

The Senate

Community Affairs
Legislation Committee

Provisions of:

Aged Care (Bond Security) Bill 2005

Aged Care (Bond Security) Levy Bill 2005

Aged Care Amendment (2005 Measures No. 1)
Bill 2005

March 2006

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AGED CARE (BOND SECURITY) BILL 2005
AGED CARE (BOND SECURITY) LEVY BILL 2005
AGED CARE AMENDMENT (2005 MEASURES NO. 1)
BILL 2005

THE INQUIRY

1.1 The Aged Care (Bond Security) Bill 2005, Aged Care (Bond Security) Levy Bill 2005 and Aged Care Amendment (2005 Measures No. 1) Bill 2005 were introduced into the House of Representatives on 8 December 2005. On 8 February 2006, the Senate, on the recommendation of the Selection of Bills Committee (Report No. 1 of 2006), referred the provisions of the Bills to the Committee for report.

1.2 In recommending the reference of these Bills to the Committee, the Selection of Bills Committee stated that the reason for referral was that the residential aged care provider sector is unsure of the potential liability arising as a result of these Bills.

1.3 The Committee considered the three Bills at a public hearing on 2 March 2006. Details of the public hearing are referred to in Appendix 2. The Committee received eight submissions relating to the Bills and these are listed at Appendix 1. The submissions and Hansard transcript of evidence may be accessed through the Committee's website at http://www.aph.gov.au/senate_ca

THE BILLS

1.4 On 15 September 2005, the Commonwealth announced that it would strengthen the existing protection surrounding aged care residents' accommodation bonds by establishing a scheme to guarantee the repayment of bond balances if a provider defaults and by introducing new prudential regulatory arrangements.¹

This suite of three Bills provides the legislative framework to strengthen the protection of aged care residents' accommodation bonds.

1.5 The purpose of the Aged Care (Bond Security) Bill 2005 is to establish a scheme to guarantee the repayment of aged care residents' bond balances in the event that an approved provider becomes insolvent and is unable to meet their obligation to repay residents' bond balances. This Bill enables the Commonwealth to pay to a person an amount that is equal to a bond balance, and interest, owed to the person by an approved provider.²

1 Minister for Health and Ageing, Second Reading Speech, 8.12.05.

2 Aged Care (Bond Security) Bill 2005, Explanatory Memorandum, p.1.

1.6 The purpose of the Aged Care (Bond Security) Levy 2005 is to enable the Commonwealth to impose levies on approved providers in order to recover any costs (including administrative costs) incurred by the Commonwealth as a result of repaying accommodation bonds to residents in the event that an approved provider becomes insolvent and defaults.³

1.7 The purpose of the Aged Care Amendment (2005 Measures No. 1) Bill 2005 is:

- to amend the *Aged Care Act 1997* (the Act) to give effect to the establishment of new prudential regulatory arrangements to improve the management of residents' accommodation bonds and entry contributions;
- to amend the provisions in the Act relating to the timing of when a bond must be refunded and when a bond must be refunded in the event that a care recipient has died; and
- to consequentially amend the Act to ensure that all of the new rules relating to accommodation bonds apply to all services holding bonds whether they are residential care services or flexible care services.⁴

1.8 The Aged Care Amendment (2005 Measures No. 1) Bill 2005 will, after an initial three year period where the Commonwealth will meet the costs of the new prudential arrangements, have a direct financial impact to industry if an approved provider becomes insolvent and the Commonwealth has to pay outstanding bond balances to residents.

1.9 The Commonwealth will have the legislative capacity to recover costs from approved providers holding bonds in a series of instalments over a number of years. The magnitude of costs will depend on the monetary value of the outstanding bond balances (including interest) repaid by the Commonwealth on behalf of the defaulting approved providers and the administrative costs incurred.⁵

1.10 The Parliamentary Secretary to the Minister for Health and Ageing commented:

The new arrangements set out in the three bills will improve both the security of bonds and the management of bonds by the sector. The introduction of these protections demonstrates the coalition government's commitment to a world-class system of aged care that provides high-quality, affordable and accessible services to meet the individual needs and choices of older Australians.⁶

3 Aged Care (Bond Security) Levy Bill 2005, Explanatory Memorandum, p.1.

4 Aged Care Amendment (2005 Measures No. 1) Bill 2005, Explanatory Memorandum, p.1.

5 Aged Care (Bond Security) Levy Bill 2005, Explanatory Memorandum, p.1.

6 Parliamentary Secretary to the Minister for Health and Ageing, Second Reading Speech.

BACKGROUND

1.11 The *Review of Pricing Arrangements in Residential Aged Care* (the Hogan Report) released in May 2004, recommended 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 the legislation, the government may be deemed to be exposed to moral hazard. This possibility should 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.⁷

