

**RETIREMENT VILLAGES AMENDMENT BILL 2012**

*Committee*

Resumed from 18 September. The Deputy Chair of Committees (Hon Brian Ellis) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

**Clause 8: Section 14A inserted —**

Progress was reported after the clause had been partly considered.

**Clause put and passed.**

**Clauses 9 and 10 put and passed.**

**Clause 11: Sections 23 to 25 inserted —**

**Hon SIMON O'BRIEN:** There has been a lot of interest in clause 11 and it was the subject of a lot of comment in the course of the second reading debate. I think we had a good debate about the issues then, so we have probably distilled a lot of it down to what members see as necessary. Clause 11 of this bill inserts new sections 23, 24 and 25. In particular, proposed new section 23 has attracted attention and there are a number of amendments on the notice paper. The process started with some amendments by Hon Lynn MacLaren and continued with a change to one of those amendments, if my memory serves me right, and now I have introduced some further amendments. Basically, I have noted the comments in the second reading debate that a lot of members were representing views that they wanted what I think was being colloquially referred to as a start date for when the clock would start ticking and the three or six-month period beyond which recurrent charges would not be levied or payable was to commence. I think that is a fair summation of where we got to. I listened to all of that with interest. I will just say by way of introduction that it has always been the government's intention that these matters had to be established and it was similarly the intention that they be established by regulation. However, there is a clear view that people see it as necessary to go to the principal act and there is a strong argument for that to happen. The argument against, of course, is that it removes a bit of flexibility, but I think it is a fundamentally important enough matter that it not only needed to be debated, but now needs to be confirmed. I have asked parliamentary counsel to provide the amendments necessary to give substance to that desire that everyone seems to be agreed on. With that in mind, Mr Deputy Chair, you might want to consider the order in which these amendments are to be moved. My first amendment 10/11 on supplementary notice paper 3 should probably be done consequent to us deciding whether a later amendment is carried, and there are several other later amendments. I suggest, with respect, and I note that my colleague Hon Lynn MacLaren may have a different view, that we debate the term "permanently vacated", which is covered in amendment 11/11, and then the "recurrent charges" amendment 12/11, before we consider matters of vacant possession or the amendments in the name of Hon Lynn MacLaren. That is the way I suggest we go. Other members might have a different view; I am just trying to facilitate this process. If you are prepared to accept this proposal, Mr Deputy Chair, the first amendment I would want to move would be 11/11, although, of course, Hon Lynn MacLaren might want to move her first amendment before that because it deals with a different matter.

**Hon LYNN MacLAREN:** Clause 11 is obviously a clause that we will spend a bit of time on this evening. It inserts new sections 23 to 25, and this is the core of many of the reforms that the minister has on the table for us. They are in reference to recurrent charges payable by former residents and whether or not recurrent charges can be deducted from the premium that is repayable to a former resident, and they are also in relation to the administering body not being able to require payment in respect of prescribed matters. All of these issues were covered quite thoroughly in our second reading debate. I think that what the minister has proposed, to begin by debating what is on the supplementary notice paper as amendment 11/11 at the top of page 2, is a very fruitful way forward, because the minister has proposed a definition for a new phrase, "permanently vacating". Providing we can return to the two amendments on the previous page at 10/11 and 1/11, I would be delighted to start at the point of debating amendment 11/11 if the rest of the chamber agrees.

**Hon KATE DOUST:** Mr Deputy Chair —

**The DEPUTY CHAIR (Hon Brian Ellis):** I was just going to test the house to see if members were in agreement with the suggestion of the minister that amendments 11/11 and 12/11, followed by 10/11, be debated in that order.

**Hon KATE DOUST:** I am not averse to that. Given we are dealing with one clause and there are a range of issues in that one clause, I do not know whether the minister wants to have a broad-ranging discussion around those matters at the same time or whether he wants to deal with each one separately. Correct me if I am wrong, as I might have misheard it, but I thought we would deal with the proposed amendment at 9/11. Are we dealing with that? I would have thought that was more appropriate than dealing with 12/11.

**Hon Simon O'Brien:** If I may reply informally: the idea is that we think we have a better way of achieving what we want by using “permanently vacated” rather than “vacant possession”.

**Hon KATE DOUST:** Would we not have the discussion about “vacant possession” and “permanently vacated”, in the first amendment, in the one go rather than dealing with the recurrent charges issue in that batch? Would we not deal with recurrent charges separately?

**Hon Simon O'Brien:** It is all the same issue.

**Hon KATE DOUST:** I know; but it is just the language we are looking to adjust, is it not?

**Hon Simon O'Brien:** Yes. We will do them one at a time. Because they are interrelated, we probably need an order.

**The DEPUTY CHAIR (Hon Brian Ellis):** Members, before I give the call to Hon Lynn MacLaren, the committee is quite able to deal with all the amendments in generality before the actual amendment is moved, if that is the wish of the committee.

**Hon ADELE FARINA:** I could not agree more with the Deputy Chair. I would suggest that the minister might outline the package of amendments he proposes to this clause and how they interrelate to each other and the end result, if those amendments are supported, in a general discussion. Hon Lynn MacLaren can do likewise, and that will guide us into consideration of the individual amendments so we have an overview of what is proposed by the package of amendments.

**Hon SIMON O'BRIEN:** I thank members for their assistance. I was just starting to do that. While the question is that clause 11 stand as printed, let me address in general what has happened. I have already referred to several amendments that were placed on the supplementary notice paper. We have seen those. First amongst those are amendments that relate to a desire to define when the three or six-month period, which will cap the length of time of payment of recurrent charges, commences. There would be an actual date. It has been said a number of times by different members.

