

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AGED CARE AMENDMENT (2008 MEASURES NO. 2) BILL 2008**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for Ageing, the Hon Justine Elliott MP)



## **AGED CARE AMENDMENT (2008 MEASURES NO. 2) BILL 2008**

### **OUTLINE**

The purpose of the Bill is to amend the *Aged Care Act 1997* (the Act) and the *Aged Care (Bond Security) Act 2006* (the Bond Security Act) to address current legislative inadequacies and maintain effective regulatory safeguards for ensuring high quality care for older Australians.

When the aged care legislation was developed ten years ago, the typical business model adopted by aged care providers was one whereby the owner of the facilities also operated the aged care facility. The regulatory framework reflected the ‘cottage’ nature of the sector as it then was. In recent years a different model of aged care has emerged, one in which the owner and operator of a facility have distinct roles and responsibilities and may function quite separately. The last decade has also seen a significant increase in the level of investment in the sector from large corporate entities. The regulatory framework has not kept pace with this shift in business practice. This lack of consistency between the regulatory framework and contemporary business practice means that the legislation has not been able to be applied equally to all approved providers regardless of their corporate structure.

The shortcomings of the existing regulatory framework are varied, impacting upon care providers, care recipients and the broader community. Under the current legislation, there is limited capacity for the Secretary of the Department of Health and Ageing (the Secretary) to consider the record of ‘related entities’ when making decisions about approvals. This unnecessarily and inappropriately limits the ability of the Secretary to make an informed assessment of a company’s record in service delivery and its suitability to be approved to deliver care in the future. The Bill addresses this issue, to provide better protection for residents and promote public confidence.

Similarly, under current arrangements, those ‘pulling the financial strings’ may not be considered ‘key personnel’ for the purposes of regulatory scrutiny. Proposed amendments to the range of people considered to be an approved provider’s ‘key personnel’ will enable an examination of all relevant people, and will ensure that the legislation applies consistently to all approved providers.

Another feature of the sector in 2008, not envisaged in the 1997 legislation, relates to the provision of a broad range of aged care services within the one facility. Increasingly developers are putting aged care, retirement villages and sometimes disability or step down care all in the same development, giving rise to uncertainty relating to the regulatory reach of the Act. Changes to the regulatory and administrative framework will clarify that only the aged care services are regulated under the Act.

In recent years there has been significant growth in the value of accommodation bonds held by aged care providers. As at 30 June 2007, around 970 approved providers (75% of all approved providers) held accommodation bonds, with a total value of \$6.3 billion. It is very important in terms of consumer confidence, and to maintain and increase the level of corporate investment into the sector, that the regulatory framework that governs these financial arrangements is as robust as possible. Proposed amendments will ensure that accommodation bonds (or like payments) that have been paid by care recipients for entry into aged care services are fully protected under the Accommodation Bond Guarantee

Scheme (the Guarantee Scheme) and that residents in similar circumstances are accorded similar protections. Since the introduction of the Guarantee Scheme in 2006 (which guarantees the refund of bonds in the event that an approved provider becomes insolvent), experience has highlighted some areas in which the protections for residents could be strengthened. The Bill amends both the Act and the Bond Security Act to improve the operation of the Guarantee Scheme.

The Bill also clarifies that the key responsibility of the Secretary when considering the imposition of sanctions on an aged care provider is to protect the health, welfare and interests of current and future care recipients.

In addition, feedback from the sector reflects a level of dissatisfaction with the complexity and number of assessments required of an individual's care needs, by Aged Care Assessment Teams. Some assessment points required in the existing process have been identified as being unnecessary or administrative in nature. The proposed amendments contained in this Bill will streamline assessments of older Australians, so as to enable more timely, consistent and quality assessments for aged care.

The proposed amendments will also make some minor, operational changes to improve the administration of the legislation so that it operates more efficiently and effectively.

#### **FINANCIAL IMPACT STATEMENT**

No net impact on budget.

## REGULATION IMPACT STATEMENT

### *1. Purpose and background*

The aged care legislation provides the regulatory framework for Commonwealth Government funded aged care providers and provides protection for aged care recipients. The purpose of this Regulation Impact Statement (RIS) is to identify the best means by which to:

- maintain effective regulatory safeguards;
- ensure high quality care for frail older Australians;
- promote public confidence in the aged care system;
- provide a regulatory framework that is appropriate in an evolving corporate environment; and
- ensure, as far as practicable, that the financial interests of care recipients are protected.

### *2. Problem*

Some of the specific problems that have given rise to the Government identifying the need for reforms to the regulatory framework for aged care include the following:

#### **a) Regulation of approved providers**

- **Linking approved provider status to an allocation of places** - Currently an entity can be an 'Approved Provider' despite not yet having been allocated any Australian Government funded aged care places. This can give rise to uncertainty regarding the protections provided to care recipients and the rights and responsibilities of the approved provider. It also allows an entity to hold itself out as being 'approved' despite not having been allocated places and not being subject to the same level of scrutiny under the Act as those providers with allocated places.
- **Ongoing suitability of approved provider** - The problem is that the Act has been written assuming that, in most cases, the entity approved as an approved provider would have all the necessary skills to directly deliver the care services. However, there have been at least two examples of large financial institutions with no aged care experience purchasing large numbers of services and engaging management companies to manage those services. If an applicant for approved provider status is reliant on a management company to demonstrate that it has skills and experience in aged care, then there can be risks to residents if the management company withdraws its services and the approved provider no longer has the expertise to manage care. This could have a significant impact on an organisation's capacity to provide aged care and could pose risks for care recipients.
- **Considering the record of related entities** - The allocation or transfer of places or approval of extra service status requires the Secretary to consider the record of the approved provider including the record in relation to each of the services operated by the approved provider. The Act was written to reflect the expectation that related aged care services will be owned and managed by a single approved provider. However, in recent times, the nature of the industry has changed and some organisations have created new approved provider entities for each service. This limits the capacity of the Department to take into account the performance

record of other services that have key personnel in common with the service under consideration.

- **Clarifying key personnel** - Currently approved providers are required to identify key personnel as part of establishing their suitability, and notify the Department about changes in key personnel. Key personnel are defined in the legislation according to the organisational role performed. As business structures have changed it has become more likely that control may be exercised over an approved provider by a variety of individuals and organisations that may be outside the immediate entity that constitutes the approved provider. For example, an approved provider entity may form part of a collection of companies managed by another company. When this occurs such people may not be notified to the Department as key personnel despite them having a significant impact on the operations of the approved provider, including the quality of care and the financial viability of the provider (directly impacting on the security of accommodation bonds and security of tenure). The problem with this is that it presents potential risks to care recipients and the Commonwealth Government as well as meaning that certain business structures potentially escape the scrutiny that is applied to key personnel in other business structures.

**b) Reducing the number of unnecessary assessments by Aged Care Assessment Teams (ACAT)**

- The recent *Final Report of the National ACAT Review* released by the Minister for Ageing on 17 March 2008, notes that some assessments that are currently required under the Act appear to be unnecessary or too frequently reviewed as a matter of administration, rather than because peoples care needs have changed. Such reassessments include the need for an annual reassessment for residential respite care and approvals for high level residential care. In both these instances, ongoing approvals are usually granted upon reassessment as it is unlikely that the person no longer requires these types of services.

**c) Protection of residents' accommodation bonds**

- The rationale for the bond refund requirements of the Act and the Guarantee Scheme is to provide strong protections for consumers and ensure high levels of confidence in the industry. There have been examples in recent times of unanticipated outcomes from this process which may be seen as inequitable or unfair to recipients of aged care services. For example the Guarantee Scheme does not cover lump sum payments (substantially similar to bonds) which have been paid by residents for entry to care to an entity that is not an approved provider at the time of the payment but which subsequently becomes an approved provider. This lack of coverage gives rise to several problems. In the event that the approved provider enters into liquidation, the Commonwealth Government is not able to repay those particular residents' lump sums through the Guarantee Scheme. Although the situation does not occur frequently, different outcomes for residents who have made very similar payments (but for the timing of the payments) and have been subject to other aged care protections, is considered inequitable and would potentially reduces consumer confidence in the security of their payments.

### 3. Objectives

The objectives are to:

- address current legislative inadequacies in order to maintain effective regulatory safeguards for ensuring high quality care for frail older Australians and promoting public confidence in the aged care system. In particular:
- in relation to the regulation of approved providers, the objectives are to:
  - clarify who is, and who is not, covered by the regulation of the Act which will improve certainty for residents and providers;
  - ensure that, where approved providers are dependent on a management company for their expertise, the appropriate expertise is maintained; and
  - ensure that requirements relating to key personnel and consideration of applicants for approvals are appropriate in an evolving corporate environment.
- in relation to ACAT assessments:
  - minimise unnecessary assessments so as to ensure more timely, consistent and quality assessments of older people and provide ACATs with the ability to focus their attention on the clients most in need of their services.
- in relation to protection of resident's accommodation bonds:
  - ensure, as far as practicable, that the financial interests of care recipients are protected and that residents in similar circumstances are accorded similar protections under the Guarantee Scheme.

### 4. Options

#### Option A: Do nothing

**Option B: Reform the legislation such that it better reflects the nature of the industry, better protects residents and more effectively and efficiently regulates the provision of services.**

Option B would involve amending the *Aged Care Act 1997* (the Act) and related legislation including the *Aged Care (Bond Security) Act 2006* (the Bond Security Act) such that:

- only those entities that have been approved as approved providers and have an allocation of places would be regulated under the Act. This would be achieved by linking approved provider status to an allocation of places so that an entity cannot be an approved provider in respect of a service unless they have aged care places as the result of allocation by the Department or transfer from another provider. Approved provider status will not take effect until the entity receives places and the status would only take effect in respect of a specific service for which an entity has an allocation of places. Those existing entities that are approved providers without allocations would cease being approved providers six months after the commencing day, unless they receive an allocation of places during that time;
- where approved providers are dependent on a management company for their expertise the appropriate expertise must be maintained (and only changed with the

agreement of the Secretary). This would mean that if the applicant is approved as an approved provider, the Secretary may, by written notice given to the applicant at the time the applicant is notified of the approval, specify the circumstance that the Secretary is satisfied materially affects the applicant's suitability to provide aged care (eg dependence on a management company for expertise). The Secretary would then specify the steps to be taken by the applicant to notify the Secretary and obtain his or her agreement before there is any change to that circumstance. Flexibility would be adopted in cases where it was not possible for the approved provider to provide prior notification (for example, if the management company withdraws its services without notice) and it is expected that the approved provider and the Department would work together co-operatively to identify alternatives which would enable quality care to continue to be provided to residents without interruption;

- the class of key personnel would be expanded to include anyone who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the approved provider. This would include directors (in the case of bodies corporate) and members of the governing body (in the case of entities that are not bodies corporate). Guidance would also be provided by the Department to detail examples of the types of persons that the Department would expect to be notified to the Department as key personnel;
- in considering applications for various approvals under the Act, the Secretary may take into account the performance of other approved providers that have (or have had) key personnel in common with the applicant. The Secretary would look at the conduct of that entity as a provider of aged care, and its compliance with its responsibilities as such a provider;
- in relation to ACAT assessments, unnecessary assessments would be minimised by preventing certain approvals from lapsing after 12 months and allowing them to continue indefinitely (reducing the number of unnecessary assessments which are inconvenient for care recipients and costly for government). This would specifically apply to approvals for high care and respite residential care because in these cases, the care needs of recipients are less likely to change over time (and if they do the ACAT team can be called in to undertake a reassessment). Amendments would also be made to Principles so that people approved for Extended Aged Care at Home (EACH) or EACH Dementia would also be eligible to receive Community Aged Care Packages (again minimising unnecessary assessments).
- in relation to protection of residents' accommodation bonds:
  - unregulated lump sums paid to an existing approved provider (i.e. those approved providers in existence at the commencement of the amendments) prior to them becoming an approved provider would be protected by the Guarantee Scheme;
  - any new approved provider (who becomes an approved provider after the commencement of amendments) would be required to refund any unregulated lump sums upon the allocation of places. The approved provider could then charge bonds or accommodation charges in place of such unregulated lump sums;



- responsibilities in relation to repayment of bond and entry contribution balances would survive the lapsing or revocation of approved provider status and the Guarantee Scheme would apply in respect of such amounts.

It is also proposed that other minor technical amendments be made to the Act to address anomalies and unintended consequences as outlined in the summary of amendments at Attachment B. Each of these is of a minor, technical nature and is not expected to have any significant impacts on approved providers, care recipients or government. This RIS does not therefore detail the impacts of these minor changes.

## 5. *Impact Analysis*

The following groups are considered to be the key groups or bodies potentially affected by the options outlined below:

- approved providers of aged care – there are currently approximately 1,800 approved provider of aged care in Australia;
- recipients of aged care services – there are currently 218,000 care recipients in operational Commonwealth Government funded aged care places; and
- Government – the Commonwealth Government funds aged care and regulates approved providers of Commonwealth Government funded aged care.

## 6. *Summary of Impact of Regulatory Changes*

### Option A: Do nothing

#### Aged care providers:

- Regulation of approved provider** - Maintaining a legislative framework that contains the identified shortcomings and anomalies inherent within it would pose a risk in terms of confidence and certainty in the sector. This risk outweighs any minor short term benefit the industry may gain by avoiding costs associated with transition to any new requirements. Entities would continue to be able to hold themselves out as being ‘approved’ despite not having been allocated places and not being subject to the same level of scrutiny under the Act as those who receive Commonwealth Government funding. This could adversely impact consumer confidence in the industry with attendant disadvantages for approved providers and government
- ACAT** – If the unnecessary reassessments are not addressed, the long waiting times for some older Australians to be assessed and approved for care services would continue, which would not be sustainable given the increasing demand for assessment services. This situation causes unnecessary complexities for providers, who rely on the assessment to establish a person’s eligibility for care, and the level of care for which they are approved. This can lead to additional costs (i.e. providers unable to accept a care recipient where there is a vacancy) and creates uncertainty for approved providers from a planning perspective.
- Accommodation bonds** - The Guarantee Scheme would continue to not cover lump sum payments which have been paid by residents for entry to care to an entity that is not an approved provider at the time of the payment but which

subsequently becomes an approved provider, which gives rise to continued risks for consumers and inequities in the process. The advantage to approved providers of existing arrangements is that by the Guarantee Scheme being unintentionally narrow, the potential call on approved providers by virtue of the imposition of a levy to recover any costs unable to be recovered from an insolvent approved provider through the existing *Aged Care (Bond Security) Levy Act 2008* is somewhat limited.

### Care recipients:

- a) **Regulation of approved provider** – Retention of the status quo presents a disbenefit to care recipients. There would continue to be uncertainty regarding the protections provided to residents who are residents of aged care services that are operated by entities that are approved by the Commonwealth Government but do not receive Commonwealth Government funding. Consumers would also remain unaware of the associated reductions in or removal of protections provided under State-based legislation where an entity is an approved provider (so not covered by some State legislation) but also not fully regulated by the Act because the entity does not have an allocation of places.
- b) **ACAT** – If the unnecessary reassessments continue the long waiting times for some older Australians to be initially assessed and approved for care services would also continue. This can lead to a situation whereby the needs of recipients are not met in a timely fashion. For frail, older Australians appropriate care and intervention is particularly imperative. Delays in access to a residential care facility can also result in care recipients remaining in hospital longer than is desirable for both their personal wellbeing and when considering the health needs of the wider community. Unnecessary assessments are also an inconvenience for care recipients.
- c) **Accommodation bonds** – The present arrangement is inequitable as a situation can arise whereby a consumer pays a lump sum to a provider prior to them becoming an approved provider. In these circumstances the Guarantee Scheme does not cover those payments, despite the fact that the provider subsequently becomes an approved provider and is covered by other aged care protections. This places those consumers at a disadvantage because they are not covered under the Guarantee Scheme and also means those consumers are at a disadvantage relative to other care recipients who paid their bonds after the provider was approved and so have coverage under the Scheme.

### Government:

- a) **Regulation of approved provider** – The regulatory reach of the Department would continue to be inconsistent. The Department would continue to have regulatory capacity with respect to providers not receiving funding, which was not the intention of the regulatory scheme. The capacity of the Department to, for example, take into account the performance record of other aged care services that have the same key personnel as a service under consideration for approval or for the allocation or transfer of places, may be limited. The Department would also continue to have limited capacity to monitor or approve significant changes to an approved provider which may directly influence quality of care. This presents

risks to the Government as the result of being unable to properly regulate approved provider in order to minimise risks to care recipients.

