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Office of the Chief Executive

Your Ref: Civil Proceedings Bill

Quote in reply: Elder Law Committee / Litigation Rules Committee: 21000326.44

14 October 2011

Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lapcsesc@parliament.qld.gov.au.

Dear Research Director

CIVIL PROCEEDINGS BILL 2011

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

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

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

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

The Civil Proceedings Amendments

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

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

The Other Amendments

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

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

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

Proposed Amendments of the Retirement Villages Act 1999

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

> ***Division 8 Amendment of Retirement Villages Act 1999***
>
> ***238 Act amended***
> This division amends the Retirement Villages Act 1999.
>
> ***239 Amendment of s 15 (What is an exit fee)***
>
> *Section 15(2)—*
> insert—
>
> 'Notes—
> 1 Subsection (2) states the day at which the exit fee for a residence contract is to be worked out, and not the method of working out the exit fee.
> 2 Section 53A states how to work out the exit fee for a residence contract that is worked out under the contract having regard to the length of time the resident has resided in the unit.'.
>
> *240 Insertion of new s 53A*
> After section 53— insert—
>
> *'53A How to work out particular exit fee for a residence contract*
> '(1) This section applies to an exit fee for a residence contract that is worked out under the contract having regard to the length of time the resident has resided in the accommodation unit to which the contract relates.
>
> Example—
> This section applies if the exit fee is 5% of the ingoing contribution payable under the contract after 1 year's residence in the unit and 6% of the ingoing contribution payable under the contract after 2 years residence in the unit.

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

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

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

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

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

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

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

Fundamental Legislative Principles

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

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

The Explanatory Memorandum for the Bill states that:

The Bill is consistent with fundamental legislative principles.

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

Clear Drafting

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

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

The Society understands that in some retirement village schemes:

- the exit fee (in some schemes called a "deferred management fee") is clearly expressed to be a fee payable by the resident to the scheme operator "for services provided" by it to the resident during his /her residency and payment for which (by the resident to the scheme operator) is deferred until the resident exits the accommodation unit; and/or

- calculated on a pro rata daily basis from and to the time the resident enters and exits the accommodation unit respectively

The Society notes however that in other retirement village schemes:

- the practice is not to draft exit clauses in residence contracts on a daily basis but rather on a yearly or staged basis where the resident's fee is determined by the year of residence, ie 2 years means in the second year of residence; and/or

- exit fee clauses are expressed to create not a 'fee for providing services' which may be properly rated on a daily basis but rather one element of the 'entry fee' which is delayed until a resident's exit from a village. Just as the payment of stamp duty on the sale of residential property comes due in full upon transfer regardless of the length of ownership, the payment of the exit fee may likewise be an agreed fixed fee and likewise part of the fixed costs of buying into a retirement village.

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

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

(1) (*Ingoing Contribution x 5%*) + ([*Ingoing Contribution x 1%*] *x 14/365*); or
(2) (*Ingoing Contribution x 6%*) *x 379/730*; or
(3) (*Ingoing Contribution x 5%*) + ([*Ingoing Contribution x 5%*] *x 14/365*); or
(4) (*Ingoing Contribution x 5%*).

Retrospectivity

The Society has concern about the retrospective nature of the proposed clause 53A(2) as the clause is directed toward any residence contract signed before the commencement of the section. As such the new section will impose itself on a wide variety of Exit Fee clauses that were drafted before a mandatory pro rata regime was considered and, in fact, at a time when the prevailing view was quite the opposite, namely that an Exit Fee would only be applied pro rata if the Exit Fee formula expressly provided for it. The proposed section essentially requires that the drafters of those existing formulas should have taken into account something which did not need to be a consideration or concern for them at the time their work was done.

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

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

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

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

Freedom to Contract

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

The Society cautions against encroaching on the freedom to contract.

Objects of RVA

The objective of the RVA is to ensure both:

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

Amendments made to the Act need to have regard to both of these objects providing an appropriate balance between residents and certainty for industry. Ultimately, if measures erode the viability of schemes in the retirement village industry it will be residents who will be displaced or left disadvantaged. It is suggested that amendments of these nature need to be supported with economic modeling of the likely impacts on the viability of the industry and the security of residents.

