



## **Submission to the Consultation- Enhanced Prudential Regulation of Accommodation Bonds**

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## About National Seniors Australia

National Seniors Australia (NSA) is the largest organisation representing Australians aged 50 and over with some 280,000 individual members.

Our members are from metropolitan, regional and rural areas across all states and territories, and are broadly representative of the three key ageing cohorts: those aged 50-65; those aged 65-75; and those aged 75 +.

NSA works to provide a voice and address the needs of this diverse membership:

- **We represent** – to governments, business and the community on the issues of concern to the over 50s;
- **We inform** – by providing news and information through our website, forums and meetings, our bi-monthly award winning magazine, a weekly E-newsletter and our Australia-wide branch network;
- **We provide opportunity** – to those who want to use their expertise, skills and life experience to make a difference in indigenous communities and on our environmental legacy;
- **We support those in need** – our Charitable Foundation raises funds to provide comfort and support for our most vulnerable older citizens;
- **We provide savings** – through quality insurance, affordable travel and tours, and discounts on goods and services.

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## About National Seniors Australia

National Seniors Australia (NSA) is the largest organisation representing Australians aged 50 and over with some quarter of a million members nation-wide. This broad-based support enables NSA to provide a well informed and representative voice on issues of concern for people aged 50 and over.

### **Recommendations**

1. That DoHA meet the benchmarks based on the Australian National Audit Offices key recommendation in their 2009-2010 Report as outlined in Part B of this submission
2. That greater protection for the use of accommodation bonds derived from community members become the central concern of the review process to enhance prudential regulation of Accommodation Bonds.
3. That the prudential regulatory branch of DoHA be given legislative capacity for the Department to take action against key personnel of approved providers even where there is evidence that they may have knowingly misused accommodation bonds.

### **Executive Summary**

We have been asked for a submission on a Consultation Paper due on 8 March 2011. The paper arises from a government commitment on 12 April 2010 to increase protections for aged care residents' savings held as accommodation bonds. The Consultation is the second round of public consultations after an Issues Paper was released on 27 October 2010. 33 submissions were received. We were advised that almost all of the submissions were made by providers. The Government wants the new risk based prudential regime in place by 1 July 2011 and to apply to accommodation bonds charged following the commencement of the legislation.

NSA has formed the view, based on the Consultation Paper and discussions with the Prudential and Approved Provider Regulation Branch, that the government's aims in increasing protections for aged care residents' savings held as accommodation bonds have not been met by the considerations in the consultation so far.

In fact, NSA has formed the view that the consultation, rather than tightening up the use of accommodation bonds has given providers more scope for their use, relaxed the rules and hence loosened the prudential protections. The Consultation Paper, as it currently stands, is lacking in any detail as to how the concerns raised by the Australian National Audit Office (ANAO) in its 2009-2010 report will be addressed by the Regulation Branch's prudential management including the ANAO's suggestions to improve risk assessments, information storage and action to address systemic and non-compliance. It is NSA's view that prudential regulation will not be enhanced unless their recommendations are implemented and such implementation is explained coherently and clearly in the Consultation Paper. Only then can consumers be assured that the review is seriously about enhancing prudential regulation. Based on the recommendations of the ANAO, NSA developed benchmarks (set out in Part B) through which we have sought to see if the Consultation Paper has in effect set about enhancing prudential regulation. We have provided these benchmarks and explained our view to the Department. Based on assessing the Consultation Paper against these benchmarks and the expectations of consumers it is NSA's view that this review has not adequately taken into consideration either articulated consumer concerns, or those of the government commitment outlined on 12 April 2010.