- b) **ACAT** – The inefficiencies identified within the assessment process relating to unnecessary assessments would be maintained and the stakeholder concerns about the timeliness of assessments would remain unaddressed. The unnecessary costs incurred by Government from funding unnecessary assessments would also continue to be incurred.
- c) **Accommodation bonds** – Maintenance of the status quo would mean the Government's capacity to protect the financial interests of aged care recipients would retain existing gaps and inequities in coverage. The scope of the Guarantee Scheme would remain as not entirely consistent with the objectives of the Act. From a Government perspective this situation potentially undermines confidence in the system and also risks exposure of Government to ex-gratia payments to disaffected individuals (in lieu of payments made under the Guarantee Scheme which are recoverable from the insolvent approved provider or other approved providers).

**Option B: Reforming the legislation such that it better reflects the nature of the industry, better protects residents and more effectively and efficiently regulates the provision of services.**

**Aged care industry:**

- a) **Regulation of approved provider** – A key element of the proposed amendments is the linking of approved provider status to the allocation of funded aged care places. Clarifying which providers are subject to the regulatory framework and which ones are not, provides greater certainty for approved providers. The costs associated with this proposed change are expected to be low and limited to indirect costs associated with industry familiarising themselves with the new arrangements rather than any significant direct costs.

At the time of application for various approvals, providers will need to give the Department additional information about other entities that share (or shared) key personnel with the provider. This will have a small associated regulatory cost. However, it will also ensure a more even playing field, by enabling the Department to consider the record of other entities, regardless of the corporate structure adopted by the applicant or the other approved providers. Overall, this option is likely to have a minor impact on existing providers but may have an adverse impact on approved providers who have structured their business affairs to avoid key elements of the regulatory framework (though there is no evidence to suggest that this has occurred).

In relation to the expansion of key personnel, some approved providers already correctly classify Directors (and others involved in management) as key personnel, so the proposed change will have no impact on those who already do so. However for those who do not, this is likely to impose costs on such approved providers, as the result of the requirement to notify these additional people and confirm they are not disqualified individuals. It is expected that initially this could have a medium impact on the sector but overall costs are expected to be small. Guidance provided by the

Department about the types of people expected to be notified would also be expected to provide greater clarity and minimise any necessary compliance costs.

- b) **ACAT** – This is likely to have a large positive impact on approved provider because it will make the assessment process significantly more efficient and lead to a significant reduction in assessment waiting times. As outlined above, given that most approved providers manage their own waiting lists and undertake their own planning processes, this improvement in the efficiency of the ACAT system is welcomed by the provider sector because it increases certainty and reduces costs.
- c) **Accommodation bonds** – By guaranteeing a wider range of payments (ie: unregulated lump sums) the aged care industry could be exposed to increased costs should a levy be imposed as a result of the Commonwealth Government being unable to recover such lump sums from an insolvent approved provider. However, the new arrangements are likely to have a low impact as they ensure no new lump sums (other than accommodation bonds) will be allowed to be held by new approved provider (so there is no increasing liability) and the number of lump sums held by existing approved providers is very low, and is expected to diminish over time (as residents leave homes). Therefore the impact on any levy is expected to be negligible. There is also expected to be an indirect benefit to providers as the result of increased consumer confidence in the security of bonds and lump sums.

#### **Care recipients:**

- a) **Regulation of approved provider** – Care recipients are expected to benefit from better regulation of approved providers. There will be greater protection for care recipients by ensuring that the intent of the existing provisions (to enable scrutiny of the key decision makers and management of an approved provider in order to protect care recipients) is maintained despite changes to the operating environment of providers.

In circumstances where a management company is retained by an applicant for approved provider status (in order to demonstrate that it has skills and experience in aged care), the limitations of the existing regulatory framework are such that an appropriate level of regulatory scrutiny of providers is not able to be applied. This level of exposure currently experienced by care recipients will be removed by the proposed amendments, which presents a significant benefit to consumers.

As noted above, there may be some minor increases in regulatory costs for providers arising from the new amendments. However, given the costs are very small, if these associated regulatory costs are passed on to consumers, the impact of that will also be minimal.

- b) **ACAT** – These proposals will remove many unnecessary reassessments from the assessment system so that reassessments are conducted only on the people that genuinely need them. This should lead to a significant reduction in assessment waiting times. This has benefits to consumers who avoid the need for reassessment when their care needs have not changed and increases the likelihood of a timely assessment when they need care or their needs have changed. This change is therefore expected to have a large positive impact on care recipients.

- c) **Accommodation bonds** – For residents, the amendments ensure greater protections in the event that their approved provider becomes insolvent and the Guarantee Scheme is activated. The proposed changes remove inequities and confusion in the system which currently allow the funds of consumers within the same facility to be treated very differently (i.e. if they have paid an unregulated lump sum they are not protected by the Guarantee Scheme, whereas, if they paid a bond they are). For residents in homes operated by an entity that subsequently become an approved provider after the commencement of the changes, unregulated lump sums will be required to be refunded and residents may be asked to pay a bond in place of the lump sum. The benefit of this to the consumer is that the new bond will be subject to all the protections of the Act and the Guarantee Scheme. This is not expected to have any adverse impact on care recipients as Government will require that the new bond agreements must not be less advantageous for the resident. Given the low probability of the Guarantee Scheme being activated through insolvency of a new approved provider, the actual impact of this amendment is expected to be small; however, increased confidence in the system could have a more significant (but immeasurable) impact.

#### **Government:**

- a) **Regulation of approved provider** – By ensuring the regulatory framework reflects the changing nature of the sector, the proposed amendments contribute significantly to the Department's capacity to meet the objectives of the Act. Changes proposed will provide the Government with more accurate information about those entities and individuals involved in the delivery of aged care services.

For example, the Government's capacity to monitor changes to approved providers' key personnel is greatly enhanced. The Department can now develop an 'early warning' system through which Departmental officers analyse notified changes to key personnel for potential risks to the provision of quality care and the security of residents' bonds.

The amendments will also require the Department to take into account the performance record of other aged care services that have the same key personnel as a service under consideration for the allocation or transfer of places. This better ensures that the Government has access to all relevant information prior to making a regulatory decision and that individuals and organisations who have a poor performance of provision of aged care do not escape regulatory scrutiny. This reduces the risk to Government that poor performers will enter (or continue) in the aged care industry.

Some of the approved provider related regulatory improvements will have cost implications for Government. For example, the scanning of notified changes to key personnel and consequent monitoring of changes assessed as posing a potential risk to residents' care/bonds will require additional resources. There will also be some small additional costs in terms of educating staff about the new regulatory approaches and changes to systems. These small additional costs are expected to be absorbed within existing budgets.

- b) **ACAT** – The inefficiencies identified within the assessment process relating to unnecessary assessments will be removed and the stakeholder concerns about the timeliness of assessments will be addressed. There are also clear benefits to Government because the overall number of (costly) reassessments will be significantly

reduced, freeing up ACATs to conduct more high priority assessments. Without this, Government would need to dramatically increase spending to ensure more timely assessments. This reform could, however, lead to the need for systems changes across government agencies (including Medicare Australia).

- c) **Accommodation bonds** – the proposed amendments enable the Government to better protect the interest of residents, particularly their financial interests. It allows the Guarantee Scheme to operate as intended, and provide greater regulatory certainty for the sector overall.

A summary of the impacts of the Options is at **Attachment A**.

## **7. Consultation**

The reforms have been the subject of consultation with the aged care sector through the Ageing Consultative Committee which comprises peak industry, professional and consumer bodies. Consultation included preparation of a consultation paper and a face-to-face meeting with the Committee on 26 June 2008. As a result of that meeting, the paper was revised and provided to the Committee for wider distribution to stakeholders. Distribution was at the discretion of Committee members but included some providers (both charitable and commercial), peak bodies, consumer representatives, consumers, and other interested parties. Eleven written submissions were received in response to the Consultation Paper from a mix of State and Territory Governments, providers, peak bodies and consumer representatives.

On the whole, stakeholders:

- did not support retaining the status quo (Option 1); and
  - supported Option 2.
- a) **Regulation of approved providers** - The majority of the consulted stakeholders indicated support for the proposed changes. It was recognised that the legislative framework needs to adapt to the changing structure and business practices of the aged care industry. It was also agreed that comprehensive and effective safeguards for consumers are crucial for all stakeholders, including because this promotes confidence in the aged care industry.

Key themes of the feedback received to date include that the proposed changes:

- will increase the accountability and transparency of the sector. All approved providers should be subject to the same scrutiny regardless of their corporate structure. In other words, if the same people manage 10 services through one approved provider entity, then they should be subject to the same scrutiny if they manage 10 services through 10 separate approved provider entities;
- will assist in removing inequities for future aged care recipients;
- will speed up the care recipient assessment process;

- that generally the changes are timely, appropriate and necessary.

Some specific concerns were raised with respect the roll out of the proposed changes and ensuring sufficient information is made available to the sector. The Department is detailing all issues raised regarding the operational elements of the proposed changes and will liaise extensively with the sector as it transitions to the new processes.

In particular it was noted that:

- a number of approved providers already notify the Department about Directors and people involved in financial management or the operational management of the provider and there should be clarity regarding who needs to be notified (the Department will develop guidance in this regard);
  - Government will need to ensure that the provisions relating to considering the record of other approved providers are not used incorrectly. It should be made clear that the provision only requires the consideration and weighing up of these matters and does not (and should not) automatically result in action (or lack thereof) by the delegate (business rules to be developed by the Department will ensure this); and
  - it presents difficulties for an approved provider when unfunded beds (that are part of a completely separate and private undertaking) are captured by Commonwealth Government regulation. The amendments would address this concern by more clearly delineating when an organisation is subject to Commonwealth Government regulation and when it is subject to State or Territory legislation. However, it was also noted that approved providers will need to define their service to ensure only aged care is captured by these provisions.
- b) **ACAT** - Like the reforms to the approved provider arrangements, there was broad support from stakeholders for action to increase the efficiency of the ACAT process. Overall the sector considers waiting lists and times to be unsuitably long, and that some of the identified reassessments currently required are unnecessary and not required or desired by care recipients.
- c) **Accommodation bonds** - Stakeholders noted that any amendments should ensure that retirement villages were not unintentionally caught by the Guarantee Scheme and that extending the coverage of the Guarantee Scheme doesn't encourage unscrupulous individuals. These matters are proposed to be addressed through the amendments and explanatory materials.

## 8. *Conclusion and preferred option*

The major disadvantage of Option 1 (status quo) is that it does not address the problems identified in this RIS.

Option 2 addresses the problems identified and is therefore the preferred option. Specifically:

- it ensures the Department has the powers necessary to protect aged care residents;
- it strikes a balance by allowing beneficial investment in aged care (and not unnecessarily impeding commerce or reducing confidence or investment);
- it provides clarity and regulatory and consumer certainty with regard to which approved providers are subject to Commonwealth Government legislation and which are not. (Only approved providers that have an allocation of Australian Government funded aged care places will be approved, and they will only be approved in relation to the services for which they have funded places);
- the changes in reassessment requirements should lead to a significant reduction in assessment waiting times; and
- it will address unexpected outcomes that have been identified following experience with the operation of the bond security legislation and the Guarantee Scheme, which may be seen as inequitable or unfair to some care recipients of aged care services.

## ***9. Implementation and review***

It is proposed that the changes take effect on 1 January 2009 but that there be a further 6 month transitional period for existing approved providers. This will allow the sector time to become familiar with the revised processes and requirements leading to a smooth transition.

A comprehensive change management plan will be developed in consultation with providers as well as other key agencies where system changes may be required to implement the improvements. It is proposed that the effectiveness of any changes to the legislation be monitored by the Department including through feedback from industry and consumer bodies and other advisory bodies such as the Ageing Consultative Committee.



## SUMMARY OF IMPACT OF OPTIONS

Issue	Stakeholder	Option 1: Status Quo	Option 2: Amend the regulation framework
Regulation of APs	Aged Care providers	<b>Benefits:</b> No direct advantages but any costs arising from any proposed changes would be avoided. <b>Costs:</b> Does not address the problem. Ongoing risks to industry as a whole if public confidence in the regulation of the sector is diminished.	<b>Benefits:</b> Brings clarity to the regulatory environment which benefits the sector as a whole. Increased public confidence in the industry as a whole increases business and investment certainty. <b>Costs:</b> No significant costs. Some minor administrative costs associated with proposed improvements (eg costs to some approved providers re examining and notifying wider class of Key Personnel) <b>Impact:</b> Medium impact but overall compliance costs expected to be low
	Aged Care Recipients	<b>Benefits:</b> No advantages <b>Costs:</b> Continuing uncertainty regarding the protections for residents in homes that do not receive Commonwealth Government funding	<b>Benefits:</b> Care recipients to benefit from better regulation of approved providers (minimising risk of poor quality of care) and clarity re those providers that are and are not covered by aged care legislation. <b>Costs:</b> No significant costs <b>Impact:</b> Low
	Australian Government	<b>Benefits:</b> No advantages <b>Costs:</b> Problems would not be addressed. Regulatory framework will continue to be less effective and efficient and offer fewer protections to consumers than is acceptable to Government.	<b>Benefits:</b> Significantly enhances the Department's capacity to regulate the sector efficiently and thoroughly to ensure the interests of care recipients are protected. <b>Costs:</b> Systematic scanning of notified changes to key personnel and consequent monitoring of changes assessed as posing a potential risk to residents' care/bonds will require additional resources but these are expected to be absorbed in existing funding. <b>Impact:</b> Large potential benefits with small associated costs
Remove the need for some reassessments by ACATs	Aged Care providers	<b>Benefits:</b> No major benefits <b>Costs:</b> Ongoing costs associated with long delays for assessment	<b>Benefits:</b> Provider will benefit significantly from the improved efficiency of the ACAT process (thru absence of delays re care recipients approval and clarity re level of care required by prospective residents). <b>Costs:</b> No significant costs. <b>Impact:</b> Large positive impact

	<b>Aged Care Recipients</b>	<b>Benefits:</b> No major benefits <b>Costs:</b> Ongoing risks associated with waiting times for assessment	<b>Benefits:</b> A significant reduction in assessment waiting times and lead to more certainty for care recipients. <b>Costs:</b> None <b>Impact:</b> Large positive impact
	<b>Australian Government</b>	<b>Benefits:</b> No major benefits <b>Costs:</b> Conducting unnecessary assessments imposes unnecessary direct costs on government, and indirect costs in terms of administrative duplication and other inefficiencies.	<b>Benefits:</b> This will allow A CATs to focus their attention on assessments of new clients to ensure that available aged care places are able to be used and will ensure that reassessments are only conducted on the people that genuinely need them. <b>Costs:</b> No significant costs. <b>Impact:</b> Medium positive impact
<b>Protection of residents' accommodation bonds</b>	<b>Aged Care providers</b>	<b>Benefits:</b> No advantages <b>Costs:</b> Lack of regulatory certainty and identified inequities in the market for residential care remain.	<b>Benefits:</b> Brings clarity to the regulatory environment which benefits the sector as a whole. Increased public confidence in the industry as a whole increases business and investment certainty. <b>Costs:</b> No significant costs. <b>Impact:</b> Low
	<b>Aged Care Recipients</b>	<b>Benefits:</b> No advantages <b>Costs:</b> Lack of regulatory certainty and identified inequities remain.	<b>Benefits:</b> Care recipients to benefit from more equity, certainty, and most of all protection afforded by the Act and the Guarantee Scheme. <b>Costs:</b> No significant costs <b>Impact:</b> Low
	<b>Australian Government</b>	<b>Benefits:</b> No advantages <b>Costs:</b> Problems would not be addressed. Regulatory framework will continue to less effective and efficient and offer fewer protections to consumers than is acceptable to Government.	<b>Benefits:</b> Strengthens the Guarantee Scheme and increases consumer confidence in the system. <b>Costs:</b> No significant costs <b>Impact:</b> Low

**Summary of Amendments including technical and consequential amendments**

**Improved Regulation of Approved Providers**

- Linking approved provider status to allocations of places
- Approved provider status will only take effect in respect of a service that has an allocation of places
- ‘Qualified Applicants’ (who have been approved but whose approval is not yet in force) will have 2 years to receive an allocation of places. If they do not receive an allocation then their approval as a provider will not take effect
- Removing the ability for an approved provider to request revocation (consequential amendment needed because approved provider status will automatically be revoked when an approved provider ceases having any allocations in respect of the service)
- Removing the requirement linking approved provider status with provision of any aged care (consequential amendment needed because approved provider status will be linked to services with allocations)
- Providing that after 6 months any existing approved providers who do not have allocations (and do not get them within 6 months) will automatically cease to be approved providers (consequential amendment to enable transition to the new system)
- Minor amendment to definition of residential care to allow the Principles to prescribe types of care that are not residential care for the purposes of the Act (technical amendment)
- Clarifying the range of people who are key personnel (to include people with significant influence over the approved provider)
- Considering the record of related entities that share key personnel
- Changes relating to ongoing suitability of approved providers (especially where a management company is relied upon)
- Allowing transfer of provisionally allocated places under exceptional circumstances (minor amendment)

**Enhanced protection of residents funds and improving the Guarantee Scheme**

- Extending refund obligations to former approved providers (and associated power to require information from former approved providers in this regard) (technical amendment to ensure Guarantee Scheme operates as intended)
- Increased Guarantee Scheme coverage of unregulated lump sums paid to a care provider which then obtains approved provider status
- Increased protection for bonds taken by approved providers who subsequently become former approved providers
- Technical changes to ensure that Guarantee Scheme operates as intended (i.e. that it refunds outstanding amounts only and enables repayment of amounts clawed back by a liquidator)
- Expanding obligation to give information relating to accommodation bonds, unregulated lump sums, entry contributions etc (consequential to changes expanding application of Guarantee Scheme)
- Enabling the Secretary to impose a condition of allocation requiring the refund of unregulated lump sums when approved provider status takes effect (noting that approved providers can then subsequently take bonds in place of unregulated lump sums)

**Reduction of unnecessary ACAT assessments**

- The reduction of unnecessary assessments by Aged Care Assessment Teams
- Ensuring that approvals for respite care and for high care residential care do not lapse after 12 months (reducing reassessments of people approved for residential respite and reassessments of people living in the community)
- Allowing people to access CACPs if approved for EACH or EACH Dementia (Principles change only)

**Other**

- New sanction to ensure that the existing 'no funding for new residents' sanction operates as intended (technical amendment)
- Changes to the matters Secretary must consider when imposing sanctions to clarify that he/she is to also consider deterring future non-compliance and considering whether the non-compliance threatens the health, welfare or interests of any future care recipients (technical amendment) and must give most weight to protecting the health, welfare or interests of current and future care recipients
- Minor technical amendment to ensure that applicants must provide all the necessary information in relation to the Aged Care Approval Round
- Missing Residents (Amendments mostly required to Principles – one minor amendment to Act to enable approved provider to disclose personal information to the Department)
- Hardship (technical amendment to enable hardship determinations to be made for people who cannot afford to pay a full bond but are able to pay a part bond)
- Private trusts and companies (technical amendment to ensure that private trusts and companies are treated in the same way under the aged care assets test as they are treated under social security and veterans affairs legislation for the pension assets test)

## AGED CARE AMENDMENT (2008 MEASURES NO. 2) BILL 2008

### NOTES ON CLAUSES

#### Clause 1 - Short title

This clause provides that the Bill, once enacted, may be cited as the *Aged Care Amendment (2008 Measures No. 2) Act 2008*.

