

Health Alert

August 2011

Changes to accommodation bonds under the *Aged Care Amendment Act 2011 (Cth)*

The government has introduced significant changes regarding permitted uses for accommodation bonds under the *Aged Care Amendment Act 2011 (Cth)* (**the Act**) which received Royal assent on 26 July 2011.

What are the key points for aged care providers?

- The Act limits the uses of accommodation bonds so that approved providers may only use the bonds for capital works, investment in financial products, loans for these purposes and refunding accommodation bonds.
- A new offence has been introduced. A penalty applies if an approved provider uses accommodation bonds, for a use that is not a "permitted use" and within 2 years from that time the approved provider is insolvent and does not refund an accommodation when it should have.
- It is also an offence for a person, who is one of the key personnel for the approved provider entity, who is aware, or should know, that a use of an accommodation bond is not permitted and fails to take reasonable steps to prevent that use and, within 2 years the approved provider is insolvent and does not refund an accommodation bond when it should have.
- The Act removes restrictions on the use of income derived from accommodation bonds, retention amounts and accommodation charges. The intention is to give approved providers greater flexibility in managing cash flow and to assist in offsetting the constraints that flow from the

introduction of the permitted use concept in relation to the principle amount of the accommodation bonds.

- The Act introduces new information gathering powers where the Secretary of the Department of Health and Ageing believes an approved provider has not, or is unlikely to be, able to refund an accommodation bond, is in financial difficulty and has been, or is, using accommodation bonds for uses which are not permitted. It is an offence for an approved provider to fail to respond to a request for information from the Secretary relating to, amongst other things, the approved provider's financial situation and its use of accommodation bonds.
- The Act replaces the Investigation Principles with new Complaints Principles (incorporated into the Aged Care Principles) which are intended to improve the handling of complaints regarding aged care by enabling the Department of Health and Ageing to adopt a range of options to assist in resolving complaints together with care recipients and approved providers, for example, through conciliation, mediation and investigation.

When will the changes take effect?

The changes regarding accommodation bonds will take effect from 1 October 2011. However, a transition period up to September 2013 applies regarding the changes to permitted uses of accommodation bonds.

All restrictions on use of income derived from accommodation bonds, retention and accommodation charges will be removed with effect from 1 October 2011.

Changes to the Complaints Principles will commence 1 September 2011.

Thomsons Lawyers recommendations

Thomsons Lawyers recommends that approved providers:

- review the way in which they currently use and invest accommodation bonds because it is possible that some of those uses will no longer be permitted due to the changes to the Act; and
- consider internal processes regarding managing, monitoring and decision making in respect of use and investment of accommodation bonds, including education of key personnel who make decisions about the use of accommodation bonds to ensure they understand the changes to the Act and the serious consequences of non-compliance.

Please let us know if you would like assistance in assessing the impact of the changes imposed by the Act in your particular circumstances.

Key points in more detail:

Permitted use of accommodation bonds

The *Aged Care Act 1997* (Cth) (**the Aged Care Act**) provided that where an approved provider charged an accommodation bond to a person for entry into a residential or flexible care service, the bond was not be used for a purpose that was not related to “providing aged care to care recipients”. Contrary to the policy intention, the use was interpreted broadly in practice to include use of the bonds to meet operational expenses and to make loans to related (and other) entities and there was uncertainty about use of the funds consistently for aged care purposes. In addition, the government considered that the Aged Care Act lacked clarity around investing accommodation bonds in financial instruments.

The Act, which was assented to on 26 July 2011, introduces the new concept of a “permitted” use. A use of an accommodation bond is permitted under the Act if the bond is used for:

- capital expenditure, such as acquiring land on which the premises are to be built, acquiring, erecting or extending premises, purchase of furniture, fittings and equipment when the premises are initially constructed or following significant alteration or refurbishment where the land, premises, furniture and equipment etc are used for providing residential or flexible care;
- investment in financial products, including in any deposit-taking facility made by an authorised deposit-taking institution, Commonwealth or State or Territory issued debenture, stock or bond, an interest or a legal or equitable right or an option to acquire an interest in a registered scheme;
- refunding accommodation bond or entry contribution balances;
- repaying debt accrued:
 - for the purposes of capital expenditure or refunding accommodation balances; or
 - before the commencement of the Act for the broader definition of providing aged care to care recipients;
- expenditure specified in the User Rights Principles.

Routine maintenance and repairs to the premises, such as painting, electrical, plumbing and gardening, are not “permitted” uses. Rent is not expressly mentioned and would not fall within the scope of the general or capital expenditure descriptors of “permitted” use.

Offences for an approved provider

A corporation commits an offence under the Act if the corporation:

- is or has been an approved provider;
- uses an accommodation bond and the use is not a permitted use; and
- within 2 years of the use, there is an insolvency event in respect of the corporation (within the meaning of the *Aged Care (Bond Security) Act 2006* (Cth)) and there has been at least one outstanding bond balance.

