ARQRV Opening Statement

Civil Proceedings Bill 2011 – Part 32, Division 8* - Proposed amendments to the *Retirement Villages Act 1999

Calculation of exit fees on a daily basis

I am the President of the Association of Residents of Queensland Retirement Villages "ARQRV". We represent the interests of retirement village residents in Queensland, with approximately 8000 financial members across Queensland.

The ARQRV wishes to make submissions regarding the proposed amendments to the *Retirement Villages Act 1999* that are set out in Division 8 of Part 32 of the *Civil Proceedings Bill 2011*.

The proposed amendments concern the manner in which exit fees are calculated when a resident leaves a village.

Exit fees are a lump sum payable by a resident to the village operator when the resident leaves the village. They are the primary source of profit for the village operator, and are usually calculated as a percentage of the sale price (or original purchase price) of the relevant unit, with the percentage often determined by reference to the number of years in occupation. For example, 5% for the first year, 10% for the second year, 15% for the third year, and so on.

The ARQRV fields approximately 4000 complaints annually from concerned residents and their families, and a large proportion of these complaints relate to the calculation of exit fees.

In most cases the outgoing resident is deceased or entering an aged care facility and the exit fee negotiations are being handled by their children. The children are generally 'baby boomers' - the generation on which the retirement village industry depends for its future viability. The treatment of their parents on exit from a village shapes their own attitude to retirement villages as an accommodation option.

The ARQRV does not oppose exit fees per se, and recognises that they benefit retirees by allowing them to obtain an improved standard of living *now* that their income would not otherwise support, that they pay for *later* from their capital.

However the ARQRV believes it is in the interests of residents and village operators alike for exit fees to be calculated fairly, as it preserves the reputation and future viability of the industry.

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

The ARQRV has long advocated for all exit fees to be calculated on a daily basis, rather than by annual increments. For instance if a residence contract imposes an exit fee of, say, 5% per year of residence, and a resident then leaves after 2 years and 1 day, it is patently unfair for the exit fee be calculated as 15% on the basis that the resident entered their 3rd year of residence, rather than just 10% plus 1/365th of the next 5%.

The amendments proposed by the *Civil Proceedings Bill 2011* are of significant concern to the ARQRV because, firstly, they purport to limit the requirement for mandatory calculation on a daily basis to contracts entered into *after* the amendments are passed and, secondly, they purport to retrospectively remove that requirement for contracts that are already on foot.

The ARQRV's position is that the amendments should require mandatory calculation on a daily basis for all contracts on foot as at the date of commencement of the amendments, as well as those entered into after that date.

This position is based on a number of important practical and legal considerations.

Firstly, limiting the requirement for mandatory calculations on a daily basis to future contracts will effectively postpone that requirement for many years. For example, even if the amendments were passed today and a resident entered a contract tomorrow, they would not be leaving their village for many years to come, and their exit fees would not be calculated for many years to come. So the proposed amendments will not address the urgent problems being caused by exit fee calculations *right now*.

Secondly, the decision to limit the application for 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.

The ARQRV's position is that the Act *does* already require exit fees to be calculated in a daily basis.

Section 15(2) of the current *Retirement Villages Act 1999* requires that exit fees must be "*calculated as at the day*" a resident ceases to reside in the unit, and this requirement has been in the Act since it commenced on 1 July 2000.

Read naturally, the words "*calculated as at the day*" call for a calculation that is specific to a day, in the sense that a different result would be produced if a different day was applied. In other words, it requires a calculation on a daily basis.

The ARQRV has been advised by an independent Queens Counsel that this construction of the current act is correct. There has also been judicial support for this construction. His Honour Judge Robin QC of the District Court has expressed an unequivocal opinion that the current Act requires exit fees to be calculated on a daily basis. He expressed this opinion in the case of Saunders *v Paragon Property Investments Pty Ltd* [2008] QDC 322.

Therefore the proposed amendments will retrospectively extinguish the rights of existing residents to have their exit fees calculated on a daily basis.

