Aged Care (Bond Security) Amendment Bill 2013 [and] Aged Care (Bond Security) Levy Amendment Bill 2013

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Social Policy Section

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Aged Care (Bond Security) Amendment Bill 2013 [and] Aged Care (Bond Security) Levy Amendment Bill 2013

Date introduced: 13 March 2013
House: House of Representatives
Portfolio: Health and Ageing
Commencement: 1 July 2014

Links: The links to the Bill, its Explanatory Memorandum and second reading speech for the Aged Care (Bond Security) Amendment Bill 2013 and the links to the Bill, its Explanatory Memorandum and second reading speech for the Aged Care (Bond Security) Levy Amendment Bill 2013 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 Bills

Aged Care (Bond Security) Amendment Bill 2013

The purpose of the Aged Care (Bond Security) Amendment Bill 2013 (the first Bill) is to change the name of the current Aged Care (Bond Security) Act 2006 to the Aged Care (Accommodation Payment Security) Act 2006. This is essentially a mechanistic change mainly arising out of changed terminology – changing the name of lump-sum payments for residential aged care from an ‘accommodation bond’ to an ‘accommodation payment’ and also including the new term ‘accommodation contributions’. The first Bill leaves substantially unchanged the provisions in the original Aged Care (Bond Security) Act 2006.¹

Aged Care (Bond Security) Levy Amendment Bill 2013

The other Bill covered in this Digest is the Aged Care (Bond Security) Levy Amendment Bill 2013 (the second Bill), which is very much like the first Bill in that it is essentially changing words, but in the Aged Care (Bond Security) Levy Act 2006.² The current Aged Care (Bond Security) Levy Amendment Act 2006 contains provisions for the possible imposition of a levy on accommodation payment holders (residential aged care providers) in specific circumstances. Broadly, these circumstances refer to the loss of accommodation payments held by a provider due to reasons like insolvency or for

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some other reason. This Bill will do similar to the first Bill and will have a similar effect to the first Bill and change the name of the Aged Care (Bond Security) Levy Act 2006 to the Aged Care (Accommodation Payment Security) Levy Act 2006.

Background

Legislation for the Living Longer Living Better aged care reforms

These Bills arise from the aged care reforms announced by the Government on 20 April 2012. The reforms are called Living Longer Living Better (LLLB). The LLLB aged care reforms extend the current arrangements for aged care bonds to all persons requiring residential care regardless of the level of care required, from 1 July 2014.

For the LLLB reforms there was a package of five Bills presented to the Parliament on 13 March 2013. Two of those Bills are discussed in this Digest and they are the:

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

The other three Bills presented on 13 March 2013 for the purposes of the LLLB aged care reforms were the:

- Aged Care (Living Longer Living Better) Bill 2013
- Australian Aged Care Quality Agency Bill 2013 and

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3. J Gillard (Prime Minister), M Butler (Minister for Mental Health and Ageing), More choice, easier access and better care for older Australians, media release, Canberra, 20 April 2012, viewed 19 March 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1578243%22
4. Ibid.

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Current legislation

There currently are two main Acts which govern the provision of accommodation bonds by users of residential aged care to aged care providers. These two Acts are the:

- Aged Care (Bond Security) Act 2006 (the Bond Security Act)\(^9\) and
- Aged Care (Bond Security) Levy Act 2006 (the Levy Act).\(^10\)

There are quite extensive legislative requirements for aged care providers about the compliance requirements for accommodation bonds. These are set out in the Aged Care (Bond Security) Act 2006. A description of these requirements is set out in the Bills Digest that accompanied the Bond Security Act when it was considered by the Parliament.\(^11\) What is interesting to note is that the two Bills discussed in this Digest do not differ materially from the two 2006 Acts. The probable reason for this is that there have not been any substantive issues or problems since 2006 with aged care providers and bond security.

