CONSUMER PROTECTION LEGISLATION AMENDMENT BILL 2018

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Clause 52: Section 50C inserted —

Committee was interrupted after the clause had been partly considered.

Hon MICHAEL MISCHIN: I asked the minister whether the Real Estate Institute of Western Australia was supportive of this provision and the minister indicated that it had indicated some support for, or at least agreement with, the provision. Is that right?

Hon ALANNAH MacTIERNAN: Yes, that is right, because the provision goes in its favour.

Hon MICHAEL MISCHIN: How does the provision operate in its favour?

Hon ALANNAH MacTIERNAN: The provision operates in its favour because at the moment the only option available to the commissioner, if an agent has not completed all of their professional development points, is to deny the renewal of their licence. This basically prevents them from practising as either a real estate agent or a sales representative. The idea is to provide other options so that, as I have explained, if there has been a minor breach, a penalty is possible. In most instances, we presume that will be by way of an infringement notice so that the agent is not then in a position in which they cannot continue to operate in that profession, but, rather, can elect to pay the fine.

Hon MICHAEL MISCHIN: How did REIWA indicate its support for, or agreement with, this provision and in what terms?

Hon ALANNAH MacTIERNAN: It is not specified specifically in the letter, but I am advised that it was through its representation on the Property Industry Advisory Committee, and, as I said, this is actually being done to stop that sudden death for real estate agents and sales representatives.

Hon MICHAEL MISCHIN: Thank you, minister, for that. The minister did say that there is a representative of REIWA on the Property Industry Advisory Committee, but that alleged consultation does not sit well with the letter that the minister tabled, dated 1 November, to the Commissioner for Consumer Protection. I will not read out the whole letter, but it starts off saying —

> Dear David
>
> **Consumer Protection Amendments Bill 2018**
>
> REIWA would like to take the opportunity to provide some feedback on the draft Consumer Protection Amendments Bill 2018.
>
> While it is disappointing REIWA was not given prior notification of the proposed changes to key pieces of legislation to our industry, with the draft Bill now publicly available we welcome the opportunity to provide an industry perspective.

It then goes into the various areas under the Residential Tenancies Act, which are not material to this bit of the debate. It continues —

> **Real Estate Business Agents Act**
>
> REIWA is generally supportive of the increases in penalties to maintain a high standard of professionalism from the industry. However, the increases are almost ten-fold in some cases and prior consultation would have been appreciated to give industry an opportunity to provide feedback.
>
> There are many in the industry who feel the large increases are excessive but REIWA does acknowledge the increases are in line with other legislation.

That does not suggest any great consultation through the property advisory council or in any other way. The first time that REIWA seems to have seen with any specificity what is being planned was when it saw the draft bill. As far as the penalty of imprisonment is concerned, it says that it believes it is best done through the Criminal Code. Towards the end of the letter, on page 2, the last three paragraphs read —

> Overall REIWA supports these changes that aim to maintain the highest possible standard of real estate professionalism. However, there are significant changes presented in the Consumer Protection Amendment Bill 2018 on which the industry would have appreciated prior consultation to the Draft being put to Government.

That, again, does not suggest that it had much input prior to seeing the final draft. It continues —

> As the both the Residential Tenancy Act and Real Estate and Business Agents Act is due for a review in 2019, REIWA looks forward to providing industry insight and feedback into future legislative changes.

I ask again: in what respect did REIWA indicate its knowledge, since it is not even mentioned in this letter, about clause 52 and that it was supportive of a penalty being imposed for failure to meet educational requirements?

Hon ALANNAH MacTIERNAN: The department strongly disputes the suggestion that the Real Estate Institute of Western Australia had no notification of those changes. Following receipt of the letter tabled today, in which REIWA complained about a lack of consultation, the Commissioner for Consumer Protection met with REIWA on 2 November to discuss the proposed amendments and detail the consultation that had taken place, which included a briefing to the Property Industry Advisory Committee on the proposed contents of the bill on 23 February 2018 and progress reports at the June and September meetings. On 7 November 2018, REIWA again wrote to the minister stating that it had received additional information and clarification around many of the proposed changes and was now largely satisfied with what was proposed. The only outstanding issue, which we have acknowledged, was the potential imprisonment of agents for trust account defalcation. In this regard, REIWA's primary concern was that an agent might risk imprisonment for an offence committed by an employer. The department was able to provide assurance. We will table that letter as soon as we get it.