Residents in villages now have entered in the reasonable belief that the Act required their exit fees to be calculated on a daily basis, regardless of whether their contract suggested otherwise. The proposed amendments imply that these residents were misled by the current Act.

Also many village operators have, sensibly, erred on the side of caution and adopted a construction of the Act that requires exit fees to be calculated on a daily basis, regardless of whether it is required by their residence contracts. If the proposed amendments were passed in their current form, these operators would be likely to return to the damaging practice of applying annual increments.

Annual increments are an unsophisticated and embarrassing anachronism, and it is currently only the very recalcitrant operators that insist on applying them. These operators argue that the current version of s15 (2) can also be read in a manner that *does not* require a calculation on a daily basis.

However they forget that section 14A of the *Acts Interpretation Act* requires legislation to be read in the manner that "*best achieves*" the objects of the legislation. The objects of the *Retirement Villages Act* include consumer protection, fair trading, adoption of best practices and, importantly, ensuring industry viability. These objects are defeated by a reading of s15 (2) that allows exit fees to be calculated on an annual basis and not daily.

These operators claim that there was '*confusion*' as to the meaning of the current Act in relation to exit fees, and that they entered the existing contracts '*in good faith*' on the basis that annual increments were permitted, and claim that they will suffer a loss of projected profits if they existing prohibition on annual increments is confirmed by the proposed amendments.

However these arguments cannot be sustained. Operators obtain extensive legal advice before releasing a standard form contract into the market, and section 15(2) has included the words "*calculated as at the day*" since it was first passed in 1999. Any prudent lawyer would have advised an operator client of the possibility of that provision being read as requiring exit fees to be calculated on a daily basis.

So operators have always been aware that the Act can be construed as requiring a daily pro-rata calculation, and they should have adjusted their contracts and profit forecasts accordingly.

Operators who continued to proffer contracts with unfair annual increments, and continued to apply annual increments in profit forecasts, were taking a conscious and calculated risk, and should not now be allowed to rely on that conduct as a basis for seeking a retrospective removal of the residents' rights under the Act.

Ultimately all forecast profits from exit fees are illusory as there is no way of knowing when a resident will ultimately leave a village. Even if annual increments were permitted under the current Act, a prudent operator would base their forecasts on the very real possibility that all residents will manage to extricate themselves from the village just prior to an annual exit fee increment, rather than just after.

Operators should not be allowed to profit from those elderly residents who, for various reasons, are unable to time their exit so as to avoid passing the next annual exit fee cusp.

Also, if exit fees are calculated on a daily basis, it will actually *increase* the operator's return in many cases because the resident will be prepared to remain in the village *beyond* the relevant exit fee anniversary, rather than seeking to extricate themselves before that date.

In light of these matters the ARQRV submits that the proposed amendments should be re-drafted to require a mandatory calculation on a daily basis for all contracts that are on foot as at the date of commencement of the amendments, as well as all contracts entered into after that date.

It should be recognised that the judgement by His Honour Judge Robin in QDC322 provided a clear interpretation of the intent of Section 15(2) of the Act, i.e. effective from 1 July 2000 (the Assent date of that legislation) exit fees were to be calculated as at the day the resident ceased to reside in the accommodation unit; and also confirmed the need for daily pro-rata calculations.

The thrust of the legislation is therefore aimed at determining the outgoing residents' period of occupancy, which will be the period between the date the resident moves in, having had an Application to Reside approved; and the date that the resident Ceases to Reside.

The implementation and expression of Judge Robin's interpretation of Section 15(2) can best be stated as follows:

"The Exit Fee is to be calculated based on the total number of days occupancy".

Notwithstanding that some Scheme Operators will continue to refer to clauses in Residence Contracts that can be interpreted to mean yearly rests for the occupancy period; Section 37(4) of the Act clearly prescribes that the provision of the Act overrides a contrary provision contained in a Public Information Document.