



Aged Care Amendment (2008 Measures No. 2) Bill 2008

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Aged Care Amendment (2008 Measures No. 2) Bill 2008

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Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill seeks to amend the *Aged Care Act 1997* (the Act) and the *Bond Security Act 2006* (the Bond Security Act) to strengthen the aged care regulatory framework so that it reflects the current structure and nature of the aged care industry.¹

Background

Regulation of the aged care industry

Aged care in Australia is largely regulated by the Commonwealth government, which funds the provision of aged care services through subsidies of the costs of residential care, as well as capital grants.²

However, State, Territory and local government regulation also affect the provision of aged care services through regulations about matters including:

- building planning and design
- occupational health and safety
- food preparation, and
- consumer protection.³

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1. See Explanatory Memorandum, Aged Care Amendment (2008 Measures No.2) Bill 2008, p. 1.
 2. Department of Health and Ageing, *The Regulatory Framework for Residential Aged Care in Australia*, November 2005, Commonwealth of Australia, p. 17.

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This Digest focuses on the Commonwealth Government's role in regulating aged care.⁴

The Aged Care Act 1997

The Act is the main legislation relating to the regulation of aged care in Australia.⁵

The Act replaced provisions in the *National Health Act 1953* and the *Aged or Disabled Persons Care Act 1954*, which had previously provided for the administration of hostels and nursing homes. The Act changed the regulatory framework, as well as some financial arrangements.

The purpose of the Act was to:

- enable the Commonwealth government to reduce its capital funding involvement in the aged care industry
- align the classification and funding arrangements for nursing homes and hostels with a view to improving the standard of accommodation and care, particularly in respect of nursing homes
- place a greater onus on older people with higher income and assets to make a greater contribution to the cost of their care. This is achieved, at least to a large extent, by:
 - imposing income testing on all people who receive residential care, and
 - allowing residential care services to negotiate with care recipients for the payment of accommodation bonds by recipients
- establish an accreditation system for residential care facilities.⁶

The Act's objectives are also reflected in its 23 [Aged Care Principles](#), which include:

- Approved Provider Principles

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3. Productivity Commission, 'Trends in aged care services: some implications', *Research Paper*, September 2008, p. 20.
 4. All references to 'Government' in this Digest are references to the Commonwealth Government.
 5. Productivity Commission, op. cit., p. 18. The meanings of the following terms are contained in the *Aged Care Act 1997*: 'aged care' (Schedule 1 clause 1); 'residential care' (section 41-3); 'flexible care' (section 49-3); 'community care' (section 45-3).
 6. See further Lee Jones, 'Aged Care Bill 1997', *Bills Digest*, Parliamentary Library, Parliament House, Canberra, no. 132, 1996-97, p. 1.

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- User Rights Principles
- Accountability Principles, and
- Sanctions Principles.⁷

The Aged Care Industry

Current regulation framework

The main areas of regulation by the Government are:

- allocation of aged care places to approved providers of aged care (approved providers)
- assessing client eligibility to access those places
- funding services
- setting prices, and
- quality control.⁸

Allocation of aged care places

Every year, the Government allocates new places to broadly match the target population,⁹ attempting to balance the provision of aged care between:

- metropolitan, regional, rural and remote areas within each State and Territory, and
- needs for different levels of aged care.¹⁰

Once places are allocated, the Government has an open tender to allocate those places to approved providers, who then have two years to make those places operational. According to the Productivity Commission, approved providers are also expected to ensure that a certain percentage of the places allocated to them are accessible to residents who cannot afford to pay an accommodation bond.¹¹

7. *Aged Care Act 1997* section 96-1(1) enables the Minister to make Principles providing for various matters required or permitted by the Act.

8. Productivity Commission, *op. cit.*, p. 20.

9. The target population consists of non-indigenous people aged from 70 years and indigenous people aged 50 to 69 years: *ibid.*

10. *ibid.*, p. 21.

11. *ibid.*

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Assessing client eligibility

The Government funds State and Territory governments to operate Aged Care Assessment Teams (ACATs),¹² staffed by health professionals, to assess the aged care needs of frail aged people and determine most appropriate care based on legislation and guidelines.¹³

Funding residential care services

Residential aged care is largely publicly funded.¹⁴

In other words, the Government provides most of the recurrent funding (with State and Territory governments contributing to the overall costs) and user contributions (by way of residents' fees and charges) providing the rest of the revenue.¹⁵

Government funding of residential aged care is mainly determined by residents' assessed care needs, using the Aged Care Funding Instrument (ACFI).¹⁶

Setting prices

The Government regulates the amount that aged care recipients pay for subsidised aged care.¹⁷

According to the Productivity Commission:

As of 1 July 2008, the three main daily user fees and charges for *new* non-pensioner residents receiving standard care in residential facilities that are 2008 compliant are the:

- basic daily care fee, up to \$32.05 a day
- asset tested accommodation charge, for high care residents with assets worth more than \$34 500, the rate increasing from zero to \$26.88 a day when assets exceed \$90 410.40
- income tested fee, with residents being charged up to \$56.57 a day or the cost of their care, whichever is the lesser.¹⁸

12. In Victoria, these teams are called 'Aged Care Assessment Services': *ibid.*

13. *ibid.*

14. *ibid.*

15. *ibid.*, pp. 21–22.