Consultation

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

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

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

Proposal

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

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

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

Yours faithfully

Noela L'Estrange
Chief Executive Officer

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Office of the President

Your Ref: Fair Trading Bill 2011 - Retirement Village Act Amendments

Quote in reply: Elder Law Section

10 December 2010

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Dear Director

FAIR TRADING AND OTHER LEGISLATION AMENDMENT BILL 2011

Thank you for the opportunity to provide comments on the *Fair Trading and Other Legislation Amendment Bill 2011.*

This response has been compiled with the assistance of the Elder Law Section and Property and Development Law Section of the Queensland Law Society.

This letter will consider amendments to the *Retirement Villages Act 1999* and the *Land Sales Act 1984.*

Retirement Villages Act 1999 ("RVA")

The Elder Law Section represent a diverse cross-section of interests, including those of retirement village residents, retirement village scheme operators and their financiers. The Elder Law Section provide the following commentary and suggestions in order to ensure clarity in the interpretation and the application of the RVA in the interests of all who are affected by it.

1. Section 15: What is an exit fee

1.1 The Act has been recognised at both Tribunal and Supreme Court/Court of Appeal levels to essentially be an Act that is not prescriptive but rather an Act that sets minimum requirements that need to be met and beyond those minimum requirement parties are free to contract and make their own bargain.

1.2 It cannot be stressed enough that as long as the minimum requirements of the RVA are met and the terms of the bargain are clear, then the parties to a Residence Contract have the freedom to strike their own bargain. Albeit generally an important aspect of the bargain, the Exit Fee is but one aspect of the overall bargain and needs to be considered in the context of the overall bargain.

1.3 Given items 1.1 and 1.2 above, any amendment by inclusion of the proposed Section 15 (3) must ensure that it dos not somehow imply a limitation to the formulas for exit fees able to be utilised be agreed between the scheme operator and the resident.

1.4 As I understand it, the purpose of the amendment by inclusion of the proposed Section 15(3) is to address confusion that has arisen over the wording of Section 15(2) in recent years.

1.5 The Section was amended in 2006 to ensure that the date for the application of an Exit Fee formula is the date that the Resident ceases to reside in the Unit, not only for contracts entered into on or after 1 July 2000 (*ie commencement of the 1999 Act*) but also for Contracts entered into prior to that date (*defined by the Act to be 'existing contracts'*).

1.6 The section both pre and post its 2006 amendment sought to fix the point in time when the formula for an exit fee must be applied.

1.7 The section both pre and post its 2006 amendment did not seek to determine how the calculation should be made, just when.

1.8 Prior to the 2006 amendment some Residents were exposed to Contract terms that required the application of the formula at the Settlement Date for the grant of the new right to reside, which date may be quite some time after the Resident ceased to reside in the Unit (this would particularly be the case where a Resident has died or moved to Nursing Care).

1.9 The purpose of the 2006 amendment is made out in the Explanatory Memorandum to the Bill for the amendment Act. It relevantly says:

> *Exit fees are usually calculated as a percentage of the re-sale proceeds, and this percentage continues to increase during the residents occupation. Presently the Act provides that for contracts entered into after the Act commenced, the percentage to be applied is the percentage as at the date of vacation of the unit, whereas for contracts entered into before the Act commenced, this percentage may continue to increase after vacation up to the time of re-sale. The clause will change the percentage applicable for existing residence contracts to also be the percentage as at the date of vacation.*

1.10 The amendment now proposed to Section 15 by the consultation draft, does not clearly address or proceed from the above comments.

1.11 Given what has brought us to the need for the amendment:

(a) the proposed amendment must be couched in terms that make it clear that the Act does not require a formula to be applied pro rata unless the Residence Contract provides for that to occur;

(b) the proposed amendment must not be couched in terms that suggest that the Act requires a formula to be applied pro rata unless the Residence Contract provides otherwise.

1.12 The Act does not otherwise provide what an Exit Fee can or cannot be. Consequently the introductory words to the proposed Section 15 (3), arguably expose it to a suggestion that it somehow limits the type of exit fee formulas that can form part of a bargain. This can easily be addressed by a small change to the introductory words.

