It is only an example. Examples came into legislative drafting in Queensland in 1991, if I remember correctly. The example is not the provision. The provision is very clear. It is like saying, 'You must not bring cats into the parliament,' and, 'Here is a picture of a cat.' But this is not the only cat.

Mr Lyons: Sure. I understand what you are saying, sir, but—

ACTING CHAIR: All this special pleading about QCAT and the courts getting tripped over because of the details of the example, I do not understand it. I do not understand why you are putting this to us.

Mr Lyons: I think what I am trying to illustrate is that the words 'unless the contract provides a way of working out the exit fee that is not on a daily basis' are capable of argument. There is not a lot of prescription as to what words are required to achieve that. The reality is that, with a lot of existing residence contracts in the marketplace, there will be a lot of opportunity and scope to argue whether or not a contract does in fact provide for calculation on a daily basis. That is a concern I have from a legal perspective in terms of the drafting.

Mr WATT: I understand the point you are making—that, in your view, the drafting is not sufficiently clear—but I suppose I want to go back a couple of steps. I do not interpret this as an example of a clause calculated on a daily basis. I take it as a way of converting a clause that is not written, necessarily, on a daily basis and converting it to one that allows you to charge on a daily basis.

As the chair says, the real issue here is the wording of the section. The section is talking about calculating fees on a daily basis. However they are written, the end result must be that they be charged on a daily basis. This gives us an example of how you convert something in subclause (a) that is not necessarily written in daily terms into something that allows you to charge it on a daily basis.

Mr Lyons: But why would that example be there in the context of applying to existing contracts that cannot be changed? It is under the section that deals with contracts that were in existence at the commencement of the section.

Mr WATT: Which have not provided for the charge to be calculated on a daily basis.

Mr Lyons: In which case it would not be calculated on a daily basis. Why is the example there?

Mr WATT: You have probably been reading this clause a little bit more regularly than me.

Mr Lyons: I have, which is why I have concerns about it.

Mr Carins: Which is the essential issue that we are talking about. There is a question of application of retrospectivity merely by the fact that it has to be raised.

ACTING CHAIR: I just do not see where you are coming from. This subsection is just the set-up section. Proposed subsection (1) states—

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.

This subsection simply directs you to what contracts it applies to—namely, all of them, whether they apply with an exit fee worked out or whether they work without an exit fee worked out. This subsection just directs you. Proposed subsection (2) then goes on to say that if you already have a contract where the exit fee is worked out then the sanctity of the contract remains. Proposed subsection (3) says that if you do not have an exit fee system worked out in the contract then it is going to be deemed to be on a daily basis. I really do not understand where you are coming from.

Mr Carins: I think the concern is that we are saying there are a lot of contracts out there that will not specifically address that issue and will not have a specific methodology on the basis that it has never been required previously.

ACTING CHAIR: That is fine.

Mr LANGBROEK: And this is now providing that certainty so that we get away from 'three years or less but more than two years', where obviously people would then get charged at whatever the exit fee percentage was that applied. We are now talking about whether it is a policy issue. We are also hearing about whether the drafting is not clear enough—

Mr Lyons: And you think that example you have given would require a daily basis calculation or not?

Mr LANGBROEK: If the existing contract has that table in it then that will still apply. In other words, if they have signed a contract that has this period of time between commencement date and the exit date and there is an exit fee percentage that applies then that contract still applies.

Mr Lyons: My concern is that, the way the drafting has been done, that could be open to argument.

Mr LANGBROEK: You have made that point.

Mr Lyons: In the context of the notes.

ACTING CHAIR: We interrupted your flow.

Mr Carins: That is quite all right because we are at the heart of the issue.

ACTING CHAIR: You did not come here to be berated by us; you came here to tell us things. We are keen that you should have your opportunity to speak.

Ms Teudt: Retirement villages require significant investment of capital funds to develop and are carefully planned and purpose-built to cater for the changing needs of older persons in our community. They play an important role in the provision of affordable retirement accommodation and services to older Queenslanders. Services include emergency response and assistance, activities and social coordination, maintenance as well as asset and environmental management through to a range of care services—low and high care.

Residents' needs change, and this is very common now. As we have discussed today, the average age of residents moving in is actually increasing and their needs are higher than they were. Residents living in retirement villages mostly choose to age in place—in their own home—accessing care and services as they need them, reducing the risk of premature entry to residential care and consequently reducing the cost burden on government.

In many cases, retirement accommodation is offered below market rate to ensure people can afford to access village living when they need it most. It is important, therefore, to be mindful that any changes to legislation that could negatively impact on the ability to tailor lower entry packages would be detrimental to older persons in communities who need our support and care.

It is very important to village operators that the Retirement Villages Act preserve the current flexibility which enables us to meet the needs of a rapidly ageing community whose financial capability to pay is limited by current and future market forces. The exit fee is only one component of an overall package that provides consumer choice and flexibility. For example, a resident entering a village may choose to offset their ingoing contribution against their exit fee. This is commonly understood as being able to access retirement accommodation today at a price they can afford and pay a higher exit fee when they leave. This is consumer choice that is preferable to them and their situation.

The retirement village sector seeks support from the government to preserve legislation that promotes growth in seniors accommodation that is affordable, suitable and caters for the care and support needs of our rapidly ageing communities. A major concern would be any proposal for retrospectivity—that is, anything that affects existing residence contracts. Prospective residents and their advisers review the options and contract provisions before moving into their chosen village. Any proposal that could potentially change that causes angst, confusion and worry to our residents, many of whom are older and frailer than when they first moved in. They require certainty and care in their life rather than upset and concern.

We have already heard here this morning that there are differing views on the interpretation of current drafting. Our residents spend enormous amounts of time comparing their contracts against others, looking at the legislative changes and comparing the different interpretations of what it might mean. We are asking for certainty and clarity. I would like to hand over to Robin.

Mr Lyons: Some of the matters I will discuss have already been covered so I will not labour them. From a legal perspective, the amendments to the Retirement Villages Act proposed in the bill are concerning for a number of reasons. I will deal firstly with proposed section 53A(3), which is the requirement to calculate the exit fee on a daily basis for all contracts formed after the transmit of the section. It does, without doubt, restrict freedom to contract.

