Accommodation Bonds
Are they protected?

By Ben Hardwick and Rachel Fletcher

" The nursing home wants us to pay a $250,000 bond before Mum can start living there. We just can't afford it. Our only option is to sell the family home. It is mum's life savings and we just don't know whether the money will be safe with the nursing home. " >>

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If you haven't heard this from a client yet, there is a big chance you will at some stage in the future.

In light of the recent corporate collapse of Lifecare, a Queensland-based nursing home provider, this article attempts to clarify issues relating to the security of accommodation bonds payable to nursing home providers and what happens when things go wrong.

In 2004, Australian aged-care providers held an estimated $4.3bn in bonds – large amounts are now required to secure nursing home places.

WHAT IS AN ACCOMMODATION BOND?

An accommodation bond is a means-tested payment or series of payments made under an accommodation bond agreement to a place at an aged-care facility.[1] Residents of certain aged-care nursing homes were required to pay bonds from as early as 1987 (then described as 'entry contributions'). Having to pay large bonds – up to as much as $250,000 or even more – to secure entry into a private nursing home has become increasingly common. In 2004, it was estimated that over $4.3 billion in bonds was held by aged-care providers in Australia.[2]

The bond payment system emerged out of the need for private funding to improve the scale and quality of aged-care accommodation facilities. In addition to improving the efficiency, sustainability and infrastructure of the aged-care sector, it was also seen as a means of securing any outstanding payments to providers at the time of the resident's death or departure from the aged-care facility.

Bonds generally have the following features:

- Providers are to use the bonds they are paid for any purposes relating to the provision of aged-care facilities and services, provided they are approved purposes within the meaning of the *Aged Care Act* 1997 (Cth) (the Act) and that the funds are applied in accordance with the prudential standards[3] stipulated in the *User Rights Principles 1997*.[4] Such bonds cannot be used for purposes other than provided aged-care services or facilities.
- The bond must not exceed the maximum amount allowable under ss57-12, 57-13 or 57-23 of the Act. In practice, this means that the resident must retain the minimum permissible asset value, which amounts to approximately 2½ times the annual single-rate aged pension.[5]
- Residents may pay the accommodation bond by way of a lump sum, or by instalments.[6]
- If the resident does not pay the bond prior to entry, the provider is entitled to charge interest until such time as the full amount of the bond has been paid.[7] Provisions relating to interest must be stipulated in the bond agreement and the interest rate charged cannot exceed the maximum permissible.[8]
- Providers may deduct annual retention amounts for a period not exceeding five years. The agreed retention amount does not change during the life of the accommodation bond agreement.
- The maximum retention amount is capped by the government and cannot exceed $3,360 per year.[9]
- Providers are entitled to make further deductions for any outstanding amounts owing under the bond agreement, resident agreement or an extra service agreement prior to refunding the bond balance. This could include debts arising from unpaid daily accommodation fees.[10]
- The Act does not specify precisely how the bond should be invested, but the provider must comply with the prudential standards set out in the *User Rights Principles 1997* (see below).
- The principal sum of the bond (minus valid deductions) is refundable 14 days after the resident leaves the facility or within 14 days after sighting evidence of the grant of probate or letters of the administration of the estate of a deceased resident.[11]

Prospective residents cannot be asked to pay an accommodation bond unless they have entered into an agreement that sets out the respective duties and responsibilities of the aged-care provider and the residents' rights under that agreement.[12] The bond agreement must be entered into either before or within the first 21 days of residency.[13] Legal practitioners advising a client in relation to the transaction should ensure that the bond agreement complies with s57-9 of the Act.

After an accommodation bond agreement has been executed, the provider must provide the resident and/or their representative with a copy of the bond agreement, and a written copy of the refund guarantee of the bond balance.[14]

THE REGULATORY FRAMEWORK

The government first announced a prudential scheme to safeguard accommodation bonds in 1997.

The restructured regulatory scheme that came into force on 31 May 2006 guarantees the refund of all bond balances held by approved providers under the Act. The new regulatory framework also operates retrospectively, protecting all entry contributions made prior to 1 October 1997.

The 2006 reforms imposed increased statutory obligations on providers to ensure higher standards of accountability and transparency in relation to accommodation bonds. Bonds are regulated by the following Acts:

1. The *Aged Care Act* 1997 (the Act);
2. The *Aged Care (Bond Security) Act* 2006;
3. The *Aged Care (Bond Security) Levy Act* 2006; and
4. The *User Rights Principles* made by the Minister from time to time under s96-1 of the Act.

