

The Auditor-General  
Audit Report No.5 2009–10  
Performance Audit

# **Protection of Residential Aged Care Accommodation Bonds**

**Department of Health and Ageing**

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of Australia 2009

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Canberra ACT  
17 September 2009

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in the Department of Health and Ageing in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure. The report is titled *Protection of Residential Aged Care Accommodation Bonds*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

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# Abbreviations

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AACD	Ageing and Aged Care Division
ANAO	Australian National Audit Office
APCS	Annual Prudential Compliance Statement
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
BIR	Base Interest Rate
Bond Act	<i>Aged Care (Bond Security) Act 2006</i>
Bond Levy Act	<i>Aged Care (Bond Security) Levy Act 2006</i>
CAP	Conditional Adjustment Payment
CIS	Aged Care Complaints Investigation Scheme
DoHA	Department of Health and Ageing
IMS	Aged Care Complaints Investigation Scheme Information Management System
LMS	Liquidity Management Strategy
MPIR	Maximum Permissible Interest Rate
OACQC	Office of Aged Care Quality and Compliance
PBS	Portfolio Budget Statements
PRB	Prudential and Approved Provider Regulation Branch
ROACA	Report on the Operation of the <i>Aged Care Act 1997</i>
RPMB	Residential Program Management Branch

STO	State/Territory Office
the Act	<i>Aged Care Act 1997</i>
the Agency	Aged Care Standards and Accreditation Agency
the Principles	User Rights Principles 1997



# Glossary

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Accommodation Bond	Accommodation bonds are akin to an interest free loan to an aged care home and by law must be used by the home to improve building standards and the quality and range of aged care services provided.
Approved Provider	An approved provider is an organisation which has been approved by the Secretary of the Department of Health and Ageing to provide Australian Government funded aged care under the <i>Aged Care Act 1997</i> .
Base Interest Rate (BIR)	Approved providers are required to pay interest to residents at the BIR on accommodation bond balances for the period between the date the resident dies or leaves the provider's service and the earlier of the date the bond balance is refunded and the date the legislated timeframe for the refund of the bond balance expires. The BIR is set out in Divisions 14 and 15 of the User Rights Principles 1997 and is published on DoHA's website.
Extra Service	Aged care homes may be approved to offer residents extra service, which enables residents to choose to enjoy a significantly higher standard of 'hotel' type extras in accommodation, food, and services, in return for a higher charge. Approval may be for the whole of a residential home or for a designated part. The number of extra service places approved in any area is capped to ensure that residential care remains available to Australians who would have difficulty affording the additional charges.

Maximum Permissible Interest Rate (MPIR)	Approved providers are required to pay interest to residents at the MPIR on accommodation bond balances for any period between when the bond balance should have been refunded (in accordance with the legislated timeframe) and the date the bond balance is actually refunded. The MPIR is set out in Divisions 14 and 15 of the User Rights Principles 1997 and is published on DoHA's website.
Regulation	Regulation is a term covering a diverse set of instruments used by government to influence or control the way people and business behave in order to achieve economic, social or environmental policy objectives.
Resident Agreement	<p>A resident agreement is a formal agreement between the resident and an approved provider that is offered to the resident before moving into the home. It may include agreement as to accommodation payments.</p> <p>It is a legal document which sets out the terms of the residency and the rights and responsibilities of the resident and the aged care home.</p>
Retention Amount	<p>An aged care home is allowed to deduct monthly amounts from accommodation bonds, called retention amounts, to use toward maintaining and improving resident accommodation.</p> <p>This monthly retention amount is agreed with the resident when they move into the aged care home. However, the Australian Government sets a maximum amount that the aged care home can retain. Retention amounts can only be deducted for a period of up to five years.</p>

## **Summary and Recommendations**



# Summary

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## Introduction

### Accommodation bonds

1. Over the next forty years, the proportion of Australians over the age of 65 is projected to double. This ageing of the Australian population is expected to increase the demand for aged care services, which will necessitate additional investment in quality residential aged care infrastructure. In order to meet this demand, the aged care industry requires access to capital to fund the construction of new aged care homes and to re-build or upgrade existing homes. Capital funding for the aged care sector is, in part, sourced from accommodation bonds lodged by residents.
2. Residents accessing low level aged care or those receiving extra services in high level care may be asked to pay an accommodation bond to an approved provider of aged care. With the average new accommodation bond at \$190 000 (as at 30 June 2008), bonds generally represent a significant proportion of a resident's life savings. Aged care providers are entitled to retain an amount from the bond each year for up to five years, in addition to the investment income derived, in order to improve building standards and increase the quality and range of aged care services. The balance of the bond is refunded to the resident, or their estate, on departure from the home.
3. Only aged care homes that are certified by the Australian Government as meeting required standards of accommodation can charge accommodation bonds. As at 30 June 2008, around 60 000 bonds with a total value of \$8 billion were held by approximately 1000 approved providers of aged care, with an average annual increase in the total bond value of around 25 per cent.

### Regulatory framework

4. A prudential scheme to protect accommodation bonds was first established in 1997 with the introduction of the *Aged Care Act 1997* (the Act). In order to improve the protections for residents paying bonds, the legislation introduced mandatory requirements for providers that included: a contractual guarantee of repayment from the provider to the resident; statutory timeframes for the repayment of bond balances by aged care providers to residents; and the submission of a certified annual statement by providers that

they followed the requirements, were able to pay liabilities, maintained adequate insurance, and repaid bonds as required.

5. In 2006, the Australian Government supplemented existing prudential regulations with standards on liquidity, record-keeping and disclosure to further protect the significant sums of money held by providers on behalf of residents. The standards are aimed at assisting providers improve their financial management practices, enhance financial sustainability, and reduce the risk of default on the refund of bond balances. The changes in 2006 also introduced a requirement for the annual statement of compliance to be accompanied by an audit opinion provided by an independent, registered auditor.

6. In addition, the strengthening of protections in 2006 included the establishment of the Accommodation Bond Guarantee Scheme (the Scheme) whereby the Government guarantees repayment of bond monies to residents if an insolvent or bankrupt provider defaults on its obligation to refund accommodation bonds. In the event of the Scheme being triggered, there is provision for the industry to ultimately pay a levy to allow the Government to recoup the monies repaid to residents under the Scheme. The Scheme is administered under the *Aged Care (Bond Security) Act 2006* and the *Aged Care (Bond Security) Levy Act 2006*.

7. Since its inception in 2006, 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.

8. In introducing and augmenting prudential regulations, Australian governments have established arrangements covering bond refunds, uses for bonds and derived income and prudential standards, with new standards introduced over time to reduce the risks to residents and government. The approach taken to date involves a regime of self-managed funds held by individual aged care providers whereby providers must meet prudential standards on liquidity, record-keeping and disclosure, and ensure that bonds and bond income are used for the purpose of providing aged care to care recipients. However, in order to allow providers access to bond funds as a source of capital, the legislation does not prescribe restrictions in relation to the decisions taken by providers on where they invest bonds. That is, providers are free to determine how they invest bond holdings as long as they can

demonstrate that the bonds, and any investment income generated, are used to provide aged care to care recipients. This reflects the policy approach stated by the Government in 2006 that it was not the Government's intention to run the business of each provider.

## **DoHA's prudential regulation function**

9. The Australian Government, through the Department of Health and Ageing (DoHA), is responsible for regulating:

- the prudential requirements under the *Aged Care Act 1997* (the Act) and User Rights Principles 1997 (the Principles);
- rules regarding the timeframes for refund of accommodation bonds and the payment of interest on late refunds; and
- the use of accommodation bond funds and ensuring that the income derived from them is directed to improvements in residential aged care infrastructure and services by aged care providers.

10. The aim of prudential regulation is to safeguard the significant and increasing bond holdings lodged by older Australians residing in aged care homes, while keeping the regulatory burden and costs to the aged care industry to a minimum. To this end, the Government has assigned DoHA responsibility for developing, in consultation with stakeholders, any necessary additional standards in order to reduce the risks to the residents and the Government. The establishment of new standards does not involve amendment to the primary legislation and can be achieved through amendments to the Principles. Amendments to the Principles require a policy decision by the Australian Government and are subject to Parliamentary scrutiny.

11. DoHA's role in administering the legislative framework established for prudential regulation under the Act and the Principles primarily comprises the following core activities:

- *monitoring compliance and acting on non-compliance by approved providers with their prudential responsibilities*: this involves assessing audited annual provider compliance statements, evaluating complaints data, reviewing regulatory intelligence, investigating possible cases of non-compliance and addressing non-compliance;
- *educating and informing approved providers and care recipients of their rights and responsibilities*: this involves producing and distributing advisory

materials to assist stakeholders to understand and meet prudential requirements;

- *monitoring the efficacy of the policy framework for prudential regulation*: this involves identifying possible inefficiencies and gaps in the prudential framework, and determining the appropriate remedial response, which may include seeking amendments to the primary legislation or introducing new prudential standards; and
- *safeguarding bonds*: this involves administration of the Accommodation Bond Guarantee Scheme including the *Aged Care (Bond Security) Act 2006* and the *Aged Care (Bond Security) Levy Act 2006*.

12. Within the legislative framework established by Parliament, DoHA has discretion to target its regulatory resources across its core activities in order to gain reasonable assurance as to providers' compliance with established regulations. In 2008–09, the department had resourcing of \$1.9 million and 12 central office staff to perform the prudential regulation function.

13. The department's administration of prudential regulations is positioned within the much larger national quality assurance framework for residential aged care established under the Act. This quality framework imposes a broad range of regulations on aged care providers in the key areas of accreditation, certification, and support for users' rights, which includes complaints investigation. Responsibility for regulation under the framework is broadly allocated across DoHA and portfolio agencies.

14. Government reforms to the regulatory framework over time have necessitated an expansion of DoHA's regulatory responsibilities and have required the acquisition and development of new, specialist skills and tailored regulatory arrangements. In particular, it has been necessary for DoHA to acquire skills in areas such as financial analysis and insolvency in order to monitor prudential compliance and to ensure the effective operation of the Scheme.

15. DoHA has also facilitated the evolution of the regulatory framework for prudential regulation and commenced work to enhance arrangements in light of its initial experience. Further changes to the legislative framework to strengthen protections for residents' bonds and improve the operation of the Scheme, based on DoHA's initial regulatory experiences, were passed by Parliament in December 2008.



## Recent developments

16. In April 2009, the Senate Standing Committee on Finance and Public Administration reported on its inquiry into *Residential and Community Aged Care in Australia*. The report commented on a broad range of residential aged care issues, including financial risk factors in aged care and the viability of aged care providers. The committee considered there was a need to establish a clear understanding of the financial status of aged care providers and recommended that DoHA undertake a 'stress test' of the aged care sector in order to measure the sector's financial wellbeing.

## Audit objective, criteria and scope

17. The audit objective was to assess DoHA's administration of prudential arrangements for the protection of residential aged care accommodation bonds.

18. The ANAO's assessment was based on the following criteria:

- DoHA has a sound governance framework to support prudential regulation;
- DoHA's oversight of prudential arrangements is sound; and
- DoHA effectively manages compliance with prudential arrangements.

19. The audit methodology was developed in accordance with the better practice principles outlined in the ANAO's *Administering Regulation Better Practice Guide*, which was published in March 2007. The audit report examines the extent to which the department has incorporated these principles into its prudential regulation function.

20. An examination of policy matters, such as the size of accommodation bonds or distinguishing between high care and low care in allowing the application of bonds, was outside the scope of this audit.

## Overall conclusion

21. The ageing of the Australian population is expected to result in an increase in demand for quality residential aged care homes and an expansion in building works to meet this growing demand through new and redeveloped infrastructure. Capital funding to support this increased investment in aged care homes will, in part, be sourced from resident contributions in the form of accommodation bonds.

22. Since the inception of prudential arrangements in 1997, there has been rapid growth in the number of bonds, the total value of bond holdings and the proportion and diversity of aged care providers relying on bonds to fund the delivery of aged care services. The scale of bond holdings (now totalling some \$8 billion), the self-managed model of stewardship, the ability of a large and diverse range of providers to make unfettered investment decisions relating to residents' funds, and ongoing structural changes in the aged care sector including the emergence of larger and more complex providers and the entry of major publicly listed corporations, present new challenges for the Department of Health and Ageing (DoHA). These challenges and successive government reforms of regulatory arrangements for accommodation bonds have expanded the scale of DoHA's responsibilities.

23. 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 non-compliance with prudential regulations.

#### *Managing risks to effective regulation*

24. DoHA has indicated that the department is aware of a range of prudential risks, had considered their impact, and is working on approaches to manage these risks. Approaches included liaison with key stakeholders, such as major financiers and insolvency practitioners, to build an understanding of contemporary underlying factors that contributed to the levels of risk. While acknowledging departmental work in this area, DoHA's regulatory activities had remained generally reactive in nature and were not informed by the systematic identification of risks to the protection of bonds. There is scope to strengthen the department's capacity to identify and assess the significance of emerging threats, through effective risk management and the targeted

collection of regulatory intelligence. Additional work in these areas would better position DoHA to reduce the likelihood of adverse events by adjusting regulatory settings or tailoring its compliance activities.

### ***Regulatory coverage***

25. While providers' decisions on where to invest bond holdings are unfettered, there has been a legislated requirement since the introduction of the Act in 1997 for bonds and bond income to be used for the purpose of providing aged care to care recipients. Access to bonds and bond income is an important avenue of funding for the aged care industry and is intended to complement other funding sources to improve the quality of aged care infrastructure and the range of aged care services. Currently, DoHA responds to the possibility of non-compliance with the legislated uses of bonds and bond income by employing its information gathering powers on a case-by-case basis once a provider presents with problems. DoHA has not, however, established regulatory processes to determine provider compliance with legislated uses for bonds and bond income.

26. The department has recently commenced work on the development of legislative options for consideration by the Government to clarify the uses of accommodation bond funds. By clarifying the use of bonds, DoHA considered that the department would be better positioned to assess whether aged care providers are compliant with the legislated uses of bonds and derived income under the Act.

### ***Monitoring compliance with prudential regulations***

27. While DoHA has stated its approach to compliance in general terms in the *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds*, it has not comprehensively documented its approach to the monitoring and management of non-compliance over time in the form of a compliance strategy and underpinning compliance schedule. As a result, there is limited assurance that the department's activities to monitor provider compliance with prudential regulations are being effectively managed over time. As prudential regulation of around 1000 aged care providers is delivered by a relatively small team with an annual operating budget of around \$2 million, it is important for the department to employ a cost-effective approach to the monitoring of compliance with prudential regulations. An approach of this type would inform the establishment of a balanced program of compliance activity targeting the department's limited resources at the highest priority compliance

risks and supporting the active management of changing and emerging risks to provider compliance.

28. To enhance regulatory performance and, as a consequence, ensure the protections intended by the regulatory framework are realised, the ANAO has made seven recommendations to strengthen DoHA's administration of prudential arrangements.

## Key findings

### Governance arrangements for effective regulation

29. DoHA's expanded role as a prudential regulator since 2006, in response to the rapidly increasing value of accommodation bonds, has broadened the department's aged care responsibilities beyond the traditional focus on quality of care matters. This change in focus requires a different set of skills and knowledge, with the department building its capability in this area. In addition, the management of the dual role of the department—that is its role in achieving the policy objectives of accessible, quality and affordable aged care and its role as a prudential regulator—is challenging and requires careful management.

30. In several recent cases where providers have experienced operational difficulties, the prudential regulator has had a large role in departmental efforts to maintain residential aged care services in identified areas of need through ownership transfer from a troubled provider to an alternate provider. The involvement of the regulator in negotiating ownership or service delivery matters, particularly where future compliance action may be warranted against an alternate provider with whom the department has negotiated a transfer, poses some risk to the perceived objectivity and impartiality of the regulator. By formally recognising these risks and considering mitigation strategies, the department would be better placed to manage potentially conflicting roles and responsibilities.

31. DoHA indicated that it was aware of a range of risks to provider compliance, had considered their impact and is working on approaches to manage these risks. These approaches included liaison with key stakeholders to build an understanding of the underlying factors that contributed to the level of risk. This work to manage the broad range of risks to the effective administration of prudential arrangements for the protection of residential aged care accommodation bonds was not, however, sufficiently reflected in DoHA's planning materials. The department had documented the following

two risks: *failure to identify emerging issues and respond appropriately*; and *failure to maintain skills and corporate knowledge*. The limited number and high level of the identified risks and the absence of an underpinning assessment does not sufficiently inform DoHA's approach to monitoring and managing prudential regulation risks. Moreover, a number of controls reported as being in place to mitigate identified risks were either not in place or not sufficiently established.

32. The effective management of prudential risk is also reliant on a regulator's timely access to, and analysis of, relevant regulatory information and data. DoHA currently accesses regulatory information through a variety of sources, including the Aged Care Complaints Investigation Scheme (particularly in relation to complaints patterns associated with bond refunds), Conditional Adjustment Payment (CAP) financial data and information from the Aged Care Standards and Accreditation Agency (the Agency).<sup>1</sup> However, DoHA does not consolidate and analyse information available to the department to better inform its assessment of key contemporary risks, including the impact of volatile financial markets on the security of bond holdings. Improved access to timely information would assist the department to better quantify risks and establish appropriate treatments to ensure that the regulatory framework delivers intended protections. Under the Act, DoHA has a suite of information gathering powers that it could utilise to obtain relevant information to inform its assessment of risk, such as targeted information on the investment of bond holdings.

33. The department has established a basic set of performance information within its annual operational plan, but has not identified measures and targets that fully inform an assessment of its regulatory performance by internal and external stakeholders. The establishment of one performance measure, with targets primarily relating to the timing of the annual compliance statement process, does not adequately cover all regulatory activities and does not reflect a balanced approach to performance measurement. Measures and targets could include: provider awareness of regulations; the percentage of compliance actions finalised within pre-determined timeframes; the impact of

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<sup>1</sup> The Conditional Adjustment Payment (CAP) was introduced by the previous government in 2004–05 as part of its initial response to the Hogan Review. The aim of CAP is to provide additional medium term financial assistance to residential aged care providers while encouraging them to become more efficient through improved management practices.

regulation on the aged care industry; or the responsiveness of DoHA to the regulation of a new issue or introduction of deregulation where appropriate.