The industry believes that there is no compelling basis for government to seek to restrict freedom to contract in this way in this particular area, particularly given, as we have heard today, that it goes to the very heart of operators' financial returns in a very specific way. Operators, like other business owners, should be entitled to offer their product to the market under a pricing model of their choosing.

In the market currently there are villages that elect to calculate exit fees on a pro rata or daily basis and others that do not. Consumers have the ability right now to make a choice. The way exit fees are worked out is one of the many factors that prospective residents are currently able to take into account when selecting between different villages in a competitive market. The industry's position on it is that market forces should be left to play.

In the industry's view, the key concern of the government should be that it is more focused on ensuring that consumers have the benefit of full and complete disclosure about the method of working out exit fees that apply in particular villages so that consumers are able to make an informed choice when selecting between villages. In the industry's view, it is the preserve of government not to impose itself upon the pricing structures and financial returns of the industry.

The other issue which we have spoken about briefly already is the retrospectivity issue. We are now dealing with proposed section 53A(2), which is the section that obviously deals with contracts that would be in place at the time this section comes into force. The industry's view about that is that the legislation adversely affects rights and imposes obligations retrospectively on operators.

The proposed section will impose a requirement on many existing residence contracts for exit fees to be worked out on a daily basis where that would not otherwise be the case. The practical effect would be that the section would, in a number of cases we believe, alter the bargain between many residents and scheme operators in a way that would adversely affect operators' rights retrospectively. The reason for that

is that under the proposed section the presumption is that a contract will be calculated on a daily basis unless the contract provides a way of working out the exit fee that is not on a daily basis. The unfairness, in the industry's view, of this drafting is that it will be directed at exit fee formulas in existing contracts that were drafted in the context of the current provisions of the Retirement Villages Act which do not regulate the method of working out exit fees which, as I said earlier, is actually acknowledged in the notes that are going to be inserted in the act under proposed new subsection 53A(2).

Currently the position is that exit fees will only need to be worked out on a daily basis if the exit fee formula in residence contracts expressly provides for a daily basis method. The new section 53A(2) will, in our view, impose itself on a wide variety of exit fee formulas that were drafted at a time when an intention not to calculate on a daily basis would have been satisfied by the contract remaining silent about pro rata calculations. After this new section commences we believe that the fact that those contracts do not expressly state that a daily basis calculation is not to apply will, in a number of cases, result in that section applying to require daily basis calculations. That is the concern.

In reality, the only exit fee formulas appearing in existing contracts that will definitely not be caught by this presumption for exit fees to be calculated on a daily basis will be those that expressly state that pro rata calculations are not intended or required. Otherwise we believe there will be a basis for argument as to whether or not this section applies to require daily calculations. The industry's view, therefore—and I am hearing perhaps that the government's intention is to do exactly what we are proposing, which is actually to amend section 53A or cast it in a way—

ACTING CHAIR: We are not speaking for the government; we are speaking for the legislature. The committee has not formed a view on this. It is not our drafting. We are asking sometimes quite probing questions because we are trying to make up our minds on the basis of the evidence we are given. We are not spokespeople for the government—

Mr LANGBROEK: I am not in the government.

Mr Lyons: We are proposing that this is ultimately what the government does in that case. The industry solution to the problems we have raised in this respect is if new subsection 53A(2) were recast to say that exit fees are not required to be worked out on a daily basis unless the contract expressly provides that the exit fee is to worked out on daily basis.

Mrs KIERNAN: Can you repeat that?

Mr Lyons: Reverse the presumption. Have the section say that exit fees in existing contracts—in other words, contracts that are in force at the time these provisions commence—will not require exit fees to be calculated on a daily basis unless the contract expressly provides that the exit fees are to be worked out on a daily basis.

Mrs KIERNAN: We have certainly had a lot of discussion about this. Is this section not relevant where a contract is silent on an exit fee?

Mr Lyons: About a daily basis.

Mrs KIERNAN: I take the point that was made that some contracts might have a lower fee on entry but a higher fee on exit. There is a whole variety of contracts out there. My understanding of what we have been talking about is that if a contract is silent then this is how the exit fee would look. It does not mean that you have to jeopardise your business model. This is not precluding anybody shopping around for the best contract or facility.

I think the point should be made that we are not very flush with retirement villages in the north of the state. They are all pretty centralised in the south-east corner—on the two coasts and obviously in Brisbane. People actually do not have a great deal of choice if they actually want to stay in certain parts of this massive state. I guess I am just getting a little bit confused, because I thought this was to protect people who have signed up so that if there is nothing in a contract or the contract is quite unclear there should be some sort of exit fee calculated on a daily basis.

Ms Teudt: One of the things we raised in our submission is that we have people who have lived in our villages for 30 years. Over the 30 years there has been the Retirement Villages Act 1988 and the Retirement Villages Act 1999. There are a plethora of different contracts out there. What really upsets and concerns elderly residents is anything that would change the contract and provisions that they had when they moved in. This is something that comes up a lot.

You have resident A who has been there for five years and you have resident B who has been there for 15 years. Resident A has a clear clause in their contract that actually states how the exit fees work would be worked out. But our older contracts, even under the aged or disabled persons act, do not clearly specify this at all. So resident B will see a change in the way their exit fee is calculated. Then they sit around at their committee meeting and discuss what that means for them, but resident B has a different contract.

This goes right to the heart of the fact that anything that would apply retrospectively to existing contracts will cause concern. If there is any way we can clearly draft the legislation, which Robin has suggested, to not change or unintentionally or inconsequentially change existing contracts, then we should do that because we should be preserving them. Existing contracts may well not state how the exit fee is worked out. Therefore, for a resident who has that sort of contract, their exit fee arrangements could change under the current proposal.

Mr BLEIJIE: What about resident B, where it is unclear in their contract and they do not have an exit fee? How do you deal with those people when they exit?