#### Clause 2 - Commencement

This clause provides that the Bill, once enacted, will commence on 1 January 2009.

#### Clause 3 - Schedule(s)

This clause provides that each Act that is specified in a Schedule to this Bill is amended or repealed as set out in the relevant Schedule, and any other item in a Schedule to this Bill has effect in the way set out in the provision. This Bill makes amendments to the *Aged Care Act 1997* (the Act) and the *Aged Care (Bond Security) Act 2006* and includes application and transitional provisions.

### SCHEDULE 1—AMENDMENTS

#### PART 1—AMENDMENTS

##### Amendments to the *Aged Care Act 1997*

##### Item 1

The intent of the Act is to regulate those providers of aged care that receive Australian Government funding.

Currently however, an entity can be an ‘approved provider’ despite not yet having been allocated any Australian Government funded aged care places. This gives rise to some specific issues of concern:

- care recipients and their families may not be aware of the limitations of the protections afforded under the Act in the absence of allocated places;
- there may be a reduction or removal of protections under State-based legislation where an entity is an approved provider (so not covered by some State legislation) but also not fully regulated by the Act because the entity does not have an allocation of places; and
- potential difficulties for the Department of Health and Ageing acting on non-compliance as its powers rely heavily on reducing or withholding subsidy.

In order to address this situation, amendments are proposed to ensure that approved provider status does not take effect until such time as the successful applicant has an allocation of places. The approved provider status then only takes effect in respect of services in relation to which an allocation has been granted.

To achieve this policy intent, many minor amendments are required throughout the Act in order to make it clear that a provider will only be an approved provider in respect of those services for which they have an allocation of places (be they provisional or operational, allocated directly to the entity or acquired by transfer).

Item 1 makes the first of these changes necessary to give effect to the policy intent.

This item repeals section 7-1 and replaces it with a new section 7-1 (Pre-conditions to receiving subsidy) which provides that payment of subsidy cannot be made unless the person is approved as a provider of aged care and certain other requirements are met.

It makes clear that payments of subsidy cannot be made under Chapter 3 to a person for providing aged care unless:

- the person is approved under Part 2.1 as a provider of aged care; and
- the approval is in force in respect of the type of aged care provided, at the time it is provided; and
- the approval is in force in respect of the aged care service through which the aged care is provided, at the time it is provided. An approval will only be in force in respect of an aged care service if there is an allocation of places to the service (refer Item 2).

## **Item 2**

This section amends section 8-1. As with Item 1, the amendment is designed to achieve the policy intent of ensuring that approved provider status only takes effect in respect of services in relation to which an allocation of places has been granted.

Section 8-1 describes the circumstances in which the Secretary must approve a person as a provider of aged care.

Subsection 8-1(2) currently provides that the approval is in respect of all types of aged care unless the Secretary specifies that it is limited to certain types of care or services.

This item repeals this subsection and replaces it with a new subsection 8-1(2) that provides that the approval is in respect of:

- either all types of aged care or specified types of aged care (this retains the existing intent of the Act); and
- each aged care service in respect of which there is an allocation of places – be it a provisional or operational allocation (originally allocated or transferred). The effect of this is that an entity will only be an approved provider in relation to those services for which they have an allocation of places.

This item also repeals subsection 8-1(3) which currently describes the period for which an approval is in force, and replaces it with a new subsection 8-1(3) which provides that the approval in respect of an aged care service begins to be in force on the first day on which the entity receives an allocation of places in respect of a service.

As allocations can be acquired by an entity in different ways, the section sets out these different ways (which impact on the timing for when approved provider status takes effect in respect of a service). In summary, approved provider status in respect of a service will take effect when:

- an allocation of a place to the person in respect of the aged care service takes effect. This is commonly known as an allocation becoming ‘operational’; or
- a provisional allocation of a place to the person in respect of the aged care service begins to be in force (for example, when the Secretary gives a provisional allocation to an entity); or

- a transfer day occurs for the transfer of a place under Division 16 (be it the transfer of a provisional or operational place).

The effect of these provisions is that a person may apply for approved provider status and may meet the tests for being an approved provider, but their actual approved provider status will not take effect until they acquire an allocation of places in respect of a service.

Further, the approved provider status will only take effect in respect of those services for which the approved provider acquires an allocation of places.

If an approved provider has been granted approval but does not acquire any allocations in respect of any aged care services within two years (or such longer period specified in the Approved Provider Principles), then the approval will lapse and will never come into force.

As is currently the case, the approval is not subject to any limitation relating to when it ceases to be in force, unless the instrument of approval specifies otherwise (for example, the approval may specify a time limit on the approval for a particular type of care). However, the effect of proposed new section 10-2 (refer Item 24) is that if an approved provider loses all of their places in a particular service then they will automatically cease to be an approved provider in respect of that service.

Conversely, if an entity is an approved provider in respect of at least one service then as the provider acquires allocations in respect of other new services, they will automatically become approved providers in respect of those new services. They will not have to keep re-applying for approved provider status. The approved provider status will automatically expand (by virtue of the operation of section 8-1) to encompass all of those services for which the approved provider has an allocation of places (be they provisional or operational).

### **Items 3, 5 and 6**

Currently many of the approvals processes under the Act require the Secretary to consider the record of the applicant or approved provider.

However, some business entities have been creating new approved provider entities for each service. Despite the fact that all of the approved providers of all of the services may have the same, or predominately the same key personnel, the Secretary is not specifically required to take into account the performance record of other, related approved providers who share key personnel when making a number of decisions under the Act.

Amendments are therefore proposed to require the Secretary to take into account whether an entity that is, or has been, an approved provider has relevant key personnel in common with the applicant, in relation to all decision-making points in the Act.

The first section of the Act which requires the Secretary to consider the performance of the applicant is section 8-3 which relates to the suitability of people to provide aged care and be approved as an 'approved provider'. Subsection 8-3(2) currently specifies that the Secretary may take into account the ability, experience, commitment, record and conduct of each of the applicant's key personnel in deciding whether the applicant is suitable to provide aged care. These qualities would normally be evidenced by, amongst other matters, the compliance history of any other entities of which the proposed key personnel

are, or have been, key personnel. It is intended, however, to put it beyond doubt that the Secretary must consider these matters in deciding whether an applicant is suitable to provide aged care.

The amendment proposed in Item 3 achieves the policy intent described above, by amending section 8-3 to insert new paragraph 8-3(1)(ga) to require that if the applicant has relevant key personnel in common with a person who is or has been an approved provider, the Secretary must also consider:

- the person's record of meeting relevant standards for the provision of aged care (see Part 4.1);
- the person's record of commitment to the rights of the recipients of aged care;
- the person's record of financial management, and the methods that the person uses or used in order to ensure sound financial management;
- the person's record of financial management relating to the provision of aged care; and
- the conduct of the person as a provider of aged care, and its compliance with its responsibilities as such a provider and their obligations arising from the receipt of any payments from the Commonwealth Government for providing that aged care.

Item 6 adds new subsection 8-3(6A) to clarify what is meant by the applicant having relevant key personnel in common with a person who is or has been an approved provider. In summary, if the applicant has any key personnel that are also key personnel for another approved provider (or was previously key personnel for another approved provider or for a former approved provider) then the Secretary must consider the performance record of the other approved provider or former approved provider with whom the applicant shares or shared any key personnel.

For example, if a Director of Aged Care Company A is Ms Jones (one of the key personnel) and she is also one of the key personnel for Aged Care Company B, the Secretary must have regard to the compliance record of Aged Care Company B, when considering the application for approved provider status by Aged Care Company A.

If Aged Care Company B has a poor compliance record, this will not necessarily adversely affect Aged Care Company A's application. In considering the record of related entities, the Secretary would have regard to matters such as how closely the entities are related. Each case would be considered on its merits and, where there have been compliance issues, the Secretary would take into account the seriousness of the compliance issue, the nature of the provider's response to the issue, and the roles and responsibilities of the key personnel under consideration.

Item 5 makes a minor, technical, consequential amendment so that existing subsection 8-3(6) appropriately references the new paragraph 8-3(1)(ga). Subsection 8-3(6) deals with references to aged care within the relevant paragraphs (including new paragraph 8-3(1)(ga)). References to aged care include references to any care for the aged, whether provided before or after the commencement of the section, in respect of which any payment was or is payable under a law of the Commonwealth.

#### **Item 4**

Subsections 8-3(3) and (4) currently define key personnel (and the qualifications of certain key personnel) for the purposes of section 8-3. This item repeals these subsections



because they are being replaced by new section 8-3A which defines **key personnel** not just for section 8-2 but for anywhere in the Act or the Principles that the term is used (refer Item 7). This saves the term being repeated, and expressed slightly differently, throughout the Act.

#### **Item 7**

Currently approved providers are required to identify key personnel as part of establishing their suitability, and notify the Department about changes in key personnel. Key personnel are defined in the legislation according to the organisational role performed.

As business structures have changed it has become more likely that control may be exercised over an approved provider by a variety of individuals and organisations that may be outside the immediate entity that constitutes the approved provider. For example, an approved provider entity may form part of a collection of companies managed by another company.

When this occurs such people may not be notified to the Department as key personnel despite them having a significant impact on the operations of the approved provider, including the quality of care and the financial viability of the provider (directly impacting on the security of accommodation bonds and security of tenure). This presents risks to care recipients and the Commonwealth Government as well as meaning that certain business structures potentially escape the scrutiny that is applied to key personnel in other business structures.

This item inserts a new section relating to key personnel.

#### **Section 8-3A Meaning of *key personnel***

Despite being a new section, the individuals who are defined as key personnel remain essentially the same as they have been, but with two important changes to address the issue detailed above:

- the definition of **key personnel** now includes an explicit statement that key personnel include any person having authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the applicant/approved provider. This general wording is based on the accounting standard AASB124 “Related Party Disclosures,” which applies to most approved providers through the financial reporting requirements associated with the Conditional Adjustment Payment; and
- currently applicants and approved providers are required to identify, as key personnel, a member of the group of persons who are responsible for the executive decisions of the entity at that time. New subsection 8-3A(2) is proposed to clarify that this includes a director of a body corporate (where the entity is a body corporate under the *Corporations Act 2001*) or in other cases, a member of the entity’s governing body.

New section 8-3A sets out each of the existing key personnel (previously included in section 8-3) along with these new requirements. In summary, each of the following is one of the key personnel of an entity at a particular time:

- a member of the group of persons who are responsible for the executive decisions of the entity at that time. This includes a director of a body corporate (where the entity

is a body corporate under the *Corporations Act 2001*) or in other cases, a member of the entity's governing body;

- any other person who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the entity at that time;
- any person who is responsible (or is likely to be responsible) for the nursing services provided by the service. This person must hold a recognised qualification in nursing; and
- any person who is responsible (or is likely to be responsible) for the day to day operations of the service, whether or not the person is employed by the entity.

The structure of the section relating to key personnel has changed slightly because it needs to deal with key personnel of both applicants and approved providers (because section 8-3A now sets up the definition of **key personnel** and is then used throughout the Act wherever the term is used).

This means that the definition has to address situations where the applicants may not yet be providing aged care (so the key personnel will include people that will *likely* be responsible the day to day running of the service) as well as entities that are already providing aged care (where the key personnel will be people that are actually responsible the day to day running of the service). This slight change in structure and wording (including the tense of the section) is not intended to have any effect on who is actually required to be notified as key personnel.

### **Items 8 and 9**

Section 8-5 requires the Secretary to notify an applicant whether they have been approved as a provider of aged care. The section also sets out those matters that must be included in the notice.

Items 8 and 9 amend these notice requirements so that they reflect the changes to approved provider status whereby the approval does not come into force until a service has an allocation of places.

These items therefore repeal paragraphs 8-5(2)(b) and (d) and replace them with new paragraphs which require the Secretary to include in the notice statements setting out the following matters:

- the types of aged care in respect of which the approval is given;
- a statement that the approval is in respect of those aged care services in respect of which:
  - an allocation of a place to the person in respect of the aged care service is in effect (whether because the place was originally allocated to the person or because of a transfer); or
  - a provisional allocation of a place to the person in respect of the aged care service is in force (whether because the place was originally allocated to the person but the allocation has not yet taken effect or because of a transfer);
- a statement that the approval will not come into force unless one of the following occurs within a period of two years, or such longer period as is specified in the Approved Provider Principles, beginning on the day on which the instrument of approval is made:
  - an allocation of a place to the person in respect of an aged care service takes effect; or

- a provisional allocation of a place to the person in respect of an aged care service begins to be in force; or
- a transfer day occurs for the transfer under Division 16 of a place to the person for the provision of aged care through an aged care service;
- if the approval specifies that it will cease to be in force on a particular day - the day on which it will cease to be in force.

### **Item 10**

Currently section 10-4 of the Act enables an approved provider to request revocation of approved provider status. As the result of the changes to approved provider status (whereby approved provider status only exists in relation to those types of care and those services for which the entity has an allocation of places), section 10-4 is being repealed (refer Item 27).

If an approved provider no longer wishes to be an approved provider then it can apply to relinquish all of its places for all of its services (in accordance with section 18-2 of the Act) and once the places have been relinquished, it will automatically cease to be an approved provider. Alternatively if it wishes to continue being an approved provider in respect of some services and not others, it need only apply to relinquish the places for the services for which it does not wish to be an approved provider. It will automatically cease being an approved provider in respect of those services for which it has relinquished places under section 18-2.

The purpose of Item 10 is to make a consequential amendment to paragraph 8-5(2)(f). Currently this paragraph requires the Secretary to notify successful applicants for approved provider status of the circumstances in which the approval may be suspended or revoked and the paragraph refers the reader to sections 10-3, 10-4 and Part 4.4. As section 10-4 will no longer describe a circumstance in which the approval can be revoked (as described above), this item removes the reference to that section within paragraph 8-5(2)(f).

### **Item 11**

It has become the business practice of a number of approved providers to engage a management company to manage the delivery of care services. If an applicant for approved provider status is reliant on a management company to demonstrate that it has skills and experience in aged care, the use of the management company should be a condition of approval, unless a change is approved by the Secretary. This is because the change to the management company could have a significant impact on an organisation's capacity to provide aged care and in some instances could pose risks for care recipients and also for the Commonwealth Government.

