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 68: Section 49A amended —

Committee was interrupted after the clause had been partly considered.

The DEPUTY CHAIR: Minister, were you going to respond to previous statements, or shall we proceed?

Hon ALANNAH MacTIERNAN: Proceed.

Hon MARTIN ALDRIDGE: Before we broke for question time, I had made quite a considerable statement and put a question to the minister seeking some assurances of the government's understanding of proceeding with this amendment, to clarify its view on the existing policy and the intent of the legislation. Obviously, I was not compelling enough for the minister to rise and respond to the question that I put. I put that there is potential for unintended consequences from moving this way, particularly with regional applications—where there is a high cost of connecting multiple services to utilities, particularly power, and it makes sense to have multiple connections arising from one electricity connection—and particularly in light of the fact that this government has increased the costs of fixed tariffs much more quickly than the consumption tariff or the consumption costs. This will place a greater burden on property owners, who will not be able to share that burden with tenants. It is also rather strange that, as far as I can tell, there is no explanation, although I would think the large majority of utility connections in Western Australia would be connected in the name of the tenant. Now, I understand —

Point of Order

Hon MICHAEL MISCHIN: I have a point of order. I am having difficulty hearing Hon Martin Aldridge, who has had to repeat a question that he asked earlier. I would like to hear the answer.

The DEPUTY CHAIR (Hon Dr Steve Thomas): I will accept that point of order. Honourable members, if you want to have a conversation, please remove yourselves from the chamber and have it outside. Hon Martin Aldridge has the call.

Committee Resumed

Hon MARTIN ALDRIDGE: What is also not clear to me—the government may clarify whether this is in the existing policy—is why we treat landlords differently, simply based upon a situation in which a service is connected in the name of a landlord rather than a tenant. I was saying that I would think the majority of utility connections, particularly power, would be in the name of the tenant. Obviously, water would be different. I think I said in my second reading contribution that I do not know whether it is a requirement of some other statute or water legislation, but it is commonplace, if not required by law, that water and drainage connections must be in the name of the property owner. That is obviously quite different from utilities such as gas and power, which would predominantly—I think it would be a very high percentage of cases—be in the name of the tenant, and the tenant would bear the cost of fixed and consumption costs relating to that utility service. In those rare circumstances in which the connection is in the name of the property owner, for whatever the reason—because there is only one connection, or the mischief that I believe the government is trying to address, which is greedy landlords profiting from solar photovoltaic connections to their investment properties—why do we treat property owners and tenants so differently in the two circumstances that I have described?

Hon ALANNAH MacTIERNAN: I understand the point the member is making. I think it probably applies equally in the city as in the regional areas. Obviously, apartments are a very big issue here. We recognise that is an issue. There has been a move towards fixed charges, in part because of the prevalence of solar panels. I have been assured that the review is looking at this issue of fixed charges, particularly with solar panels, and how best to deal with this. I point out, of course, that sometimes landlords are putting in solar panels, not that that is a bad thing, because, at the end of the day, they are making money out of it; they are entitled to charge it at certain rates, but, obviously, have the benefit of rebates, so it is not all a one-way street. But I have been advised that, in particular, the issue of solar panels and whether our policy settings on this matter are correct will be part of that review.

Hon MARTIN ALDRIDGE: Before we broke for the taking of questions, the minister referred me to a tabled letter of 7 November 2018 from the Real Estate Institute of Western Australia in response to my question about its concerns expressed in correspondence of 1 November 2018. I have had a chance to review that letter during the taking of parliamentary questions. The bulk of the letter does not necessarily apply to the issue that I raised, with the exception of the second paragraph, which reads —

> REIWA has received additional information and clarification around many of the proposed changes from the Department of Mines, Industry Regulation and Safety (DMIRS) and is now largely satisfied with what is proposed.

That is hardly explicit in terms of its support—correction, approval—of the clause that is before us. Is the minister able to confirm whether there is further correspondence with REIWA or some admission that, indeed, its views of 1 November 2018 were misinformed and therefore not correct?