Ms Teudt: It is about the wording. The exit fee is in there. But, as Robin stated, in previous legislation we have not had to be specific about how it is actually worked out within the year. We do annual drawdowns. We are one of the charitable organisations. Many of us are the same. Each anniversary we annually draw down. A lot of our residents' drawdowns are finished, but a lot of them are not. Therefore, for us, if it was clearly stated in contracts that we may have done in recent years and where it has maybe been more specific, then it is very clear. But in older contracts it does say 'an annual drawdown', but it does not specifically say that it would be worked out on the month or the day or the three months or anything like that.

Mr BLEIJIE: Under this provision, for those older contracts a daily basis would apply.

Ms Teudt: But why? You are changing the contracts. That is the very issue.

Mr BLEIJIE: How do they know how much it is going to cost them?

Ms Teudt: They know that there is an annual drawdown.

Mr Lyons: The point we are making is that existing contracts actually do all have exit fee formulas in them. They are clear in the context of the current legislation. The current legislation does not talk about trying to impose any method over the top of what is in contracts. It does not do that at all. So the reality is that, if current contracts are left the way they are, they will all have, in our industry's view, a clear meaning in the context of the current legislation as to how they will work. The concern is that we are bringing in a provision that potentially has some form of application going backwards. That in itself means that it is only—

ACTING CHAIR: Why does it have some form of application going backwards?

Mr Lyons: Because it is stated to apply to contracts that exist at the time the legislation commences.

ACTING CHAIR: But is it not simply a restatement of the common law?

Mr Lyons: The statute—

ACTING CHAIR: Is not this proposed statutory provision merely a restatement of the doctrine of Judge Robin in the Paragon case?

Mr Lyons: I do not believe so. Just on the Saunders and Paragon case, which was the Robin decision, it is a decision of a single District Court judge about a particular clause in a particular contract in a particular village. So it is very particular to its facts. The decision was ultimately not based on a strict interpretation of section 15(2) because it was about the timing issue. The industry has held the view that the decision is not sound in terms of its reasoning. The industry does not accept and has never accepted that it is an accurate interpretation of the current act.

ACTING CHAIR: Yes, but the judge says, 'This is the law.' The fact that you disagree with the law does not alter the fact that the judge has said, 'This is the law.' So you cannot really come to us and say the law is something other than what the judge says, because the law is what the judge says.

Mr Lyons: Like all decisions, though, it is not necessarily what a judge says about the law and it does not necessarily mean that it is always going to be the case or that it is correct always.

ACTING CHAIR: Absolutely. If you want to say to us, 'The law should be changed,' then we are exactly the sort of people you should be talking to about that. But if you are trying to say to us, 'This is not the law, although the judge has said it is,' we are not going to believe you.

Mr Lyons: In terms of the legal process, what I am attempting to explain is that that decision was very particular to its facts about a particular matter. Robin's opinion about section 15(2) was obiter, strictly.

ACTING CHAIR: Sure, but it was obiter from the highest court that has considered the matter.

Mr BLEIJIE: But it is persuasive.

Mr Lyons: Correct.

Mr BLEIJIE: It is not law; it is persuasive.

Mr Lyons: It is his opinion.

ACTING CHAIR: It is highly persuasive, especially if you are in QCAT or in the Magistrates Court. Is that not so?

Mr Lyons: It would be taken into account, no doubt.

ACTING CHAIR: More than that: it is the law.

Mr Lyons: No. I do not accept that. As background on that matter, it was never accepted, as I said, as being a correct interpretation of section 15(2).

ACTING CHAIR: Never accepted by whom?

Mr Lyons: The industry.

ACTING CHAIR: As long as that is what you are saying, that is fine.

Mr Lyons: That is what I am saying. The industry was seeking to appeal that decision, but for various reasons on which the decision was made it was not done.

ACTING CHAIR: Understood.

Mr Lyons: It has obviously looked very closely at that decision and has obtained its own advice about it. All I can say to you is that we do not believe that that reasoning in that decision was soundly based. I do not think that that decision should be the guiding light in terms of how this provision should be interpreted.

ACTING CHAIR: Yes, we can change the law, and we are open to your submissions that we should change the law. But we are not open to a proposition that something that a judge says is not the law, if you see what I mean. Ms Taylor, were you going to say something to us?

Mr Lyons: I think the legal issues have been pretty well ventilated.

Ms Taylor: Chair, I am happy to say something right at the end in the last two minutes. If we have reached that period, I am happy to talk. If you have more questions of the representatives of both organisations who belong to the various committees in retirement living, I will wait until my time is ready to present.

ACTING CHAIR: Honourable members, are there any further questions?

Mr BLEIJIE: I think the time we had with you was until 11 am. We have reached that time now. So I think you should probably go ahead.

Ms Taylor: Thank you very much. We welcome the fact that we were allowed to appear in front of the committee. We have enjoyed the discussion we have had. However, we do remain concerned about the likely result of this amendment if it is enacted as proposed. It is not only the legal advice from Robin, who is a member of both our committees, but also advice that we have received from a large number of independent and senior legal firms whom we have approached confidentially. We believe it will add to more confusion in the industry. Although there is QCAT and the District Court to resolve these issues, in the interests of both the industry and indeed the residents—many of whom are older—we do not believe that that is the best way to run an argument. We believe that there should be clarity and consistency and simplicity in any legislation that is about retirement villages.

We remain concerned that if there is not consistency and clarity and a lack of disputes, then retirement villages, as the final home for the majority of older Queenslanders, will not be able to remain as viable and robust and well accepted by the community. The overwhelming majority of retirement village operators want to provide a service that involves care to older Queenslanders. We are concerned that without an appropriate financial footing, an appropriate profit margin, which sometimes takes up to 30 years to come to realisation, then there will not be investment in the retirement village industry going forward.

Finally, we were asked to provide some information in regard to the estimate of the one per cent of the value of $1 million—

Mr Mackintosh: It was more about residents coming in and what are the statistics on residents leaving villages who do not max out. I think that was the question by the member for Mount Isa.

Ms Taylor: We are happy to provide that in commercial-in-confidence. We are also happy for that to be subject to appropriate scrutiny. Any research that is presented to this committee should be assessed on the methodology and also the appropriate peer review from appropriate people. That is with regard to anything that we have said and anything that any other submissions purport to the committee. We do not have anything more to say. Thank you very much.