1.13 The use of the word '*proportional* 'instead of the phrase '*pro rata*' is understandable. However the phrase '*pro rata'* is:

(a) a phrase that is commonly understood by consumers; and

(b) the phrase used by both Residents Advocacy groups and Industry groups to describe the mischief with which the amendment is concerned.

Consequently it would be more appropriate to use the phrase '*pro rata.'*

1.14 The phrase '*pro rata'* is :

(a) a phrase recognised and defined by the Oxford Dictionary and the Macquarie Dictionary; and
(b) a phrase used widely in legislation, particularly but not only industrial relations legislation (*a search of www.austlii.com.au will reveal a large variety of state and federal legislation in which the phrase is used.*) For instance, section 123D of *Parliament of Queensland Act 2001*, defines pro rata amount (with respect to government allowances) as follows:

> "***pro rata amount*** of an advance allowance relating to the remainder of a period means the proportion of the amount of the allowance that is the same proportion that the remainder of the period bears to the whole period."

1.15 The words '*having regard to the period of the residents residence in the accommodation unit*' where they appear in the proposed amendment are unnecessary and detracts from the clarity required to achieve the purpose of the proposed amendment.

1.16 The words 'the method of calculating the exit fee on that basis' where they appear in (b) of the proposed Section 15 amendment do not add anything to the words in the proposed Section 15(a). They can be omitted without affecting the meaning of the section.

1.17 In order to best achieve the purpose of the proposed amendment, Section 15(2) should be amended slightly.

1.18 In order to best reflect the purpose of the proposed amendment, Section 15(3) should expressly state that unless the residence contract provides for a proportional application then it is not to apply.

1.19 It would also be prudent to include an appropriate example/s after the proposed Section 15(3).

Section 15 - Proposed Amendments

1.20 In order to address the concerns in the nature of those in items 1.6 and 1.7 above, the Society proposes the introductory words to Section 15 (2) read as follows (proposed amendments in bold italics or noted by strike through):

> (2) ~~The~~ ***A formula for calculation of an*** exit fee for a residence contract, including an existing residence contract, that a resident may be liable to pay to, or credit the account of, the scheme operator is to be ***applied*** ~~calculated as~~ at –

1.21 The comments and concerns listed above could also be addressed by inserting a new Section 15(3) reading as follows:

> (3) *Without limiting how a residence contract may provide for the calculation of an exit fee:*
> *(a) a residence contract may provide that the exit fee must be calculated on a proportional basis by reference to time or otherwise; and*
> *(b) an exit fee shall not otherwise be apportionable.*
>
> *Example –*
> *Full Application*
> *Mr. Smith enters into a residence contract under which the right to reside commences on 1st February,2009. The formula in the residence contract provides that the exit fee is 3% per annum. Mr. Smith ceases to reside in the accommodation unit on 3rd March 2010. The exit fee will be calculated on an annual basis and the part of a year (from 1st February 2010 to 3rdMarch 2010) is calculated as if it were a whole year. According to this formula the exit fee will be 6%.*
>
> *Pro Rata Application*
> *Mr. Jones enters into a residence contract under which the right to reside commences on 1st February,2009. The formula in the residence contract provides that the exit fee is 3% per annum* ***applied pro rata for a part year.*** *Mr. Smith ceases to reside in the accommodation unit on 3rd March 2010. The exit fee will be calculated on an annual basis and the part of a year (from 1st February 2010 to 3rd March 2010) is calculated as a 31/365 part of the 3% applicable to that year. According to this formula the exit fee will be 3.2548%.*

Further Comments

1.22 It seems that this Bill has been seen as an opportunity not only to advocate against the amendment but to advocate for a mandate for the pro rata daily application of all exit fees.

1.23 That school relies significantly on the 2008 District Court decision in *Saunders v Paragon Property Investments Pty Ltd* [2008] QDC 322 when making its submissions.

1.24 With respect to His Honour Judge Robin QC, his decision in so far as it concerns the operation of Section 15(2) does not seem to properly reflect the history of Section 15(2).