One of the ways suggested is represented by some amendments that stand in the name of Hon Lynn MacLaren. For example, a definition of “vacant possession” is introduced; namely —

*vacant possession* means the date on which the keys to the residential premises are returned to the administering body by the former resident.

That sought to provide a specific moment in time when the clock starts ticking. As I have already indicated, the government looked at this and noted what was trying to be achieved. It agrees with it in spirit, after listening to the second reading debate. A lot of members covered this point—there was a community of like minds. With that in mind, I set about seeking advice by engaging parliamentary counsel quite late yesterday. Someone was roped in to do some very good work at very short notice to produce the amendments that I have now produced.

Very quickly, the path we have sought to go down is to create instead a definition of “permanently vacated”. That definition is at 11/11 and states, in part —

... To insert —

*permanently vacated*, in relation to a former resident and residential premises in a retirement village, means that —

Four criteria have to be met, as follows —

- (a) if required by the residence contract—the administering body has been given notice of the former resident’s intention to vacate the residential premises; and
- (b) the goods and belongings of the former resident have been removed from the residential premises; and
- (c) the former resident has ceased to reside in the residential premises; and
- (d) the right to exclusively occupy the residential premises has been given up by the former resident (or, if the former resident is deceased, by the estate of the former resident) by returning the keys to the residential premises to the administering body;

A lot of people observing this debate might ask what the difference is; it all sounds very much alike. Indeed it is. We are trying to cover all the bases required, on legal advice, to have a more definitive definition so that we avoid, to the extent possible, future dispute. Let us face it, that is one of the main things we are all trying to achieve by these proposed amendments to the act. We will introduce the definition “permanently vacated”, which spells out those things that have to happen in identifying when the date can occur. Other amendments I have on the supplementary notice paper pick up the term “permanently vacated” to give substance to the spirit of

the amendments that have already been debated. In short, I am saying: okay, the government will go along with this, but let us word the amendments so they best fit the bill and achieve the outcome we want.

**Hon LYNN MacLAREN:** If we are now debating the term “permanently vacated”, I understand the intention behind that is to specify quite clearly that a resident has left the premises. I welcome the minister actually putting that on the record. As explained to me, the issue with using the commonly used term “vacant possession”, which is common in many leases and residency agreements, is that the minister’s adviser saw that it left it open that refurbishment could still be required. The whole point of clauses 23 to 25 is to try to narrow the window in which a retirement village can receive charges from residents who have left the village. Even though the resident has left, if the term “vacant possession” implies that there is still some refurbishment that can be done before that resident or his or her estate is liable for recurrent charges —

**Hon Simon O’Brien:** Before the clock starts ticking in effect.

**Hon LYNN MacLAREN:** In effect. The term that I proposed, which is from common usage in real estate contracts, of “vacant possession” left open that window of opportunity that refurbishment had to be completed because, in the case of commercial tenancies and commercial contracts, it sometimes requires the vacating tenant to refurbish the premises so that they are ready for the next tenant to come in. Because that term “vacant possession” includes this potential for a requirement that the premises are refurbished, it meant that it was not locking down the time to a particular point when the resident was no longer liable for recurrent charges. As has been explained to me, if we specifically say, as in the New South Wales legislation, “permanently vacated”, the window of opportunity that the village operators can require a vacating resident to refurbish the residence is not there. Therefore, basically, once the resident permanently vacates the premises, that is the time from which the three-month window for recurrent charges or, in the case of existing contracts, six months, applies. That is the advice I received and it was important to me to have that on the parliamentary record in order to interpret the legislation in later days when people look at this clause to see what “permanently vacated” really means.

**Hon COL HOLT:** Just listening to Hon Lynn MacLaren, it is quite complex, is it not? Even the way in which the member tried to describe it was pretty complex and convoluted. We have also been briefed on the term “permanently vacated” and I think we are in agreement that this is the best way forward to give that certainty. I think Hon Lynn MacLaren was really talking about that certainty of when we press “go” on the cap clock, if we like. I understand what Hon Lynn MacLaren tried to achieve with the term “vacant possession”, which is an odd term—it is almost an oxymoron. I know it is used, but it almost seems like it, does it not? Like other parties in this chamber, the Nationals certainly agree with putting a definition into the bill to give that certainty about when the clock starts. If we accept this amendment, obviously, we will have to go back and change some of the earlier lines in the bill. I thank the minister for the amendment, and, from our viewpoint, his suggestion is the way forward.

**Hon KATE DOUST:** I want to put on the record my thanks to the minister for being so accommodating and taking on board the comments that were made by a range of speakers in this place. From my experience in the last couple of years, it is not necessarily the norm to be able to have a range of amendments put on as swiftly —

**Hon Simon O’Brien:** I hope that wasn’t a play on words!

**Hon KATE DOUST:** No, I had not thought of that. Unfortunately, it is not the standard practice that a minister is so willing to move swiftly to try to address concerns. So, today the minister gets a little gold star for that —

**Hon Simon O’Brien:** But!

**Hon KATE DOUST:** There is no “but”. I am supportive, certainly, of the minister’s first amendment. I listened to Hon Lynn MacLaren as well. I looked at the amendment standing in the minister’s name at 11/11, and in particular paragraph (d), and then I looked at Hon Lynn MacLaren’s amendment at 9/11 to put a definition in place. Initially, I could not really see the difference between paragraph (d) and the definition. I wonder whether there is any clear difference between those two sets that would cause great difficulty. I like the fact that the minister’s amendment at 11/11 does step out a series of options, if you like, of when that vacant possession would occur. I think that is important and that is what we are trying to get at. But is there a difference between the words in paragraph (d) and the definition? If there is not, maybe we could come to some sort of arrangement to accommodate. I think we are all in the right space, I just want to make sure that we have the right words in place.