ACTING CHAIR: Just on what you have said though, if the takings from the exit fees represent your profit, how can it benefit your industry to have a profit that is so random? It falls randomly on particular individuals, does it not?

Mr Macintosh: I am not sure what you mean, Acting Chair.

ACTING CHAIR: You are arguing for the proposition that it should be possible for retirement villages to have somebody move in and stay for two years and one day or two years and five days or two years and 302 days and they still pay a whole year's exit fees. That is the proposition you are arguing for, is it not?

Mr Macintosh: Yes.

ACTING CHAIR: So that is going to affect people randomly, because nobody chooses to die at the end of the financial year.

Mr Carins: They do not know when.

Mr Macintosh: That is right. It comes back to the proposition that this is just one component of what residents sign up for when they come in.

ACTING CHAIR: How does the randomness of this help you? Do you not have actuaries who could give you a business model that would enable you to run profitably without relying on random windfalls from the random changes of particular individuals' lives?

Mr Carins: Absolutely. One of our key concerns is the interpretation of valuers, because this goes to the heart of the value of villages, not necessarily just cash flow or, as you say, profit. What they do then is take a capitalisation risk rate and apply it to that cash flow under their formulas. So if it is 10 per cent, it

would be 10 times the value of that cash flow to give a value to the village. That is really our key concern. If there is any undermining of the value of those villages, then that attracts attention from financiers who could narrow their margins—their lending ratios are pretty thin anyway. If valuers interpret that to a point that the value is decreased significantly—and, bear in mind, it is capitalised cash flow, not just the cash flow numbers themselves because that is not really the key issue—that is our concern, because that involves big numbers.

ACTING CHAIR: There is nobody here certainly that has any attitude to you other than that we are very glad that you provide the service that you provide to the community and we wish you to do so with a sustainable profit margin. I am sure that all of my colleagues hold that view.

Mr Carins: We understand.

ACTING CHAIR: The question I just asked you was: how does it help your cash recoupment to have the contributions to your profit coming unequally from the various people who live in your establishments?

Mr Macintosh: I guess that is a fact of business life. You will have customers who will walk into a showroom and buy a car and say, 'I want the pink one and here is my cash.' For others the salesperson might have to cajole them and throw in a free radio. You will have customers that will perhaps at the margin contribute more profit per resident and you will have others that do not. On a unit basis, you will have some units that will be vacant for a long period of time and you will have some that are not. In the end, an operator has to go on what he or she thinks is going to happen in the future and put all the building blocks in place in terms of the financial offering that he or she thinks will be attractive, cover their costs and produce a profit in the end. In the end, none of us can predict the future. We just have to make assumptions.

I am sure residents come into a village thinking, 'I would like to be here until stumps and enjoy all the facilities, the social life and everything that there is to offer,' but life sometimes does not pan out that way. The truth is that we do not know when people are going to leave our villages. All we can do, as you say, is actuarially try to predict that and try to build our business models around that.

Mr LANGBROEK: There is no doubt that there will be a diminishing of exit fees under this new legislation as it will be applied with the daily basis fees?

Mr Macintosh: Yes, and then other adjustments will have to be made to compensate.

Mr LANGBROEK: To the whole model.

Ms Taylor: Which then causes a degree of concern about the affordability issue for older Queenslanders—

Mr LANGBROEK: Subsequently entering.

Ms Taylor: Because there is a range of products even in villages that operate for profit and those that are not for profit. There is a range of entry prices. One of the key issues in the Productivity Commission report on caring for older Australians is its concern about affordability of accommodation for people over the age of 75. That is certainly a growing concern and it is one the industry wants to keep abreast of because we realise that we actually do have a responsibility to provide—

ACTING CHAIR: But a purchase is no more affordable because a particular cost is hidden and random.

Mr Macintosh: It should not be hidden. That is one of the other points we have made. If there is a perception out there—or a reality—that disclosure can be improved, let us do that. We are happy to do it. We have had a project working alongside with the residents. Maybe what parliament should be focusing on is disclosure and ensuring that in a good, free-market economy people can see and have information that they need to understand available so they can make adequate comparisons. Let us not do things that add to costs.

In the end, if we want more villages in regional Queensland it depends on how good the proposal is that we take to the bank. That is the truth. I think government should try to not do things that make that harder.

Ms Teudt: From the church and charitable perspective, we certainly do not have any huge margins. Anything that we do have we put back into services in the communities. We do offer a lot of our accommodation at something like 75 per cent of what the general market rate would be, and it is very hard. We have to carry all the capital costs. Once a unit is vacant, we have to pick up the general services charges when that resident is no longer responsible. There is a whole range of things that, as operators, to maintain a viable business and service for the community, make it a very tight balance for us.

I also would like to reinforce the fact that we really care for our residents. That is why we are here. That is why we do what we do. I am really concerned about any uncertainty or any ambiguity that would cause concern for residents. It is very important to me that we have it clear. We are working on a simplified public information document that we hope to provide to the office of Fair Trading for their consideration. We are working with the residents association on that so that people can make decisions based on very clear information that they have.

Ms Taylor: And this is in our submission.

Mr LANGBROEK: Ms Teudt, you talked about residents of different vintages being concerned about changes. The member for Murrumba, the acting chairman of the committee, is nearly the father of the House here. He first came in in 1986. I often see the member for Everton with the member for Murrumba in the dining room silently weeping as they discuss the changes to parliamentary superannuation.

Mr WATT: I would never raise that. I take it as a badge of honour that I never talk about that.

Mr LANGBROEK: But there is a case of an elderly resident of this nursing home in parliament and a new resident who has come in under slightly different conditions.

Mr WATT: I think you are mistaking me for the member for Kawana. He talks about those kinds of things!

Mr LANGBROEK: He silently weeps with me on my side of the parliamentary dining room.

ACTING CHAIR: It is understandable that the member for Surfers Paradise should confuse maturity with elderliness.

Ms Taylor: Well said, Mr Chairman.