The bond security prudential requirements are supplemented by the Accommodation Bond Guarantee Scheme (Guarantee Scheme) established under the Bond Security Act. This scheme guarantees that residents’ accommodation bond and entry contribution balances will be repaid in the event that a provider becomes bankrupt or insolvent and defaults on its bond refund obligations to residents. In reference to prudential scrutiny, the 2011–12 Department of Health and Ageing (DoHA) annual report on the application of the Aged Care Act 1997 stated:

Since 2006, Approved Providers have had to comply with three Prudential Standards. Legislative changes to the prudential requirements took effect from 1 October 2011. These include limiting the permitted uses of bonds, the introduction of criminal penalties for significant bond misuse where within two years of the misuse the Approved Provider becomes insolvent with at least one outstanding bond balance, and the introduction of new information gathering powers. The User Rights Principles 1997 were amended to introduce a new Governance Standard from 1 February 2012 and improve disclosure arrangements. These reforms have improved protection of the over 65,000 aged care recipients who pay accommodation bonds.\(^12\)

Application and use of accommodation bonds

A good description of the purpose, use and application of accommodation bonds can be seen in the Bills Digest that accompanied the Bond Security Act.\(^13\) Accommodation payments are one of the main forms of resident contributions that are levied on people in residential aged care facilities.

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These accommodation payments are paid as either accommodation bonds (for residents in low care or hostel beds and for residents in high care ‘extra service’ facilities) or accommodation charges (for residents in high care or nursing homes beds). The amount of accommodation payment levied essentially depends on the income and asset level of each resident and the type of care utilised. Accommodation payments are designed to help provide a stream of capital income for operators of residential facilities and enable to them to build facilities, carry out maintenance and capital upgrades et cetera.

What has been the usage of bonds

In its June 2011 report *Caring for Older Australians*, the Productivity Commission (PC) detailed that:

> The average new resident’s bond is now more than three and a half times than it was in 1998 (when the average new bond value was around $60 000). Between 1998 and 2008, the average value of each new accommodation bond increased by 13 per cent per year (ANAO 2009). The balance between public and private contributions to aged care has changed over the past decade, with a rise in user contributions and private funding for services.\(^\text{14}\)

So in short the numbers of bonds and dollar amounts of monies held by age care providers from bonds has increased quite dramatically over the last ten years.

Amounts of bonds paid

Set out below is a table showing average new accommodation bond payments by sector from 2007–08 to 2009–10.\(^\text{15}\) This is from the 2011 PC report *Caring for Older Australians*.

<table>
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<th>2007–08</th>
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<tr>
<td><strong>Residents taking up non-extra services places</strong></td>
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<tr>
<td>Not-for-profit</td>
<td>169 608</td>
<td>194 758</td>
<td>209 797</td>
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<tr>
<td>For-profit</td>
<td>205 217</td>
<td>221 041</td>
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<tr>
<td>Government</td>
<td>135 122</td>
<td>164 951</td>
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<tr>
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<tr>
<td><strong>Residents taking up extra services places</strong></td>
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<td>Government</td>
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<td>259 383</td>
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<tr>
<td>All sectors</td>
<td>246 755</td>
<td>257 796</td>
<td>292 744</td>
</tr>
</tbody>
</table>

*Source: DoHA (2010h).*

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\(^{15}\) Ibid., p. 122.
The PC report categorised some residential aged care providers as being in the not–for–profit sector, which refers to an organisation that does not distribute profits or surpluses to personal owners or shareholders. The 2011 PC report further detailed that in June 2010 there were 2773 aged care facilities in Australia delivering formal residential care. Around 59 per cent of the beds were operated by not–for–profit providers, 35 per cent by commercial (for profit) organisations and six per cent by some state and local government providers.\(^\text{16}\)

### The benefits of accommodation bonds to aged care providers

Currently, the provision of accommodation bonds has several benefits to residential aged care providers. In brief these are:

- interest/income earned from the bond amounts that have been invested can be retained by the provider
- the provider can make withdrawals from the bond amount in the form of retention amounts\(^\text{17}\) and
- the bond funds can be used by the provider to recoup costs incurred in establishing the aged care facility and also to upgrade or expand the facility.