Michael O'Neill, the Chief Executive Officer of National Seniors and Liz Curran met with the Department of Health and Aging (DoHA) on Friday 25 February 2011 at NSA offices- Level 18, 215 Adelaide Street, in Brisbane. They met with Violeta Stefanoska (Acting Assistant Secretary, Prudential and Approved Provider Regulation Branch) and Tom Dale (Director, Prudential and Approved Provider Standards Section). This submission will reflect in the main the key points raised at the meeting. Whilst taking on board most of the points raised by NSA, particularly the lack of consideration to the consumer concerns around the protections on the use of accommodation bonds, we left the meeting concerned that the clear aims of prudential regulation seemed to have been missed or not fully understood at this late stage of the process and with a Government expectation that the new risk based prudential regime in place by 1 July 2011. Some of the elements in the section of the Consultation Paper on 'Disclosure and Information Gathering Powers' we welcome but again there is a need for further clarification about how DoHA will manage and respond to this information.

Some of the changes suggested in this Consultation paper would involve legislative change and we question some of them as will be discussed later in this submission in that they broaden and relax the use of bonds without corresponding checks and balances and consumer protection safeguards being put in place. In some instances as the discussion in Part C will identify the Department is also being given wider discretions which do not to NSA sit comfortably with consumer protection and transparency that consumers would desire.

Part A of the submission will introduce the key issues and definitions and provide the background and context (pages 5-9).

Part B provides benchmarks to test whether enhancements proposed will improve prudential regulation (pages 9-11).

Part C Provides NSA comments on the proposals suggested using the Department's Consultation paper Headings (pages 12-17).

## **Part A Introduction and background**

### Prudential Regulation

Prudential regulation is regulation of deposit-taking institutions and supervision of the conduct of these institutions and set down requirements that limit their risk-taking. The aim of prudential regulation is to ensure the safety of depositors' funds and keep the stability of the financial system. We remain unconvinced that the measures proposed will enhance such regulation.

A prudential regulatory scheme to protect accommodation bonds and to ensure some transparency that was first established in 1997 with the introduction of the Aged Care Act 1997. All the rules and regulations concerning an accommodation bond are defined in the Aged Care Act 1997 (ACA-97), and the accompanying User Rights Principles 1997 (URP-97). The aim of prudential regulation of Accommodation Bonds is to safeguard the significant and increasing bond holdings lodged by older Australians residing in aged care homes, while keeping the regulatory burden and costs to the aged care industry to a minimum. To this end, the Government has assigned DoHA responsibility for developing, in consultation with stakeholders, any necessary additional standards in order to reduce the risks to the residents and the Government. The establishment of new standards does not involve amendment to the primary legislation and can be achieved through amendments to the Principles. Amendments to the Principles require a policy decision by the Australian Government and are subject to Parliamentary scrutiny.

Schedule 1 of the ACA-97 defines the accommodation bond as "an amount of money that does not accrue daily and is paid or payable to an approved provider by the person for the person's entry to a residential care service or flexible care service through which care is, or is to be, provided by the approved provider."

A resident can only be asked to pay the bond if they can afford to do so. A resident cannot be asked to pay the bond unless they have entered a bond agreement.

This agreement sets out a resident's rights and responsibilities. A resident has up to 21 days after entering an aged care home to enter into the bond agreement. Where a person is unable to enter an agreement due to mental impairment, the agreement must be entered into within 21 days of a guardian being appointed. Any change in the level of a resident's assets after they have entered the home does not affect the amount of bond they have agreed to pay.

When a resident pays a lump sum bond, the aged care home must:

- guarantee in writing to repay the bond balance within the statutory time periods, which is within 14 days of giving notice of your departure, on the day you leave if you notify your aged care provider of your departure more than 14 days before you leave, within 14 days after you leave if no notice is given or in the case of death, 14 days after the approved provider is shown probate or letters of administration;
- provide a copy of the bond agreement and a written guarantee within 7 days of the agreement being signed. Every October, the aged care home must also:
- provide information about the number of accommodation bond balances that were not refunded within the statutory time periods over the past financial year;

- give a written statement (including an audit opinion on that statement) about the aged care provider's performance against the prudential requirements; and
- a copy of the entry in the bond register.

Aged care homes must also provide this information to prospective residents on request. Residents and prospective residents may also request the provider's financial accounts.

If the aged care home does not refund a resident's bond balance within the set timeframe, interest will be paid by the aged care home on the bond balance until it is refunded. Furthermore, in the event the aged care home becomes bankrupt or insolvent, the Government will repay a resident's bond balance entitlement, including any interest that has accrued on the bond balance.

