Parliament of Australia
Department of Parliamentary Services

Parliamentary Library
Information analysis and advice for the Parliament

BILLS DIGEST

31 January 2006, no. 83, 2005–06, ISSN 1328-8091

Aged Care (Bond Security) Bill 2005

Jennifer Norberry and Greg McIntosh
Law and Bills Digest Section and Social Policy Section

Contents

Aged Care (Bond Security) Bill 2005

Date introduced: 8 December 2005

House: House of Representatives

Portfolio: Ageing

Commencement: The Bill's formal provisions commence on Royal Assent. The substantive provisions commence at the same time as Schedule 5 of the proposed Aged Care Amendment (2005 Measures No. 1) Act 2005.[1]

Purpose

The Aged Care (Bond Security) Bill 2005 (the Bond Security Bill or the Bill) is part of a suite of three Bills. The other Bills are the Aged Care (Bond Security) Levy Bill 2005 (the Levy Bill) and the Aged Care Amendment (2005 Measures No. 1) Bill (the No. 1 Bill).

The essential purpose of these three Bills is to strengthen the prudential requirements and enhance the protections available to residents in aged care facilities who have paid accommodation bonds. These bonds are paid upon entry by non-concessional residents of low care facilities (formerly called hostels), and also by residents in high care facilities (formerly nursing homes) which have 'extra service' status, as well as some residents in Multipurpose Services. When residents exit an aged care facility they, or their family, may be eligible for a refund of part of the accommodation bond paid. Under current arrangements if a residential care facility provider becomes bankrupt or insolvent the resident is not guaranteed that they will get their relevant accommodation bond amount refunded. These Bills are designed to ensure that residents will, in all cases, be refunded the amount of accommodation bond that they are owed.

In short:

- the Bond Security Bill provides for a scheme whereby the Commonwealth will repay outstanding accommodation bond balances to relevant aged care recipients in cases of aged care provider default. The Commonwealth can then attempt to recoup that balance amount from the defaulting aged care provider. It also contains administrative steps that must be taken so that a levy on aged care providers can be imposed under the Levy Bill.
- the Levy Bill will enable the Commonwealth to impose a levy on aged care providers to the extent necessary to recover amounts (including administrative costs) that it is has not been able to obtain from defaulting providers, and
- the No. 1 Bill will enable the strengthening of existing prudential requirements related to accommodation bonds especially in relation to liquidity, record keeping and

disclosure. These new prudential requirements will be developed over time and will be subject to review.

This Digest should be read in conjunction with Bills Digests Nos. 84 and 85.

Background

Overview of residential aged care

The Commonwealth Government is essentially responsible for funding and regulating the formal residential aged care sector in Australia. The framework under which this formal residential aged care sector operates comes via the *Aged Care Act 1997* and the associated *Aged Care Principles 1997*.

The three main strands of residential aged care are:

- high care places (formerly nursing home beds)
- low care places (formerly hostel beds), and
- community based options, in particular Community Aged Care Packages (CACPs) and Extended Age Care at Home (EACH) packages – these packages provide an alternative to residential aged care and allow the elderly to stay in their home or like environment. Both these packages are funded by the Commonwealth. The Home and Community Care Program (HACC) also provides in-home and community care to not only the aged but also to people with special needs. The HACC Program is jointly funded by the Commonwealth and the States and Territories.

There are approximately 3000 residential aged care facilities across Australia. These facilities provide about 160 000 aged care places with a mixture of high care and low care beds. Funding to run these facilities comes from a mixture of government support and contributions from the residents themselves. There are also about 32 000 community care packages (which exclude services provided under the HACC Program) across Australia.

In order to receive Commonwealth funding an aged care facility must be accredited with the Aged Care Standards and Accreditation Agency. The main form of Commonwealth subsidy is the Residential Care Subsidy or RCS which varies according to the needs of the resident – a high care resident attracts a higher subsidy than a low care resident. In 2004-05 a high care resident, on average, attracted an RCS subsidy of $42 879 whilst a low care resident attracted an average subsidy of $15 563.[2]

Funding

With respect to the funding of residential aged care, the Commonwealth provides approximately three-quarters of the total funds available (mainly via residential care subsidies and capital grants to providers) with the remaining funding coming from permanent residents in aged care facilities paying accommodation and daily living charges. Most of the funding comes via the Commonwealth Department of Health and Aged Care but there is also specific residential aged care funding via the Department of Veterans' Affairs for aged veterans.