1.25 The passages in His Honours decision relevant to the operation of Section 15(2) are essentially obiter dicta.

1.26 It seems clear from some of the passages in His Honours judgement that he was put at a disadvantage because matters relevant to how the Industry and the legislation works as a whole may not have been ventilated before His Honour properly or at all. In this regard amongst

other passages His Honour states at paragraph 13 of the judgement – I am not certain what is the warrant for treating the exit fee as a deferred management fee.

1.27 The very fact that His Honour considered that Section 15(2) should operate in a manner that does not reflect its history is the reason that Parliament should amend Section 15(2) to make its original intention abundantly clear. To do otherwise would be for Parliament to abdicate its law making responsibility to the judiciary.

1.28 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 - Saunders v Paragon Property Investments Pty Ltd [2009] QDC 019 Robin QC DCJ 13/02/2009.

1.29 The only passage of that decision that seems relevant is paragraph [8] which reads:

> *[8] Part of the respondent's argument was that the applicant/appellant's "grounds for success are of recent origin"; it referred to the so-called calculation of time argument which was heard only because this court gave leave and, of course, had not surfaced in the Tribunal. The so-called apportionment argument, it is correctly said, was raised by the Court. It may well be that if the appeal had succeeded only by reference to those arguments, so that the respondent would have been successful in their absence, it should not be ordered to pay costs of the appeal. My view is that the appeal succeeded on the general ground of the meeting of s 15(2) of the Retirement Villages Act 1999, quite apart from the "new" grounds.*

1.30 With respect, this passage is only relevant to His Honours determination of whether the costs of the Appeal should be borne by the Respondent. Considered in its proper context, it is not a comment by His Honour that the relevant passages were part of the ratio of his earlier decision as opposed to dicta. When it comes to the issue of the original comments being ratio or obiter it is also relevant to note that:

(a) the obiter was not required for the decision ultimately made by His Honour;

(b) the financial effect of the decision as made and a decision on the basis of the obiter would have differed slightly.

1.31 Much is made by the ARQRV (Association of Residents of Queensland Retirement Villages) of the unfairness of anything other than a mandated pro rata daily application of Exit Fee formulas. His Honour Robin QC DCJ in Saunders case seems to have taken to this claim of unfairness.

1.32 However what seems to be lost to those focussed on this alleged unfairness are the following amongst other things :

(a) the Exit Fee is but one aspect of the overall bargain struck between Operator and Resident as allowed to be struck under the Act;

(b) on entering into a Retirement Village a Resident is afforded a number of benefits and services, some of which would be attainable outside a Village and others not and the cost of achieving those things inside the Village environment is generally less than the cost of doing so outside it. These benefits include but are not limited to :

(i) essentially buying a neighbourhood with a reasonably fixed and complimentary age demographic;

(ii) the relative security of community living with on site management staff;

(iii) the availability of a number of community facilities that will often include not only general communal facilities and facilities focussed on leisure but also the ready availability of assistance with personal needs such as emergency care, meals, cleaning and transport;

(c) when it comes to financial matters the Scheme Operator can generally only benefit from:

(i) the 'capital gain' in the value of a right to reside when it comes to its resale (whenever that may be) but only to the extent that it has not shared that with the Resident as part of the terms of the residence contract;

(ii) the Exit Fee;

(d) the operation of an Exit fee must be clearly stated in the Residence Contract and the PID;

(e) the PID also includes examples of the application of the Exit Fee;

(f) an Applicant for a right to reside should not , if properly advised, be taken by surprise by the eventual impact of the Exit Fee formula;

(g) an Applicant is afforded the benefit of a fourteen (14) day Cooling Off Period during which the effect of the Exit Fee can be considered and if unpalatable the Resident can terminate the Contract without penalty;

(h) once an Applicant makes a decision to take up a right to reside on its properly disclosed terms, then it is unfair for the Applicant, some years later, as a departing Resident to argue that he/she no longer finds the Exit fee palatable;

(i) if an Operator lacks prudence and does not set out the Exit Fee clearly and consistently in the PID and the Residence Contract then the Resident is further protected by Section 37(3) which provides that the provision more beneficial to the Resident is that which should apply.