**Hon SIMON O’BRIEN:** It is nice to have the sentiments around the place that we are working together on this, because this is how things are meant to be in a Committee of the Whole House, particularly for a bill that generally has multi-partisan support. That is great and I share those sentiments.

**Extract from Hansard**

[COUNCIL — Wednesday, 19 September 2012]

p6120b-6132a

Hon Simon O'Brien; Hon Lynn MacLaren; Hon Kate Doust; Deputy Chair; Hon Adele Farina; Hon Col Holt

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We need to make some progress and I think perhaps the best way to respond to Hon Kate Doust is if I now move the amendment shown on the notice paper at 11/11 to insert the definition of “permanently vacated”. Therefore, I move —

Page 8, after line 11 — To insert —

*permanently vacated*, in relation to a former resident and residential premises in a retirement village, means that —

- (a) if required by the residence contract — the administering body has been given notice of the former resident’s intention to vacate the residential premises; and
- (b) the goods and belongings of the former resident have been removed from the residential premises; and
- (c) the former resident has ceased to reside in the residential premises; and
- (d) the right to exclusively occupy the residential premises has been given up by the former resident (or, if the former resident is deceased, by the estate of the former resident) by returning the keys to the residential premises to the administering body;

Hon Kate Doust asked what the difference is, in effect, between paragraph (d) of that definition and the other possible definition of “vacant possession” that was floated in another possible amendment. Amendment 9/11’s definition states —

*vacant possession* means the date on which the keys to the residential premises are returned to the administering body by the former resident.

That definition might not be, with respect, as precise as it needs to be in practice. Yes, we all know what it means; we all have a workaday understanding of what is meant by “vacant possession” and we all have a commonplace understanding of what is meant when the keys are returned as an act of finality. It is not only symbolic; returning the keys gives the administering body the control of the premises. However, for the purposes of a definition that is going to stick, we felt it needed a number of other elements. When we look at the wording of paragraph (d) and contrast that with the other reference to keys being returned, we see some important differences. Part of the definition that I propose states —

the right to exclusively occupy the residential premises has been given up ...

That is a good deal more precise than simply returning the keys. Paragraph (d) also contemplates perhaps the way that most retirement village residents do vacate their premises—I think it might be quite a large majority—that is, by actually being deceased; shuffling off the mortal coil. Heck, we have all said it ourselves about places where we like living, “They’ll be carrying me out of here in a box.” Therefore, there is reference indeed to “if the former resident is deceased,”—we felt this was terribly important and serious—“by the estate of the former resident” taking these actions and returning the keys. There is still that expression of “returning the keys”, but only after certain standards of ownership and possession have been defined. In particular, we wanted to capture that element of probate because it is all very well to talk about someone returning the keys and then telling the operator of a village, “Righto, you’ve now got three months”—or six months—“before you start paying the recurrent charges instead of the former resident”, but in fairness if the premises have not been permanently vacated, what is the operator or the owner meant to do? They cannot get in and refurbish, renovate or sell the premises if probate has not been settled. Generally the grant of probate, we would hope, would not take too long, but there can be occasions on which it drags on for months. That is why the start date in those situations also has to be kicked back. I hope that is enough explanation.

**Hon LYNN MacLAREN:** One of the reasons I think that “permanently vacated” might be a superior definition to “vacant possession” is that vacant possession is often required for the person coming into a property. When someone buys a property, they agree to start paying on vacant possession. They do not start paying the rent or the mortgage until they get those keys and they have moved into the property ready for them. The minister has improved the definition of “permanently vacated” as it has more to do with the person leaving. If the ex-resident, the former resident, the one leaving, has finished with their interest in the property and has moved out and taken all their possessions—they are on the cruise to the Caribbean as we speak—the property is available for whatever purpose. It could be available if the village owners want to refurbish it, put a fresh coat of paint on it or whatever. From that point of time, the resident who is departing is no longer liable for charges.

I think the reason that this definition of “permanently vacated” is used here is that there is a precedent in the New South Wales legislation to use precisely this definition. In terms of real estate, rather than looking at vacant possession for the person coming in, we are basically looking at the seller, the person coming out. When they have permanently vacated, their goods and possessions are out, they no longer have any responsibilities for

refurbishing or anything to do with that property. Once those keys are given, my view is that the resident should not be held responsible for charges from that day. I recognise that the industry has said that it is appropriate to leave three months for new contracts and six months for existing contracts for that resident to still be liable for charges in order to ensure that the ongoing services and financial viability of the village is not affected by having one fewer resident. But it has always been my view in real estate that the timing of those days is always organised so finely. The resident departs the property on the day before the new resident, the new ratepayer, comes in, so that there is no liability for anyone departing in that handover period. It is a passage of ownership from one person to the next person. We have even recently updated our tenancy laws to be really clear that that is the day on which a person ceases to be liable for the property that the person had an interest in, whether someone was a tenant or whether they owned the property. It is from that day that they have handed it over to someone else. That is normally organised very carefully with the settlement agent and with a real estate agent to make that date really finely tuned.

The bank has an interest in that as well, but in the Retirement Villages Act, because of the additional services offered to retirement village residents, there are other encumbrances involved with people who are residents. There is this allowance of three months in order to work it out—three months to sort out that handover from one resident to the next resident. I personally think it is a shame we still have that, but I acknowledge the work that has been done over the past six years in trying to get these recurrent charges capped and limited in some sense. We are now looking at a period of three months from that period of handover that a resident who has already departed is still liable for recurrent charges. I hope that shines some light onto why the minister is proposing that we change this clause to “permanently vacated”.