16. *ibid.*, p. 22. For an explanation of ACFI, see *ibid.*, p. 23.

17. *ibid.*, p. 24.

18. See *ibid.*

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Aged care recipients may also have to pay accommodation bonds to enter low care or extra service residential facilities.¹⁹ Although accommodation bond amounts are not capped, approved providers cannot levy an amount leaving an aged care recipient with assets worth less than the threshold amount.²⁰ When an aged care recipient leaves an aged care facility, the balance of the bond amount is refundable to that recipient.²¹

Quality control

The *Quality of Care Principles 1997*²² set out standards relating to the quality of care in aged care facilities, the compliance with which is assessed by the Aged Care Standards and Accreditation Agency (the Agency).²³

Non-compliance with standards results in sanctions imposed on the non-complying approved provider, which may include suspension of funding and revocation of approval.²⁴

The Office of Aged Care Quality and Compliance (OACQC) investigates aged care services funded by the Government under the Act and oversees the following:²⁵

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19. For an explanation of the different levels of care, see Department of Health and Ageing, *Aged Care Assessment and Approval Guidelines*, September 2006 at: <http://www.aodgp.gov.au/internet/main/publishing.nsf/Content/ageing-acat-acapaag.htm~ageing-acat-acapaag04.htm>, accessed on 29 October 2008. See also Aged Care Australia, 'Types of care and services', Department of Health and Ageing, 7 March 2007, at: <http://www.agedcareaustralia.gov.au/internet/agedcare/publishing.nsf/Content/Types%20of%20care%20and%20services>, accessed on 29 October 2008. Aged care recipients requiring high levels of care may have to pay an accommodation charge if their assets exceed a particular amount: Productivity Commission, op. cit.
 20. As at 1 July 2008, the threshold amount is \$34 500: *ibid.*
 21. *ibid.*
 22. *Quality of Care Principles 1997* at [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/FE2DB3472E32E447CA25741200168B72/\\$file/QualityofCarePrinciples1997.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/FE2DB3472E32E447CA25741200168B72/$file/QualityofCarePrinciples1997.pdf), accessed on 10 November 2008. These Principles are among several Principles made under *Aged Care Act 1997* section 96-1(1). See note 7 above.
 23. Productivity Commission, op. cit., p. 25. For an explanation of the role of the Agency, see The Aged Care Standards and Accreditation Agency, 'About the Agency', at: <http://www.accreditation.org.au/AboutTheAgency>, accessed on 29 October 2008.
 24. Productivity Commission, op. cit., p. 26.
 25. For an explanation of the role of the OACQC, see Department of Health and Ageing, 'Role of the Office of Aged Care Quality and Compliance', at: <http://www.health.gov.au/internet/main/publishing.nsf/Content/533BD8F8521DC312CA25>

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- the Aged Care Complaints Investigation Scheme;
- police checks for relevant aged care staff and volunteers in Australian Government-subsidised aged care services;²⁶
- compulsory reporting of sexual and serious physical assault in residential aged care, with protections for approved providers and staff who report;
- compliance and sanctions action; and
- prudential regulation.

Profile of aged care providers

In 2007, there were around 2872 residential aged care providers in Australia.²⁷ Of these, approximately 61.4 per cent are private not-for-profit, 26.9 per cent are private for-profit and the remaining are government providers (11.75 per cent).²⁸

Changes in the industry

The aged care industry has undergone significant change since the Act was enacted. A recent report has noted that the number of people receiving subsidised care has doubled in that time.²⁹ In addition, the nature of the aged care industry has changed significantly.

Nature of the aged care industry

The current legislative framework reflects the ‘cottage industry’ nature of the aged care industry that was present when the Act was introduced.³⁰ Since then, the trend in the

[730E001C019B/\\$File/Role%20of%20the%20office%20final.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/8FDF9FBCB0DBC281CA25730E000899EA/$File/Role%20of%20the%20office%20final.pdf), accessed on 29 October 2008.

26. For an explanation of police checks on aged care providers and employees, see Department of Health and Ageing, ‘Police checks’, at: [http://www.health.gov.au/internet/main/publishing.nsf/Content/8FDF9FBCB0DBC281CA25730E000899EA/\\$File/police%20checks.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/8FDF9FBCB0DBC281CA25730E000899EA/$File/police%20checks.pdf), accessed on 29 October 2008. For a critique of the effectiveness of police checks in the aged care sector, see comments made by Lillian Jeter, a spokeswoman for the Elder Abuse Prevention Association, who argues that police checks will not make any difference to patient safety: Kate Benson, ‘Nursing home staff sacked for alleged sexual abuse’, *Sydney Morning Herald*, 22 October 2008, p. 1.
27. Productivity Commission 2008, op. cit., p. xvi.
28. *ibid.*
29. See Grant Thornton, *Aged care survey*, October 2008, p. 4, at: http://www.grantthornton.com.au/files/aged_care_survey_2008-final.pdf, accessed on 28 October 2008.
30. Explanatory Memorandum, op. cit., p. 1.