By a letter dated 29 November, the then Minister for Commerce and Industrial Relations, Bill Johnston, wrote to REIWA addressing that concern about the risk of a prison sentence being imposed on an agent who is not directly involved in an offence. A letter has come back. As I said, the consultation process started in addition, obviously, to the work that had been done years ago. The contents of the bill went through to the advisory committee on 23 February 2018. There were progress reports at the June and September meetings and then we got the response from REIWA on 7 November 2018 advising that it had had clarification around the changes and was largely satisfied.

Hon MICHAEL MISCHIN: I do not see that there is much more to discuss but I want some clarification. The minister said there was a briefing to the Property Industry Advisory Committee on 23 February. That was well before the bill had been prepared. What was the content of that briefing? What were the progress reports about? That was with the committee; it was not necessarily with the industry. I take it that the government relied on the representative passing on any information provided at these briefings to the industry; is that right? When was the final form of the legislation available so that people could know what would be in it?

Hon ALANNAH MacTIERNAN: The whole purpose of the advisory committee and having a REIWA member on it was that it was a mechanism for consultation. REIWA had a person specifically on the advisory committee in order to fulfil that role of negotiating. As I said, the letter from REIWA dated 7 November says that it had received additional information and clarification, and was largely satisfied but concerned about the two years' imprisonment. It could see that agents could be imprisoned for the crimes of their staff. The minister wrote back to REIWA and assuaged that fear, saying there was no possibility that that would occur.

Hon MICHAEL MISCHIN: The letter of 1 November says —

> … REIWA was not given prior notification of the proposed changes to key pieces of legislation … the draft Bill now publicly available we welcome the opportunity to provide an industry perspective.

On penalties, it states —

> … prior consultation would have been appreciated to give industry an opportunity to provide feedback.

The letter continues —

> … there are significant changes … on which the industry would have appreciated prior consultation to the Draft being put to Government.

So that one is wrong?

Hon ALANNAH MacTIERNAN: There is a mechanism. There is an advisory committee with a REIWA member on it. We do not know what went wrong. It is incorrect to claim that there was no consultation. We have clear, documented dates on which its representatives were engaged in this. As I said, this legislation has been a long time coming; it has been talked about since 2014 when the first package went up. We have had a series of meetings, or consultations, dating back to February 2018. The letter of 7 November, which came after the letter the member referred to, says that REIWA's one remaining concern was the issue of agents' potential liability for the defalcations of their employees. We have explained that the legislation does not allow a person to be subject to imprisonment for a defalcation that was not their own.

Clause put and passed.

The DEPUTY CHAIR (Hon Dr Steve Thomas): The first clause for amendment I have is clause 67. Does any member have a clause to debate between 53 and 66? The question shall therefore be that clauses 53 to 66 inclusive stand as printed. That is the motion that I intend to put to the chamber unless someone indicates an alternative clause. Hon Aaron Stonehouse, are you asking about a clause or making a point of order?

Hon AARON STONEHOUSE: I was just going to suggest, Mr Deputy Chair, that perhaps we should proceed not to clause 66 but to clause 63, which is the beginning of part 9. That would allow us to range over that section of the bill as a sort of clause 1–type ranging debate, if you follow.

The DEPUTY CHAIR: Okay. The question shall therefore be, if everybody is in agreeance, that clauses 53 to 62 inclusive stand as printed.

Clauses 53 to 66 put and passed.

