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6 November 2008

Ms Lisa Fenn  
A/g Committee Secretary  
Community Affairs Committee  
Committee Secretariat  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Fenn,

## RE: Aged Care Amendment (2008 Measures No 2) Bill 2008

Aged Care Association Australia (ACAA) has closely examined the amendments proposed in the Aged Care Amendment (2008 Measures No 2) Bill 2008 and wish to express our appreciation for the opportunity to comment on the proposed amendments.

In the attached summary of recommendations we have only commented on those sections which we feel need some change and in some instances, our recommendation to repeal the proposed amendment.

In addition, we have included two additional changes to the Bill, namely:

### 1. ACAT assessment

The section that deals with enhancing Aged Care Assessment Team (ACATs) efficiencies ignores one of the most obvious and irritating requirements of the existing scheme.

When an ACAT assesses a prospective resident and determines that the resident is residential low care but on admission the aged care provider having completed an Aged Care Funding Instrument (ACFI) assessment determines the resident is classified as a high care recipient, the current scheme dictates the aged care provider will receive a subsidy at the default rate \$44.14 per day though the aged care provider may have assessed the resident as requiring care at \$135.00 per day.

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The default rate continues until an ACAT visits the facility and completes a fresh assessment and confirms low or high care. This can often take as much as twelve weeks for the ACAT re-assessment to occur.

Meanwhile, the aged care provider is receiving the default rate of subsidy without any backdating provisions.

In other words, the approved provider is required to provide the services as if the resident were receiving the higher subsidy, though even when the ACAT assessment confirms high level care is correct, there is no correction of the subsidy to date of admission. The correct subsidy is only paid from the date of the ACAT re-assessment.

There are aged care providers who over the course of a year have lost subsidy payments in excess of \$50,000.00 due to the time for ACAT re-assessments but more particularly, due to the extremely low rate of the default subsidy, the refusal by the Department to support a change to the date on which the correct subsidy should be paid; the date of admission.

## 2. Sub Division of Residential Care Facilities

ACAA is concerned regarding the ownership structure attached to the Bridgewater facility in Victoria.

In this case, from ACAA's understanding, the owner of the residential care facility sold some individual accommodation units within the nursing home complex to individual investors on a strata title basis.

ACAA believes there is a need to reconsider the obligation on an approved provider to ensure the integrity of the real property or control of the real property in which it is proposed the aged care operator plans to conduct the activities of a residential care service funded under the Commonwealth Aged Care Program.

ACAA would support a thorough analysis of the implications of such a restriction and the impact of the Aged Care Act 1997 or other legislation on achieving this objective.

Thank you for your attention to this matter.

Yours sincerely



Rod Young  
CEO

# Comments on

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

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### Part 1

#### Item 5

This amendment requires the secretary to consider the record of the applicant taking into account shared key personnel. Where this is the case the record of the personnel in other facilities is to be taken into account

**ACAA Comment:** Provided a strong record is a relevant consideration.

#### Item 6

This amendment requires the secretary to consider the record of the applicant taking into account shared key personnel. Where this is the case the record of the personnel in other facilities is to be taken into account

**ACAA Comment:** Provided a strong record is a relevant consideration.

#### Item 7

This amendment introduces the new section 8-3A which defines key personnel and includes any person having authority for directing or controlling activities of the facility and those responsible for executive decisions.

**ACAA Comment:** ACAA is concerned that the definition of key personnel is being expanded extensively but may not address the primary issue or may expand even further over time.

#### Item 11

This amendment indicates that management companies which manage the delivery of care services should become a condition of approval and would also be considered to be key personnel.

**ACAA Comment:** This requires better definition as management company arrangements can take a variety of forms. This amendment leaves considerable discretion to the Secretary and considerable uncertainty for providers.

#### Item 14

This is a drafting amendment which recognizes the amendment to the key personnel arrangements at item 7 and retains the current outcome in the legislation.

**ACAA Comment:** Provided the Secretary provides for the common form to be lodged electronically.

#### Item 15

This amendment legislates that an Approved Provider who does not yet hold an allocation of places (and AP status not yet in force) must comply with the obligations under Section 9-1

**ACAA Comment:** How will DoHA monitor Approved Providers who do not have any allocated places comply with this provision?

Item 33

This amendment states that the secretary must take into account, in the allocation of places, key personnel in common with other approved providers in making the decision to allocate places.

**ACAA Comment:** ACAA considers that this could have far reaching workforce ramifications and could be construed to be a form of black-listing. ACAA recommends that this should be limited to the boards or the owners and therefore recommends that the words “as defined in paragraphs 8-3A (1) (a) or (b)” should be inserted between the words “personnel” and “in common” on line 1 of the amendment.

Item 34

This is a consequential amendment following the introduction of paragraph 14-1 (da) in item 33.

**ACAA Comment:** No Comment other than those provided in Item 33

Item 35

This amendment defines “relevant key personnel in common”.

**ACAA Comment:** No Comment other than those provided in Item 33

Item 68

This amendment is consequential to the policy to align the approved provider status with the allocation of places.

**ACAA Comment:** section 18-1 has sub-sections (1), (2) and (3). To insert a sub-section (c) after sub-section (3) appears to be a drafting error. ACAA suggests the “(c)” be amended to “(4)”.

**NEW ITEM TO BE ADDED**

ACAA proposes that there be no definition between high and low care on the approval of a resident under Division 22. This would ensure that providers are not penalized where ACATs assess the person as requiring low care yet the ACFI indicates that the person requires high care. Currently this person would be funded at the default low care rate (\$44.14 per day) until such time as the ACAT reassesses the person. As the ACAT decision cannot be backdated the provider loses care funding often amounting to thousands of dollars.

