



Caring for Older Australians
Productivity Commission
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Our Ref: AF/10/147

Dear Commissioners

Inquiry into Caring for Older Australians

Thank you for the opportunity to provide an initial submission to your inquiry.

The significant projected increase in the numbers of older Australians who will require access at some stage in their lives to aged care services in community and/or residential settings; the increased proportion of GDP this will involve and how to actually fund it; and, the expectations, if not demands of these citizens and their families for a more diversified and flexible range of service delivery responses, clearly involve major challenges.

The direct involvement of the Productivity Commission in examining and reviewing the current service system; considering and evaluating the ideas and initiatives, concerns and difficulties of both today's and possibly tomorrow's consumers and providers of the services required, is a very positive development.

The 'task' to develop the needed reforms and options to meet current and future challenges however, will not be easy as the factors involved appear to be so multi-faceted.

What appears to be needed are strategies which will provide for:

- a major expansion of services to meet anticipated growth in demand;
- the delivery of flexible and responsive services tailored to individual needs;
- new or revised funding options for those services which are streamlined to avoid what currently appears to be an administratively complex system of Government funding;
- the creation of an environment that does not inhibit or unnecessarily restrict the development of needed services and the entry of new 'providers';
- somehow 'balancing' what each concerned individual can rightfully and reasonably pay towards the costs of the services that they receive or will

receive with the 'actual' costs of such services and with the Australian community's capacity to subsidize such costs when appropriate;

- workforce training and development;
- workforce salaries and conditions for aged care workers which are commensurate with that applicable to other sectors or industries; and,
- full access and equity for those individuals of special needs groups, including people living in rural and remote locations, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, and veterans.

At this early stage of your inquiry, the New South Wales Trustee & Guardian (NSW T&G) however, wishes to focus on two (2) major areas of concern. First, the issue of the ever-increasing size of accommodation bond payments being required by some approved providers and secondly, the 'prudential' requirements for the investment and use of the very considerable capital that such payments now represent.

In terms of your Issues Paper (issues paper) of May, 2010 these concerns would fall into the 'key' issues of "who should pay and what should they pay for" and "what role for regulation".

We will also make limited observations on the accreditation system, complaints and quality of care.

NSW Trustee & Guardian

NSW Trustee & Guardian ("NSWTG") was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former offices of the Protective Commissioner and the Public Trustee NSW. NSWTG is a NSW Government agency within the Department of Justice and Attorney General.

Under section 11 of its governing legislation the NSWTG may act in any of the following capacities:

1. financial manager of the estate of a managed person
2. agent or attorney
3. executor or administrator
4. trustee
5. collector of estates
6. guardian or receiver of the estate of a minor
7. receiver of any other property

Currently, NSWTG has in excess of 6,000 deceased estates under administration and over 9,500 clients under direct financial management. A further 2,950 clients have a private financial manager appointed, whose management is overseen by NSWTG. NSWTG also holds about 17,000 powers of attorney most of which are dormant, but which may become active if the principal loses capacity or seeks assistance in managing their financial affairs.

Consequently, NSWTG is very actively involved in, or has the potential to become involved in, the day to day management of the affairs of a large proportion of the

community, who may be at risk due to mental illness, intellectual disability or other cognitive impairment. Approximately 3,000 of our clients are elderly people, many of whom require aged care residential or community support services; they reside predominantly in NSW but in some cases in other states or territories of Australia, with a small number also residing overseas. As such this organisation, because of its obligation to act in and to promote the best interests of its vulnerable clients, is a significant stakeholder in regard to the Australian aged care service system.

NSWTG is also a member of the Australian Guardianship and Administration (AGAC) which is comprised of the Public Guardians, Adult Guardians and Public Advocates, the Boards and Tribunals who deliberate upon applications under guardianship and administration legislation and the State Trustees, Public Trustees or Protective Commissioners. The purpose of AGAC is to provide a forum at a national level for all relevant State and Territory agencies associated with the protective jurisdiction of adult guardianship and administration. AGAC will next meet in Canberra in October 2010 where the issues outlined in this submission, shared by many members, will be discussed.

The Size of Accommodation Bonds:

The introduction of the *Aged Care Act 1997* enabled accommodation charges, inclusive of the payment of an accommodation bond in some circumstances. I note that prior to that, entry contributions were sometimes made as gifts or loans to enable older Australians to access 'hostel care' under the *Aged or Disabled Persons Care Act 1954*.