Total Commonwealth funding for residential and community aged care has been rising steadily as the aged population in Australia grows. For example, according to official government data contained in the Health and Ageing 2005-06 Budget Media Kit (*More Choice, Better Aged Care Services),* the Commonwealth will outlay about $7.3 billion in 2005-06 on residential aged care and community care. This compares to a figure of about $3 billion in 1995-06.

Fees and charges in residential aged care facilities

Accommodation payments

Accommodation payments are one of the main forms of resident contributions that are levied on people in residential aged care facilities. These accommodation payments are paid as either accommodation bonds (for residents in low care or hostel beds and for residents in high care 'extra service' facilities) or accommodation charges (for residents in high care or nursing homes beds). The amount of accommodation payment levied essentially depends on the income and asset level of each resident and the type of care utilised.

Accommodation payments are designed to help provide a stream of capital income for operators of residential facilities and enable to them to build facilities, carry out maintenance and capital upgrades etc.

The maximum accommodation charge that can currently be levied on new entrants to high level care is $16.63 per day.

Accommodation bond (for low level or hostel care) amounts and payment methods vary and are negotiated with the residential care provider. They can only be levied on residents who have assets in excess of $30,500. The average accommodation bond being levied on new residents in 2004-05 was $127,618.[3]

The balance of accommodation bonds are refunded when a resident leaves an aged care facility minus certain deductions and the investment returns from the bond amount. Providers are allowed to deduct a certain amount per year for a maximum of 5 years, the so called 'retention amount'. Maximum retention amounts are decided by the Government (currently $3186 per annum for bonds in excess of $31 860) and are indexed annually.

Daily care fees

There are two types of care fees. The level of the fees is essentially dependent upon the residents income and assets and the type of service chosen. There is a basic daily care fee (currently of up to $28.62 per day for respite residents and pensioners and up to $35.69 per day for other non pensioner residents) and income tested fees (which can range from up to $22.08 per day for part means tested pensioners to up to $50.07 per day for non pensioner residents). Thus, the maximum daily care fees that a wealthy person may have to pay is $85.86 per day made up of $35.69 for the basic daily care and $50.17 for the income tested fee.

Current prudential arrangements relating to accommodation bonds

There are currently a number of prudential requirements that aged care providers must comply with in terms of how accommodation bonds are levied and managed. All residents and providers must sign a bond agreement before a bond can be charged. This agreement sets out the rights and responsibilities of the parties involved. The bond can be paid in the form of a lump sum, a fortnightly or monthly payment or a combination of these two options. No bond can be levied on residents who have assets worth less than $30 500. Residents have up to 21 days after entering an aged care home to sign up to a bond agreement.

With respect to lump sum accommodation bond payments the service provider must guarantee in writing to repay the bond balance within 7 days if a resident moves to another aged care facility and within two months in all other cases. As well, aged care providers must have insurance to cover circumstances that may adversely affect their ability to pay bond balances and they must provide a yearly written statement outlining their performance related to the prudential requirements. These statements must be certified by an independent auditor or accountant.

Further details on prudential requirements for lump sum accommodation bonds are contained in the *Residential Care Manual* which is published by the Department of Health and Ageing:

> Providers have a number of obligations under the prudential arrangements.
>
> When a resident originally pays a lump sum bond the Approved Provider must, by written agreement, guarantee repayment of the bond balance within the time periods required under the Act, i.e. if the resident is transferring to another residential aged care service and has given 7 days notice, the bond balance must be repaid on the day the resident leaves the service. If the resident has given less than 7 days notice that they are transferring to another service, the bond balance must be repaid within 7 days of the day they gave notice. In all other cases (eg if the resident dies, or leaves the service to go home), the bond balance must be repaid within 2 months of that event.

Within 4 months of the end of each financial year for an Approved Provider, the provider must provide a written prudential statement to the Department of Health and Ageing.

• The annual prudential statement must state whether:

– the provider entered into accommodation bond agreements in accordance with the Act; and

– the provider has provided a written guarantee of repayment to each resident who has entered into a lump sum bond agreement; and

– all residents' bond balances required to be refunded during the year were repaid in accordance with the Act; and

– the provider has the capacity to repay, in accordance with the Act, all bond balances that can be expected to fall due in the following financial year; and

– the provider has throughout the past year maintained enough insurance to cover losses arising from fraud, loss of earnings, fire, flood or other reasonably insurable events that may affect the ability of the provider to refund bond balances; and

– the provider has given a copy of the latest prudential compliance statement to each current resident who has paid a bond and each prospective resident.

• The statement must be certified, or qualified, by an independent auditor or accountant.