**Hon COL HOLT:** We are on 11/11, are we not?

**The DEPUTY PRESIDENT (Hon Brian Ellis):** Yes.

**Hon Lynn MacLaren:** We're going to be on 11 for a while.

**Hon COL HOLT:** The member was on there for a little while, but she drifted off.

It seems to me that what we are trying to do here is have a set of conditions that clearly spells out when a person has left a residence. The definitions are certainly a set of conditions that anyone vacating a property could follow to indicate that they have permanently vacated that residence. There are a number of steps. If someone were to take only one of those steps, it may not indicate they had permanently vacated. In terms of Hon Lynn MacLaren's definition, just handing back the keys is not enough of a condition to say they have left. I think what the minister is trying to introduce helps to say that besides handing in the keys they also have to ensure all their stuff has gone, and they have to write to the administering body to say that they have left and have given up that right to occupy. My view is that this is the right way forward.

**Hon KATE DOUST:** I listened to Hon Lynn MacLaren. I must say I got a bit confused in a couple of parts. Having listened to the debate last night, I do not think that a retirement village situation is the same as a normal rental arrangement in which one person leaves and another person moves in. The issue of the recurrent charges is all agreed. What we are trying to resolve is the point in time when that commences. I think what the minister has done addresses that issue well. As long as the point in time that the property is permanently vacated can be established, from that point in time it is either three or six months that the recurrent charges can be charged. But that does not necessarily mean that that property or abode will necessarily be ready for a new tenant, a new resident. All we are dealing with is when the charges start and finish for that individual. It could be that it takes eight, nine or 12 months for a refurbishment of that unit. All we are concerned about is when the charges start and finish for the person. I am satisfied that the proposal with the variety of options put forward by the minister provides that degree of comfort for the residents. I would be quite happy to support this amendment. I imagine that links back to the minister's first amendment as well.

**Hon ADELE FARINA:** Can I just seek one point of clarification? My understanding is that in paragraph (b) of the minister's definition, he is, I think, also implying that the former resident has to actually make good the premises, which is a bit different to refurbishment. The issue is that a resident might install a shed in the backyard of the unit or might put up a pergola and there might be a clause in the contract that they actually have to make good the premises and remove what they put in, which I do not consider as refurbishment. Refurbishment is something quite different; that is, the retirement village will then decide that in order to sell it on the open market, given that it is 10 or 20 years old, it should do some refurbishment works. I see that as being quite different to “making good” the premises. Although proposed paragraph (b) provides that “the goods and belongings of the former resident have been removed from the residential premises”, I do not know that there is any reference to “making good”. I want to know from the Minister for Commerce whether it is the intention that, from the date that we start counting the three or six-month period, the former resident has to have “made good” the premises as well. If that is the case, I wonder whether that needs to be added to the definition.

**Hon SIMON O'BRIEN:** Members may recall that when we debated this matter last night I was asked by a couple of members, including Hon Adele Farina, about the matters that may be compulsory or prohibited in contracts, and the sorts of things that they might recover. Members may also recall that the sorts of things that might be requirements in accordance with the recommendations of the final report—I give an indication that this is where we intend to go with the regulations—could include to provide residents with the right to add or remove fixtures in their own dwellings with a clear definition of what “fixtures” are. That will be coming in due course; there will not be any surprises there, but it is important to have it. It could also include to state that residents may be held liable for the repair of any damage caused by the addition or removal of the fixtures. The option then for the resident is to either—in accordance with the contract and in agreement with the owner—make good what they have done, which could mean removing fixtures and making good the holes in the wall or whatever it might be; or to make an arrangement whereby the work is done by the owner as part of refurbishment when the owner has possession of it and the cost can then be taken out of the premium refund at the end of the day. Those are the sorts of things that will be prescribed. That will give residents some control over their own destiny or estate because in the course of removing goods and belongings, they could also do that work, which would mean that the requirement had been met and the clock could start ticking, which is what they presumably want; or they might elect to come to some other arrangement by removing goods and belongings, and the question of making good with the fixtures will be something that is dealt with by the owners after the clock has started ticking. This element puts some cards back into the hands of the resident and, in effect, leaves things at the resident’s discretion.

I think there is probably a willingness to move on with this now, but I will make one point. I might have heard Hon Lynn MacLaren say that she felt that industry supported the introduction of three and six-month caps; perhaps I misheard. That most certainly is not the case.

**Hon Lynn MacLaren:** I don’t think I said that.

**Hon SIMON O'BRIEN:** Oh, good.

**Hon Lynn MacLaren:** I was a bit convoluted, but I don’t think I said that.

**Hon SIMON O'BRIEN:** I just wanted to clarify that that is the case, because there is in fact a counter view to what we are talking about here. Members either have received or will receive representations from the Retirement Village Association, because operators obviously do not want to see caps; they do not want to see the liability for recurrent charges to pass from the former resident to them until they have a new resident. These recurrent charges do not just go away; someone has to pay the rates, the insurance and whatnot. Someone has to pay, and there is no getting away from that. It is not a discretionary thing, but I hope we can now vote on this amendment.

**Hon LYNN MacLAREN:** If the minister is indeed moving the amendment at 11/11, I would like to support that amendment. I think it is an improvement on the term “vacant possession”. It makes clear what the starting date is, which is the intention of my amendments. Although there is obviously an adjustment period that the industry will have to go through, I think this is a very fair amendment for residents who are moving out of retirement villages. It is long overdue that we set a start date for a period during which recurrent charges can be levied on residents who have left, so this is a good way forward and I support the amendment.