ACTING CHAIR: Thank you very much for your patience and your endurance. We have asked you probing questions because it is our business to make recommendations to the parliament. Sometimes in order to see something clearly you need a searchlight. Thank you very much for providing your advice to the people of Queensland.

ARMSTRONG, Mr Les, President, Association of Residents of Queensland Retirement Villages

ACTING CHAIR: I welcome Mr Les Armstrong. Thank you for taking the trouble to come to speak to the committee.

Mr Armstrong: Thank you. I had prepared a brief statement, but in the interests of time, because the other people took longer than their half hour—

Mr LANGBROEK: Do not worry about that.

Mr Armstrong: It is a joke. What I would like to do is quickly paraphrase that and then expand on some of the issues raised in the recent discussion. I represent the residents association. We have 9,000 members of the 42,500 residents living in the 300 retirement villages in Queensland. The ARQRV is particularly concerned about the manner in which the exit fees are calculated when a resident leaves a village, particularly when the dictum or the decision of Robin is not followed. I will come to that in a moment.

You all know what exit fees are and how they are calculated on a certain percentage per year. They usually max out at about eight to 10 years. Some of the more recent operators are now maxing them out at about four to five years, obviously a higher percentage. Nonetheless, they are usually referred to as a percentage per year.

The ARQRV's position is that we are not opposing exit fees, per se. We recognise that they benefit retirees by allowing them to obtain an improved standard of living at the time they enter that their income at that time might not allow them to afford and that they pay for that later from their capital. We understand that. We believe, though, it is in the interests of the residents and operators alike for exit fees to be calculated fairly because it preserves the reputation and the future viability of the industry. That is one of the key tenets: consumer protection from our point of view and the viability of the industry. I say 'profitability' but it is the same thing.

The proposed amendment to the Civil Proceedings Bill purports to limit the requirement for mandatory calculation on a daily basis to contracts entered into after the amendment has passed and, secondly, it purports to retrospectively remove that requirement for contracts that are already on foot. We believe, first of all, that is inadequately drafted. It certainly does not reflect by any interpretation the judgement of Justice Robin. Our position, quite clearly stated in our submission, is that the amendment should require mandatory calculation on a daily basis for all contracts on foot as at the date of commencement of the amendment and then following on from that for contracts entered into after the date of assent.

I have a number of points I will quickly mention to you on which we are basing that argument. Firstly, when you limit the requirement for mandatory calculation from a daily basis to future contracts, that effectively postpones that requirement for a number of years—a delay in profit et cetera. For example, even if the amendment were passed today and a resident entered a contract tomorrow, that resident would not be leaving the village for many years to come and their exit fees would not be calculated for that number of years. So the proposed amendment does not address the urgent problem being caused by exit fee calculations right now. It is a stopgap measure.

Secondly, the decision to limit the application of the mandatory calculations on a daily basis to future contracts has plainly been premised on the very contentious assumption that the act does not already require exit fees to be calculated on a daily basis. Our position, quite clearly, is that from the date of the decision handed down by Robin in the Paragon and Saunders case he quite clearly—there is no argument about it—said 'calculated as at the day you cease to reside'. If you change that date in the calculation you are changing the calculation and you are not making a daily pro rata.

The best example I can give of that is—we talk about the periodicity of occupancy, and in this very vague area that is one of the few things which is very precise. The period you live in the village starts on the day you enter, and that is a contractual obligation following your application to reside, dated in the contract. It ends when you cease to reside, which is the day that you hand your keys in and various other administrative processes start. It is a very precise and easily calculated period of residency.

When you look at the statement of the act, the exit fee will be calculated as at the day you cease to reside. You already have the day you came in, so you know exactly how many days you were living in the village. That is exactly what Robin said. Therefore, I suppose you could draw a layman's perspective on that and say that what he really said was that as of 1 July 2000, when that act was drawn up and given assent—that is, the 1999 Retirement Villages Act. A strong argument pushed out by our members when that decision was passed down was, 'Let's go now and chase up all of the exit fees that have occurred since 1 July 2000 and push for a correct calculation of the fees. We discussed this with the RVA and Aged Care Queensland and we have decided that would be folly because it would be almost impossible to ascertain the huge number of people who have departed. Some would be dead; some would be half-dead et cetera. So we struck a compromise and looked at retrospectivity in terms of on foot contracts.

We have heard a lot of argument today about the million dollars—it was millions but it became a million today—that it is going to cost the industry and, in particular, what it would cost the AVEO group with its 26 villages in the next year. I did some quick figures while I was listening to Andrew Macintosh talk.

Remember that we only have 300 villages in Queensland. The worst case overcharge—my word, 'overcharge'—on an exit fee is $10,000. It was $9,990 for Mrs Saunders in the Saunders v Paragon case. Going down the scale, you occasionally get arguments about a couple of thousand dollars. The range is an overcharge of between $2,000 and $10,000. If you look at that and take an average of $5,000, at that particular stage you would want to have 200 exits from the 300 villages in the year. But it is not 300 villages; Andrew is talking about 26 villages. So he has had to have, in this particular case of a $5,000 overcharge, 200 people exiting from his 26 villages. Of the 200 that exited, all of those—to attract this $1 million penalty—would have had to be a significant overcharge, of one, two, three or four days as against someone going out on day 364 or 362.

You mentioned that yourself. That was the thrust of your question, I believe. That was not answered because to answer it like I have done would put to light that it is a nonsense. Anyway, let us look at the statistics if they are ever produced. There is no chance that the exit fee being calculated on a pro rata basis would cost an operator of a 26-village stable a million dollars in a year. I got a bit sidetracked there, sorry.

In wanting to bring this to a conclusion, the ARQRV has proposed a simply worded amendment to replace the amendment which has come out now—remembering that the amendment which is being proposed is an attempt, I suppose, to clarify the existing alleged ambiguity in section 15(2). Our wording would be that the exit fee must be calculated with reference to the total number of days of occupancy. I have already told you the ease at which you calculate the number of days of occupancy—the day you sign to come in, the day you go out, that is it. The final point is that is exactly what Justice Robin said.