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industry has been a separation between the owner and operator of aged care venues.³¹ In addition, the industry is moving towards a ‘campus’ model of care, whereby a broad range of services are being provided on the one site or by the one facility.³²

Aged care recipients

The Australian population is ageing.³³ Currently, older Australians (aged 65 years and over) make up 13.4 per cent of the population (2.8 million) or one in seven Australians.³⁴ By 2050, the Productivity Commission estimates that one in four Australians will be aged 65 years or over.³⁵

As individuals age, some form of assistance with personal and everyday activities is usually required.³⁶ The latest available data indicates that 32 per cent of those aged between 65-74 years and 86 per cent of those aged 85 years and over require some form of assistance.³⁷ Consequently, there has been an increase in the numbers of people seeking to access aged care.

A further trend relating to an increase in numbers of people seeking to access aged care is that family structures have changed, whereby the family unit may no longer be a primary source of aged care for increasing numbers of people, as it has been in the past.

Another emerging trend is that people are entering residential aged care requiring a higher level of care.³⁸

Policy Commitment

Many of the provisions contained in the Bill were announced by the Minister for Ageing on 22 March 2008 as part of the [Better protection for frail aged Australians](#) package (the reform package).³⁹ The reform package, to be administered by the Department of Health and Ageing (DOHA), sets out a range of measures to improve quality and to protect frail aged people. These measures include:

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31. *ibid.*
 32. *ibid.*
 33. See, for example, Grant Thornton, *op. cit.*, p. 4.
 34. Productivity Commission, *op. cit.*, p. xv.
 35. *ibid.*, p. xv.
 36. *ibid.*
 37. *ibid.*, p. xvi (2003 data).
 38. Grant Thornton, *op. cit.*
 39. See the Hon. Justine Elliott MP, Minister for Ageing, *Better protection for frail aged Australians*, media release, 22 March 2008.

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- increased visits of aged care facilities by the Agency,⁴⁰ an independent ‘watchdog’
- increasing the powers of the Agency
- expanding the requirement for all aged care employees to undergo police checks, irrespective of whether they have supervised or unsupervised access to residents⁴¹
- requiring investigation staff to check on both residents and paperwork in a facility, and
- reviewing the Act to fill in gaps in the legislation, as well as improve quality of aged care.⁴²

The reform package is consistent with the Government’s pre-election commitment in relation to aged care.⁴³

Committee consideration

The Bill has been referred to the [Senate Community Affairs Committee](#) (the Committee) for inquiry and report by 20 November 2008.⁴⁴

The Committee has called for submissions by 5 November 2008.

Position of significant interest groups/press commentary

Although the Government has stated that it did consult with stakeholders in relation to the Bill,⁴⁵ there has been limited public commentary on the Bill—which perhaps reflects the relatively uncontroversial nature of the Bill.

40. As to the role of the Agency, see above note 23.

41. Currently, police checks only apply to aged care staff who have unsupervised access to aged care residents—these checks would occur under the Accountability Principles of the Act and the Government plans to have this reform in place by as early as 1 January 2009: see the Hon. Justine Elliott MP, Minister for Ageing, *Aged care police checks – in place as early as January 1*, media release, 21 October 2008.

42. See above note 39.

43. See Australian Labor Party, *National Platform and Constitution 2007*, pp. 131–134 at: http://www.alp.org.au/download/now/2007_national_platform.pdf, accessed on 28 October 2008.

44. See Senate Standing Committee on Community Affairs, ‘Inquiry into Aged Care Amendment (2008 Measures No. 2) Bill 2008’, at: http://www.aph.gov.au/senate/committee/clac_ctte/aged_care_amend_2008_measures_n_o2/index.htm, accessed on 10 November 2008.

45. Consultation occurred through the Ageing Consultative Committee (the ACC), comprising of peak industry organisations, as well as professional union and consumer organisations: the Hon. Justine Elliott MP, Minister for Ageing, *Further protection for Aged Care*

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However, it is noted that the Bill has been criticised for focusing too much on compliance, as opposed to alleviating the ‘already overburdened regulatory system on the aged care industry’, which continues to be insufficiently funded.⁴⁶

Similar sentiments about the current aged care industry have been reflected in research showing that many aged care providers have been incurring ‘unsustainable operating losses’ and could hardly afford to keep existing facilities running.⁴⁷ Such research indicates that high consumer demand for aged care facilities is not being matched by investor interest due to low returns, with recommendations for a review of funding and regulatory arrangements so as to boost investment:

The regulatory and pricing framework now threatens the viability of the aged care sector by suppressing incentives to invest in modern aged care infrastructure. This decline in investment severely limits choice for consumers of aged care services.⁴⁸

Pros and cons

Although there has been little public comment on the Bill, it had been previously noted that there was a need for consistent regulation of the sector as well as the capacity to be flexible and responsive.⁴⁹

In a recent survey of the aged care sector, Professor Hogan (who completed a review of the aged care sector in 2004) noted that:

residents, media release, 16 October 2008. For information about the ACC, see the Hon. Justine Elliott MP, Minister for Ageing, *New Aged Care Advisory Committee Improves Consultation With Sector*, media release, 25 June 2008. For information relating to the consultation process in relation to the Bill, see Explanatory Memorandum, op. cit., pp. 12-13.