Hon ALANNAH MacTIERNAN: I think the fact that it then goes on to outline its remaining concern, which is the issue of the impact of the imprisonment provisions, rightly allows us to conclude that that, indeed, is the case. We also have a letter of 2 November 2018, which states —

> I am writing to enclose a letter that was provided to the Commissioner for Consumer Protection …
>
> The matters raised in the letter were discussed —

That was the letter of 1 November 2018 —

> and we now await a formal response from the Commissioner.

Our understanding is that, as a result of that letter from the commissioner and subsequent discussions, it is not opposing this particular provision.

Hon MARTIN ALDRIDGE: The minister mentioned in a previous answer the issue of on-charging of consumption by landlords to tenants. Noting that they can pass on only the consumption of a utility that is a separately metered, is there any ability for them to alter the tariff or the per-unit charging of the utility, or is that restricted in some way by the Residential Tenancies Act or some other statutory provision?

Hon ALANNAH MacTIERNAN: It is for only consumption, but the legislation contemplates it. It states —

> although consumption at the premises is not separately metered, the charge is calculated in accordance with a method previously agreed to in writing by the lessor and the tenant;

I believe there is a provision in the regulations. Form 1AA, the prescribed agreement, in schedule 4 of the Residential Tenancies Regulations states —

> Where the premises are not separately metered to measure the consumption of a specific utility, the tenant must pay the consumption costs for that utility which will be calculated as follows:

There is a provision for the parties to agree on the method of calculation of the consumption.

Hon MARTIN ALDRIDGE: That provision is for when there are not separate meters, but if there are meters and a tariff is charged to the property owner, is there a restriction on the tariff that can be on-charged to the lessee. There is quite a complex tariff charging regime for power. Some consumers elect to access and pay for green power, which is created by renewable energy and is much more expensive. If a property owner makes that decision, does the lessee simply have to bear that, or is there some reference to a standard tariff that they cannot be charged a value greater than the standard tariff if separate metering is available?

Hon ALANNAH MacTIERNAN: I think it says it is only for consumption. Form 1AA states —

> Where the premises are separately metered to measure consumption of a specific utility, the tenant must pay for the connection and consumption costs as per the relevant account for the premises.

If there is a separate meter, there will be an account. The connection and consumption charges are all that the tenant can be required to pay.

Hon MARTIN ALDRIDGE: On that basis, if a lessor makes a decision to be a good environmental citizen and signs their premises up to a renewable energy tariff that is at a higher cost than the standard residential tariff, the lessee has no choice but to pay the tariff that has been chosen by the lessor.

Hon ALANNAH MacTIERNAN: In theory, that is true. I think the member will find that most people use solar panels because they provide cheaper energy. However, it is very clear here that lessors cannot add their own little bits onto the account. Whatever consumption amount is charged by the utility is all that can be charged to the tenant. As I said, a review is going on, and it will look at this issue of solar panels and make some decisions about them.

Hon MARTIN ALDRIDGE: Has the government considered how this provision may disincentivise lessors from installing solar PV on investment properties?

Hon ALANNAH MacTIERNAN: As I said, this is subject to review. Lessors and people who are building units know that the installation of solar panels is a selling point, so I think the member's fundamental supposition is quite wrong. My experience is that many property developers see the installation of solar panels as a selling point in the current apartment market.

Hon MARTIN ALDRIDGE: Proposed section 49A(3)(b)(ii) states —

> although consumption at the premises is not separately metered, the charge is calculated in accordance with a method previously agreed to in writing by the lessor and the tenant;

Will this clarifying provision be retrospective? How will it be determined when "previously agreed to in writing" will apply in the event of an ongoing tenancy if it is not retrospective?

Hon ALANNAH MacTIERNAN: A similar provision is already in the legislation. We are clarifying the operation of the whole section, but I think it is important to have a look at the existing provision, which states —

> if consumption at the premises is not metered and the lessor and tenant have agreed in writing to an alternative method of calculating the charge to be paid by the tenant—the charge calculated in accordance with the agreed method;

Although there is a change in the wording, the fundamental premise is the same. That provision is there and we have perhaps improved the clarity. I am advised—I hope it is correct—that form 1AA is an existing form. This is not a totally new idea. The fundamental principle is in the legislation.

Hon MARTIN ALDRIDGE: So I can understand the minister's response fully, is the minister saying that the lessor would not be able to provide an invoice to a tenant for consumption unless that agreement existed? If a current tenancy arrangement is in place when this bill is passed and its provisions are proclaimed, will there be no ability for a lessor to charge a lessee for consumption at a premises where there is not separate metering until an agreement is in place between the lessor and the lessee?