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#### DoHAs Regulatory Function & Safeguarding bonds

The Australian Government, through the Department of Health and Ageing (DoHA), is responsible for regulating:

- the prudential requirements under the Aged Care Act 1997 (the Act) and User Rights Principles 1997 (the Principles);
- rules regarding the timeframes for refund of accommodation bonds and the payment of interest on late refunds; and
- the use of accommodation bond funds and ensuring that the income derived from them is directed to improvements in residential aged care infrastructure and services by aged care providers.

DoHA's role in administering the legislative framework established for prudential regulation under the Act and the Principles primarily comprises the following core activities:

- monitoring compliance and acting on non-compliance by approved providers with their prudential responsibilities: this involves assessing audited annual provider compliance statements, evaluating complaints data, reviewing regulatory intelligence, investigating possible cases of non-compliance and addressing non-compliance;
- educating and informing approved providers and care recipients of their rights and responsibilities: this involves producing and distributing advisory materials to assist stakeholders to understand and meet prudential requirements;
- monitoring the efficacy of the policy framework for prudential regulation: this involves identifying possible inefficiencies and gaps in the prudential framework, and determining the appropriate remedial response, which may include seeking amendments to the primary legislation or introducing new prudential standards; and

- Safeguarding bonds: this involves administration of the Accommodation Bond Guarantee Scheme including the Aged Care (Bond Security) Act 2006 and the Aged Care (Bond Security) Levy Act 2006.

Within the legislative framework established by Parliament, DoHA has discretion to target its regulatory resources across its core activities in order to gain reasonable assurance as to providers' compliance with established regulations. The ANAO Report 2009-2010 provides useful information which we have drawn from heavily in this submission.

In 2008–09, the department had resourcing of \$1.9 million and 12 central office staff to perform the prudential regulation function. The department's administration of prudential regulations is positioned within the much larger national quality assurance framework for residential aged care established under the Act. This quality framework imposes a broad range of regulations on aged care providers in the key areas of accreditation, certification, and support for users' rights, which includes complaints investigation. The total value of bonds has increased by 20% over the last 4 years. In 2008-2009 the average bond holding held by an individual approved provider was \$10 million and the average new accommodation bond paid was \$212,000. (Source: DoHA Consultation Paper, February 2011)

DoHA concedes there is evidence suggesting that accommodation bonds have been diverted by some approved providers to non-aged care purpose and or used as general operation funds. (Source: DoHA Consultation Paper, February 2011). This suggests that there are significant problems with the current regulatory framework if this legislative requirement on providers has been avoided and no timely action has been taken.

A comparison by DoHA of APCS data from 2006–07 to 2007–08 indicated improved overall reported compliance by providers with each prudential standard (except the Records Standard) and an overall improvement in the timeframes for refunding bonds. In 2007–08, reports lodged by aged care providers suggested that compliance against the three prudential standards—liquidity, record-keeping and disclosure—on average ranged between 95 and 99 per cent, with reported compliance with the disclosure standard below 90 per cent for state/local government providers. In the same period, on average 87 per cent of providers reported that they had refunded all bond balances to residents or their estates within statutory timeframes. Although on the face of it these data on compliance levels seems high the information is derived from self-reporting by providers backed by independent reports from registered company auditors. NSA is not therefore fully convinced of their veracity given the heavily reliance on self reporting and the absence of effective independent monitoring mechanisms as has been highlighted by the ANAO. Unlike some other regulatory regimes, the department does not have a risk-based compliance monitoring program that provides reasonable assurance as to the appropriateness of self-reporting arrangements. Furthermore, the department does not collect data from providers on the value of late bond repayments (Source ANAO 2009/2010).