As for the bit about obiter, a lot of people will say they have had QCs and people have told them all sorts of things about whether it was or was not obiter. I do not know anything about that. I do know that we have a couple of learned lawyers who have told us it is definitely not obiter. Acting Chair, your comment about it referring to the cost case is quite right.

Finally, if I may, Robin Lyons made quite an issue about the fact that decisions or judgements by the courts are only as good as the circumstances relating to that opinion—saying perhaps that the Saunders case only referred to Bellcarra and Mrs Saunders and Paragon. I do not know anything about that, but what I do know is that you are allowed to appeal those decisions and I do know that the RVA and Aged Care Queensland appealed the Robin decision. They sought leave to appeal and it was granted, but just before the appeal went ahead, for reasons known only to themselves, they withdrew that appeal.

ACTING CHAIR: I call the member for Kawana.

Mr BLEIJIE: Welcome, Les. Are you still living in Kawana?

Mr Armstrong: Yes.

Mr BLEIJIE: Welcome to Brisbane. You will recall I brought you down last year when Mr Lawlor was the minister, and we had a meeting in relation to the current bill which was contained in the fair trading—

Mr Armstrong: That is right, yes.

Mr BLEIJIE: This bill now, the Civil Proceedings Bill, is a mishmash of everything under the sun. So it was the fair trading aspect of it with retirement villages now in this bill. Can you explain in your view what has changed since when I took you down there and we were talking to Mr Lawlor, the previous minister, about the amendments he had at that time? I cannot recall whether you supported them at the time or did not support those current amendments. It seems like these amendments still do not represent your residents, your members; you still want changes to these ones. There are two questions. Firstly, were you consulted on these new amendments? Secondly, what happened between Minister Lawlor and the new Minister Lucas in terms of these amendments?

Mr Armstrong: I will answer the second question first, if I may. The amendment that we discussed at the meeting you attended with me was a super nonevent. It was simply saying that because there was not any ambiguity in that phrase—neither side thought there was ambiguity. I was quite positive that 'as at the day you cease to reside' meant the day, and Robin and company are equally as adamant that 'as at the day you cease to reside' means that you can have a yearly rest. I am not going to argue their case for them because it is quite clearly nonsense, but that does not matter.

We did not solve that with the meeting with the original minister, Mr Lawlor. Nothing was produced. Both sides produced papers which led to the raising of this second amendment. I do not know why it was put into a different bill, but nonetheless that was an expediency. Our argument was exactly the same for both of these amendments. It quite clearly has always been from the date of the assent and, reinforced by Robin's decision, it is daily pro rata.

We were asked to comment on this and we did. There are some papers that have gone in; there is probably written about a dozen pages on that and they have been passed out to various members of the Office of Fair Trading and the minister's office. I can leave that additional summary I have here today with you if you wish.

Mr BLEIJIE: The one we have here is from your vice-president, Phil Phillips, with a half-page email in terms of the issue. Was that the submission you made to this committee?

Mr Armstrong: No. There was a much more detailed one. Phil put that in at the last minute. I was away overseas at the time. He acted very quickly to a request to appear before this committee.

Mr LANGBROEK: Do you have more of a submission? Amanda, do we have more of a submission from the ARQRV?

Ms Powell: As far as I know, we only have the email. Mr Armstrong may be talking about the submission to the earlier bill.

Mr LANGBROEK: I am interested to see that, but maybe not right now. I want to refer to the email from Phil Phillips, the vice-president, because I think this is interesting for the department—where he speaks very specifically about the example given at 15(2) of the exit fee payable in the example case. It does seem to me that it is quite clear that if the exit fee is five per cent under your first year and six per cent of the ingoing contribution after the second year and you are there for 14 days out of the year in the second year, you would be paying 14/365ths of six per cent of the ingoing contribution, not 14/365ths of the one per cent.

Mr Armstrong: That is correct.

Mr LANGBROEK: I am just putting this into *Hansard* for the department. It seems to me that it does seem quite clear: It is five per cent, six per cent a year, and it would be 14/365ths of six per cent.

Mr Armstrong: I am sorry. When I said 'that is correct', I was not talking about the same correctness you are talking about. When Phil wrote that, he was giving an example of the Saunders case, if you like, and the Lynch case which is another one which has come up recently. It means that the exit fee, as written by Phil there, could let people believe that you paid five per cent for the first year and the exit fee went up by one per cent the next year to six per cent. In fact, in this particular case, the exit fees are five per cent for the first year, then six per cent for the second year and then 10 per cent further and so on. So whether you look at it from the point of view that it is a one per cent increase for that year and you are paying 14/365ths of one per cent, the net effect of that because of the mathematical calculation is that it is 14/365ths of the six per cent, which gets you to the larger figure. That is the way the operators calculate it to maximise their profitability.

Mr LANGBROEK: Yes, but if that is in a contract, at least that is understood. The important thing is clarifying the example and I am again just going to ask the department to make sure that how they have written it is actually correct.

Mr Armstrong: I understand.

Mr WATT: Mr Armstrong, thanks for coming today. One of the witnesses in the previous session—I think it was Ms Teudt—raised a concern that, should this change be made, the result might be that you had different residents who had entered a village at different times now having different contracts and changes to their contracts and that that might cause some disharmony and confusion within the village. Have you got a view on what impact that would have if this change were to be made?

Mr Armstrong: I certainly have. If you are talking about contracts, there are about 42,000 residents living in those 300 villages as I mentioned. There are about 30,000 contracts. They are all different and every PID to which they relate is different. In our village, for example, we have been in there eight years and we have 16 issues of PID. I know villages that have 30 PIDs. So when Kim talks about the uncertainty surrounding the differences in contracts between people who have been in the village certain periods of time, that does not only relate to exit fees; it is every single condition of living in the village. Is Kim really expecting the people to believe that, if there is a change which is beneficial to these aged, destitute people living in the retirement village, they will be upset? Of course not! They would welcome this change.