46. Australian Ageing Agenda, *Proposed amendment to Aged Care Act*, 16 October 2008, at: <http://www.australianageingagenda.com.au/2008/10/16/article/REWWFZXXWZ.html>, accessed on 28 October 2008.
47. Yasmine Phillips, ‘Outdated aged care fails to meet needs of elderly’, *West Australian*, 15 October 2008, p. 17. See also Grant Thornton, op. cit.
48. Grant Thornton, op. cit., p. 3. See also Edwina Scott, ‘Care crisis: investors shun nursing homes’, *Canberra Times*, 16 October 2008, p. 11.
49. Refer to Aged Care Association of Australia, *Productivity Commission research a wake-up call for government*, media release, 26 September 2008, [http://www.agedcareassociation.com.au/content/Media per cent20Release per cent20wake per cent20up per cent20call per cent20on per cent20aged per cent20care per cent2026Sept2008.pdf](http://www.agedcareassociation.com.au/content/Media%20Release%20wake%20up%20call%20on%20aged%20care%2026Sept2008.pdf). See also J Sammut, ‘Aged-care industry desperate for bond extension’ *Australian Financial Review*, 4 October 2008, p. 63. [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressclp per cent2F6FQR6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressclp%20per%20cent2F6FQR6%20per%20cent22), accessed 29 October 2008.

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...it is imperative that the review of our aged care regulatory and funding arrangements are revisited. In particular, careful scrutiny must be given to those aspects of regulation which limit consumer choice and investment in modern infrastructure.⁵⁰

It could be argued that this Bill does increase the regulation of the aged care industry, however, the proposed amendments do not appear to limit consumer choice. Equally, it could be argued that the proposed amendments are necessary for accountability of the aged care sector as the current corporate structures do not reflect what is articulated in the Act.

Although outside the scope of the Bills Digest, the over-regulation of the aged care sector has been a concern for some time. The case for less regulation was made in the ‘Hogan Review’ in 2004 and most recently in the Productivity Commission’s report on aged care services (2008). The Grant Thornton Aged Care Survey (2008) found that the regulatory and pricing framework decreased the viability of the sector. Although this Bill addresses some of the inconsistencies in the Act, it does nothing to address the fundamental concern of over-regulation and the need for regulatory reform.

Financial implications

According to the Government, there would be no financial implications on the Budget.⁵¹ However, it is expected that there would be additional financial burdens on approved providers in complying with their new and amended obligations under the Act. Additional and amended obligations proposed by the Bill may also affect investor confidence in the aged care industry.⁵²

Regulatory implications

It is expected that there would be some additional regulatory burdens on current approved providers, especially in relation to matters such as additional police checks and additional lump sum payment⁵³ obligations.

Until now, those approved providers, whose approved provider status cease (former approved providers), have been excluded from the regulatory regime. Proposed amendments in the Bill would include those former approved providers in the aged care

50. Grant Thornton, *op. cit.*, p. 11.

51. Explanatory Memorandum, *op. cit.*, p. 2.

52. See notes 46–48 above.

53. Lump sums in this Digest relate to payments made by aged care recipients for entry into a residential or flexible care service: see, for example, *Aged Care Act 1997* Divisions 57 (accommodation bonds and entry contributions); 57A (accommodation charges). As to the meanings of ‘residential care’ and ‘flexible care’, see *ibid.*, Schedule 1 clause 1.

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regulatory regime, in so far as their former provision of aged care services has ongoing implications, for example, obligations under the Bond Security Act.

Main provisions

As the Explanatory Memorandum provides a comprehensive explanation of the proposed amendments, this Digest will focus on the major themes rather than the detail of individual provisions in Schedule 1 Part 1 of the Bill.⁵⁴

Amendments to the Aged Care Act 1997

Improving regulation of aged care providers

As mentioned earlier, when the Act was initially enacted, the typical business structure was one where the owner of the aged care facility was also the operator of those facilities and the regulatory regime in the Act reflects that type of structure.⁵⁵ On the other hand, the owner and operator of a facility now have distinct and, at times, separate roles and responsibilities. In addition, there has reportedly been an increase in:

- the level of investment into aged care services by large corporate entities, and
- aged care services being combined with other kinds of services within the same facility.⁵⁶

Consequently, the aged care regulatory regime provided for in the Act does not adequately address these changes.

The Bill proposes amendments to the Act to address the different business structures currently involved in providing aged care services, to improve and extend the regulation of aged care providers.

Approved provider status

First, the Bill proposes to amend the Act to clarify that the Act regulates aged care services and that approved provider status relates to:

- approval given for the type of aged care and specific services provided, and
- the allocation of places.