PRUDENTIAL STANDARDS TO BE MET BY PROVIDERS

An approved provider is required to comply with three prudential standards, which are set out in the *User Rights Principles 1997*. Those standards are as follows:

The liquidity standard

The liquidity standard requires providers to maintain a sufficient level of liquidity to ensure that they can refund bond balances (and any entry contributions made prior to 1997). Approved providers are also required to implement and maintain a documented liquidity management strategy to identify and maintain a minimum safe level of liquidity.[15]

The record standard

An approved provider is required to keep an up-to-date record of all bond holdings, which must be audited each year. The bond register must accurately identify all bond deposits and the deductions made from each individual bond. Specifically, those records must show the date, amount and purpose for each deduction. The bond register must also keep track of when a refund is due, with interest calculations as they fall due.[16]

The disclosure standard

The disclosure standard is designed to ensure that comprehensive, accurate and up-to-date information obtained through adhering to the liquidity and records standard is made available to current and prospective residents and the government.

Disclosure of the provider's compliance with the prudential standards must be made to the Department of Health and Ageing (the Department) annually.[17] The provider is also required to provide all bond-paying residents and/or their representatives with a copy of the following information within four months of the conclusion of each financial year:[18]

1. an account of the number of bonds that are held in compliance with the Act, and a statement of compliance with the Act;
2. a copy of the bond entry that relates to the applicable resident within the bond register; and
3. a copy of an independent auditor's opinion as to whether the provider has complied with the prudential standards.

The provider has an additional obligation to provide the information that is stated above, plus the most recent statement of the provider/organisation's audited accounts, to a resident and/or their representative within seven days of the request being made. This information may be requested at any time.[19]

The provider has a duty to disclose to prospective residents and/or their representatives the following information within seven days of receiving the request:[20]

1. an account of the number of bonds held in compliance with the Act, and a statement of compliance with the Act;
2. a copy of an independent auditor's opinion as to whether the provider has complied with the prudential standards; and
3. the most recent statement of the provider's audited accounts.

WHEN AN APPROVED PROVIDER DEFAULTS IN REFUNDING THE BOND

The *Aged Care (Bond Security) Act* 2006 (Cth) (the Bond Security Act) was established to protect accommodation bonds paid to approved providers. It provides a safety net that allows the Commonwealth to refund residents if the provider defaults on its refund obligations because of insolvency or bankruptcy. The protection is provided to accommodation bonds, as defined in the Act, that are subject to a range of regulatory obligations, including prudential requirements, established in the Act.

The Bond Security Act sets out the framework for the guarantee scheme and the series of statutory declarations that must be made before residents can recover their bonds from the Commonwealth.

The critical trigger is an 'insolvency event', which is defined in s6 of the Bond Security Act. An insolvency event occurs in the following instances:[21]

- a winding-up order is made against an approved provider;
- the directors of an approved provider have passed a special resolution to wind up the company; or
- the creditors of an approved provider entity have passed a resolution to wind up the company at the second meeting of creditors.[22]

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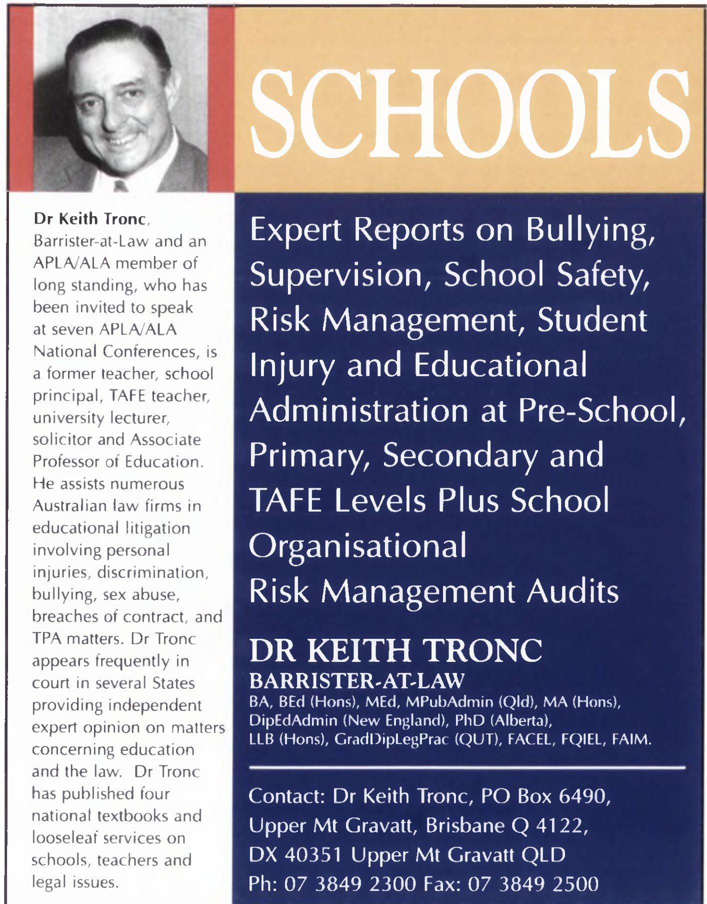

Where providers default on their obligation to refund bonds, you must trigger an insolvency event or petition the minister.