It is also a fallacy to say that everybody understands when they come into the retirement village because of this disclosure that our exit fee is going to be calculated a certain way. With respect, I have seen more about exit fees in the last five years than all of those people who were sitting at this table before me combined. I am not talking about casual inquiries; I am talking about going to the tribunal, preparing the papers and doing the calculations. I have not met a resident in those villages where there is no pro rata—where it is monthly, quarterly or yearly rests, as against our village where it is daily rests—who thought it was anything other than daily pro rata. Because they read the act—and the act is the same for everybody; the PIDs, of course, are different—and their interpretation, admittedly influenced by our writings in our newsletter, is that the phrase 'as at the day you cease to reside' can mean nothing else other than the day you leave.

The fact you have a dichotomy between the act, that is, the primary piece of legislation, and the subservient document, that is, the public information document—where it usually has a phrase in there saying that 'your exit fee is five per cent more than one year but less than two, more than two years but less than three', et cetera and it gives you the yearly increments—quite clearly, with respect to section 37 of the act, if there is a discrepancy or a difference between those two pieces of legislation, the act prevails. We have already said that the act prevails in terms of what Robin said. What the decision reinforced was as at the day you cease to reside, the day you leave, is daily pro rata, and the contradiction in the public information document—that is, the contract to which they continue to refer—is a nonevent. Section 37 makes it to no effect.

ACTING CHAIR: If there are no other questions, I thank you, Mr Armstrong. We really appreciate you taking the time and trouble to come and advise us.

Mr Armstrong: Thank you for the opportunity. I will leave this additional summary with Amanda.

BRADLEY, Ms Imelda, Director, Strategic Policy, Department of Justice and Attorney-General

LANG, Ms Jennifer, Acting Assistant Director-General, Strategic Policy, Legal and Executive Services, Department of Justice and Attorney-General

REED, Mr Philip, Director-General, Department of Justice and Attorney-General

SAMMON, Mr Damian, Director, Fair Trading Policy, Department of Justice and Attorney-General

WOO, Ms Linda, Executive Director, Office of Regulatory Policy, Department of Justice and Attorney-General

ZGRAJEWSKI, Mr Mark, Principal Legal Officer, Fair Trading Policy

DEPUTY CHAIR (Mr Langbroek): Welcome. In the absence of the Acting Chair, we will start. I know the department has been present this morning. I am not sure whether there are specific things that the department would like to speak to, having heard the public hearing, but there are certainly members here who have some questions. I am sure you will welcome those but we are happy to hear from you first.

Mr Reed: We would be quite happy just to answer any questions. I also note that I did write yesterday to the Acting Chair following on from the discussions about retirement villages and in particular the Robin QC decision. I emailed that through last night. It seems you do not have it. That was trying to clarify the point that the Acting Chair had made in relation to was this a direct translation of the judgement of Judge Robin and we have said 'not quite, but nearly'. We might just leave that as part of that record.

We also clarify the associations incorporation question by trying to identify the sort of class of entity that may well take up the opportunity to move from being an incorporated association to a corporations law company. But apart from that, I think we would be quite happy just to answer any questions.

Mrs KIERNAN: The class of entity, that is great. Thank you. I look forward to having a look at that correspondence and also further information from you on the retirement villages. I still have my questions. I really have concerns about the JP component that I raised earlier in the week—about the taking of copies of documents, the security of those documents, the knowledge of people holding those, the refusal of a JP who might say, 'Unless you give me a copy of all your stuff I am not going to sign it.' So I still have those same concerns.

Mr Reed: Yes, we had subsequent discussions with the JP area of the department and we came back to some of those responses that we made at the appearance on Wednesday about the fact that it is a 'may' rather than a 'must'—and you well and truly understand that, I know—but also that there would be nothing to stop a JP right now from not agreeing to actually witness a document were they not happy with the information. But in terms of the security of holding of copies, we are not clear that that will be the primary element that JPs will want to record. As we understand it now, they are recording information. There is nothing, in a way, to stop them; they just do not have a head of power to be able to record information already about what they saw—driver's licence, those sorts of things. But this actually allows them to do that legally, if they want to. If it comes down to that particular clause about the security of documents then we are happy to try and give you additional information. But ultimately it is something that the committee will probably need to deliberate on as to what level of concern there is and therefore whether that is an amendment that should be recommended to the government.

Mrs KIERNAN: Mr Reed, I do understand the 'may'—not compulsory. I do not have a problem if there are some JPs out there who want to record 'I have sighted this document on this given day' on some sort of ledger. The concerns that I think will be genuinely felt out there—this is in no way being disrespectful of the incredible work that JPs do right across the state, particularly in more isolated communities where they are such valuable members of the community and—normally—honest, upstanding citizens. Nonetheless, when we say in this that we are giving them the ability to take copies, it is going a bit further than 'noting'. I know that the police had their concerns. Does that mean that the local JP can take a copy of the warrant that a JP might be assisting in effecting? Does it mean that they can take a copy of that documentation?

Ms Bradley: The provision talks about recording or taking copies of proof-of-identity documents; it is not necessarily the underlying document that is being witnessed. So it might be the driver's licence or the passport but not necessarily the document that is being witnessed.

Mrs KIERNAN: '... including by taking a copy of the document, for the purpose of taking an affidavit or attesting an instrument or document'. So it is proof of identity. How is that defined? What does it exactly say? I have to say, it is not clear. I am a commissioner of declarations. There will be people out there who say, 'Actually, I want to keep a copy of everything.' And then I come back to my other question: the right of refusal. There are communities where there is one JP in town—or two JPs and one is out of town—where

people will be disadvantaged if JPs have the ability to say, 'Well, if you're not going to hand it over, I'm not signing.' I would like some of those protections. If you say, 'This is exactly what it means. This is exactly what they can take copies of,' I am happy to receive that information back.

Mr Reed: We would be quite happy, now that I better understand that element about the linkage, to try and clarify the reading of this clause and also the definition of the proof-of-identity element. That will not deal with the right-of-refusal issue necessarily, but if we can at least clarify what we mean by the documents and come back formally to the committee with that and make sure that you are provided that information, then we are happy to do that.

Mrs KIERNAN: Okay. Thank you.

Mr BLEIJIE: Mr Reed, you have had departmental officers here during this morning's briefing. Would anyone care to respond to the issues raised by the submitters this morning?

Mr Reed: You mean in relation to the retirement villages provisions?