## **Regulatory oversight**

34. The regulatory framework establishes the requirement for approved providers, which have obtained building certification, to use accommodation bonds for the purpose of providing aged care to care recipients. DoHA did not consider that the legislation provided processes or powers that effectively supported regular and broad-based monitoring of the use of accommodation bond funds and bond income. Rather, DoHA used its information gathering powers on a case-by-case basis where the possibility of non-compliance had emerged. Consequently, DoHA has not established risk-based compliance processes to monitor the use of accommodation bonds and bond income in order to provide reasonable, targeted assurance of provider compliance. DoHA has, however, concluded that improved clarity surrounding the use of bonds would enable the department to more readily assess whether aged care providers are compliant, with work commenced on the development of legislative options for the Government's consideration to clarify the use of accommodation bonds and the income derived.

35. Regulators often use a client service charter and a regulatory code of conduct to inform regulated entities of their rights and to enable them to formulate expectations about how a regulator will administer regulation. DoHA has not developed and published a service charter or regulatory code of conduct for its prudential regulation function. As such, there is limited guidance to inform regulated entities of their rights and to guide their expectations about how the department will administer prudential regulations.

36. DoHA has not yet finalised policy and procedural documentation for key aspects of its regulatory functions such as compliance monitoring. Overall, the development of documentation is at an early stage. Additional guidance material for regulatory staff would reduce the risk of operational inefficiency and inconsistent application of regulatory requirements.

## **Monitoring compliance**

37. Routine monitoring of compliance enables a regulator to adjust the focus of its regulatory activities over time to reflect changing priorities that result from new and evolving threats. DoHA has not documented its compliance strategy or underpinning compliance program/schedule and is in the preliminary stages of developing prudential risk indicators. Finalisation of

the documentation and supporting risk indicators would more completely support the alignment of the department's day-to-day monitoring approaches with short, medium and longer term regulatory objectives.

38. The primary element of DoHA's prudential monitoring activity is the Annual Prudential Compliance Statement (APCS), which the department relies on to provide an assurance of provider compliance with prudential regulations. In the absence of prudential risk indicators, the department's application and use of the APCS requires all providers to respond to a standard set of questions. DoHA also obtains supplementary regulatory intelligence, including complaints data, CAP financial data and information from the Aged Care Standards and Accreditation Agency. DoHA should consider whether the collection and use of information is sufficiently targeted in a rapidly changing aged care environment, and more broadly in investment markets, which can affect an individual provider's ability or willingness to comply with prudential regulation.

39. While DoHA utilises data, both from within the department and available externally, to inform its compliance activities, it is yet to establish a process or system to bring together all regulatory intelligence in order to build a comprehensive risk profile of providers. Information is currently sourced from separate databases and, potentially, an array of official files held in both Central Office and in State/Territory Offices. As a consequence, there is an increased risk that key pieces of regulatory intelligence will not be readily available to inform monitoring activities. DoHA has, however, re-aligned its structure to centralise and co-locate the prudential and approved provider regulatory functions to improve the sharing of regulatory intelligence. The department has also incorporated CAP administration into the same area to ensure the use of information from this program is maximized. A group of aged care program managers has also been formed to regularly discuss intelligence about providers of concern.

## **Managing non-compliance**

40. A comparison by DoHA of APCS data from 2006–07 to 2007–08 indicated improved overall reported compliance by providers with each prudential standard (except the Records Standard) and an overall improvement in the timeframes for refunding bonds. In 2007–08, reports lodged by aged care providers suggested that compliance against the three prudential standards—liquidity, record-keeping and disclosure—on average ranged between 95 and 99 per cent, with reported compliance with the

disclosure standard below 90 per cent for state/local government providers. In the same period, on average 87 per cent of providers reported that they had refunded all bond balances to residents or their estates within statutory timeframes. These data on compliance levels are derived from self-reporting by providers backed by independent reports from registered company auditors. Unlike some other regulatory regimes, the department does not have a risk-based compliance monitoring program that provides reasonable assurance as to the appropriateness of self-reporting arrangements. Furthermore, the department does not collect data from providers on the value of late bond repayments.

41. The ANAO tested database records for a randomly generated selection of 65 provider compliance statements for 2007–08 in order to gain an assurance over the integrity of prudential data holdings. Testing found that, for around 3 per cent of the sample, issues such as the conformance of audit opinions with requirements, qualified audit opinions or reported non-compliance with prudential standards were not identified through the review processes established by DoHA.

42. In those instances where reported provider non-compliance with prudential regulations was confirmed following an investigation, DoHA instituted remedial action. In 2007–08, the department issued 62 ‘warning letters’ and one Notice of Non-compliance. The power to impose a sanction on a provider is also available to the department in cases of serious non-compliance with legislated responsibilities. The use of sanctions to remedy prudential non-compliance is infrequent, primarily because the existing sanctions have limitations in providing a proportionate response for cases of non-compliance. DoHA has indicated that it is considering regulatory reforms to deliver more appropriate remedies for prudential non-compliance and limit any adverse impact upon the financial viability of providers subject to non-compliance action.

## **Safeguarding bonds**

43. 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.



**44.** The three Scheme activations since 2006 have been administratively challenging for DoHA, particularly given the lack of precedent and the change in departmental focus from traditional quality of care issues to prudential considerations. DoHA has worked through these challenges in order to calculate outstanding bond balances and repay residents. Notwithstanding, the department's administration of the Scheme would be further enhanced through the finalisation of guidance materials and the conduct of timely post-event evaluations.

## DoHA's response

**45.** The department advised that the following summary comment and the responses to each of the recommendations in the body of the report comprised its formal response:

The major strengthening of protections for accommodation bonds in 2006, including the introduction of prudential standards and the Accommodation Bond Guarantee Scheme, significantly expanded the department's regulatory responsibilities and necessitated investment in specialist skills such as financial analysis and new regulatory arrangements. At the time of introducing the 2006 legislative reforms, it was noted that the regulatory framework would be adjusted over time in light of experience and the ANAO's report will assist in informing the ongoing development of the regulatory framework. The department considers that there is an existing base of work that can be further developed or improved upon and this is reflected in the responses to the recommendations.

# Recommendations

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*The ANAO has made the following recommendations aimed at improving DoHA's administration of prudential arrangements for the protection of residential aged care accommodation bonds. Report references and abbreviated agency responses are included below, with DoHA's more detailed responses to the recommendations included in the body of the report.*

## **Recommendation No. 1**

### **Para 2.40**

In order to improve its regulatory effectiveness, the ANAO recommends that DoHA adopts a structured and systematic risk management methodology for its prudential regulation of residential aged care accommodation bonds to: routinely identify, analyse, document, evaluate and monitor regulatory risk; rank risks, based on assessments of likelihood and consequences; and plan and conduct activities to treat risks.

**DoHA response:** *Agreed.*

## **Recommendation No. 2**

### **Para 2.51**

To improve DoHA's internal management and external accountability for its prudential function, the ANAO recommends that the department establishes an integrated and balanced set of performance measures and targets for key regulatory activities, against which the achievement of prudential regulation objectives can be assessed and reported to internal and external stakeholders.

**DoHA response:** *Agreed.*

## **Recommendation No. 3**

### **Para 3.16**

The ANAO recommends that DoHA enhances its regulatory approach to include reviews of whether aged care providers are using bonds and bond income for the purpose of providing aged care to recipients as required in the *Aged Care Act 1997*.

**DoHA response:** *Agreed.*

**Recommendation  
No. 4**

**Para 3.28**

In order to better inform stakeholder expectations regarding the service levels to be achieved and the code of conduct to be observed, the ANAO recommends that DoHA:

- (a) develops, in consultation with stakeholders, a client service charter and regulatory code of conduct in relation to the prudential regulation of residential aged care accommodation bonds; and
- (b) reports annually on performance against the charter.

**DoHA response:** *Agreed.*

**Recommendation  
No. 5**

**Para 3.42**

The ANAO recommends that, in order to ensure nationally consistent implementation of prudential arrangements, DoHA establishes policy and procedural documentation for key aspects of its prudential regulation of residential aged care accommodation bonds.

**DoHA response:** *Agreed.*

**Recommendation  
No. 6**

**Para 4.8**

In order to plan and coordinate its prudential regulation compliance activities and facilitate the monitoring of compliance trends over time, the ANAO recommends that DoHA documents its compliance strategy, promulgates the strategy to internal and external stakeholders, and routinely reviews the strategy.

**DoHA response:** *Agreed.*

**Recommendation  
No. 7**

**Para 4.42**

The ANAO recommends that DoHA establishes a process or system to capture, collate and share regulatory intelligence from internal and external sources to build a risk profile of regulated entities.

**DoHA response:** *Agreed.*



## **Audit Findings and Conclusions**



# 1. Introduction

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*This Chapter provides an overview of aged care in Australia and background information on accommodation bonds, including prudential arrangements for the protection of bonds. It also outlines the audit objective, criteria, scope and methodology.*

## Residential aged care accommodation bonds

### Ageing population

**1.1** The Australian Government has outlined a range of substantial challenges for Australia's economic growth and long-term fiscal sustainability as a result of the ageing of Australia's population. One such challenge is meeting the aged care sector's capital funding needs to expand building works for new aged care homes and the upgrading of existing homes to address the anticipated increase in demand for quality residential aged care services.

### Residential aged care

**1.2** Residential aged care homes provide accommodation, personal care and nursing services to people who can no longer manage to live in their own homes. At any time, about one in 13 people over the age of 70 years have left their home to receive care in a residential aged care home. For people who reach age 65, a third of all men and half of all women will enter permanent residential care at some time later in their lives. The average age on entry to permanent residential care is 82 for both men and women.<sup>2</sup>

**1.3** Residential aged care (high and low care) is mostly provided by the non-government sector (religious, charitable and private sector providers).<sup>3</sup> State and local governments, with funding from the Australian Government, also operate a small number of aged care homes (see Figure 1.1). As at 30 June 2008, there were 2830 aged care homes operated by 1215 approved providers delivering residential care across Australia to 160 380 people.

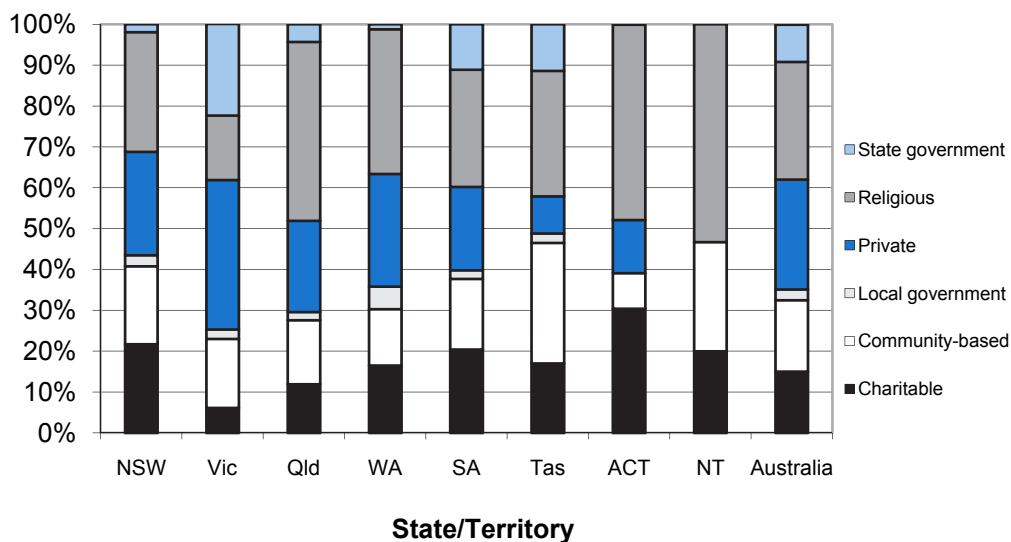
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<sup>2</sup> Department of Health and Ageing, 2008, *Ageing and Aged Care In Australia*, Canberra, p. 7.

<sup>3</sup> High level care involves 24 hour care, where nursing care is combined with accommodation, support services, personal care services and allied health services. Low care provides accommodation, support services, some allied health services and, when required, nursing services.

**Figure 1.1**

**Residential aged care providers (as at 30 June 2008)**



Source: Australian Institute of Health and Welfare

## Residential aged care capital funding

**1.4** Access to capital to assist with the costs of maintaining and upgrading aged care homes is available to service providers through targeted assistance from the Australian Government and through the contributions of residents (accommodation charges and accommodation bonds).

### *Australian Government*

**1.5** The Australian Government provides capital grants to approved providers to help maintain and upgrade aged care homes in rural and remote areas where it is difficult to attract sufficient residents who are able to make accommodation payments. This capital assistance is provided to around 30 aged care homes each year. In 2008–09, \$51 million in capital assistance was allocated.

### *Resident contributions*

**1.6** Resident contributions through accommodation charges and bonds supported an estimated \$1.5 billion of new building, refurbishment and upgrading work in 2007–08, which involved around 13.4 per cent of all homes. It is estimated that an additional \$1.9 billion of work was in progress at



30 June 2008, with approximately 11.6 per cent of homes planning building works.<sup>4</sup>

**1.7** An accommodation charge is a daily fee payable by residents who enter high level residential care. It is fixed from the date the resident enters care until discharged. In 2007–08, approximately 70 per cent of aged care homes applied accommodation charges, with an average daily charge to new residents of \$17.19.

**1.8** Residents in low level care or those receiving extra services (whether in low or high level care) may be asked to pay an accommodation bond.<sup>5</sup> Bonds cannot be levied on residents receiving high care that are not receiving extra services. Only aged care homes that are certified by the Australian Government as meeting required standards of accommodation can charge accommodation bonds.<sup>6</sup>

## Accommodation bonds

**1.9** Accommodation bonds are akin to an interest free loan to an aged care home, with the aged care provider entitled to invest a resident's bond during the period in which the resident is accommodated. By law, bonds must be used to provide aged care to care recipients, and the derived income from investment used to improve building standards and the quality and range of aged care services. The *Aged Care Act 1997* (the Act) does not, however, place restrictions on the investment decisions taken by providers in relation to their bond holdings. That is, providers are free to determine how they invest bond holdings as long as they can demonstrate that the bonds, and any investment income generated, are used in accordance with legislated purposes.

**1.10** The amount of each bond varies between residents and is agreed between the resident and aged care provider. There is no cap on the size of bond that can be levied. However, a bond cannot be levied that, after an

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<sup>4</sup> Department of Health and Ageing, 2008, *Report on the Operation of the Aged Care Act 1997: 1 July 2007 to 30 June 2008*, Canberra, p. 50. Data on building, refurbishment and upgrading work in 2008–09 will be reported by the department in late 2009.

<sup>5</sup> Aged care homes may be approved to offer residents extra service, which enables residents to choose to enjoy a significantly higher standard of 'hotel' type extras in accommodation, food and services, in return for a higher charge.

<sup>6</sup> Building certification is designed to improve the physical standards of aged care homes. While State, Territory and local governments regulate building safety and quality, all Australian Government subsidised homes must meet higher targets for fire, safety, privacy and space.

assessment of the new resident's assets prior to their entry to the home, leaves them with assets worth less than a threshold amount set by the Australian Government (\$36 000 as at 20 March 2009).<sup>7</sup> Once raised, a bond amount does not vary regardless of the resident's changing circumstances.

**1.11** If a resident has less than the threshold amount in assets, they cannot be asked to pay an accommodation bond. Under the Act, aged care homes are required to care for a minimum number of people who need help to pay for their aged care accommodation—known as concessional or assisted residents. They are considered to be fully supported, with the Government paying a higher subsidy to the aged care home for these residents. This is designed to ensure that all residents receive the same standard of care and have equal access to care.

**1.12** Where a bond is to be paid, the resident must enter an accommodation bond agreement with the aged care provider, usually as part of the resident agreement, within 21 days of entering the aged care home.<sup>8</sup> A bond can be paid as a lump sum, regular periodic payment or combination of the two.<sup>9</sup> New residents have up to six months to pay an accommodation bond as a lump sum, subject to agreement on entry to the home and the payment of interest charges.

**1.13** In recent years, the method of bond payment by new residents has remained relatively stable and has overwhelmingly favoured lump sum payments (see Table 1.1).

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<sup>7</sup> This assessment is carried out by Centrelink or the Department of Veterans' Affairs. Prior to 1 July 2005, assessments were carried out by aged care homes.

<sup>8</sup> A resident agreement is a formal agreement between a resident and an approved provider that is offered to the resident before moving into a home. It may include agreement as to accommodation payments. It is a legal document which sets out the terms of the residency and the rights and responsibilities of the resident and the aged care home.

<sup>9</sup> Periodic payments are regular payments equivalent to the amount that a provider could have derived from an accommodation bond if it had been paid as a lump sum. A periodic payment comprises a component for the retention amount that the provider could have received on the lump sum and a component for the income that the service provider could have derived from the lump sum.

**Table 1.1****Method of payment of accommodation bonds**

Method of payment	2005–06 %	2006–07 %	2007–08 %
Lump sum	91	91	91
Periodic payments	4	4	3
Combination of lump sum and periodic payments	5	5	6

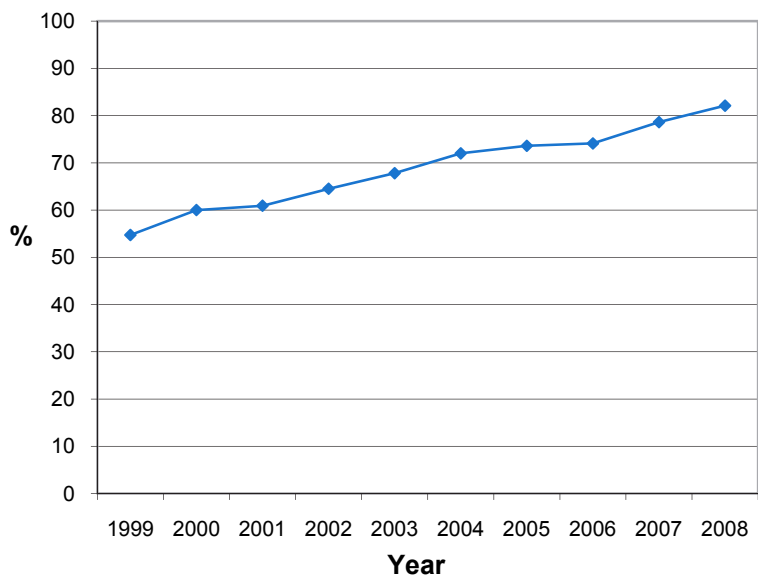
Source: ANAO from DoHA information

**1.14** The aged care provider is entitled to retain an amount from the bond each month for up to five years. The Australian Government sets a maximum retention amount (currently \$299 per month) with the balance of the bond required to be refunded to the resident, or their estate, within a legislated period following departure. Providers may also retain any income they derive from accommodation bonds.