To ensure that the applicant continues to be suitable to provide care, this item amends section 8-5 to provide that if the applicant is approved as a provider of aged care, the Secretary may, by written notice given to the applicant at the time the applicant is notified of the approval, specify any circumstance that the Secretary is satisfied materially affects the applicant's suitability to provide aged care (proposed subsection 8-5(3)).

For example, the Secretary may specify that the retention of the management company materially affects the applicant's suitability to provide aged care.

The notice may specify the steps to be taken by the applicant to notify the Secretary and obtain his or her agreement before there is any change to that circumstance (proposed subsection 8-5(4)). Proposed subsection 8-5(5) notes, for the purposes of the *Legislative Instruments Act 2003* and the avoidance of doubt, that a notice given to the applicant (under subsection 8-5(3)) is not a legislative instrument.

By way of example of the proposed operation of the notice provision, the notice could state that the applicant must notify the Secretary at least 14 days prior to changing management company (if this is reasonably practicable given the circumstances) and identify an alternative option for the Secretary's approval in order to ensure that the provider maintains suitability to provide care and that the interests of residents are not jeopardised during any transition to a new management company.

Item 114 introduces a complementary amendment whereby it will be a responsibility of the approved provider to comply with steps required in the notice (proposed new section 63-1C).

It is important to note that neither the changes to section 8-5 nor new section 63-1C will have any impact on existing approved providers as at 1 January 2009. However, new entities applying for approved provider status may be impacted. This will depend on a case by case consideration of the circumstances of the applicant for approved provider status. If the Secretary considers that the suitability of the applicant is dependent on a particular circumstance (e.g. the ongoing use of a particular management company) then at the time of granting qualified applicant status, the Secretary may choose to specify that the management company should not be changed unless the provider has done all things reasonably practicable to first notify, and seek the agreement of, the Secretary.

#### **Item 12**

Paragraph 8-6(2)(b) describes circumstances in which States, Territories and local government may lose approval as a provider of aged care including where approval is revoked under section 10-4.

As explained at Item 10, currently section 10-4 of the Act enables an approved provider to request revocation of approved provider status. As the result of the changes to approved provider status (whereby approved provider status only exists in relation to those types of care and those services for which the entity has an allocation of places), section 10-4 is being repealed.

Item 12 therefore removes the reference to section 10-4 which is made redundant by the repeal of that section.

#### **Item 13**

This item makes consequential amendments to paragraph 8-6(3)(b) which reflects changes that have been made to the location of provisions in the Act relating to key personnel. This change does not impact on the effect of the provision.

#### **Item 14**

Subsections 9-1(2) and (3) currently set out the definition of key personnel for the purposes of section 9-1.

This item repeals those subsections because they are no longer necessary as key personnel are now defined in a central definition (in new section 8-3A) that applies to the term wherever it is used in the Act or Principles.

Item 14 inserts new subsections 9-1(2) and (3) as described below:

- subsection 9-1(1) currently requires that approved providers notify the Secretary of a change of circumstances that materially affects the approved provider's suitability to be a provider of aged care or a change of any of the key personnel. Currently these notifications can be notified over the phone, by email, as part of other correspondence and in a variety of different forms. This can lead to confusion and can mean that some notifications are not properly recorded. Item 14 includes a new subsection 9-1(2) which requires that the notification must be in the form approved by the Secretary. It is proposed that the Department will issue a standard form for use by approved providers notifying the changes mentioned in subsection 9-1(1). This is expected to improve the process for both providers and the Department; and
- new subsection 9-1(3) clarifies that State or Territory government approved providers are not required to notify changes that relate to persons who are responsible for the executive decisions of the approved provider (this simply retains the current policy) or any other person who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the approved provider (this reflects the change to the definition of key personnel included in new section 8-3A).

#### **Item 15**

This item inserts new subsection 9-1(3B) which requires that entities who have applied for, and been granted, approved provider status but who do not yet have an allocation of places (so their approved provider status is not yet in force) must comply with the obligations in section 9-1. These obligations require them to notify the Secretary of any of the following changes within 28 days after the change occurs:

- a change of circumstances that materially affects the approved provider's suitability to be a provider of aged care; or
- a change of any of the approved provider's key personnel.

As noted at Item 2, if an applicant is approved as a provider, they have two years within which to acquire an allocation of places (which will bring their approval as a provider into force). During this time, it is important that they notify the changes detailed above to the Secretary because changes in these areas could affect their suitability to be a provider of aged care should they acquire allocations of places.

#### **Item 16**

This item makes a similar amendment to that described in Item 15. In this case, new subsection 9-2(2A) requires that entities who have applied for, and been granted, approved provider status but who do not yet have an allocation of places (so their approved provider status is not yet in force) must comply with the obligations in section 9-2. Section 9-2 provides that the Secretary may, at any time, request an approved provider to give the Secretary such information, relevant to the approved provider's suitability to be a provider of aged care (section 8-3), as is specified in the request. The approved provider must comply with the request within 28 days after the request was made, or within such shorter period as is specified in the notice.

### **Items 17, 18 and 19**

Section 9-3A allows the Secretary to, at any time, request an approved provider to give the Secretary specified information relating to one of the listed topics and the approved provider must comply with the request within 28 days (or a shorter period specified in the request).

Items 17 and 18 amend this section so that it applies not just to approved providers but also former approved providers.

Item 19 amends subsection 9-3A(1) to add to the list of topics in relation to which the Secretary may request information. The additional topics are:

- unregulated lump sums paid to the person; and
- the amount of one or more unregulated lump sum balances at a particular time.

This enables the Secretary to request information regarding unregulated lump sum holdings of an approved provider or former approved provider in the event that the Accommodation Bond Guarantee Scheme (the Guarantee Scheme) has been activated in relation to that approved provider or former approved provider.

### **Item 20**

This is a consequential amendment that amends subsection 9-3A(2) to omit ‘the approved provider’ and substitute ‘the person’ so that the provision can apply to approved providers and former approved providers.

### **Item 21**

Item 21 makes a consequential amendment to ensure that subsection 9-3A(3) applies to approved providers as well as former approved providers. The item repeals the subsection and inserts a new subsection 9-3A(3) which revises the offence so that it applies to a person rather than an approved provider. The substance of the offence remains the same.

### **Item 22**

Section 10-2 sets out the circumstances in which an approval as a provider of aged care ceases to have effect. This includes if the approval is revoked under section 10-4 (refer to paragraph 10-1(1)(b)).

As explained at Item 10, currently section 10-4 of the Act enables an approved provider to request revocation of approved provider status. As the result of the changes to approved provider status (whereby approved provider status only exists in relation to those types of care and those services for which the entity has an allocation of places), section 10-4 is being repealed.

Item 22 therefore removes the reference to section 10-4 which is made redundant by the repeal of that section.

### **Item 23**

This is a consequential amendment that amends a cross-reference to subsection 8-1(3) (within paragraph 10-1(1)(c)) so that it reflects the revised structure and numbering of section 8-1. The amended provision provides that an approval as a provider of aged care ceases to have effect if the period (if any) to which the approval is limited under subsection 8-1(5) ceases to have effect. The amendment does not make any policy change to the section.

#### **Item 24**

Section 10-2 currently provides that if an approved provider does not provide any aged care during a continuous period of six months, the approval lapses on the day after the end of that period. This item repeals this section because approved provider status will instead be linked to whether the approved provider has an allocation of places.

This item inserts a new section 10-2 as follows.

#### **Section 10-2 Approval lapses if no allocated places**

This section provides that the approval of a person as a provider of aged care that is in force lapses if the provider does not have any allocation of any places.

This gives effect to the policy intent which is that approved provider status is directly linked to allocation of places. Approved provider status come into force with the allocation of places to a service and lapses when there are no allocations in respect of a service.

#### **Item 25**

Subsection 10-3(1) currently provides that the Secretary must revoke an approval if the Secretary is satisfied that:

- the approved provider has ceased to be a corporation; or
- the approved provider has ceased to be suitable for approval (see section 8-3); or
- the approved provider's application for approval contained information that was false or misleading in a material particular.

This item repeals existing subsection 10-3(1) and replaces it with a subsection that is substantially the same except that it refers to 'persons' rather than 'approved providers'. This change is needed because an entity may have been granted approved provider status but that status is not yet in force because they have not been allocated places. In this case, the entity is not an approved provider but needs to be covered by section 10-3(1). Subsection 10-3(1) is therefore being amended so that it is expressed to apply generically to 'persons' which covers any of the types of entities to which the subsection may need to apply.

Proposed new subsection 10-3(1) provides that the Secretary must revoke an approval of a person as a provider of aged care under section 8-1 if the Secretary is satisfied that:

- the person has ceased to be a corporation; or
- the person has ceased to be suitable for approval (see section 8 3); or
- the person's application for approval contained information that was false or misleading in a material particular.

Notes following the subsection draw the reader's attention to the fact that revocation of approvals are reviewable under Part 6.1 and approvals may also be revoked as a sanction under Part 4.4.

#### **Item 26**

This item makes consequential amendments to subsections 10-3(3), (5), (6), (7) and (7B) to replace the term "the approved provider" (wherever occurring) with the term "the person". This is so that the provision (which relates to revocation of approval) applies not just to approved providers but also to entities that have been granted approved provider

status but whose approval is not yet in force. Rather than listing these different types of entities, item 26 amends the section to apply to ‘persons’ which includes both of these entities.

#### **Item 27**

This item repeals section 10-4. As noted in item 10, currently section 10-4 of the Act enables an approved provider to request revocation of approved provider status. As the result of the changes to approved provider status (whereby approved provider status only exists in relation to those types of care and those services for which the entity has an allocation of places), section 10-4 is being repealed.

If an approved provider no longer wishes to be an approved provider then they can apply to relinquish all of their places for all of their services (in accordance with section 18-2 of the Act) and once the places have been relinquished, they will automatically cease being an approved provider.

#### **Item 28**

Section 13-1 enables a person to apply for an allocation of places. The section provides that an application is only valid if, among other things, it is in the form approved by the Secretary.

This item makes a minor amendment to the section by inserting new paragraph 13-1(ca) which provides that the application is only valid if it is accompanied by the statements and other information required by the form.

#### **Items 29 and 30**

Subsection 14-1(1) currently provides that the Secretary may allocate places to a person to provide aged care services for a region, but only if the person is an approved provider. Places must not be allocated to the approved provider if:

- under Division 7, subsidy could not be paid to the approved provider for care provided in respect of the places; or
- a sanction imposed under Part 4.4 is in force prohibiting allocation of places to the approved provider.

This item amends subsection 14-1(1) and repeals 14-1(2) (replacing it with a new subsection) which ensures that places may only be allocated to a person who:

- is approved under section 8-1 to provide the aged care in respect of which the places are allocated; or
- will be approved to provide aged care in respect of which the places are allocated once the allocation takes effect or, in the case of a provisional allocation, begins to be in force.

New subsection 14-(2A) retains the existing limitation that the places must not be allocated to the person if a sanction imposed under Part 4.4 is in force prohibiting allocation of places.

#### **Items 31 and 32**

These items amend subsection 14-1(4). Subsection 14-1(4) currently provides that in order for an allocation to be made to an approved provider, the approved provider must



have made a valid application that complies with the invitation unless the Secretary waives these requirements.

This item makes a consequential amendment to this subsection to replace the references to ‘approved provider’ with references to ‘person’. This is so that the provision applies to both approved providers and entities that have been granted approved provider status but whose approval is not yet in force. Rather than listing these different types of entities, these items amend the section to apply to ‘persons’ which includes both of these entities.

### **Items 33 to 35**

Section 14-2 sets out the matters that the Secretary must consider in deciding which allocation of places would best meet the needs of the aged care community in a region.

Item 33 adds an additional matter for consideration in cases where the applicant has relevant key personnel in common with a person who is or has been an approved provider (new paragraph 14-2(1)(da)). In this case the Secretary must consider the conduct of that person as a provider of aged care and its compliance with its responsibilities and obligations arising from the receipt Commonwealth Government aged care funding. Item 35 clarifies that the applicant has relevant key personnel in common with a person who is or has been an approved provider if at the time the person provided aged care, another person was one of its key personnel and that other person is one of the key personnel of the applicant (new subsection 14-2(3)).

Item 34 makes a consequential amendment to subsection 14-2(2) so that it is clear that a reference to aged care, where it occurs in either paragraph 14-2 (1)(d) or (da), includes a reference to any care for the aged, whether provided before or after the commencement of this section, in respect of which any payment was or is payable under a law of the Commonwealth.

### **Items 36 to 41 and 44 to 51**

These items amend sections within Part 2.2 (Allocation of places) to replace the references to ‘approved provider’ with references to persons or a person as the case may be.

These are consequential amendments to ensure that the provisions apply to both approved providers and those entities that have been granted approved provider status but whose approval is not yet in force.

The specific provisions that are being amended are subsection 14-4(1), paragraph 14-4(1)(a), paragraph 14-4(2)(a), paragraph 14-4(3)(a), subsection 14-5(1), paragraph 14-5(4)(c), subsection 14-6(1), subsection 14-9(1), subsection 15-1(1), section 15-3, subsection 15-4(3), subsection 15-4(5), subsection 15-4(6) subsection 15-4(8), subsection 15-5(1), subsection 15-5(4), subsection 15-5(6), section 15-6 and section 15-7.

### **Items 42 and 43**

Section 14-5 provides that the Secretary may make an allocation of places subject to such conditions as the Secretary thinks fit. Subsection 14-5(4) lists examples of the types of matters with which the conditions may deal.

Item 42 amends subsection 14-5(4) by adding new examples of matters with which the conditions may deal (new paragraphs 14-5(4)(e) and (f)). In summary, the new conditions can deal with the treatment of what is known as “pre-allocation lump sums”.

In essence, a pre-allocation lump sum is an amount that is paid by a resident to an entity for entry to the service before it becomes an approved provider in respect of a service. A pre-allocation lump sum is an amount that does not accrue daily, is not a bond or entry contribution and is paid for the care recipient's entry to a residential aged care service conducted by an entity who is not an approved provider and does not have any places under the Act in respect of the service for which the amount was paid.

The amendment defines a *pre-allocation lump sum* so that it is distinguishable from other amounts with which the Act deals such as accommodation bonds and entry contributions.

The amendment enables the Secretary to impose conditions in relation to:

- the treatment of any pre-allocation lump sum (or part thereof) including the refund of the sum or part of the sum, with the consent of the care recipient or the forgiveness of any obligation (including a contingent obligation) in relation to the sum or part of the sum, with the consent of the care recipient (new paragraph 14-5(4)(e)). The intent of this provision is to enable the Secretary to impose as a condition of allocation, a requirement that the entity to whom places are to be allocated, refund any pre-allocation lump sums to residents. The entity, which would become an approved provider in respect of the service upon allocation of the places, may then be able to take a bond in lieu of the pre-allocation lump sum; and
- the conditions and entry into force of any accommodation bond agreement entered into as a consequence of the refund of a pre-allocation lump sum or part of such a sum, or the forgiveness of an obligation (including a contingent obligation) in relation to a pre-allocation lump sum or part of such a sum (new paragraph 14-5(4)(f)). This means that the Secretary can impose a condition to ensure that any bond agreement does not disadvantage the resident (relative to the position that they were in before the refund of the pre-allocation lump sum).

Item 43 adds a new subsection 14-5(5) which provides that if a condition requires refund of a pre-allocation lump sum (or part thereof) or the forgiveness of a contractual obligation relating to that pre-allocation lump sum, and the care recipient continues in care in the same service, then the care recipient and approved provider may then enter into arrangements for payment of a bond or a charge under the Act.

The resident and the approved provider would have the same rights, duties and obligations in relation to the taking of an accommodation bond or an accommodation charge as they would have had, had the care recipient entered the service on the day on which the allocation was made. It is important to note that this is subject to any conditions imposed in relation to the bond agreement that will ensure that the Secretary is not in a less advantageous position as a result.

These changes will ensure that funds paid by residents' to their care providers, that subsequently become an approved provider, are protected under the Act and Bond Security Act. It is expected that only a small number of entities would be affected by these conditions.

## **Item 52**

Division 16 deals with how allocated places are transferred from one person to another. The effect of this item (and Item 66) is to divide Division 16 into two Subdivisions:

- Subdivision 16-A—Transfer of places other than provisionally allocated places; and
- Subdivision 16-B—Transfer of provisionally allocated places

Item 52 also inserts new application section 16-1A which provides that Subdivision 16-A applies to the transfer of an allocated place, other than a provisionally allocated place.

### **Items 53 and 54**

These items make consequential amendments to section 16-1 so rather than referring to allocated places generally, it refers specifically to places to which Subdivision 16-A applies (namely the transfer of places other than provisionally allocated places).

### **Item 55**

Paragraph 16-1(2)(a) provides that the Secretary must approve the transfer of a place if, and only if, an allocation of that place has taken effect under Division 15. The effect of this is to prohibit the transfer of provisionally allocated places (i.e. places that have not take effect under Division 15).

