Aged Care (Living Longer Living Better) Bill 2013

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Aged Care (Living Longer Living Better) Bill 2013

Date introduced: 13 March 2013

House: House of Representatives

Portfolio: Health and Ageing

Commencement: Sections 1 to 4 and anything not covered below – the day the Act receives Royal Assent
Schedule 1 – 1 July 2013
Schedule 2 – 1 January 2014
Schedule 3 – 1 July 2014
Schedule 4, Part 1 – 1 July 2013
Schedule 4, Part 2 – 1 July 2014
Schedule 5, Part 1 – 1 July 2014
Schedule 5, Parts 2 and 3 – 1 July 2014 (immediately after Part 1)

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of this Bill is to give effect, in part, to the Living Longer Living Better (LLLB) package announced by the Government in April 2012. Specifically, this Bill:

- makes changes to residential aged care, including the introduction of accommodation payments for all types of residential aged care
- removes the distinction between high and low level care for residential aged care
- establishes ‘Home Care’ which will replace existing community aged care packages
- introduces (means tested) fees and charges for both residential and home care
- introduces new supplements for eligible care recipients and a workforce supplement for eligible providers
- ensures that people in residential or community aged care prior to 30 June 2014 will maintain their current arrangements unless they choose to have the new arrangements apply or leave care for more than 28 days and
- makes changes to governance and administrative arrangements, including an independent review of implementation of the legislation to be tabled in Parliament no later than 30 June 2017.
Structure of the Bill

This Bill has five Schedules each with multiple parts.

- **Schedule 1** – Amendments commencing on 1 July 2013
  - the Schedule is largely technical and replaces the current framework with new terminology and approach (namely the substitution of community care with home care). There are also some administrative changes in relation to the Aged Care Funding Instrument, the Allocation Principles and sanctions

- **Schedule 2** – Amendments commencing on 1 January 2014
  - this Schedule establishes the Aged Care Pricing Commissioner and makes related adjustments to the role of the Aged Care Commissioner. It also contains provisions relating to the new Australian Aged Care Quality Agency and the Department of Health and Ageing

- **Schedule 3** – Amendments commencing on 1 July 2014
  - the Schedule empowers the Minister to set fees, subsidies or payments for residential and home care. These will be detailed in a new legislative instrument, ‘Fees and Payment Principles’ which is disallowable. The Schedule introduces means testing and accommodation payments for all people in residential aged care

- **Schedule 4** – Amendments to other Acts
  - makes consequential amendments to other connected legislation. The relevant Acts are listed in the Schedule. Part 1 takes effect from 1 July 2013 and Part 2 takes effect from 1 July 2014 and

- **Schedule 5** – Aged Care (Transitional Provisions) Act 1997
  - this Schedule deals with the transitional provisions associated with the Bill.

Legislative instruments

The Bill is structured so that detailed information about subsidies, fees and payments and other matters is contained in the relevant Aged Care Principle(s). These are all disallowable legislative instruments and reflective of the current structure of the *Aged Care Act 1997* (ACA 1997 – see section 96-1 of the ACA 1997).\(^1\)

Timing of the tabling of these instruments in Parliament is at the discretion of the Government and there is nothing to compel the Government to table the instrument(s) prior to, or during, debate of the Bill. The subordinate legislation cannot be presented to the Parliament until the primary bill is passed.\(^2\) Once tabled, there are 15 sitting days to move a disallowance motion.\(^3\)

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2. Senate Community Affairs Legislation Committee, *Inquiry into Aged Care Bills (Living Longer Living Better package)*, transcript, public hearing, 2 May 2013, p. 69, viewed 9 May 2013,
Consultation on the Principles has commenced and the Government has released four consultation papers: Draft Accommodation Pricing Guidelines, Draft Aged Care Workforce Supplement Guidelines, Dementia and Veterans’ Supplement in Aged Care – Consultation Paper and Home Care Packages – Consultation Draft. The Government has indicated that the proposed content of the Principles will be published through consultation process underway. It is expected that the consultation process will be completed by 23 May 2013 and that drafting of the principles will be completed pending the passage of the legislation.

Amendments to Principles

As a result of this Bill, many of the existing Aged Care Principles will be consolidated, amended or repealed. From 1 July 2014, a new set of Principles will govern the operation of the ACA 1997. They are as follows:

- Subsidy Principles (consolidation of amended Subsidy Principles) (new)
- Aged Care (Transitional Provisions) Principles (new)
- Fees and Payments Principles (new)
- Grants Principles (consolidation of amended Grant Principles) (new)
- Quality Agency Principles and Quality Agency Reporting Principles and
- User Rights Principles (amended).

A number of Principles are due to be amended by 1 July 2013 and will continue on 1 July 2014:

- Allocation Principles
- Approval of Care Recipients Principles


5. Senate Community Affairs Legislation Committee, p. 69, op. cit.


7. Subject to a disallowance motion not being passed.

8. There are currently separate Principles for each type of aged care subsidised by the Government (Community, Flexible and Residential). Amendments are due to take effect from 1 July 2013.

9. There are separate Grants Principles for: Advocacy, Community Visitors, Residential Care, Accreditation. The amended Grants Principles are due to take effect from 1 July 2013.

10. These will be made under the Australian Aged Care Quality Agency Act (once passed) and take effect from 1 January 2014.
• Approved Provider Principles
• Certification Principles
• Classification Principles
• Complaints Principles
• Information Principles
• Quality of Care Principles and
• Sanctions Principles.

There are some exceptions. The Accountability Principles are due to be amended by 1 January 2014 and the Extra Service Principles are due to be amended by 1 July 2014. Both will be in effect on 1 July 2014. The Records Principles is the only Principle that is unchanged.11

**Structure of the Living Longer Living Better legislative package**

On 13 March 2013 the Government introduced five Bills simultaneously into the Parliament to give effect to the LLLB initiative announced in April 2012. LLLB was the Government’s response to the recommendations of the Productivity Commission’s (PC) Inquiry *Caring for Older Australians.*12

There are five interrelated Bills:

• Aged Care (Living Longer Living Better) Bill 2013
• Australian Aged Care Quality Agency Bill 201313
• Australian Aged Care Quality Agency (Transitional Provisions) Bill 201314
• Aged Care (Bond Security) Amendment Bill 201315 and
• Aged Care (Bond Security) Levy Amendment Bill 2013.16

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Further information about each of these Bills can be found in the respective Bills Digest or the Bills homepage. The principal Bill is the Aged Care (Living Longer Living Better) Bill 2013. Amendments contained in this Bill give effect to the other Bills. For example, the Quality Agency Reporting Principles made under this Bill will have an effect on the operation of the Australian Aged Care Quality Agency established by the Australian Aged Care Quality Agency Bill 2013.

There are three commencement dates for the legislative package: 1 July 2013, 1 January 2014 and 1 July 2014. 17

Background

Reform to aged care was identified as a second-term priority by the Gillard Government. 18 Prior to the election of the Gillard Government, the Rudd Government had referred aged care to the Productivity Commission (PC) for inquiry and report in April 2010. The original reporting date was April 2011 but this was extended to June 2011. The scope of the inquiry was broad and the PC was requested to develop ‘detailed options for redesigning Australia’s aged care system to ensure it can meet the challenges facing it in coming decades’. 19

The response to the Inquiry was significant with 487 initial submissions and 438 submissions in response to the draft report. 20 This was supplemented by 13 public hearings. 21 The draft report was publicly released in January 2011 22 The final report was submitted to Government in June 2011 and publicly released in August 2011. 23 When releasing the report, the Government announced the start

23. For an overview of the final report, see R de Boer, Caring for older Australians report – a sector in need of reform, FlagPost, Parliamentary Library, 16 August 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2FF1022219%22

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of a ‘national conversation’ to help inform the Government’s response. Four principles were articulated to guide the response:

- every older Australian has the right to access quality care and support according to their needs and when it is required
- older Australians should have greater choice and control over their care arrangements
- funding for aged care needs to be sustainable and fair for both older Australians and the broader community and
- older Australians deserve quality care from an appropriately skilled workforce.

The Government also indicated that it would be consulting with the National Aged Care Alliance and the Ageing Consultative Committee when developing its response.

Living Longer Living Better

The response to the PC’s recommendations was released by the Government on 20 April 2012. The LLLB package, while not accepting the structural changes recommended by the PC, made some changes to the aged care system which may, potentially, lead to further reform in the future. In contrast to current arrangements: the costs of accommodation and care will be separated, older Australians who can afford to do so will pay towards the cost of care with lifetime caps, the introduction of accommodation payments for all people in residential aged care facilities, a greater focus on consumer directed care and the introduction of a ‘Gateway’ to help older Australians navigate the aged care system.

Committee consideration

Senate Selection of Bills Committee

At its meeting of 13 March 2013, the Senate Selection of Bills Committee immediately referred the five aged care Bills introduced into the House of Representatives on 13 March to the Senate Community Affairs Legislation Committee for inquiry and report by 17 June 2013. The principal

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issue for consideration by the Committee is the ‘full impact on how these changes will affect providers, older Australians and their families and carers’.  

Details of the inquiry by the Senate Community Affairs Legislation Committee are at the inquiry webpage. The five Bills will be considered concurrently. The due date for submissions was 22 April 2013 and many of these have been published online. Public hearings around Australia were held from 29 April to 2 May 2013. Due to time constraints, this Digest does not consider issues raised in the submissions or hearing as these will be covered in the Senate Report due to be tabled on 17 June 2013.

Financial implications

The Explanatory Memorandum notes that the Government will provide $3.7 billion over five years to the aged care sector as a result of the LLLB package. However, much of this money is existing allocations and re-directions from the aged care budget. The total net cost of the aged care package, as calculated by Government in April 2012, is $576.9 million over five years. To date, there has been no revision of these figures.

Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Parliamentary Joint Committee on Human Rights examined the Bill in March 2013. It concluded that further information was required to determine human rights compatibility. Further detail is

28. Ibid., Appendix 1.
33. The Statement of Compatibility with Human Rights can be found at pages 4-5 of the Explanatory Memorandum to the Bill.
sought about the ‘overall impact of the proposed means test for aged care services and the justification for what appears to be retrogressive measure’. The Committee has written to Minister Butler requesting further detail about means testing, including any savings and the impact on individuals. It also has requested information about the protections provided to a person in situations whereby a subsidy may be reduced if documentation is not supplied. The response from the Minister, once received and considered by the Committee, will be incorporated into a subsequent report.

**Key issues and provisions**

When the LLLB package was announced the Government gave a commitment to include a review of implementation in the legislative package. It considered the LLLB package to be the first step on the continuum of a ten year reform process.

**Clause 4** gives effect to this commitment. It binds the Government to a review of the operation of the Aged Care (Living Longer Living Better) Act 2013, the Aged Care (Bond Security) Amendment Act 2013 and the Aged Care (Bond Security) Levy Amendment Act 2013 (once commenced).