Hon ALANNAH MacTIERNAN: That is the current situation and will be the situation under this provision. There will be no change in that regard.

Clause put and passed.

Clauses 69 to 71 put and passed.

Clause 72: Act amended —

Hon NICK GOIRAN: I propose to ask these questions under clause 72, but they are really questions on all of part 10, which is to be dealt with, if you like, in a cognate fashion under this clause. With the minister's indulgence, I look particularly at clause 82 in part 10 that looks to insert a new offence when an agent fails to complete prescribed professional development requirements. Can the minister advise the chamber of those requirements?

Hon ALANNAH MacTIERNAN: I think we set that out in some detail on a previous clause when we were also dealing with the real estate agents. There is a requirement for six compulsory professional development units. Each year, four of those are mandated by the commissioner and the other two are a range of electives, which also have to be approved by the commissioner. The requirement is compulsory professional development. As we explained earlier in debate when we discussed these issues, that is the standard.

Hon NICK GOIRAN: The minister referred to previous debate but this is the first time we have reached part 10.

Hon Alannah MacTiernan: The part on real estate agents has similar provisions. When we discussed real estate agents, we also discussed the requirements for settlement agents.

Hon NICK GOIRAN: Right. As I understand it, this offence, which includes a fine of up to $5 000, has not existed previously; this is the first time it is in legislation. Are the professional development requirements the same for settlement agents as they are for real estate agents?

Hon ALANNAH MacTIERNAN: The real estate agents' requirements are slightly more onerous. For them, it is 10 points. In a rough sense, one point equals one hour. A program that might deliver two points would generally be a two-hour program. It is 10 points for real estate agents and six points for settlement agents. We did discuss this matter, but I note that the member may not have been here. Currently, the only way we can deal with a person failing—they may have done five points, but just missed out on getting their sixth point—is to totally cancel their licence and stop them operating. We felt that this consequence was too onerous and that we needed the ability to respond in a different way so that if there is a small or accidental failure to meet the standard, we will have the ability to issue a fine. We intend to prescribe modified penalties for infringement to help the industry. It is to stop this being a sudden death. Obviously, if someone has acquired no points in the year, they are probably still likely to lose their licence unless there are specific circumstances, but this tries to give some flexibility because sometimes the shortfall is not that serious and we do not want people to lose their livelihoods unnecessarily.

Hon NICK GOIRAN: What is the intended modified penalty?

Hon ALANNAH MacTIERNAN: Generally speaking, the modified penalties are about 20 per cent of the listed penalty.

Hon NICK GOIRAN: Twenty per cent of $5 000 is $1 000, so a penalty, a fine, an infringement, if you like, will be issued to a settlement agent asking them to pay $1 000. Will that fine be issued in the event that a settlement agent indicates that they are not meeting the professional development requirements because they do not intend to renew their licence at the upcoming deadline?

Hon ALANNAH MacTIERNAN: Their obligation is to complete them if they have signed on that year. That is a very particular circumstance and the commissioner may determine that it is not worth prosecuting. The commissioner would apply, as we have discussed in this bill on many occasions, the public interest test, whereby the department considers the gain from proceeding with an infringement notice, a disbarment or a fine, so those things can be taken into account.

Hon NICK GOIRAN: Will the department and the commissioner monitor and enforce this requirement?

Hon Alannah MacTiernan: Yes.

Hon NICK GOIRAN: The minister indicated that this new fine—the $5 000 that is intended to have a modified penalty of $1 000—has been implemented by the government to assist the industry. Does this provision have industry support; and, if it does, was that indicated in some written form that can be tabled?

Hon ALANNAH MacTIERNAN: I do not have a document that says that. Dion Dosualdo, the CEO of the Australian Institute of Conveyancers WA, represents the settlement agency industry on the Property Industry Advisory Committee, and PIAC has raised no objections for noncompliance. As I said, it really would not complain about this because if we keep the existing regime, people could lose their entire livelihoods. Therefore, a settlement agent who earns $7 000 or $8 000—some may be doing better than that—will cease to be able to operate. The advice generally is that the industry sees this as a positive. It will enable the industry to enforce and incentivise settlement agents to complete compulsory education units without them losing their licence.