**1.15** In the period June 1998 to June 2008, the department has reported that the aggregate value of accommodation bonds has increased at an average rate of 25 per cent per annum. The average value of each new accommodation bond increased at an average of 13 per cent per annum in the period 1998 to 2008, resulting in bond values more than tripling. As at 30 June 2008, approximately 80 per cent of aged care homes held accommodation bonds (see Figure 1.2), with the average new bond value being \$188 798 and the median bond amount \$155 000 (see Figure 1.3).

Figure 1.2

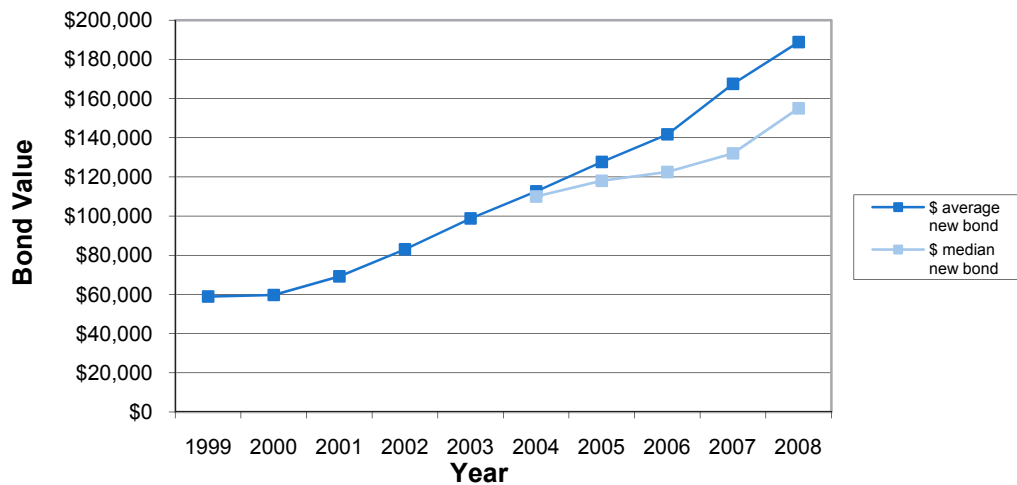
Homes holding accommodation bonds



Source: ANAO from DoHA information

Figure 1.3

Average and median value of new accommodation bonds



Note: DoHA commenced public reporting of the median value of accommodation bonds in 2004.

Source: ANAO from DoHA information

**1.16** As at 30 June 2008, 965 (out of 1215) approved providers reported that they held accommodation bonds with a total value of \$7.7 billion. Each approved provider held an average of 60 accommodation bonds, worth around \$8 million in total. The largest bond is approximately \$1 million.<sup>10</sup>

**1.17** The largest accommodation bond liability for an approved provider was \$296 million, which represents 3.9 per cent of total bond holdings. The bond holdings of the top ten approved providers totalled 9230 bonds worth \$1.45 billion. The total value of bonds across the sectors is detailed at Table 1.2.

**Table 1.2**

**Bonds held by sector (as at 30 June 2008)**

Organisation type	Total number of bonds	Total value of bonds	Average value of bonds
For profit	16 901 (29%)	\$2 686 382 552 (35%)	\$158 948
Government	2811 (5%)	\$260 352 229 (3%)	\$92 619
Not for profit	38 619 (66%)	\$4 778 769 344 (62%)	\$123 741
<b>Total</b>	<b>58 331 (100%)</b>	<b>\$7 725 504 125 (100%)</b>	<b>\$132 443</b>

Source: ANAO from DoHA information

## Accommodation bond protections

**1.18** A prudential scheme to protect accommodation bonds was first established in 1997 with the introduction of the Act. Entry contributions had been collected from residents by aged care providers without such protection in the preceding decade.<sup>11</sup> In order to improve the protections for residents paying bonds, the legislation introduced mandatory requirements for providers that included:

- a contractual guarantee of repayment from the provider to the resident;
- statutory timeframes for the repayment of bond balances by aged care providers to residents; and

<sup>10</sup> Internal DoHA document.

<sup>11</sup> An entry contribution is any payment given or loaned by a care recipient before 1 October 1997 to a provider in return for entry to a hostel (within the meaning of the *Aged or Disabled Persons Care Act 1954*).

- the submission of a certified annual statement by providers that they followed the requirements, were able to pay liabilities, maintained adequate insurance, and repaid bonds as required.

**1.19** When the Government introduced the new prudential scheme for accommodation bonds in 1997, it announced the creation of a single national, independent trustee-regulated fund into which all participating approved providers would contribute. The fund was to be managed under the supervision of an independent board, the Aged Care Accommodation Bond Board Limited. Board members, with backgrounds in banking, law and aged care, were appointed in October 1997. The Government subsequently replaced the trustee-regulated fund and independent board in November 1997 in favour of a regime of self-managed funds held by individual providers (for further information on the trustee-regulated fund see Appendix 1).

## **Strengthened bond protections**

**1.20** The February 2004 report of the *Review of Pricing Arrangements in Residential Aged Care* (the Hogan Review) recommended the introduction of reforms to strengthen the protection of accommodation bonds.<sup>12</sup> The key recommendations included:

- the Government should establish a guarantee fund, managed by an Authority established for the purpose, from which, in the event of a defined 'default event', people with entitlements would be able to recover accommodation bond amounts; and
- the Authority was to have prudential oversight of approved providers, with powers including the ability to examine the financial affairs of a provider, the ability to appoint an administrator of the corporate entity, the ability to apply to court for the winding up of insolvent providers and the ability to require a provider to enter into negotiations for the disposal of assets.

**1.21** In responding to the Hogan Review's recommendations, the former government announced new arrangements in September 2005 to strengthen protections for accommodation bonds by:

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<sup>12</sup> Commonwealth of Australia, 2004, *Review of Pricing Arrangements in Residential Aged Care*, Canberra. The pricing review of residential aged care examined the longer term prospects of residential aged care services with particular respect to future arrangements for private and public funding, performance improvement in the industry and longer term financing.

- enhancing prudential regulatory arrangements; and
- guaranteeing the repayment of bond balances to residents in the event that a provider becomes insolvent and is unable to repay bonds.

**1.22** The former government considered that the high degree of regulation recommended by the review could not be justified and chose not to implement a regulatory framework where providers holding bonds would be required to comply with comprehensive prudential requirements, modelled on those administered by the Australian Prudential Regulation Authority (APRA) in respect of financial services. It instead decided on a framework that required providers holding bonds to comply with an initial set of prudential standards, based largely on existing requirements under the Act, backed by a guarantee scheme. New standards were to be developed by the department over time following consultation with stakeholders and appropriate research and analysis. It was considered that the guarantee scheme delivered a similar degree of security to residents without the high cost of additional regulation and the resulting administrative burden on providers.

#### *New prudential standards*

**1.23** From 1 July 2006, approved providers holding accommodation bonds were required by the Act to meet the new prudential standards set out in the User Rights Principles 1997 (the Principles), as amended. These standards are aimed at assisting providers improve their financial management practices, enhance financial sustainability, and reduce the risk of default on the refund of bond balances. The new prudential standards comprise standards on liquidity, record-keeping and disclosure (see Figure 1.4 for an overview of the standards).

Figure 1.4

Residential aged care accommodation bond prudential standard overview

Liquidity Standard	Records Standard	Disclosure Standard
<p><b>Objective:</b> <i>To ensure providers have access to sufficient readily available funds to allow them to refund bond balances as they fall due over the next 12 months</i></p>	<p><b>Objective:</b> <i>To ensure that accurate, comprehensive and up-to-date information on bond holdings is collected and maintained</i></p>	<p><b>Objective:</b> <i>To require all providers holding bonds or pre-1997 entry contributions to give to the Secretary of the Department, residents, prospective residents and their representatives, information on their compliance with standards and information on their financial standing</i></p>
<p><b>Provider requirements:</b></p> <ul style="list-style-type: none"><li>maintain sufficient liquidity to ensure that they can refund bond balances as they fall due over the following 12 months</li><li>implement and maintain a written Liquidity Management Strategy (LMS)</li><li>maintain the minimum level of liquidity in the form specified in the LMS</li><li>ensure that their LMS is up-to-date and complies with the requirements of the Liquidity Standard</li><li>modify or replace the LMS if the provider becomes aware that it no longer meets the requirements of the Liquidity Standard</li></ul>	<p><b>Provider requirements:</b></p> <ul style="list-style-type: none"><li>all providers are required to establish and maintain a bond register:<ul style="list-style-type: none"><li>the bond register may be maintained at the service level or at the provider level</li><li>the requirements for bond register entries are only for lump sum bonds</li><li>the bond register may be kept in hard copy or electronic form</li><li>personal information retained on the bond register must be protected</li><li>information must be recorded and kept for each resident</li><li>historical bond register entries should be kept for a minimum of 3 years</li></ul></li></ul>	<p><b>Provider requirements:</b></p> <ul style="list-style-type: none"><li>providers must give a resident a copy of the bond agreement and a copy of the written guarantee of the refund of the bond following agreement execution</li><li>annual provision of information to residents on compliance with standards and individual bond holdings</li><li>provision of information to residents on request</li><li>provision of information to prospective residents on request</li><li>retention of records on disclosures to residents and prospective residents</li><li>provision of information to the Department of Health and Ageing:<ul style="list-style-type: none"><li>including an annual Prudential Compliance Statement</li></ul></li></ul>

Source: ANAO from DoHA information

Accommodation Bond Guarantee Scheme

1.24 In the event that an approved provider becomes insolvent or bankrupt and defaults on its obligations to refund accommodation bonds, the Australian Government’s Accommodation Bond Guarantee Scheme (the Scheme), under the *Aged Care (Bond Security) Act 2006* (the Bond Act), provides a guarantee to refund to aged care residents or their estates the outstanding bond balances owed by the provider. Where recovery of the full amount is not possible from the defaulting provider, the *Aged Care (Bond Security) Levy Act 2006* (the Bond Levy Act) allows the Government to recover costs incurred through a levy on remaining providers holding bonds.



## DoHA's regulatory responsibilities

**1.25** Where residential aged care homes accept accommodation bonds, the Government, through DoHA, is responsible for regulating:

- the prudential requirements under the Act and delegated legislation;
- rules regarding the timeframes for refund of accommodation bonds and the payment of interest on late refunds; and
- the use of accommodation bond funds and ensuring that the income derived from them is directed to improvements in residential aged care infrastructure and services by aged care providers.

**1.26** DoHA undertakes prudential regulation of accommodation bonds within the statutory framework established by the Act and the Principles. In addition, it administers the scheme that guarantees the refund of accommodation bond balances to residents under the Bond Act and the Bond Levy Act. As the Act does not place restrictions on the way in which providers invest their bond holdings, the Government does not regulate investment decisions.

**1.27** DoHA's role in administering the legislative framework established for prudential regulation under the Act and the Principles primarily comprises the following core activities:

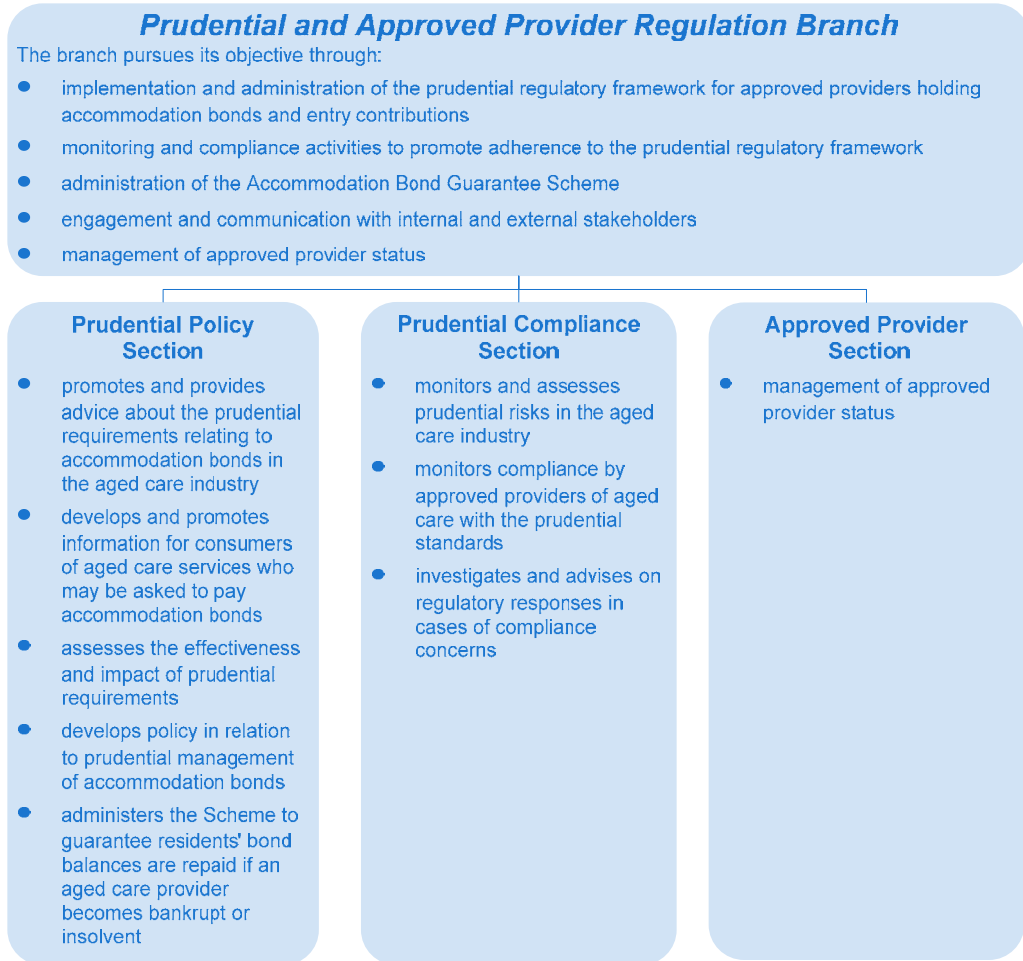
- *monitoring compliance and acting on non-compliance by approved providers with their prudential responsibilities:* this involves assessing audited annual provider compliance statements, evaluating complaints data, reviewing regulatory intelligence, investigating possible cases of non-compliance and addressing non-compliance;
- *educating and informing approved providers and care recipients of their rights and responsibilities:* this involves producing and distributing advisory materials to assist stakeholders to understand and meet prudential requirements;
- *monitoring the efficacy of the policy framework for prudential regulation:* this involves identifying possible inefficiencies and gaps in the prudential framework, and determining the appropriate remedial response, which may include seeking amendments to the primary legislation or introducing new prudential standards; and



an overview of the PRB structure). In 2008–09, PRB had a budget allocation of \$1.9 million and 12 staff.

**Figure 1.6**

### **Prudential and Approved Provider Regulation Branch structure**



Source: ANAO from DoHA information

**1.31** The Residential Program Management Branch (RPMB), within the department's Ageing and Aged Care Division (AACD), is responsible for a subset of protections, including:

- minimum resident asset thresholds;

- the maximum amount that providers may retain from accommodation bonds; and
- the treatment of accommodation bonds when a resident changes aged care services.

**1.32** Broader policy issues, such as the charging of accommodation bonds for different levels of care, are the responsibility of the Policy and Evaluation Branch in AACD.

**1.33** Ensuring compliance with prudential arrangements is shared between PRB and the Compliance Branch, with investigations also handled by DoHA's State/Territory Office (STO) network. In addition, the Aged Care Standards and Accreditation Agency (the Agency), within the Health and Ageing Portfolio, may become aware of possible compliance issues with the prudential requirements through its accreditation and monitoring program.

## Recent developments

**1.34** The recent Senate Standing Committee on Finance and Public Administration's report on its inquiry into *Residential and Community Aged Care in Australia* commented on financial risk factors in aged care and the resulting impact on the viability of aged care providers.<sup>13</sup> These risks included the impact of the global financial crisis on providers, with industry submissions to the inquiry outlining difficulties in accessing capital, investment write-downs and falling investment returns.

**1.35** The committee noted contradictory evidence from the department and the aged care industry on the significance of these risks, with industry submissions suggesting an impending aged care crisis. Given this divergence in views and the lack of an agreed methodological approach, the committee recommended that DoHA undertake a 'stress test' of the aged care sector in order to measure the sector's financial wellbeing and help to establish whether the sector is in crisis and whether it is in a position to meet future needs.<sup>14</sup>

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<sup>13</sup> Commonwealth of Australia, 2009, Standing Committee on Finance and Public Administration, *Residential and Community Aged Care in Australia*, Canberra.

<sup>14</sup> *ibid.*, pp. 38-40.

## The audit

### Objective, criteria and scope

**1.36** The audit objective was to assess DoHA's administration of prudential arrangements for the protection of residential aged care accommodation bonds.

**1.37** The ANAO's assessment was based on the following criteria:

- DoHA has a sound governance framework to support prudential regulation;
- DoHA's oversight of prudential arrangements is sound; and
- DoHA effectively manages compliance with prudential arrangements.

**1.38** The audit examined the processes and systems employed by DoHA to gain an assurance of provider compliance and to monitor the robustness of the regulatory framework. The audit did not seek to validate the accuracy of assertions made by providers regarding their compliance with prudential arrangements and, therefore, does not form an opinion on whether providers are compliant. It did, however, scrutinise processes that the department has established to gain an assurance that assessments made by providers and their independent auditors are valid.