Under the proposed LLLB reforms, amounts of accommodation payments and accommodation contributions held by residential aged care providers will still be able to earn interest/income for the provider, but the practise of retention amounts being able to be withdrawn will cease.

### The need for spending on the provision of aged care facilities

One of the original aims of allowing residential aged care providers to ask for accommodation bonds was to indirectly finance the provision of more and improved residential aged care facilities. This is important as the projected increased cost of aged care is quite large. In the *Caring for Older Australians* report, the PC noted:

> Australian Government spending on aged care is projected by the 2010 Intergenerational Report to increase from 0.8 to 1.8 per cent of GDP over the period 2010 to 2050.\(^\text{18}\)

The PC also stated:

> Addressing inefficiencies in Australia’s aged care system can reduce the rate of growth in government spending but is unlikely to be sufficient to prevent future tax increases. The public expenditure burden could also be lessened by requiring higher co-contributions from care recipients who can afford to pay.

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17. A retention amount may be deducted from an accommodation bond balance or included in a bond periodic payment for each month, or part of a month that a care recipient is resident in a home, for a maximum of five years across all homes in which a person resides. The retention amounts are set by the Government.
18. Ibid., chapter 6, p. 1.
Funding arrangements could be improved by separating the costs of aged care (accommodation and living expenses, personal and health care) and applying funding principles consistently across care settings. This would allow prices to better reflect underlying costs, enable better targeting of subsidies to those most in need, and overcome inconsistencies and inequities between different forms of care.

Accommodation costs and everyday living expenses are reasonably predictable and should be the responsibility of individuals, with a safety net for those of limited means. 19

These statements essentially sum up some of the main findings of the PC report. The cost of providing for aged care, for both government and individuals, has and is going to increase quite dramatically and go on increasing. This is due to increased longevity and the ageing of the population, especially the post war Baby Boomers. If the current funding arrangements continue the only way to finance the increased cost is with increased taxation and/or decreased government expenditure in other areas.

Are accommodation bonds serving to increase the provision of aged care facilities?

According to the PC report the short answer to this question is no. The PC 2011 report noted that notwithstanding the rapid increase in the number of and dollar amounts held in bonds by providers over the past ten years, very little had been used in providing for high care facilities.

Pricing of services

Providers argued that some of the prices for aged care services set by DoHA are not adequate to cover costs. The result is that some providers are particularly reluctant to invest in maintaining and building capacity in the sector.

Accommodation charges and retention amounts

Many residential aged care providers advised that the maximum price set for the accommodation charge and public subsidies for accommodation in non-extra service high care do not cover the financing cost and depreciation of buildings and maintenance. Access Economics (2009a) estimated that accommodation charges need to be at least 50 per cent higher in order to cover these costs (that is, around $43 per day compared to then current maximum charge of $28.72). 20 This situation has arisen because the maximum price and subsidy for ordinary high care accommodation has not been indexed at a rate that reflects increases in building costs for residential aged care.

These pricing restrictions are causing some providers to delay the building and/or refurbishment of non-extra service high care facilities. Others are not applying for new licenses to construct and operate ordinary high care beds because it is not viable to make such investments under the current pricing regime. For example, Catholic Health Australia noted that there:

19. Ibid.
... has been under allocation of residential high care places in recent Aged Care Approval Rounds (ACAR), and the handing back of allocated places (bed licenses). The under allocation of residential places in the 2009 ACAR was 1,915 places or 25% of residential places advertised (5748 allocated compared with 7663 places advertised). (sub. 217, p. 9)

In the 2009-10 aged care approval, only 5643 of the 8140 proposed residential aged care places were allocated. The shortfall was made up by increasing the allocation of [Community Aged Care Packages] CACPs, [Extended Aged Care at Home] EACH and [Extended Aged Care at Home – Dementia] EACH-D (DoHA 2010a; DoHA 2010p; Elliot 2010). For services that charge accommodation bonds, pricing restrictions and time limits on the size of the retention amount can affect the capacity of some providers to cover the costs of depreciation and capital replacement. 21