Mr BLEIJIE: Yes.

Mr Sammon: It might be easier if we got some specific questions to respond to. There was a lot of discussion about the wording of examples—and the chair has pointed out that they are just examples; it is not a binding part of section. It would be certainly easier for us to respond to particular issues that were raised. We have taken notes, but I have four or five pages of notes now. It would not be easy to go through them all.

DEPUTY CHAIR: And, Mr Sammon, we know that you will give us a formal response as well. Do not feel any compunction to respond. I raised an issue—which was mainly to put it in *Hansard*—about the ARQRV submission about the example given in 15(2). As I read it now, I think Mr Phillips, the vice-president of ARQRV, has given what he sees as a mistake in the interpretation of what 14/365ths would be. Simply because most contracts obviously do not have 'five per cent first year, six per cent total for the second year', he has presumed that, because in the example it says five per cent and then 'and six per cent'. So he is saying that it should be 14/365ths of six per cent. But if a contract said, 'It is five per cent in the first year and six per cent in the second,' then your example is correct and it would be 14/365ths of one per cent. But I think he is stating what are pretty obvious examples. In the table given to us in the previous submission from Aged Care Queensland and Retirement Village Association Queensland, the one year or less was 7.5 per cent, two years or less was 15 per cent and obviously the example then would say it would be three 14/365ths of 7.5 per cent. I am just trying to clarify it again for *Hansard* for you to look at, because I made an inquiry about that based on what I thought the example said and his submission said.

Mr Reed: We would be happy to come back on that as well.

Mr WATT: On a similar note, Mr Reed, if you could just go back and look at the transcript of some of the comments by the Law Society. They made the point that the example in section 53A(2) possibly did not really amount to an example of a daily fee. When I read it, I wonder whether they might be right about that and in fact that example may be better placed in subsection (3) as an example of how you convert something that is not written as a daily fee into a daily fee, if you understand what I mean.

Mr Reed: I do understand.

Mr WATT: I am not normally a member of this committee. Today is the first time I have looked at this legislation, so I may not be reading it correctly, but I wonder if they might not have a point there. The second thing was related to the Law Society's submission. As Mr Armstrong said in respect of one example, the Law Society talks about the example in subsection (2) also being incorrect. It is at the base of page 4 of their submission. I will not bother restating the point they made; it is all in their submission. I thought, again, at first blush it looked like they may have a point there. I do not disagree with the policy intent here, but I wonder whether just a bit of tweaking of the examples might clear things up a little bit.

Mr Reed: They are matters of clarity, so we are happy to come back. The sooner we get the *Hansard* on that the better. We have notes, obviously, so we will prepare a response, but we obviously want to provide that as quickly as possible.

Mr BLEIJIE: Division 7 of the bill deals with the amendment to QCAT and the membership base. I think in the first submission you made you said that there are 100 members whose terms are due to expire later this year. This provision allows them, if they still have proceedings before them, to carry on. How is the department going to juggle the appointment process, though? I am concerned about the certainty of QCAT, because the annual report from Justice Wilson noted that, with the Neighbourhood Disputes Resolution Act starting later this year, QCAT's resources are stretched to the max now. And he did make a qualification that if they continue to get the burden they now have then they may have to wind back or there will be delays in terms of mediation. I am concerned that if we have 100 members in QCAT whose contracts are due to expire, what certainty can we give QCAT? You are going to have another 50 appointed this time, because we do not know, unless you can give us the statistics, how many current cases before that 100 will be ongoing.

Mr Reed: On this particular matter, were the bill able to be passed by parliament and commenced prior to the expiry of the positions of the current sessional members, it would apply to them. But it will not apply to them, clearly, at the point of appointment, when we obviously have to continue on the

reappointment process that the government has underway at the moment. If those two things fall out of sync it will not apply to the current members, and QCAT will be aware that it will not apply, and therefore they will be doing everything possible to ensure the current members complete their matters.

This is trying to ensure for the future that there is an ability for a member, as they get towards the expiry of their term and they have matters still on the books, to complete those matters before their term expires, in effect. So they do not hear any new matters; they just deal with the tail end of it. So from QCAT's perspective it will be clear that they will understand where we are up to in this particular process and therefore they have to ensure, as best as possible, all matters are completed; otherwise they will need to be reheard. I do not think that will be an issue for QCAT at this point in time but, clearly, what we are trying to do is futureproof into any subsequent appointments that this is an allowable element for completing the work that is on their books.

Mr BLEIJIE: The current principles are, really, if you have an appointment you are appointed for X amount of time, and we seem to just allow now, despite the appointment—because a lot of these members may have numerous matters. How are we going to manage this? They may start matters a couple of months before their appointment ends that could be ongoing for 12 months, to give a time frame. And we will be creating this situation where there is no certainty ever in contracts. Their contract will end but, despite that contract ending, they are going to continue on. I refer to what happened in North Queensland with the appointments of the two Supreme Court judges in Cairns and Townsville. They made sure they wound back the matters they were dealing with, as a succession plan I guess, so that when their appointment ended they had finished those matters.

Mr Reed: Clearly it is still a matter for the president of QCAT to ensure they are managing the workload of QCAT efficiently and effectively. Clearly it is known when the current members' terms end. We are going through a process of appointment for the next round of members. Therefore, from my perspective, it is an issue that is very much in the forefront of the mind of the president of QCAT at the moment in terms of trying to manage that workload.

I do not think there will be a problem between now and the expiry of the terms of the current members and the appointment of the new members, but if the committee feels that there is an issue here that should be addressed and consideration be made for, for instance, retrospective application of this then obviously that could be considered. That would need to come back to government for them to consider. At the moment, it is a prospective amendment—that is, for work commenced before the expiry of the term of the current members then it would apply but otherwise it will only be for new appointees.

CHAIR: Thank you very much for coming and briefing us. That is the end of the public hearing. I thank everybody who has come and spoken to the committee today. We have more information available to us as a result of you coming than we had before you came. That will, we believe, improve the quality of what we are able to recommend to the parliament. Can I thank the Hansard reporters. Can I thank the committee staff and also my colleagues.

Committee adjourned at 12.02 pm