The ANAO reported that in those instances where reported provider non-compliance with prudential regulations was confirmed following an investigation, DoHA instituted remedial action. In 2007–08, the department issued 62 'warning letters' and one Notice of Non-compliance. The power to impose a sanction on a provider is also available to the department in cases of serious non-compliance with legislated responsibilities. The ANAO stated that the use of sanctions to remedy prudential non-compliance is infrequent,

primarily because the existing sanctions have limitations in providing a proportionate response for cases of non-compliance. Although DoHA indicated that it is considering regulatory reforms to deliver more appropriate remedies for prudential non-compliance and limit any adverse impact upon the financial viability of providers subject to non-compliance action, this is not articulated clearly in the Consultation Paper and would need to be detailed in any final report with time lines in place for a transitioning to the new enhancements.

NSA is well aware that over the next forty years the population of over 65 year olds is projected to double. In order to meet demand, we appreciate that the aged care industry requires access to capital to fund the construction of new aged care homes and to re-build or upgrade existing homes. Capital funding for the aged care sector is, in part, sourced from accommodation bonds lodged by residents. Although we appreciate this need for funding of the aged care system given accommodation bonds come directly from members of the community it is critical that community members have confidence in how that money is used. We are concerned that the fact that the money originates from community members has been lost in the Consultation Paper which seems to be all about relaxing and improving things for the provider rather than providing enhanced mechanisms to assure the public that the accommodation bonds are being well managed and to ensure that where there is risk frameworks are in place to minimise it. We are not convinced by the Consultation paper that such concerns have received sufficient prominence.

In order to improve the protections for residents paying bonds, the legislation introduced mandatory requirements for providers that included: a contractual guarantee of repayment from the provider to the resident; statutory timeframes for the repayment of bond balances by aged care providers to residents; and the submission of a certified annual statement by providers that they followed the requirements, were able to pay liabilities, maintained adequate insurance, and repaid bonds as required.

In 2006, the Australian Government supplemented existing prudential regulations with standards on liquidity, record-keeping and disclosure to further protect the significant sums of money held by providers on behalf of residents. The standards are aimed at assisting providers improve their financial management practices, enhance financial sustainability, and reduce the risk of default on the refund of bond balances. The changes in 2006 also introduced a requirement for the annual statement of compliance to be accompanied by an audit opinion provided by an independent, registered auditor.

Since its inception in 2006, the Scheme has been activated on three occasions, with bond balances to be refunded by the Commonwealth under the Scheme totalling around \$19 million. The Government did not levy the industry to recoup its outlays in relation to the first Scheme event and a decision is yet to be made in relation to subsequent events.

In introducing and augmenting prudential regulations, Australian governments have established arrangements covering bond refunds, uses for bonds and derived income and prudential standards, with new standards introduced over time to reduce the risks to residents and government. The approach taken to date involves a regime of self-managed funds held by individual aged care providers whereby providers must meet prudential standards on liquidity, record-keeping and disclosure, and ensure that bonds and bond income are used for the purpose of providing aged care to care recipients. However, in order to allow providers access to bond funds as a source of capital, the legislation does not



prescribe 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 provide aged care to care recipients. This reflects the policy approach stated by the Government in 2006 that it was not the Government's intention to run the business of each provider (Source ANAO; 2009/2010 Report, Protection of Residential Aged Care Bonds).

Responsibility for regulation under the framework is broadly allocated across DoHA and portfolio agencies. Government reforms to the regulatory framework over time have necessitated an expansion of DoHA's regulatory responsibilities and have required the acquisition and development of new, specialist skills and tailored regulatory arrangements. In particular, it has been necessary for DoHA to acquire skills in areas such as financial analysis and insolvency in order to monitor prudential compliance and to ensure the effective operation of the Scheme.

### **Part B. Benchmarks to Test Whether Enhancements to Prudential Regulation are addressed/met by the Consultation Paper**

NSA specifically suggested to DoHA at its meeting with them on 25 February 2011, that in gauging how effectively the Consultation Paper dealt with enhancing prudential regulation, NSA had formulated a set of benchmarks based upon what the Australian National Audit Office suggesting if these benchmarks were reached it would in our view make prudential regulation more effective in relation to accommodation bonds.

An 'x' symbol beside the benchmark means that the Consultation Paper does not have address or consider the benchmark.

An '✓' means the benchmark has been met.