So the PC analysis was that accommodation bond funds were being used to subsidise loss-making high care provision. High care provision was running at a loss as the daily care fees and accommodation charges were not adequate to cover the real costs of high level care and this was indirectly causing a drain on investment in new and upgraded residential care facilities. In short, the current accommodation bond arrangements are not resulting in adequate investment in residential aged care facilities, especially high care facilities. This lack of adequate funding of new and expanded facilities for aged care, especially high care, is one of the main impetuses that is highlighted in the presentation of the LLLB aged care reforms.

A 2012 survey of the aged care industry by Grant Thornton 22 found:

Industry commentators have argued that the low financial returns achieved in residential aged care was the primary reason that Australian investment in new infrastructure was declining. While anecdotal evidence has generally supported this position, the cost of care research undertaken in this study confirms that returns generated by operators of modern facilities are inadequate to justify investment in new supply. 23

There have been more recent results highlighting the costs pressures in the provision of aged care. The Bentley 2012 Survey Report detailed:

Consumer funding and investment attraction will be critical to sustaining the aged care sector and ensuring enough beds for future generations.... According to Bentleys director and aged care specialist Heath Shonhan, results indicate lagging profitability in the sector, with expenses increasing at higher rates than income. “With greater focus on the decoupling of care, services and accommodation, the survey broke down costs across those categories, finding care costs now represent 67 per cent of the average provider’s expenses (up from 65.3 per cent in 2011), accommodation at 15 per cent and services at 18 per cent,” said

22. Grant Thornton is an independent assurance, tax and advisory firm. The Grant Thornton 2008 Aged Survey was conducted to analyse emerging trends in residential aged care. The first report examined the impact of policy models on service quality and consumer choice. The second report focused on financial performance of aged care providers and some of the strategies employed by operators. Research was undertaken using survey data from almost 700 residential care services.
Mr Shonhan. “It also found that care costs (where subsidies are generally first directed and which include items like nursing and chemist supplies), jumped 11.58 per cent between 2011 and 2012.”

Are bonds paid equally by aged care users?

At present there is no equity in the funding of care costs between individuals. For those in residential aged care they can be asked to pay an accommodation bond and in all cases the amount of a bond asked for by a provider is set by the market. Of course providers are going to make commercial decisions and use their capital and efforts to concentrate in areas where they think they can get a greater return, that is, charge higher bond amounts. Accordingly, those with higher levels of income and assets will be advantaged in their capacity to pay bonds and thereby access aged care facilities. The capacity to attract bonds and the value of bonds is influenced by the economic conditions and, consequently, real estate prices in an area. This can present problems in rural areas which are more prone to fluctuations in economic conditions and where much capital is tied up in farms as opposed to residential properties.

However, the same does not apply in reference to those in high level care (nursing home care), in which a universal maximum daily care fee is charged. This is the daily care fee which is currently set at 85 per cent of the single rate of age pension. A provider cannot charge an accommodation bond for high level care. Those with income above the maximum income limits to allow access to the full rate of age pension are required to pay an additional income-tested fee and this is called the accommodation charge. While there is this extra care fee chargeable for higher income residents, there is no accommodation bond payable.

The LLLB reforms will apply accommodation bonds (accommodation payments) across all areas of residential aged care and the main difference with current arrangements will be the application of accommodation payments to high care situations.

Has accommodation bond security been problematic?

The DoHA 2011–12 annual report on the operation of the Aged Care Act 1997 stated:

The level of compliance with the Prudential Standards is relatively high with 96 per cent of providers compliant with all three prudential standards. In particular, over 99 per cent of providers reported

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25. Aged care homes that provide low level residential care are also often referred to as hostels. Low level care generally includes accommodation and personal care, such as help with dressing and showering, together with occasional nursing care. These differ from aged care homes providing high level residential care, often referred to as nursing homes.