### Audit methodology

**1.39** The audit methodology comprised:

- interviewing key personnel at DoHA's Central Office and at three STOs;
- interviewing stakeholders, including representatives from peak bodies and industry groups;
- analysing and testing prudential data holdings to verify integrity;
- reviewing relevant documentation, including policies, procedures and correspondence;
- visiting approved providers; and
- reviewing relevant literature.

**1.40** The audit methodology was developed in accordance with the better practice principles outlined in the ANAO's *Administering Regulation Better Practice Guide*, which was published in March 2007.<sup>15</sup> The audit report examines the extent to which the department has incorporated these principles into its prudential regulation function.

**1.41** The ANAO recognises that there is no 'one-size-fits-all' model for administering regulation. Therefore, the better practice guide focuses on principles and characteristics that are relevant to the design and management of administrative operations for all regulators, irrespective of their size, organisational structure or regulatory objectives. In formulating these principles, the ANAO was assisted by an expert reference group, which included a prudential regulator (the Australian Prudential Regulation Authority) and a Health and Ageing Portfolio regulator (the Therapeutic Goods Administration).

**1.42** The audit was conducted in accordance with ANAO Auditing Standards at a cost of \$415 000.

### **Previous audit coverage**

**1.43** The ANAO has not previously audited DoHA's administration of prudential arrangements for the protection of residential aged care accommodation bonds. However, the ANAO has completed the following related aged care audits:

- Australian National Audit Office Audit Report No.40, 2008–09, *Planning and Allocating Aged Care Places and Capital Grants*, Canberra.
- Australian National Audit Office Audit Report No.35, 2007–08, *Building Certification of Residential Aged Care Homes*, Canberra.
- Australian National Audit Office Audit Report No.38, 2006–07, *Administration of the Community Aged Care Packages Program*, Canberra.
- Australian National Audit Office Audit Report No.42, 2002–03, *Managing Residential Aged Care Accreditation*, Canberra.

**1.44** The ANAO has also completed the following audits of regulators in the Health and Ageing Portfolio:

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<sup>15</sup> ANAO *Better Practice Guide—Administering Regulation*, March 2007, Canberra.

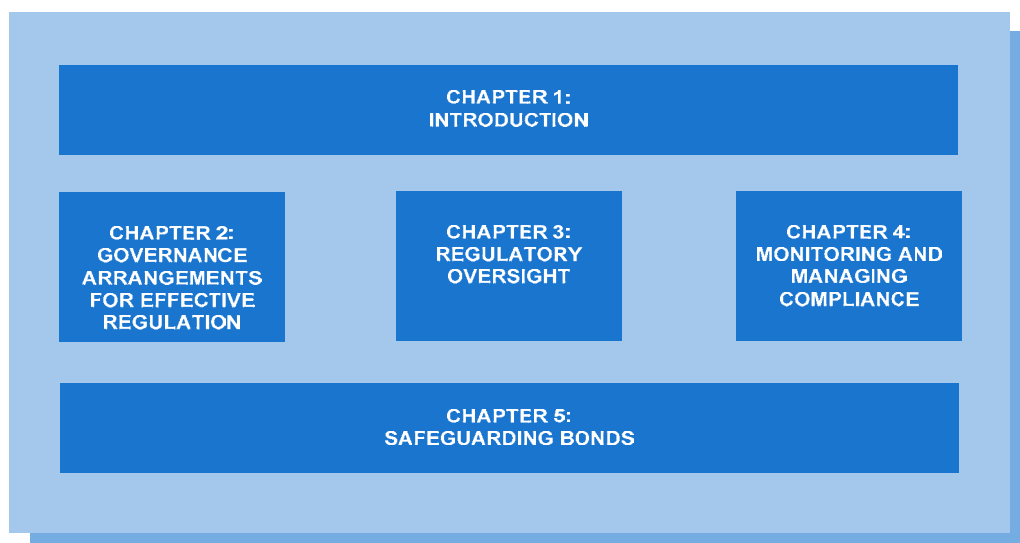
- Australian National Audit Office Audit Report No.20, 2005–06, *Regulation of Private Health Insurance by the Private Health Insurance Administration Council*, Canberra.
- Australian National Audit Office Audit Report No.7, 2005–06, *Regulation by the Office of the Gene Technology Regulator*, Canberra.
- Australian National Audit Office Audit Report No.30, 2004–05, *Regulation of Commonwealth Radiation and Nuclear Activities*, Canberra.
- Australian National Audit Office Audit Report No.18, 2004–05, *Regulation of Non-prescription Medicinal Products*, Canberra.
- Australian National Audit Office Audit Report No.2, 2000–01, *Drug Evaluation by the Therapeutic Goods Administration–Follow-up Audit*, Canberra.
- Australian National Audit Office Audit Report No.8, 1996–97, *Drug Evaluation by the Therapeutic Goods Administration*, Canberra.

## Acknowledgements

1.45 The ANAO appreciates the assistance provided by DoHA staff and aged care stakeholders during the conduct of this audit.

## Structure of the report

1.46 The audit report is structured as follows:



## 2. Governance arrangements for effective regulation

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*This Chapter examines the governance framework established by DoHA for prudential regulation of residential aged care accommodation bonds.*

### Overview

**2.1** Sound governance arrangements enable a regulator to meet its responsibilities and discharge its accountabilities. They also assist a regulator to meet many of the community's expectations, which helps build stakeholder and public confidence. The ANAO's examination of accountability arrangements for prudential regulation, which was informed by governance principles outlined in the *Administering Regulation* Better Practice Guide, focused on DoHA's:

- articulation of its regulatory objectives, outcomes and administrative priorities;
- integration of strategic and operational planning, including its approach to the management of risk; and
- measurement, management and reporting of regulatory performance.

### Regulatory objectives, outcomes and priorities

**2.2** Clearly defined and published regulatory outcomes and administrative priorities enhance the transparency of a regulator's strategies and compliance expectations. This information assists regulatory staff to assess and, where necessary, enforce, regulatory requirements. It also enables regulated entities to assess the extent to which they are meeting expectations and the implications should the standards not be met.

**2.3** DoHA has publicly reported that the principal objective of prudential requirements is to protect accommodation bonds and entry contributions paid to providers by residents of aged care homes.<sup>16</sup> This overall objective for prudential requirements is supplemented by the current objective for the

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<sup>16</sup> Department of Health and Ageing, 2008, *Report on the Operation of the Aged Care Act 1997: 1 July 2007 to 30 June 2008*, Canberra, p. 57.



Prudential and Approved Provider Regulation Branch (PRB), as outlined in its 2008–09 operational plan:

PRB aims to improve the security of accommodation bonds paid by residents to their approved providers by promoting improved financial management practices of aged care providers holding accommodation bonds, to reduce the risk of default on accommodation bond obligations and enhance financial viability over time.

**2.4** The promotion of improved financial management practices and enhanced viability of aged care providers is a broad objective extending beyond the enforcement of prudential regulations, and would present difficulties in measuring attainment. The broad objective is also particularly susceptible to external factors beyond the control of the prudential regulator, such as the impact upon providers' investment returns as a result of deteriorating financial conditions. In practice, the scope of PRB's work in relation to improving financial management practices in the aged care industry was limited to promoting awareness of the prudential regulation framework.

**2.5** PRB's objective for prudential regulation had also changed in each of the years reviewed (the last three years), with a changing focus on the promotion of improved financial management practices and enhanced financial viability in relation to the primary role of establishing and enforcing prudential regulations. In particular, changes in the objective indicate some uncertainty surrounding the desired outcome of prudential regulation and the means in which to achieve the outcome.

**2.6** It is important that DoHA's objective for prudential regulation reflects the Government's decision in 2006 to strengthen the prudential regulation framework incrementally. In introducing legislative reforms in 2006, the then Minister for Ageing stated that: 'While good business practices are critical, it is not, however, the Government's intention that the Government run the business of each provider for them'.<sup>17</sup> As a consequence of the Government's decision, the role of the prudential regulator in the financial affairs of providers is limited, with powers available to the regulator reflecting this position. Care is needed to ensure that both internal and external stakeholders are aware of the intended role of the prudential regulator.

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<sup>17</sup> Commonwealth of Australia, 28 March 2006, *The Senate—Aged Care (Bond Security) Bill 2005, Aged Care (Bond Security) Levy Bill 2005, Aged Care Amendment (2005 Measures)—Second Reading Speech*, Canberra, p. 3.

**2.7** Clarifying the objective of DoHA's prudential function would serve to delineate the desired regulatory outcome—improved security of accommodation bonds—from the means of achievement—the establishment, promotion and enforcement of prudential regulations. Further clarification would also reduce the potential for stakeholder confusion over the breadth of PRB's role in promoting improved financial management practices of providers and subsequent enhancement of financial viability.

## **The role of the prudential regulator**

**2.8** The introduction of prudential regulation in the late nineties and the strengthening of the prudential framework in 2006 broadened DoHA's aged care responsibilities beyond the traditional focus on quality of care matters. This change in focus requires a different set of skills and knowledge, with the department building its capability in this area.

**2.9** The management of the dual role of the department—that is its role in achieving the policy objectives of accessible quality and affordable aged care and its role as a prudential regulator—is challenging. There can be tensions where prudential non-compliance action may be warranted, but to do so would bring into question the viability of the provider which may be delivering services in an area of residential aged care shortage.

**2.10** Furthermore, in several recent cases, PRB has had a large role in departmental efforts to maintain residential aged services in identified areas of need through ownership transfer from a troubled provider to an alternate provider. The involvement of a regulator in negotiating ownership or service delivery matters, particularly where future compliance action may be warranted in relation to an alternate provider with whom the department has negotiated a transfer, poses some risk to the perceived objectivity and impartiality of a regulator. By formally recognising these risks and considering mitigation strategies, the department would be better placed to manage potentially conflicting roles and responsibilities.

## **Strategic and operational planning**

**2.11** Aligned and mutually supportive strategic and operational planning processes provide assurance to a regulator that operational priorities and activities are consistent with key regulatory outcomes and that they address emerging regulatory risks. The establishment of a forward-looking (for example, three-year) strategy in conjunction with annual operational/business

plans can be used to improve stakeholder understanding of a regulator's long-term and short-term priorities.

**2.12** The development of a 'fit-for-purpose' planning regime for prudential regulation would require DoHA to strike an appropriate balance between an approach that takes into account the scale and complexity of its regulatory activities and one that delivers a responsive and coordinated program of regulation over the short and longer term. In particular, a proportional planning approach would inform the department's allocation of funding to key regulatory tasks and priorities, while supporting a more informed discussion with government about regulatory priorities and emerging threats.

## **Strategic planning**

**2.13** DoHA has not established a separate strategic plan to govern its prudential regulatory activities, both within the responsibilities of PRB and more widely across the department. Adopting a strategic or longer term approach and plan would assist DoHA to guide its administration of prudential arrangements, establish regulatory priorities and provide a means to measure their achievement. The importance of a strategic outlook for prudential regulation is heightened due to the Government's implementation of a staged approach to the strengthening of the prudential regulatory framework.

**2.14** In the absence of a strategic plan, DoHA has outlined its general strategic directions for the protection of residential aged care accommodation bonds in the context of its annual PRB operational plan. The current strategic direction is:

The Prudential Regulation Branch (PRB) is focused on protecting accommodation bonds and entry contributions paid by residents to their approved provider.

**2.15** Section task lists also included a number of strategic level activities. Departmental officers advised, however, that day-to-day activities and unanticipated remedial action to address non-compliance limited their ability to address these longer term, strategic activities. There would be long term benefits to DoHA if it identified and prioritised the resources required to strengthen its regulatory functions and balance the emphasis placed on meeting this need against competing pressures to respond to day-to-day events.

**2.16** The establishment of a strategic plan, which reflects the scale and complexity of DoHA's prudential regulation function, would assist the department to capture and communicate its future directions for prudential regulation over the medium to longer term, including the articulation of its staged approach to the introduction of a strengthened prudential regulatory framework.

## **Operational planning**

**2.17** Business and operational planning should be tailored to the scale and complexity of regulatory activities, with plans clearly stating what is expected to be achieved, when it is expected to be achieved and the level of resources to be allocated. Plans should also be reviewed on a regular basis and updated, where appropriate, to reflect changes in the regulatory environment or work program priorities.

**2.18** DoHA has an established planning framework, which includes a structured approach to corporate planning through the provision of template plans for division and branch level planning. In addition to the templates, the department has also provided supporting material to assist departmental officers to populate template plans.

**2.19** The ANAO reviewed PRB's branch level operational plans for the last three years. The review compared business and operational plans for prudential regulation against the department's established planning criteria and revealed that, overall, they were compliant. However, the review identified a lack of:

- an appropriate range of measures and targets against which the performance of the prudential regulator could be assessed; and
- coverage of risks that affect the regulator's ability to effectively administer prudential regulation.

**2.20** These matters are examined in further detail later in this Chapter.

**2.21** PRB did not routinely review and update its operational plan to account for changes in the regulatory environment or work program priorities, for example the impact of the changed financial climate in late 2008 on provider compliance. There were no amended plans endorsed in the three years reviewed by the ANAO. Departmental officers advised that the branch complies with the department's requirements for annual operational plans,

supplemented with an informal approach to the review of progress against the plan in an ad-hoc manner throughout the year.

**2.22** The ANAO also reviewed the current Office of Aged Care Quality and Compliance (OACQC) business plan to determine the extent to which prudential regulation was considered in the context of the department's broader compliance program. Elements of the PRB operational plan were found to be integrated into the higher level divisional business plan, for example the business plan included information on prudential regulation procurement and also policy proposals. However, of the two risks identified in the business plan there were no specific prudential risks, such as the impact of worsening financial conditions on provider compliance. Prudential risk was rolled into an overarching risk relating to resident safety.

**2.23** The OACQC business plan also outlined the importance of maintaining cooperative working relationships with other areas of the department and other government agencies, such as the Department of Education, Employment and Workplace Relations and the Department of Immigration and Citizenship. The plan did not, however, outline the importance of consultation between the department's prudential regulation function and the Australian Prudential Regulation Authority (APRA) or other Health and Ageing Portfolio regulators. Overall, PRB has had only limited engagement with APRA and portfolio regulators. A more strategic and focused engagement with regulators in other sectors would inform DoHA's development of better practice regulation and allow the department to benchmark its prudential regulation function.

### *Managing risk*

**2.24** Regulatory risk is an actual or potential event or circumstance that interferes with the achievement of a regulation policy objective or administrative outcome. It can be categorised into two broad groups:

- risk that affects a regulator's ability to effectively administer regulation (examined in this Section); and
- risk that decreases a regulated entity's ability or willingness to comply with regulatory requirements (examined in Chapter 4 of this report).

**2.25** Risk management guides the development and implementation of strategies and activities that maximise administrative effectiveness subject to available resources. Routine monitoring of regulatory risk enables a regulator to adjust the regulatory framework to reflect changing priorities that result

from new and evolving regulatory threats. If the risk of non-compliance declines, a reduction in the nature and extent of regulatory activity may be appropriate.

**2.26** The management of risk within DoHA is governed by a Risk Management Policy (approved by the Secretary), Chief Executive's Instructions, Procedural Rules and a Risk Assessment Toolkit.<sup>18</sup> DoHA's guidance documentation outlines the importance that is placed on risk management within the department.

**2.27** In accordance with the departmental governance framework for risk management, PRB has incorporated a prudential risk management plan as an attachment to its annual operational plan. The ANAO reviewed risk management plans over the last three years to determine the extent to which PRB utilises risk management as a tool to develop and implement strategies to improve regulatory effectiveness. Regulatory staff were also interviewed to ascertain the extent to which risk management was used.

**2.28** The ANAO found that there was a general appreciation of the importance of risk management within PRB and also observed the informal application of risk management principles, such as undertaking an informal, generally undocumented assessment of risk when determining whether to undertake compliance action. A culture of risk awareness, when informed by appropriate systems and structures to identify, rank and mitigate risks, is an important component of a sound risk management regime. The department has not, however, effectively implemented a structured and systematic risk management approach to inform its administration of prudential arrangements and guide the informal practices employed by regulatory staff.

**2.29** In earlier years, the number of documented prudential risks remained relatively stable at around seven and the risk rating and target risk rating did not change across years. Importantly, a number of controls reported as in place were not, such as development of procedures manuals and effective records management. Furthermore, some proposed treatments/activities were yet to be sufficiently deployed, such as engaging with stakeholders and regulators in other sectors to assist skills development.

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<sup>18</sup> Chief Executive's Instructions (CEIs) are the primary mechanism for a Chief Executive to set out the processes to promote the proper use of Commonwealth resources, including public money and property by officials in his or her agency.

**2.30** The 2008–09 operational plan evidenced a significant reduction in the number of documented regulatory risks, down from seven in the previous years to the following two risks:

- failure to identify emerging issues and respond appropriately; and
- failure to maintain skills and corporate knowledge.

**2.31** The ANAO was informed that the reduction related to the alignment of the branch's operational risks with the Enterprise Risk Assessment Framework for the department, with a focus on higher level risks. Notwithstanding, DoHA considered that the current risks adequately capture the scope of the previously identified risks.

**2.32** The need to align organisational risks should not come at the expense of effective, targeted operational risk management. With the move to higher level risks in the operational plan, the use of an underpinning assessment to identify risks to a regulator's ability to effectively administer prudential regulations, would help to validate the risk ranking of the two risks in the operational plan as those of highest priority. PRB does not have a supplementary risk management plan to underpin the high level risks outlined in the operational plan, nor is there supporting information to explain the basis for the rating applied to the reported risks.

**2.33** The integrity of the regulatory framework and the extent of provider compliance are affected by a range of risks, including those related to the evolving complexity of providers' operations within the aged care sector and those related to the recent deterioration in financial conditions.

#### Aged care sector

**2.34** The ability and willingness of aged care providers to comply with regulatory requirements is affected by such matters as:

- rapid provider growth, resulting in inadequate systems of control and documentation, insufficient staff skills and poor record-keeping;
- consolidation within the aged care industry, leading to conflicting systems, lack of audit trails and the loss of corporate skills and knowledge;
- capacity constraints within some sections of the aged care industry, with a consequential inability to implement appropriate management strategies, investment decisions and governance requirements;

- the diverse management structures adopted by aged care providers and related entities that have the potential to reduce transparency of management decisions and ultimately accountability;
- providers' awareness of their obligations, with potential non-compliance where requirements are poorly understood; and
- the globalisation of the aged care sector in Australia.

