



# Health Alert

## September 2009

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- > *Corporate governance developments*
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### Aged Care – more or less regulation in store for the aged care sector?

The recent focus on the regulation of the aged care industry has continued through September, with the release of the report by the Australian National Audit Office (ANAO) on Protection of Residential Aged Care Accommodation Bonds (ANAO report) and the 'Annual Review of Regulatory Burdens on Business - Social and Economic Infrastructure Services' report prepared by the Productivity Commission (PC), which devoted an entire section to aged care.

#### ANAO report

The ANAO report, which deals with the management of prudential risks associated with accommodations bonds by the Department of Health and Ageing (DoHA), was released on 17 September 2009. The ANAO report identified significant scope for improvement in terms of how DoHA monitor and enforce prudential regulation.

#### Legislative background

A prudential scheme to protect accommodation bonds was first established in 1997 with the introduction of the *Aged Care Act 1997* (Cth). This scheme was supplemented in 2006 with the introduction of standards of liquidity, record-keeping and disclosure in an effort to protect the substantial sums of money held by providers on behalf of residents. These standards were backed up by the Accommodation

Bond Guarantee Scheme, under which the Australian government guarantees the repayment of bond refunds to resident in the event that an insolvent or bankrupt approved provider defaults on its obligation.

#### Areas for improvement identified by the ANAO

A key requirement of accommodation bonds is that they must be invested, and the income from that investment used to provide aged care to care recipients. To date, there is no legislation which prescribes where or how aged care providers may invest bond holdings.

ANAO's report identified the following three key areas as areas which require DoHA's attention:

- > The systematic assessment and treatment of prudential risk;
- > The expansion of DoHA's activities to include whether bonds and bond income are being used for the purpose of providing aged care; and
- > The development of systems to identify and act upon instances of breaches of the prudential regulations.

#### Recommendations

The ANAO report makes seven recommendations which aim to improve DoHA's administration of prudential arrangements for the protection of residential aged care accommodation bonds, including:



> DoHA adopt a structured and systematic risk management methodology for its prudential regulation of residential aged care accommodation bonds to:

- routinely identify, analyse, document, evaluate and monitor regulatory risk;
- rank risks, based on assessments of likelihood and consequences; and
- plan and conduct activities to treat risks.

> DoHA establish an integrated and balanced set of performance measures and targets for key regulatory activities, against which the achievement of prudential regulation objectives can be assessed and reported to internal and external stakeholders.

> DoHA enhance its regulatory approach to include reviews of whether aged care providers are using bonds and bond income for the purpose of providing aged care to recipients as required under the Act.

> DoHA develop, in consultation with stakeholders, a client service charter and regulatory code of conduct in relation to the prudential regulation of residential aged care accommodation bonds, and report annually on performance against the charter.

> DoHA establish a process or system to capture, collate and share regulatory intelligence from internal and external sources to build a risk profile of regulated entities.

We think that one of the main messages to come out of the ANAO report is that the obligation of an approved provider to invest accommodation bonds needs to be clarified

to ensure that prudent investments are made, but this needs to be done carefully so that it is not overly restrictive.

### Productivity Commission report

Two days before the ANAO released its report, the Productivity Commission (PC) released its Annual Review of Regulatory Burdens on Business - Social and Economic Infrastructure Services' (PC report). One section of the PC report was devoted entirely to aged care. That section contained 15 recommendations for the Australian government, including the following:

> Explore options for:

- relaxing supply constraints in the provision of aged care services
- allowing consumers' needs and preferences to be better understood and addressed, and
- providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service
- removing the regulatory restriction on bonds as a source of funding.

> Once the supply in the provision of aged care services has been freed up (see recommendation 1), abolish the 'extra service' residential care category.

> Amend the requirements in the Accountability Principles 1998 (Cth) to report missing residents to DoHA. This recommendation would not impact on the reporting of missing residents to police services by providers.

> Review the Aged Care Standards and Accreditation Agency visits program to residential aged care facilities including

the associated visit performance targets with a view to making the program more targeted, with less visits less visits imposed on residential aged care providers overall.

> Amend the Prudential Standards to remove the requirement on aged care providers to make disclosures to care recipients or prospective care recipients about their compliance with the Prudential Standards.

> Have the DoHA and the Aged Care Standards and Accreditation Agency clarify their respective roles to the industry.

> Have the DoHA consult with relevant state and territory government departments to identify and remove, onerous duplicate and inconsistent regulations.

> Abolish the annual fire safety declaration for those aged care homes that have met state, territory and local government fire safety standards.

> Allow residential aged care providers choice of accreditation agencies to introduce competition and to streamline processes for providers who are engaged in multiple aged care activities.

We think that the overall theme of the productivity commission report was that some existing regulations were overly restrictive to the point where they achieved nothing but adding to the already extensive compliance burden of struggling aged care providers.