As noted in the issues paper, residents entering a low care facility or an extra service place can be asked to pay an accommodation bond.

Such a bond is often described as being an 'interest free' loan to the aged care provider to be used to defray debt or improve building standards and the quality and range of aged care services.

The amount of each bond is said to be as negotiated between an older Australian and the aged care provider. The actual power of such older Australians in terms of such 'negotiations' is at best questionable however, and it is easy to imagine an aged care provider adopting a 'take it or leave it' approach (an example of which is provided later).

The only control on the size of the bond that a provider can request or demand is that after paying the bond, the older Australian must be left with at least \$37,500 in assets.

The aged care provider invests the bond and retains the interest earned plus can retain from the bond amount a retention sum capped at \$299 per month for a cumulative period of five (5) years. The aged care provider determines the retention amount up to the cap. The balance of the bond is then returned to the resident on leaving the facility or to their estate.

The size of individual bonds paid by residents continues to increase substantially each year. In the period June 1998 to June 2008, the Department of Health and Ageing (DoHA) has reported that the average value of each new accommodation bond increased at a rate of 13 per cent per annum, resulting in bond values more than tripling during that period.

As at 30 June 2008, approximately 80 per cent of aged care homes held accommodation bonds with the average new bond value being \$188,798 and the median bond amount \$155,000. For 2008-2009 the average new bond was \$212,958 (an increase in the year of 12.79%) with the median bond being \$200,000 (or an increase of 29%).

As at 30 June, 2008 the largest bond across Australia was \$1 million. A review of bonds paid by NSW Trustee & Guardian (NSW T&G) on behalf of its clients since 1997 confirms the steady increase in 'average' and 'median' bonds paid each consecutive year but also notes the extreme upward departures in bond sizes from the figures cited by DoHA.

The largest bond thus far paid for a NSW T&G client was \$1.15 million in 2010. This bond was paid to an approved provider targeting the 'luxury' end of the market in an expensive area of Sydney. This provider appears to have pre-determined the bonds it wants for its rooms which start at \$500K - \$750K for the ground floor, \$750K - \$1.5 million for the middle floor, and, \$1.5 million - \$2.5 million for its top floor with a \$2.6 million room being the 'best in the house' with some water views.

The pre-determination of what this provider wants to charge by way of bonds is possibly no different from what some other providers similarly do, however the sums involved make a mockery in some ways of the Government's intention that bond sums are to be negotiated and as agreed with a resident and the provider. The concerned provider initially wanted to charge the concerned individual \$1.6 million and the reduction to \$1.15M didn't involve any resiling from that by the provider, but did involve the individual opting for a different room on a lower cost floor.

The concerned provider could be said to be 'cherry-picking' by targeting and admitting only those residents who can afford to pay such high bonds and hence thereby constraining the ability of some to gain access to residential care. Alternatively, the provider's facility would have been very expensive to establish and the bonds set may be appropriate in an accounting sense to assist the provider to defray its debt.

An immediate problem with the setting of bond levels is that there is currently no test to measure the correctness or otherwise of these different propositions. The only control at present on the level of bonds is that an individual resident must be left with at least assets totalling \$37,500. There is currently no test of the 'reasonableness or appropriateness' of a bond setting by a provider based on its actual costs of development or redevelopment of a facility.

The next highest bond paid by NSW T&G for one of its clients during the past 13 years was \$750K. For 2008-2010 bond amounts have tended to cluster around \$300K - \$500K.

An interesting anomaly is that as average bonds have soared by 300% or more during the past 13 years the maximum retention amount that a provider can deduct from a bond has shifted by only 39% (ie. a cap of \$215 per month on 1 October, 1997 to \$299 per month from 1 July, 2009). This may be a factor in helping to drive up the costs of bonds.

Retention amounts in and of themselves are somewhat inequitable as a resident who pays a \$60K bond and is left with the minimum asset level of \$37,500 and who is charged the full capped retention amount of \$299 per month for 5 years, would have a bond balance returned to them or their estate of \$42,060 or 70% of the original bond. Another resident given the same conditions pays a \$1 million bond and would lose only the same amount of \$17,940 in retention amounts and would have returned to them or their estate \$982,060 or 98.2% of their bond. In addition, the latter resident then benefits from receiving a full aged pension by paying the \$1 million bond which they wouldn't have received if they had only paid a bond of say, \$400K.