**Amendment put and passed.**

**Hon SIMON O'BRIEN:** It would be appropriate and convenient for us to go back to the start of the supplementary notice paper. I move —

Page 8, line 7 — To delete “who does not” and insert —

who has permanently vacated residential premises in the retirement village and who does not

Quite clearly, this advances and makes use of the permanently vacated aspect that we have just spent so much time nailing down, so this is a consequential amendment to give effect to the intentions that we have been discussing and agreeing to.

**Amendment put and passed.**

**Hon LYNN MacLAREN:** I move —

Page 8, after line 11 — To insert —

*personal representative* includes a resident’s attorney, guardian, executor, administrator or trustee in bankruptcy;

By way of explanation, this amendment would insert a definition that the Greens (WA) believe is necessary because the former resident may have a diminished capacity for decision making or may have indeed died, in

which case their personal representative must be a stand-in to deal with their personal affairs for the purpose of giving vacant possession to the administering body or handing back the keys, for example. The definition is taken from clause 5.1 of the Fair Trading (Retirement Villages Code) Regulations 2009. We know that the code is due for review, as we discussed earlier, but the stakeholders of retirement villages were very concerned to have this definition specified in this clause so that they could rest easy that a personal representative would be empowered to close their affairs with the retirement village should they not have the capacity to do that. We felt that their concerns were significant enough to seek to amend this clause and insert the definition of “personal representative”. This would give them peace of mind to know that someone could handle their affairs and, in relation to the clause that we have just amended, ensure that the starting date is initiated by handing back the keys to the retirement village unit or retirement home. In that regard, we would not see long periods in which the estate is being charged because no-one is in that position to act on the person’s behalf. The minister may have a different view.

**Hon SIMON O'BRIEN:** I am afraid that we continue to all be in furious agreement!

**Hon Kate Doust:** You are a role model for your colleagues.

**Hon SIMON O'BRIEN:** Yes. We are just trying to whack the geometry so that it fits with what we are trying to do. I think I have some reassuring news for the member. The previous amendment to the definition regards a place being permanently vacated, and several aspects must be met to fit the criteria. With that amendment we wanted to capture the concern about this clause also applying to a deceased estate. I think that is precisely the concern that the member articulated. I can reassure the member that we already have addressed it. I have a bit of personal knowledge about this, having had some exposure to this, and know that residents’ contracts include provisions for a personal representative when a resident has died or is incapable of managing their affairs. I think that is the current state of play. I am advised that the act currently operates without a problem in that regard and that deceased estates currently pay recurrent charges under contract until the residence is sold to a new resident. The estate or representative does stand in the former resident’s shoes to ensure the continuity and management of the deceased’s affairs. The provisions that we have already inserted give belt and braces to the legislation, whether or not they are needed, and pick up the concern that the member has now identified. However, the purpose of the amendment, as I understand it, relates also to another amendment standing in the member’s name to proposed subsection 23(2). That amendment states —

- (2) In this section any reference to a former resident is deemed also to be a reference to that former resident’s personal representative.

This is the point at which I would caution people to not go too far. We have what we wanted. I can tell the member that it is already there. In any case, we now have it well and truly enshrined in the bill. However, if we put in a definition of “personal representative” to apply to proposed section 23, that could have some unintended and unforeseen consequences in other parts of the legislation that also refer to a resident. I can talk more about that if the member wants me to, but we already have, in good faith, as with the previous amendment, taken this concern on board and done it in a way that will not deliver unforeseen consequences, we hope. We could discuss this in a lot more detail but I think the Committee of the Whole wants to make some progress so I will leave it at that. With respect, I suggest that this amendment probably should not be supported and that we should just let it go.

**Hon KATE DOUST:** I have listened to what the minister said and I know that the issue of deceased estates was certainly addressed in the earlier amendment. However, I think that the definition proposed by Hon Lynn MacLaren is broader than that type of circumstance. I know that it is currently in the code, which I looked at last night. I understand that the minister is saying that to date there has not been any recorded issue about that. However, that is not to say that there have not been some difficulties. I have had correspondence—other members may have too—from a range of people about the difficulties they have had when they have raised concerns about a particular situation in a retirement village and the issue may well not have been welcomed by the manager or the manager may not have been as responsible or dealt with it as appropriately as one would like. I listened to Hon Max Trenorden last night talk about an 88-year-old constituent of his who was quite stressed about her situation. It made me think that provisions may very well be in the code but not everyone knows about them. An 88-year-old woman, for example, might not know that she needs to look for the definition in the code that would enable her to get a personal representative to give her assistance, or she might not necessarily have the confidence to do that. More often than not people feel more comfortable when they can say that something is the law and is written in an act. That gives them confidence. In some circumstances, we are talking about extremely vulnerable people, given their age or health, who may need to rely upon any of those individuals cited in that definition. A range of legislation enables a personal representative to act on someone’s behalf; it is not just in the case of dealing with an estate. I would hope that as my parents get older—although they still live in their own home—if they lived in a retirement village and could not articulate their concerns or convince

management of their issues, someone else could be their voice. It could be a family member who speaks up for them or it could be a lawyer, a guardian or someone who has power of attorney for the individual. Although to date it may have worked to have had those words in the code, I think it would provide comfort to people to spell them out very clearly in the definition of the act. I believe that people will go to the act before they go to the code. A lot of people in that situation might not have the confidence to speak up for themselves, but other people might do it for them. In a situation of conflict, some people get pretty upset and sometimes they are not capable of articulating what they want. They want to know that if they cannot do that, then there is no difficulty or barrier to them bringing in someone else who can speak for them. We are trying to make it clearer for them so that they know there is no difficulty; so that management cannot say, “No, I am not going to deal with you. I will only deal with the resident.” The opposition would be happy to support the amendment. I note that the minister said there is potential difficulty with the placement in this provision of the proposed definition. We have probably already passed an earlier stage where it could have been a more general definition. I do not know whether the opportunity to go back at a later stage and adjust that exists, or whether we can find another part of the bill for this provision. For clarity, for comfort and for people in this situation, I do not see why we cannot replicate that definition into the legislation. From my own experience, when people deal with these things they tend to go to the act before they go to a code or a guidance note —