**Subclause 4(2)** sets out the terms of reference for the review. These are broad ranging and include whether unmet demand for aged care has been reduced, the effectiveness of the means testing arrangements, the effectiveness of the new price regulation arrangements and the effectiveness of workforce strategies in aged care services.

Importantly, for future reform efforts, the review must consider whether ‘the number and mix of places for residential and home care should continue to be controlled’ (paragraph 4(2)(b)) and whether ‘further steps could be taken to change key aged care services from a supply driven model to a consumer driven model’ (paragraph 4(2)(c)). These were key recommendations made by the PC that have not been accepted by Government at this stage.

The review must be undertaken three years after the commencement of Schedule 1, in 2016 (subclause 4(4)). Public consultation is required by subclause 4(3), which also lists particular groups that must be consulted. The reviewer has 12 months to complete the review and present the Minister with a written report (subclause 4(5)). This report must be tabled within 15 sitting days of receipt (subclause 4(6)).

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35. Ibid., p. 27.
36. Ibid., p. 31.
37. Ibid., p. 31. See proposed sections 44-20A and 48-6.
39. Ibid.
Schedule 1 – Amendments commencing on 1 July 2013

Part 1

This Part is largely administrative and proposes a number of changes to the ACA 1997, such as changes in terminology, to reflect the LLLB framework. For example, community care will now be known as home care. Existing community care packages (Community Aged Care Package, Extended Aged Care at Home and Extended Aged Care at Home – Dementia) will be replaced with four levels of Home Care, to be known as Home Care Levels 1-4.40 It also repeals definitions which are no longer necessary.41 The Explanatory Memorandum clearly sets out these changes and these will not be replicated in this section of the Digest.42

Part 2 of Schedule 1 details the transitional and savings provisions associated with Schedule 1. Of note, item 199 enables the Minister, by legislative instrument, to make Allocation Principles and/or Approval of Care Principles to give effect to this Part. Any Principles made in this way may be incorporated into Allocation Principles and/or Approval of Care Principles made under section 96-1 of ACA 1997.

This section of the Digest will provide an overview of the proposed clauses in Schedule 1 which are likely to generate interest from stakeholders, such as:

- expansion of the meaning of ‘people with special needs’ in the ACA 1997
- ministerial determinations to be published on the DoHA website
- suspension of approved providers for providing false or misleading information about the Aged Care Funding Instrument
- revocation of accreditation status and notice to rectify by the Secretary
- agreements between Home Care providers and recipients for the provision of Home Care and
- the appointment of administrators and advisers as part of the aged care sanctions process.

Expansion of the meaning of people with special needs in the Act

Section 11-3 of the ACA 1997 defines ‘people with special needs’ as:

a. people from Aboriginal and Torres Strait Islander communities

b. people from non-English speaking backgrounds

c. people who live in rural or remote areas

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42. For a complete list of the substitutions and subsections to be replaced or repealed, see Explanatory Memorandum, pp. 8, 9, 11, 12, 17, 18, and 24.
d. people who are financially or socially disadvantaged

e. people of a kind (if any) specified in the Allocation Principles.

**Item 6** in **Schedule 1** of the Bill repeals paragraphs 11-3 (b) to (e) and substitutes them with:

b. people from culturally and linguistically diverse backgrounds

c. people who live in rural or remote areas

d. people who are financially or socially disadvantaged

e. veterans

f. people who are homeless or at risk of becoming homeless

g. care-leavers

h. lesbian, gay, bisexual, transgender and intersex people

i. people of a kind (if any) specified in the Allocation Principles.

The current **Allocation Principles** already include the groups specified at **item 6**. This amendment expands ACA 1997 to include these groups and signals the Government’s commitment to an inclusive aged care sector.

**Ministerial determinations to be published**

ACA 1997 already requires the Minister or Secretary to publish determinations (see subsections 12-3(2), 12-6(3) and 32-7(2)). These determinations usually relate to subsidies payable under ACA 1997 and a range of other matters, such as eligibility. Currently the legislation requires these determinations to be published in the Australian Public Service Gazette (the Gazette). They are also published on the ComLaw website, on the Federal Register of Legislative Instruments.

**Items 7, 9 and 44** amend **subsections 12-3(2), 12-6(3) and 32-7(2)** to omit ‘in the Gazette’ and replace with the ‘on the Department’s website’. The Explanatory Memorandum notes that this will be published on www.health.gov.au. The rationale provided is that this information will be ‘more accessible and centrally located’. Some of this information is already published on the DoHA

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44. Should a future Government wish to remove one or all of these groups, legislative, rather than regulatory, change would be required.


46. Explanatory Memorandum, p. 10.

47. Ibid.
website, for example ‘Fees and Charges’ for residential aged care.\(^{48}\) It is not clear if this information will also be published on the ‘Aged Care Australia’ website, which is part of the new ‘gateway’ for aged care.\(^{49}\)

Currently, only general information about costs of aged care is provided on the Aged Care Australia website. The information provided is linked to general information about the costs of residential aged care on the DoHA website.\(^{50}\) Specific information about fees and changes for residential aged care requires a separate search and/or clicking on a hyperlink in a side bar on the DoHA website. There is no advice to consumers on either website about where specific information can be found.

Greater transparency and accessibility of information is to be commended but this amendment will be of little value to consumers if the information is difficult to find. One of the objectives of the new aged care gateway and the associated ‘My Aged Care’ website and national call centre is to provide ‘clear and reliable information’ and ‘build a comprehensive system of information enabling Australians to find the information they need’.\(^{51}\) It remains to be seen if this amendment will make it easier for consumers to find key information about aged care.

Suspension of approved providers for providing false and misleading information about the Aged Care Funding Instrument

Funding for residential aged care providers is governed by the Aged Care Funding Instrument (ACFI). The ACFI determines the subsidy payable based on the care needs of the recipient and is paid directly to the aged care provider. Providers are able to reassess the care needs of the resident and request additional funding from DoHA\(^{52}\) but must be able to demonstrate the basis for this claim, should this be requested by DoHA.

Amendments to subsection 25-4(1) proposed by items 35 to 38 of Schedule 1 more effectively target the Secretary’s power when an aged care provider gives false, misleading or inaccurate information in relation to appraisals and reappraisals under the ACFI. For example, the Secretary can suspend a provider from making appraisals or reappraisals at one or more of the services operated by that provider (subsection 25-4(1) at item 35).

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52. The legislation refers to ‘the Secretary’ – in practice this is DoHA.
The threshold for the Secretary suspending a provider from making appraisal and reappraisals has also been lowered (paragraphs 25-4(1)(a) and 24-4(1)(b) at items 36-37). Currently, the Secretary has to be satisfied that a ‘substantial’ number of appraisals or reappraisals were false or misleading. Paragraph 24-4(1)(a) is amended to omit ‘substantial’, so that the Secretary can suspend a provider on the basis of one or more instances of the provision of false or misleading information.\(^{53}\)

Subsections 25-4(2) and 27-3(2) will be repealed as a result of these changes as they relate to how the Secretary interprets the term ‘substantial’.

Subsection 27-3(1) sets out the circumstances when the Secretary may require a reappraisal to be made of the level of care needed by one or more people to whom an approved provider provides care. The current circumstances in which such a reappraisal may be required mirror the current circumstances in which a provider may be suspended from making appraisals and reappraisals under subsection 25-4(1) and will be amended in a corresponding way. That is, the Secretary will be able to require a reappraisal if satisfied that the provider has given false, misleading or inaccurate information in relation to one or more appraisals or reappraisals (currently this is required to have occurred in a ‘substantial number’ of appraisals or reappraisals) (paragraph 27-3(1)(a)), that the ACFI classification resulting from the erroneous appraisal or reappraisal was then changed (paragraph 27-3(1)(b)), and the Secretary is satisfied that, after that change, the provider gave false, misleading or inaccurate information in another appraisal or reappraisal (that is, the requirement will be met where this occurs on one occasion after the earlier change. This may be compared to the current requirement that the provider continued to provide incorrect information in relation to the other appraisals or reappraisals) (paragraph 27-3(1)(c)).\(^{54}\)

Decisions made by the Secretary about suspension of aged care providers from making appraisals or reappraisals are reviewable by the Administrative Appeals Tribunal (AAT) under Part 6.1 of ACA 1997. Decisions made by the AAT are publicly available.

Although no rationale for these provisions was included in the Explanatory Memorandum, it is likely that these relate to the charge of ‘unusual claiming’ by aged care providers made by Minister Butler in April 2012.\(^{55}\) He noted that there had been ‘dramatic increases’ in movements between low needs to medium needs to high needs under the ACFI by some providers.\(^{56}\) He also challenged the assumption that the additional money being received by the providers was being spent on additional care staff.\(^{57}\) The LLLB package included a $1.6 billion clawback (over five years) of the ACFI funding.\(^{58}\)

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\(^{54}\) See items 40-43, respectively.

\(^{55}\) J Gillard (Prime Minister) and M Butler (in his capacity as Minister for Ageing), Transcript of joint press conference, Canberra, 20 April 2012, op. cit.

\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) DoHA, Living Longer Living Better, op. cit., p. 38.
This was designed to slow the growth in ACFI funding to historical funding rates between two to three per cent above indexation.59

At the same time, changes were also announced to the evidence requirements for some ACFI questions. Despite this, claims about alleged ‘rorting’ of the aged care system have persisted. In August 2012, 7.30 Report detailed a number of claims made by whistleblowers from DoHA about the incorrect use of aged care funding.60

Revocation of accreditation status and notice to rectify by the Secretary

Amendments to subsections 39-3(1) to (3), at items 48 and 49 of Schedule 1 of the Bill are designed to enhance the processes associated with the revocation of certification of approved providers. Certification is part of the accreditation process and is a necessary prerequisite to receiving government subsidies for aged care. Currently there is no provision in ACA 1997 for approved providers to rectify a situation after being given notice by the Secretary that revocation is being considered.

This is addressed in the amendments to subsection 39-3(1) and (2). As is currently the case, under proposed subsection 39-3(2), the Secretary must notify the approved provider in writing that revocation is being considered and for what reason(s). The approved provider has 28 days to respond to the Secretary’s notification. The amendments then introduce a new option for the Secretary. After considering the submission, the Secretary will be able to choose to give a notice requiring the provider to give an undertaking that the provider will rectify the identified problem (proposed subsections 39-3A(2) and (3)). The notice will explain that the provider’s certification will be revoked if the undertaking is not given or complied with (proposed paragraph 39-3A(3)(b)). Revocation is avoided if the undertaking is complied with (proposed subsection 39-3A(5)). The Secretary is compelled to revoke certification if the provider has not given and/or complied with the undertaking (proposed subsection 39-3A(5)). It would appear that these amendments offer greater protection to residential aged care providers and promote a more collaborative approach to the regulation. It also provides ‘natural justice’ to aged care providers.