54. Part 2 of the Bill proposes application and transitional provisions.

55. Explanatory Memorandum, op. cit., p. 1.

56. *ibid.*

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For example, **item 1** proposes to **amend section 7-1** of the Act, to the effect that subsidy payments under Chapter 3 of the Act can only be made to a person for providing aged care if:

- that person is an approved aged care provider under Part 2.1, and
- the approval is in force with respect to:
 - the type of aged care provided, and
 - the aged care service through which aged care is provided

at the time in which such care is provided.

In addition, **item 2** proposes to **amend subsections 8-1(2) and (3)** of the Act to ensure that approved provider status does not become effective until the successful applicant has an allocation of places, and then, only in relation to the type of aged care and aged care service(s) for which an allocation has been granted.

Other proposed amendments reflect those proposed in **items 1 and 2**.

Expanding entities who would be subject to regulation

Second, the Bill proposes to amend the Act by expanding the entities involved in providing aged care which are subject to scrutiny and regulation, thereby trying to address:

- the current limitations on the Secretary⁵⁷ to consider the record of:
 - related entities, and
 - those who influence executive decision making of the aged care facility
- the current situation where obligations under the Act cease when approval status is no longer in force, thereby excluding former approved providers from the regulation regime, and
- the inclusion of an entity whose approved provider status is not yet in force because the entity has not yet been allocated any places, into the regulatory regime.

For example, **item 3** proposes to **insert new paragraph 8-3(1)(ga)** into the Act to the effect that where:

- the Secretary is deciding whether an applicant is suitable to provide aged care, and
- the applicant has relevant key personnel in common with another current or former approved provider (see **item 6**),

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the Secretary would have to consider the financial and managerial performance, and criminal records of that other current or former approved provider.

In addition, **item 6** proposes to **insert new subsection 8-3(6)** into the Act, defining the term ‘relevant key personnel in common’ with a current or former approved provider as follows:

- at the time the current or former approved provider provided aged care as approved, another person was one of its key personnel (see **item 7**), and
- that other person is a key personnel of the applicant.

Item 7 proposes to **insert new section 8-3A** into the Act defining ‘key personnel’ of an entity, which would include those persons who, at the relevant time, are:

- responsible for the entity’s executive decision making
- authorised or responsible for (or having significant influence over) the entity’s planning, directing or controlling activities
- either:
 - responsible for the nursing services provided by, as well as the day to day operations of, the aged care service conducted by the entity (irrespective of whether that person is employed by the entity), or
 - likely to be responsible for the nursing services provided by, as well as the day to day operations of, the aged care service proposed to be conducted by the entity (irrespective of whether that person is employed by the entity).

The reference to persons responsible for the entity’s executive decision making would include:

- if the entity is a corporation under the *Corporations Act 2001*—the director of that corporation, and
- in any other case—a member of the entity’s governing body.

Under **proposed subsection 8-3A(3)**, people who are, or are likely to be, responsible for nursing services in an entity’s aged care service, would have to hold recognised nursing qualifications.

The proposed definition in **item 7**, applying throughout the Act, would effectively increase the number of people involved, or likely to become involved, in providing aged care who are regulated and monitored.

Other proposed amendments reflect those proposed in **items 3, 6** and **7**.

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Ongoing suitability of approved provider to provide aged care

Third, consistent with the aim to extend the regulatory regime to reflect the increasingly diverse business structures involved in providing aged care, the Bill proposes amendments relating to notifying the Secretary of material changes related to the ongoing suitability of an approved provider to provide aged care.

For example, **item 11** proposes to **insert new subsections 8-5(3)-(5)** into the Act to ensure that the Secretary may, when notifying an applicant of approval of the applicant's aged care provider status, also notify the applicant of any circumstances that the Secretary is satisfied materially affects the applicant's suitability to provide aged care. An example of such circumstances is the applicant's engagement of a management company to manage the delivery of aged care services.

Such proposed amendment is related to **item 114**, which proposes to **insert new section 63-1C** into the Act, directly related to situations where approved aged care providers engage a management company to manage the delivery of aged care services. If an applicant for approved provider status relies on the management company to demonstrate skills and experience in providing aged care, the use of that management company should be an ongoing requirement and any change should be approved by the Secretary.

In addition, entities that have applied for approved provider status but have not yet been allocated any places would also be regulated.

For example, **item 15** proposes to **insert new subsection 9-1(3B)** into the Act, to ensure that where an entity has been approved as an aged care provider under section 8-1 but has not yet been allocated any places, that entity would have to comply with the obligations under section 9-1. This means that during the two year period in which an applicant may acquire an allocation of places, thereby bringing their approved provider status into effect, the applicant would have to notify the Secretary of those changes that could affect their suitability to be an aged care provider if they acquire allocation of places.

In addition, **item 25** proposes to **amend subsection 10-3(1)** of the Act by changing the reference to 'approved provider' with a reference to 'person' in relation to when the Secretary must revoke an approval. This proposed amendment means that an entity whose approved provider status is not yet in force because that entity has not yet been allocated places, would be covered by the subsection. Note that a revocation of an approval would be reviewable under Part 6.1 and may also occur as a sanction under Part 4.4 of the Act.