1.12 The Government response to the recommendations within the Hogan Report provided \$0.8 million to establish a provider funded guarantee fund and implement processes to improve the existing financial protections provided to residents.⁸

ISSUES

1.13 Most submissions supported the Commonwealth's initiative to strengthen prudential arrangements surrounding accommodation bonds, including the COTA Over 50s Alliance, Catholic Health Australia (CHA) and the Aged Care Association Australia (ACAA). The Association of Independent Retirees (A.I.R) stated that 'these Bills are of tremendous importance to retirees contemplating entering residential aged care facilities and those already in care'.⁹ However, a number of concerns were also raised. These issues will be addressed as they relate to each Bill.

Aged Care (Bond Security) Bill 2005

1.14 The ACAA commented that clearer definitions were required for events that would cause the Minister of the day to declare an insolvency situation and the administrative rules surrounding the recovery provisions from the industry in the event of a failure by an aged care provider to repay bonds.¹⁰ The Department of Health and Ageing (DoHA) provided a clear explanation that the Bill proposes the Minister may only make a default insolvency event declaration when the approved

7 Review of Pricing Arrangements in Residential Aged Care, pp.163-64.

8 Australian Government's Response to the Review of Pricing Arrangements in Residential Aged Care, p.4.

9 *Submission 2*, p.1 (A.I.R.).

10 *Submission 6*, p.1 (ACAA).

provider is an externally administered body and there is at least one bond balance outstanding.¹¹ The intent of this proposal is to guarantee bond monies when a technical insolvency event has not occurred but the provider is under administration and unable to repay bond balances to residents.

1.15 The ACAA also suggested that further specificity and rationale needs to be provided for the time period set in Clause 6 (2). This clause relates to the refund obligations of approved providers and states that approved providers will have been given the set of obligations ten days before the default event declaration was made and at that time the bond balances became outstanding bond balances.¹²

1.16 The Department explained in determining the ten day period in Clause 6, it was trying to account for three different scenarios:

- (1) where new people come into the sector after a default event has been declared;
- (2) where people leave the sector after a default event has been declared but before a levy has been imposed; and
- (3) where people remain in the sector but who might change their arrangements in relation to their bonds to attempt to avoid paying the levy.¹³

1.17 The ten day default event allows for two situations where approved providers will not be liable to pay a Commonwealth imposed levy. These two situations involve an approved provider who begins operating in the aged care industry after the default event, therefore missing the ten day period before the default event and approved providers who cease operating after the default event but before a levy is imposed.

1.18 The Department explained that even though it is possible for approved providers leaving the industry to declare a potential future liability in their financial reports, this declaration does not enforce liability to pay a levy on new approved providers entering the industry. However, if a new approved provider buys an existing business and remains trading as the same legal entity, the corporation remains liable to pay a levy imposed by the Commonwealth.

1.19 Regarding these two situations, the Department stated:

It is not the Government's policy intent that newcomers to the industry (following a default event) be required to contribute to the levy imposed as a result of a default event that occurred prior to the involvement of the newcomer in the sector. A principle of the new guarantee system is that providers holding bonds at the time of a default event share the risk and the cost of the default event, as they have benefited from the guarantee of their bond liabilities up to that point. Industry has been consulted on the fact that

11 *Committee Hansard*, 02.03.06, p.20 (DoHA).

12 *Aged Care (Bond Security) Levy Bill 2005*, p.3.

13 *Committee Hansard*, 02.03.06, p.23 (DoHA).

people who enter the industry after a default will not be subject to any levy in respect of that default and agree that this approach is the most appropriate.¹⁴

When the ownership of a corporation that is an approved provider changes hands, there is no change to the legal entity. Such a corporation is not a newcomer to the industry. If a corporation held bonds 10 days before the day on which a default event declaration is made and continues to be an approved provider on the day a levy is imposed, the corporation would be liable to pay the levy, even if, in the intervening period, all the shares in the corporation had been purchased by outside interests and new directors appointed.¹⁵

1.20 The ACAA also questioned the form of the written notification under Part 3 Clause 9 (1). This clause requires that written notification be given by an approved provider to the Secretary by the end of the first business day after an insolvency event occurs. The Department advised that detailed guidelines, which approved providers will find helpful with the requirements in this Clause, are being prepared in consultation with industry.¹⁶