1.33 When it comes to the Exit Fee:

(a) the formula according to which this is calculated varies across the industry but will ordinarily be driven by market acceptability – put plainly an Operator who decides to charge an Exit Fee considerably greater than that charged by its competitors is likely to lose buyers to its competitors;

(b) the Exit Fee is often but not always calculated as a percentage of :

(i) the outgoing Residents original ingoing contribution; or

(ii) the incoming Residents new Ingoing Contribution;

(c) the Exit Fee is not generally charged for every year of residence, because the Exit fee is almost always capped, in that the formula will only apply for a limited number of years (eg 3% per annum for each of the first 7 years);

(d) the capping varies but anecdotally can be as little as 3 years and as high as 15 years;

(e) it is not appropriate to look at the Exit Fee as purely a fee for services rendered;

(f) if it is for services then is it suggested that the services cease or are for free once the relevant years in the cap have expired ?

(g) if fairness is to be applied by an apportionment in the years before the number of years in the cap have expired then how is fairness and viability for the Operator accounted for once the relevant years of the cap have expired ?

(h) the Exit Fee is not a periodical payment in the sense described in section 233 of the Property Law Act.

1.34 The date at which the relevant Exit Fee formula is to be applied is the date that the Resident ceases to reside in the unit.

1.35 Apart from the very rare occasions of breaches that lead to termination by an Operator, the Resident has ultimate control of when the Resident ceases to reside in a unit, not the Operator.

1.36 In a general sense, on the termination of a right to reside whether by Notice from the Resident or the Residents death, the following occur:

(a) agreement on or other determination of the resale value;

(b) agreement on or other determination of necessary reinstatement works;

(c) the Operator will allow the Resident to continue to reside in the unit despite the termination of the right to reside;

(d) the Operator will ask the Resident to vacate in order to undertake the necessary reinstatement works.

1.37 A Resident will invariably need to vacate a Unit before the Settlement Date of the grant of a new right to reside.

1.38 If a Resident is concerned about how the exit fee will apply then the Resident can manage that exposure by appropriately terminating a right to reside and vacating the unit.

2. Section 28: Registration of retirement village scheme

2.1 The Registrar has power in Section 28(1) to refuse to register an Application.

2.2 The intention of the proposed amendment is to enable the Registrar to refuse to register a scheme that may technically comply with the minimum requirements of the Act but not the essential purpose of the Act.

2.3 The genesis for the proposed amendment is a scheme that provides for residents to eventually have control of the Scheme Operator entity, thereby muddying the responsibilities that lie between Residents and Operator in the Act.

2.4 The mischief noted at item 3 above could be more easily addressed by amending the definition of 'Retirement Village Scheme Operator' at Section 8 to exclude entities that the Residents of a Village directly or indirectly control by membership or officeholding.

2.5 The Minister may be satisfied that the relevant mischief is sufficiently addressed by this alternate amendment of Section 8 on its own.

2.6 If Section 8 is not to be amended then the example proposed below should be made part of the proposed amendment.

2.7 The use of the words 'contrary to the regulatory framework' to base the Chief Executive's power is arguably so wide and uncertain as to stifle innovation by Scheme Operators. This is particularly relevant when innovation may / will be required to meet market demands for Villages as the demographic changes.

2.8 Unfortunately if an alternate and more clear phrase/s cannot be found then the Industry will need to be left with this uncertainty until the Chief Executive chooses to use his/her power and an Operator decides to appeal against the refusal.

2.9 Some of the above concerns may be alleviated by using the phrase 'contrary to the Objects and regulatory framework'.

2.10 Use of the obligatory words 'must not register' may unnecessarily expose the chief executive to action or simply be too prescriptive. It may be more appropriate to use the words 'may refuse to register.'