This item repeals this paragraph because new Subdivision 16-B will now allow transfer of provisionally allocated places in exceptional circumstances.

### **Item 56**

Subsection 16-1 deals with transfer of places. This item makes a technical consequential amendment to paragraph 16-1(2)(d) that flows from the changes linking approved provider status to the allocation of places.

Its effect is that the Secretary must approve the transfer of places if, and only if, the transferee is an approved provider when the transfer is completed in respect of the aged care service to which the places will relate after transfer.

### **Items 57 and 58**

These items make consequential amendments to paragraph 16-1(3)(a) and subsection 16-2(1) so that they are specific to Subdivision 16-A (noting that there are separate but similar provisions applying to transfers of provisionally allocated places under Subdivision 16-B).

### **Item 59 and 60**

Subsection 16-2(4) sets out the timeframes for making an application for transfer of places. Items 59 and 60 make technical amendments to this section so that the section works properly in conjunction with the changes to when approved provider status commences (upon allocation of places). There is no substantive change to the actual timeframes for making an application for transfer of places.

In summary, the items amend the subsection to provide that an application must be made:

- if the transferee has been approved under section 8-1 as a provider of aged care (even if the approval has not yet begun to be in force) - no later than 60 days, or such other period as the Secretary determines under subsection 16-2(5), before the proposed transfer day; or
- if the transferee has not been approved under section 8-1 as a provider of aged care - no later than 90 days, or such other period as the Secretary determines under subsection 16-2(5), before the proposed transfer day.

**Item 61**

Subsection 16-2(7) requires the Secretary to give written notice of his or her decision relating to transfer of places to the transfer or and the transferee. Item 61 amends subsection 16-2(7) to clarify that the written notice is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This statement is declaratory only, for the avoidance of doubt.

**Items 62, 63 and 64**

Section 16-4 sets out the matters that the Secretary must consider when deciding whether a transfer of places (other than provisionally allocated places) is justified.

Item 62 is a consequential amendment that numbers the subsection to allow for the new subsections created by Item 64.

Item 63 inserts two new matters that the Secretary must consider:

- if the transferee has been a provider of aged care, the Secretary must consider its conduct as such a provider and its compliance with its responsibilities and obligations arising from the receipt of payments from the Commonwealth Government for providing that aged care (new paragraph 16-4(ea)); and
- if the transferee has relevant key personnel in common with a person who is or has been an approved provider - the conduct of that person as a provider of aged care, and its compliance with its responsibilities as such a provider and its obligations arising from the receipt of any payments from the Commonwealth Government for providing that aged care (new paragraph 16-4(eb)).

Item 64 inserts new subsections 16-4(2) and (3). New subsection 16-4(2) clarifies that a references to aged care (within the new paragraphs inserted by Item 63 as described above) includes a reference to any care for the aged, whether provided before or after the commencement of this subsection, in respect of which any payment was or is payable under a law of the Commonwealth. This is a standard definitional provision included in all similar sections in the Act.

New subsection 16-4(3) clarifies what is meant by the transferee having relevant key personnel in common with a person who is or has been an approved provider. This will be case if, at the time the person provided aged care as an approved provider, another person was one of its key personnel and that other person is one of the key personnel of the transferee.

**Item 65**

This item makes a consequential amendment to subsection 16-8(1) so that the subsection only applies in respect of a place to which this Subdivision applies.

**Item 66**

This item inserts a new Division 16-B in the Act, dealing with the transfer of provisionally allocated places.

Currently the process for the allocation of places transferred from one person to another only applies to the transfer of operational places, and not to the transfer of provisional places. The Australian Government's goal in relation to provisional allocations is that they should be made operational in the shortest possible time. A change of ownership

does not necessarily compromise this objective and, in some cases, may be the most effective way of bringing a particular parcel of provisional allocations into operation.

On the other hand, as provisional allocations are made following a highly competitive process involving detailed proposals, and in which the applicant's record as a provider carries significant weight, the transfer of provisional allocations should be scrutinised to ensure the integrity of the allocation process.

In order to address this issue, a new Subdivision is being inserted in the Act to expressly deal with the transfer of provisionally allocated places. As a general rule, provisionally allocated places will not be able to be transferred unless exceptional circumstances exist.

## **Subdivision 16-B—Transfer of provisionally allocated places**

### **Section 16-12 Application of this Subdivision**

This new section provides that this new Subdivision applies to the transfer of a provisionally allocated place. Subdivision 16-A applies to places that are not provisionally allocated (also commonly known as operational places).

### **Section 16-13 Transfer of provisionally allocated places**

New subsection 16-13(1) provides that a transfer of a provisionally allocated place from one person to another is of no effect unless it is approved by the Secretary. However, new subsection 16-13(2) provides the Secretary must not approve the transfer of a provisionally allocated place unless:

- an application for the transfer is made under new section 16-14;
- the Secretary is satisfied that, because of the needs of the aged care community in the region for which the places were provisionally allocated, there are exceptional circumstances justifying the transfer;
- the Secretary is satisfied, having regard to the matters mentioned in new section 16-16, that the needs of the aged care community in the region for which the places were provisionally allocated are best met by the transfer;
- the Secretary is satisfied that the transferee will be an approved provider in respect of the aged care service to which the places will relate after transfer, once the transfer is complete;
- the location in respect of which the place is provisionally allocated will not change as a result of the transfer; and
- the provisional allocation is in respect of residential care subsidy.

New subsection 16-13(3) provides that if the transfer is approved:

- the transferee is taken, from the transfer day (see new section 16-19), to be the person to whom the place is provisionally allocated; and
- if, as part of the transfer, approval is sought for variations of the conditions of allocation, the Secretary is taken to have made such variation of the conditions as is specified in the approval.

### **Section 16-14 Applications for transfer of provisionally allocated places**

This new section is based on existing section 16-2, which applies to transfer of operational places. It has been adapted to ensure that applications contain the information necessary for the Secretary to assess the proposed transfer of provisionally allocated places.

New subsection 16-14(1) provides that a person to whom a place has been provisionally allocated may apply in writing to the Secretary for approval to transfer the place. New subsection 16-14(2) provides that the application must be in a form approved by the Secretary, include required information, be signed by the transferor and the transferee, and set out any variation of the conditions to which the provisional allocation is subject for which approval is being sought as part of the transfer.

New subsection 16-14(3) specifies that the information that is required to be included in the application is the:

- the transferor's name;
- the number of places to be transferred;
- the aged care service to which the places currently relate, and its location;
- the proposed transfer day;
- the transferee's name;
- if, after the transfer, the places would relate to a different aged care service - that aged care service. It should be noted that while there will be a different service (i.e. service of transferee rather than transferor), the location of the service will not be able to change. New paragraph 16-13(2)(e) expressly provides that the Secretary must not approve the transfer if the location in respect of which the place is provisionally allocated will change as a result of the transfer;
- whether any of the places are places included in a residential care service, or a distinct part of a residential care service, that has extra service status, or places in respect of which one or more residential care grants have been paid;
- if the places are included in a residential care service and, after the transfer, the places would relate to a different residential care service - whether that service, or a distinct part of that service, has extra service status;
- evidence of the progress made by the transferor towards being in a position to provide care in respect of the places;
- the day on which, if the transfer were to take place, the transferee would be in a position to provide care in respect of the places; and
- such other information as is specified in the Allocation Principles.

New subsection 16-14(4) requires that the application must be made:

- if the transferee has been approved as a provider of aged care (even if the approval has not yet begun to be in force) - no later than 60 days (or such other period as the Secretary determines under new subsection 16-14(5)) before the proposed transfer day; or
- if the transferee has not been approved as a provider of aged care - no later than 90 days (or such other period determined by the Secretary under new subsection 16-14(5)) before the proposed transfer day.

Under new subsections 16-14(5) and (6) the Secretary may, at the request of the transferor and the transferee, determine another period if satisfied that it is justified in the circumstances. In deciding this Secretary must consider any matters set out in the Allocation Principles.

New subsection 16-14(7) requires that the Secretary must give written notice of his or her decision to the transferor and the transferee. The notice is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This statement is declaratory only, for the avoidance of doubt.

New subsection 16-14(8) provides that if the information included in an application changes, the application is taken not to have been made under this section unless the transferor and the transferee give the Secretary written notice of the changes.

### **Section 16-15 Requests for further information**

This section is based on existing section 16-3, which applies to transfer of operational places.

New section 16-15 applies to transfer of provisional allocations. New subsection 16-15(1) provides that if the Secretary needs further information to determine the application, the Secretary may give to the transferor and the transferee a notice requesting that:

- either the transferor or the transferee give the further information within 28 days after receiving the notice; or
- the transferor and the transferee jointly give the further information within 28 days after receiving the notice.

By the operation of new subsection 16-15(2), the application is taken to be withdrawn if the further information is not given within the 28 days, however the period for giving the further information can be extended in accordance with section 96-7.

### **Section 16-16 Consideration of applications**

New subsection 16-16(1) provides that in considering whether the needs of the aged care community in the region for which the places were allocated are best met by the transfer, the Secretary must consider each of the following matters:

- whether the transfer would meet the objectives of the planning process (set out in section 12-2). These objectives are:
  - to provide an open and clear planning process; and
  - to identify community needs, particularly in respect of people with special needs; and
  - to allocate places in a way that best meets the identified needs of the community;
- whether the transferor has made such significant progress towards being in a position to provide care, in respect of the places, that it would be contrary to the interests of the aged care community in the region not to permit the transfer;
- whether the transferee is likely to be in a position to provide care in respect of the places within a short time after the transfer;
- the standard of care, accommodation and other services proposed to be provided by the aged care service in which the places would be included if the transfer were to occur;
- the suitability of:
  - the transferee to provide the aged care to which the places to be transferred relate;
  - the premises proposed to be used to provide care through the aged care service in which the places would be included if the transfer were to occur;
- if the places were allocated to meet the needs of people with special needs - whether those needs would be met once the allocation of the places to be transferred took effect;
- if the places were allocated to provide a particular type of aged care - whether that type of aged care would be provided once the allocation of the places to be transferred took effect;

- if the transferee has been a provider of aged care - its conduct as such a provider, and its compliance with its responsibilities as such a provider and its obligations arising from the receipt of any payments from the Commonwealth Government for providing that aged care. New subsection 16-16(2) makes clear that 'aged care' in this context includes any care for the aged (whether provided before or after the commencement of the section) in respect of which any payment was or is payable under a Commonwealth law;
- if the transferee has relevant key personnel in common with a person who is or has been an approved provider - the conduct of that person as a provider of aged care, and its compliance with its responsibilities and obligations arising from the receipt of Commonwealth Government payments for providing that aged care. New subsection 16-16(3) clarifies that:
  - the transferee has relevant key personnel in common with a person who is or has been an approved provider if, at the time the person provided aged care, another person was one of its key personnel that other person is one of the key personnel of the transferee;
  - 'aged care', in this context, includes any care for the aged (whether provided before or after the commencement of the section) in respect of which any payment was or is payable under a Commonwealth law;
- the financial viability, if the transfer were to occur, of the transferee and the aged care service in which the places would be included if the transfer were to occur;
- the measures to be adopted by the transferee to protect the rights of care recipients; and
- any matters set out in the Allocation Principles.

A note to the section reminds readers that the Secretary must not approve the transfer if the location in respect of which the place is provisionally allocated will change as a result of the transfer (see new paragraph 16-13(2)(e)).

This section is similar to section 16-4 but has been adapted so that it is specific to the transfer of provisionally allocated places.

### **Section 16-17 Time limit for decisions on applications**

New subsection 16-17(1) provides that the Secretary must, at least 14 days before the proposed transfer day approve or reject the transfer and notify the transferor and transferee accordingly (this is a reviewable decision under Part 6.1). However, new subsection 16-17(2) allows that the Secretary may make a decision on a later day if the transferor and the transferee agree, provided that this later day does not occur on or after the proposed transfer day.

New subsection 16-17(3) provides that if the Secretary is given written notice (the alteration notice) under new subsection 16-14(8) of changes to the information contained in the application and this is given within 30 days of the day by which the Secretary must act, the Secretary is not obliged to act until the end of the 30 day period following the day on which the alteration notice was given by the Secretary.

This section is based on section 16-5 which applies to transfer of places other than provisionally allocated places.



A note to the section reminds readers that the rejection of applications is reviewable under Part 6.1.

### **Section 16-18 Notice of decision on transfer**

This new section provides that if the transfer is approved, the notice must include statements setting out:

- the number of places to be transferred;
- the proposed transfer day;
- the aged care service to which the places currently relate, and its location;
- if, after the transfer, the places will relate to a different aged care service - that aged care service. A note at the end of the section reminds readers that the Secretary must not approve the transfer if the location in respect of which the place is provisionally allocated will change as a result of the transfer (see new paragraph 16-13(2)(e));
- the proportion of care, in respect of the places to be transferred, to be provided once the allocation takes effect, to people with special needs; supported, concessional or assisted residents; recipients of respite care; people needing a particular level of care; or people specified in the Allocation Principles;
- such other information as is specified in the Allocation Principles.

This section is based on section 16-6 which applies to transfer of places other than provisionally allocated places.

### **Section 16-19 Transfer day**

New subsection 16-19(1) provides that the transfer day is the proposed transfer day specified in the application.

New subsection 16-19(2) requires that if the transfer is not completed on or before the proposed transfer day, the transferor and the transferee may apply, in writing, to the Secretary to approve a day as the transfer day. A note to this subsection makes clear that, because the proposed transfer day must be specified in the application for transfer, the Secretary must be notified if the transfer is not completed on or before the proposed transfer day.

New subsection 16-19(3) sets out that the Secretary must, within 28 days after receiving the application approve or reject the application and notify the transferor and the transferee accordingly. A note to this subsection reminds readers that such a decision is reviewable under Part 6.1.

New subsection 16-19(4) provides that the day approved by the Secretary as the transfer day must not be earlier than the day on which the transfer is actually completed. This section is based on section 16-7 which applies to transfer of places other than provisionally allocated places.

### **Section 16-20 Transfer of places to service with extra service status**

This new section provides that, as a general rule, the Secretary must not approve the transfer of a provisionally allocated place if the transfer would result in residential care being provided by a different residential care service where that residential care service has, or a distinct part of that service has, extra service status.

A note to new subsection 16-20(1) reminds readers that the Secretary must not approve the transfer if the location in respect of which the place is provisionally allocated will change as a result of the transfer (see new paragraph 16-13(2)(e)).

However, new subsections 16-20(2) and (3) provide that the Secretary may approve a transfer in those circumstances if the Secretary is satisfied that:

- the places other than the transferred places could, after the allocation has taken effect, form one or more distinct parts of the residential care service concerned (noting that the transferred places would not have extra service status because of the operation of section 31-3); or
- granting the transfer would be reasonable, having regard to the criteria set out in section 32-4 and would not result in the maximum proportion of extra service places under section 32-7, for the State, Territory or region concerned, being exceeded; and any other requirements set out in the Allocation Principles are satisfied. A note draws readers attention to the fact that the places would have extra service status because of the operation of section 31-1 (section 31-3 would not apply).

### **Section 16-21 Information to be given to transferee**

This new section provides that the Secretary may give to the transferee information specified in the Allocation Principles at such times as are specified in those Principles.

### **Items 67 and 68**

These items amend subsection 18-1(1), which sets out the circumstances in which allocation of places ceases to have effect, to include when the person to whom the place is allocated ceases to be an approved provider.

This gives effect to the policy intent which is the alignment of approved provider status with the allocation of services to a particular service. If a provider ceases to be an approved provider then the allocation of places to that entity will also automatically cease to have effect.

### **Items 69 and 70**

The *Final Report of the National ACAT Review*, released by the Minister for Ageing on 17 March 2008, notes that some assessments of care recipients for eligibility for aged care are unnecessary or too frequently reviewed as a matter of administration, rather than because people's care needs have changed.

These reassessments include the need for an annual reassessment for residential respite care and high level residential care. In both these instances, ongoing approvals are usually granted upon reassessment as it is likely that the person will continue to need the level and type of care approved.

In order to address this issue and reduce the number of unnecessary reassessments (both of which are resource intensive for Government and inconvenient for care recipients), Items 69 and 70 amend section 23-3 which relates to the lapsing of approvals for these types and levels of care.