The Prudential Regulatory Framework for Bonds:

The introduction of the *Aged Care Act 1997* saw the establishment of a prudential scheme to protect accommodation bonds. The 1997 legislation introduced mandatory requirements for providers that included a contractual guarantee of repayment of bond balances; statutory timeframes for this to occur; and, the submission of a certified annual statement by providers attesting to their ability to meet their liabilities, had maintained adequate insurance and were able to repay bonds as required.

The *Review of Pricing Arrangements in Residential Aged Care* (February, 2004 Hogan Review Report) recommended a range of reforms to strengthen the protection of accommodation bonds. The major reforms recommended by the Review were not agreed to by the then Government which felt that the high degree of prudential regulation recommended could not be justified.

Instead, the Government commencing from 1 July, 2006 determined that providers were to meet the new prudential requirements required by the Act and the User Rights Principles which aimed to assist providers to improve their financial management practices; enhance financial sustainability; and, reduce risk of default on the refund of accommodation bond balances.

The new prudential standards focussed on liquidity, record-keeping and disclosure backed up by an Accommodation Bond Guarantee Scheme including the *Aged Care (Bond Security) Act 2006* and the *Aged Care (Bond Security) Levy Act 2006*.

DoHA took on the difficult task of administering the legislative framework established for prudential regulation under the Act and the Principles including

monitoring compliance and acting on non-compliance; educating approved providers and care recipients of their rights and responsibilities; monitoring the efficacy of the policy framework for prudential regulation; and, safeguarding bonds.

From the Government's point of view bond balances after deduction of retention amounts is guaranteed. This guarantee has apparently only been called on 3 or 4 times since 2006 with the initial 3 times involving a sum of about \$19 million. In 2008-2009 however, the Accommodation Bond Guarantee Scheme was triggered twice.

As at 30 June 2008, 965 (out of 1215) approved providers reported that they held accommodation bonds with a total value of \$7.7 billion involving 58,000 bonds. Each approved provider held an average of \$7.9 million with the largest bond then paid being approximately \$1 million.

The largest accommodation bond liability for an approved provider was \$296 million, which represented about 3.9 per cent of total bond holdings. The bond holdings of the top ten approved providers totalled 9230 bonds worth around \$1.7 billion or 22.3% of all accommodation bond monies.

As at 30 June 2009 the total bonds held would now be well over \$9 billion given that aggregated bond holdings are said to increase by approximately 25% per annum. With the average new bond in 2008-2009 being \$212,958 and the median bond amount being \$200,000 it is easy to see how the total bonds held continues to rapidly increase particularly as the vast majority of bonds are paid as a 'lump sum' to the approved providers.

Surprisingly, the prudential regulation of accommodation bonds does not prescribe any restrictions in relation to the decisions taken by providers on where they invest bonds. That is, providers are free to determine how they invest bond holdings as long as they can demonstrate that the bonds, and any investment income generated, are used to improve the quality of aged care infrastructure and the range of aged care services.

There has clearly been rapid growth in the number of bonds, the total value of bond holdings and the proportion and diversity of aged care providers relying on bonds to fund the delivery of aged care services.

The current scale of bond holdings, the possibly very mixed ability of a large and diverse range of providers to make sound investment decisions, plus the ongoing structural changes in the sector would present many challenges for DoHA in its role as prudential regulator.

Unfettered investment decisions by approved providers does however run the risk of considerable financial losses given events such as the global financial crisis and the on-going turmoil in financial markets. Although the 'prudent' investor has also obviously struggled in these difficult periods the 'less-than-prudent' investor has certainly suffered more. Such losses severely impact on the intention and goal of the payment of accommodation bonds as the funds available to an approved

provider to improve current aged care infrastructure and to develop new facilities is undermined by poor investment choices.

Other comments

NSWTG is concerned that the current accreditation system may be overly based on a set of minimum reporting categories or policies, which can be met on paper but may or may not translate into practice. During the past 12 months this office has uncovered two instances of serious neglect in two different Aged care facilities. While both have been reported we believe that the current system would be strengthened by random visits and publicly available reports similar to the system used in the UK. We recognise the complexity that attends the provision of quality care. We understand the staffing and resource constraints faced in the industry and the balance between regulatory frameworks and a risk management approach. However it is our experience that the three year review cycle can see significant changes in standards of service delivery that may not be detected in the current framework.

Thank you once again for the opportunity to raise these concerns about the size of accommodation bonds and the current prudential regulatory investment framework.

Yours sincerely

Imelda Dodds
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NSW Trustee & Guardian
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