26. Ibid.


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compliance with the Records Standard, 99 per cent with the Liquidity Standard and 97 per cent with the Disclosure Standard.  

In 2009 the Australian National Audit Office (ANAO) reported in an audit that:

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

The ANAO also reported:

In the context of these challenges, the administrative framework established by DoHA to manage prudential arrangements for the protection of residential aged care accommodation bonds does not sufficiently support effective regulatory oversight. The department has established some of the elements necessary to underpin a sound administrative framework, such as a dedicated prudential regulation capability, a separate database to hold prudential data, and an annual audited provider compliance statement process. Notwithstanding, the following three key areas require attention in order to strengthen regulatory oversight: the systematic assessment and treatment of prudential risks that have resulted from new and evolving threats; the expansion of DoHA’s regulatory activities to include whether bonds and bond income are being used for the purpose of providing aged care as established under the Aged Care Act 1997 (the Act); and the development of robust approaches to effectively identify and act upon instances of provider noncompliance with prudential regulations.

While the ANAO report contained some criticisms of DoHA procedures and processes in its oversight of bond security and also its preparedness for anticipating bond security non-compliance, the ANAO did not recommend any legislative change or enhancement.

More accommodation bonds (accommodation payments) to be used with the reforms

The LLLB reforms involve a far greater application of accommodation bonds (to be called accommodation payments) and also accommodation contributions. The lack of amendment to the 2006 Acts, that govern the application and security of accommodation payments, would suggest that the Government is satisfied the current legislation is adequate. The ANAO report of 2009 indirectly confirms this view.

Senate Community Affairs 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 2013 to the

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30. Ibid., p. 18.
Community Affairs Legislation Committee for inquiry and report by 31 May 2013. The principal 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.

Position of major interest groups

Referencing the two Bills covered by this Digest, which primarily concerns accommodation payments, the reaction of the many varied interest and lobby groups in the aged care area to the proposed expanded use of such payments is generally supported. Comments have been by the Council for the Ageing:

These reforms deserve the support of all political parties and the Independents so they are in place well before 30 June this year to provide certainty as we move forward on reform

and the National Aged Care Alliance:

Allow providers to set accommodation prices for non-supported residents with flexibility to pay by periodic payment or equivalent fully refundable accommodation bond, with appropriate grand-parenting arrangements for existing residents and price monitoring by the [Australian Aged Care Commission] AACC during a transition period.

Aged and Community Services Australia (ACSA) was generally supportive of the use of accommodation bonds, as presented in the LLLB reforms, but did have concerns that the complexity would cause confusion. ACSA also had concerns about the limitations on the use of bond funds for providers in that they would need to have them in a readily available place so that a person could draw down on the amount to pay their on–going accommodation costs. ACSA felt this would limit places that providers could invest accommodation payment funds to earn interest income.
The Chief Executive of Catholic Health Australia, Mr Martin Laverty reported that the aged care community and industry, while not getting all it wanted, was in support of the LLLB reforms presented by the Government.36

**Financial implications**

The Explanatory Memoranda attached to both the Aged Care (Bond Security) Bill 2013 and to the Aged Care (Bond Security) Levy Bill 2013 say there are no financial implications arising from either Bill unless an aged care provider becomes bankrupt and the Commonwealth has to cover the costs of the amounts of accommodation payments lost. Even then, where a provider does go bankrupt and accommodations payments are lost, the Commonwealth Government is only committed to cover the cost of the lost payments. The Government has ultimately the choice and power to then impose a levy but is not required to impose a levy. The Government has the discretion to consider if the administrative costs of imposing a levy are warranted by any instance of lost payments.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed both Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.37 The Government considers that the Bills are compatible. The LLLB aged care reform Bills have been considered by the Joint Standing Committee on Human Rights and in its Fourth Report of 20 March 2013, the two Bills the subject of this Digest were listed as being unlikely to raise human rights incompatibility issues.38

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37. The Statement of Compatibility with Human Rights can be found at page three of the Explanatory Memorandum to each of the Bills.