Agreements between Home Care providers and recipients for the provision of Home Care

Section 56-2 of ACA 1997 sets out the responsibilities of approved community care providers.61 Item 127 of Schedule 1 of the Bill inserts paragraph 56-2(ca), to require home care providers to provide the care and services set out in the agreement between the care provider and the care recipient. The Explanatory Memorandum notes that this is to give effect to the policy framework of

60. ‘Funding feeds profits over aged care’, The 7.30 Report, transcript, Australian Broadcasting Corporation (ABC), 16 August 2012, viewed 21 April 2013, http://www.abc.net.au/7.30/content/2012/s3569659.htm
61. To be known as ‘home care’ providers once the Bill is passed.

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the LLLB, which stipulates that all home care packages are to be provided on a consumer directed basis. 62

Consumer directed care (CDC) for community aged care was introduced on a trial basis for a limited number of (community care) packages in 2010. 63 The evaluation of the CDC trial noted that there was inconsistency in the provision of documented care plans and information about individual budget statements to participants. 64 It also highlighted the tensions for providers between balancing consumer choice and the provider’s duty of care. 65 There was considerable variability among providers about what was considered ‘acceptable’ under CDC. Common examples of refused requests included computers and internet connections, engagement of informal workers (such as family members), cash payments of CDC funds or requests to use CDC funds for informal social activities. 66

Some of these issues have been clarified by the release of the consultation draft on Home Care Package Guidelines (the Guidelines) by DoHA. 67 This provides an overview of what might be included by Home Care Levels 1-4. 68 It notes that consumers will be able to negotiate 69:

... other services required to maintain a person at home where this will assist the consumer to achieve his/her goals consistent with the consumer’s needs and the scope of the Home Care Packages Program.

The Guidelines also give some insight into excluded services and items. Some of these include use of funds: as a source of general income, to purchase food, to purchase motorised wheelchairs (although these can be leased or hired), for travel and accommodation for holidays, for entertainment activities (although travel costs can be claimed) and for payment of consumer fees for Home Care Packages or other programs. 70

It also defines the principles that will underpin the operation and delivery of CDC packages. 71 ‘Respectful and balanced partnerships’ between consumers and approved providers is considered ‘absolutely crucial’ to consumer control and empowerment. 72 What this means, and how this will work in practice, remains to be seen. As noted in the evaluation of the CDC trial, the extent to which

65. Ibid., p. 62.
66. Ibid., p. 62.
68. Ibid., pp. 42-48.
69. Ibid., pp. 41-42.
70. For a complete list, see p. 48 of the Guidelines.
71. Ibid., pp. 9-10.
72. Ibid., p. 9.
participants had control and input varied across providers. This was attributed to either inflexibility of the provider or a lack of understanding or awareness by the participant. The latter may be addressed by provision of the Charter of Rights and Responsibilities for Home Care which must be provided to participants at the commencement of the package.

The appointment of administrators and advisers as part of the aged care sanctions process

As part of the accreditation process, sanctions can be imposed on residential aged care providers for non-compliance. These can culminate in revocation of approved provider status. To avoid this, providers can appoint an adviser to assist with complying with their responsibilities and addressing non-compliance. Item 142 of Schedule 1 amends subparagraph 66-2(1)(a)(iii) to further clarify that this appointment should be in relation to the approved provider’s responsibilities in relation to the provision of ‘care and services’. Similarly, subparagraph 66-2(1)(a)(iv) is amended by item 143 of Schedule 1 to clarify the appointment of an adviser in relation to governance and business operations. This clarification ensures that the appointed adviser is the most appropriate for the task.

Schedule 2 – Amendments commencing on 1 January 2014

There are two parts of this Schedule. Part 1 contains amendments relating to the establishment of the Australian Aged Care Quality Agency (the Quality Agency) and the Aged Care Pricing Commissioner and related adjustments to the role of the Aged Care Commissioner. Part 2 describes the transitional and savings provisions in relation to this Schedule. Many of the provisions in this Schedule are clearly set out in the Explanatory Memorandum and will not be replicated in this section of the Digest. The following issues will be considered:

- administrative changes as a result of the establishment of the Quality Agency (Part 1)
- administrative changes as a result of the establishment of the Aged Care Pricing Commissioner (Part 1)
- administrative provisions to enable smooth implementation of the Bill (Part 1) and
- transitional and savings provisions (Part 2).

Administrative changes as a result of the establishment of the Quality Agency

The Quality Agency is established by the Australian Aged Care Quality Agency Bill 2013. This replaces the existing Australian Aged Care Standards and Accreditation Agency (AACSAA). The Bill

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73. KPMG, op. cit., p. 63.
74. Ibid., p. 63.
75. DoHA, Home care packages program guidelines, op. cit., p. 27.
76. Only approved providers are eligible for Commonwealth funding.
77. For Bills Digest, see R de Boer, Australian Aged Care Quality Agency Bill 2013 [and] Australian Aged Care Quality Agency Bill (Transitional Provisions) Bill 2013, Bills Digest, no. 103, 2012-13, Parliamentary Library, Canberra, 2013, viewed 21 April 2013,

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amends the ACA 1997 to reflect the new arrangements, for example, accreditation of residential aged care providers will be undertaken by the Quality Agency from 1 January 2014. Item 1 of Part 1 ensures that providers that are already accredited will maintain this accreditation under paragraph 42-4(a) of ACA 1997.

The Quality Agency will be governed by the Quality Agency Principles, the Quality of Care Principles and the Quality Agency Reporting Principles. Under new section 65-1A, inserted by item 2 of Schedule 2 of the Bill, the Secretary may have regard to information provided by the Quality Agency.

Part 5.4 of the ACA 1997 sets out the requirements for ‘accreditation grants’, which are provided by the Commonwealth to the AACSAA to fund its accreditation functions. Part 5.4 is repealed by Item 4 as the Quality Agency, as a statutory agency, will receive direct appropriations from the Government rather than accreditation grants.

The functions of the Aged Care Commissioner (the Commissioner) will change as a result of the establishment of the Quality Agency. For example, the Commissioner will no longer be required to examine the conduct of AASCAA staff as they will be public servants and subject to the Public Service Act 1999. However, the Commissioner will be able to examine complaints about the Quality Agency’s processes in relation to accreditation and quality review. The Commissioner will also be able to examine the processes undertaken by the Quality Agency and make recommendations to the CEO as a result. Item 6 amends paragraphs 95A-1(2)(d) and (e) to give effect to these changes.

This change was supported by the Commissioner. The Commissioner also recommended that section 95A-12 be amended to expand the range of issues that are required to be included in the Commissioner’s annual report to the Minister (and the Parliament), to include information about the number of times the Commissioner has directed there be a new process and the number of times the Commissioner has sent a ‘special report’ to the Minister. It was acknowledged that while there currently no impediments to this information being reported, this amendment would send a ‘powerful signal’ if it was a legislative requirement.

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F2379864%22

78. The Quality of Care Principles are already established under ACA 1997 and remain unchanged. The Quality Agency Principles will be established under the Australian Aged Care Quality Agency Act 2013 (once passed).
79. Explanatory Memorandum, p. 29.
81. In relation to the operation of the Aged Care Complaints Scheme.
82. Lamb, op. cit., p. 2. The Commissioner notes that these expanded powers are not set out in the Bill, but are foreshadowed as being included in the new Complaints Principles.
83. Ibid., p. 2.

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Administrative changes as result of the Aged Care Pricing Commissioner

There will be two Commissioners under the Act – the Aged Care Commissioner and the Aged Care Pricing Commissioner. To ensure consistency between the Commissioners, ‘Commissioner Principles’ will be created. A reference to these new principles will replace the existing reference to ‘Complaints Principles’ in subsections 95A-4(1) and (2) - see item 7. The extent to which the Commissioner Principles replace the Complaints Principles is limited to the functions of the Commissioner. The Complaints Principles will remain in force.

Section 95A-9 will be amended to reflect contemporary drafting practice and ensure that the Aged Care Commissioner and the Aged Care Pricing Commissioner are treated in a consistent way in relation to resignations (new subsection 95A-9(2)) and termination of appointment (amended section 95A-10). The Aged Care Commissioner was consulted about these changes and is supportive of them.\(^84\)

Item 14 of Schedule 2 introduces new Part 6.7, which establishes the Aged Care Pricing Commissioner (Pricing Commissioner). The functions of the Pricing Commissioner are detailed at new section 95B-1 and are to:

- approve extra service fees
- approve accommodation payments (for residential aged care) that are higher than the maximum amount determined by the Minister
- perform other functions that are conferred on the Pricing Commissioner under the Act or other Commonwealth law and
- perform functions specified by the Minister in a legislative instrument.

The Pricing Commissioner will be appointed by the Minister by written instrument for a period that does not exceed three years (new subsections 95B-2(1) and (3)).\(^85\) The appointment can be made on either a full-time or part-time basis (new subsection 95B-2(2)). Remuneration will be determined by the Remuneration Tribunal (new section 95B-4). Allowances will be prescribed by the Commissioner Principles (new subsection 95B-4(2)). As noted above, the provisions for resignation (new section 95B-9) and termination of appointment (new section 95B-10) are identical to the Aged Care Commissioner. Other provisions relating to the appointment and employment of the Pricing Commissioner are set out in the Bill and adequately explained in the Explanatory Memorandum.\(^86\)

It is possible for the Pricing Commissioner to delegate some or all of their functions to an Australian Public Service employee under new section 95B-11. However, the Pricing Commissioner must have regard to the function that is being delegated and who is being delegated to (new subsection 95B-11(2)). The delegate must comply with any directions from the Pricing Commissioner

\(^84\) Ibid., p. 1.
\(^85\) However, the Commissioner may be reappointed – see section 33AA of the Acts Interpretation Act 1901, available at: http://www.comlaw.gov.au/Details/C2012C00001
\(^86\) Explanatory Memorandum, pp. 31-32.
(new subsection 95B-11(3)). These provisions protect the integrity of the Office of the Pricing Commission while providing some flexibility.

The Pricing Commissioner must submit an annual report to the Minister on its operations, as soon as practicable after the end of the financial year (new subsection 95B-12(1)). This report will be tabled in Parliament and must include (new subsection 95B-12(2)):

- the number of applications that were made to the Pricing Commissioner during the financial year for approval to charge an accommodation payment that is higher than the maximum amount determined by the Minister
- the number of applications that were approved, rejected or withdrawn during the financial year
- the number of applications that were made to the Pricing Commissioner for approval to charge an extra service fee and
- any other information required by the Commissioner Principles to be included in the Report.