#### Financial conditions

**2.35** The global financial crisis may impact on providers' financial viability and their ability to refund accommodation bonds, or improve the quality of aged care provided to care recipients by causing:

- a reduction in potential residents' asset values, with a consequent fall in the pool of funds available to refund existing bonds and invest in the aged care industry;
- less security for providers' investments, leading to possible loss of bond monies; and
- reductions in the rate of return on providers' investments, resulting in a lower level of income for providers, increasing vulnerability to insolvency and a reduction in funds available to invest in aged care.

**2.36** The aged care industry, through submissions to the recent Senate inquiry into *Residential and Community Aged Care in Australia* outlined the extent of the impact of the global financial crisis on aged care providers, which included: investment write-offs, reductions in interest income from investments and a decrease in access to capital funding.<sup>19</sup>

**2.37** Given these trends, a well developed understanding of the significance of the risks and their impact on the integrity of the regulatory framework, underpinned by a program of compliance activities targeted at regulated entities that pose the highest risk of non-compliance, is an important requirement of effective prudential regulation.

**2.38** Timely access to, and analysis of, relevant regulatory information and data would inform DoHA's understanding of the significance of risks. The department does not currently have access to timely information, through

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<sup>19</sup> Commonwealth of Australia, 2009, Standing Committee on Finance and Public Administration, *Residential and Community Aged Care in Australia*, Canberra, p. 39.



existing channels, that would inform its assessment of key contemporary risks, such as the impact of changes in the financial climate on the security of bond holdings. Delays in accessing information on emerging risks has the potential to compromise the department's ability to quantify the significance of the risks and establish appropriate treatments to ensure that the regulatory framework delivers the intended protections. Under the Act, DoHA has a suite of information gathering powers that it could utilise to obtain relevant information to inform its assessment of risk. The use of legislated information gathering powers to determine the compliance status of providers is examined further in Chapter 4.

**2.39** DoHA indicated that it was aware of a range of risks to provider compliance, had considered their impact and is working on approaches to manage these risks. These approaches included liaison with key stakeholders, such as major financiers and insolvency practitioners, to build an understanding of the underlying factors that contributed to the level of risk. Notwithstanding, DoHA's prudential arrangements are not underpinned by the systematic identification and management of risks to the protection of bonds.

## Recommendation No.1

**2.40** In order to improve its regulatory effectiveness, the ANAO recommends that DoHA adopts a structured and systematic risk management methodology for its prudential regulation of residential aged care accommodation bonds to: routinely identify, analyse, document, evaluate and monitor regulatory risk; rank risks, based on assessments of likelihood and consequences; and plan and conduct activities to treat risks.

### *Departmental response*

**2.41** *The department agrees with the recommendation.* The department will build on and extend the risk analysis already undertaken on issues such as the impact of the Global Financial Crisis on aged care providers and consolidation in the aged care sector. The department has already enhanced its approach to risk management as part of the strategic planning process for 2009–10.

## Measuring, managing and reporting performance

**2.42** Central to a regulator's governance arrangements is a sound performance management framework. A framework not only facilitates

effective internal management, but also enables a regulator to demonstrate to stakeholders that its operations conform to legislative requirements, are cost effective and are achieving regulatory objectives.

Performance measures and targets

Internal measures and targets

2.43 The ANAO reviewed PRB’s operational plans for the last three years to examine the coverage of performance information, in particular the appropriateness of measures and targets. The 2008–09 plan included one performance measure for prudential regulation and five related targets (see Table 2.1).

Table 2.1

2008–09 internal performance measures and targets for prudential regulation

Program	Performance Measure	Targets			
		1 <sup>st</sup> Qtr	2 <sup>nd</sup> Qtr	3 <sup>rd</sup> Qtr	4 <sup>th</sup> Qtr
Outcome 4.8-Residential Care					
Prudential Regulation	Effective administration of prudential regulatory arrangements	2007–08 Annual Prudential Compliance Statement (APCS) distributed to approved providers	Making of regulations for the recovery of prudential regulation costs	Liaise with internal stakeholders regarding outcomes of 2007–08 APCS process Issue cost recovery invoices	Prepare documentation for 2008–09 APCS

Source: DoHA

2.44 The absence of a strong correlation between the measure, *Effective administration of prudential regulatory arrangements*, and underpinning targets adversely impacts upon the usefulness of existing performance information. Furthermore, targets were narrow in their coverage, with a focus on the quantitative aspects of the Annual Prudential Compliance Statement (APCS) process (examined later) and the, now deferred, introduction of cost recovery for prudential regulation. The limited use of appropriate performance information means that DoHA is not well positioned to measure the strategic impact of its regulatory activities.

**2.45** The further development of the performance measurement framework for prudential regulation would better inform DoHA's management of regulatory activities and strengthen accountability arrangements. The establishment of performance measures and targets for the following key elements of the planned PRB work program would be a useful starting point:

- monitor compliance with prudential requirements;
- improve the financial management practices of approved providers holding accommodation bonds and entry contributions; and
- administer the Scheme.

**2.46** Departmental officers advised that they are considering the development of additional effectiveness measures and targets relating to regulatory activities, such as provider compliance levels.

#### *External measures and targets*

**2.47** The foundation for external agency accountability and transparency is performance information presented initially in Portfolio Budget Statements (PBS). PBS are presented to Parliament by departments and agencies to inform Senators and Members of Parliament of the proposed allocation of resources to achieve government outcomes. Agencies are required to provide sufficient information, explanation and justification in their PBS to enable Parliament to understand the purpose of each outcome in the proposed appropriations in Appropriation Bills (Numbers 1 and 2).<sup>20</sup>

**2.48** Performance information for the department's administration of residential aged care is grouped in its PBS under *Program 4.8: Residential Care*. DoHA currently has three performance indicators and three performance targets for Program 4.8. These indicators and targets relate to aged care places and provider compliance with accreditation standards.<sup>21</sup> DoHA's PBS do not currently include performance information for its administration of prudential arrangements for the protection of accommodation bonds.

**2.49** The absence of a balanced set of performance indicators in the PBS limits the ability of external stakeholders to assess regulatory performance. DoHA does, however, signal its forward program of activity in relation to

<sup>20</sup> ANAO *Better Practice Guide—Performance Information in Portfolio Budget Statements*, 2002, Canberra, p. 1 and p. 5.

<sup>21</sup> Department of Health and Ageing, 2008, *Portfolio Budget Statements 2008–09*, Canberra, p. 107.

prudential regulation in the narrative discussion in its PBS. For example, DoHA's 2008–09 PBS outline the department's focus on compliance and administration of the Scheme.

**2.50** Given the continuing rapid growth of accommodation bond numbers, bond values and overall bond holdings, coupled with changes in investment risk resulting from the changing financial climate, DoHA may wish to consider including some performance information for external stakeholders in its PBS and subsequently reporting against this information in the department's annual report.

## **Recommendation No.2**

**2.51** To improve DoHA's internal management and external accountability for its prudential function, the ANAO recommends that the department establishes an integrated and balanced set of performance measures and targets for key regulatory activities, against which the achievement of prudential regulation objectives can be assessed and reported to internal and external stakeholders.

### ***Departmental response***

**2.52** *The department agrees with the recommendation.* In operational planning for 2009–10 the department will establish further performance measures and targets for its activities. These measures will cover issues such as: provider awareness of regulations; timeliness of responses to prudential issues and the efficient operation of the Accommodation Bond Guarantee Scheme. As part of the 2010–11 Budget process the department will consider measures to be included in the 2010–11 Portfolio Budget Statements.

## **Performance reporting**

### ***Internal reporting***

**2.53** Departmental officers advised that prudential operational reporting was generally undertaken in an informal manner, with oral reports provided at weekly branch executive meetings. Financial reporting was documented, with reports generated from the department's financial management information system outlining the branch's actual expenditure against budgeted expenditure for the current month and the year-to-date.

**2.54** The existing informal reporting regime would be strengthened if it were underpinned by periodic written reports that outline achievements against objectives and targets. Such reporting, which is commensurate with the scale and complexity of prudential functions, would enable DoHA to more effectively monitor activities to support the achievement of regulatory objectives and take timely action to address areas of non-achievement.

### *External reporting*

**2.55** A key aspect of reporting to the Parliament is the need to ensure that the agency informs the Parliament about what it is planning to do (that is, usually through the PBS) and subsequently reports in similar terms on what it actually did (in the annual report tabled in the Parliament).<sup>22</sup>

**2.56** As DoHA has not established performance information in its PBS for its administration of prudential arrangements, it does not report on its performance against established measures in its annual report. The department does, however, provide high level, narrative information on selected aspects of prudential regulation, such as action in relation to the insolvency of a specific provider, in its annual report.<sup>23</sup>

**2.57** The department's primary means of communicating regulatory performance to external stakeholders is via the annual *Report on the Operation of the Aged Care Act 1997* (ROACA). The ROACA is prepared under section 63-2 of the Act in order to meet the requirement that the Minister for Ageing present to Parliament a report on the operation of the Act for each financial year. This report describes the operation of the Act and associated aged care principles.

**2.58** The 2007–08 ROACA provided external stakeholders with the following information on prudential regulation activity:

- background information on bonds and current statistics on accommodation bond holdings;
- general information on the department's promotional/educational activities;

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<sup>22</sup> ANAO *Better Practice Guide—Public Sector Governance*, July 2003, Canberra, p. 22.

<sup>23</sup> Department of Health and Ageing, 2008, *Annual Report 2007–2008*, Canberra, p. 80.

- information on prudential regulations and details regarding the operation of the Scheme; and
- an overview of prudential compliance monitoring arrangements and some limited data on compliance activity.

**2.59** Notwithstanding, the information provided by DoHA in the ROACA does not provide a comparison of actual performance against planned regulatory performance. Nor does the prudential compliance information contained in ROACA align with the year under review in the report, as prudential data and information on compliance action for the previous financial year is not generally finalised prior to the release of ROACA in November. In addition, lengthy investigations into non-compliance can mean that compliance action reported in ROACA may relate to an issue that was first identified several years earlier. As a consequence, it is difficult for external stakeholders to form an opinion as to non-compliance trends.

**2.60** A review of the adequacy of existing accountability arrangements would assist DoHA to identify whether further improvements are warranted. Stakeholder input regarding the adequacy of current arrangements and options for improvement would also usefully inform any review.

## 3. Regulatory oversight

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*This Chapter examines DoHA's oversight of prudential arrangements for the protection of residential aged care accommodation bonds.*

### Overview

**3.1** The quality of regulatory administration is a major determinant of success in achieving policy objectives and minimising the administrative and compliance costs imposed on regulated entities, taxpayers and the Australian community by a regulatory regime. The ANAO's examination sought to determine the extent to which DoHA had appropriately incorporated better practice principles across the following areas of its oversight of prudential arrangements:

- maintenance of the prudential regulation framework;
- administering the regulatory framework;
- management of stakeholder relationships;
- documentation of operating policies and procedures; and
- sound management of regulatory records.

### Maintaining the regulatory framework

**3.2** Activities associated with the development and maintenance of the statutory framework for prudential regulation include identifying possible inefficiencies and gaps in advance and determining the appropriate remedial response before problems arise. Responses can include the issuance of guidance to industry, amendment of the Principles or the seeking of amendments to the primary legislation. DoHA has indicated that it places high importance on maintenance of the statutory framework to ensure that it remains appropriate for the efficient and effective operation of prudential regulation and the Scheme, such that the policy objective of protecting residents' accommodation bonds is achieved.

**3.3** A continuing focus on the adequacy of the prudential framework not only represents sound regulatory practice, it also supports the Government's approach to underpin a staged introduction of prudential standards. The Government's approach, as outlined in its 2005 Regulatory Impact Statement for the proposed strengthening of the regulatory framework, was to establish a

prudential regulatory framework with an initial set of prudential standards, with new standards developed over time. The Government assigned DoHA responsibility for developing, in consultation with stakeholders, any necessary additional prudential standards in order to reduce risks to residents and Government.<sup>24</sup> The establishment of new standards does not involve amendment to the primary legislation and is achieved through amendments to the Principles, which is a disallowable instrument.<sup>25</sup>

**3.4** As part of the establishment of its prudential regulation function, DoHA has created a Prudential Policy Section within PRB with defined responsibility for:

- assessing the effectiveness and impact of the prudential requirements; and
- developing policy in relation to prudential management of accommodation bonds.

**3.5** DoHA has demonstrated its willingness to act in response to weaknesses or gaps identified through its regulatory activities and provider insolvencies, with the Government (based on advice from the department) amending primary legislation. Recent amendments were aimed at ensuring that accommodation bonds (or like payments) that have been paid by care recipients for entry into aged care services are fully protected under the Accommodation Bond Guarantee Scheme (the Scheme) and that residents in similar circumstances are accorded similar protections. DoHA reported that the legislative changes were the result of experience that highlighted some areas in which the protections for residents could be clarified.

**3.6** The department has also recently signalled its intention to strengthen the regulatory framework to improve the transparency and accountability of providers' use of bond holdings. This action is in response to a recent case of suspected misuse of bond holdings by a provider.

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<sup>24</sup> Parliament of the Commonwealth of Australia, 2005, *House of Representatives Aged Care (Bond Security) Bill 2005: Explanatory Memorandum*, Canberra p. 5.

<sup>25</sup> A disallowable instrument is a determination, made by the Minister for Ageing in the case of the Principles, containing guidelines that must be taken into account when making decisions. A disallowable instrument must be notified in the Gazette and must be laid before each House of Parliament. The instrument will come into effect if: no motion of disallowance has been moved within 15 sitting days in either House; or such a motion has been withdrawn or defeated.



**3.7** The adoption of a structured and systematic approach to risk management, as recommended in Chapter 2, would assist DoHA to identify risks to the security of bond holdings and adjust regulatory settings, where necessary, in advance of adverse events.

## **Administering the regulatory framework**

**3.8** In general, departmental officers demonstrated a well-developed understanding of the regulatory framework and evidence was generally available on file to demonstrate compliance with key obligations (record-keeping issues identified by the ANAO are examined later in this Chapter). For example, the form of the annual compliance statement was approved by the appropriate delegate, recorded and filed. The ANAO also noted that:

- draft procedural documentation, to the extent to which it has been developed, generally included some reference to the relevant provisions of the legislation underpinning particular decisions/actions; and
- correspondence with providers was referenced to legislative provisions.

**3.9** DoHA also relies extensively on legal advice to confirm the legality of proposed decisions/actions and to clarify the intent of legislative provisions. This advice is obtained from a dedicated internal legal resource and from external legal service providers, as required. This represents a sound approach given the complexity of the legislation and the significant impact that compliance decisions can have on a regulated entity.

**3.10** There were, however, several areas of the legislative framework where DoHA had not established appropriate administrative arrangements to monitor provider compliance or where departmental staff did not demonstrate a sound understanding of requirements, with the most significant relating to the establishment of processes to monitor the use to which the accommodation bond, retention amounts and bond income must be put.

## **Legislated use of accommodation bonds and bond income**

**3.11** The legislative framework prescribes lawful uses for bonds and bond income and operational procedures are needed to ensure provider compliance

with these legislated uses.<sup>26</sup> DoHA informed the ANAO that it has not established processes to monitor provider compliance with this aspect of the legislation. The department has, however, investigated the use of bonds and bond income by using its information gathering powers on a case-by-case basis once a provider has presented with problems. DoHA informed the ANAO that it did not consider that the legislation required approved providers to routinely report on their use of accommodation bonds, nor did it consider that the legislation contained powers intended to enable the department to routinely seek information about the use of bond funds.<sup>27</sup>

**3.12** The inappropriate use of bonds and bond income by providers is a matter of public and Parliamentary interest, with the issue recently raised in the media and by members of the Senate Standing Committee on Finance and Public Administration.<sup>28</sup> The case in question related to the suspected use of bond holdings by a provider to fund a loan to a sporting club.

**3.13** Given the aggregate value of bond holdings currently stands at around \$8 billion with average annual growth around 25 per cent, the ANAO considers that DoHA should develop, as a priority, an appropriate response to this gap in its coverage. That is: to ensure that bonds are used to provide aged care to care recipients and bond income to improve building standards and the quality and range of aged care services. In response to the ANAO's findings, DoHA has advised that:

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<sup>26</sup> The approved provider must not use the accommodation bond for a purpose that is not related to providing aged care to care recipients, or that does not comply with the prudential requirements – [Section 57-2 (1)(k)].

Furthermore, the approved provider must use the income derived from the accommodation bond and the retention amount in the following ways:

- (i) to meet capital works costs relating to residential care;
- (ii) to retire debt relating to residential care; or
- (iii) where no capital expenditure is reasonably necessary to comply with matters specified in the certification principles...to improve the quality and range of aged care services – [Section 57-2(1)(n)].

<sup>27</sup> Where suspected non-compliance is reported to DoHA, the department has a number of legislated powers at its disposal to access information from a provider in order to gain an assurance of prudential compliance or the extent of non-compliance. The information gathering powers in the Act (sections 9-2, 9-3, 9-3A and 93-1—see Appendix 3 for further detail on the extent of these powers) allow DoHA to seek information relating to specific matters, such as accommodation bonds and suitability to be an approved provider (see Chapter 4: *Capturing and managing compliance data*).

<sup>28</sup> The Senate Committee on Finance and Public Administration completed its inquiry into residential and community aged care in Australia in April 2009.

Given the recent evidence of alleged misuse of accommodation bonds, the department is proposing to recommend amendments to the *Aged Care Act 1997* (the Act) to more specifically define the allowed use of accommodation bonds. These changes would also be supported by changes in the Prudential Standards that would require approved providers to routinely report on the use of accommodation bonds—possibly through the Annual Prudential Compliance Statement.