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Increased protection of aged care residents' bonds

There has been an increase in the value of accommodation bonds that are held by aged care providers.⁵⁸

In addition, it has been reported that situations have arisen in which there have been negative outcomes for aged care recipients, reflecting gaps in the current protection regime.⁵⁹ An example is that the Accommodation Bond Guarantee Scheme does not apply to lump sum payments made by aged care residents, for entry into care, to an entity that is not an approved provider at the time of payment but subsequently becomes an approved provider. One problem arising from that situation is that if the approved provider becomes insolvent, the Government cannot pay those lump sums through the Accommodation Bond Guarantee Scheme.⁶⁰

The Government states that it is committed to improving consumer confidence, and increasing corporate investment in aged care services⁶¹ and that the proposed amendments aim to ensure that accommodation bonds would be better protected under the Accommodation Bond Guarantee Scheme (accommodation bonds must be refunded if the approved provider becomes insolvent).⁶²

Examples of such proposed provisions are as follows.

Items 17 to 19 propose to amend **subsection 9-3A(1)** of the Act. These proposed amendments have the effect that the requirement to provide the Secretary with specific information under section 9-3A, about such matters as accommodation bonds and entry contributions, would apply to both current and former approved aged care providers. In addition, the list of information that the Secretary may request from the provider would be extended to:

- unregulated lump sums paid to the current or former provider, and
- the amount of one or more unregulated lump sum balances at a particular time.

Item 21 proposes to amend **subsection 9-3A(3)** of the Act, to the effect that where the approved provider is a corporation, failure to comply with the Secretary's request for such

58. At 30 June 2007, approximately 75 per cent of approved providers held accommodation bonds to the total value of \$6.3 billion: Explanatory Memorandum, op. cit., p. 1.

59. *ibid.*, p. 4.

60. *ibid.*

61. *ibid.*, p. 1.

62. See *ibid.*, pp. 1–2. See also the Hon. Justine Elliott MP, Minister for Ageing, *Further protection for Aged Care residents*, media release, 16 October 2008.

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information within the specified time, would be an offence with a penalty of an amount ranging from \$3 300 to \$16 500.⁶³

These proposed amendments are consistent with attempts to bring former approved providers into the regulatory regime (see above).

Subsection 14-5(4) lists examples of the matters that conditions, under which allocations are made, may relate to and **item 42** expands that list to include treatment of ‘pre-allocation lump sum’ (or part thereof) paid or payable to the person to whom a place is allocated, by a recipient of care in particular circumstances specified by **proposed subsection 14-5(6)**. This means that the Secretary may impose the following additional conditions on allocation that:

- the entity, to whom places are allocated, refund any pre-allocation lump sum to residents, and
- if, as a consequence of such refund, an accommodation bond agreement is entered into, the conditions and entry into force of such agreement, or
- the forgiveness of any obligation in relation to the pre-allocation lump sum (or part thereof).

Proposed subsection 14-5(5) provides that if the above condition(s) applies and the recipient of care remains in care with the same residential care service from the date the allocation was made, then both the aged care recipient and provider may enter into an arrangement for payment of an accommodation bond or charge under the Act. In such circumstances, both recipient and provider would have the same rights, duties and obligations in relation to the accommodation bond or charge as if the recipient entered the service on the day that the allocation was made.

Item 96 proposes to **amend subsection 57-14(1)** of the Act, enabling the Secretary to determine that, in accord with User Rights Principles,⁶⁴ a person must not be charged an accommodation bond, or an accommodation bond of more than a certain amount, if payment would cause that person financial hardship.

Refusal by the Secretary to make such a determination of financial hardship is reviewable under Part 6.1 of the Act.

A similar amendment is proposed by **item 108** in relation to accommodation charges.

63. The penalty proposed by the Bill is 30 penalty units. Usually, one penalty unit is \$110: *Crimes Act 1914* section 4AA. However, corporations may be subject to penalties five times the maximum amount for natural persons: *ibid.* subsection 4B(3).

64. As to Principles established under the Act, see note 7 above.

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The Bill also proposes amendments to the Act to ensure that obligations with respect to bond repayments (and interest thereof) would also apply to former approved providers who have outstanding bonds.

Item 102 proposes to **insert a new section 57-21AA** into the Act, requiring an approved provider, who ceases to be approved for a particular residential or flexible care service, to refund any accommodation bonds paid to that provider by aged care recipients for entry to that residential or flexible care service to the respective aged care recipients, within a time specified by **proposed subsection 57-21AA(2)**.

Under **proposed subsection 57-21AA(3)**, if the former aged care provider is a corporation, failure to comply with **proposed subsections 57-21AA(1)** and **(2)** would be an offence with a penalty of an amount ranging from \$3 300 to \$16 500.⁶⁵

According to the Government, this amendment would address the current gap in protection of bonds under the Act as statutory obligations on aged care providers cease when providers cease to be approved under the Act.⁶⁶

In addition, **items 103** and **104** propose to **insert new subsections 57-21A(1A)** and **57-21B(1A)** into the Act, which would have the effect of requiring aged care providers (current and former), who would be subject to refunding accommodation bond amounts or entry contributions, to pay interest on those amounts.