These provisions have attracted some comment from stakeholders. Grant Thornton has recommended that Division 95B be removed from the Bill.\textsuperscript{87} Grant Thornton disagrees with the introduction of any new restrictions on accommodation pricing in aged care.\textsuperscript{88}

### Transitional and savings provisions

As noted previously, accreditation that is in force prior to 1 January 2014 will be taken to be in effect from this date and will be taken to have been given by the new Quality Agency, rather than the ACSAA. Item 25, Part 2 gives effect to this.

The effect of item 26 is that the Pricing Commissioner can commence consideration of applications for higher accommodation payments (above the Minister’s determination) from 1 January 2014, despite not taking effect until 1 July 2014.\textsuperscript{89} Providers will be able to advertise their prices prior to 1 July 2014 and will give greater certainty to consumers and providers alike.\textsuperscript{90} A decision not to approve an application made by the Pricing Commissioner is reviewable by the AAT under subitem 26(5). The Commissioner has noted that the Bill is silent about who will consider complaints and disputes about pricing made by the members of the public.\textsuperscript{91} It was suggested that the Committee may wish to consider whether this could be a matter for review by the Pricing Commissioner.\textsuperscript{92} However, it would be inappropriate for the Pricing Commissioner to review their

\begin{itemize}
  \item Ibid.
  \item Explanatory Memorandum, p. 37.
  \item Ibid.
  \item Lamb, op. cit., p. 3.
  \item Ibid., p. 3.
\end{itemize}
own decision(s). The Aged Care Complaints Scheme was suggested as a possible vehicle to consider complaints from the public about increases in pricing.93

Schedule 3 – Amendments commencing on 1 July 2014

Summary of changes to fees and charges for aged care - overarching principles

- Those who can afford to, will contribute to the cost of care and accommodation, through means testing arrangements
- Lifetime and yearly caps apply to protect consumers from high costs
- Full pensioners will be exempt from paying fees (both home and residential care)
- Current rules for the treatment of the family home as an exempt asset will continue
- The cost associated with care and accommodation will be separated
- Care fees cannot be higher than the Government subsidy

Overview of Schedule 3

The proposed amendments to the ACA 1997 presented in Schedule 3 of the Bill intrinsically refer to the LLLB aged care reforms that are proposed to apply from 1 July 2014. The Schedule 3 amendments make up the bulk of the provisions presented in the Bill and refer to:

- care recipients may be required to contribute to their costs of care and cost of accommodation
- the payment of a subsidy by the Commonwealth to a care provider
- requirements for approved care providers (to the Government) to continue as an approved provider
- power for the Secretary to prescribe that some care places be used for specific purposes, such as care level, respite care and special needs care
- allowing the Secretary to allocate funding for designated types of care places
- the certification of a residential care place
- subsidies paid for residential care
- government supplements for different categories of residential care
- income testing of a residential care resident and the reduction in government care subsidy
- annual lifetime caps on individual contributions for costs of care
- asset testing valuation
- the application of an accommodation supplement and means testing
- income testing and Government subsidy for home care

93. Ibid., p. 3.
• the setting of maximum residential daily care fees
• accommodation payments and accommodation contributions for residential care
• responsibilities and requirements for residential care providers
• responsibilities and requirements for in-home care providers
• responsibilities and requirements for flexible care providers
• sanctions for approved providers and
• new definitions to be used in legislation and elsewhere when referring to residential and home care.

As can be seen from this extensive list much of the substantive new provisions and rules for the LLLB reforms are contained in this Schedule. This section also provides an overview of the policy framework underpinning this Schedule. Detailed consideration of the proposed legislation follows.

Income testing for home care and residential care and accommodation subsidies

Item 8 of Schedule 3 and the LLLB reforms more broadly, stipulate a general principle for the proposed aged care reforms, that is, a care recipient may be required to contribute to the costs of their care and accommodation. It should be noted this refers to all care, both residential and home care. In making contributions to the costs of care, contributions for accommodation costs does not refer to home care, only to residential aged care.\(^{94}\)

Income testing

The broad details of what the income testing will be for home and residential care subsidies has been spelt out by the Government.\(^{95}\) A care recipient's assessable income will be determined using the same rules as used by Centrelink for pension purposes. This refers to the pensions income test as applied under the *Social Security Act 1991* (SSA 1991). This is essentially gross income with stipulated allowable deductions as set out in the SSA 1991.\(^{96}\) It is not taxable income or net taxable income or Adjusted Taxable Income (ATI) as is used for family assistance payments under the *A New Tax*

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94. The PC report defined residential aged care as facilities (other than hospitals) which provide accommodation and aged care as a package to people requiring ongoing health and nursing care due to chronic impairments and a reduced degree of independence in activities of daily living (ADL). These facilities provide residential aged care combined with either nursing, supervision or other types of personal care required by the residents. Aged care institutions include specially designed institutions where the predominant service component is long-term care and services are provided to people with moderate to severe functional restrictions.


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System (Family Assistance) Act 1999 (FAA 1999). For the purposes of assessing income for aged care subsidies, income for an individual includes income support payments they receive from the Australian Government such as the age pension.

Home care and income level and care fees payable

Recipients of home care with assessable income less than the maximum income level for a full rate of pension, will not be asked to pay a care fee.

For recipients of home care who are part-rate pensioners, including self-funded retirees with the same level of income, their care fee will be calculated at 50 per cent of their assessable income above the relevant threshold up to an annual cap. Annual care fees for this group will be capped at $5000 and this limit will be indexed.

For recipients of home care who have assessable income greater than the maximum income level for access to a pension, their annual care fee will be equal to $5000 (indexed) plus 50 per cent of their assessable income above the relevant threshold. The care fees of these care recipients will be capped at $10 000 (indexed) per annum.

No individual’s care fee can be greater than the level of Government subsidy payable in respect of their home care package. A lifetime cap on the care fee of $60 000 will protect all care recipients who receive care for a longer than average period of time. Contributions a care recipient makes as recipients of residential care will be taken into account in calculating lifetime care expenditure.

Residential care and income level and care fees payable

Currently, for high level care (nursing home care), a basic daily care fee is payable which is set at 85 per cent of the single rate of pension. Residents with income above the pension income test free area may be asked to pay an extra income tested extra care fee. This income tested fee payable is calculated at 5/12ths of assessable income above the income tested fee threshold. High care recipients are not currently asked to pay any accommodation bond or accommodation payment.

Under the LLLB reforms, these arrangements will change. Residents who can afford to do so will make a means tested contribution that will reduce the amount that the Government pays toward their care and accommodation. Residents who can afford to will pay:

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97. Payments provided under the FAA 1999 are Family Tax Benefit Part A, Family Tax Benefit Part B and Child Care Benefit.
98. $22 700.60 for singles and $22 232.60 share of assessable income for a member of a couple as at 20 March 2012.
99. Self-funded retirees with income levels low enough to allow a part-rate pension but who do not receive a pension are those whose assets preclude access to the pension.
100. DoHA, Living Longer Living Better; fairer means testing for Home Care packages, op. cit.
101. Ibid.
102. Ibid.
• a basic fee of up to 85 per cent of the single basic pension (currently $15 364 per annum)
• a means tested contribution to their accommodation that reduces the level of the Government accommodation supplement plus
• a means tested contribution to their care (‘the care fee’) that reduces the level of the Government care subsidy.

Note that the maximum means tested contribution is distributed first towards the resident’s accommodation payment until the full cost of accommodation is paid and then towards their care costs.

No one will be asked to pay a care fee greater than the cost of their care. In addition, an annual cap of $25 000 (indexed) will apply to a resident’s contribution to their care costs, together with a lifetime cap of $60 000 (indexed). The lifetime caps refer to both home and residential care.

Fee setting and income and asset limits

Only assessable income above the maximum income for a full pensioner will count towards the aged care means test. There is also an asset test free threshold of $40 500 (2012 prices). Any care recipient whose levels of income or assets are below these levels will not pay fees attributable to the respective test. For people with income or assets above these thresholds, the maximum means tested contribution is (thresholds in 2012 prices):

• 50 per cent of income above the income threshold, plus
• 17.5 per cent of the value of assets between $40 500 and $144 500, plus
• 1 per cent of the value of assets between $144 500 and $353 500, plus
• 2 per cent of the value of assets above $353 500.

The maximum means tested contribution is distributed first toward the resident’s accommodation payment until the full cost of accommodation is paid and then toward their care fee. The care fee paid cannot exceed the cost of care.

An annual cap of $25 000 on care fees will protect residents with higher than average care fees. A lifetime cap of $60 000 will protect all care recipients who receive care for a longer than average period of time. Contributions that residents may have made as recipients of home care will be taken into account in calculating lifetime care expenditure.

As is currently the case, a resident’s former family home will not count as an asset if it is occupied by a protected person, usually a partner. Even when the value of a resident’s former home is included

105. Ibid.
106. Ibid.

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as an assessable asset, its asset value is capped at $144,500 (2012 prices), so that it is only counted in determining a resident’s ability to pay for their accommodation.\footnote{107}

**Part 1 – Amendments**

**Aged Care Act 1997**

The new contribution arrangements to be inserted into the Act by Schedule 3 of the Bill will not apply to ‘continuing care recipients’ (\textit{item 1, proposed section 1-5}). A ‘continuing care recipient’ is a person who was a recipient of care prior to 1 July 2014 and will remain under those arrangements until they change care or elect to be covered by the LLLB arrangements.\footnote{108}

\textbf{Item 8} inserts \textit{new section 3-3A}, which provides that care recipients may be required to contribute to the costs of their accommodation and the costs of their care. This highlights one of the main tenets of the LLLB reforms, that is, care recipients, whether they are receiving residential or home care, and regardless of whatever level of care is being provided, may be required to contribute to the costs of care and the costs of accommodation.

\textit{Schedule 3} contains a large number of items that change wording in the ACA 1997 to update provisions with the new terminology for the proposed LLLB reforms. \textbf{Items 249 to 289} change terms in the Dictionary at Schedule 1 of the ACA 1997. For example, the term ‘accommodation bond’ is changed to ‘accommodation payment’. Also, redundant terms are omitted.

Terms like ‘residential care subsidy principles’ are amended to remove ‘residential care’, as subsidies are to be applied to all care situations, be it home or residential care. The word ‘subsidy’ is redefined to encompass government provided care subsidies being provided under the ACA 1997 or the \textit{Aged Care (Transitional Provisions) Act 1997} (\textit{ACTPA 1997}).

\textbf{Items 34} and \textbf{38} continue the Secretary’s current power to direct that a certain number of places are required to be provided for specified care places, a particular type of care, or respite care or care for those with special needs. As is currently the case, this means that if the Secretary is of the opinion that particular types of care places need to be allocated, in a geographical location, he/she has the power to so directly by the allocation of care type places. The substance of the changes made by \textbf{items 34} and \textbf{38} is that instead of listing the different categories of persons whom care must be provided to in ACA 1997, these categories will be in the Allocation Principles. The Explanatory Memorandum\footnote{109} says the Allocation Principles will list all the existing classes. This also is a clear manifestation that the LLLB reforms are not a complete open market demand driven reform. That is, the Government, by having the power to allocate funded places and types of funded places will have direct control of the care places approved providers can provide. Provision of care places will not be solely market driven.