Hon NICK GOIRAN: The minister says that the industry sees this as a positive, but I understand that the document the minister is referring to indicates that no objection was raised. I think there is a distinction between people in the industry who actively say, "We have considered this new penalty and we support it; we see this as a positive initiative", and somebody who remains silent and does not raise any objection. I am interested to know whether the mechanism that is being implemented is common in Western Australia—that is, we fine people who do not comply with professional development requirements. It has been a while since I have applied for a practising certificate in the legal profession, but it is certainly not my recollection that if I were to fail to adhere to the professional development requirements and complete various units, I would be fined. The minister is quite right: I could be prohibited from re-registering—that is true—but a fine is also a significant punishment for someone who does not comply with a professional development requirement. I am interested to know about that. Clearly, that is going to be the case for real estate agents and settlement agents. Does a similar provision exist for other industries in Western Australia or is this only for settlement agents and real estate agents?

Hon ALANNAH MacTIERNAN: Yes. When operating at the professional level—lawyers, doctors and, I believe, accountants—these provisions would probably more likely lead to non-renewal of a licence or a tribunal process. We are trying to get something that is fit for purpose. After talking to the industry, our judgement is that we certainly do not want people to go to tribunals and to have those sorts of inquiries when all that is required is six hours of professional development. We are not going to hang, draw and quarter someone for not completing their PD points, but we do not want the only option to be to ban them and stop them exercising their livelihood. We are again looking at a very pragmatic—because our laws should be pragmatic and practical—simple and cost-effective sanction. It is one that provides a sufficient incentive for people to do what they are supposed to do, at the same time as not causing people to lose their livelihood for minor noncompliance.

Hon NICK GOIRAN: The modified penalty is likely to be $1 000. What will be the cost for a settlement agent to apply for their licence and their triennial certificate?

Hon Alannah MacTiernan: I am not sure we have that information available. However, it is not changing with this legislation. Sorry, I do not have that available.

Hon NICK GOIRAN: I would like to know, because if it is going to be an incentive, we need to ensure that the modified penalty is comparable with the cost of a licence. For example, if it costs a settlement agent $2 000 to apply for their licence and their triennial certificate, it actually will be a disincentive because they could just as well pay the $1 000 fine and make a profit.

Hon Alannah MacTiernan: Sorry. Is your proposition that if you do not do your points, you lose your licence and you reapply?

Hon NICK GOIRAN: No. The minister has said that they will not lose their licence; they will get a fine instead under this new regime.

Hon ALANNAH MacTIERNAN: In serious cases, settlement agents will still lose their licence. Obviously, this does not mean that they will not have to pay their triennial certificate fee. The triennial certificate fee is $1 010, so it is roughly the same. I cannot see that there will be any profiteering here. If they lose their licence, they will not be able to reapply and get their licence back straightaway. This will not disallow the commissioner to refuse to renew a licence in situations of gross noncompliance. We are obviously very concerned about making sure that the person has sufficient contemporary information and knowledge to discharge their obligations to their customers.

Hon NICK GOIRAN: Clause 80 inserts proposed new section 34(1), which will mandate compliance with the settlement agents' code of conduct. Who approves that code?

Hon ALANNAH MacTIERNAN: It is prescribed. A statutory instrument will presumably be approved by the minister of the day, subject to disallowance. In one sense it will be approved by the Parliament, if it does not disallow it.

Hon NICK GOIRAN: Clause 80 also inserts proposed section 34AB, which will empower a licensee to apply to remove a special condition imposed by the commissioner. Are any application fees or charges payable on an application?

Hon Alannah MacTiernan: You are really trying to string this out. This is unbelievable. No, there are not.

Hon NICK GOIRAN: With respect, minister —

Hon Alannah MacTiernan: You know some of your questions earlier on were legitimate, but this is stringing it out.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Hon Nick Goiran, you have the call.

Hon NICK GOIRAN: Thank you, Mr Deputy Chair. As I was saying earlier, I want to know the amount that people will have to pay to make sure that the proposed modified penalty is actually an incentive to comply. When I first asked the question, the minister said that she did not have that information, but in the end she did have the information and said it was $1 010. That is why I stopped asking questions on that. I ask for a little bit of courtesy so that when I ask a very simple question, the minister provides a simple answer. Then we can move on.