Section 28 - Proposed Amendments

2.11 In order to achieve the objective in item 2.9 above, it is suggested that the proposed Section 28 (4) read as follows (proposed changes to bill provision in bold italics or noted by strike through) :

> (4) However the chief executive ~~must not~~ ***may refuse*** *to* register a retirement village scheme if the chief executive reasonably considers the scheme is contrary to ***the Objects and*** the regulatory framework ~~under~~ *of* this Act.
>
> ***Example-***
> ***A retirement village scheme that provides for residents to directly or indirectly control the scheme operator by membership or officeholding is contrary to the regulatory framework of the Act.***

3. ***Section 91: Capital Replacement Fund***

3.1 The definition of reinstatement works uses the phrase replacements or repairs.

3.2 For certainty, the proposed amendment of Section 91 should use terminology consistent with the definition.

3.3 Section 91(5) is a Section that essentially defines the primary prohibition in Section 91(3).

3.4 Consequently the proposed amendment would work as an exception to Section 91(5)'s non exhaustive list of prohibitions to the prescriptive use imposed by Section 91 (3).

3.5 Consequently what we have is an exception to a prohibition which prohibition is intended to fortify a primary prescriptive use.

3.6 Given items 3.3, 3.4 and 3.5 above it would be prudent to make a complimentary amendment to Section 91(3) so that it is clear that use of the fund for Reinstatement Works (as per the prescriptive Section 62(4)) is a primary permitted use of the fund.

Section 91 - Proposed Amendments

3.7 In order to achieve the objectives in item 3.2 above, it is proposed that the Section 91 definition read as follows (proposed changes to bill provision in bold italics or noted by strike through) :

> (5)(a) the village's capital improvement, maintenance or repairs, other than ***replacements or*** repairs that are reinstatement works the cost of which must be paid out of the fund under section 62(4)

3.8 In order to address items 3.3 to 3.6 above, Section 91(3) should be amended to include the following either as a new (b) with the current (b) and 9 (c) to be renumbered, or as a new (d) :

> (3)(b)
>
> OR
>
> (3)(d) replacements or repairs that are reinstatement works the cost of which must be paid out of the fund under section 62(4)

4. ***Amendment of Dictionary Schedule: Definition of Cooling Off Period***

4.1 The intention of this amendment was to return the definition to its pre-2006 amendment Act form.

4.2 The definition immediately prior to the 2006 amendment Act was:

> '*cooling off period for a residence contract means a 14 day period starting on the day the contract is made*'

4.3 The use of the word 'signed' to trigger commencement of the Cooling Off Period is uncertain.

4.4 It may mean signed by the Resident without any requirement that it also be signed by the Operator. Consequently the Period may begin but the Operator may not have yet accepted the contract.

4.5 Alternatively it may mean signed by Resident and Operator, but without the first signatory necessarily having been informed of the second signatory's signature.

4.6 The term 'signed' should therefore be clarified.

4.7 A prudent alternative would be to have signed be akin to the requirements for formation of a contract, namely offer, acceptance and communication of acceptance.

Dictionary Schedule - Proposed Amendments

4.8 In order to achieve the objectives of item 4.7 above, the proposed definition should read as follows (proposed changes to bill provision in bold italics or noted by strike through) :

> cooling off period for a residence contract means a 14-day period starting on the ~~day when the contract is signed~~ ***later of :***
>
> ***(a) the day the resident receives notice of the Operators signature of the residence contract;***
>
> ***and***
>
> **(b) *the day the Operator receives notice of the residents signature of the residence contract.***

4.9 As an equally appropriate alternative, the definition could be returned to the form it was in immediately prior to the 2006 amendment. That would require the following simple changes to the proposed amendment:

> cooling off period for a residence contract means a 14 day period starting on the day the contract is ~~signed~~ ***made***.

Land Sales Act 1984

5.0 The Bill proposes that the *Land Sales Act 1984* be amended to remove the requirement for a developer of lots in an off-the-plan scheme to provide a purchaser with a transfer of title within a stated time period and to also remove the mechanism which permits that time period to be extended. The current proposal is that a developer must provide a purchaser a transfer of title within:

- any stated period in the contract of sale; or
- if no period is stated in the contract, a period of 3 ½ years.

It has been the long standing position of the QLS that property law needs to achieve a balance between two objectives:

- providing certainty and stimulus for industry; and
- consumer protection.