• If the provider is an incorporated body then the statement must be signed off by the company directors. If the provider is not incorporated then it must be signed off by a member of the group of people who are responsible for the provider's executive decisions i.e. 'key personnel', as registered with the Department.

To assist providers with this process, the Department sends a Prudential Compliance Statement pro-forma to each provider soon after the end of the financial year.[4]

The Hogan Review

In the 2002-03 Federal Budget the Government announced that it would establish a comprehensive review of the pricing arrangements for residential aged care. A key emphasis of the Review (formally called the *Review of Pricing Arrangements in Residential Aged Care*) was on the long term funding needs and options of the sector. The Reviewer was Professor Warren Hogan and the subsequent report (released in May 2004) is commonly called the 'Hogan Report'. A number of the recommendations in the Report called for additional Commonwealth funding for aged care. The 2004-05 Budget did address many of the issues raised by Hogan. Included in the recommendations was a call for a tightening of the prudential requirements as they relate to accommodation bonds. The Report noted that:

> The accommodation bond has been an important source of funding in low care residential facilities. This funding approach is also found in high care Extra Service places. The large sums of money held in these bonds and the lack of a comprehensive arrangement for the monitoring and supervision of the management of these funds is a major source of concern…Given the mechanisms by which the fundraising through these bonds is provided for within legislation, the government may be deemed to be exposed to moral hazard. This possibility should be not be set aside lightly even though no substantial concerns have arisen in recent years. There is an obligation on government to ensure these funds are not exposed to risk of any loss. The position as it currently stands is that where sole traders and partnerships go bankrupt or companies go into liquidation, there is little protection for those entitled to reimbursement of bond monies paid.[5]

Accordingly, the Report recommended that the government should establish a guarantee fund to ensure that all accommodation bond balances were secure. This fund was to be funded by an industry levy and the authority charged with running the fund would also have prudential oversighting authority of approved aged care providers. The proposed legislation contained in these three Bills does not provide for the exact type of strengthened prudential arrangements as set out in the Hogan Report. Rather than set up a guarantee fund via a levy on the industry, the government has opted to, in the first instance, act as guarantor of the bond balances and then on 'as needs' basis levy the industry to recoup any amount that it has outlaid on bond default payments.

This latter approach has the advantage of not 'locking up' potentially large amounts of bond money in a fund that then would not be available to aged care providers for capital purposes. An 'as needs' approach to levying the providers would appear to be more flexible and less costly whilst still providing the requisite levels of prudential protection. It forgoes the need to have a permanent guarantee fund that would necessarily reduce the amount of potential capital funding available to the aged care sector. However, a 'downside' of this model is that all aged care providers, or at least all low care providers, may be called on to pay a bond security levy – 'good' providers thereby 'bailing out' 'bad' or defaulting providers.

On balance though, this model is probably preferable to one that ties up scarce capital resources in a guarantee fund that providers contribute to just 'in case' there is a defaulting problem somewhere in the sector.

Industry views

It would appear that the residential aged care provider sector is comfortable with the changes proposed in these three Bills. The model contained in the proposed legislation has received broad industry support not least because it imposes minimal costs on the industry. For example, according to Catholic Health Australia

> It has been Government policy since the Federal Budget of 2004 that there be a prudential guarantee scheme to protect residents bonds funded by the industry. The outcome that the Government intends to legislate into existence is by far the lowest cost guarantee scheme that the industry, including the Church based sector, could possible hope for and should be supported in the interests of resident confidence in continuing to pay increasingly larger bonds.[6]

Another peak aged care provider group, the National Aged Care Alliance (NACA), indicated in its response the Hogan Review of Pricing Arrangements in Residential Aged Care that it supported an 'examination of appropriate means to protect consumer funds including by arrangements such as trust funds, insurance or a guarantee fund'.[7].

As stated in the Explanatory Memorandum for the Bond Security Bill the Government did undertake a range of external stakeholder consultation following the release of the Hogan Review, including consultation on prudential issues.[8] The Explanatory Memorandum makes clear that the aged care sector preference for guaranteeing the security of accommodation bonds is the model (the post payment model where the Commonwealth guarantees the bond balances and has the option to levy the sector to recoup any default payments thus paid) contained in these Bills.

Financial implications

With respect to the provisions of the Bond Security Bill and the Levy Bill there will be no costs to the providers of aged care unless one or more of them goes bankrupt or insolvent and are unable to refund accommodation bond amounts to residents. In situations such as this the Commonwealth may recover any costs that it has incurred by placing a levy on aged care providers. The need for, and the size of, this levy would depend on the circumstances of the bankruptcy or insolvency and the consequent ability of the Commonwealth to recover funds from the aged care provider/s concerned.