An '?' means the benchmark has been only partly addressed.

#### ***The benchmarks are as follows:***

- a. Strengthen the department's capacity to identify and assess the significance of emerging threats, through effective risk management and the targeted collection of regulatory intelligence. x
- b. Establish regulatory processes to determine provider compliance with legislated uses for bonds and bond income. x
- c. Clarify the use of bonds. x
- d. Comprehensively documents its approach to the monitoring and management of non-compliance over time in the form of a compliance strategy and underpinning compliance schedule. x
- e. Management of the dual role of the department—that is its role in achieving the policy objectives of accessible, quality and affordable aged care and its role as a prudential regulator. x
- f. The new structuring of DoHA regulation strengthens its perceived objectivity and

impartiality given likely involvement of the regulator in negotiating ownership or service delivery matters, particularly where future compliance action may be warranted against an alternate provider with whom the department has negotiated a transfer. × Note: The meeting suggested that DoHA had consulted mainly with providers and not consumer groups in its Consultation Paper. This was concerning. NSA suggested some further Consumer Groups who ought be consulted. It led us to suggest that the perception could be that the proposed regime does not suggest objectivity and impartiality in the manner in which the consultations and process have been set up.

- g. Developed an improved underpinning assessment of risks and measures to mitigate risk - including timely information to better quantify risks and establish appropriate treatments to ensure that the regulatory framework delivers intended protections. ×
- h. Identifies measures and targets that fully inform an assessment of its regulatory performance by internal and external stakeholders. Includes measures and targets for provider awareness of regulations; the percentage of compliance actions finalised within pre-determined time-frames; the impact of regulation on the aged care industry; or the responsiveness of DoHA to the regulation of a new issue or introduction of deregulation. ×
- i. Establishes a risk-based compliance processes to monitor the use of accommodation bonds and bond income in order to provide reasonable, targeted assurance of provider compliance
- j. Developed and published a service charter or regulatory code of conduct for its prudential regulation function. ×
- k. Documenting of compliance strategy or underpinning compliance program/schedule and developing prudential risk indicators. ×
- l. Alignment of the department's day-to-day monitoring approaches with short, medium and longer term regulatory objectives. ×
- m. Timely access to, and analysis of, relevant regulatory information and data and consolidation and analysis of information available to the department to better inform its assessment of key contemporary risks, including the impact of volatile financial markets on the security of bond holdings to better quantify risks and establish appropriate treatments to ensure that the regulatory framework delivers intended protections. '?'

Note: There was some evidence in the Consultation Paper that DoHA would be seeking greater disclosure from providers but, not in a way that DoHA would be able to identify the systemic risks the benchmark here would mitigate against.

- n. A process or system to bring together all regulatory intelligence in order to build a

comprehensive risk profile of providers. Centralisation and co-locating the prudential and approved provider regulatory functions to improve the sharing of regulatory intelligence. x

**Part C      Comments on the Consultation Paper from a consumer protection perspective using the Consultation Paper's own headings:**

- I. **Permitted use of bonds-** the Consultation Paper states the bond amount taken from residents would only be used for certain purposes – costs associated with capital investment; loans to related parties with limitations on who; making financial investments i.e. in financial products as defined under Corporation Act; investment in other deposit-like accounts with authorised deposit taking institutions and meeting proposed new Governance standards; refunding bonds and associated retirement of debt. Consideration is also being given to: Removing current restrictions on use of income from bond investment; including in permitted uses of bonds (under costs associated with capital investment); initial start-up costs associated with construction or acquisition of facilities; purchase of allocated places (bed licenses); losses incurred for a specified period following the acquisition of facilities as a 'going concern' to facilitate 'white knight' investment.

**NSA Comment:** In view of the admitted non-compliance with existing legislation how would this 'permitted use' be enforced?