### Conclusion

On an initial view these two reports appear to be at cross purposes, with the ANAO Report appearing to advocate a more stringent attitude towards regulation while



the PC report proposes a more relaxed one. However the important difference between the two reports is that the ANAO report is directed at DoHA's internal processes on how it carries out its existing regulatory obligations and the PC report is directed at the impact that the existing regulatory obligations have on the efficiency of approved providers. The overall message from reading the two reports together is that DoHA needs to be more efficient and do more with the information it already has access to under the existing regulatory regime, while the regulatory burden on approved providers is cumbersome needs to be reduced. We look forward to seeing how the Australian government responds to these reports.

## Corporate governance developments

There have been a number of interesting developments in corporate governance. The Corporations and Markets Advisory Committee (**CAMAC**) has released its report on 'Diversity on Boards of Directors'. This report:

- > Confirmed that there is a relatively limited pool of directors in Australia and an under representation of women on company boards.
- > Does not support any move to impose a particular model of board diversity because that would cut across the responsibility of shareholders for the appointment of the directors who are to be accountable to shareholders.
- > Notes that effective change will depend on convincing corporate leaders and shareholders of the benefits of a more open approach to the identification and selection of directors.

- > Refers to possible steps that could be taken to assist a more diverse group, including women, to develop the skills that would enable them to take up board positions, including mentoring programs and adoption of more accommodating employment practices at executive management level.
- > Draws attention to refinements that could be considered for inclusion in the ASX Corporate Governance Council Principles and Recommendations such inclusion of board diversity as a relevant issue; adopting a more structured approach to selection of directors rather than relying on informal business or social contacts and giving shareholders more information about the criteria and processes used to invite directors to seek election.

The full report can be viewed at the [CAMAC website](#).

CAMAC is also now responding to the referral by the Minister for Financial Services, Superannuation and Corporate Law for CAMAC to examine what guidance is required for both executive directors and non-executive directors (**NEDs**) to fully understand the responsibilities of their roles, particularly increasing the engagement of NEDs with their position on the board and bring an independent and broad view to board decision making. The Minister has specifically requested CAMAC to:

- > examine the guidance or codes of conduct that are available overseas for corporate directors;
- > examine whether there is sufficient guidance provided to executive directors and NEDs in Australia to ensure that they have a clear understanding of their roles and responsibilities; and

- > advise whether the performance of directors would be enhanced by the introduction of guidance for directors, for example through a code of conduct or best practice by a relevant regulator; and if so what form that guidance should take.

Finally, in the UK, Mr David Walker released his 'Review of Corporate Governance in UK Banks and Other Financial Industry Entities' on 16 July 2009. This review was commissioned by the UK Prime Minister and led to 39 recommendations around five key themes including:

- > The principal governance deficiencies related more to patterns of behaviour than to organisation. The most critical need is for an environment in which effective challenge of executives is expected and achieved in the boardroom before decisions are taken on major risk and strategic issues. Achieving that will require closer attention to board competition.
- > Board level engagement in the high level risk process should be materially increased with particular attention to monitoring of risk – this will call for NEDs to focus more on risk issues.
- > Against a background of effective control and serious excess in some instances, substantial enhancement is needed in board level oversight of remuneration policies for executives.
- > The full review can be viewed at the [HM Treasury website](#).



## Focus on prevention – introducing the Australian National Preventative Health Strategy

On 1 September 2009 the Minister for Health and Ageing launched the National Preventative Health Strategy (**Strategy**). The Strategy recommends a range of interventions aimed at reducing the chronic disease burden associated with obesity, tobacco and alcohol, and is based on research papers released by the Preventative Health Taskforce.

### Strategic directions

The strategic directions of the Strategy are:

- > Shared responsibility – developing strategic partnerships at all levels of government, industry, business, unions, the non-government sector, research institutions and communities
- > Act early and throughout life – working with individuals, families and communities
- > Engage communities – act and engage with people where they live, work and play, at home, in schools, workplaces and the community. Inform, enable and support people to make healthy choices
- > Influence markets and develop coherent policies – for example, through taxation, responsive regulation, and through coherent and connected policies
- > Reduce inequity through targeting disadvantage – especially low socioeconomic status population groups

- > Indigenous Australians – contribute to 'Close the Gap' by reducing the difference in life expectancies between indigenous and non-indigenous people
- > Refocus primary healthcare towards prevention.

### Targets

The ambitious targets of the Strategy are:

- > Halt and reverse the rise in overweight and obesity
- > Reduce the prevalence of daily smoking to 10% or less
- > Reduce the proportion of Australians who drink at short-term risky/high-risk levels to 14%, and the proportion of Australians who drink at long-term risky/high-risk levels to 7%
- > Contribute to the 'Close the Gap' target for Indigenous people, reducing the life expectancy gap between Indigenous and non-Indigenous people

These targets have been aligned with a further set of interim targets set by the Council of Australian Governments (**COAG**).