The addition of new subsection 23-3(1A) provides that a person's approval does not lapse under subsection 23-3(1) (if the person is not provided with the care in respect of which he or she is approved) if:

- the care in respect of which he or she is approved is limited to residential care provided as respite care. This means that approval for residential respite care will not lapse but could expire if time limited. However, reassessment should occur at any stage if there has been a change in the care recipient's care needs;
- if the approval is for residential care other than residential care provided as respite care and the care in respect of which he or she is approved is not limited to a low level of residential care. In other words, if the person is eligible for high level residential care then their approval will not lapse. This acknowledges that the care needs of a person approved for high level care are unlikely to diminish and that the Act already makes provision so that a person approved for high level residential care is able to access residential care at any level; or
- if the care in respect of which he or she is approved is flexible care - the care is specified in the Approval of Care Recipients Principles. This will allow certain types of flexible care to be non-lapsing such as Extended Aged Care at Home (EACH) or EACH Dementia (EACHD). This acknowledges that the care needs of a person approved for EACH or EACHD (assessed as equivalent to high level residential care) are unlikely to diminish.

Approvals for care, either in the community or in a residential setting, that have been limited to a low level will continue to lapse after 12 months. This means that approvals for these types of care should be less than 12 months old at the point of entry to low level residential care or at the commencement of the provision of community care services.

Other minor amendments include the substitution of the heading to section 23-3, and the insertion of a subheading to subsection 23-3(1)

### **Item 71**

This is a consequential amendment that results from the new provisions relating to the transfer of provisionally allocated places (new Subdivision 16-B).

In summary, section 31-3(1) currently provides that if places are allocated or transferred to a service that has extra service status and the allocation or transfer was in accordance with subsection 14-7(2) or 16-8(2), the allocated or transferred places are taken not to have extra service status.

This item simply amends this paragraph 31-3(1)(b) so that it not only references subsection 16-8(2) (which relates to transfers of places other than provisionally allocated places) but also subsection 16-20(2) (which relates to transfers of provisionally allocated places).

### **Items 72 to 75**

Section 32-4 describes the criteria that must be satisfied in order for the Secretary to approve applications for extra service status.

Consistent with the changes made in relation to other approval points throughout the Act, Item 72 amends subsection 32-4(1) to add an additional criterion for the Secretary to consider.

New paragraph 32-4(1)(ca) provides that if the applicant has key personnel in common with a person who is or has been an approved provider - the Secretary must be satisfied that person has a very good record of conduct as a provider of aged care and compliance with its responsibilities as such a provider, and meeting its obligations arising from the receipt of payments from the Commonwealth Government for providing aged care.

Item 73 amends subsection 32-4(2) which sets out matters that may be included in Extra Service Principles, specifying in further detail how the Secretary is to make such determinations. New paragraph 32-4(d) provides that the Principles can specify the matters to which the Secretary must have regard in considering whether a person with whom the applicant has relevant key personnel in common (and who is or has been an approved provider) has a very good record of conduct, compliance or meeting its obligations, for the purposes of paragraph 32-4(1)(ca).

Item 74 makes a consequential change to subsection 32-4(3) so that it appropriately cross-references the new paragraph 32-4(1)(ca).

Item 75 inserts new subsection 32-4(4) which clarifies what is meant by the applicant having relevant key personnel in common with a person who is, or has been, an approved provider. This will be the case if, at the time the person provided aged care as an approved provider, another person was one of its key personnel and that other person is one of the key personnel of the applicant.

#### **Items 76 to 78**

Sections 35-1, 36-1 and 36-3 all relate to extra service (approval for extra service fees, provision of residential care on extra service basis and contents of extra service agreements).

All of those sections currently apply to approved providers as it is assumed that an entity will be an approved provider prior to applying for extra service status. However, with the changes to the timing of approved provider status taking effect (at the point of allocations being granted or transferred) it is possible that an entity will wish to seek extra service status prior to their approved provider status coming into force by virtue of the allocation of places.

Items 76 to 78 therefore amend the references to an approved provider within subsection 35-1(1), paragraph 36-1(1)(b) and the note to subsection 36-3(1) so that the references are to 'a person' which means a legal person (such as a corporation). This could be an approved provider or an entity awaiting their approved provider status coming into force through the allocation of places.

#### **Items 79 to 81**

Section 38-3 sets out the matters that the Secretary must have regard to when considering an application for certification of a residential aged care service.

The effect of these items is to amend the list of matters to which the Secretary must have regard by adding a new requirement (at new paragraph 38-3(1)(ca)) that the Secretary must consider the compliance history of any other approved provider or former approved provider that shares or shared, key personnel with the applicant.

For example, if one of the Directors (key personnel) of Aged Care Company A is Ms Jones and she is also one of the key personnel for Aged Care Company B, the Secretary must have regard to the compliance record of Aged Care Company B, when considering the certification application by Aged Care Company A. If Aged Care Company B has a poor compliance record, this will not necessarily adversely affect Aged Care Company A's application. However, it will be a matter that is looked into by the Secretary including to determine whether the reason for the poor compliance record has anything to do with the involvement of the shared key personnel.

### **Item 82**

This section defines *residential care*. In summary, residential care is personal care or nursing care, or both personal care and nursing care, that is provided to a person in a residential facility in which the person is also provided with accommodation that includes, for example, staff to meet care needs, meals and cleaning services, furniture and equipment.

Currently the definition of residential care expressly excludes:

- care provided to a person in the person's private home;
- care provided in a hospital or in a psychiatric facility; and
- care provided in a facility that primarily provides care to people who are not frail and aged.

The purpose of Item 82 is to amend this definition so that it also excludes any other care that is specified in the Residential Care Subsidy Principles not to be residential care (new subsection 41-3(2)).

This is being included to increase flexibility and to enable the exclusion of, for example, types of care that are not Commonwealth Government funded and should not be inadvertently regulated under the Act.

### **Item 83**

This amendment is a consequential amendment resulting from the changes described in Item 96.

In summary, Item 96 creates a new power for the Secretary to determine (in accordance with the User Rights Principles) that a person must not be charged an accommodation bond of more than a specified maximum amount because of financial hardship.

Item 83 amends section 44-7, which sets out the meaning of concessional resident so that it includes pre-2008 reform residents in relation to whom a hardship determination is in place under either paragraph 57-14(1)(a) or 57A-9(1)(a). These paragraphs provide for the Secretary to determine that a person must not be charged any accommodation bond or charge at all because it would cause the person financial hardship.

The item also inserts a new subheading to subsection 44-8(1A) to assist readers to navigate the provision.

#### **Item 84**

This item inserts a new subsection in section 44-8 (Meaning of assisted resident). New subsection 44-8(1AA) provides that a person is also an assisted resident if the person is a pre-2008 reform resident and a hardship determination is in force under paragraph 57-14(1)(b) or 57A-9(1)(b). These paragraphs enable the Secretary to determine that a person must not be charged more than a certain amount by way of bond or charge because of financial hardship.

#### **Items 85 to 88**

Currently, the Act does not specifically provide that a person's interest in a private trust or company should be included in an aged care assets assessment. However, from a policy perspective a person's interest in a private trust or company should be treated in the same way as an asset that has been disposed of (i.e. gifted). Under the Act, gifted assets are treated in the same way as they are treated under the pension assets test (refer to subsection 44-10(1C)).

These items therefore makes technical changes to address this anomaly by amending section 44-10 to provide that the value of a person's assets is taken to include the amount that the Secretary determines to be the amount:

- if the person is receiving an income support supplement or a service pension (within the meaning of the *Veterans' Entitlements Act 1986*) - that would be included in the value of the person's assets if Subdivision H of Division 11A of Part IIIB of the *Veterans' Entitlements Act 1986* applied for the purposes of this Act; and
- if the person is not receiving an income support supplement or a service pension - that would be included in the value of the person's assets if Division 8 of Part 3.18 of the *Social Security Act 1991* applied for the purposes of this Act. .

A new note to section 44-10 assists readers by describing that Subdivision H of Division 11A of Part IIIB of the *Veterans' Entitlements Act 1986*, and Division 8 of Part 3.18 of the *Social Security Act 1991*, deal with the attribution to individuals of assets of private companies and private trusts.

#### **Item 89**

The note at the end of section 53-1 currently provides that an approved provider's responsibilities cover all the care recipients in an aged care service who are approved under Part 2.3 as recipients of the type of aged care provided through the service, as well as those in respect of whom a subsidy is payable under Chapter 3.

This item amends the note to that section so that the responsibilities of an approved provider in respect of an aged care service cover all the care recipients in the service who are approved under Part 2.3 as recipients of the type of aged care provided through the service, as well as those in respect of whom a subsidy is payable under Chapter 3.

This reflects other changes to the Act to link approved provider status to the allocation of places to a particular service.

**Item 90**

Subsection 54-1(2) currently provides that the responsibilities of approved providers in relation to quality of care, apply in relation to matters concerning a person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for the provision of the care to the person; or
- the person is approved under Part 2.3 as a recipient of the type of aged care provided through the service.

This item amends this subsection so that it aligns with the changes relating to the linking of approved provider status with the allocation of places to a particular service.

The amended subsection provides that the responsibilities of approved providers in relation to quality of care, apply in relation to matters concerning a person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for the provision of the care to the person; or
- both the approved provider is approved in respect of the aged care service through which the person is provided, or to be provided, with aged care and for the type of aged care provided, or to be provided, to the person, and the person is approved under Part 2.3 as a recipient of the type of aged care provided, or to be provided, through the service.

**Item 91**

Section 55-1 describes Part 4.2 relating to user rights. This item makes a consequential amendment to that section to reflect the linking of approved provider status to the allocation of places to a particular service.

The item amends the section so that it provides that a person who is an approved provider in respect of an aged care service has general responsibilities to users, and proposed users, of the service who are approved as care recipients of the type of aged care in question. Failure to meet those responsibilities may lead to sanctions being imposed under Part 4.4.

**Item 92**

Section 56-5 currently provides that the responsibilities under the Division (relating to user rights) apply in relation to matters concerning any person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for the provision of care to that person; or
- the person is approved under Part 2.3 as a recipient of the type of aged care provided through the service.

This item amends paragraph 56-5(b) so that it aligns with the changes relating to the linking of approved provider status with the allocation of places to a particular service.

The amended section provides that the responsibilities under the Division apply in relation to matters concerning any person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for the provision of care to that person; or
- both the approved provider is approved in respect of the aged care service through which the person is provided, or to be provided, with aged care and for the type of aged care provided, or to be provided, to the person, and the person is approved under

Part 2.3 as a recipient of the type of aged care provided, or to be provided, through the service.

### **Items 93 to 95 and 100**

These items make consequential changes to paragraphs 57-2(1)(g), 57-2(1)(h) and 57-20(4)(c) as well as subsection 57-12(1) to update section and paragraph cross-references to reflect the changes to section 57-14 discussed at Item 96.

### **Item 96**

This item repeals subsection 57-14(1) and replaces it with a new subsection that allows the Secretary to not only determine (in accordance with the User Rights Principles) that a person must not be charged an accommodation bond because of financial hardship but also to enable the Secretary to determine that the person must not be charged an accommodation bond of more than a specified maximum amount.

For example, financial hardship assistance could be granted where a person has been unable to sell a farm because there are no potential buyers. If the property is the person's major asset the Secretary may determine that the person must not be charged an accommodation bond until the property is sold. However, if the person has assets apart from the farm, the Secretary may determine that the person may be charged a reduced amount of accommodation bond until the property is sold.

A note draws the reader's attention to the fact that refusals to make determinations are reviewable under Part 6.1.

This item also amends the heading to section 57-14 to "Accommodation bond in cases of financial hardship". This change reflects the fact that the section has been broadened to apply not just to cases where no bond is payable because of financial hardship but also where a smaller bond is payable.

### **Items 97 and 98**

Subsection 57-14(4) describes how applications may be made to the Secretary for a determination that payment of an accommodation bond would cause financial hardship. This item amends the subsection so that it applies to such applications as well as applications for a determination that payment of an accommodation bond of more than a specified maximum amount would cause financial hardship.

### **Item 99**

Subsection 57-14(7) currently provides that if the Secretary makes a determination of financial hardship, the notice given to the approved provider and the person (to whom the financial hardship determination relates) must set out when the determination ceases to be in force.

This item repeals that subsection and replaces it with a new one that retains the requirement for the notice to include this information but also requires that if the determination is that a person must not be charged an accommodation bond of more than a specified maximum amount, the notice must also specify the maximum amount of the accommodation bond.



### **Item 101**

Paragraph 57-21(1)(b) currently provides that an accommodation bond balance must be refunded by the approved provider conducting the service if the care recipient ceases to be provided with residential or flexible care by a service conducted by the approved provider.

This item makes a minor, consequential amendment to this section to ensure that its operation aligns with the changes which link approved provider status to services for which there is an allocation of places. The policy intent of the provision remains unchanged.

### **Item 102**

This item inserts a new section into the Act as follows:

#### **Section 57 21AA Refunding of accommodation bond balance—former approved providers**

Experience with the operation of the *Aged Care (Bond Security) Act 2006* has highlighted that the Guarantee Scheme only operates in regards to current approved providers and does not protect bonds when the approved provider status has lapsed or been revoked before the refund declarations have been made.

Additionally, once an entity loses its approved provider status, the provisions of the Act intended to protect accommodation bonds, such as timeframes for bond refunds and interest on late refunds of bonds, cease to have effect. This is particularly problematic in cases where the reason for departure is the death of a care recipient and probate may take a long time to be awarded, or where the liquidation process does not commence until several months after the facility has closed and approved provider status has lapsed or has been revoked. This represents an unintended gap in the protections of the Guarantee Scheme.

This new section addresses this problem by imposing requirements for the repayment of accommodation bond balances, and the payment of interest on refunds of accommodation bond balances, on persons that were approved providers but have ceased to be approved providers under the Act ('former approved providers').

This amendment is intended to preserve the statutory obligations imposed on approved providers for refunding accommodation bond balances and paying interest on refunds of accommodation bonds in circumstances in which the entity ceases to be an approved provider. In the absence of this amendment, the requirements of the Act would not apply following the cessation of approved provider status, despite the fact that the bond was paid to the entity prior to it becoming a former approved provider. Residents would need to rely on contractual obligations in their accommodation bond agreement for refunds and interest payments.

This amendment will also support the operation of the Guarantee Scheme. The Guarantee Scheme requires, among other events, that there is an outstanding bond balance. The preservation of the statutory refund obligations for former approved providers will ensure that the Guarantee Scheme will operate as originally intended and protect residents.

The section achieves this policy intent by providing that if an accommodation bond was paid to an approved provider for entry to a residential or flexible care service and the approved provider ceases to be an approved provider (in relation to the specific service

entered by the care recipient), the former approved provider must refund the accommodation bond balance in respect of the accommodation bond to the care recipient.

In terms of the timeframes within which the accommodation bond balance must be refunded, new subsection 57-21AA(2) provides that:

- if the care recipient dies within 90 days after the day on which the former approved provider ceased to be an approved provider in respect of the service (the 90 day period) - the accommodation bond balance must be repaid within 14 days after the day on which the former approved provider is shown the probate of the will of the care recipient or letters of administration of the estate; or
- if the care recipient is to enter another service to receive residential care within the 90 day period:
  - if the care recipient has notified the former approved provider of the move more than 14 days before the day on which the former approved provider ceased providing care to the care recipient - on the day on which the former approved provider ceased providing that care; or
  - if the care recipient so notified the former approved provider within 14 days before the day on which the former approved provider ceased providing that care - within 14 days after the day on which the notice was given; or
  - if the care recipient did not notify the former approved provider before the day on which the former approved provider ceased providing that care - within 14 days after the day on which the former approved provider ceased providing that care; or
- in any other case - within the 90 day period.

New subsection 57-21AA(3) specifies that a corporation commits an offence if it was required to refund an amount on a particular day or within a particular period and did not do so. This offence is punishable by a maximum penalty of 30 penalty units which equates to \$16,500 for a corporation. This penalty is consistent with all similar offences in the Act.

A note in the section draws the reader's attention to the fact that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

This item also amends the heading to section 57-21 so that it is clear that section 57-21 applies to refunds by approved providers by contrast to 57-21AA which applies to refunds by former approved providers.

#### **Items 103 and 104**

Section 57-21A relates to payment of interest on accommodation bond balances and section 57-21B relates to payment of interest on entry contribution balances. These items insert a new subsection into each of these sections so that they apply to both approved providers and former approved providers.

#### **Item 105**

Section 57A-2 sets out the basic rules about accommodation charges.

Currently one of the rules (at paragraph 57A-2(1)(g)) is that the daily amount at which the accommodation charge accrues must not exceed the maximum provided for by section 57A-6 and the care recipient must not be charged more than one accommodation charge in respect of entering the service.

This item amends the paragraph so that it provides that the daily amount at which the accommodation charge accrues must not exceed the maximum provided for by section 57A-6 or 57A-8A or paragraph 57A-9(1)(b) and the care recipient must not be charged more than one accommodation charge in respect of entering the service.

The addition of the reference to 57A-8A addresses a previous inadvertent omission and the addition of the reference to 57A-9(1)(b) reflects the amendments described at Item 108 whereby a new power is created for the Secretary to determine that a resident not be charged more than a certain accommodation charge.