\footnotesize{107. Ibid.\hspace{0.5cm}108. For further explanation see \textit{Schedule 5, Part 2, proposed section 1-2A} in this Digest.\hspace{0.5cm}109. Explanatory Memorandum, p. 42.}
From item 79 onwards, amendments are proposed to remove references to ‘residential care subsidy principles’. The different types of care subsidy principles are being consolidated into one set of principles – Subsidy Principles. Having different types of care subsidy principles will no longer be necessary under the LLLB reforms. There will no longer be any distinction between high or low care in residential aged care.

Items 98 to 109 refer to amendments to the residential care subsidy and how it is to be calculated. The care subsidy paid by the Government to an approved provider for an individual can be reduced under an income test applied to the individual care recipient’s income.

**Government subsidies for specific care needs**

**Item 103** proposes the insertion of a new section 44-5, which provides that the ‘primary supplements’ element of the residential care subsidy can have different components such as:

- respite supplement
- the oxygen supplement
- the enteral feeding supplement
- the dementia supplement
- the veterans’ supplement
- the workforce supplement or
- any other primary supplement set out in the Subsidy Principles.

**New subsection 44-5(3)** provides that the Minister can set out in a legislative instrument the supplements that can attract extra subsidy payment and also the amount of each supplement or the way the amount of a supplement is worked out.

**Workforce supplement**

The proposed introduction of the workforce supplement has been the subject of sustained criticism by Catholic Health Australia (CHA). In short, attaching conditions to Government funding (such as enterprise bargaining agreements) is not considered an appropriate way to achieve industrial outcomes such as higher wages for aged care staff. \(^{110}\) CHA is concerned that the proposed framework will result in greater disparities across the sector and will do little to attract and retain the aged care workforce. \(^{111}\) CHA also noted that the supplement is not new funding and many

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110. Catholic Health Australia, Submission to the Senate Standing Committee on Community Affairs Legislation Committee, *Inquiry into the Aged Care (Living Longer Living Better) Bill 2013*, April 2013, p. 6-11, viewed 24 April 2013,

111. Ibid.
providers will be unable to afford the increase. In contrast, the Australian Nursing Federation (ANF) has welcomed the workforce compact (which will be paid through the workforce supplement). The workforce supplement is designed to increase the wages of aged care nursing and care workers but is only available to aged care providers who vary current enterprise agreements or negotiate a new agreement and commences from 1 July 2013.

Residential aged care – accommodation and care costs means testing

<table>
<thead>
<tr>
<th>Summary of key changes</th>
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<tbody>
<tr>
<td>• Income and asset testing are based on the rules set out in the Social Security Act 1991</td>
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<tr>
<td>• Two components for means testing – income and asset testing</td>
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<tr>
<td>– In both calculations, annual income and asset tested amount are separately divided by 364 to calculate a daily means tested amount</td>
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<tr>
<td>• Income testing assesses the total income of a person, including any income support payments (such as the pension)</td>
</tr>
<tr>
<td>• An income free area applies and income less than the free area is assessed as zero. This is currently set at around $23,767 per annum (indexed twice a year)</td>
</tr>
</tbody>
</table>

Residential care subsidy reduction calculator

• The level of income and assets determines whether a person will make a contribution to their accommodation costs
• The maximum government accommodation supplement is subtracted from the person’s means tested amount.
  – If zero, the full government subsidy for care and accommodation is paid to the residential aged care provider
  – If above zero, the amount of government subsidy paid to the aged care provider is reduced by the amount that is able to be paid by the person, plus any supplements.

Asset testing

• Asset testing will be used to determine if an accommodation charge will be payable
• The level of a person’s assets will be added to their income to determine the daily means tested amount
• A supplement will be paid by the Government to residential aged care providers on behalf of

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112. Ibid. The workforce supplement will be funded, in part, through the ACFI ‘claw-back’ announced in December 2011. See discussion ‘Suspension of approved providers for providing false and misleading information about the Aged Care Funding Instrument’ in the Digest.


114. M Butler (in his capacity as Minister for Mental Health and Ageing), *Aged care workers to get a well deserved pay rise*, media release, 5 April 2013, viewed 24 April 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2275355%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2275355%22)
those whose daily means tested amount is less than the maximum daily accommodation supplement on their day of entry to residential aged care

- Supplement and means tested amounts will be determined by the Minister and set out in a legislative instrument (which will be known as ‘Fees and Payment Principles’)

Overview

As it is set out in the Bill, means testing is complicated and will be difficult for lay people to understand. The primary element is that means testing (both income and asset testing) applies to all residential aged care.

The Government has set out what the proposed accommodation payment arrangements will be for a person entering residential aged care115 from 1 July 2014 onwards.116 On entering care, it will be the level of income and assets of a care recipient (their means) that will determine how they can be asked to meet their accommodation costs. If the care recipient has sufficient means (that is, if their means are greater than certain thresholds), the approved provider can ask the care recipient to pay an accommodation payment. If, based on their means, the care recipient can only meet some of their accommodation costs (again, based on thresholds), the Government will pay an accommodation supplement, and the approved provider can ask the care recipient to pay an accommodation contribution.

Both an accommodation payment and an accommodation contribution can be paid as a refundable deposit (lump–sum), a daily payment or a combination of both. A description of the means testing free areas, thresholds and limits is provided in the section titled ‘Fee setting and income and asset limits’ above.

The important difference to note is that the new provisions (new section 52E–1), for residential care refer to:

‘care recipients may pay for or contribute to the cost of accommodation provided for residential care’.

There is no distinction regarding the level of care being provided in residential care. This highlights one of the major changes in the LLLB reforms, that is, the cost of accommodation can be charged to all types of users in residential care. Currently, those in high care are essentially charged only for their care costs.

Asset and means testing

115. DoHA, Living Longer Living Better; fairer means testing arrangements for residential care, op. cit.

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**New section 44–22.** inserted at item 110 of Schedule 3, sets out the detail of the income and asset testing (means testing) for residential aged care and refers to both an accommodation supplement and also to the care subsidy. Means testing essentially uses the income and assets testing methodology as is used for the pensions’ income and asset tests as set out in the SSA 1991.\(^{117}\) This is the income and asset testing that is currently used. The means testing has two components – the income tested amount and also the asset tested amount. When these two separate amounts are determined they are added and divided by 364 to arrive at a daily means tested amount. Further detail can be found in Appendix 1 – Residential care.

**Item 118** adds new sections 44–26A, 44–26B and 44–26C setting out the provisions for determining the level of a person’s assets for the purposes of adding it to the person’s income tested amount to arrive at the person’s means tested amount. This asset testing refers only to means testing for residential care not home care. Home care only has income testing. The broad asset testing principles include counting as an asset any refundable accommodation bond paid by the care recipient. This is consistent with the current asset testing, which counts amounts held in an accommodation bond as an asset, for residential aged care.

**Item 125** proposes new section 44–28 which details what the accommodation supplement will be. In short, the amount of the accommodation supplement will be set by the Minister in a legislative instrument. An accommodation supplement will be payable by the Government to an approved residential care provider in respect of residents whose daily means tested amount (derived from the person’s income and assets) is less than the maximum daily accommodation supplement amount on their day of entry into residential care. Where a person on entry was assessed as having high enough means to be required to provide an accommodation payment, they will have a reduced or no Government paid accommodation supplement. The assessment of the person’s means on the day of entry will be perpetual. So even where a person’s means diminish after entry, they will not be subsequently eligible to any or a higher Government accommodation supplement. On first glance this seems quite harsh but it is a way of ensuring people with higher means do not fritter or dispose of assets/income and then later on get access to a higher rate of or any accommodation supplement. However, the existing financial hardship provisions will be allowed to apply – see below.

**Financial hardship provisions**

Financial hardship assistance may be available to residents who do not have the income or assets to utilise to pay for their costs of care. Each case is considered on an individual basis, based on a resident’s financial circumstances. Financial hardship assistance is not intended to cover the circumstances where a discretionary choice has resulted in financial difficulties. Some situations where hardship assistance would not normally be approved are:

- where a personal choice is made not to use a particular asset which could help with the payment of care fees, for example, investments or savings

117. Section 8 of the SSA 1991, op. cit.
• where money or an asset has been gifted or disposed of or
• where finances or an asset are being earmarked for inheritance purposes.

Currently, under subsection 44-30(4) of ACA 1997, where a person has chosen to accept an extra service place\textsuperscript{118}, financial hardship assistance is unable to be provided. New section 44-28, which is discussed above, details when a person will be eligible for an accommodation supplement, and the amount of that supplement. Under new section 44-28, the amount of the accommodation supplement determined on the date of entry (based on the person’s means) will remain unless the financial hardship provisions are applied. This appears harsh, but it is probably appropriate recognising that persons should not fritter away their means and thereby gain access to an accommodation supplement or a higher rate of accommodation supplement. The financial hardship provisions do allow for situations where a person’s financial circumstances have taken a downward turn for reasons outside their control.

**Home care – income testing**

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<tr>
<th>Summary of key changes</th>
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<tbody>
<tr>
<td>• Annual caps of $5000 (indexed) for part pensioners and $10 000 (indexed) for self-funded retirees apply with a lifetime cap of $60 000</td>
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<tr>
<td>• The lifetime cap applies to contributions made towards the cost of care in both the residential and home care context</td>
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**Home care subsidy income test**

• Full pensioners will not be required to pay a care fee
• Part pensioners will pay 50 per cent of assessable income above the income free area (indexed twice a year) up to an annual cap
  – Any income less than the income free area is assessed as zero
• Self-funded retirees will pay $5000 (indexed) plus 50 per cent of their assessable income above the pension income test cut-off limit

**Home care fees**

• The maximum daily home care fee will be determined by the Minister and set out in a legislative instrument (which will be known as ‘Fee and Payment Principles’)
• The fee cannot be more than 17.5 per cent of the daily rate of the basic single rate of the age pension (this limit is currently around $9.20 per day)
• No individual can be charged a care fee greater than the Government subsidy

**Home care fee calculator**

• The maximum daily home care fee will be added to the income tested fee – an extra fee for extra service, as agreed between the care recipient and provider, will also be included

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\textsuperscript{118} Extra service places (both permanent and respite) refers to a place where a person chooses to pay for the provision of a significantly higher standard of accommodation, services and food.