Protecting aged care recipients' health, welfare and other interests

The Bill also proposes amendments expressly focused on the protection of the needs of the aged care community, as well as aged care recipients' health, welfare and interests.

Examples of such proposed provisions are as follows.

Item 66 proposes to **insert new section 16-13**, which would provide for specific conditions to be met before the Secretary can approve the transfer of provisionally allocated places. These include conditions that the Secretary must consider under **proposed section 16-16**, when deciding whether the needs of the aged care community in the particular region would best be met by the transfer.⁶⁷

Item 112 proposes to **amend subparagraph 62-1(b)(iv)** to allow for personal information about an aged care recipient to be released for the purpose of complying with obligations

65. See note 63 above.

66. Explanatory Memorandum, op. cit., p. 47.

67. The Government has also stated that the general rule with transfers of provisionally allocated places is that it will only happen to meet the needs of aged care in a particular community in exceptional circumstances: *ibid.*, p. 35.

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under the Act or any Principle made under section 96-1. **Proposed amended subparagraph 62-1(b)(iv)** would mean that in the event of a situation occurring where an aged care provider had to inform the Secretary that a resident is absent from the aged care facility without explanation, the aged care provider would not be in breach of non-disclosure provisions in the Act.⁶⁸

Items 115 to 118 propose to **amend section 65-2** of the Act in relation to matters that the Secretary must consider when deciding the appropriateness of sanctions on approved providers for non-compliance with responsibilities under Parts 4.1 to 4.3 of the Act.

In particular, **items 116 and 117** propose two additional matters that the Secretary would have to consider under **new subsection 65-2(1)**:

- whether the non-compliance would threaten future recipients' health, welfare or interests, and
- the desirability of deterring future non-compliance.

Item 18 proposes to **insert new subsection 65-2(2)** into the Act to clarify that the Secretary's paramount consideration, when deciding the appropriateness of imposing sanctions under **subsection 65-2(1)** of the Act, must be whether non-compliance threatens or would threaten current and future aged care recipients' health, welfare or interests.

Streamlining assessments by Aged Care Assessment Teams

Within the context of increasing numbers of people seeking to access aged care, the Bill proposes amendments to streamline assessments by the ACATs, allowing for more timely and consistent assessments for aged care.

Examples of proposed provisions are as follows.

Items 69 and 70 propose to **amend section 23-3** of the Act to address the situation where aged care recipients' assessments are reviewed unnecessarily or too often for administrative reasons rather than because of a change of the recipients' aged care needs. Section 23-3 currently provides for the lapsing of approvals for certain types of care if care is not received within a certain time.

Item 70 proposes to **insert new subsection 23-3(1A)** into the Act, whereby approval would not lapse under the following types of aged care:

- residential care provided as respite care. or

68. For information about the Government's proposed measures regarding aged care residents who go missing, see Hon. Justine Elliott MP, Minister for Ageing, *Minister for Ageing announces measures for residents who go missing from aged care facilities*, media release, 2 June 2008.

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- residential care not limited to low level of residential care, or
- flexible care (specified in the Approval of Care Recipients Principles).

These proposed provisions may improve the costs of the ACAT system, a concern which appears to be consistent with the Government's announcement that it will also provide \$72.16 million to the States and Territories for the Aged Care Assessment Program for 2008-09, as part of its commitment to streamline and improve the aged care assessment process.⁶⁹

Review of decisions

Items 120 to 129 propose **amendments to section 85-1** of the Act (which includes a table setting out what decisions are reviewable by the Administrative Appeals Tribunal (AAT)), many of which are consequential to other proposed amendments in the Bill. In particular, **items 124, 125, 127 and 129** propose that particular decisions would be reviewable by the AAT, such as decisions to:

- reject an application for transfer of provisionally allocated places, as well as those allocated places other than provisionally allocated places
- approve (or to reject an application to approve) a day as being a transfer day for transfer of provisionally allocated places, as well as those allocated places other than provisionally allocated places, and refuse to make a financial hardship determination under **proposed paragraphs 57-14(1)(b) and 57A-9(1)(b)** (see **items 96 and 108**).

Amendments to the Aged Care (Bond Security) Act 2006

Regulating former approved providers

The Bill proposes amendments to the Bond Security Act to ensure that the Bond Guarantee Scheme would apply in relation to both current approved providers, as well as former approved aged care providers who continue to have outstanding bonds.⁷⁰

Unregulated lump sum and lump sum balances

Other proposed amendments relate to provision for unregulated lump sums and unregulated lump sum balances.

Item 157 proposes to **insert** a new definition 'unregulated lump sum balance' into **subsection 6(1)** of the Bond Security Act. Unregulated lump sum balance would be

69. The Hon. Justine Elliott MP, Minister for Ageing, *Action to assess older Australians for aged services: ACATS and \$72.16 million injection*, media release, 16 October 2008.