Clause 67: Section 47 amended —

Hon ALANNAH MacTIERNAN: I move —

Page 39, line 8 — To delete "child," and substitute —

child or other vulnerable person,

This issue was raised by a member; that is, there might be vulnerable people other than children—for example, people with a physical or an intellectual disability—who might trigger the need for their carer to have the ability to bolt in furniture. To deal with that, we seek to add "or other vulnerable person". We do not have further definitions. This is not something that will be capable of ongoing definition, but I think the general principle is there—that is, a person who might be able to bring down or play on furniture and cause themselves a severe injury. We have moved that amendment to deal with an issue that was raised by members during the second reading debate.

Hon MICHAEL MISCHIN: Is "child" defined at all in the legislation?

Hon ALANNAH MacTIERNAN: No, it is given its ordinary meaning that it has in legislation throughout the state.

Hon MICHAEL MISCHIN: All right. If the minister were the tenant of a house and had a 25-year-old son, that would be her child. Would that be a basis for exercising the provisions in this legislation? What is a child for the purposes of this amendment?

Hon ALANNAH MacTIERNAN: It is quite clear that the legislation is not referring to the biological status of being the child of someone. Indeed, everyone is the child of someone. This refers to a child, who is a person who is not an adult.

Hon MICHAEL MISCHIN: Does a 17-year-old need the protection of this legislation as well?

Hon ALANNAH MacTIERNAN: Members should bear in mind that this is something that will have to be done at the expense of the tenant, as will the reparation. This is not something that people will frivolously pursue. It is designed to protect. There have been real-life cases of young children being killed because furniture has fallen upon them. The definition certainly does not include anyone who is a child of some other person, but a person who has that status of being a child—that is, not an adult—or being a vulnerable person.

Hon MICHAEL MISCHIN: Thanks, but the minister has now introduced another couple of concepts—"young child" and "other vulnerable person". What is a vulnerable person? How is a lessor meant to know that when he finds a letter delivered to him by a tenant saying they want to affix furniture to every wall in his house because they have a vulnerable person there? What is a lessor meant to make of that? How will they know whether they can legitimately object to that alteration to their premises? What is a vulnerable person—vulnerable to what?

Hon ALANNAH MacTIERNAN: The landlord will make a judgement because the consent of the landlord is required. A person will make a submission, and a 25-year-old who has an intellectual disability who is vulnerable and may have the intellectual capability of a small child may, in fact, be living in the house. If the landlord does not think that is reasonable, that is a judgement that the landlord will be able to make and it will be up to the tenant to take this further. It is really important to understand that this is to deal with a real-life issue and is something that will be done at the expense of the tenant. It is not something that tenants will pursue trivially. At the end of the day, the landlord will have the right to say yes or no, and if there is a dispute, the matter can be taken before a tribunal to be determined. Normal, reasonable human beings looking at how life works in the raw will consider all reasonable factors and decide whether that person who is being presented is a vulnerable person. I can assure members. If members think this through, people are not going to be making this up. They will not seek to bolt in furniture and incur the expense of doing that and repairing it, and then taking it to court. Members should really think through what this legislation will do. My understanding is that the industry supports this measure.

Hon MICHAEL MISCHIN: The minister said that the industry supports the measure. Does the industry support the vagueness of the term "vulnerable person"? Has it been put to the industry in those terms?

Hon Alannah MacTiernan: No, it has not. That came out of the debate.

Hon MICHAEL MISCHIN: Then the minister should not tell us that the industry supports this measure. We are fastening on the meaning of these words. The government is making this law. The minister should not talk about "real-life situations". We had enormous debates in the last Parliament about the meaning of "thing"—that a pencil might be considered the basis for a criminal prosecution because it is a thing! We have here mentions of things, and this vague concept of "vulnerable person". Just about every bill introduced into this place by the government throws in the term "vulnerable person", but nobody is able to define: vulnerable to what? The government is making this a law. The minister talked about the landlord being able to provide consent. No, they cannot. There is a farcical measure here that an application can be made to them to give their consent, but they cannot withhold it. Before the government makes this law, the minister should tell us what a vulnerable person is. If I am a lessor and I am presented with someone who I have rented my place to, and I would ordinarily expect them to come for my permission before they start altering it, and they say that they want to affix some furniture to a wall because they have a vulnerable person in the house, what am I to make of that? How am I to decide whether that is a legitimate basis for making alterations to my property?