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**Item 142** repeals section 48–1 and inserts **new sections 48–1 to 48–12** which refer to the setting of the home care subsidy. As set out in the Explanatory Memorandum:

> Currently, the fees paid by a care recipient to a care provider do not reduce the amount of Government funding payable.\(^{119}\)

Under the LLLB reforms, the Government will provide home care subsidies to providers but the amount of the subsidy may be reduced by the income of the care recipient. This means those with higher levels of income will be asked to pay more for their home care servicing but there will be both annual and lifetime caps on the amount of contributions a person can be asked to make toward the cost of their care.

**New section 48–1** outlines how the care subsidy amount is arrived at for a care recipient. **New section 48–2** provides for the Minister to set the basic care subsidy amount by way of a legislative instrument. The Minister may set different amounts to recognise the level of care being provided, supplementary amounts for specific items listed in the Subsidy Principles\(^ {120}\) and other matters the Minister considers appropriate.

Once the maximum care subsidy applicable to a care recipient is determined (under **new section 48-1**), **new section 48–7** sets out how the care subsidy might be reduced. This is done basically by an application of an income test to the care recipient. It should be noted that unlike the means testing that is proposed to be applied to residential care, the home care subsidy reduction only refers to an income test and not also to an asset test. The Government has set out the broad principles of how the home care subsidy income testing will work:

> Some care recipients will be asked to contribute more to the cost of their care through an income tested care fee on top of the current basic fee that all care recipients can be asked to pay. The new arrangements will replace the additional contributions that some Home Care recipients are currently paying and will ensure that people with similar means pay similar fees, with safeguards for those who can least afford to pay. Care recipients who can afford to do so will make a means tested contribution that will reduce the amount that the Government pays toward their care. Care recipients who can afford to will pay:

  - a basic fee of up to 17.5 per cent of the single basic pension (currently $3,163 per annum, although many care recipients pay less); and
  - a means tested contribution to their care (‘the care fee’) that reduces the level of the government care subsidy.

No one will be asked to pay a care fee greater than the cost of their care. Full pensioners will not pay a care fee. In addition, annual caps of $5,000 and $10,000 (indexed) will apply to the care fees of part pensioners and self funded retirees respectively, together with a lifetime cap of $60,000 (indexed).\(^ {121}\)

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119. Explanatory Memorandum, p. 68.
120. Care subsidy can have different components for matters like respite, oxygen, dementia et cetera. Refer to **item 103** in **Schedule 3**.

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Further detail about the home care subsidy income test can be found in Appendix 2: Home care subsidy income test.

**Fees and payments**

**Item 149** proposes to insert a *new Chapter 3A–Fees and payments* which contains *new Part 3A.1–Resident and home care fees, new Part 3A.2–Accommodation payments and accommodation contributions* and *new Part 3A.3–Managing refundable deposits, accommodation bonds and entry contributions* into the ACA 1997.

**Residential care fees**

The new provisions in this chapter set out the Minister’s capacity to set the care fees for residential care. These are called ‘resident fees’ – *new section 52C–2* refers. *New section 52C–4* details that the Minister can set the standard residential care fee by legislative instrument and, if an alternative amount is not set, this will be 85 per cent of the single basic rate of age pension. This is the same as the high care (nursing home) daily care fee as is set now. *New section 52C–3* sets out the steps to be taken to arrive at the maximum daily amount payable by the care recipient for residential care.

**Residential accommodation payments**

**Proposed new Part 3A.2** of the ACA 1997 refers to accommodation payments and accommodation contributions for residential care, not home care. The proposed new provisions in this part refer to the capacity to charge residents a refundable accommodation payment (similar to the current accommodation bond), or daily accommodation contributions or combinations of both. Up-front refundable accommodation payments and regular accommodation contributions are similar to current payment methods for residential care that is classified as less than high care (nursing home care). These proposed accommodation lump–sums and contributions arrangements refer to those who enter residential care on or after 1 July 2014.

**Home care fees**

**Item 149** also includes new provisions for home care fees. *New sections 52D–1 to 52D–3* refer. *New section 52D–3* provides that the Minister can set in a legislative instrument a basic daily home care fee, or if no amount is determined for the care recipient, the fee cannot be more than 17.5 per cent of the daily rate of the basic single rate of age pension. As at 20 March 2013, the basic single rate of age pension is $733.70 per fortnight or about $52.40 per day and 17.5 per cent of this is about $9.18 per day.

*New section 52D–2* sets out the home care fee calculator. The calculator starts off with the basic daily care fee as set out in *new section 52D–3*, then adds any income tested care fee (see home care subsidy income test above). In addition, any extra fee amounts for extra services agreed between the care recipient and the provider is then added and the result is the maximum home care fee that can be charged. With the home care subsidy income test, those assessed with more income will pay more for home care. The setting of amounts for extra servicing must also comply with the Fees and...
Payment Principles as set out in section 96–1 of the ACA 1997. This is further explored in the next section of the Digest.

**Fees and Payment Principles**

<table>
<thead>
<tr>
<th>Summary of key changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Up-front accommodation payments (what is currently known as an ‘aged care bond’) will be required from all residents who have the capacity to pay, and who enter residential care on or after 1 July 2014</td>
</tr>
<tr>
<td>• This amount will be determined by legislative instrument and providers will be required to publish this amount (this is not in the Bill but may be in the legislative instrument)</td>
</tr>
<tr>
<td>• Accommodation payment will be required if the means tested amount is in excess of the maximum accommodation supplement payable by the Government</td>
</tr>
<tr>
<td>• If the means tested amount is less than the maximum accommodation supplement payable by the Government, the person will pay a daily accommodation contribution, depending on their income above the means tested amount free area</td>
</tr>
<tr>
<td>• The daily contribution cannot be more than the government daily accommodation supplement or the daily accommodation amount based on the level of the person’s assessed means</td>
</tr>
<tr>
<td>• People have the option of paying an up-front lump-sum refundable deposit, or daily payment or combination of both. They have 28 days from the date of entry to make this decision</td>
</tr>
<tr>
<td>• Where a person chooses to pay an up-front lump-sum refundable deposit they have six months from the date of entry to make the payment</td>
</tr>
<tr>
<td>• Providers are no longer able to charge a retention amount but are able to earn interest on up-front refundable deposits</td>
</tr>
</tbody>
</table>

New section 52E–2 refers to the ‘Fees and Payment Principles’. Generally, subsection 96(1) of the ACA 1997 empowers the Minister to make, by way of legislative instrument\(^\text{122}\), principles for matters as specified in a table listed in subsection 96(1). Item 236 contains proposed amendments to alter the table of matters listed in subsection 96–1 of the ACA 1997 to insert a new item called ‘Fees and Payment Principles’. This amendment will empower the Minister to determine Principles dealing with such matters.

**Accommodation payments and accommodation contributions**

Item 149 also contains new Part 3A.2–Accommodation payments and accommodation contributions.

New section 52F–3 sets out the requirements and necessary components for an accommodation agreement between an approved provider and a person entering residential care. The Government has set out the essential components of accommodation payments being:

\(^{122}\) Ibid.
• the person can be required to pay an accommodation payment if their means tested amount is in excess of the maximum accommodation supplement payable by the Government

• where the person’s means tested amount is less than the maximum accommodation supplement payable by the government, the person can be required to pay a daily accommodation contribution, depending on their level of means over the means tested amount free area

• persons can choose to pay an up-front lump-sum refundable deposit, or daily payments or a combination of both

• where a person elects to pay an up-front refundable lump-sum they have six months from date of entry to make that payment and

• within 28 days of entry a person must choose to pay an accommodation payment or an accommodation contribution by way of daily payments, or a refundable deposit or combinations of both.\(^{123}\)

Other requirements for agreements are also set out in new section 52F–3, mainly targeting flexibility to vary payments between lump-sums and daily payments on an on-going basis.

**New section 52G–2** details a person cannot be charged an accommodation payment unless their means tested amount is larger than the maximum accommodation supplement payable for that person.

**New section 52G–3** provides for the Minister to set out in a legislative instrument the maximum amount of an accommodation payment an approved provider can charge. An approved provider can charge less than the maximum but this is probably unlikely as almost all providers charge the maximum.

**New section 52G–4** provides for the Pricing Commissioner (established by item 14 in Schedule 2 of this Bill) to approve a higher accommodation payment maximum on application from an aged care provider. A Pricing Commissioner decision is appealable and a new application on the same matter can only be made 12 months after a decision. The Aged Care Commissioner has noted that the Bill is silent about who will consider complaints and disputes about pricing made by the members of the public.\(^ {124}\) It was suggested that the Committee may wish to consider whether this could be a matter for review by the Pricing Commission.\(^ {125}\) However, it would be inappropriate for the Pricing Commissioner to review their decision(s). The Aged Care Complaints Scheme was suggested as a possible vehicle to consider complaints from the public about increases in pricing.\(^ {126}\)

**New section 52G–5** details that a provider cannot accept a price that is higher than the amount set out in the accommodation agreement. This helps to stop collusion on prices between providers and

\(^{123}\) DoHA, *Living Longer Living Better; fairer means testing arrangements for residential care*, op. cit.

\(^{124}\) Lamb, op. cit., p. 3.

\(^{125}\) Ibid., p. 3.

\(^{126}\) Ibid., p. 3.

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individuals willing to pay more to get access to services. Again, this is confirmation that the Government does not want the provision of residential aged care to be an open consumer driven market.

New sections 52G–2 and 52G–6 refer to accommodation payments and accommodation contributions. New section 52G–2 details a person entering residential care cannot be charged an accommodation payment (like an accommodation bond), unless their daily means tested amount exceeds the daily Government accommodation supplement. Persons liable to pay an accommodation payment are those with greater means and they can elect to provide their payment as a one-off up-front lump-sum or in a series of lump-sum amounts or daily payments or both. Complementing this, new section 52G–6 details that for those with lesser means, who are therefore not required to pay an accommodation payment, they can be asked to make an accommodation contribution (a daily accommodation charge amount). The amount of the daily accommodation contribution cannot be more than:

- the amount of the Government daily accommodation supplement or
- the daily accommodation amount based on the level of the person’s assessed means.

Eligible flexible care

The accommodation payments and contributions provisions in the Bill refer primarily to residential aged care but there are also equal references to ‘flexible care service’. For example, new section 52E–1 refers to accommodation payments and accommodation contributions for residential care but also for ‘eligible flexible care’. This raises the issue as to what is eligible flexible care? At present, flexible care refers to care that can be extended aged care at home and the requirements are:

- in the care recipient’s home and
- in the form of services necessary to maintain the person at home, including nursing care or personal assistance (or both), in an individually tailored and managed package of care.

This care can only be for a care recipient who:

- needs care equivalent to a high level (nursing home) of residential care and
- would, if he or she were not receiving extended aged care at home, have required a high level of residential care.\(^\text{128}\)

Currently, flexible care packages are a long-term care option for frail older people who want to remain living in the community. They are not meant be used as a crisis management tool for people

\(^{127}\) Their means tested amount is less than the government daily accommodation supplement.