The Act imposes a penalty of 300 penalty units for this offence, which is currently \$33,000.

Offences of key personnel

An individual commits an offence under the Act if:

- the individual is one of the key personnel of an entity that is or has been an approved provider;
- the entity uses an accommodation bond and the use is not a permitted use and at the time of the use the entity was a corporation;

- the individual knew or was reckless or negligent as to whether the bond would be used and that the use was not permitted;
- the individual was in a position to influence the conduct of the entity in relation to the use of bonds and did not take reasonable steps to prevent the use of the bond; and
- within 2 years of the use, there is an insolvency event in respect of the corporation (within the meaning of the *Aged Care (Bond Security) Act 2006* (Cth)) and there has been at least one outstanding bond balance.

The Act imposes a penalty of imprisonment for 2 years for this offence.

Removal of restrictions on use of income derived from accommodation bonds

The Act removes restrictions on the use of income received from accommodation bonds and retention amounts as from 1 October 2011 regardless of when the bond was charged. This is significant in that approved providers can use that income for any purpose at all and not necessarily in connection with the provision of aged care services. Presumably approved providers may use the income derived for operational expenses which are now excluded from the permitted use of the principle amount of the bond.

Information gathering powers

The new information gathering powers apply where the Secretary for the Department of Health and Ageing reasonably believes that an approved provider has not refunded or is unlikely to be able to refund an accommodation bond balance and is experiencing financial difficulties and has used an accommodation bond for a use which is not permitted under the Act.

The Secretary may request (and the request must be in writing and must specify time frames for responding and the consequences of failure to respond) that the approved provider give information relating to:

- the suitability of the approved provider to be a provider of aged care;
- the approved provider's financial situation;
- the amount of accommodation bond balances at a particular time;
- how the accommodation bonds have been used;
- the approved provider's policies and procedures in relation to the accommodation bonds; and
- roles and responsibilities of key personnel in respect of the accommodation bonds.

The approved provider must comply with the request within 28 days (or shorter period if specified in the request) or within time frames specified if the request is for periodic information.

Under the Act an approved provider commits an offence if it is a corporation and fails to comply with the request within the time frames specified. The penalty is 30 penalty points for this offence, which is currently \$3,300.

New Complaints Principles

The Act replaces the Investigation Principles with the new Complaints Principles (incorporated in the Aged Care Principles) as a means of shifting the focus of the Aged Care Complaints Investigation Scheme from investigating complaints to resolving complaints with a greater emphasis on cooperative engagement with care recipients and providers of aged care.

Draft Exposure Bill and guidelines for public ancillary funds

The Assistant Treasurer recently released Exposure Draft – Public Ancillary Funds (**Exposure Draft**) and draft Public Ancillary Fund Guidelines 2011 (**draft Guidelines**).

These documents deal with the proposed legislative and regulatory changes to public ancillary funds (**Funds**), ie public funds that have deductible gift recipient (**DGR**) status that distribute to 'doing' DGRs (eg DGRs that conduct charitable activities).

This follows the government's announcement in the 2010-11 Federal Budget that it would introduce a new regulatory framework for Funds, and the Assistant Treasurer's release of the discussion paper "Improving the integrity of public ancillary funds" in November 2010.

Summary

The proposed changes are similar to those introduced on 1 October 2009 for private ancillary funds (ie private foundations, usually funded and controlled by

high net worth individuals or companies), and will be effective **from 1 January 2012** (a six month delay from what was originally proposed).

The proposed changes for Funds are intended to:

- improve and bring the standards of the Funds' governance and accountability in line with private ancillary funds;
- include binding guidelines governing the establishment and maintenance of the Funds; and
- provide the Commissioner of Taxation with the power to impose administrative penalties on trustees for breaches of the guidelines, and to remove or suspend trustees of non-complying funds, instead of the harsh 'all or nothing' penalty system that currently applies (ie a penalty can be imposed instead of complete loss of DGR status). This function may later move to the new Australian Charities and Not-For-Profits Commission once it is up and running.

Consultation process

As part of a public consultation process, there is an opportunity to comment on the draft Guidelines by 31 August 2011.

The Exposure Draft (including Explanatory Materials), and the draft Guidelines, are available on the [Treasury website](#).

Please [click here](#) to read our full article on the **Draft Exposure Bill and guidelines for public ancillary funds**.

Please let us know if you would like assistance in determining what the impact of the Exposure Draft and the draft Guidelines will be in your particular circumstances, or in making any submission on the draft Guidelines.

Retirement Village Association NSW & ACT Regional Conference 2011

Lucinda Smith and Fraser Bell attended and presented at the Retirement Village Association NSW & ACT Regional Conference in Canberra on 28-29 July 2011.