#### **Item 106**

As described in Item 105, section 57A-2 sets out the basic rules about accommodation charges. Paragraph 57A-2(1)(i) provides that the accommodation charge must not be charged if a determination is in force under section 57A-9 that paying an accommodation charge would cause the care recipient financial hardship.

This item amends paragraph 57A-2(1)(i) so that it cross-references paragraph 57A-9(1)(a) which is the paragraph that deals with circumstances where an accommodation charge must not be charged at all.

This is distinct from circumstances where the Secretary has determined that a smaller charge should be levied based on financial hardship. Item 105 ensures that an approved provider can not charge more than this amount, if the Secretary has so determined.

#### **Item 107**

Subsection 57A-6(1) deals with the maximum daily accrual amount of accommodation charge. It provides, among other things, that subject to section 57A-8A, the maximum daily amount of accommodation charge is detailed in the subsection. This item makes a consequential change to this subsection so that it is also subject to section 57A-9 (refer item 108) which creates another circumstances whereby there may be a maximum daily accrual amount of accommodation charge (namely where the Secretary has determined a maximum based on financial hardship).

#### **Item 108**

Section 57A-9(1) currently provides that the Secretary may determine in accordance with the User Rights Principles that a person must not be charged an accommodation charge because payment of an accommodation charge would cause the person financial hardship. This section does not currently provide for the situation where a person may have the financial resources to pay a lesser amount of accommodation charge than would normally be requested based on the person's assets.

This item provides for the Secretary to determine that a person may pay a lesser amount of accommodation charge, including where a person has assets that are unable to be realised but still retains sufficient assets to pay an amount of accommodation charge.

For example, financial hardship assistance could be granted where a person has been unable to sell a property due to the number of properties on the market in the particular area or retirement village. If the property is the person's major asset the Secretary may determine that the person must not be charged an accommodation charge until the property is sold. However, if the person has assets apart from the property, the Secretary may determine that the person may be charged a reduced amount of accommodation charge until the property is sold.

A note in the subsection reminds readers that refusals to make determinations are reviewable under Part 6.1.

This item also amends the heading to section 57A-9 so that it reads "Accommodation charge in cases of financial hardship". This change reflects the fact that the section now deals not only with situations where accommodation charge is not payable at all but also where a smaller amount is payable because of financial hardship.

### **Items 109 and 110**

These items make technical changes to subsection 57A-9(4) and paragraph 57A-9(4)(b) which are needed because of the change to subsection 57A-9(1) (refer Item 108) which enables the Secretary to determine that a person must not be charged an accommodation charge of more than a specified maximum daily amount because payment of more than that amount would cause the person financial hardship.

The changes made by these items enable an application to be made to the Secretary that payment of an accommodation charge of more than a specified maximum daily amount would cause the person financial hardship.

### **Item 111**

This item makes a consequential change to subsection 57A-9(7) that results from the new power of the Secretary to determine that a person must not be charged an accommodation charge of more than a specified maximum daily amount (refer Item 108).

The item repeals subsection 57A-9(7) and replaces it with a new subsection that provides that if the Secretary makes the determination of financial hardship, the notice must:

- set out any period at the end of which, or any event on the occurrence of which, the determination will cease to be in force (this retains the requirement of the previous subsection); and
- if the determination is that a person must not be charged an accommodation charge of more than a specified maximum daily amount - specify the maximum daily amount of the accommodation charge.

### **Item 112**

Section 62-1 sets out the responsibilities of an approved provider relating to protection of a care recipient's personal information. In summary, the personal information must not be used other than for a purpose:

- connected with the provision of aged care to the person by the approved provider; or
- for which the personal information was given by or on behalf of the person to the approved provider.

The section also provides that, except with the written consent of the person, the personal information must not be disclosed to any other person other than for the purposes listed in section 62-1.

This item amends paragraph 62-1(b)(iv) to allow the disclosure of personal information for the purpose of complying with an obligation under this Act or any of the Principles made under section 96-1.

This change recognises that there are a number of circumstances in which an approved provider is required to disclose information to, for example, the Secretary to enable the approved provider to comply with the legislation. The change puts it beyond doubt that it is not a breach of the approved provider's responsibilities under section 62-1 to make a disclosure in such circumstances, as such a disclosure is for a purpose connected with the provision of aged care to the person by the approved provider.

Further, as part of the package of reforms (of which this Bill is part) it is also proposed that amendments be made to Principles to require an approved provider to notify the Secretary when a resident is absent from a residential care service without explanation and the police have been notified. The amendment to section 62-1 puts it beyond doubt that the approved provider can disclose such information to the Secretary without being in breach of the non-disclosure provisions.

### **Item 113**

Subsection 63-1(2) currently provides that the responsibilities relating to accountability apply in relation to matters concerning a person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for provision of the care to that person; or
- the person is approved under Part 2.3 as the recipient of the type of aged care provided through the service.

This item amends this subsection so that it aligns with the changes relating to the linking of approved provider status with the allocation of places to a particular service.

The amended subsection provides that the accountability responsibilities apply in relation to matters concerning a person to whom the approved provider provides, or is to provide, care through an aged care service only if:

- subsidy is payable under Chapter 3 for provision of the care to that person; or
- both the approved provider is approved in respect of the aged care service through which the person is provided, or to be provided, with aged care and for the type of aged care provided, or to be provided, to the person, and the person is approved under Part 2.3 as a recipient of the type of aged care provided, or to be provided, through the service.

### **Item 114**

This item inserts a new section 63-1C.

#### **Section 63-1C Responsibility relating to circumstances materially affecting an approved provider's suitability to provide aged care**

As noted in relation to Item 11, it has become the business practice of a number of approved providers to engage a management company to manage the delivery of care

services. If an applicant for approved provider status is reliant on a management company to demonstrate that it has skills and experience in aged care, the use of the management company should be an ongoing requirement, unless a change is approved by the Secretary.

To ensure that the applicant continues to be suitable to provide care, amendments to section 8-5 (refer Item 11) enable the Secretary to issue a notice (if necessary) stating that where, for example, an approved provider is reliant on a management company and this materially affects its suitability to provide aged care, the approved provider must notify the Secretary and obtain agreement before there is any change to that circumstance (where practicable).

Section 63-1 C then makes it a responsibility of an approved provider in relation to a circumstance specified by the Secretary in a notice given under section 8-5, to do all things reasonably practicable to ensure that there is no change to the circumstance without complying with the steps specified in the notice under section 8-5.

It is important to note that this section will have no impact on existing approved providers as at 1 January 2009. For more detailed discussion of this please refer to Item 11.

### **Items 115 to 118**

Currently section 65-2 sets out the matters that the Secretary must consider when deciding whether it is appropriate to impose sanctions on an approved provider for non-compliance with its responsibilities under Part 4.1, 4.2 or 4.3.

The Secretary must consider the following:

- whether the non-compliance is of a minor or serious nature;
- whether the non-compliance has occurred before and, if so, how often;
- whether the non-compliance threatens the health, welfare or interests of care recipients;
- whether the approved provider has failed to comply with any undertaking to remedy the non-compliance; and
- any other matters specified in the Sanctions Principles.

Item 115 renumbers the section to enable the inclusion of the new subsection 65-2(2).

Items 116 and 117 insert new paragraphs 65-2(1)(ca) and (da), providing two new requirements that the Secretary must also consider:

- whether the non-compliance would threaten the health, welfare or interests of future care recipients (Item 116); and
- the desirability of deterring future non-compliance (Item 117).

The requirement specified in Item 116 puts it beyond doubt that even if there are no care recipients currently at risk because of an approved provider's non-compliance with its responsibilities, for example, because all care recipients have left the service where the non-compliance occurred, in deciding whether it is appropriate to impose sanctions the Secretary must consider whether the non-compliance would threaten the health, welfare or interests of any future care recipients if they were to commence receiving care provided by the approved provider.

The requirement specified in Item 117 puts it beyond doubt that the desirability of deterring future non-compliance, either on the part of the non-compliant approved

provider or by other approved providers, is a relevant matter that the Secretary must consider in deciding whether it is appropriate to impose sanctions on an approved provider.

Item 118 adds new subsection 65-2(2) which expressly provides that the Secretary's paramount consideration must be whether the non-compliance threatens or would threaten the health, welfare or interests of current and future care recipients. This puts it beyond doubt that, in deciding how much weight to give to each of the relevant considerations that must be taken into account in deciding whether it is appropriate to impose sanctions on an approved provider, the Secretary must give the most weight to whether the non-compliance threatens or would threaten the health, welfare or interests of current and future care recipients. The interests of any other party, insofar as they are taken to be a relevant consideration, must be given less weight than the health, welfare or interests of current and future care recipients.

#### **Item 119**

Section 66-1 sets out sanctions that may be imposed by the Secretary in the event of non-compliance with the legislation. Item 119 repeals an existing sanction and replaces it with a new sanction which is intended to better give effect to the policy intent of the sanction which is the restriction of payment for new residents.

The revised sanction allows the Secretary to restrict the payment of subsidy under Chapter 3 to the provision of care to either:

- care recipients to whom the approved provider is providing care at the time a notice is issued under section 67-5 about the Secretary's decision to impose a sanction; or
- care recipients other than those to whom the approved provider commenced providing care, through one or more specified aged care services, after the section 67-5 notice time.

This change ensures that, if an approved provider on whom the sanction is imposed nevertheless commences providing care to a new resident despite the restriction on payment of subsidy for care provided to new residents, the provider will have the same responsibilities under the Act towards the new resident as it has towards existing residents, provided the new resident is approved under Part 2.3 as a recipient of residential care. This change also ensures that the new resident has the same rights as other residents, including access to the Complaints Investigation Scheme and the protection provided by the Guarantee Scheme.

#### **Items 120 to 129**

These items amend section 85-1 which includes a table setting out the decisions that are reviewable by the Administrative Appeals Tribunal.

The amendments made by these items make consequential changes to the table to:

- reflect minor changes to the wording of the substantive provisions which are referenced in the table in section 85-1 (for example, to change references from 'approved provider' to 'person');
- reflect the repeal of certain provisions; and
- include the new decision points resulting from the inclusion of new sections in the Act as the result of this Bill.

Specifically:

- Item 120 repeals table item 2 which states that the decision to reject an application for a waiver of the operation of 10-2(1) is reviewable. This item of the table has been repealed because section 10-2 has been repealed (refer Item 24);
- Item 121 amends the cell at table item 3 to refer to a “provider of aged care” rather than an “approved provider” (this is a technical change to reflect the change to the wording of section 10-3(1)) (refer Item 25);
- Item 122 repeals table item 4 because this refers to subsection 10-4(5) which has been repealed (refer Item 27);
- Item 123 amends the cell at table item 6 so that it refers to a “person” rather than “an approved provider” (consistent with the changes to section 15-4);
- Items 124 and 125 replace table items 10, 11 and 12 with new items that reflect the changes made to Division 16 in relation to the transfer of places that are not provisionally allocated (Subdivision 16-A) and those that are provisionally allocated (Subdivision 16-B) (see Items 52 to 66). In summary, all relevant decisions relating to transfer of places will be reviewable including:
  - a decision to reject an application for transfer of allocated places, other than provisionally allocated places under subsection 16-5(1) (table item 10). This retains the status quo;
  - a decision to approve a day as a transfer day for the transfer of allocated places, other than provisionally allocated places under subsection 16-7(3) (table item 11). This retains the status quo;
  - a decision to reject an application to approve a day as a transfer day for the transfer of allocated places, other than provisionally allocated places under subsection 16-7(3) (table item 12). This retains the status quo;
  - a decision to reject an application for transfer of provisionally allocated places under new subsection 16-17(1) (table item 12A). This is a new decision point as the result of amendments to enable transfer of provisionally allocated places;
  - a decision to approve a day as a transfer day for the transfer of provisionally allocated places under new subsection 16-19(3) (table item 12B). This is a new decision point as the result of amendments to enable transfer of provisionally allocated places; and
  - a decision to reject an application to approve a day as a transfer day for the transfer of provisionally allocated places under new subsection 16-19(3) (table item 12C). This is a new decision point as the result of amendments to enable transfer of provisionally allocated places;
- Item 126 amends table item 51 which relates to a decision to refuse to make a determination that paying an accommodation bond would cause financial hardship. As the result of changes to that section, this decision point is now at paragraph 57-14(1)(a) (rather than subsection 57-14(1)) so the table in section 85-1 is being amended accordingly (refer Item 96);
- Item 127 inserts a new type of decision that is reviewable (at table item 51A) namely a decision to refuse to make a determination that paying an accommodation bond of



more than a specified maximum amount would cause financial hardship, or to specify a particular maximum amount under such a determination (new paragraph 57-14(1)(b)) (refer Item 96);

- Item 128 amends table item 53A which relates to a decision to refuse to make a determination that paying an accommodation charge would cause financial hardship. As the result of changes to that section, this decision point is now at paragraph 57A-9(1)(a) (rather than subsection 57A-(9)(1)) so the table is being amended accordingly (refer Item 108); and
- Item 129 inserts a new item at table item 53AA to reflect the new decision point which is the decision to refuse to make a determination that paying an accommodation charge of more than a specified maximum daily amount would cause financial hardship, or to specify a particular maximum daily amount under such a determination (new paragraph 57A-9(1)(b)) (refer Item 108).

### Items 130 to 134

These items make minor consequential amendments to sections 93-1 and 93-4 (which relate to the Secretary's power to obtain information, and authorised officers examining people under oath or affirmation) so that they apply, where appropriate, to both approved providers and former approved providers. These items change paragraph 93-1(2)(a), paragraph 93-1(3)(a), subparagraph 93-1(4)(b)(i), paragraph 93-4(2)(a) and subparagraph 93-4(3)(b)(i).

### Items 135 to 140

These items amend definitions in Schedule 1, or add new definitions to Schedule 1, as follows:

- amendment to the definition of **accommodation bond** so that it means, in relation to a person, 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 and in respect of which the approved provider holds an allocation of places. The underlined words show the change to the definition – this is a technical change only which reflects the fact that approved providers will, as a result of the changes made by the Bill, only be approved in respect of those services for which they have an allocation of places (Item 135);
- repeal of the definition of **key personnel** and replacement with a new definition (Item 136). Key personnel has the meaning given by new section 8-3A, which is described in Item 7;
- insert a new definition of **pre-allocation lump sum** (Item 137). This has the meaning given by new subsection 14-5(6) (refer Item 43);
- insert a new definition of **provisionally allocated** (Item 138). A place is provisionally allocated if it is a place in relation to which a provisional allocation is in force under Division 15;

- insert a new definition of ***unregulated lump sum***, having the same meaning given by the *Aged Care (Bond Security) Act 2006* (Item 139); and.
- insert a new definition of ***unregulated lump sum balance***, having the meaning given by the *Aged Care (Bond Security) Act 2006* (Item 140).

### **Amendments to the *Aged Care (Bond Security) Act 2006***

Current legislative protections for accommodation bonds are predicated on maintenance of approved provider status. However, it is possible that situations could arise in which approved provider status may cease prior to all outstanding bonds being refunded. This could occur where, for example, as a result of compliance action, the Department has revoked approved provider status of an entity no longer considered appropriate to operate in the aged care industry.

In circumstances where approved provider status has ceased, there is no ongoing legislative requirement for repayment of outstanding bonds and the Guarantee Scheme established in the *Aged Care (Bond Security) Act 2006* (the Bond Security Act) would also not apply.

The rationale for the bond refund requirements and the Guarantee Scheme is to provide strong protections for consumers and ensure high levels of confidence in the industry. If there are any potential gaps that may undermine the effective operation of this safety net, then this can pose risks not just to consumers but also to providers where public confidence in the system may be adversely affected.

The Government considers it important that these issues be addressed and that comprehensive consumer safeguards continue to exist in these circumstances.

This Bill therefore proposes amendments to the *Aged Care Act 1997* so that the obligations relating to the repayment of bonds (and interest) apply in relation to former approved providers who continue to have outstanding bonds. The Bond Security Act is also being amended to ensure that the bond Guarantee Scheme would also apply in such circumstances. These changes will ensure that the original policy objectives of the reforms to strengthen the protection of accommodation bonds are achieved and the Guarantee Scheme operates as intended.

#### **Item 141**

Section 3 of the Bond Security Act provides a simplified outline of that Act.

This item makes a consequential amendment to this simplified outline to refer to both approved providers and former approved provider. This reflects the changes made throughout the Bond Security Act so that the Guarantee Scheme can apply to approved providers and also to former approved providers who have not refunded bonds before becoming a former approved provider.