1.21 CHA and UnitingCare raised the issue of the unknown potential liability applying to providers from this scheme. UnitingCare stated that there is a 'lack of data or financial modelling available to indicate what the levies on providers are likely to be in the event they are responsible for bonds unable to be paid by a defaulting provider'.¹⁷ CHA recognised that estimating the potential liability is problematic as 'to date, there has been no failure to refund Bonds. Any attempt to forecast future default possibilities could not be accomplished with any degree of accuracy'.¹⁸

1.22 The Department stated that, in order to estimate the likely costs to industry, PricewaterhouseCooper had been commissioned to analyse the financial risk profile of the residential aged care industry. Based on this analysis the Department indicated that:

Estimates that in any given financial year the average value of accommodation bonds that may need to be repaid by the Guarantee arrangements, and consequently recovered from providers would be in the order of 0.2 per cent of the value of the industry's accommodation bond holdings...The Department also estimates, on the above very conservative assumptions, that the size of the levy on the industry would only exceed 0.8 per cent of bond holdings once in every twenty years.¹⁹

14 *Submission 5A*, Additional information, DoHA, 17.03.06.

15 *Submission 5A*, Additional information, DoHA, 17.03.06.

16 *Committee Hansard*, 02.03.06, p.22 (DoHA).

17 *Submission 4*, p.1 (UnitingCare).

18 *Submission 3*, p.3 (CHA).

19 *Submission 5*, pp.11-12 (DoHA).

1.23 CHA stated that the Commonwealth has not discussed the process of recovering the full cost of bonds from approved providers and as a result the CHA has reservations on how this recovery will be achieved.

1.24 The Department stated that the need for, and the size of, a levy will 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. The cost to an approved provider (the levied provider) will depend on:

- (a) the likelihood that default events will occur in that financial year;
- (b) the likely size of those events, if they should occur;
- (c) the amount the Australian Government can recover from the defaulting providers in respect of those default events; and
- (d) the share of the industry's total accommodation bond holdings that are held by the approved provider who is being levied.²⁰

Aged Care (Bond Security) Levy Bill 2005

1.25 Professor Hogan suggested that there was a need for clarification of the meaning of 'classes of providers' in Clause 9 and stated that discriminatory practices by regulation should not be 'opaque'.²¹

1.26 The Department explained that this clause provides the Minister of the day with the discretion to deal with circumstances that may exist where one type of approved provider may need to be dealt with differently. This discretion is a regulation-making power and as such is subject to appropriate parliamentary scrutiny of the Commonwealth. The example was given of an approved provider running a smaller operation with ten or fewer funded beds. The Department stated:

What we do not want to do by imposing a levy to recoup costs is to cause any interruption in the delivery of care in other services to residents. This gives the Minister of the day the capacity to recognise that there might be classes of approved providers that need to be dealt with differently.²²

Aged Care Amendment (2005 Measures No.1) Bill 2005

1.27 Schedule 3 proposes Prudential Standards that provide for the protection of accommodation bonds, sound financial management and the provision of information about the financial management of approved providers. CHA and ACAA requested a clear definition of what is meant by the term 'corporate governance' in Subdivision 57-4 (2) (b).

1.28 The Department, in response to this request, stated:

20 *Submission 5*, p.11 (DoHA).

21 *Submission 7*, p.7 (Prof. Hogan).

22 *Committee Hansard*, 02.03.06, p.20 (DoHA).

The reference to corporate governance is part of an indicative list of potential prudential standards that might be developed. We had anticipated that if a need arose for a prudential standard on corporate governance that would be as a result of ongoing discussions with industry that identified the need for that sort of standard and therefore the definition would be developed collaboratively with the sector as the need arose. We are not even saying at this point in time that there is a need for it, so we certainly did not want to go so far as to define what it would be.²³

1.29 The ACAA also questioned the need and appropriateness of the additional inspectorial processes given the existing process of auditing financial accounts.

1.30 The Department indicated that it held the responsibility to ensure the legislative framework is implemented as intended by the Commonwealth and it can not rely solely on third party auditing. The suite of monitoring and compliance activities that would be expected of any regulatory regime will be utilised for this scheme. The Department went on to comment that it did not expect any significant additional compliance costs to industry as a result and DoHA will work with industry to minimise any additional costs.²⁴

1.31 UnitingCare raised an issue of discrepancy with the time period of 14 days for approved providers to refund bond monies in the event of a resident's death. UnitingCare stated that the 'legal requirement of a provider having to wait to refund the amount until probate has been obtained' creates potential difficulty.²⁵

1.32 Professor Hogan provided the following clarification on this issue. The Department, during the enquiry, indicated that they supported Professor Hogan's statement:

The only way in which, in the event of death, the bond can be repaid is through the formal and legal recognition of where that bond is due for repayment. The 14 days give the provider time to make judgments on this matter. If the argument is that the provider needs to check that the request is in fact a valid one and that the provider would wish to seek advice from that provider's legal advisers, then an argument could be made that it should not be 14 days but 21. But all of those things seem quite reasonable to me.²⁶

Other issues

1.33 Over Fifties Mutual Investment Group (OFM) generally supported the Commonwealth's policy of strengthening the existing protection. However it recommended modification to the rules to permit an 'income bond' to hold accommodation bond monies.