**Hon Simon O'Brien:** A confused 88-year-old looking up the act when they have a conflict; I don't think so!

**Hon KATE DOUST:** I used to deal with safety officers in the workplace, shop stewards and rank and file members, and if they wanted to look up something, they would go to the legislation. They would not necessarily know to go to a code or a guidance note, and they would not rely on those things because they did not necessarily have the same impact as the law. The minister has to raise this type of opportunity up to that level. It provides comfort to the types of people to whom Hon Max Trenorden referred. I would feel more comfortable giving people the capacity to say, “If I cannot do it for myself, I know there is nothing that prevents me from calling in any of those types of individuals listed in the definition.” It would be helpful to people and would allay some of their concerns about how to resolve these issues as they arise. I would be interested in the minister's response.

**Hon LYNN MacLAREN:** To finalise the argument in favour of inserting this definition, I want to point out to members that this definition would apply to only section 23 of the act. Proposed section 23(1) states —

In this section —

So the definition of “personal representative” applies to only this section. There is a view that it may conflict with other sections of the act, but I want to reiterate that the purpose of inserting “personal representative” in this section is merely to apply to these types of contract negotiations we are talking about in section 23 where a resident might need the assistance of an attorney, a guardian or someone else as their personal representative to act upon their behalf.

**Hon SIMON O'BRIEN:** I will now respond to the questions raised by Hon Kate Doust and the concluding remarks by Hon Lynn MacLaren—indeed, I would like these to be concluding remarks so we can get on with this process.

As I have already indicated, we do not need an amendment here to have representation by an attorney or whoever it may be. All of the retirement villages law, as it currently stands—whether it is in the act, the regulations, the code or the contracts that are made between parties—acknowledges a capacity for the resident to be represented by a competent other, be it a lawyer or, sadly, an executor, a guardian or someone with a power of enduring attorney. That is already established. That is one good reason why we do not need to worry about this, and we have reinforced the protection by the amendment that we just passed. Members might say, “Well, okay, this is just more belt and braces.” But it is not. As Hon Lynn MacLaren pointed out, this amendment specifically applies to section 23 of the act; therefore, we will have a definition that says that a personal representative includes attorneys and what have you —

**Hon Lynn MacLaren** interjected.

**Hon SIMON O'BRIEN:** It says explicitly that this is a provision for section 23. I could see a lot of mischief, potentially, being caused for those very few people who might want to realise the fears that have been advanced; that they cannot have someone represent them if, in every other case in the act that refers to the “resident” means that they cannot have a representative, because that is what this amendment surely hints at. This amendment would deliver uncertainty; not deliver people from uncertainty. There is no need for this amendment. I have taken on board what members have said, and we can have another look at all of the times that “resident” is mentioned in the rest of the act and contemplate whether a person or representatives could be covered there when we look at the second bill. But in conclusion—and let me make this quite clear—I have already indicated that if someone has an idea that they want reassurance on, that they want to insert a provision, on behalf of

government and as a sponsor of this bill, I am saying, "Fine, let us do it." But I am not saying that now. I am specifically saying to members opposite that if they insert a definition of "personal representative" solely for the purpose of this section, then it will be likely to create confusion and uncertainty with regard to other provisions in the act that would otherwise apply to personal representatives of a resident, and I sure as heck do not want to do that. We certainly do not want to go back to some general provision on the run and say that this definition applies right across the act, because that is not something we have looked at either. With respect, let us not adopt this matter and make progress with the rest of the bill.

**Hon KATE DOUST:** I have listened to the minister and I know that he is keen to get on with this. He has made reference to the fact that the intent is already covered in the act. I wonder if he might seek some advice so that he can point me to those parts of the current legislation that enable residents to seek that other type of representation.

**Hon Simon O'Brien:** It is a common law right.

**Hon KATE DOUST:** Yes, but the minister has specifically said that it is in the current act.

**Hon SIMON O'BRIEN:** I do not know what the point of this is. The act creates a regime for contracts, and the contracts reflect arrangements between the parties where either of the parties may be represented. It is a common law right that people involved in proceedings such as dealing with property may be represented, whether by lawyers, guardians, people with enduring powers of attorney or anyone else. This is self-evident. We are not seeking to change that and we do not want to upset the balance.

**Amendment put and negatived.**

**Hon SIMON O'BRIEN:** I move —

Page 8, lines 12 to 15 — To delete the lines and insert —

*recurrent charges* means recurrent charges —

- (a) that are payable in respect of the residential premises in a retirement village that a former resident formerly occupied; and
- (b) that arise —
  - (i) after those premises have been permanently vacated by the former resident; and
  - (ii) on or after the commencement of the *Retirement Villages Amendment Act 2012* section 11.

There is one exception. I note that there is currently a definition of "recurrent charges" at lines 12 to 15 on page 8 of the bill. This definition will be augmented by this amendment. The first line of the amendment should read "recurrent charges, except in subsection (6), means recurrent charges". The words "except in subsection (6)", which appear in the current definition in the bill, were meant to be in this amendment. I sought advice from the Clerk and he indicated that if I raised the issue in this manner, we could make that alteration to the amendment because it does not affect anything of substance.