Under the provisions of the No. 1 Bill, the Government will meet the costs of the new prudential regulatory framework for the first three years of its operation. After that time the costs will be recovered from providers who hold resident accommodation bonds. The three year cost to the Commonwealth of the new prudential framework is estimated to be $8.5 million over three years - $2.7 million in 2005-06; $$2.7 million in 2006-07 and $3.0 million in 2007-08.

Main provisions

Clause 4 applies the legislation to all the States and the internal Territories (the Australian Capital Territory, the Northern Territory and Jervis Bay Territory).

Clause 5 binds the Crown in each of its capacities (ie Commonwealth, State and Territory) but exempts the Crown from prosecution for breaching the legislation.

Clause 6 is a definitions provision. Note that the term, 'bonds', is defined to mean both accommodation bonds and entry contributions. For convenience, this Digest uses the expressions 'accommodation bonds' and 'bonds' interchangeably.

An 'approved provider' is a person or body that has an approval under the *Aged Care Act 1997* and may include States, Territories, State and Territory authorities, and local government authorities.

The term, 'insolvency event', is of great importance because it triggers or can trigger certain actions. The definition of 'insolvency event' contains seven paragraphs ((a) to (g)). Included in the definition are winding up orders made under the *Corporations Act 2001* because an approved provider is insolvent, the passing of a creditors' resolution under the Corporations Act that the provider be wound up, and the acceptance of a debtor's petition against an approved provider under the *Bankruptcy Act 1966*.

Insolvency and insolvency event declarations

As indicated above, this Bill enables the Commonwealth to take certain action in the event that an approved provider of aged care accommodation becomes insolvent *and* cannot repay accommodation bonds it owes to aged care recipients (ie becomes a defaulting approved provider).

If an approved aged care accommodation provider is an externally-administered corporation under the Corporations Act or is the subject of a personal insolvency agreement under the Bankruptcy Act *and* has at least one outstanding accommodation bond balance (as defined in subclause 6(2)), then:

- the Minister *may* make an *insolvency event declaration*. The declaration must be in writing. It is not a legislative instrument, which means that Parliament cannot disallow it and it need not be tabled in Parliament (**clause 7**)
- once a declaration is made, the Minster must give a copy to the relevant approved provider. However, failure to do so does not affect the validity of the declaration (**clause 8**).

Clause 7 recognises that may be circumstances in which the approved provider is not insolvent according to paragraphs (a) to (f) of the definition of 'insolvency event' but may be in serious financial difficulties and unable to repay bond balances. In these circumstances, it enables the Minister to exercise his or her discretion about issuing an insolvency event declaration. The Explanatory Memorandum states that this provision 'would only be used where there is no likelihood that the bond balances will be returned to the care recipients.'[9]

Clause 9 requires an approved provider to notify the Secretary of the Department in writing 'the first time' that certain 'insolvency events' occur. [10] *These are the events are specified in paragraphs (a) to (f) of the definition of 'insolvency event'* in **clause 6**. An example is where a winding up order is made under the Corporations Act because an approved provider is insolvent. In other words, **clause 9** covers the situation where the approved provider is insolvent and not merely in serious financial difficulty. Notification must be given to the Secretary by the end of the first business after the day on which the insolvency event occurred. It is an offence for an approved provider to fail or refuse to comply the notification requirement. The maximum penalty is 30 penalty units ($3300).

Default event declarations

The Bill also provides that soon as practicable after becoming aware that an *insolvency event* has occurred *and* that the approved provider has at least one outstanding bond balance,[11] the Secretary of the Department *must* make a written *default event declaration*. Such a declaration is not a legislative instrument (**clause 10**).

A copy of the declaration must be given to the approved provider and anyone that the Secretary considers may be entitled to a bond balance refund. Additionally, a copy of the declaration must be published in a national newspaper ie a newspaper circulating generally throughout Australia.[12] Failure to comply with these notification requirements does not invalidate the declaration (**clause 11**).

It is important to note that once a default event declaration has been made, action can be taken so that bond balance refunds are made to aged care recipients.

The Bill does not require defaulting approved providers to provide the Secretary with details of outstanding bond balances. The reason is that the proposed No. 1 Bill obliges approved providers to provide bond information to the Secretary. Further, as a result of amendments to be made by that Act it is anticipated that records standards will be implemented that will require each approved provider holding bonds to maintain an independently audited bond register. It is also intended to promulgate information standards. These measures will ensure that accurate information about bonds and bond balances will be kept and will also be obtainable by the Commonwealth should the guarantee and recoupment schemes be activated.