70. Explanatory Memorandum, op. cit., p. 56. Examples of such proposed amendments are **items 141, 149, 150, 158, 163, 169, 170-175, 177, 179, 180, 182-184** of the Bill.

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defined as an amount, at a particular point in time, which is equal to the difference between:

- the unregulated lump sum amount, and
- any amounts that had been, or was permitted to be, deducted at that particular point in time, under the Agreement under which the lump sum was paid.

Item 161 proposes to **insert new subsection 6(3)** into the Bond Security Act, explaining the meaning of ‘unregulated lump sum’ as an amount of money paid by an aged care recipient to a person called the ‘unregulated lump sum holder’ (the amount), in circumstances specified in **proposed subsection 6(3)**. These circumstances include:

- the amount is paid under a written Agreement for the aged care recipient’s entry into either:
 - a residential care service, through which residential care—that is not respite care—is or will be provided by the unregulated lump sum holder, or
 - a flexible care service through which flexible care is or will be provided by the unregulated lump sum holder
- the amount does not accrue on a daily basis
- under the Agreement, if the unregulated lump sum holder ceases to provide the relevant aged care to the aged care recipient, the amount must be refunded to the aged care recipient
- the unregulated lump sum holder is an approved provider immediately before 1 January 2009
- the amount was paid to the unregulated lump sum holder before:
 - 1 January 2009, and
 - unregulated lump sum holder became an approved provider
- the amount is not an entry contribution, and
- the aged care recipient continued to be provided with the relevant aged care after the amount had been paid and before the unregulated lump sum holder became an approved provider.⁷¹

71. Note that the Bill proposes that the following terms have meaning given by the Dictionary in Schedule 1 to the Act: ‘entry’ in relation to a person and an aged care service (**item 146**); ‘aged care service’ (**item 143**); ‘residential care service’ (**item 154**); ‘flexible care service’ (**item 148**); ‘respite care’ (**item 155**); ‘residential care’ (**item 153**); and ‘flexible care’ (**item 147**).

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Other examples of proposed amendments that include unregulated lump sum and unregulated lump sum balances being given into protections under the Bond Security Act include **items 144, 145, and 156**.

Insolvency events

Items 162 to 185 propose amendments to the Bond Security Act specifically in relation to insolvency events.

Item 162 proposes to **insert new section 6A** into the Bond Security Act, dealing with transitional issues. **Proposed section 6A** exempts certain people for a certain period of time, from the operation of the Bond Security Act in relation to certain insolvency events.⁷²

The Government states that this proposed provision would ensure that the Commonwealth Government will not be responsible for bonds held by aged care services that never held an allocation of Commonwealth funded places.⁷³ It is noted that the Government offers an assurance that:

Current approved providers whose approval will lapse as a result of the requirement to have an allocation of places (which occurs on 1 July 2009), will be covered by the Guarantee Scheme for a period of 12 months from 1 July 2009. The period of coverage of the Guarantee Scheme will cease on 1 July 2010. This will provide care providers and their residents with time to make any necessary adjustments to their contractual arrangements.⁷⁴

However, this does raise the question of what would happen to bonds held by aged care providers that do not receive Commonwealth funding, although it is expected that the number of such providers would be relatively low.

Item 169 proposes to **substitute section 9** of the Bond Security Act, to the effect that former approved providers would have the same obligation under **proposed section 9** to notify the Secretary of first occurrences of insolvency events, which are set out in the definition of ‘insolvency event’ in section 6 of the Bond Security Act.

Expanded considerations for the Secretary when determining refund amounts

Item 176 proposes to **amend paragraph 12(2)(b)** of the Bond Security Act, to the effect that the Secretary would be able to consider any amount that may have been refunded up till the time the refund amount is determined and that should be considered in determining that refund amount.

72. For details, see **item 162** of the Bill.

73. Explanatory Memorandum, op. cit., p. 59.

74. *ibid.*

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Item 181 proposes to **insert new section 13A** into the Bond Security Act, providing for the Secretary to make an additional amended refund declaration in circumstances where:

- a current or former approved provider refunds part of a bond balance (the initial refund)
- after that initial refund, the Secretary determines the amount considered equal to the outstanding amount of bond balance as at the time of that determination
- the Secretary makes a refund declaration under section 13 of the Bond Security Act, and
- the current or former approved provider's initial refund is void or voidable under the *Corporations Act 2001* or the *Bankruptcy Act 1966* (depending on whether the current or former approved provider is a corporation) to the effect that the person, to whom the initial refund of the bond balance was made, does not retain the value of that refund.

The formal requirements for the additional refund declaration would be similar to the requirements for current refund declarations under section 13 of the Bond Security Act.

Concluding comments

This Bill is largely uncontroversial and seeks to ensure the provisions of Act accord with changes in the aged care industry, as well as addressing certain gaps in the current aged care regulation framework.

However, Parliament may wish to consider the extent to which additional and amended obligations proposed by the Bill would affect investor confidence in the aged care industry, especially in the context of increasing demand for aged care services.

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