### Australian National Preventative Health Agency

The first legislative step taken by the Australian government to implement the strategy is to introduce a Bill to establish the Australian National Prevention Agency (**Agency**), which will oversee and drive the Strategy. The *Australian National Preventative Health Agency Bill 2009* (Cth) was introduced into the House of Representatives and received its second reading speech on 10 September 2009. According to the Bill, the Agency will be a statutory agency made up of a Chief Executive Officer (CEO), an Advisory

Council, and staff employed under the *Public Service Act 1999* (Cth). The Bill proposes that the Agency commence operating from 1 January 2010.

The shift in focus towards prevention is an interesting one, and clearly has potential fiscal benefits for the Australian government if the targets can be achieved. We will keep you up to date as legislation to implement the other strategic directions is introduced into Parliament.

## Legislation update

### *Therapeutic Goods Amendment (2009 Measures No. 1) Act 2009 (Cth) and Therapeutic Goods Amendment Regulations 2009 (No. 5) 2009 (Cth)*

The *Therapeutic Goods Amendment (2009 Measures No. 1) Act 2009* (Cth) was assented to on 27 August 2009. It makes the amendments to the *Therapeutic Goods Act 1989* (Cth), including:

- > Suspending registered and listed goods from the Australian Register of Therapeutic Goods
- > Incorporating new provisions for the issue and transfer of manufacturing licenses
- > Expanding monitoring powers in relation to the assessment of safety and quality in manufacturing, and
- > Improving the regulation of homeopathic and anthroposophic medicines.

Effective from 11 September 2009, the *Therapeutic Goods Regulations 1990* (Cth) were amended by the *Therapeutic Goods Amendment Regulations 2009*



(No. 5) 2009 (Cth). The amendments include:

- > a new Part 7A (Infringement notices) to administer and implement the infringement notices scheme under the *Therapeutic Goods Act 1989* (Cth), which enables a person who is alleged to have committed an offence against, or contravened, a civil penalty provision to pay the Commonwealth a specified penalty as an alternative to prosecution or civil penalty proceedings.
- > a new schedule 15, which sets out the requirements for infringement notices for matters such as how they are issued (and withdrawn), their content, and how they are served and paid.

#### **Justice and Community Safety Legislation Amendment Act (No. 2) 2009 (ACT)**

The *Justice and Community Safety Legislation Amendment Act (No. 2) 2009* (ACT) was assented to on 1 September 2009. It amends the *Charitable Collections Act 2003* (ACT) and the *Charitable Collections Regulation 2003* (ACT) to provide that the receipt of unsolicited money or benefits does not constitute a 'collection', in order to clarify the types of activities exempt from regulation.

#### **Statute Law Amendment Act 2009 (ACT)**

The *Statute Law Amendment Act 2009* (ACT) was assented to on 1 September 2009. It amends the *Mental Health (Treatment and Care) Act 1994* (ACT) to make it clear that officials exercising functions under that Act are protected from any civil liability that may arise in the proper exercise of those functions. The liability rests with the Territory. It also makes some unrelated amendments to the *Environment Protection Act 1997* (ACT).

#### **Health Insurance Amendment Regulations 2009 (No. 2) 2009 (Cth)**

Effective from 11 September 2009, the *Health Insurance Regulations 1975* (Cth) were amended by the *Health Insurance Amendment Regulations 2009 (No. 2) 2009* (Cth). The purpose of the amendments is to set out a method for determining the amount that is to be the market value of property, goods or services, and a method of working out whether the amount of a payment or of consideration for property, goods or services is substantially different from the market value of the property, goods or services for the purposes of Part IIBA of the *Health Insurance Act 1973* (Cth), which contains provisions that are directed at preventing requesters of pathology services and diagnostic imaging services from (either directly or indirectly) asking for or accepting, or being offered or provided, any benefits (other than permitted benefits) in order to induce the requesters to request the services from providers of those services. We will be reporting on these regulations and associated documents issued by DoHA in more detail in our next issue.

#### **Health Insurance Amendment (Compliance) Bill 2009 (Cth)**

The *Health Insurance Amendment (Compliance) Bill 2009* (Cth) proposes to amend the *Health Insurance Act 1973* (Cth). It was introduced into the House of Representatives and received its second reading speech on 17 September 2009.

The Bill is intended to give effect to the Increased MBS Compliance Audits (IMCA) initiative, which was announced in the 2008-09 Budget. It aims to ensure the integrity of the Medicare scheme by:

- > increasing the number of compliance audits undertaken by Medicare Australia;
- > compelling practitioners to produce evidence to verify their Medicare claiming when audited; and
- > introducing administrative sanctions (financial penalties) for Medicare practitioners who claim incorrectly.



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