Fraser appeared in a panel discussion entitled "Making Green Pay" which focused on whether green initiatives are good for the bottom line in the retirement industry and to what extent residents will pay for these

initiatives. Thomsons launched its latest edition of [The Village Green](#) at the conference which considers the impact of carbon tax on retirement village operators and residents.

Submission to Treasury on the treasury consultation paper 'Better Targeting of Not-For- Profit Tax Concessions' dated 27 May 2011

In July 2011, our corporate and tax teams at Thomsons Lawyers took the opportunity to jointly provide extensive response to the Treasury Consultation Paper "Better Targeting of Not-for-profit Tax Concessions". We will keep our not-for-profit clients updated as this issue progresses. Click here to view [our submission](#). Please contact Philip de Haan if you have any questions.

Legislation update

Health Services Amendment (Local Health Districts and Boards) Act 2011 (NSW) No. 313

This Act was assented to on 16 May 2011. It amended the *Health Services Act 1997* (NSW) to constitute local health districts and establish boards for such districts.

This Act included the following principal amendments:

- to constitute local health districts and replace existing local health networks;
- the establishment of boards for each local health district in place of the existing system of local health network governing councils;
- provision for certain statutory health corporations to be specialty networks with boards; and
- consequential changes to certain definitions as a result of the amendments.

This Act was subsequently repealed by sec 30C of the Interpretation Act 1987 No 15 with effect from 2 July 2011. However, the amendments to the *Health Services Act 1997* remain in force.

Health Services Amendment (First SCHN Board) Regulation 2011(NSW) No. 320

As part of the amendments under the *Health Services Amendment (Local Health Districts and Boards) Act 2011 No. 313* (NSW) (now repealed) the Sydney Children's Hospital Network was reconstituted as a 'Specialty Network Governed Health Corporation'.

Following an amendment to the *Health Services Amendment (First SCHN Board) Regulation 2008 No. 320* the Minister for Health may appoint more than 13 members (but no more than 20) to the first board of the Sydney Children's Hospital Network (Randwick and Westmead).

The regulation commenced on 1 July 2011.

Allocation Principles 1997 (Cth)

The *Allocation Principles 1997* (Cth) are made under subsection 96-1 (1) of the *Aged Care Act 1997* (Cth). The *Allocation Amendment Principles 2011 (No. 1)* (Cth) amend the *Allocation Principles 1997* (Cth). The new principles aim to clarify the information an approved provider must provide in relation to capital payments in transferring allocated places.

The amendments also assist in estimating the capital payment deductions that might be applied if the transferee applied for and was granted extra service status in respect of the service.

The amending principles commenced on 25 June 2011.

Residential Care Subsidy Principles 1997 (Cth)

The *Residential Care Subsidy Amendment Principles 2011 (No. 2) 2011* (Cth) are made under subsection 96-1 (1) of the *Aged Care Act 1997* (Cth) and amend the *Residential Care Subsidy Principles 1997* (Cth).

According to the Explanatory Statement, the amending principles make consequential amendments in order to specify what kinds of payments are 'capital payments' for the purposes of s. 43-6 of the *Aged Care Act 1997* (Cth).

The amending principles commenced on 25 June 2011.

Human Services Legislation Amendment Act 2011 (Cth) No. 32

The Act amends, amongst other things, the secrecy provisions in the *Aged Care Act 1997* (Cth) No. 112 to ensure that the current arrangements within Centrelink for the use of customer information can continue after the integration of Centrelink into the Department of Human Services.

Accreditation Grant Principles 2011 (Cth)

This new regulation proposes to repeal and replace the existing principles relating to the accreditation of residential care services. The new principles set out the procedures to be followed and the matters to be taken into account by the Aged Care Standards and Accreditation Agency Limited and the conditions that the accreditation grant will be subject to.

The principles commenced on 20 May 2011.

Fairer Private Health Insurance Incentives Bill 2011 (Cth)

This Bill introduced into the House of Representative on 7 July 2011 is, subject to passage through Parliament, due to commence from 1 January 2012. If assented to, the Bill will ensure that those with a greater capacity to pay will make a larger contribution towards the cost of their private health insurance. It also aims to ensure that Government support for private health insurance will remain fair and sustainable in the future.

National Health Reform

In August 2011, out-of-session, the Council of Australian Governments has agreed the National Health Reform Agreement which provides the plan for major reforms in the delivery of health and aged care in respect of the organisation, funding and delivery of those services in Australia. The Agreement is a blueprint for how the Commonwealth, State and Territory governments plan to work together for the stated objectives of improving health outcomes for all Australians and to achieve sustainability of the health system in Australia. The intention of the reforms is to achieve improved access to services, enhance local accountability and transparency, improve responsiveness to community issues and the provision of a more robust financial foundation for the Australian health system via increased Commonwealth funding. We will report more on this in our next edition.

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