Refund declarations

Once a default event declaration has been made, the Secretary must identify the outstanding bond balances, the date on which the bond balance became outstanding, the amount of the outstanding bond balance, interest that has accrued on it, the person to whom the money is owed and the most appropriate method of repayment (**clause 12**).

Once these matters have been determined, the Secretary must make a written *refund declaration* identifying the defaulting approved provider, stating the amount of the outstanding bond balance, the amount of accrued interest and to whom the money is to be paid (**clause 13**). A refund declaration is not a legislative instrument. A copy of the refund declaration must be given to the refund recipient and the approved provider. However, failure to comply with notification requirements does not invalidate the declaration (**clause 14**).

As the Explanatory Memorandum points out, the Secretary can obtain bond information from a variety of sources including the approved provider's insolvency practitioner.[13] As pointed out earlier in this Digest, the defaulting approved provider can also be required to give information about bonds to the Secretary under the proposed No. 1 Bill.

Transfer of rights and payment of refund amounts

Once the Secretary makes a refund declaration, any rights the refund recipient has to recover an amount equal to the refund amount from the approved provider are transferred to the Commonwealth. This means that the Commonwealth stands in the shoes of the aged care recipient and can attempt to recoup the money from the defaulting approved provider. A clause note states that rights to recover *additional* amounts are not transferred to the Commonwealth by this provision (**clause 15**).

The refund amount must be paid to the refund recipient within 14 days of a refund declaration being made (**clause 16**). **Clause 17** appropriates the necessary moneys from consolidated revenue.

Cost recoupment determinations

Clause 18 enables the Minister to make written *cost recoupment determinations* specifying *refund amounts* that have not been recovered by the Commonwealth from the defaulting aged care provider. These determinations must identify relevant refund declarations, the costs recoupment amount and the relevant default event declaration. Costs recoupment determinations are not legislative instruments.

There is also provision for the Minister to make an *administrative costs recoupment determination* (**clause 19**). These determinations specify *administrative* costs[14] associated with a refund declaration that have been incurred by the Commonwealth. Like other determinations in the Bill, costs recoupment determinations are not legislative instruments.

Note that the money specified in these determinations is obtained through the imposition of a *levy* on approved providers. The levy is provided for by the proposed Levy Bill. The amount of the levy is set by regulations made under that proposed Bill.

Miscellaneous

Clauses 20 and 21 enable the Minister and the Secretary to delegate their powers as prescribed. The delegate must comply with any written directions given by the Minister or Secretary.

Clause 22 enables regulations to be made. The regulation making power extends beyond the standard power, which enables regulations to be made that are required, permitted or necessary to give effect to an Act. **Clause 22** also enables regulations to be made that will facilitate the collection of the levy that can be imposed under the proposed Levy Bill.[15] This includes regulations specifying who is liable to pay the levy, when the levy is payable, how the levy can be paid, penalties for late payment, repayments, and penalties for offences against the regulations.[16]

Endnotes

1. Schedule 5 commences six months after the Aged Care Amendment (2005 Measures No. 1) Bill 2005 receives Royal Assent unless it is commenced earlier by proclamation.

2 Department of Health and Ageing, *Annual Report on the Operation of the Aged Care Act* 1997 – 2004-05.

3 Department of Health and Ageing, *Annual Report on the Operation of the Aged Care Act* 1997 – 2004-05.

4 Department of Health and Ageing, Part 9.3.2 Prudential Requirements, *The Residential Care Manual*, revised April 2005.

5 Review of Pricing Arrangements in Residential Aged Care, pp. 163–64.

6 Catholic Health Australia, *Aged Care Bulletin*, September 2005, p. 1

7 NACA Response to the Hogan Review, June 2004, p.6

8 Explanatory Memorandum, pp. 11–12.

9 Explanatory Memorandum, p. 17.

10 However, as pointed out in the Explanatory Memorandum, the Secretary may become aware of insolvency events in other ways-for instance, via an insolvency practitioner or an aged care resident. See page 18.

11 The term 'outstanding bond balance' is defined in clause 6.

12 The expression 'national newspaper' is defined in clause 6.

13 Explanatory Memorandum, p. 19.

14 'Administrative costs' are defined in clause 6.

15 This is presumably done for an abundance of constitutional caution. See endnote 2 of the Bills Digest for the Levy Bill.

16 Penalties for offences against the regulations cannot exceed 50 penalty units (ie $550). Note this penalty accords with the approach generally taken by the Commonwealth ie that penalties for offences in regulations should not exceed 50 penalty units. See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, February 2004.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2476 or (02) 6277 2503.