The minister might be pleased to know that I have only two more questions. Those questions will be quick if the minister assists me. Clause 83 amends section 65 of the Settlement Agents Act to increase penalties. How was the increase in the penalty for offences relating to the administration of a trust account from $3 000 to $25 000 arrived at, and how does this compare with other industries?

Hon ALANNAH MacTIERNAN: These provisions were last amended in 1995, so the current penalty levels are around 22 years old. They are the same as those in the Real Estate and Business Agents Act. We have tried to have a similar level across the property sector. The penalty level review was commenced in 2014. We looked at a range of provisions, including the inflation component, to get a sense of what seemed to be reasonable for the nature of the offence. There is no precise science about this. As I have said, we have already passed the real estate provisions; they were 22 years old. The cumulative effect of the consumer price index over that time would probably result in something roughly similar to that. In any event, $3 000 will go up to $25 000 and $10 000 will go up to $50 000.

Hon RICK MAZZA: My question is about clause 80, which seeks to replace section 34, and particularly proposed section 34AA, which provides that the commissioner may at any time impose a special condition on a licence or triennial certificate. Proposed subsection (3) states —

> Without limiting subsection (2), the Commissioner may impose a condition that relates to —
>
> (a) the holding of a policy of indemnity insurance or fidelity insurance in a specified amount …

Are there any other proposed conditions that could be applied to the licence or triennial certificate by the commissioner?

Hon ALANNAH MacTIERNAN: No. It is a broad discretion. For example, in one case when there were some concerns about the way that the trust account was being administered, one of the conditions required by the commissioner was that the person undertake special trust account training.

Hon RICK MAZZA: I thank the minister for that. Can settlement agents individually source their own professional indemnity insurance policy or is it a group scheme?

Hon Alannah MacTiernan: It is a group scheme.

Hon RICK MAZZA: Who is the current underwriter of that group scheme, what is the amount of insurance that each settlement agent has to carry and what is the current premium?

Hon ALANNAH MacTIERNAN: It is not structured in this way. I am advised that there is a fee like the fee for real estate agents. The fee is part of the licence fee, but licensees are also required to be insured under this master policy. The act gives the commissioner the power to make arrangements in respect of fidelity insurance. When the commissioner considers it necessary, a master agreement with an insurer can be entered into. At present,

Jardine Lloyd Thompson has been appointed as the brokers of the master policy agreement for settlement agents. It is a central fund, but with Jardine Lloyd Thompson as the brokers of that fund. It assesses the risk associated with each settlement agency, presumably on the basis of its past performance, and it sets the insurance premium.

Hon RICK MAZZA: The master policy is underwritten by Jardine and Jardine then assesses each settlement agent depending on the level of risk, whether it is a one-person operation from home or whether it is a great big conveyancing agency with 30 or 40 staff, so the premium would be based on that. Is that correct?

Hon Alannah MacTiernan: Yes, but not just on size, but obviously on past performance.

Hon RICK MAZZA: It would be based on previous claims and, I imagine, turnover as well. Can the minister advise whether there is a set excess for all settlement agents or is it also assessed independently for each agent?

Hon ALANNAH MacTIERNAN: Just to clarify, Jardine is the brokers, not the underwriters. It holds both professional indemnity and fidelity insurance. As with any insurance, I do not know whether an excess applies. I am not sure that that is a relevant concept in this matter. I do not have any information on an excess. There is no indication that there is an excess.

Hon RICK MAZZA: I take it that under the new —

Hon Alannah MacTiernan: We are not changing any of this; there are no changes in relation to this matter, so it is not really relevant to the act.

Hon RICK MAZZA: Under proposed section 34AA(3), would a special condition that the agent hold an indemnity insurance policy to continue trading be imposed on every licence and triennial certificate that is issued?

Hon ALANNAH MacTIERNAN: I am advised no. My understanding of the way the legislation is structured is that if the commissioner makes the decision that there is a master policy, which he has, everyone is required to be part of that master policy arrangement, so that becomes automatic. It is not imposed as a specific condition.

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

Sitting suspended from 6.00 to 7.30 pm