Hon ALANNAH MacTIERNAN: I do not think that is that difficult to resolve. The vulnerability would obviously relate to the likelihood of that person interacting with the furniture in a way that a child would and the potential for that person to find themselves in that situation. I imagine that people would outline the nature of the person and their disability and the reason it was considered that they would be in the same degree of vulnerability as a child in this regard, and a decision would be made. The landlord may be of the view that it is not a vulnerable person.

At the end of the day, we were seeking to make this change. We think it probably improves the legislation. I think it was suggested by one of the members. I think Hon Rick Mazza put it forward as a proposal. We thought that was reasonable because people will be caring for people over the age of 18 who may have a much lower intellectual age and therefore have a similar vulnerability. At the end of the day, we are seeking to provide that as another option. If people do not support the amendment, they do not support it. The quintessential thing for us is to get the bill through. We thought that Hon Rick Mazza's suggestion was reasonable so we put it into the bill. In reality, we do not think it will be that hard to determine. The vulnerability will relate to this very specific matter—that is, the likelihood that a person could interact with a piece of furniture in such a way that it could fall on them. This would be about a person who lacks the ability to judge the stability of that furniture—someone of either emotional or intellectual disability who is not able to make a reasonable risk assessment that we would expect of a person over the age of 18.

Hon ALISON XAMON: I rise to indicate that the Greens will be supporting this amendment and also concur that the suggestion put forward by Hon Rick Mazza is sound and is a useful addition to this legislation. I also wanted to flesh out how wide the scope for a vulnerable person could be. My concern is that I would not want a landlord to unreasonably withhold permission to affix furniture if that is an important safety measure that needs to be undertaken. As the minister has rightly identified, taking it all the way to a tribunal to determine that would be quite onerous. It may be quite reasonable for someone to expect to be given permission to affix furniture, particularly as the nature of furniture is changing; that is, a lot of it is getting higher. It is very easy for furniture to become unbalanced and fall on a range of people. A person does not necessarily need to be a child to be small. They might not want furniture falling on them.

I want to examine the scope by which this could potentially be determined. We have talked about a child. I think that is pretty self-explanatory. The minister referred to people with intellectual or cognitive disability who may not be able to make the appropriate risk assessment to stop furniture inadvertently toppling over. I also note that in earlier contributions the minister spoke about elderly people who might be quite vulnerable, or others. I think it would be useful for the *Hansard* record to get some idea of the anticipated scope of what a vulnerable person could encompass, understanding that it is not intended to be definitive. In that way, it can give some guidance to a future tribunal and also give some indication to a landlord who might be seeking advice on this matter so that the capacity to ensure that residents are safe is not unreasonably withheld.

Hon ALANNAH MacTIERNAN: The member is correct. There was a discussion about frailty, and we were particularly concerned about people with walking frames who have a vulnerability with their stability as they seek to interact with furniture. It is a broad term. We have not defined it very closely because there are various circumstances. As I said, I keep going back to the basics. At the end of the day, the tenant has to pay the cost of affixing the furniture and pay the cost of restoring it. The landlord has the right to make a determination. Obviously, they have to look at what is fair and reasonable when making that determination. We could spend weeks trying to define

a vulnerable person and everyone would be able to come up with a new potential "vulnerable person". The primary focus of the amendment is children but we understand that other classes of people might need to access this protection. We want to leave that capability in the legislation. At the end of the day, if the landlord does not believe that they have satisfied that requirement, the landlord can determine that and the matter will be determined by a tribunal. I do not think we will get to that in the vast majority of cases, but there is really nothing more that we can add.

Hon AARON STONEHOUSE: We have heard that "vulnerable person" might include somebody with a limited mental capacity who may not understand their interactions with furniture and have furniture topple on them. It may include the elderly or someone who is vulnerable to injury if furniture were to topple on them. I wonder whether "vulnerable person" is broad enough to include someone merely of short stature. A set of shelves falling on top of somebody of short stature might cause them more injury than somebody who is a bit taller.