**ACAA Comment:** ACAA recommends that sub-section 22-2 (3) be repealed. This will also have an effect on other sections of the Act

- Delete sub-section 22-4 (2) and replace with:

“The Secretary may limit the assessment to assessing the person in relation to the person’s eligibility to receive one or more specified types of \*aged care”

- Delete paragraph 22-6 (2) (c)

Item 70

Following the new item added by ACAA above the proposed amendment in this item, to ensure that high care approvals do not lapse, requires amendment. Accordingly the following words should be deleted from the proposed paragraph 23-3(1A) (b)

“the care in respect of which he or she is approved is not limited to a \*low level of residential care”

**NEW ITEM TO BE ADDED**

- In paragraph 57-2 (1) (aa)(iv) delete the words “a \*low level of care”.
- Delete paragraph 57A-2(1) (ii)

These amendments are required following the ACAA amendment to delete the Section 22-2 differentiation between high and low care

Item 79 – 81

Purports to give the Secretary power when considering an application for certification to have regard to the compliance status of any approved provider or former approved provider that shares or shared key personnel with the applicant.

**ACAA Comment:** As certification is meant to expire 31 December 2008 as 1999 Compliance on Fire and Safety and 2008 Space and Privacy has been substantially met, it is difficult to understand what this amendment is trying to address.

ACAA has been calling on the Government to enter into discussions with the industry to consider the role and place of certification beyond 31 December 2008, if any.

Item 83 creates a new focus for the Secretary to determine that a person must not be charged an accommodation bond of more than a specified maximum amount because of financial hardship.

**ACAA Comment:** ACAA would need to be consulted on the policies and procedures to be put in place to determine a maximum bond level due to financial hardship.

Item 93 – 100

Item 96 as per Item 83 and Item 100

Item 106 same as 83 and Item 100

107 “ “ “ “

108 “ “ “ “

Item 100

This is a consequential amendment following the change to Section 57-14 which stated that the Secretary may limit the accommodation bond that may be payable because of financial hardship.

**ACAA Comment:** ACAA would need to be consulted on the practices and procedures to be put in place to determine a maximum bond level due to financial hardship

Item 102

This amendment has been inserted to protect a resident who has paid a bond and the person to whom they have paid a bond subsequently relinquishes the approved provider status. It imposes the requirement for repayment of the bond balances (and applicable interest) on persons who have ceased to be approved providers.

**ACAA Comment:** Whilst the idea behind this is to protect the resident, an objective ACAA supports, this complicates the process on the sale of a facility as a going concern. The sale of aged care facilities takes into account the net assets in the sale price. One of the liabilities taken into account is the level of accommodation bond balance.

Accordingly under contract law the liability passes to the new provider. This amendment states that the bond balances must be repaid by the former approved provider within 90 days. Therefore the incoming provider will have to enter into a new accommodation bond agreement with all residents. This may prove impractical.

ACAA recommends that at the end of paragraph 57-21AA (1) (b) the word “and” should be included. The following paragraph should be inserted after paragraph 57-21AA (1) (b):

“(c) the liability in respect of all outstanding accommodation bond balances, including entry contribution balances and pre-allocation lump sums, has not been transferred to the approved provider by the former approved provider in the contract of sale”

#### Items 103 and 104

These amendments are consequential to the amendment outlined in Item 102. They impose a requirement on the former approved provider to also pay interest on the balances owed to residents at the time the former approved provider became the former approved provider.

**ACAA Comment:** ACAA has no comment provided the recommendation in relation to former approved providers who make allowances in the contract of sale (see item 102) is acted upon.

#### Item 112

This amendment is far too wide as it gives the secretary power to have access to personal information relating to anything under the Act or Principles. We are currently in dispute with the department over validation of expired RCS forms and a requirement to submit GPFs when they are not required. This would give the department the power to access whatever records that had an inkling to look at including employee personnel records. The current legislation allows the secretary all the power necessary to ensure compliance with the Act or Principles.

**ACAA Comment:** Repeal the amendment proposed under this item to subparagraph 62-1 (b) (iv)

#### Item 116

This introduces a new paragraph 65-2 (1) (ca) and introduces a sanction that can be imposed where the secretary considers the non-compliance will threaten the health and welfare of future residents. ACAA would like to know how this is determined and what

the secretary will take into account. The proposed amendment is extremely subjective as it currently stands.

**ACAA Comment:** repeal the amendment.

Item 117

This introduces a new paragraph 65-2 (1) (da) and allows the secretary to impose a sanction simply because he/she considers that the action of imposing the sanction will deter future non-compliance. This is again extremely subjective.

**ACAA Comment:** repeal the amendment.

Item 118

This amendment states that the secretary should give paramount consideration to the health, welfare or interests of residents and future residents. Again we ask how this is to be determined?

**ACAA Comment:** delete the words “and future” after the word “current” on line 2

Item 119

This amendment changes the sanction from restricting the Approved Providers approval to residents in the facility prior to the S67-5 notice (therefore no subsidy for new residents) to restricting the payment of subsidy to residents in the facility prior to the S67-5 notice (therefore no subsidy for new residents). This means that the provider is still the Approved Provider and will have the same responsibilities even though no subsidy is payable during the sanction period.

**ACAA Comment:** This penalty is excessively harsh and should be a fixed penalty not an open removal of funding for all new residents for at least six months.

ADDITIONAL SECTION

ACAA would recommend that these amendments should endeavor to address the circumstances recently experienced at the Bridgewater facility in Victoria.

One of the difficulties experienced by the Administrator in the Bridgewater case was the sale of the units in the nursing home on a strata title basis.

ACAA does not consider that the ownership structure of a residential care service lends itself to further subdivision of individual units on a strata title basis or any other real property basis.

ACAA would recommend a review of ownership and control issues that would avoid this situation arising in the future.