#### **Item 142**

This item makes a consequential amendment to the definition of ***administrative costs*** in subsection 6(1), to reflect the insertion of new section 13A (refer Item 181) which enables the making of additional refund declarations. Specifically, this item amends the definition of administrative costs so that such costs include costs incurred by the Commonwealth in

relation to, and as the result of, the making of a default event declaration including costs incurred by the Commonwealth as a result of making any refund declaration under new section 13A.

#### **Item 143**

This item inserts in section 6 a new definition of *aged care service*, with the meaning given by the Dictionary in Schedule 1 of the *Aged Care Act 1997*. Aged care service is defined in that Act to mean an undertaking through which aged care is provided.

#### **Item 144**

This item amends the definition of *bond* in subsection 6(1) so that it also includes an unregulated lump sum.

#### **Item 145**

This item amends the definition of *bond balance* in subsection 6(1) so that, for a bond that is an unregulated lump sum, the bond balance is the *unregulated lump sum balance* (as defined by the new definition in section 6).

#### **Items 146 to 148, 151 and 153 to 155**

These items insert a number of definitions into subsection 6(1). The amendments provide that the definitions for all of the following terms are as they appear in the Dictionary in Schedule 1 to the *Aged Care Act 1997*;

- *entry*;
- *flexible care*;
- *flexible care service*;
- *provisional allocation*;
- *residential care*;
- *residential care service*; and
- *respite care*.

#### **Items 149 and 150**

These items amend the definition of *insolvency event* in subsection 6(1) so that it applies to both approved providers and former approved providers.

#### **Item 152**

This item amends the definition of *refund declaration* so that it appropriately references new section 13A (refer Item 181).

#### **Items 156 and 157**

These items insert two new definitions in subsection 6(1):

- *unregulated lump sum* has the meaning given by subsection 6(3); and
- *unregulated lump sum balance*, in relation to an unregulated lump sum is, at a particular time, an amount equal to the difference between the amount of the unregulated lump sum and any amounts that have been, or are permitted to be, deducted at that time under the agreement under which the unregulated lump sum was paid.

#### **Items 158 and 159**

Subsection 6(2) establishes the definition of *outstanding bond balance* which is relied upon when the Secretary makes a default event declaration or a refund declaration. Items

158 and 159 amend this subsection so that the definition of outstanding bond balance applies to approved providers as well as former approved providers.

This provision enables the Secretary to determine an outstanding bond balance in relation to approved providers or former approved providers.

#### **Item 160**

New paragraph 6(2)(c) adds an unregulated lump sum as another type of outstanding bond balance. In essence, an unregulated lump sum is an outstanding bond balance if the time within which it should have been refunded has passed, or if part of it has not been refunded in the required time. In the case of unregulated lump sums, this is the lesser of the time specified for the lump sum to be refunded in the agreements or 14 days after the day on which the care recipient ceased to be provided with care through the service operated by the approved provider or former approved provider.

#### **Item 161**

This item inserts a new definition of *unregulated lump sum* in new subsection 6(3).

In summary, an amount of money will be an unregulated lump sum if:

- the money is paid by a care recipient (under a written agreement) for entry to a residential or flexible care service and it does not accrue daily and must be refunded (in whole or part) if the care recipient ceases to be provided with residential or flexible care;
- the person to whom the money was paid is an approved provider on 31 December 2008;
- the amount was paid before 1 January 2009 and before the entity became an approved provider under the *Aged Care Act 1997*;
- the amount is not an entry contribution;
- the care recipient did not cease to be provided with residential care through the residential care service, or flexible care through the flexible care service (as the case requires) after the amount was paid but before the unregulated lump sum holder began to be an approved provider.

#### **Item 162**

This item inserts a new section 6A.

#### **Section 6A Transitional application of this Act to certain insolvency events**

This clause provides that this Bill, once enacted, does not apply in relation to any insolvency event that occurs after the period of 12 months beginning on the transition day has expired if:

- immediately before the commencement of the proposed *Aged Care Amendment (2008 Measures No. 2) Act 2008*, a person is an approved provider;
- the person ceases to be an approved provider in respect of an aged care service on the day immediately after the period of six months, beginning on the commencement of proposed *Aged Care Amendment (2008 Measures No. 2) Act 2008*, has expired (the transition day); and
- the person ceases to be an approved provider in respect of the service because there is no allocation of a place to the person in respect of the service in effect on the transition day, or there is no provisional allocation of a place to the person in respect of the service in force on the transition day.

This clause ensures that the Commonwealth does not remain responsible for bonds held by aged care services that have never held an allocation of Commonwealth funded places.

This item defines a period in which residents of current approved providers who do not hold an allocation of places, or a provisional allocation of places, will be covered by the Guarantee Scheme.

Current approved providers whose approval will lapse as a result of the requirement to have an allocation of places (which occurs on 1 July 2009), will be covered by the Guarantee Scheme for a period of 12 months from 1 July 2009. The period of coverage of the Guarantee Scheme will cease on 1 July 2010. This will provide care providers and their residents' with time to make any necessary adjustments to their contractual arrangements.

### **Item 163**

This item amends subsection 7(1) so that it applies not just to an approved provider but to a person who is, or has been, an approved provider.

### **Items 164 to 168**

These items amend subparagraph 7(1)(a)(i), subparagraph 7(1)(a)(ii), paragraph 7(1)(b), the note in subsection 7(1), and subsection 8(1) so that all of these provisions make reference to a person rather than an approved provider (so that the provisions apply to the relevant person be they an approved provider or former approved provider).

### **Item 169**

This item repeals existing section 9 and replaces it with a new section.

### **Section 9 Notice of certain insolvency events**

This new section provides that if a person is an approved provider and any of the events mentioned in paragraphs (a) to (f) of the definition of *insolvency event* occur in relation to the person, the person must notify the Secretary the first time that the event occurs.

If the person has been, but is no longer, an approved provider and any of those events occur, and there was at least one outstanding bond balance of the person at the time the event occurs, the person must notify the Secretary the first time that the event occurs.

The notification must be given in writing by the end of the first business day after the day on which the event occurs.

A person commits an offence if the person refuses or fails to comply with a requirement under this section. This offence is punishable by a penalty of 30 penalty units which equates to \$3,300 for an individual and \$16,500 for a corporation. This penalty is consistent with all similar offences in the *Aged Care Act 1997*.

### **Items 170 to 175 and 177**

These items amend paragraph 10(1)(a), paragraph 10(1)(b), subsection 10(2), subsection 11(1), subsection 12(1), and paragraph 12(2)(d).

The amendments ensure that the provisions apply to both approved providers and former approved providers.

### **Item 176**

The current legislation does not allow the Secretary to take account of transactions such as partial refunds that may occur after a persons bond first becomes outstanding and before the refund determination is made. This item will amend paragraph 12(2)(b) to allow the Secretary to take account of all transactions that have occurred up to the time that the amount of refund is determined and that should be considered in determining the refund.

### **Item 178**

This item inserts a new subsection in section 12.

New subsection 12(3) enables the Secretary to make a refund declaration in respect of a refund which has been voided, or ‘clawed back’ through the operation of the specified provisions of the *Corporations Act 2001* or the *Bankruptcy Act 1966*. The provisions listed in new subsection 12(3) specify the types of transactions for which the Secretary may make a refund declaration in respect of a voided transaction if the Secretary is satisfied that the effect of the voiding has been to reverse the refund of an accommodation bond balance, entry contribution balance or unregulated lump sum balance.

### **Items 179 and 180**

These items amend subsection 13(1) and paragraph 13(2)(b) to ensure that the provisions apply to both approved providers and former approved providers.

### **Item 181**

This item inserts a new section 13A.

### **Section 13A Additional refund declaration where refund by approved provider or former approved provider void or voidable**

This new section provides that the Secretary may make additional refund declarations in certain cases where a liquidator has ‘clawed back’ a bond balance that amounted to an unfair preference, meaning that the care recipient has been left without the total bond balance owed to them.

In summary, the power to make an additional refund declaration operates if:

- the Secretary makes a refund declaration under section 13 in reliance on a determination that an outstanding bond balance is owed to a care recipient by an approved provider or a former approved provider; and
- if the approved provider is:
  - a corporation, the transaction under which the refund took place is a voidable transaction under subsection 588FE(2), (2A) or 2(B) of the *Corporations Act 2001* and the liquidator takes action under section 588FF, as a result of which the person to whom the refund was made does not retain the value of the refund, or part of the value of the refund; and
  - not a corporation, the transfer of any property for the purposes of giving the refund is void under section 122 of the *Bankruptcy Act 1966* and the trustee in bankruptcy takes action as a result of which the person to whom the refund was made does not retain the value of the refund, or part of the value of the refund.

In these circumstances, new subsection 13A(2) provides that the Secretary may:

- determine the amount that the Secretary considers is equal to the amount of the bond balance that has not been refunded at the time that the determination is made; and

- as soon as practicable after the Secretary has determined that matter, make an additional refund declaration relating to the outstanding bond balance.

New subsection 13A(3) requires that the additional refund declaration be in writing and specify the approved provider or former approved provider that has not refunded all, or part of the relevant outstanding bond balance. It must also declare that the Commonwealth is to pay an amount equal to the amount determined under paragraph 13A(2)(a).

Subsection 13A(4) clarifies that an additional refund declaration is not a legislative instrument. This is provided for the purposes of the *Legislative Instruments Act 2003* and for the avoidance of doubt.

### **Items 182 to 184**

These items amend paragraph 14(1)(b) and section 15 (including the note in that section) so that the provisions apply to both approved providers and former approved providers.

## **PART 2—APPLICATION AND TRANSITIONAL**

This Bill, once enacted, commences on 1 January 2009. However, a six month transitional period is being provided for many of the amendments to ensure a smooth transition. This Part details how each of the provisions will be expected to operate and when they will take effect.

### **Item 185**

This item sets out the definitions used in this Part relating to application and transitional arrangements:

- ***commencing day*** means 1 January 2009;
- ***transition day*** means the day immediately after the end of the transition period (in other words 1 July 2009); and
- ***transition period*** means a period of six months beginning on the commencing day (in other words the period to from 1 January 2009 to 30 June 2009).

This item also states that an expression used in this Part that is also used in the *Aged Care Act 1997* has the same meaning in this Part as it has in that Act.

### **Item 186 Application of amendments to existing approved providers**

This item provides that if, immediately before the commencing day (1 January 2009), a person is an approved provider, the approved provider amendments do not apply during the transition period (that is, until 1 July 2009). The approved provider amendments are mainly those linking approved provider status to an allocation of places for a particular service (specifically the amendments made by Items 1, 24 to 26, 89 to 92, 113, 120, 121 and 123).

On 1 July 2009, the approval of existing approved providers is taken to be in respect of:

- for types of aged care:
  - if, immediately before the transition day, the approval was in respect of all types of aged care - all types of aged care; and
  - if, immediately before the transition day the approval was limited to a specified type or types of aged care - that type or those types of aged care; and

- for aged care services - each aged care service in respect of which:
  - any allocation of a place (be it provisional or operational) is in effect in respect of the aged care service (whether because the place was originally allocated to the person or because of a transfer).

The approval of the entity as an approved provider in relation to any other service ceases on 1 July 2009. In other words, if an approved provider has services but no allocations for those services, it will cease being an approved provider for those services from 1 July 2009.

The obligation under new section 57-21AA (refer Item 102) does not apply in relation to accommodation bond balances in respect of accommodation bonds paid for entry to such a service before the transition day.

#### **Item 187 Application of amendments relating to approval of persons as providers of aged care**

This item provides that the amendments made by Items 2, 8 and 9 apply to the approval of a person as a provider of aged care where the approval is given on or after 1 January 2009.

#### **Item 188 Application of key personnel amendments**

This item provides that the key personnel amendments made by Items 3, 4, 5 and 6 apply in relation to an application for the approval of a person as a provider of aged care made on or after 1 January 2009.

However, existing approved providers as at 1 January 2009 are not required to notify the Secretary until 1 July 2009 of a change in key personnel that is only a change in key personnel because of the amendments made by this Bill.

The amendments made by:

- Item 14 apply in relation to a change in key personnel that occurs on or after 1 January 2009;
- Items 63 and 64 apply to applications for transfer of allocated places made on or after 1 January 2009;
- Items 72 to 75 apply in relation to applications for extra service status made on or after 1 January 2009; and
- Items 79 to 81 apply to applications for certification of a residential care service made on or after 1 January 2009.

#### **Item 189 Application of amendments relating to revocation of a provider's approval on request**

This item provides that the amendments made by Items 10, 12, 22, 27 and 122 do not apply if the request is made, before 1 January 2009, by an approved provider to revoke its approval.

#### **Item 190 Application of amendments relating to matters materially affecting a person's suitability to provide aged care**

This item provides that the amendments made by Items 11 and 114 only apply to new approved providers, where the approval as a provider is given on or after 1 January 2009. They do not apply to any approved providers existing as at 1 January 2009.



**Item 191 Application of amendment applying to notice of certain changes**

This item provides that the amendments made by Item 15 only apply to new approved providers, being entities approved as a provider of aged care, on or after 1 January 2009).

**Item 192 Application of amendment relating to applications for allocation of places**

This item provides that the amendment made by Item 28 applies in relation to an application for an allocation of places made on or after 1 January 2009.

**Item 193 Application of amendments relating to allocation of places**

This item provides that the amendments made by Items 29 to 51 apply to an allocation of places made on or after 1 January 2009.

**Item 194 Application of amendments relating to lapsing of approval as a recipient of aged care**

This item provides that the amendments made by Items 69 and 70 apply on and from 1 July 2009.

**Item 195 Application of amendments relating to extra service status**

This item provides that the amendments made by Items 76 to 78 apply to applications for extra service status made on or after 1 January 2009.

**Item 196 Application of amendments relating to working out residential care subsidy**

This item provides that the amendments made by Items 83 to 88 apply for the purposes of working out the amount of residential care subsidy payable to an approved provider for the provision of residential care through a residential care service to a care recipient, in respect of a payment period that begins on or after 1 January 2009.

This item clarifies that nothing in Items 93 to 100 or 105 to 111 affects a determination made before 1 January 2009 under subsection 57-14(1) or 57A-9(1) of the *Aged Care Act 1997* (as in force immediately before 1 January 2009), or anything done in relation to or in reliance upon such a determination.

Further, the amendments made by:

- Items 126 and 127 apply in relation to a refusal to make a determination on or after 1 January 2009 under paragraph 57-14(1)(a) or (b) of the *Aged Care Act 1997* (as in force at that time);
- Items 128 and 129 apply in relation to a refusal to make a determination on or after 1 January 2009 under paragraph 57A-9(1)(a) or (b) of the *Aged Care Act 1997* (as in force at that time).

**Item 197 Application of amendment relating to refund of accommodation bond**

This item provides that the amendment made by Item 101 applies where the care recipient ceases to be provided with care by a residential care service or a flexible care service in a residential setting on or after 1 January 2009.

**Item 198 Application of amendments relating to refund of bonds by former approved providers**

The amendment made by Items 102 to 104 (relating to refund of bonds by former approved providers) applies where a person ceases to be an approved provider on or after 1 January 2009.

**Item 199 Application of amendments relating to the imposition of sanctions**

In summary, this item provides that the amendments made by Items 115 to 118 (which relate to the matters to be considered by the Secretary when imposing sanctions) apply in relation to decisions made on or after 1 January 2009 on whether it is appropriate to impose sanctions for non-compliance with responsibilities under the *Aged Care Act 1997*.

The amendment made by Item 119 (which is the new sanctions relating to the restriction of payment in certain circumstances) applies to sanctions imposed on or after 1 January 2009 on an approved provider that has not complied, or is not complying, with one or more of its responsibilities.

**Item 200 Application of amendments dealing with sanctions**

This item clarifies that the repeal of paragraph 66-1(c) in Item 119 (which is one of the sanctions that may be imposed by the Secretary) does not affect the validity of any restriction imposed under that paragraph before its repeal.

This means that if a sanction has been imposed using an existing sanction power then this will continue for the life of the sanction and will not be affected by the amendment that repeals the existing sanctions and replaces it with a newly worded one.

**Item 201 Application of amendment of definition of accommodation bond**

This item provides that the amendment made by Item 135 (which amends the definition of accommodation bond to align with the changes linking approved provider status to the allocation of places to a service) applies in relation to amounts of money that are paid or payable on or after 1 July 2009.

**Item 202 Application of amendments relating to refund declarations**

This item provides that the amendments made by Items 142, 152, 176, 178 and 181 (which relate to refund declarations) apply in relation to the determination of matters on or after 1 January 2009.

**Item 203 Application of amendment relating to insolvency event declarations**

This item provides that the amendment made by Item 169 (namely the repeal of section 7 of the *Aged Care (Bond Security) Act 2006* and replacement of it with a new section that applies to both approved providers and former approved providers) applies in relation to insolvency events that occur on or after 1 January 2009.