Hon Alannah MacTiernan: No, we're not size-ist and we're not saying that short people are vulnerable. They can see things at a different level.

Hon AARON STONEHOUSE: As funny as that idea might be, the reason I am raising it is that I think we are starting to get into the absurd here. The original intent of this part of the bill was to allow tenants to affix furniture to a wall, ensuring the safety of a child. I think that was already too broad as it does not need to be the tenants' child. "Child" is not defined in the legislation. It could be a grandparent who may or may not have children visiting them and furniture may topple over those children. It could apply to virtually anyone. Tenants do not need to prove to a landlord that children are visiting them, as I understand it from the briefings I received. Anybody—even a childless single person renting a property—could go to their landlord and say, "You need to give me permission to affix this furniture because at some point in the future a child may or may not come and visit me and they may climb the furniture and injure themselves." Now we are expanding that to "vulnerable person", which again is not defined, and it is so incredibly vague that it could apply to anybody.

I wonder if the government received advice from the Parliamentary Counsel's Office when drafting this amendment. It seems like a rather half-baked idea that the government has picked up at the suggestion of Hon Rick Mazza, who I think may have made that suggestion in an effort to highlight the vagueness and the broadness of these measures to begin with. Perhaps the minister can answer that for me in a moment.

If the government is going to go down this route of allowing a tenant to affix furniture to a wall to ensure the safety of a child or other vulnerable person, we might make this simpler by removing both those terms and merely say "to ensure the safety of an occupant". That is essentially what we are going for. The minister jokingly said that short people would not be considered vulnerable people but I imagine that someone with a physical disability that perhaps makes it harder for them to get around and reach top shelves would be a vulnerable person. An elderly person who certainly does not have any physical disability but merely by the nature of their age has a harder time getting around and might be at risk of serious injury if furniture fell on them would be a vulnerable person. Why do we not make it simpler for everybody and make it clear what we are doing rather than using vague terms and say "to ensure the safety of an occupant"? That would at least make it clear. It would be incredibly broad but at least we would not be hiding that broadness behind obscure, vague language. Perhaps the minister can answer those two questions for me.

Hon ALANNAH MacTIERNAN: At the moment, the tenant is required to seek permission and they would need to outline the nature of the vulnerable person—that is, whether they have a child or they are grandparents who regularly have children stay with them. If the landlord believes that that person is not either a child or a vulnerable person, the landlord can dispute it. The member's suggestion is that anyone should be able to affix furniture to a wall, in which case we would have to change the provision and make it a general right for a tenant to bolt furniture to a wall. It will be more restrictive if everyone is potentially caught by this provision. The landlord will have fewer rights because, fundamentally, a tenant under the member's proposition would be able to simply say that they want to affix furniture to a wall for the safety of any person without having to nominate a child or a vulnerable person.

Hon AARON STONEHOUSE: Did the government seek advice from Parliamentary Counsel's Office when drafting this amendment?

Hon ALANNAH MacTIERNAN: Yes. We also looked at whether it was desirable to provide a definition of "vulnerable person" but PCO advice was that in the context of the overall legislation and of people understanding the purpose and the type of vulnerability—namely, people doing things that may result in furniture falling on top of them—it was better to have the general phrase "vulnerable person". I think we should vote on it. If members support it, they support it. If they do not, they do not. Seriously, we can continue talking about it but there is no ability to further define this.

Point of Order

Hon NICK GOIRAN: What is the question currently before the Chair?

The DEPUTY CHAIR (Hon Dr Steve Thomas): The question is that words to be deleted, be deleted.

Hon NICK GOIRAN: I note from the supplementary notice paper that if we delete the word "child", we cannot immediately thereafter insert the word "child". There is a problem with the amendment before the Chair.

The DEPUTY CHAIR: Hon Nick Goiran, because it is contiguous, the question is that we delete the word "child," and insert the words "child or other vulnerable person", without a comma.