**3.14** The department subsequently indicated that it has commenced work on the development of options for legislative reforms to clarify the allowed uses of accommodation bond funds. It is envisaged by DoHA that further clarity will be achieved by prescribing the use of bonds to more closely reflect the policy intent of providing a source of capital. These changes could involve legislative amendment to more explicitly link the use of funds and retirement of debt to capital works. DoHA considered that improved clarity surrounding the use of bonds would enable it to more readily assess whether aged care providers are compliant and would also discourage the misuse of bonds.

**3.15** In the interim, DoHA should administer compliance within the existing legislative provisions under the Act through the establishment of appropriate processes to gain an assurance that providers are using accommodation bonds for the provision of aged care to care recipients and bond income to improve building standards and the quality and range of aged care services.

## Recommendation No.3

**3.16** The ANAO recommends that DoHA enhances its regulatory approach to include reviews of whether aged care providers are using bonds and bond income for the purpose of providing aged care to recipients as required in the *Aged Care Act 1997*.

### *Departmental response*

**3.17** *The department agrees with this recommendation.* In the context of the development of policy and legislative options for the consideration of the Government, the department will consider ways of enhancing this function.

## Managing relationships

**3.18** The relationships between a regulator and stakeholders can make an important contribution to the effective administration of regulation by

engendering trust and understanding between parties and facilitating information exchange and feedback.

**3.19** Open and responsive relationships increase regulated entities' confidence in the regulatory regime and, in turn, can be expected to increase the level of voluntary compliance, provide early warning of emerging compliance challenges, and lead to better designed regulatory responses to non-compliance. This has the potential to reduce administrative costs for regulators and compliance costs for regulated entities.

## **Establishing relationships**

### *Identifying stakeholders*

**3.20** As part of its annual operational plan, DoHA has identified key stakeholders in the prudential regulatory regime. The department has also outlined in its planning documents the importance of its relationships with key stakeholders.

**3.21** The list of stakeholders identified by PRB did not include residents/potential residents and their carers. Departmental officers indicated that consumers were a recognised stakeholder, but that PRB had not worked extensively with this group. It was considered that the legislation focused on approved providers and, therefore, PRB's activities were primarily directed at this stakeholder group.

### *Roles and responsibilities*

**3.22** The articulation of roles, obligations and commitments of a regulator and regulated entities increases the transparency of the relationship's structure and provides a framework for holding parties accountable for their contributions to the relationship. The Government has recognised the importance of articulating roles and responsibilities, with established policy requiring agencies with direct and indirect service delivery functions, as well as regulatory functions, to publish a service charter and report annually on performance against the charter. In addition, regulators are expected to develop, in consultation with stakeholders, a regulatory code of conduct.

### *Service charter*

**3.23** A client service charter sets out the standards of service that regulated entities can expect and also establishes a strong performance measurement and accountability tool as it focuses on service outcomes.

**3.24** Regulators within the Health and Ageing Portfolio, such as the Aged Care Standards and Accreditation Agency (the Agency) and Therapeutic Goods Administration, and prudential regulators outside the portfolio, such as the Australian Prudential Regulation Authority (APRA), publish on their websites standards of service that stakeholders can expect when dealing with them, and the behaviour they expect from regulated entities.

#### Regulatory code of conduct

**3.25** A regulatory code of conduct informs regulated entities of their rights and enables them to formulate expectations about how a regulator will administer regulation. Codes of conduct generally outline a regulator's priorities and undertakings regarding:

- consultation processes for developing regulations or guidelines;
- provision of information on regulations and compliance requirements;
- approaches to enforcement and penalties, including where breaches are self-detected and notified;
- use of public statements and the media;
- processes for dealing with complaints and appeal/review mechanisms; and
- timeframes for responses.

**3.26** DoHA has not developed and published a service charter or regulatory code of conduct for its prudential regulatory functions, nor have these mechanisms been developed for the department's administration of the national quality framework for aged care more broadly. As such, there is limited guidance to inform regulated entities of their rights and to guide their expectations about how DoHA will administer prudential regulation. The department acknowledged that a service charter may enable providers' rights to be expressed in plain English and in a format that is more accessible to allow for frequently asked questions to be addressed. However, it did outline that, with respect to matters such as compliance action, investigation and application of sanctions by the department, the rights and obligations of providers are set out in the Act.

**3.27** The establishment of a service charter and code of conduct for prudential regulation should take account of the scale and complexity of this regulatory function and need not be as comprehensive as those developed by larger regulatory bodies.

## Recommendation No.4

**3.28** In order to better inform stakeholder expectations regarding the service levels to be achieved and the code of conduct to be observed, the ANAO recommends that DoHA:

- (a) develops, in consultation with stakeholders, a client service charter and regulatory code of conduct in relation to the prudential regulation of residential aged care accommodation bonds; and
- (b) reports annually on performance against the charter.

### *Departmental response*

**3.29** *The department agrees with the recommendation.* Given that prudential regulation forms part of a much larger regulatory framework for the quality of aged care, the department will consider incorporating prudential regulation into the service charter for the Office of Aged Care Quality and Compliance's regulatory functions.

## Information on the regulatory framework

**3.30** DoHA produces and distributes a wide range of advisory materials to stakeholders about the prudential regulation framework. These materials are both incorporated into residential aged care materials more broadly, and through targeted prudential publications. The materials are made available to stakeholders primarily through the following channels:

- websites;
- information telephone lines;
- hard copy materials; and
- consultative arrangements.

### *Website*

**3.31** A well-designed and up to date website allows stakeholders to access regulatory information at their convenience. DoHA utilises the Internet extensively to make prudential regulation materials available to stakeholders.

This information is available from the department's Internet page, as well as several ageing-specific Internet sites.<sup>29</sup>

### *Points of contact for enquiries*

**3.32** Publishing an email address or telephone number for enquiries provides stakeholders with simple, low-cost access to a regulator. The successful management of enquiries is determined largely by DoHA being able to provide a timely, accurate and helpful response to an enquiry.

**3.33** The department's Aged Care Information Line, which was established in 1997, is available to respond to stakeholder enquiries relating to aged care, including prudential matters. The material utilised by information line staff is provided by PRB in the form of prudential regulation scripts, which outline suggested responses to frequently asked questions. Details about access to the information line are publicised on the departmental Internet site. In 2007–08, DoHA reported that 26 918 calls to the information line (or 27.2 per cent of all calls) were related to accommodation bonds or charges.

### *Hard copy materials*

**3.34** DoHA produces and distributes advisory materials in hard copy form to assist stakeholders. The majority of these publications, which may also appear on the department's Internet site, are aimed at assisting approved providers and their auditors to understand and meet prudential requirements. This information includes: the *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds*; and updated financial rates in departmental publications/newsletters, such as *Payment Essentials*.<sup>30</sup>

**3.35** The department's provision of a wide range of targeted materials and information through a variety of media represents a sound approach to assisting stakeholders to understand their rights and responsibilities in relation to accommodation bonds and prudential requirements.

<sup>29</sup> These include: <[www.agedcareaustralia.gov.au](http://www.agedcareaustralia.gov.au)> and <[www.seniors.gov.au](http://www.seniors.gov.au)>.

<sup>30</sup> *Payment Essentials* is a monthly departmental newsletter designed to keep financial officers within residential aged care services informed of changes to all payment related forms and processes for residential aged care. *Payment Essentials* is mailed to all aged care providers and is available on the department's website at <[www.health.gov.au](http://www.health.gov.au)>.

### *Consultative arrangements*

**3.36** Regular formal meetings between a regulator and key stakeholders provide the opportunity for an open exchange of information, opinions and feedback on regulatory matters.

**3.37** DoHA meets with key stakeholders in a range of settings, from high level consultative meetings through to consultation rounds to discuss regulatory framework changes. These meetings occur between stakeholders and the department's Central Office staff and via DoHA's network of State/Territory Offices (STOs). These consultative arrangements provide DoHA with an opportunity to seek feedback from stakeholders on its performance as a prudential regulator.

**3.38** Feedback could also be obtained through a targeted campaign to gauge the views of regulated entities on the adequacy and appropriateness of prudential regulation. DoHA has not, however, formally sought feedback from stakeholders on its regulation of accommodation bonds. This was confirmed by external stakeholders who informed the ANAO that feedback had not been sought from providers. The department advised that, while formal feedback had not been sought, the opportunity is available to stakeholders to raise issues as part of consultative arrangements.

**3.39** Implementing specific arrangements to obtain regular feedback from stakeholders would enhance DoHA's ability to capture systemic stakeholder issues and use this information to inform improvements to prudential regulation processes.

### **Documenting operating policies and procedures**

**3.40** Establishing and publishing standard operating procedures for key regulatory activities, and training staff in their use, enhances operational efficiency and consistency in carrying out regulatory activities. It provides stakeholders with confidence that regulatory activities are conducted in accordance with legislative requirements and reflect better regulatory practice. It also reduces the impact of staff turnover, which is particularly important for smaller regulators where there is limited additional capacity to cope with loss of corporate knowledge.

**3.41** DoHA has not established standard operating procedures for key prudential regulatory activities performed in its Central Office or undertaken by its STO network. In general, the department is at an early stage in its documentation of prudential policies and procedures, with several draft



manuals/guidance documents and some limited documentation of lower level compliance tasks. The absence of documented operating policies and procedures increases the risk of operational inefficiency and inconsistent application of regulatory requirements. It also increases the risk of unlawful regulatory decisions.

## Recommendation No.5

**3.42** The ANAO recommends that, in order to ensure nationally consistent implementation of prudential arrangements, DoHA establishes policy and procedural documentation for key aspects of its prudential regulation of residential aged care accommodation bonds.

### *Departmental response*

**3.43** *The department agrees with the recommendation.* The department will review existing policy and procedural documentation and ensure that there is more complete coverage of standard operating procedures for key aspects of prudential regulation. This review will also take into account the centralisation of the prudential regulation function which will further reinforce a nationally consistent approach.

## Record-keeping

**3.44** In addition to meeting statutory record-keeping requirements, fully documenting key strategic, operational and regulatory decisions provides a record of evidence, analysis and judgment that can be used to:

- improve consistency of decisions over time and across decision-makers in an organisation;
- increase transparency of the decision-making process and of the rationale underpinning the decision;
- conduct a review, either internally or by a third party, of the merits of a decision; and
- enhance accountability, for example, by enabling an informed response to a regulated entity's formal challenge to a decision.

**3.45** In general, the ANAO considers that DoHA's management of prudential records requires strengthening. PRB fell short of better practice

record-keeping and did not comply with departmental record-keeping policy in areas such as file registration, completeness, classification and consistency.

**3.46** Previous ANAO audits within DoHA have identified weaknesses in the department's record-keeping systems, including within an ageing and aged care program, and subsequently recommended improvements. The current prudential regulation record-keeping practices did not provide an assurance that DoHA had promulgated lessons learned from earlier audits.

## 4. Monitoring and managing compliance

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*This Chapter examines the strategies and practices employed by DoHA to monitor regulated entities' compliance with prudential regulations and manage non-compliance with prudential regulations, including communication of compliance outcomes to stakeholders.*

### Overview

**4.1** Regulators have a responsibility to provide assurance to the Australian community that regulated entities are meeting mandated requirements. A compliance program informed by risk helps to:

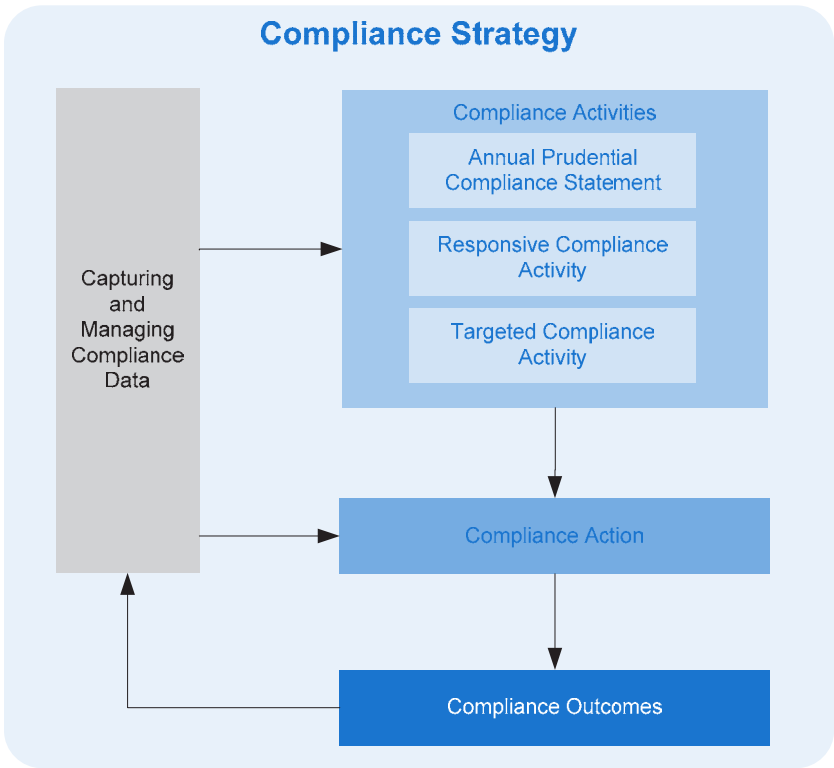
- target available resources at the highest priority regulatory risks;
- respond proactively to changing and emerging risks; and
- identify opportunities to reduce the nature and extent of regulatory activity where the risk of non-compliance has decreased.

**4.2** The ANAO's assessment of DoHA's compliance monitoring strategies and practices, and approaches that are used to manage non-compliance is depicted at Figure 4.1 and focused on:

- the department's strategic approach to compliance management;
- compliance activities;
- the capture and management of compliance data;
- action to determine the compliance status of providers; and
- the outcomes of the compliance action.

Figure 4.1

ANAO’s audit approach



Source: ANAO

Compliance strategy

4.3 A compliance strategy defines the types of activities to be undertaken to confirm compliance, who will undertake the activities, how frequently they will be conducted, and how they will be reported. The key determinants of the strategy’s design are the regulatory risks and the resources that are available to conduct monitoring activities. The regulator’s assessment of these will inform the most appropriate compliance strategies, assessment methods, responses to non-compliance and contingency responses to unexpected and residual risk. The systematic review and regular update of the strategy ensures that it reflects changing regulatory threats and remains effective.

4.4 Typically, regulators put in place a compliance program/schedule to guide the delivery of compliance activities over the shorter term, which gives effect to the overarching risk-based compliance strategy. Under a three year compliance strategy, for example, an agency may target a different risk

indicator each year in order to achieve an overall strategic objective or adopt a graduated approach to enforcement.

**4.5** Departmental officers informed the ANAO that PRB had not established a documented risk-based strategy or compliance schedule, but that it was part of the forward program of work. A documented strategy would assist DoHA to communicate its overall rationale for prudential compliance to stakeholders and support a more structured/systematic approach to compliance monitoring. In particular, a strategy could be used to articulate an appropriate balance between proactive and reactive compliance activity, express the criteria used by the department to target compliance action, and establish compliance parameters such as timeframes for compliance action. It would also serve to inform the routine analysis of compliance trends over time, as changes in compliance activity, for example a move from an education focus to an enforcement focus, could be taken into account when assessing changes in provider compliance levels.

**4.6** In the absence of a documented compliance strategy, DoHA has outlined its overarching approach to the management of prudential non-compliance in its *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds*. The department advised that the guide gives regulated entities an understanding of the risk-based approach adopted by DoHA and the types of factors that are considered in assessing the need for compliance action.

**4.7** In addition, departmental officers explained DoHA's (un-documented) approach to the enforcement of strengthened prudential arrangements. The ANAO was informed that PRB had implemented a staged approach to monitor and manage compliance, with an evolving focus from education in the first year following the framework changes in 2006 to enforcement in subsequent years. The incorporation of these approaches into a documented strategy would assist DoHA to communicate its strategic objectives to stakeholders and subsequently monitor and report on progress to achieve the objectives.

## Recommendation No.6

4.8 In order to plan and coordinate its prudential regulation compliance activities and facilitate the monitoring of compliance trends over time, the ANAO recommends that DoHA documents its compliance strategy, promulgates the strategy to internal and external stakeholders, and routinely reviews the strategy.

### *Departmental response*

4.9 *The department agrees with the recommendation.* The department will review the existing information published on its compliance approach in the *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds* and set out its compliance strategy in further detail. This will take into account experience and data obtained by the department during the first two years of administering the enhanced protections for accommodation bonds.

## Compliance activities

4.10 In the absence of a documented, risk-based compliance strategy and underpinning schedule, DoHA delivers a predominantly reactive compliance program primarily structured around the Annual Prudential Compliance Statement (APCS) process, supplemented by compliance activity in response to regulatory intelligence.

### *Annual Prudential Compliance Statement*

4.11 The APCS is DoHA's primary source of information in relation to the bond holdings of approved providers and also information on a provider's compliance with prudential requirements under the Act and the Principles. The Principles require the statement to be certified by one of the approved provider's key personnel and submitted for each financial year. It is completed through what was described by a departmental officer as a 'self assessment' model, backed by an independent auditor's opinion.

4.12 The APCS provides certification of: the total number and value of bonds held at the end of the financial year; whether bond refunds were made in the course of the year; whether all refunds were made within the timeframes specified in the Act and details of any non-compliance; any limits on the provider charging accommodation bonds; and compliance with prudential standards, including statements as to the causes of non-

compliance (see Figure 4.2 for a list of examples of prudential non-compliance). Further information on the processing of APCS generated prudential data is covered under a later section entitled *Capturing and managing compliance data*.

**Figure 4.2**

### Examples of provider non-compliance with prudential regulations

#### Refund of accommodation bond balances

- Failure to refund accommodation bonds within the required timeframes for bond balances that became due during the financial year.

#### Use of bonds and bond income

- Failure to use bonds for the provision of aged care to care recipients and the derived income to meet capital works costs, retire debt related to residential care or to improve the quality and range of aged care.

#### Liquidity Standard

- Failure to maintain the minimum level of liquidity, sufficient to enable the refund of bond balances that are expected to fall due in the 12 months following the date of signing the APCS.
- Failure to implement or maintain a written liquidity management strategy that sets out the:
  - dollar amount of the minimum level of liquidity under the strategy;
  - factors that were considered in determining the minimum level of liquidity; and
  - form in which the minimum level of liquidity is maintained.