Accommodation Bonds and Operating Expenses- Two options are given. Approved providers would generally not be able to use accommodation bonds for operating expenses, except:

- Option A - Approved providers would be able to notify the Department where they believe they will be unable to comply with the new permitted uses requirements for bonds; and the Department would be able to use existing administrative powers under the Act to authorise, on a case-by-case basis, the continued non-compliance for a limited period of time in order for the approved provider to restructure its business to be compliant.
- Option B - Approved providers would be able to use accommodation bonds to meet operating expenses subject to certain requirements being met which are articulated as: regular and detailed reporting to the Department on this use; prohibiting significant amounts of accommodation bonds being used to meet operating expenses; and controlling the use of bond balances to meet operating expenses charged by related entities in order to address the risks of inflated expenses (for example, rents and management fees that do not reflect commercial realities).

**NSA Comment:** One view is that, DoHA in seeking to get around providers circumnavigating legislative requirements on the application of bonds, is, to allow wider scope for providers to get around the legislation. It then suggests enabling DoHA a discretion that they can exercise more widely. NSA is not sure that this either addresses ANAO concerns or how it will enhance consumer confidence in the protection of the bond

use. ANAO's other concerns about data collection, assessment of threats and risk, impartiality and perceptions currently around the misuse of bonds (above benchmarks b, c, g, h, l, k, l, and m) it is hard to see how these suggestions are an enhancement. It could in fact see the regulation around the use of bonds even further weakened. This is not the greater 'clarification of further use of bonds' that DoHA was to be achieving.

## 2. Governance Standards

**NSA Comment:** These appear to be a little light on for detail for NSA to be able to make sensible comment. The governance aspects seem to be targeted at providers rather than addressing the key benchmarks above of a, b, e, f.

Certainly better governance of providers as the Consultation Paper suggests, especially after incidents like those at Assisi in Rosanna (The Sunday Age 31 October 2010) are desirable. Again, the proposals are light on detail and the suggestion that different governance standards and controls might be considered proportionate to the size of provider suggests a fundamental misunderstanding around good governance. Good governance usually is not normally limited by size but practice and procedures being firmly in place and embedded in the culture of the organization. The proposals in paragraph 36 are a good start.

## 3. Disclosure and Information Gathering Powers

The suggestions in this part of the Consultation Paper will increase the information available to the Department and will enhance transparency from providers and NSA welcomes these. They providers are to include information in their APCS as follows: which permitted uses total bond balances have been used for; value of total bond balances held against permitted; uses at end of financial year; details of loans to related parties; attestation that bonds have only been used for permitted purposes (further details to be provided if attestation cannot be made;).

**NSA Comment:** We welcome clearer reporting on how bond balances are being used as detailed in paragraph 44. The proposal that 'where the Department has reasonable grounds for concern, it will require an approved provider to submit to the Department information relevant to accommodation bond balances held by the approved provider, including on a periodic basis for a period up to 12 months' is a good measure. The critical issue is around how the DoHA will store monitor and respond to this information in line with benchmarks a, d, g, l, l, and m. The proposal, in paragraph 51-56, to amend the Disclosure Standard to require approved providers to submit information on the uses of bond monies is good. In particular, providers will need to submit the following information in their APCS and it is suggested that they also be required to report failures to comply with permitted uses which is desirable.

It is understandable why providers want a simplified reporting approach and this should be accommodated but, in such a way, **that does not undermine the level of information and its accuracy and detail so as to properly monitor what is happening and to enforce standards.** It is good to see that there will be disclosure to care recipients and prospective care recipients especially as they are the ones paying the bonds. Expansion of the Act to enable this gathering of information to the Department would be required.

More detail on the logistics of this gathering of information and of its use to monitor compliance and ensure that sound comparisons data would be available to assist consumers in their choices, confidence in the data and how accessible the information would be is required.

Significant misuse of bonds would be the subject of a separate reporting requirement for criminal penalties (These would apply to providers who fail to disclose significant misuse of bonds and individuals who intentionally or recklessly fail to meet their responsibilities and, as a consequence, bonds are significantly misused).

**NSA Comment:** The processes that DoHA would follow to initiate such criminal prosecution by DoHA are vague. Information would be given to existing/prospective care recipients as follows: which actual or likely permitted uses bonds will be used for; a brief statement of Investment Management Strategy (if applicable); any failure to comply with permitted uses and/or action taken by Department; additional powers for the Department to request relevant financial information.