It is noted that the policy intent behind the original provision is to provide an incentive for developers to expedite their projects and to also limit as far as is possible the delay (and possible change in circumstances) for the purchaser.

Issues

5.1 The current requirement for extensions of the sunset period to be made by regulation, are indeed cumbersome and do not facilitate industry or greatly assist in protecting consumers. A simpler mechanism is required.

If the agreed time period allowed to be stated in a contract of sale is not capped or restricted in time in any way there is a risk that, particularly for small developments, periods over 5 years may be considered unfair terms under the new Australian Consumer Law. This is not a position that provides certainty for developers or consumers. In this regard a statutory cap on the sunset date will validate agreed dates up to the capped amount avoiding the operation of the unfair terms provisions.

The specified period approach may also work significantly to the detriment of consumers if a lengthy period, say ten years, is selected for the life of the project, especially in smaller scale developments. Even in larger scale developments the development time should be clearly brought to a purchaser's attention, possibly through pre contract disclosure. Extended delay heightens the risk that the purchaser's circumstances will change making them less capable of fulfilling settlement obligations. The purchaser will also be deprived of the benefit of their deposit monies during this period and it is unclear whether any interest accruing on invested deposit monies will be applied to their benefit.

A further complication with the specified period mechanism is that in some instances forces beyond the control of either party will extend the duration of the contract and will delay the provision of transfer documentation. It is not clear whether a contract that provides for settlement, for example within 6 years, subject to a right of the seller to extend under a force majeure clause will be a specified period under the proposed Bill. This issue needs to be addressed in the drafting.

It is also unclear the exact purpose of the transitional provision in clause 37. The clause appears to allow a seller to continue to comply with the requirements of s 28 *Land Sales Act 1984*. We query the need for this provision. Under s 28, notice of the prescribed period is required to be given prior to the buyer entering into a contract. At the time of commencement of the proposed amendments to s 27 it will only be contracts that have not yet been entered into where a seller could validly give a notice under current s 28. If the contract is not yet signed a seller could merely comply with the new s 27 and provide a specified period in the contract. Why continue to comply with the notice provisions in s 28? Alternatively, is the purpose of clause 37 to allow a seller who has failed to comply with s 28 (ie notice not given prior to contract) to now comply? If that is the intention, this is not clearly articulated in the provision.

Proposals

5.2 The QLS proposes that in order to address the issues raised above a new approach could be adopted in which a vendor must give to the purchaser a transfer, either

- within 4 years after the day the contract for sale was formed; or
- in the case of a large scale development, within a time period specified under a contract of sale

We propose that a reasonable definition for the term *large scale development* would be a project which has a rise in storeys of more than 20 and contains 2 or more separate lots. The Department may wish to undertake some further investigation into current developments to ensure that such a threshold is fair and reasonable given existing extensions.

We also propose that terms such as *rise in storey* and *storey* are defined using a similar mechanism as is adopted in section 74(5) of the *Home Building Regulation 2004* (NSW). This section usefully defines *rise in storey* in terms of the *Building Code of Australia,* however we see it as imperative that basement car parking and other vehicle accommodation levels are excluded from the calculation of storey for the purposes of the definition.

In the case of the specified time for large scale developments whether the time can be further extended under a right contained in the contract should be clarified.

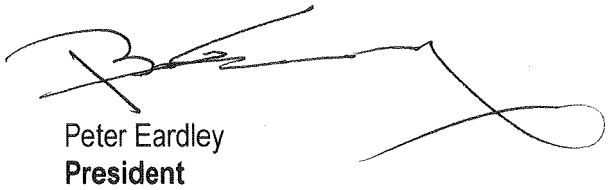
It should be made clear in transitional provisions that:

1. the new maximum period applies only to contracts entered into after commencement; and
2. existing extensions granted for particular developments under s 28 *Land Sales Act 1984* are still operative for contracts entered into after the commencement.

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

Please do not hesitate to contact either myself or have a member of your staff contact our Principal Policy Solicitor Matt Dunn on 3842 5889 or m.dunn@qls.com.au or our Policy Solicitor, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au, if you wish to discuss these concepts further.

Yours faithfully



Peter Eardley
President