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Caring for Older Australians
Productivity Commission
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Our Ref: AF/10/147

Dear Commissioners

Inquiry into Caring for Older Australians

Thank you for the opportunity to provide an additional submission to your inquiry prior to the Commission finalizing its Draft Report. This submission should be read in conjunction with that submitted on 5 August, 2010 by the NSW Trustee & Guardian for and on behalf of the Australian Guardianship & Administration Committee (AGAC). AGAC members include State Trustees Victoria, the Public Trustees of Queensland, Tasmania, South Australia, Western Australia, Northern Territory, Australian Capital Territory and the New South Wales Trustee & Guardian as well as the Public Guardians or their equivalents in each State/Territory and the various Tribunals that make financial management and guardianship orders.

The principal concerns outlined in the submission of 5 August, 2010 involved first, the issue of the ever-increasing size of accommodation bond payments being required by some approved providers; and, secondly, the 'prudential' requirements for the investment and use of the very considerable capital that such payments now represent.

Size of Accommodation Bonds:

All State and Territory members of AGAC have commented on the rapid acceleration, over the past 2 years in particular, in the amounts now being requested for accommodation bonds with sums of $500K to $750K and sometimes $1M+ now becoming somewhat of the norm rather than the exception. In NSW one approved provider has set its bond levels at between $500K to $2.6M depending on the floor level and the particular rooms.

By way of additional information, there are a few issues with this apparent trend that we would like the Commission to consider:

1. There appear to be no 'independent' controls, checking or vetting for 'reasonableness' the actual bond amounts being requested by an approved

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provider. The particular facility in NSW referred to above, no doubt would have been very costly to redevelop as the original property is in a very expensive area of Sydney and the modifications and refurbishments required would have been extensive. The debt to equity costs of the approved provider could be expected to be high. Nevertheless, there is no 'independent' scrutiny and assessment (paying due regard to all of the financial issues involved) of the 'reasonableness' of the bonds being charged.

Our use of the term 'independent' is possibly questionable as the only real avenue for making such an assessment of 'reasonableness' would be DoHA itself and there would obviously be some perception of self-interest as DoHA is responsible for progressing the Government's aged care policy initiatives. Nevertheless, no such assessment currently exists as a check and balance to the demands of individual approved providers.

2. There is the on-going general myth, promulgated by DoHA and aged care providers in general, that somehow the amount of an accommodation bond that a consumer will be charged is readily negotiable and is that amount agreed with the approved provider. The only actual limitation on what a provider can charge is that the consumer currently must be left with no less than $38.5K.

There are many factors that an approved provider would consider in setting and then 'negotiating' the accommodation bond required/agreed to be paid by a consumer. Such factors would include:

- the location of the facility and the demand levels for access to its rooms;
- the vacancy rate;
- the financial situation and circumstances of the consumer seeking access; and,
- obviously the financial situation and indebtedness level of the approved provider.

There are no other limitations apart from the $38.5K issue and no 'caps' on what can be charged/requested. Placing a 'cap' on what can be charged is highly problematic due to the multiplicity of factors that could be involved, however an independent test of 'reasonableness' appears to be appropriate to implement.

The ability of a consumer to 'negotiate' a bond amount is clearly often questionable at best given the often emotionally charged nature of a consumer's move from home to aged care; the general pre-requisite need to sell a family home and to pay an accommodation bond, as well as some of the additional pressures mentioned below.

3. An approved provider is currently unconstrained in setting and requiring an accommodation bond payment of whatever amount they wish, or feel justified in seeking, other than for the $38.5K limitation. With no test for 'reasonableness' and

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no current system for enabling those consumers who cannot realistically pay the amount sought, it is not surprising that 'cherry-picking' will occur. A prime and sought-after location with rarely vacant rooms can obviously lead to an approved provider only offering access when available to those consumers who can pay the bond amount it wants, or from 'holding-out' to only offer placements for those who can afford it.

Doing that however, clearly undermines the Government's general policy objectives of access and equity. It would impact on not only urban consumers but also particularly those in regional Australia who being unable to pay the requested sum need to source aged care facilities in places which could be very distant to their friends, family and relatives.

4. Retention amounts are an interesting factor in the overall picture. Such amounts are not linked to the actual accommodation bond payment itself in terms of amount. As at 1 October 2010 the Commonwealth has 'capped' the retention amount at $307.50 per month for a cumulative period of up to 5 years or 60 months. The actual retention amount is set by the approved provider up to the 'cap'.

The obvious inequities in this are significant and may be helping to drive up the accommodation bond levels being requested. After the 5-year period a consumer who had paid an accommodation bond of $250K would have returned to them (on leaving the facility), or to their estate, $231.55K (after a retention payment of $18,450), or 92.62% of their initial bond payment. A resident of the same facility who paid an accommodation bond of $1M, in contrast, would have $981.55K remaining or 98.16% of their initial bond payment.

As retention amounts involve an actual capital transfer (exclusive of interest earned on the bond sum) from a bond payment to an approved provider, a better system (if such a process is to continue) may be to strike an actual percentage 'cap' rather than a 'capped' sum. For example, levying a cumulative 10% maximum retention amount over 5 years on all bonds would leave the consumer with a $250K bond with $225K and the consumer with a $1M bond with $900K.

The current system seems to leave the consumer (or their estate) who pays a lower bond worse off than someone who pays a higher bond and who can afford to do so.