23 *Committee Hansard*, 02.03.06, p.22 (DoHA).

24 *Committee Hansard*, 02.03.06, p.22 (DoHA).

25 *Submission 4*, p.1 (UnitingCare).

26 *Committee Hansard*, 02.03.06, p.15 (Prof Hogan).

1.34 The OFM stated that such a modification would have the following advantages:

1. Government would not be required to 'step in' to guarantee accommodation bond balances (as the bonds would already be protected from creditors);
2. Aged care providers would receive competitive returns on accommodation bond monies (further enhancing the resident care fees and Government subsidies they receive); and
3. Aged care residents' accommodation bond balances would be swiftly repaid on death (increasing the benefits to their beneficiaries).²⁷

1.35 The Department outlined a number of issues of concern with the proposal including, the cost of administration, a level of risk associated with the income bond holder and an inability of approved providers to have access to the capital while placed in an income bond.²⁸ OFM also conceded that its proposal would leave unprotected a resident whose bond was misused or misappropriated prior to the purchase of an income bond.²⁹

1.36 The Committee asked the ACAA to comment on the OFM proposal and after examination stated the proposal would be highly inefficient on two counts, the first being the administrative cost involved and the second being the operational requirements of the scheme. The ACAA concluded that: 'In our opinion, therefore, the OFM scheme is inferior and more costly to that being proposed by the Government in the Bills before the Senate'.³⁰

1.37 Professor Hogan also provided commentary on the OFM proposal and raised a number of considerable issues. These issues include approved providers seeking higher investment returns rather than investing prudently, the ability to readily transfer bond monies when residents move facilities and the problematic situation of refunding bond monies to nominated recipients rather than estate beneficiaries. The proposal will also accrue additional administrative costs and prevent approved providers from using bond monies to fund expansion of capacity in residential and domiciliary services. Professor Hogan concluded 'The proposal for introduction of an income bond is redundant in light of the proposals embodied in the legislation now before Parliament and being considered by the Senate Community Affairs Committee'.³¹

27 *Submission 8*, p.3 (OFM).

28 *Committee Hansard*, 02.03.06, p.17-18 (DoHA).

29 *Committee Hansard*, 02.03.06, p.9 (OFM).

30 *Submission 6A*, Additional information, ACAA, 07.03.06.

31 *Submission 7A*, Additional information, Professor Hogan, 23.03.06.

Recommendation

1.38 The Committee reports to the Senate that it has considered the Aged Care (Bond Security) Bill 2005, the Aged Care (Bond Security) Levy Bill 2005 and the Aged Care Amendment (2005 Measures No. 1) Bill 2005 and recommends that the Bills be passed without amendment.

Senator Gary Humphries
Chairman

March 2006

APPENDIX 1

Submissions received by the Committee

- 1 COTA Over 50s Alliance (NSW)
- 2 Association of Independent Retirees Ltd (ACT)
- 3 Catholic Health Australia (ACT)
- 4 UnitingCare Australia (ACT)
- 5 Department of Health and Ageing (ACT)
- 6 Aged Care Association Australia (ACAA) (ACT)
Supplementary information
 - Additional information provided following hearing 2.3.06, received 15.3.06
- 7 Hogan, Emeritus Professor Warren (NSW)
Supplementary information
 - Additional information provided following hearing 2.3.06, received 23.3.06
- 8 OFM Investment Group (VIC)

APPENDIX 2

Public Hearing

Thursday, 2 March 2006
Senate Committee Room 2S1

Committee Members in attendance

Senator Humphries
Senator Moore
Senator Adams

Senator Polley
Senator Allison
Senator McLucas

Witnesses

OFM Investment Group – Teleconference

Mr Benedict Davies, Technical Services Manager

Aged Care Association Australia (ACAA)

Mr Rod Young, CEO

Professor Warren Hogan – Teleconference

Department of Health and Ageing

Mr Nick Mersiades, First Assistant Secretary, Ageing and Aged Care Division

Ms Liz Cain, Assistant Secretary, Head of Pricing Review Implementation Unit

Dr David Cullen, Executive Director, Financial and Economic Modelling and Analysis Group

Ms Andrea Matthews, Consultant (MP Consulting)