Key provisions

Aged Care (Bond Security) Amendment Bill 2013

Schedule 1–Amendments

Aged Care (Bond Security) Act 2006

The amendments presented in Schedule 1 of the Bill propose to amend the Aged Care (Bond Security) Act 2006 (the Bond Security Act). The original purpose of the Bond Security Act was set out in the Bills Digest for that Bill:

The essential purpose of these three Bills is to strengthen the prudential requirements and enhance the protections available to residents in aged care facilities who have paid accommodation bonds. These bonds are paid upon entry by non-concessional residents of low care facilities (formerly called hostels), and also by residents in high care facilities (formerly nursing homes) which have ‘extra service’ status, as well as some residents in Multipurpose Services. When residents exit an aged care facility they, or their family, may be eligible for a refund of part of the accommodation bond paid. Under current arrangements if a residential care facility provider becomes bankrupt or insolvent the resident is not guaranteed that they will get their relevant accommodation bond amount refunded. These Bills are designed to ensure that residents will, in all cases, be refunded the amount of accommodation bond that they are owed.39

The Bond Security Act basically set out that the Commonwealth Government would cover any person who lost their bond when an approved accommodation provider went bankrupt and the bond funds were lost.

A separate but connected Act, the Aged Care (Bond Security) Levy Act 2006 (the Levy Act) was also passed at the same time. The Levy Act empowered the Government to impose a levy on all residential aged care providers, if necessary, to cover the costs of the Commonwealth covering the loss of bond funds. Since that Levy Act was passed in 2006, there has not been any levy introduced and imposed and it is probably safe to assume this is due to the very minimal number of providers who have lost accommodation bonds.

Under the LLLB aged care reforms, accommodation bonds are proposed to be called ‘accommodation payments’. Therefore, much of the amendments in the Aged Care (Bond Security) Levy Bill 2013 are wording changes, in particular changing the term ‘bond’ to ‘accommodation payment’ in the Bond Security Act. These proposed amendments are largely mechanistic and the provisions regarding security of payments in the original Bond Security Act are largely unchanged by this Bill.

Aged Care (Bond Security) Levy Amendment Bill 2013

Schedule 1–Amendments

39. Ibid., p. 2.
Aged Care (Bond Security) Levy Act 2006

The amendments presented in Schedule 1 of the Bill are simple and involve word changes. As set out above, the Levy Act was introduced to empower the Government to impose a levy, if needed, on aged care providers. The word changes arise from the Government’s LLLB aged care reforms and involve using the term ‘accommodation payment’ rather than the existing ‘accommodation bond’. These proposed amendments are largely mechanistic and the provisions regarding the power to impose a levy in the original Levy Act are largely unchanged by this Bill.

Concluding comments

Much of the amendments made by the two Bills covered in this Digest to the Aged Care (Bond Security) Act 2006 and also to the Aged Care (Bond Security) Levy Act 2006 are wording changes arising from changing references to ‘accommodation bond’ to ‘accommodation payment’ under the LLLB aged care reforms. They are essentially mechanistic changes and the main and other provisions of the two 2006 Acts are unchanged.

The power to impose a levy to cover the costs to the Commonwealth for covering lost bond sums from approved accommodation providers going bankrupt has been in place since 2006 but has not been used. Probably the main reason for this is that not that many providers have gone bankrupt and this is due to the fairly strict prudential and scrutiny requirements placed on providers to allow them to take a bond.

The LLLB aged care reforms do involve the provision of accommodation payments across the whole range of residential aged care situations, so this will see an increased number and amount of lump–sum accommodation payments (bonds) taken by providers. This will then see increased amounts held by providers. The Government hopes this access to increased levels of capital will then result in increased spending by providers on improved and expanded facilities.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.