Committee Resumed

Hon AARON STONEHOUSE: Before the minister provided clarification about whether the Parliamentary Counsel's Office was consulted in drafting the amendment, she said that the provisions of this legislation are not too broad because a tenant will have to have a child or a child visiting them and if the lessor is not satisfied that a child will be visiting them, they could refuse consent to have furniture affixed. Proposed section 47(2A)(b) states that "the lessor may only refuse consent". The reasons do not provide circumstances for a lessor to refuse consent if they are not satisfied that a child exists or will be in some kind of danger when visiting the lessee. Is it incumbent upon the lessee to prove to the lessor that a child will be in the premises and at risk or is it incumbent upon the lessor to disprove that at the State Administrative Tribunal? After reading that on its own, it seems that it could be any child. There is no need for a biological link. There is no need for the lessee to prove to the lessor that a child will visit them. From my reading, it allows for anybody to say, "A child may visit me at some point; therefore, I must affix this furniture", which puts in place what was described previously as a farcical right to refuse consent. Can the minister clarify the conditions under which a lessor may refuse consent if they are not satisfied that a child will be present or, in the case of the minister's amendment, that a vulnerable person will be present?

Hon ALANNAH MacTIERNAN: Proposed section 47(2A) states that it is a term of every residential tenancy agreement that a tenant may affix for the purpose of ensuring the safety only with a landlord's consent. A landlord can refuse that consent for a range of reasons. If there is no child or vulnerable person to nominate, the ordinary rules will apply. The provision requires that a lessee has to nominate for the safety of a child. I would presume that consent would have to detail the child or vulnerable person who is to be protected.

Hon Michael Mischin: Why do you have to presume that? How can you presume that? It doesn't say so.

Hon ALANNAH MacTIERNAN: The way the legislation has been structured is that the tenant will seek advice and nominate a child or vulnerable person. If the landlord does not believe that there is a child or vulnerable person, they are not required to give consent under these provisions. The situation would go back to section 47(1), which sets out the circumstances. The landlord has the capacity to say, "I don't believe that there is a child or vulnerable person involved in the tenancy and therefore I'm going to withhold consent." Ultimately, if that is challenged, it is up to the tribunal to decide whether a child or vulnerable person is involved.

Hon RICK MAZZA: My understanding is that proposed section 47(2A) is the result of a recommendation in the coroner's report after furniture fell on a child and the child lost their life. I was genuine when I made points about people who are elderly or have an intellectual or physical disability; indeed, these circumstances occur. As was discussed earlier, the definition of a "child" is quite broad. We could be talking about someone who is 17 years, 11 months and 21 days. A child may visit a premises on occasion; for example, grandchildren may visit their grandparents on occasion. In those circumstances, it would not be difficult to claim a genuine reason for wanting to affix furniture to a wall. I appreciate the government's sentiment in wanting to include people other than children who may require that furniture be attached to a wall. The reality is that anybody could be considered vulnerable. It would be difficult for a landlord to refuse a lessee's request to affix furniture to a wall to secure it and stop it from falling. I think they would be pretty brave if they did refuse, because anything could happen. But the terminology "child or vulnerable person" at least gives some guidelines to the purpose of this proposed section. It does not encompass everybody but it provides guidelines. I will support this amendment unless other language can be found to better facilitate this. The provision states that a lessor may refuse consent if asbestos is contained on the property, if it is heritage-listed —

Hon Alannah MacTiernan: By way of interjection to support the comment you made, it is the principle of statutory interpretation. A "child or other vulnerable person" helps to create, as the member said, a cluster and a sense and meaning about the limits of a vulnerable person—someone who has a vulnerability similar to a child. As the member rightly reflected, the clustering of "child or other vulnerable person", will affect the interpretation.

Hon RICK MAZZA: Overall, the reality is that anyone can request this. There are a couple of reasons why a landlord can refuse consent, such as if the premises has asbestos et cetera.

Progress reported and leave granted to sit again, on motion by Hon Alannah MacTiernan (Minister for Regional Development).

Sitting suspended from 6.01 to 7.30 pm