There is no specification around how the DoHA would deal with such information coming through. This again overlooks the role of the department in regulation enforcement and planning responses systematically to non-permitted use. It states 'It is proposed that several changes of a technical or administrative nature be made to current arrangements as part of this package of measures.' In order to address the key concerns of ANAO more detail would need to be provided on these measures by the Department in its final suggestions for the enhancement of the regulation of accommodation bonds.

#### **4. Permitted Use of Bonds**

The four categories proposed are:

- i. meeting capital works costs where these costs relate to the provision of residential care, or flexible care in a residential setting, by the approved provider, including the retiring of debt related to these costs;
- ii. loans to related parties where the related party uses the loan for a permitted use, subject to certain criteria being met;
- iii. investing in financial products, subject to certain requirements being met; and
- iv. paying back existing accommodation bonds.

(See discussion under I above). The key extension is that the proposals clarify that accommodation bonds may be used by the approved provider to meet capital works costs related to the provision of residential care, or flexible care in a residential setting, by the provider. This would include retiring debt incurred by the approved provider in meeting capital works costs where the purpose of the capital works is, or was, related to the provision of residential or flexible care by the provider. Capital works could include new or refurbished residential or flexible care facilities, or acquiring existing facilities, other than those where

the resident who paid the bond resides and certain costs associated with the initial start-up of new facilities or the purchase of existing facilities should be included within the definition of capital works costs. There is some provision as to the use of bonds in the Act s 70-73 and the proposals broaden these. The definition would be amended to include 'flexible care provided in a residential care' setting (e.g. through a Multi-Purpose Service) and to make the definition exhaustive. It would probably require legislative change so opens up opportunity for further examination/scrutiny.

**NSA Comment:** The Consultation Paper states 'while it is proposed to adopt a relatively broad definition for capital works costs, the effectiveness of this definition will be monitored.' How would the Department monitor it? Given the key driving reason for this process were the concerns of the ANOA around how DoHA sets up its processes to monitor and their ineffectiveness, the lack of detail in the paper on DoHAs own monitoring improvements is concerning from a consumer protection perspective.

At the end of the day, accommodation bonds are handed over by the consumer and the amount not spent is supposed to be returned on leaving or death. If the monitoring and compliance processes remain vague and ad hoc then the regulation will be problematic and lack rigor. We suggest this can only lead to even more cynicism about the use of bonds in the community than there already is. ***Whilst understanding the key role of providers in the provision of aged care facilities there must be a better balance if the real aims of prudential regulation are to be achieved.***

## 5. Related Party Loans

The provisions around loans are being broadened but with a proviso 'but to amend the Act to ensure that these loans and the risks they pose are appropriately managed.' Whilst making loans arms-length and on a commercial basis and to be disclosed in the approved providers APCS the questions around effective monitoring and response to risk by DoHA still remains (See benchmark i) It allows for investment by provider in financial products stating this 'is subject to the provider being able to demonstrate it has an appropriate level of risk management.'

**NSA Comment:** No detail is provided as to how DoHA would monitor this 'broadening of related party loans' in line with the ANOA recommendations is provided.

NSA is concerned that the Department seems to be arguing that the best way of clarifying the permitted uses for lump sum accommodation bonds would be by 'removing the current restrictions contained in the Act... on the use of income derived from investing accommodation bond balances.' They then state that to 'reduce regulatory burdens' would ensure 'ensure that regulation better targets the key risks to accommodation bonds'. The

logic would seem to be that less restrictions leads to better regulations. This may not satisfy the general public sense of the definition of good prudential regulation.

## **6. Refunding Accommodation Bond Balances**

This proposal would amend the Act to enable accommodation bonds to be used to refund existing accommodation bond balances or be used to repay an approved provider who has incurred a liability by refunding accommodation bond balances from its own funds.

**NSA Comment:** NSA is not sure how this is a method of better protecting the bonds paid by consumers. It certainly gives more latitude to the providers. If the point of this is to enhance prudential regulation and better proscribe/ clarify bond use to protect them and ensure they are used largely in line with the real costs of providing the aged care facility then the proposals fall significantly short.