Circumstances where a provider does not have the space to accommodate its residents, is unable to meet its obligations as and when they fall due, or has entered into administration, are not deemed insolvency events within the meaning of the Bond Security Act. As a consequence, residents are at risk of being placed in 'limbo' until a recognised insolvency event occurs. This is what transpired following the collapse of Lifecare. Despite the fact that the landlord had taken steps to evict Lifecare from the premises, the residents, who were forced as a result to find alternative accommodation urgently, were not at that point entitled to make a claim against the guarantee scheme for the refund of their bonds.

The Bond Security Act gives the minister the power to make an 'insolvency event declaration' where an approved provider is under external administration and the Department of Health and Ageing has satisfied itself that the provider is required to refund at least one bond balance. This declaration substitutes for one of the insolvency events described above.

The Secretary of the Department of Health and Ageing (the Secretary) must make a 'default event declaration' as soon as practicable after becoming aware that:

1. an insolvency event has occurred (by way of a trigger event or declaration); and
2. that at least one outstanding bond balance is payable by a resident.

Once the default declaration has been made, it is then incumbent on the Secretary to identify each outstanding bond balance and to verify the validity of any deductions that have been made from it, in accordance with the *User Rights Principles 1997*.[23] This also includes calculating interest on the unpaid bond balance under s12(2)(c) of the Bond Security Act and s23.79D of the *User Rights Principles*. The interest component of the claim is critical, as the provider will invariably be charging the resident interest on any unpaid bond amount.

Upon collating this information, the secretary is then required to make a 'refund declaration'[24] in respect of each resident who is entitled to a bond refund. The content of that declaration must state the amount that the secretary deems is refundable, taking into account any legitimate deductions that can be proven, plus the payment of interest on the principal sum. The Commonwealth has an obligation to pay the amount specified in the refund declaration to the recipient within 14 days of making the refund declaration.[25]

Immediately after the refund declaration is made by the secretary, any rights to recovery of the former resident, as a creditor of the approved provider, are subrogated to the Commonwealth.[26] If the Commonwealth is unsuccessful in recovering bond refunds from the approved provider, the Minister for Ageing may impose a levy on all other approved providers to recover the full cost (plus administrative costs) under the *Aged Care (Bond Security) Levy Act* 2006.

LIFECARE – COLLAPSE OF AN AGED-CARE PROVIDER

Slater & Gordon was retained by the representatives of five former residents of Lifecare's dementia aged-care facility in Carrara, Queensland. Lifecare was operated by Lifestyle Care Providers Pty Ltd, one of four companies that collapsed as a result of insolvency. Our clients' unfortunate predicament proved to be the first known occasion that an approved provider failed to repay a bond, resulting in the first successful group claim being made under the Bond Security Act.

As a result of Lifecare being evicted from the facility, our clients were forced to find alternative accommodation within a suitable aged care facility in September 2007. After waiting some months for their bonds to be repaid, our clients became concerned that Lifecare had dissipated their bonds and would be unable to refund the bond amount as a result of insolvency. The bonds were valued between $120,000 and $150,000 per resident, with a collective amount of $632,500 owed to our clients. These bond deposits represented a significant proportion of our client's life savings, and were desperately required for the purposes of securing entry into their new aged-care facilities.

In our claim against the department, our clients disputed the outstanding bond balance that had been identified by the liquidators. Lifecare claimed that it was entitled to make deductions and had done so under a residential care agreement. We argued that the validity of those deductions could not be substantiated as a result of Lifecare's failure to provide statements accounting for the deductions as required by the *User Rights Principles 1997*. This issue was a significant concern for our clients, given that a collective amount of over $52,000 in unaccounted-for deductions had been made.

On 25 March 2008, the government notified our clients that the full amount of their bonds, without any deductions, was to be refunded with interest. The basis for disallowing the deductions claimed by Lifecare was that the bond agreements did not comply with the requirements of s57-9 of the Act.

Lessons from Lifecare

While the residents were satisfied with the outcome of the claims process, it took nearly six months from when they were forced into relocating to another facility until they received the refund declaration by the department. This delay may be partly explained by the fact that this was the first claim of its kind, and partly because of the structure of the Bond Security Act.

The initial delay arose because liquidators were not appointed until 14 January 2008. The department advised

that the Bond Security Act did not provide it with legal standing to commence the insolvency process, and advised our clients to seek legal advice. The directors of Lifecare ultimately declared insolvency and called a members' meeting to appoint liquidators.