#### Records Standard

- Failure to establish and maintain a bond register.
- Failure to correctly record in the register the interest payable with the refund of a bond.

#### Disclosure Standard

- Failure to enter into an accommodation bond agreement with each care recipient who paid a bond during the financial year.
- Failure to provide a copy of the agreement to care recipients or their representatives within seven days of entering into the agreement.
- Failure to provide a written guarantee of refund of the bond balance.
- Failure to comply with disclosure requirements to existing or prospective residents.

Source: ANAO

### *Responsive compliance activity*

**4.13** DoHA responds to information from a broad range of sources that provide insights into provider compliance with prudential regulation and

inform the department's views on the financial viability of providers, and ultimately the security of bond holdings. This includes information from credit agencies, ASIC, the media and other sources. The department also reviews data on complaints lodged with the Aged Care Complaints Investigation Scheme (CIS) and information obtained from other departmental programs, such as general purpose financial statements lodged under the Conditional Adjustment Payment (CAP).<sup>31</sup>

**4.14** Where concerns are raised, DoHA generally prepares a 'provider synopsis' to bring together such information on the provider. The ANAO reviewed synopses prepared by the department and found that they generally provided a comprehensive 'picture' of a provider. In order to ensure that decision-makers have access to all relevant information on a provider, DoHA indicated that it was developing an agreed synopsis pro-forma in consultation with decision-makers.

#### *Targeted compliance activity*

**4.15** The adoption of targeted or risk-based compliance activity has been a topical issue for prudential regulators over the last decade. National and international regulators have been working to develop improved methods to anticipate problems in regulated entities to support early intervention in contrast to responding after the event. A method often used by regulators is to 'risk rate' a regulated entity's willingness or ability to comply with regulations.

**4.16** Overall, DoHA's proactive or targeted compliance activity is the least developed of its approaches to identify non-compliance. Although the department advised that it undertakes targeted compliance activity based on data analysis and research that may indicate a heightened risk of non-compliance or major impacts from non-compliance, its development of risk indicators for aged care generally, and specifically prudential compliance, is at a relatively early stage. Therefore, DoHA is not in a position to routinely assess providers against an agreed and documented set of indicators to identify those providers that present the greatest prudential risk.

**4.17** The establishment of targeted compliance activity, as part of an overarching strategic approach to the management of compliance, would

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<sup>31</sup> The Conditional Adjustment Payment (CAP) was introduced by the previous government in 2004–05 as part of its initial response to the Hogan Review. The aim of CAP is to provide additional medium term financial assistance to residential aged care providers while encouraging them to become more efficient through improved management practices.



provide balance to the predominantly reactive model currently adopted by DoHA. A targeted compliance regime, based on effective risk profiling of providers, would give the department access to timely information, which would inform early intervention where required.

**4.18** DoHA had a clearly stated intention of supplementing the assurance that it gained from the audited APCS with additional compliance activities in order to meet its accountability obligations as a regulator. DoHA outlined the following approach to the Parliament at its attendance at a Senate Community Affairs Legislation Committee hearing in March 2006:

We agree that there is definitely a role for registered company auditors to work with the providers to confirm some of the information that will be held by Approved Providers in the bond register, but it is also the responsibility of the Department of Health and Ageing to ensure that the legislative framework passed by parliament is implemented as parliament intended. So the suite of monitoring and compliance activities that parliament would expect of any regulatory regime will be utilised for this one. We cannot rely solely on third party auditors to deliver on our responsibilities or accountability in that area.<sup>32</sup>

**4.19** The greater use of targeted compliance action, such as seeking detailed financial records from a small number of providers that present the highest risk of prudential non-compliance, would allow the department to better direct the limited resources that it has at its disposal for prudential compliance. It would also ensure that lower risk providers were freed from unnecessary regulation of their businesses.

**4.20** The Productivity Commission, in its draft research report entitled *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, recently commented on the lack of risk-based targeting of compliance activity in the aged care sector and resulting impact on providers. It found that the Aged Care Standards and Accreditation Agency's (the Agency's) conduct of unannounced visits across the sector irrespective of performance is not the most cost-effective or efficient way of improving the health and well-being of residents in under-performing homes. The Commission concluded that: '...if there was a more risk managed approach with greater focus on under performing homes, it is likely that the overall

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<sup>32</sup> Commonwealth of Australia, 2009, *Senate Community Affairs Legislation Committee: Reference: Aged Care (Bond Security) Bill 2006; Aged Care (Bond Security) Levy Bill 2006; Aged Care Amendment (2005 Measures No. 1) Bill 2006*, Canberra, p. CA31.

number of unannounced visits could be reduced, while potentially improving resident-focused care'.<sup>33</sup> In essence, a reduction in regulatory activities through better targeting of compliance activity could result in an improvement in compliance.

**4.21** DoHA has commenced preliminary work on the development of prudential risk indicators, with some initial indicators outlined in a draft document entitled *Prudential Regulation Branch Risk Indicators*. The draft document outlined data and information available on approved providers' financial risk and prudential compliance, as well as the sources of information such as the Australian Securities and Investments Commission (ASIC) and credit agencies. The document also outlined a range of indicators that could lead to non-compliance, such as a change in key personnel within the approved provider or a change in accreditation status.

**4.22** The department indicated that work was currently underway within PRB to weight risks and profile 'at risk' providers. Departmental officers also advised that PRB had contributed in a limited way to an Office of Aged Care Quality and Compliance (OACQC) assessment of compliance risk, with this work being undertaken by the Compliance Branch. It was envisaged that PRB would 'slot in' PRB risks when required.

**4.23** The objective of the Compliance Branch's work is to: '...establish the capacity to systematically evaluate data on all approved providers against a comprehensive set of risk factors to identify emerging compliance risks'. The compliance data would then be incorporated into the existing 'Homes of Concern' initiative.<sup>34</sup> This work commenced in October 2008 and a timeframe has not been established for completion. It was envisaged that, of the full set of risk indicators, one will relate to prudential risk due to the perceived link to care issues.

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<sup>33</sup> Productivity Commission, 2009, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, Canberra, pp. 40-41, available from <[www.pc.gov.au](http://www.pc.gov.au)> [accessed 29 June 2009].

<sup>34</sup> The Homes of Concern initiative comprises a list that identifies those aged care services/approved providers about which OACQC has identified a high risk of significant non-compliance. The distribution of the Homes of Concern list within DoHA is intended to promote the sharing of regulatory information and cooperation in responding to emerging compliance risks between:

- branches within Central Office with regulatory responsibilities; and
- Central Office and STOs.

**4.24** Regulators within the Health and Ageing Portfolio have developed fit-for-purpose compliance risk indicators and, in some instances, publicly released the indicators to assist regulated entities to comply with regulations. In 2007, the Agency published a set of compliance risks in its newsletter (*The Standard*) for aged care homes staff, managers, residents and their families. Indicators included: changes in approved provider; changes in key personnel; changes in management systems; and rapid growth in resident numbers. The article which accompanied the indicators stated that the Agency had identified risk indicators through research and analysis of the accreditation data that it held.

**4.25** More broadly, both national and international prudential regulators have been developing and refining risk-based regulatory frameworks since at least 1997. Consultation with these regulators would inform the department's current review of aged care risk factors by providing useful insights into the development of a set of fit-for-purpose risk indicators for its prudential regulation function.

## Capturing and managing compliance data

**4.26** Sound information management is central to effective and accountable regulatory administration. A regulator's ability to identify, analyse and prioritise regulatory risk; design and implement strategic and operational plans; make well-informed, reliable and consistent regulatory decisions; and provide assurance to stakeholders that regulatory objectives are met is dependent on the quality of the information available to it. The capture and retention of information is also fundamental to a regulator meeting its accountability obligations.

**4.27** There are a number of mechanisms that the department uses to capture data and become aware of potential compliance issues, including information obtained from:

- the Annual Prudential Compliance Statement (APCS) submitted by providers; and
- regulatory intelligence sourced from providers, unions, media or the public.

## **Annual Prudential Compliance Statement and the prudential database**

### *Data collection*

**4.28** A key element of the prudential regulatory framework is the requirement for each provider to lodge an APCS with DoHA. The APCS for each financial year is required four months after the provider's year-end. It includes information on compliance or non-compliance with refund timeframes and prudential standards during the year, and bond holdings at year-end. This means that some of the data in relation to bonds held at the start of the financial year (July for the majority of providers) may be 16 months old before it is collected as at 31 October, and then it may be a further three months or longer before it is fully analysed.

**4.29** Where bonds have been held in the financial year, the APCS must be accompanied by an audit opinion provided by an independent, registered auditor. Assurance is provided in relation to all specified legislated prudential regulatory requirements, but details of the measures taken by the provider to meet these requirements are not required to be reported.

**4.30** A contracted statement processing firm (the contractor) distributes APCS forms to each approved aged care provider. Where forms are not returned to the contractor within the specified timeframe (generally by 31 October), follow-up procedures, such as reminder letters, are issued by the contractor to encourage compliance. These measures are taken prior to referring the matter to PRB for possible compliance action. Twelve per cent of approved providers did not submit the 2007–08 APCS by the legislated due date of 31 October 2008, with the department working to obtain outstanding statements.

### *Data capture*

**4.31** Once the provider has returned the completed APCS form to the contractor, the contents of the form are entered into DoHA's prudential database by the contractor's staff. The contractor is responsible for monitoring the completeness and integrity of the information in the statements, and any reported non-compliance, anomalies and errors. The contractor has its own procedures manuals, work books and integrity measures to guide its processing of APCS forms.

### Data validation

**4.32** Validating data on entry into the information management system, and regularly reviewing the integrity of existing data holdings, provides decision-makers with an assurance over the reliability of the data. The data held on PRB's prudential database is validated in a number of ways, with in-built system integrity measures used to identify key conflicts within the data or missing data.

**4.33** The ANAO tested database records for a randomly generated selection of 65 APCS returns for 2007–08 in order to gain an assurance over the integrity of prudential data holdings. Testing found that, for around 3 per cent of the sample, issues such as the conformance of audit opinions with requirements, qualified audit opinions or reported non-compliance with prudential standards were not identified through DoHA's review processes. The results are summarised in Figure 4.3.

**Figure 4.3**

#### Summary findings: testing of a case selection of 2007–08 APCS returns

Test	ANAO Finding
<b>Database entry supported by attached APCS?</b>	Yes—100 per cent of sample
<b>APCS submitted by deadline?</b>	No—15.4 per cent of sample were not
<b>Appropriate action taken for non-submission, with details recorded in the database?</b>	Yes—all items cleared One case was referred to PRB for follow-up
<b>Accommodation bonds/entry contributions held by providers?</b>	24.6 per cent of sample did not hold bonds or contributions and so were not required to complete the remainder of the statement <sup>35</sup>
<b>Details of bond-holding correctly recorded in database?</b>	Yes—100 per cent
<b>Signature of key personnel verified?</b>	Yes—100 per cent of signatures verified

<sup>35</sup> All approved providers are sent the statement, but only those that held bonds are required to complete it in full.

Test	ANAO Finding
<b>Original APCS form complete?</b>	No—13.8 per cent of sample were not Examples of missing items were: <ul style="list-style-type: none"> <li>• audit opinion missing</li> <li>• Parts B and C missing</li> <li>• Attachment A (list of bonds) missing</li> <li>• Attachment A incomplete or not totalled</li> <li>• questions not answered</li> <li>• Attachment B (details of overdue refunds) not provided, although instances declared on form</li> </ul>
<b>Appropriate action taken for incompleteness, with details recorded in the database?</b>	Yes—all items followed up and submitted
<b>Data on APCS accurately entered into database?</b>	Yes—100 per cent
<b>System controls identified integrity issues?</b>	Yes—errors in 6 per cent of sample. All related to Attachment A totals of numbers and values of bonds or entry contributions
<b>Appropriate action taken regarding data integrity issues, with details recorded in the database?</b>	No—half of the cases were followed up and corrected by the contractor or PRB (on referral). However, the remaining instances of data integrity issues identified by the system were overlooked by the contractor. Of these, one was subsequently identified and followed up by PRB after the contractor had finalised the case
<b>Audit opinion attached?</b>	No—3 per cent of sample did not have the opinion attached to the original statement
<b>Action taken to follow-up non-receipt, with details recorded in the database?</b>	Yes—all items followed up and received
<b>Auditor status confirmed?</b>	Yes—100 per cent
<b>Audit opinion given in respect of provider compliance with Div.3 Part 4 of Principles?</b>	No—10.8 per cent of sample opinions stated that the form was compliant, not the provider
<b>Appropriate action taken regarding audit opinion, with details recorded in the database?</b>	No—just over half of those cases were correctly identified and pursued. The remaining non-compliant cases were not identified by the contractor. Of these, one was subsequently identified by PRB
<b>Audit opinion addressed to Secretary?</b>	No—6 per cent of the sample were not Of these cases, one case was identified by the contractor and followed up. The others were not identified
<b>Audit opinion qualified?</b>	7.7 per cent of the sample had a qualified audit opinion Qualifications were in relation to failures to comply with the prudential standards or the late refund of bonds

Test	ANAO Finding
<b>Appropriate action taken regarding audit opinion, with details recorded in the database?</b>	Of these, all but three were correctly acted upon Two cases had no reference on the database to the identified breach of the Liquidity Standard One case had no reference on the database to the identified breach of the Records Standard
<b>Overdue refunds reported?</b>	12.3 per cent of sample reported overdue refunds
<b>Action taken and details correctly recorded in the database?</b>	Yes—100 per cent
<b>Limits on charging bonds reported?</b>	No sampled providers reported limits on charging bonds
<b><u>Liquidity Standard</u></b>	
<b>Liquidity Standard compliance reported?</b>	100 per cent of sampled providers reported compliance with the Liquidity Standard However, 3 per cent of sample were qualified by the auditor for a breach of the Liquidity Standard
<b>Action taken regarding Liquidity Standard non-compliance and recorded in the database?</b>	Of these non-compliant cases, none were identified in the database or had action taken
<b><u>Records Standard</u></b>	
<b>Records Standard compliance reported?</b>	97 per cent of sampled providers reported compliance with the Records Standard. The remaining 3 per cent reported non-compliance and provided explanations that were recorded in the database However, 5 per cent of sample were qualified by the auditor for breach of the Records Standard
<b>Action taken regarding Records Standard non-compliance and recorded in the database?</b>	Of these non-compliant cases, one case was not identified in the database or had action taken
<b><u>Disclosure Standard</u></b>	
<b>Disclosure Standard compliance reported?</b>	97 per cent of the sampled providers reported compliance with the Disclosure Standard. The remaining 3 per cent reported non-compliance and provided explanations that were recorded in the database These cases were also qualified by the auditor
<b>Action taken regarding Disclosure Standard non-compliance and recorded in the database?</b>	Of these non-compliant cases, half were referred to PRB for action, while half were recorded in the database but not referred

Source: ANAO from DoHA data

**4.34** Although the issues revealed by the ANAO's testing affected a small number of sample returns, invalid data or ineffective monitoring of valid data

poses implications for sound prudential regulation. At least one case has been identified by departmental staff where a provider advised in its 2006–07 APCS that it had complied with all prudential regulations, but this assurance was subsequently found to be incorrect. The attached audit opinion was processed and considered complete by the contractor. However, qualifications contained in the opinion were not detected by the contractor, and the APCS was consequently not referred to PRB for consideration. It was only after a complaint was received from a member of the public in relation to the repayment of bonds that the opinion was subsequently reviewed by DoHA. It was found to be qualified, with significant compliance and viability issues identified. The provider was then subject to regulatory review and ultimately formal compliance action.

**4.35** In response to the above issue, departmental staff established a policy requiring the review of all audit opinions in 2007–08, irrespective of whether the APCS was referred for consideration. This option was pursued as departmental officers considered that the contractor provided primarily a data entry service, with limited capacity for more in-depth analysis of audit opinions. Given the small number of compliance staff within PRB, the review of all audit opinions presents a considerable workload. DoHA could consider a risk-based approach to the sampling and review of audit opinions or better use could be made of contracted resources.

#### *Analysis and reporting of data*

**4.36** In order to adequately support decision-makers, regulatory data must be timely, accessible and fit-for-purpose. DoHA advised that there are residual issues around the display of prudential data on the prudential database, and that these issues will be progressively addressed over time. In January 2008, the department sought improvements to the reporting capacity of the database.<sup>36</sup> Limited compliance reporting is now incorporated into the database (for 2007–08), having been missing for previous periods. Departmental staff indicated that the aim was to further improve the quality of prudential reporting and to enhance analytical capabilities.

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<sup>36</sup> While the prudential database is owned by the department, the contractor has contractual responsibility for its maintenance, including improvements to functionality.



## Regulatory intelligence

**4.37** Regulatory intelligence is information acquired by a regulator that, in isolation, may be inconclusive. However, when it is combined with other pieces of intelligence, or added to electronic information held in databases, it may provide sufficient evidence of heightened regulatory risks to warrant investigation.

**4.38** Sources of intelligence on a provider's prudential compliance and financial viability include information obtained from:

- aged care providers;
- the Aged Care Standards and Accreditation Agency (the Agency);
- the Aged Care Complaints Investigation Scheme (the CIS);
- ageing and aged care programs administered by DoHA; and/or
- information from third parties, such as unions, the media or the public.

**4.39** Over the last twelve months, the department has re-aligned its organisational structure in an effort to improve the use of regulatory intelligence. Key initiatives include the co-location of approved provider regulation and CAP administration within the same branch as the prudential functions in order to provide a more holistic approach to regulatory activities. Furthermore, the 'Homes of Concern' initiative provides a forum for OACQC managers to meet regularly to discuss cases of provider non-compliance, with documentation of discussions circulated to State Managers/Assistant State Managers and the Chief Executive of the Agency.

**4.40** While DoHA has changed its organisation structure to provide a more coordinated approach, it is yet to establish a means to bring together the array of regulatory intelligence that it holds on each aged care provider. To gain a holistic view of a provider, departmental officers manually collate information from separate databases and, potentially, a range of files held in both Central Office and in STOs. This situation is resource intensive, increases the risk that important regulatory intelligence is overlooked, and makes it difficult for the department to respond to emerging compliance issues in a timely manner.