\(^{128}\) DoHA, Living Longer Living Better; fairer means testing arrangements for residential care, op. cit.
requiring temporary care or short–term care, such as those waiting for access to other more appropriate care options for which they may have been approved.

For these types of care situations, high care and also eligible flexible care, currently there is no requirement to provide an accommodation bond. Care recipients with higher levels of assets may be required to pay extra care charges, but there is no testing for an up-front accommodation charge, as is the case for residential care in low care situations.

In short, eligible flexible care servicing refers to care not in a normal or common residential aged care arrangement. However, the Bill proposes that the rules and disciplines for accommodation fees and payments that are to apply to residential care are also to apply to flexible care. **New section 52F–5** sets out that accommodation agreements for flexible care are not required to refer to accommodation contributions by the person being cared for. The Explanatory Memorandum refers to flexible care in a residential setting like a Multi-Purpose Service. This refers to rural and/or regional locations where care is provided attached to a local health facility, where there isn’t the population density and then therefore the need for a dedicated separate residential care facility.129

**Division 52H–Rules about daily payments**

**New sections 52H–1 to 52H–4** set out rules for daily accommodation payments. Essentially it allows approved providers to charge up to one month in advance for daily accommodation payments. The important provisions refer to approved providers being able to charge interest on accommodation amounts owed for more than one month but the interest rate charged cannot exceed a rate set out in a legislative instrument by the Minister and interest cannot be charged on an amount that is not at least one month outstanding. This is very much like what applies to accommodation bond amounts held by approved residential aged care providers currently, whereby deductions (retention amounts) can be made against a bond amount at a rate determined by the Minister.130

**Division 52J–Rules about refundable deposits**

Proposed **new sections 52J–2 to 52J–7** set out new provisions covering up–front accommodation deposits held by approved providers. Persons entering care can elect to provide an up–front deposit at any time if their means testing reveals that they have the necessary capacity to make a deposit. Refer to the discussion on Part 3A.2–Accommodation payments and accommodation contributions above.

**New section 52J–2** allows a resident to elect to pay a refundable lump–sum deposit at any time, even after they have entered care under an accommodation agreement. **New section 52J–3** makes the payment of deposits subject to the Fees and Payments Principles. **New section 52E–2** refers to the ‘Fees and Payment Principles’. Generally, subsection 96–1 of the ACA 1997 empowers the Minister to make, by way of a legislative instrument, principles for matters as specified in a table

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129. Explanatory Memorandum, p. 85.

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listed in subsection 96–1. At item 236 there are proposed amendments to alter the table of matters listed in subsection 96–1 of the ACA 1997 to insert a new item called ‘Fees and Payment Principles’.

Proposed new section 52J–5 sets out that an approved provider cannot accept a refundable deposit from a person unless they have assets above a minimum threshold. This level is to be 2.25 times the annual single basic rate of pension amount at the time of entry or a higher amount specified in the Fees and Payments Principles.\(^{131}\)

Proposed new section 52J–6 details that an approved provider can retain income earned from refundable deposits. There is no like provision allowing providers to retain amounts derived from accommodation contributions.\(^{132}\)

Proposed new section 52J–7 details that an approved provider can deduct amounts from refundable deposits, being amounts as set out in the Fees and Payments Principles, for accommodation charges. This section allows providers to deduct daily care and accommodation costs, amounts specified in the Fees and Payments Principles and amounts agreed in writing with the care receiver from refundable deposits.

Note: The current arrangements permit aged care providers to earn interest from aged care bonds (accommodation payments) as well as retain amounts from the bonds.\(^{133}\) These are known as retention amounts.\(^{134}\) Under the proposed LLLB reforms, approved providers will only be able to retain the interest earned from accommodation payments amounts held.

Financial hardship

Item 149 also includes new Division 52K–Financial hardship. There are currently provisions in the ACA 1997 for financial hardship but mainly in reference to residential care. The financial hardship provisions presented in the Bill closely mirror the existing provisions but the existing references to residential care are replaced with references to accommodation payment and accommodation contribution. The need for and application of financial hardship is discussed in the context of item 125 above.

The financial hardship provisions presented here only refer to persons being required to provide an accommodation payment or accommodation contribution – there is no reference to home care financial hardship. The home care hardship provisions are set out in the new provisions presented in item 142.

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131. As at March 2013 this is about $42,922.00.
133. Ibid.
134. Ibid.
Accommodation payments security

Item 149 proposes to also insert new Part 3A.3—Managing refundable deposits, accommodation bonds and entry contributions. This new part has new sections 52L–1 to 52P–4.

As with financial hardship provisions discussed above, there are already provisions in the ACA 1997 for the management and security of accommodation bonds. Separate to this Bill there are two other LLLB Bills before the Parliament in regards to accommodation payment security. They are the:

- Aged Care (Bond Security) Amendment Bill 2013 and
- Aged Care (Bond Security) Levy Amendment Bill 2013.

Those two other LLLB Bills referencing accommodation payments mainly feature word changes to the Aged Care (Bond Security) Act 2006 and the Aged Care (Bond Security) Levy Amendment Act 2006 to bring them up-to-date with the new LLLB reform terminology. The Bond Security Bills do not have any significant changes to the existing bond security and bond levy provisions, which is a manifestation that the Government probably thinks the current laws for bond security are adequate. The Bond Security Bills include changing the term ‘accommodation bond’ to ‘accommodation payment’. This recognises the changes in terminology in reference to accommodation payments, which are a feature of this Bill. The Bills Digest for these Bond Security Bills discusses the effectiveness of the current security arrangements for accommodation bond payments. In brief, there have not been any significant issues or problems with accommodation bond security.

Approved providers responsibilities under the Aged Care Act 1997

Item 153 repeals and substitutes paragraphs 56–1(a) to (m) setting out the responsibilities for approved providers of residential care.

Item 154 makes a similar amendment to section 56–2 in the ACA 1997 which currently covers responsibilities for approved providers – community care. The amendments made by Items 125 to 128 of Schedule 1 to the Bill will change the references in this section to ‘community care’ to ‘home care’.

Item 155 makes similar amendments to current section 56–3 of the ACA 1997 in regards to flexible care. Flexible care addresses the needs of care recipients, in either a residential or community care setting, in ways other than the care provided through mainstream residential and community care.

135. ACA 1997, Division 57—What are the responsibilities relating to accommodation bonds and entry contributions?
136. Aged Care (Bond Security) Amendment Bill 2013, Bill homepage, viewed 26 April 2013, http://parlinfo/parlInfo/search/display/display.w3p;adv%3Dyes;orderBy%3Dcustomrank;page%3D0;query%3DTtitle%3DAbond%20Dataset%3AbillsCurBef,BillsCurNotBef;rec%3D0;resCount%3DDefault
137. Aged Care (Bond Security) Levy Amendment Bill 2013, Bill homepage, viewed 26 April 2013, http://parlinfo/parlInfo/search/display/display.w3p;adv%3Dyes;orderBy%3Dcustomrank;page%3D0;query%3DTTitle%3DAbond%20Dataset%3AbillsCurBef,BillsCurNotBef;rec%3D0;resCount%3DDefault
138. Once published, the Bills Digests will be available from the Bills homepages.

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Five types of flexible care are now provided for under the ACA 1997 – Extended Aged Care at Home (EACH) and Extended Aged Care at Home Dementia (EACHD) packages, Transition Care, Multi-Purpose Service (MPS) places, and Innovative Care. Arrangements for the various types of flexible care are set out in the Flexible Care Subsidy Principles 1997.  

Sanctions for providers

Items 170 and 171 propose amendments to section 66–1 of the ACA 1997, which set out what sanctions can be imposed on an approved provider if they do not comply with the requirements of the ACA 1997. The amendments refer to accommodation payments and accommodation contributions, which are the two new types of payments paid to providers for residential care under the LLLB reforms. The changed provisions have sanctions that centre on compelling providers to repay amounts of accommodation payment or accommodation contribution to the care recipient with interest and restricting the use of payments paid to providers during a period of a notice of non–compliance. The main rigor is in item 170 which will prevent providers from charging accommodation payments or accommodation contributions during a period of non–compliance. There are no fines or other financial penalties for non–compliance by a provider.

Reviewable decisions

Items 188 to 193 propose amendments to section 85–1. Section 85–1 currently contains a table listing what decisions, made under the ACA 1997. The proposed added decisions to the table refer to the new and changed payment arrangements that will apply to residential and home care under the LLLB reforms. These matters centre on the process whereby the Government accommodation and/or care subsidy, payable to an approved provider, can be reduced where the care recipient has sufficient income and/or assets (means). A detailed description of each proposed addition/change to the table in the ACA 1997 is set out in the Explanatory Memorandum. Obviously the main appellants on these types of decisions made under the ACA 1997 will be approved residential aged care providers but also approved home care providers and probably their main issues or complaints will be about pricing decisions for fees and charges.

Attributing decision making powers to the Aged Care Pricing Commissioner

Items 194 through to item 212 make changes to the ACA 1997 adding the name of the Pricing Commissioner as a person with decision making powers under the Act. Currently, it is the Secretary with decision making powers in the Act. The Pricing Commissioner is established by item 5 in Schedule 2 of this Bill and will be in the new Part 6.7 of the ACA 1997.

Grant Principles made by the Minister


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Items 235 to 238 propose to amend section 96–1 of the ACA 1997 to consolidate the current separate Grant Principles that can be set by the Minister by way of a legislative instrument. It is proposed that the Advocacy Grant Principles, Community Visitors Grant Principles, Other Grant Principles, Residential Care Grant Principles will be consolidated into a single set of Grant Principles. This Bill does not detail what will be set out in the proposed single Grant Principles – that will be set out by the Minister in a legislative instrument that has not been set out yet. In item 168 of Schedule 5 of this Bill, there are also amendments to section 96–1 empowering the Minister to make, in a legislative instrument, principles to apply in relation to the transitional provisions.

Items 249 to 289 make definitional amendments to Schedule 1 of the ACA 1997 141, which is the Dictionary of Terms, making changes consistent with the new legislative terminology to be used for the LLLB reforms.

Schedule 4–Amendments of other Acts

Schedule 4 of the Bill amends six Acts. 142 Broadly, the amendments insert the new terminology used in the Bill, where these terms are used in other Acts. For example, ‘community care’ is renamed as ‘home care’. Another example is the insertion of the new terms ‘accommodation payment’ and ‘accommodation contribution’ into appropriate other Acts.

Social Security Act 1991

Section 9 of the SSA 1991 deals with definitions for financial assets and income streams. Subsection 9(1D) currently provides that ‘to avoid doubt, neither an accommodation bond nor an accommodation bond balance is a financial investment’ for the purposes of the SSA 1991. Item 15 amends subsection 9(1D) to also refer to ‘refundable deposits’ and ‘refundable deposit balance’. This clarifies that amounts held by a provider from accommodation payments and contributions are not to be regarded as a financial investment under the SSA 1991.