**The DEPUTY CHAIR (Hon Col Holt):** The Minister for Commerce has moved to delete the lines and insert the words "recurrent charges, except in subsection (6), means recurrent charges" and paragraphs (a) and (b) as listed on the supplementary notice paper.

**Amendment, by leave, altered.**

**Hon SIMON O'BRIEN:** Thank you, Mr Deputy Chair, for reading that out to clarify how the amendment will read. This will give substance to a couple of things. The term "recurrent charges" will be varied to reflect the policy change that we implemented a little earlier on and so the definition refers to the term "permanently vacated". This amendment will extend the cap on recurrent charges to those who have moved out before the act commences, but if they are still paying recurrent charges, they will be caught up in the six-month cap, so they will not keep paying ad infinitum. I should point out that there is more to this matter, and that is picked up in another amendment that deals with further parts of this proposed section. But the amendment that I have just moved is limited to that which I have just described.

**Hon ADELE FARINA:** I am still not clear why the minister has inserted the words "with the exception of subsection (6)". In doing so, what is the definition of the term "recurrent charges" as it applies in proposed subsection (6)? It leaves that question wide open when the definition does not apply to it. What are we talking about? Are we talking about a completely different beast; and, if so, what is it? I am not clear from my quick reading of this that we need an exception to the application of this definition to proposed subsection (6). I would like that to be further explained.

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The other point is that paragraph (b)(ii) of the amendment that the minister has just moved contains the words “on or after”. However, in his subsequent amendments that terminology is “before or after”, which suggests a lack of consistency. But maybe there is a reason for that and I would be interested to understand the reason for that.

**Hon SIMON O'BRIEN:** It is a pity that we cannot consider these two amendments together, but that is not how the format works as the amendments are set out on the supplementary notice paper.

**The DEPUTY CHAIR:** If it is the will of the committee, we can deal with both amendments as they are contingent on each other.

**Hon SIMON O'BRIEN:** If I may, I also formally move —

Page 8, lines 16 to 21 — To delete the lines and insert —

- (2) This section applies to a former resident of residential premises in a retirement village, whether that former resident permanently vacated those premises before or after the commencement of the *Retirement Villages Amendment Act 2012* section 11.
- (3) Subject to subsection (4), a former resident's liability to pay recurrent charges —
  - (a) begins when the residential premises have been permanently vacated by the former resident; and
  - (b) ceases in accordance with the regulations.

I think I can make this relatively simple if I explain it in these terms. A lot of what we have been discussing is about recurrent charges and we need to define “recurrent charges” because this whole debate has been about whether we have a cap on how long a resident pays their recurrent charges after they have moved out. That is what we are all about. It is as simple as that. We have to get the legislative machinery in place that gives certainty to that. That is why we have done some more tweaking. We have already made some significant changes, but this is also important. We will end up with a definition of “recurrent charges” so that, henceforth, everyone will know what is meant by recurrent charges when a cap on their payment is made. The definition will mean recurrent charges that are payable in respect of the residential premises in a retirement village that a former resident formerly occupied and that arise after those premises have been permanently vacated—this is how we make use of the definition that we debated earlier—and on or after the commencement of clause 11 of the *Retirement Villages Amendment Bill 2012*. That is one thing that recurrent charges will be able to be. In addition, we are including in the proposed section the following —

- (2) This section applies to a former resident of residential premises in a retirement village, whether that former resident permanently vacated those premises before or after the commencement of the *Retirement Villages Amendment Act 2012* section 11.

That includes the person who already has, under our new definition, permanently vacated and is still paying, perhaps for years, recurrent charges. We have decided that we also want to capture them in the six-month cap. The proposed section will also include —

- (3) Subject to subsection (4), a former resident's liability to pay recurrent charges —
  - (a) begins when the residential premises have been permanently vacated by the former resident; —

We have already put arrangements in place for that —

and

- (b) ceases in accordance with the regulations.

What is that last bit about? The conspiracy theorists could —

**Hon Kate Doust:** None of whom exist in this room.

**Hon SIMON O'BRIEN:** None of whom exist in this place—could pick this up and run with it. I had better explain what it specifically means. It actually contemplates a circumstance or circumstances that could arise when someone would otherwise be relieved earlier of their requirement to pay recurrent charges. So that is what that is there for.

Finally, Hon Adele Farina has pointed out that the other aspect of this definition, which is this definition of “recurrent charges” I have been describing, does not apply when the term is used in proposed subsection (6). So in proposed subsection (6), as I understand it, “recurrent charges” has a different meaning because proposed subsection (6) talks about not the individual former resident's recurrent charges but how the gap left by the nonpayment of those recurrent charges may not be extracted from other residents as a levy or any other element.

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So clearly in that discrete sense “recurrent charges” has a meaning that must not be confused with everywhere else that we use it.

**Hon LYNN MacLAREN:** Proposed section 23 limits the recurrent charges payable by former residents. The proposed section applies retrospectively to existing contracts, but not to those residents who have left the village before the section commences and who have an ongoing liability for recurrent charges. It seems highly inequitable that these residents should have no sunset provision in relation to their ongoing liability, as the minister has just stated, particularly as unscrupulous operators may delay the sale of their unit so that they continue to have a stream of income without any limitation. The amendments the minister is now moving extend the protection to residents who have left the village before the section commences, and who have an ongoing liability for recurrent charges. I support the amendments. They were in fact in the nature of some amendments that I have on the supplementary notice paper, but indeed they achieve the same outcome and I therefore support them.

**Hon KATE DOUST:** I will be a lot more succinct. We are very pleased the minister has moved these amendments; they provide that clarity, and we will support both.