## **7. Accommodation bonds and operating expenses**

The Department concedes that Regulatory and compliance actions undertaken by the Department have indicated that there may be some approved providers who are using accommodation bonds to meet operating expenses.

**NSA Comment:** Again this section eases/broadens the use for bonds as above to accommodate providers. Whilst sometimes if there is an effort to ensure compliance occurs and monitor this as may be appropriate (e.g. an approved provider may temporarily encounter difficulties with complying). They suggest in this situation it would be appropriate to allow approved providers experiencing difficulties complying, on a case-by-case basis and for a limited period of time giving them the opportunity to make changes such as restructuring their business operations, in order to ensure that they comply with the permitted uses of accommodation bonds). NSA finds this concerning.

DoHA also suggests giving itself administrative powers under the Act to use approve use of the accommodation bonds for operational expenses within a limited time frame and that the Department would monitor this. Given the ANAO was so concerned about DoHA's capacity to monitor, and given most of the benchmarks have not been met, this raises further concern from a consumer protection and arms length dealings by the Department of providers perspective.

## **8. Criminal Penalties**

In cases where accommodation bonds have been misused the most significant action the Department can take is to revoke approved provider status and allocated places. Once approval has been revoked, there are no powers under the Act to take action against responsible individuals or the company for the misuse of bonds. Issues around providers going into liquidation are challenges discussed. Whilst it is good that it is noted in paragraph 64 that



Government believes that the significant misuse of accommodation bonds is a serious offence that should carry criminal penalties. Criminal penalties would create additional incentives to comply with the permitted uses of accommodation bonds, while reflecting the serious nature of the breach of responsibilities where non-compliance has occurred. The Government also believes that it is important from a prudential perspective to require approved providers to disclose non-compliance as soon as possible in order to ensure such breaches can be rectified and the risks to bond balances minimised. A tiered approach to criminal sanctions is suggested so as to promote and balance the need for early exposure but also avert misuse of bonds inclusive of intentional and reckless failure. Significant misuses would be required to be disclosed with a definition of 'significant' suggested. Penalties could include pecuniary penalties and possible imprisonment.

**NSA Comment:** The Consultation Paper notes that there is currently no legislative capacity for the Department to take action against key personnel of approved providers even where there is evidence that they may have knowingly misused accommodation bonds. This is clearly a significant area in need of reform from a consumer point of view and to also avert poor practices and deter these. There was concern from providers that they not be exposed to criminal sanctions simply on the basis of use of the bonds for non-permitted purposes hence a distinction between minor and significant breaches was proposed.

Providers also argue that it should have criminal sanctions for only the 'worst cases' for example, fraudulent activities.

NSA is very troubled by this request. It would seem to offer an inconsistent application of the rule of law and would not assist in enhancing consumer confidence. We suggest that in the longer term the providers' suggestion would be more unsettling for providers in terms of them being certain of a consistent and a fair approach in the application of the laws. More clarification around DoHA's attitudes to the providers' rather extraordinary suggestions that the law be applied differently is needed. NSA would seek to be assured that the fundamental and long valued notions of the rule of law will underpin reform are requested. We respectfully suggest that the Department may want to seek further external legal advice on the providers proposal before proceeding with it.

#### Other relevant issues to the consultation:

In April 2009, the Senate Standing Committee on Finance and Public Administration reported on its inquiry into Residential and Community Aged Care in Australia. The report commented on a broad range of residential aged care issues, including financial risk factors in aged care and the viability of aged care providers. The committee considered there was a need to establish a clear understanding of the financial status of aged care providers and recommended that DoHA undertake a 'stress test' of the aged care sector in order to measure the sector's financial wellbeing. The Government Response to this Report was tabled on 17 February 2011 and is worthy of also being considered by this review.

#### Queries on submission

Should you have any questions on this submission, please do not hesitate to contact Dr Liz Curran, Director of Policy at National Seniors Australia on (02) 62306798.