Veterans’ Entitlements Act 1986

The Veterans Entitlements Act 1986 (VEA 1986) uses, for service pension means testing purposes, the same assets test rules as are applied in the SSA 1991. Item 38 provides the same amendment to the VEA 1986 that item 15 does to the SSA 1991 (see above) in regards to accommodation payments and contributions.


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Schedule 5 – Amendments commencing on 1 July 2014

In essence the Schedule creates a second version of the Act so that the arrangements are unchanged for the people receiving Government subsidised aged care prior to 1 July 2014. These people are known as ‘continuing care recipients’ and are defined as:143:

Those who were in care before 1 July 2014 and have not since left care for more than 28 days or have not moved services and elected to be subject to the new arrangements.

There are three parts to this Schedule:

- Part 2 details the amendments and the transitional arrangements, including repealing of definitions no longer required and
- Part 3 outlines the transitional and savings provisions.

As with other sections of the Digest, only relevant provisions will be highlighted in this section. The Explanatory Memorandum adequately addresses the proposed changes.144

Part 1 – enactment

The effect of this Part is to:

- create a new version of the Act, known as the Transitional Provisions Act 1997. It will operate alongside the Act, as amended by Schedules 1, 2 and 3 of this Bill.145

The Transitional Provisions Act only applies to the legislative arrangements that are different for continuing care recipients.146 The arrangements, such as fees and charges, for this group of people will remain unchanged until they move services147 or choose to be covered by the new arrangements.

Part 2 – amendments

The majority of these amendments are administrative, such as omissions and substitutions to reflect new terminology and changes to the Principles.148 They are designed to ensure that aged care providers meet their responsibilities under the Act (as amended by this Bill) and the Transitional Provisions Act.149 They also facilitate the charging of different fees and charges and the

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144. Explanatory Memorandum, pp. 124–137.
146. Explanatory Memorandum, p. 125. See definition of continuing care recipient above.
147. For example, move from community care to residential care.
148. For example, see Explanatory Memorandum, pp. 132–133.
149. Explanatory Memorandum, p. 127.
arrangements for bonds depending on whether a person is covered under the Act or the Transitional Provisions (for example, see item 28 (section 41-2) and amendments to section 57-13 (item 131) and item 141, paragraph 57-23(2) (b)). It also sets out the reviewable decisions and legislative instruments that can be made under this Act.

**Proposed section 1-2A**, inserted by item 4 of Schedule 5 provides that the Transitional Provisions Act will only apply to continuing care recipients. Item 188 of Schedule 5 amends the Dictionary at Schedule 1 of the Transitional Provisions Act to provide that continuing care recipient has the same meaning as in ACA 1997. Detailed information is included in the Explanatory Memorandum and will be incorporated in the Dictionary to the Act. The definition encompasses three types of aged care currently funded by the Government: flexible, home care and residential. The definition for each type of care has the same requirements: recipients must be in care before 1 July 2014, have not ceased to be provided care for more than 28 days (unless taking leave from care) and before moving to another service have not made a choice in writing to be covered by the Living Longer Living Better arrangements (as outlined in Chapter 3 and 3A of the Act).

People who change care, for example move from home care to residential care or vice versa, on or after 1 July 2014, will no longer be considered a continuing care recipient. The new fees and arrangements as proposed in the Bill will apply. For people who move between services of the same type, for example between two residential aged care services or two community care services, they will be considered a continuing care recipient. The exception to this is if there is a gap of more than 28 days between leaving the first service and entering the second service or if they elect to be covered Living Longer Living Better arrangements (the Act). Those already in home care on or after 1 July 2014, who later require a higher level of home care, will be considered continuing care recipients.

Section 85-1 details the reviewable decisions under the Transitional Provisions Act. A number of items are repealed (section 85-1 (table items 1 to 39)) as they relate to matters dealt with in the ACA 1997. Item 166 amends the table in Section 85 of the ACA 1997 to ensure decisions made under the Transitional Provisions Act, if passed, will be reviewable.

Item 168 repeals section 96-1 of ACA 1997 and enables the Minister to make Principles under the Transitional Provisions Act. These will be known as Aged Care (Transitional Provisions) Principles and will relate to continuing care recipients. It will outline arrangements for matters such as

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150. The arrangements for bonds are set out at items 131 and 141, Explanatory Memorandum p. 133.
152. Explanatory Memorandum, p. 125. Note that under the Living Longer Living Better arrangements, flexible care will be part of home care.
153. Explanatory Memorandum, p. 126
156. Explanatory Memorandum, p. 126.
accommodation bonds and the payment of supplements that are only relevant to continuing care recipients.\textsuperscript{160} This Principle will be disallowable under the \textit{Legislative Instruments Act 2003}. This is consistent with other Principles made under the Act. All other principles under the LLLB package are provided for in the new laws.

\textbf{Part 3 – transitional and savings provisions}

This Part facilitates the proposed commencement date of 1 July 2014. It also ensures that instruments that were in place under a provision of the Act on 30 June 2014 continue under the corresponding provision of the Transitional Provisions Act (item 216). Applications, requests and other processes that were commenced under a provision of the ACA 1997 prior to 1 July 2014 will be considered to have been commenced under the Transitional Provisions Act (item 217). For example, if an application for a hardship determination was submitted prior to 1 July 2014 under a provision of the Act, the application will continue to be processed after 1 July 2014 under the corresponding provision of the Transitional Provisions Act.

\textsuperscript{160}. Explanatory Memorandum, pp. 134–135.
Appendix 1: Residential aged care

Income tested amount

As noted in the Digest, the income test uses the SSA 1991 income testing rules. There is currently income testing for residential aged care purposes; residents in permanent aged care may be asked to pay an income tested fee in addition to a basic daily fee. The amount they pay depends on their income and the level of care they need. This fee is paid directly to the aged care provider as part of their overall fees. This income testing method is already set out in section 44-21 of the ACA 1997.

For the purposes of determining income under the proposed income test, total income includes any income support payment paid to the person. For a person on an income support payment (like the age pension), their total income will include both the amount of their age pension (but not including the Pension Supplement (PS)) and any other income. For example, where a person has $100 a week in income from bank interest, share dividends and a small amount of superannuation, their total income will be the sum of their age pension plus their $100 a week income.

Residential care subsidy reduction calculator

New sections 44–20A to 44–23 refer to the new residential accommodation supplement and residential care subsidy reduction calculator. The level of the person’s income and assets (means) determines whether they can be asked to contribute to their accommodation costs. If a care recipient is unable to contribute towards their accommodation costs the Government will pay an accommodation supplement to the approved provider on their behalf.

The first step is to subtract the maximum government accommodation supplement amount from the person’s means tested amount. If the result is zero, this means the person’s means tested amount is less than the maximum accommodation supplement and the government care subsidy for the person is not reduced. If the amount is more than zero, this means the care recipient’s means tested amount exceeds the accommodation supplement amount and in the next step, this excess may then reduce the care subsidy amount the government pays to the provider. However, any reduction depends on the amount in excess of zero.

If the excess amount is less than the basic care subsidy for the care recipient, plus any other extra supplements, the care subsidy is reduced by the excess amount. If however the excess amount exceeds the basic care subsidy, plus any care supplement amounts, the care subsidy reduction

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161. The amount of income support paid does not include any Pension Supplement paid so it is just the basic rate of pension paid to the person.

162. The Pension Supplement (PS) was introduced with the Reforms to Pension Payments of 20 September 2009. It replaced (consolidated) other previous supplement payments; Pharmaceutical Allowance, Telephone Allowance, Utilities Allowance, GST Supplement. The current rates of PS are $61.20 per fortnight (single) or $92.20 per fortnight (partnered combined).

163. The amount of income support paid does not include any Pension Supplement.

164. The residential care subsidy can have different components for matters like respite, oxygen, dementia, et cetera. See ‘Government subsidies for specific care needs’ section in this Digest.
amount is the sum of the basic subsidy amount plus any primary supplement amounts. This methodology means that for residents with higher means tested amounts, the maximum care subsidy reduction amount cannot exceed the sum of the government care subsidies payable to the provider for that individual. It’s a complicated way of working out accommodation supplement and care subsidy amount reductions but in the end it does mean reduction amounts for individuals with higher means do not exceed the accommodation and care subsidies the government provides.

Elsewhere in the Bill, there are amendments to section 96–1 of the ACA 1997 empowering the Minister to set the subsidy amounts so it is a way of direct price control.

**Asset testing**

To determine the means tested amount, in addition to the income tested amount there is also an asset tested amount. In both calculations the annual income amount and the asset tested amount are separately divided by 364 to arrive at a combined daily means tested amount.

There is already asset testing for persons in residential aged care. Asset testing can be used to determine if a person in high care (nursing home care) can be required to pay an extra accommodation charge.165 Persons in residential care, at a lower care level than high care, can also be required to pay an accommodation bond if their assets exceed certain limits. Currently, residents who enter care with assets in excess of $41 500 may be asked to pay an accommodation charge.166

The asset treatment of the family home will not change in the LLLB reforms and it will continue to be exempt from the aged care assets test if occupied by a spouse or other protected person.167 There will be a cap on the maximum asset value of a home. Proposed section 44–26B, inserted by item 118 of Schedule 3 of the Bill, provides that the maximum home value will be set by the Minister in a legislative instrument. The maximum home asset value will be $144 500 (2012 prices).168

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167. A protected person refers to a partner, a dependent child, a carer or a close relation of the person.

*Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.*
Appendix 2: Home care subsidy income test

Maximum rate pensioners

Home care recipients with assessable income less than the maximum income level for a full pensioner ($22,700.60 for singles and $17,604.60 share of assessable income for a member of a couple as at 20 March 2012), will not be asked to pay a home care fee. The Government will pay the full home care subsidy to the provider.

Part rate pensioners

Home care recipients with income greater than the maximum income level for a full pensioner, but less than the maximum income level for a part pensioner ($43,186 for singles and $33,046 share of assessable income for a member of a couple as at 20 March 2012), their care fee will be calculated as 50 per cent of their assessable income above the relevant threshold up to an annual cap. These care recipients whose level of income would make them eligible for a part pension under the income test for pensions will have their annual care fees capped at $5000 (indexed).

Non pensioners due to excess income

Home care recipients with income that precludes payment of a pension, their annual care fee will be equal to $5000 (indexed) plus 50 per cent of their assessable income above the relevant threshold. Their care fees will be capped at $10,000 (indexed) per annum.

No individual’s care fee can be greater than the level of Government subsidy payable in respect of their Home Care package. A lifetime cap on care fees of $60,000 will apply. Contributions that care recipients may make as recipients of residential care also count in calculating the lifetime cap.