5. The ability of a consumer to strike an 'agreement' with an approved provider as to the size of the bond that they will pay when there is no check for 'reasonableness' opens-the-door for significant manipulation of the income support system. Accommodation bonds are excluded from the Commonwealth's asset test for income support payments. The current system however, makes it possible for a consumer to pay a highly inflated and inappropriate level of bond payment so as to secure access to a pension such as the aged pension.

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For example, a 'reasonable' bond level for the room on offer by an approved provider may be $500K. The consumer is a 'non-home owner' (eg. following the sale of their property) and single with $1.3m in financial assets. Possibly following the advice of a financial planner the consumer agrees to pay to the approved provider a bond of $1m leaving them with $300K in assessable assets for pension purposes. That sum enables them to receive the full aged pension. If a bond of $500k was paid by them they would have $800K in assessable assets and wouldn't be eligible for even a minimal pension payment. The system as it stands appears to leave the door open for this to occur and for the approved provider, they can get the same retention amount irrespective of whether a bond of $500k or $1m is paid but they do get the benefit of additional interest earned on the bond and access to additional capital. For the concerned consumer, they get access to taxpayer's money that they could be argued to be not entitled to.

The Prudential Requirements for Accommodation Bonds:

We note that subsequent to our 5 August, 2010 submission, the Department of Health and Ageing (DoHA) has recently released (25 October, 2010) an issues paper entitled "Enhanced Prudential Regulation of Accommodation Bonds". That Paper sets out a range of legislative and accountability initiatives proposed to be taken to strengthen reporting and investment controls over accommodation bonds with possibly even the addition of criminal offences for proven misuse of accommodation bonds held by an approved provider.

The proposed initiatives if implemented, will significantly address the concerns that we have raised in our earlier submission. This would be a most positive development although the actual separation of the management and investment of such significant accommodation funds (which stand at $9.1 billion as at 30 June, 2009 and which are estimated by the Commonwealth to increase to $22.7 billion over the next 5 years, exclusive of growth that will necessarily occur if such bond arrangements are introduced in part or whole for residents of high care facilities) from the 'arms' of the 'approved providers', is still something that the Commission may care to consider.

The concerns particularly identified by DoHA in its Issues Paper involve:

- accommodation bonds have been diverted to non-aged care purposes;
- accommodation bond funds have been transferred to entities related by ownership or common directors, and may have been used for non-aged care purposes and without any financial benefit to the approved provider;
- some approved providers were using accommodation bonds as general operational funds; and,
- a lack of regular reporting on the use of bonds makes it difficult for the Department to identify non-compliance and emerging compliance problems.

The separation of the administration, management and investment of

accommodation bonds from the control of what is undoubtedly a multiplicity of skill sets within the pool of approved providers which extend from small non-Government players to multi-national equity investors, has in our view much to commend it.

The 'Issues Paper' doesn't canvas such an option but if implemented it would potentially negate by a single initiative, the necessity for many of the steps proposed and avoid the problems identified in DoHA's Issues Paper. At the same time, such an option would ensure that the Commonwealth's current Accommodation Bond Guarantee Scheme doesn't have to be triggered again. We note that that Scheme since its introduction in May, 2006 has been triggered 5 times thus far at a cost of $24.5M to refund some 150 accommodation bonds.

Separating the administration, management and investment of accommodation bonds would mean that such bonds were 'safe' and that the Commonwealth would no longer have to take on the role of an unsecured creditor chasing a now insolvent approved provider to recover the funds that it has guaranteed and if unsuccessful then potentially seeking to recover such outstanding funds by a levy across the remaining and uninvolved sector.

The Commission may note that all Australian States and Territories (with the exception of Northern Territory) have this separation when it comes to 'residential rental bonds' with such bonds being held and invested by a government authority separately to 'landlords'.

Similarly, the Commission may note that the 'Trustee' members of AGAC collectively invest, each year on behalf of their financial management and other clients, sums involving billions of dollars through their Common Funds yet in so doing, are rightly constrained by the 'prudent person principle' in their investment decision-making. The DoHA issues paper only refers to "clearly articulating in the Act that Accommodation Bonds can only be used …. for certain investments." Exactly what those proposed 'certain investments' are isn't explained as yet. Non-compliance with any such 'articulation of what those specified investments may be' doesn't safeguard and will not actually protect consumers however nor resolve the issues raised above. Misusing accommodation bonds and then being subject to criminal sanctions doesn't get the money back.

That is a cause of concern to AGAC members. A seemingly simply solution is to take control of what will become increasingly an enormous sum of consumers' accommodation bond payments and this could occur by utilizing the existing State/Territory departments/authorities involved with residential rental bonds; the AGAC Trustees within the States and Territories or possibly by making use of the centralized and established Future Fund set up by the Commonwealth Government or by other means.

In 2008-2009 approved providers held on average $10m in accommodation bonds. By 2013-2014 this average sum will increase to $34M. The introduction of a centralized or more concentrated (eg. through States and Territories) system of

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administration, management and investment of what is conservatively estimated to involve $22.7B by the latter date, would put into place not only much enhanced consumer protections but also enable much greater and appropriately 'prudent ' investment returns because of the absolute scale of the funds available. The scale of funds invested would be added to by the significant funds (particularly those of the Future Fund or Trustees) already under investment by other organizations.

The administrative costs of distributing retention amounts and interest earned as appropriate would be covered by the extra investment returns made possible by such a system.

Thank you once again for the opportunity to provide additional comments to your Inquiry.

Yours sincerely

NSW Trustee & Guardian
For and on behalf of the
Australian Guardianship and Administration Committee (AGAC)
15 November, 2010