**Hon ADELE FARINA:** I am not sure the minister addressed the other point I raised about proposed subsection (2), about whether that should actually read “on or after the commencement of the Retirement Villages Amendment Act 2012”, or whether it should actually read “before or after”, which would be consistent with the amendment the minister is proposing to move at 13/11.

**Hon SIMON O'BRIEN:** Just quickly, I think I might have got ahead of myself there; that “before” element is picked up in the next amendment.

**Hon Adele Farina:** Doesn't it need to be picked up in both?

**Hon SIMON O'BRIEN:** In 13/11, so that is where we have that and why.

**Amendments put and passed.**

**Hon LYNN MacLAREN:** I note that amendment 9/11 that I placed on the supplementary notice paper is in relation to vacant possession, and we have thoroughly discussed the concept of vacant possession and how an amendment we agreed to earlier, which inserted the definition of “permanently vacated”, covers the concerns and the attempt to try to nail down that point in time when the recurrent charges start—that period that is to be capped in regulations. Therefore, I do not move this amendment. I do not have to withdraw it; do I just not move it?

**The DEPUTY CHAIR (Hon Col Holt):** Yes. Is amendment 3/11 also to be withdrawn?

**Hon LYNN MacLAREN:** I think we could say that that amendment fell away when my previous amendment to try to insert the definition of “personal representative” failed.

**The DEPUTY CHAIR:** Thank you; just checking.

**Hon LYNN MacLAREN:** I will not be able to fight this fight, but leave it for another day. But I do note that the minister indicated that he would look at the definition of “personal representative” in the next stage of the amendments to the Retirement Villages Act, and I appreciate his undertaking.

**The DEPUTY CHAIR:** What about amendment 4/11, Hon Lynn MacLaren?

**Hon LYNN MacLAREN:** I do not seek to move this amendment. This, too, was dealt with in the minister's amendment 13/11.

**The DEPUTY CHAIR:** I assume it is the same with 5/11?

**Hon LYNN MacLAREN:** Likewise with 5/11.

**Hon SIMON O'BRIEN:** I move —

Page 8, line 26 — To delete “subsection (3),” and insert —  
subsection (3)(b),

This is a consequential amendment.

**Amendment put and passed.**

**Hon SIMON O'BRIEN:** I move —

Page 9, lines 27 and 28 — To delete the lines and insert —

(i) after those premises have been permanently vacated by the former resident; and

This is a consequential amendment to make new proposed section 24 consistent with the new section 23 that we have just arranged.

**Amendment put and passed.**

**Hon SIMON O'BRIEN:** I move —

Page 10, line 9 — To delete “ceased to occupy” and insert —  
permanently vacated

As members will see, this is another consequential amendment in which we again make use of our new definition of “permanently vacated”.

**Amendment put and passed.**

**Clause, as amended, put and passed.**

**Clauses 12 to 14 put and passed.**

**Clause 15: Section 57A inserted —**

**Hon LYNN MacLAREN:** The amendment standing in my name to delete “special resolution” and insert “ordinary resolution” is rather complicated. I do not know whether we will have time tonight to deal with it. Shall I proceed?

**Hon Simon O'Brien:** Just move it; we will vote on it and that will deal with it.

**The CHAIR:** As they are consequential amendments, the member can move amendment 7/15 in conjunction with amendments 6/15 and 8/15.

**Hon LYNN MacLAREN:** I move —

Page 15, line 10 — To delete “special resolution” and insert —  
ordinary resolution

Page 15, lines 15 to 18 — To delete the lines and insert —

*ordinary resolution* means a resolution passed at a meeting of residents called either by the administering body or by the Residents Committee, or (in villages where there is no Residents Committee) by a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater). The meeting must be held in accordance with subsection (4).

Page 15, after line 18 — To insert —

- (4) To pass an ordinary resolution
  - (a) the residents must have been given notice of the meeting by the administering body or by the Residents Committee or by the residents calling the meeting; and
  - (b) there must be a quorum present (whether in person or by proxy) of
    - (i) a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater); or
    - (ii) If the retirement village has fewer than 10 occupied residential premises, a majority of residents entitled to vote; and
  - (c) the resolution must be carried by at least 51% of the number of residents who are present (whether in person or by proxy) and who are entitled to vote, and do vote.

These amendments relate to how complicated it is to get the management to have another look at charges. It has to do with how to get an application to the State Administrative Tribunal. At present applications to the State Administrative Tribunal regarding increases in recurrent charges or the imposition of a new levy must be authorised by special resolution. The requisite special resolution must be passed at a general meeting, and that meeting must be called by the administering body as required by the existing 2009 code of practice under the Fair Trading Act. It is therefore impossible to circumvent the administering body in making such an application to SAT. The administering body invariably has a conflict in such matters because it will have imposed the fee or levy that is being challenged. The residents may be hesitant to be seen to be stirring up trouble by calling on the

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administering body to call a general meeting, or they could have a fear of being victimised. I understand it is proposed to amend the requirements in relation to the special resolution so that it may be passed at a meeting called by either the administering body or the residents themselves. This is a very welcome change but it does not go far enough. There is strong pressure from the retirement village residents to further simplify the process for referring such disputes to SAT. One way of making the appeal process to SAT more accessible would be to change the requirement for a special resolution to a requirement for an ordinary resolution, requiring only a simple majority of those present at a meeting and entitled to vote and who do vote to pass it. That is the nature of these amendments.

**Hon SIMON O'BRIEN:** We will oppose these amendments but I think there is a desire for us to at least discuss them a bit further.

**Progress reported and leave granted to sit again, on motion by Hon Simon O'Brien (Minister for Commerce).**