On 17 January 2008, the liquidators notified the secretary that an event, defined as an insolvency event within the meaning of s6 of the Bond Security Act, had occurred. The department was then under an obligation to make the first declaration (the default event declaration) as soon as practicable. It took the department some five weeks to do so, because it wanted to obtain access to the company's records to satisfy itself that:

1. a *valid* resolution had been passed to appoint a liquidator of Lifecare; and
2. there was at least one bond balance outstanding.

Although pleased that the entire amount of the 'refund declarations' was made, the legislative basis for doing so was unexpected. The department found that, while 52 per cent of the total amounts to be refunded were done so under the provisions of the Bond Security Act, an amount representing 48 per cent of the amount to be refunded was to be refunded under the 'act of grace' arrangements provided for under s33 of the *Financial Management and Accountability Act* 1997.

The department determined that 48 per cent of the total bond payments had been advanced to Lifecare before it became an 'approved provider' within the meaning of the Act. In order for the bond payments to be deemed 'accommodation bond' payments, they must have been paid to an 'approved provider'. Lifecare held itself out to the residents as an 'approved provider' and, within months of the bond payments being advanced, it did in fact become a Commonwealth-approved provider. However, the Department adopted a literal interpretation of the Act and decided that only those funds advanced to Lifecare after it became an approved provider could be protected by the Bond Security Act. To avoid leaving the residents without the protection that the legislature intended to afford them, the government agreed to the department's application for those amounts not capable of being characterised as 'accommodation bond' payments to be refunded under the *Financial Management and Accountability Act* 1997.

The department's literal reading of the Bond Security Act appears to have created an artificial distinction that is not easily reconciled with the underlying intent and purpose of the legislation. Having disputed this interpretation with the department, we are hopeful that legislative changes will be made. We have since been advised by the department that it will re-examine the operation of the Act following the Lifecare case.

It is also worth noting that the Bond Security Act does not provide for the reimbursement of legal fees incurred in connection with assisting claimants to take steps to trigger an insolvency event or preparing their claims.

CONCLUSION

Aged-care residents who entrust what may be a large portion of their entire lifetime savings have a legitimate expectation that their bond will be protected. Given that only one insolvency event has been reported since the bond system was introduced, it is reasonable to infer that the accommodation bonds system is working reasonably effectively. Of course, it is as yet only early days.

Practitioners should advise prospective residents of an aged-care facility:

- to be satisfied that the prospective provider is registered on the register of approved providers maintained by the Commonwealth Department of Health and Ageing;
- to be satisfied that there are no conditions on the prospective provider's registration;
- to be satisfied that the premises of the aged-care facility have been certified by the local government to meet Australian Building Standards;
- to be satisfied that the accommodation bond agreement complies with s57-9 of the *Aged Care Act* 1997;
- to request that the provider discloses the following information within seven days:
  1. the number of bonds that were not refunded in the last financial year in compliance with s57-21 (3) of the Act. Legal practitioners should also enquire as to whether the provider complied with this division;
  2. the independent auditors' opinion as to whether the provider complied with the prudential standards (especially the liquidity standard) in respect of the preceding financial year;[27] and
  3. the most recent statement of the provider/organisation's audited accounts.

If a provider does default in its obligations to refund your client's bond, you should act quickly to trigger an insolvency event or petition the minister to make the insolvency event declaration. ■

Notes: **1** *Aged Care Act* 1997 (Cth) s57-2(1)(l). **2** J Bishop, *Hansard* second reading speech of the Aged Care (Bond Security) Bill 2005, 8 December 2005, p13. **3** *Aged Care* Act 1997 s57-2(k). **4** *Ibid*, s57-3. **5** *Ibid*, s57-12 (3). **6** *Ibid*, s57-17. **7** *User Rights Principles 1997* Div 10. **8** *Ibid*, s23.69 (1). **9** *Ibid*, s23:71. **10** *Aged Care* Act 1997 s57-19(1)(b). **11** *Ibid*, s57-21A (3). **12** *Aged Care Act* 1997, *s57.9*. **13** *Aged Care Act* 1997 s57-2(e). **14** *User Rights Principles 1997* s23.43. **15** Department of Health and Ageing *Financial Information (aged care)*, 16 May 2006, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/aging-prudential-guidelines, (4 Feb 2008) p2. **16** *Ibid*, p5. **17** *User Rights Principles 1997* ss23.39 and 23.40. **18** *User Rights Principles 1997* s23:42. **19** *User Rights Principles 1997* s23.42(3). **20** *Ibid*, s23.43. **21** Under s6 of the *Aged Care (Bond Security) Act* 2006, equivalent stages in the bankruptcy process have occurred if the approved provider is an individual as opposed to a corporate entity. **22** *Aged Care (Bond Security) Act 2006* s9. **23** *Ibid*, ss12 (1) and (2). **24** *Ibid*, s13. **25** *Ibid*, s16. **26** *Ibid*, s15. **27** *User Rights Principles 1997*, s23.40 (1)(e).

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