**4.41** The 2008–09 Office of Aged Care Quality and Compliance business plan states that an integrated data management system, to make better use of provider information collected by different branches, is now in place as a mitigating factor in their risk management plan. Departmental officers

indicated that work on the development of the integrated data management system is ongoing.

## **Recommendation No.7**

**4.42** The ANAO recommends that DoHA establishes a process or system to capture, collate and share regulatory intelligence from internal and external sources to build a risk profile of regulated entities.

### ***Departmental response***

**4.43** *The department agrees with the recommendation.* The department has commenced the integration of regulatory information systems, data collections and reporting capabilities. This work has enhanced the department's capacity to assess the risks of regulated entities. The department has also made structural changes such as centralising and co-locating the prudential and approved provider regulatory functions to improve the sharing of regulatory information and incorporating the administration of the Conditional Adjustment Payment into the same area. It has also formed a group of aged care program managers to regularly discuss regulatory intelligence and increased the systematic sharing of regulatory information with the Aged Care Standards and Accreditation Agency.

## **Gathering regulatory intelligence**

**4.44** Generally, DoHA obtains information on the status of a provider's compliance with prudential regulations from the provider, or the provider's auditor, through the APCS process. Where a provider has indicated non-compliance, the department confirms that a breach has occurred and then determines an appropriate response to remedy the factors that led to the non-compliance.

**4.45** Where suspected non-compliance is reported to DoHA, the department has a number of legislated powers at its disposal to access information from a provider in order to gain an assurance of prudential compliance or the extent of non-compliance. The information gathering powers in the Act (sections 9-2, 9-3, 9-3A and 93-1—see Appendix 3 for further detail on the extent of these powers) allow DoHA to seek information relating to specific matters, such as accommodation bonds and suitability to be an approved provider. These powers range from requiring the production of written information through to the oral examination of persons that may have information relating to a

provider. The ANAO's review of departmental records indicated that DoHA utilised these powers to obtain information from providers that were subject to compliance action.

**4.46** The exercise of information gathering powers is also useful as part of a targeted, risk-based approach to managing compliance. These powers would underpin access to detailed financial records of providers assessed as presenting the highest risk of prudential non-compliance.

## Compliance action

### Compliance rationale

**4.47** When non-compliance is found, a regulator must initiate action to address the risks posed by the non-compliance. Regulators need a range of response options that are proportionate to the risks presented. DoHA has outlined its compliance rationale in its *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds*, which states:

...in keeping with the objective of assisting the aged care industry to improve financial management practices, the [PRB's] principal focus will be on working with providers to assist them to comply with the new requirements... However, in order to discharge its responsibilities with regard to the regulatory requirements, the Department may need to take compliance action in some instances. The Department has a range of powers to monitor compliance and take action (including the imposition of sanctions) where necessary.<sup>37</sup>

**4.48** DoHA advised that investigation and enforcement of prudential compliance is principally reactive, as outlined earlier, with a focus on a relatively small number of providers for which sufficiently serious compliance concerns arise.

### Compliance investigations

**4.49** Actual or suspected cases of prudential non-compliance may be directed to STOs for investigation as a result of a complaint lodged under the CIS or from PRB based on reported non-compliance identified through the

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<sup>37</sup> Department of Health and Ageing, Undated, *User's Guide to the Regulation of Approved Providers Holding Accommodation Bonds*, Canberra, p. 44, available from: <[www.health.gov.au](http://www.health.gov.au)> [accessed 31 March 2009].

APCS process. In general, investigations are conducted in a similar manner irrespective of the source of the complaint.

*Investigating complaints regarding prudential non-compliance*

**4.50** Cases of suspected prudential non-compliance lodged under the CIS, such as the failure of a provider to repay a resident's bond, are categorised by the department as financial cases and added to IMS. The financial category also includes complaints that may not relate to accommodation bond issues. A review of financial complaints recorded on the IMS in the six months from 1 July 2008 indicated that there were, on average, six cases each week, of which one third were potential prudential issues relating to accommodation bonds.

**4.51** In the case of a CIS complaint, PRB will not necessarily have prior knowledge of the complaint details. These cases of suspected non-compliance are investigated within the CIS framework. However, PRB officers have established a separate process to independently monitor new 'financial' cases entered onto IMS in order to identify prudential issues and gather regulatory intelligence on providers.

*Investigating reported prudential non-compliance*

**4.52** All identified areas of non-compliance obtained through the APCS process are referred from the department's contracted statement processing provider to PRB for consideration. DoHA's subsequent management of prudential non-compliance is guided by an informal assessment by the Prudential Compliance Section of whether non-compliance constitutes a major or minor breach. The factors that can influence the assessment of the non-compliance include:

- the provider's explanation of the breach;
- prudential history;
- compliance history; and
- the extent, number and duration of any breaches.

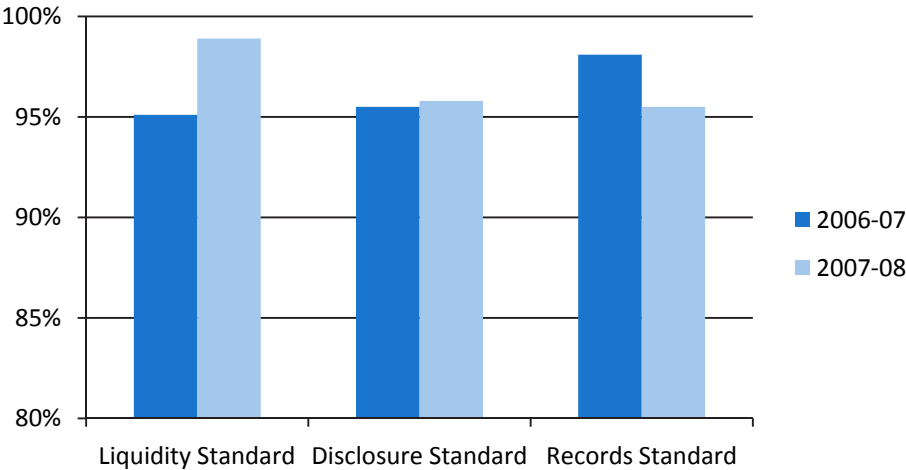
**4.53** As part of their review of late bond refunds, PRB officers may consider the total number of bonds affected; the number of late refunds in relation to total bond holdings, and the associated risk; the reasons given for the late refunds and whether they are within the control of the approved provider (such as delays in obtaining correct forwarding details); other compliance issues such as questions of care; and complaints received through the CIS.

**4.54** In comparing APCS data for 2007–08 with those for 2006–07, there was improved overall reported compliance by providers in relation to the liquidity and disclosure standards, and a reduction in the level of reported compliance with the records standard. PRB officers considered that the decrease in compliance with the records standard was partly due to the inclusion of additional certification requirements in 2007–08 relating to interest payments. Overall compliance levels varied across industry sectors (see Figure 4.4 and Figure 4.5)

**4.55** Similarly, there was an overall improvement in reported compliance by approved providers with statutory timeframes for the refund of bonds, from an average of 85 per cent compliant in 2006–07 to 87 per cent in 2007–08. The level of compliance also varied between industry sectors, with the ‘for-profit’ sector showing a reduction in reported compliance levels between 2006–07 and 2007–08 (see Figure 4.6).

**Figure 4.4**

**Reported compliance with prudential standards<sup>38</sup> by year**

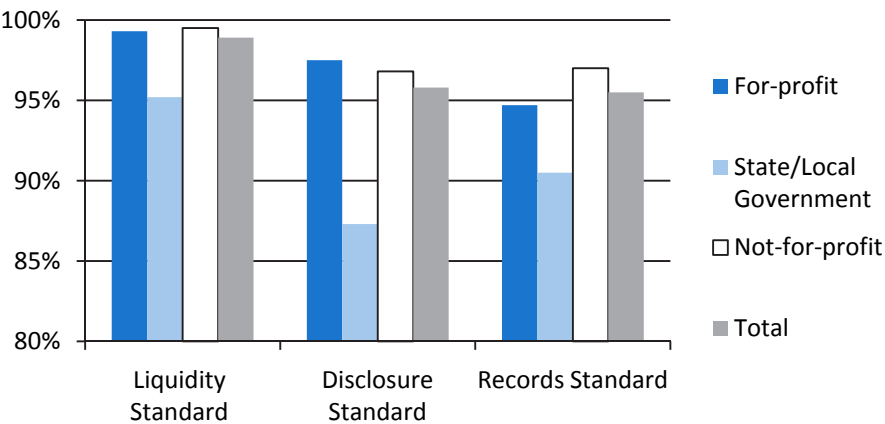


Source: ANAO from DoHA information

<sup>38</sup> Figure 1.4 in Chapter 1 provides an overview of the prudential standards.

Figure 4.5

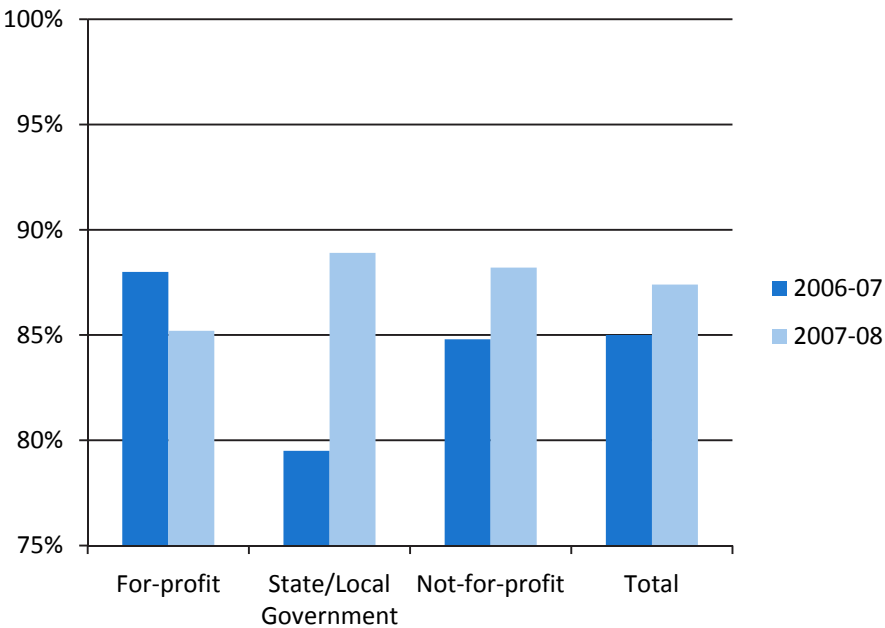
Reported compliance with prudential standards by industry sector (2007–08)



Source: ANAO from DoHA information

Figure 4.6

Reported compliance with statutory refund timeframes by industry sector



Source: ANAO from DoHA information

## Handling 'minor' breaches

**4.56** The management of minor breaches of prudential regulations identified through the APCS process is handled centrally by PRB. The ANAO found that compliance officers generally contact the provider by telephone to confirm the circumstances that led to the breach and to determine the remedial action to be taken. If the breach appears to relate to a systemic issue, PRB will issue the provider with a written warning. If the breach is non-systemic and the risk is assessed as low, the letter is waived and no further action is taken against the provider.

## Investigating 'major' breaches

**4.57** Where suspected provider non-compliance with prudential regulations is categorised by PRB as major, or where a provider has failed to adequately respond to PRB's requests for information, the case is referred to the relevant STO for investigation. In relation to the 2006–07 statement period, DoHA referred 65 cases to its STOs for investigation, with a further 29 referred for 2007–08.

## Investigation methodology

**4.58** The majority of STOs adopt a desk-based approach to the investigation of prudential non-compliance. As with minor cases of prudential non-compliance, the investigation officer generally contacts the provider to outline the area of concern and to seek evidence of corrective action.

**4.59** The department's STOs, and even officers within the same STO, adopt different investigative techniques and evidentiary requirements. In general, departmental investigators do not seek evidence to corroborate the stated remedial action taken by providers. This means that DoHA relies solely on provider assertions. The ANAO suggests that, in order to obtain reasonable assurance, DoHA adopts a risk-based approach to the collection of evidence to demonstrate remediation of non-compliance by providers.

**4.60** In its review of investigation files, the ANAO also identified elements of good practice adopted by departmental investigators. One investigator routinely included relevant excerpts from the Principles in correspondence to providers subject to investigation. This approach highlights the dual role of an investigation, both as a means of enforcing compliance and also as means of educating regulated entities.

## Investigation timeframes

**4.61** DoHA has not established timeframes for the completion of compliance investigations generally, and specifically for prudential investigations. The ANAO's analysis showed that, in 2006–07, the average duration of an investigation was around 81 days.<sup>39</sup> Data to complete an analysis of 2007–08 investigation data was not available as 34 per cent of cases were not finalised at the point at which the ANAO accessed data in early 2009. As part of an overarching risk-based compliance strategy and implementation schedule, DoHA could establish targets for the completion of prudential investigations. The establishment of targets would allow the department to benchmark performance and identify opportunities to improve the timeliness of investigations.

**4.62** DoHA has since advised that all investigations relating to APCS identified breaches of prudential regulations will now be handled within Central Office by Prudential Compliance Section officers. The department considered that centralisation of all formal compliance action would ensure that technical experts will have the primary carriage of more complex prudential issues. As STO investigators will retain responsibility for the investigation of prudential complaints lodged under the CIS and for gathering regulatory intelligence, there is an ongoing need for a program of training and support for STO officers in relation to prudential regulation.

## Compliance outcomes

**4.63** Once an STO has considered a provider's response to its request for information regarding the causes of non-compliance, which generally involves input from PRB, a decision is taken as to whether further compliance action is warranted. DoHA has a range of actions available to it when addressing compliance issues, including:

- no action—in the event the alleged non-compliance is unsubstantiated;
- education—where a provider's non-compliance was unintentional and based on a misunderstanding of requirements;
- issue of a Notice of Non-compliance (issued under section 67-2 of the Act); and

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<sup>39</sup> The shortest investigation duration was 17 days and 356 days the longest. One case remained outstanding from 2006–07.



- imposition of sanctions—a sanction may be imposed if the provider’s response to the Notice of Non-compliance is unsatisfactory, and may include:
  - prohibiting the charging of accommodation bonds;
  - restricting funding to existing residents;
  - revoking or suspending the existing allocation of places;
  - revoking or suspending the provider’s approval as a provider of aged care;
  - varying the conditions of approval for allocated places; or
  - prohibiting any further allocation of places.

**4.64** In 2007–08, DoHA reported that it had issued 62 ‘warning letters’ and one Notice of Non-compliance to providers for prudential non-compliance.<sup>40</sup> In the previous year, the department reported that it issued 12 warning letters, six Notices of Non-compliance and one Notice to Remedy to approved providers for prudential non-compliance. Sanctions were also imposed in 2006–07 on one provider with a history of non-compliance with statutory timeframes for accommodation bond refunds and late submission of the APCS.<sup>41</sup>

**4.65** In a situation where DoHA considers that further compliance action is necessary, a Notice of Non-compliance may be issued under section 67-2 of the Act. The Notice of Non-compliance requires the provider to submit details of action taken, or intended to be taken, to remedy the non-compliance. If the provider’s response to a Notice of Non-compliance is not satisfactory, this may result in further compliance action including the imposition of sanctions.

## Sanctions

**4.66** Sanctions are imposed by the department on providers in cases of serious non-compliance with their legislated responsibilities. DoHA has indicated that a decision to impose sanctions is not taken lightly and includes consideration of issues such as the seriousness of the non-compliance; whether it has occurred before; and whether it threatens the health, welfare or interests

<sup>40</sup> Department of Health and Ageing, 2008, *Report on the Operation of the Aged Care Act 1997: 1 July 2007 to 30 June 2008*, Canberra, p. 58.

<sup>41</sup> Department of Health and Ageing, 2007, *Report on the Operation of the Aged Care Act 1997: 1 July 2006 to 30 June 2007*, Canberra, p. 58.

of the residents. Different types of sanctions may be imposed depending on the nature of non-compliance.

### ***Appropriateness of sanctions***

**4.67** DoHA's use of sanctions to address prudential non-compliance is infrequent. During the course of the audit, the ANAO received a range of views from internal and external stakeholders on the appropriateness of the current sanction regime in respect to prudential regulation. In general, stakeholders considered that the existing suite of sanctions was more suited to rectifying quality of care issues. In particular, there was a view that the application of a sanction for a breach of prudential regulations, such as prohibiting the charging of accommodation bonds, in isolation may contribute to financial viability issues for the provider.

**4.68** The views expressed by stakeholders were also reflected in the *Regulatory Impact Statement*, which formed part of the *Explanatory Memorandum* for the *Aged Care (Bond Security) Bill 2005*. The Statement included the following reference: '...sanctions are infrequently exercised in relation to prudential matters as the current focus of the aged care legislation is on ensuring quality of care rather than ensuring the financial viability of providers'.

**4.69** DoHA is yet to evaluate its prudential compliance program, or more specifically the range of remedial actions available to address prudential non-compliance. An evaluation of DoHA's prudential regulation compliance program would provide insights into the adequacy of remedial action available for prudential non-compliance and provide useful information to support the development of a risk-based compliance strategy.

**4.70** The department has since indicated that it is considering regulatory reforms that will deliver more appropriate remedies to prudential non-compliance and limit any adverse impact upon the financial viability of providers subject to compliance action. DoHA has stated that its experience in managing prudential non-compliance has demonstrated that the existing sanctions have limitations in providing a proportionate response for cases of non-compliance and may reinforce problems for providers experiencing financial difficulties.

## **Lessons learned**

**4.71** Improving a regulated entity's understanding of applicable regulations through education activities is a key strategy to improve regulatory

compliance and may induce compliance at a lower cost (to PRB and the provider) than subsequent action to address non-compliance. DoHA has stated that a key element of PRB's work for 2008–09 is the promotion of provider understanding of prudential monitoring and compliance activities through communication with industry stakeholders on key issues. Over the last two years, DoHA has not undertaken a specific program of awareness to convey the outcomes of its compliance program to providers or to share lessons learned from the prudential compliance program with providers. The ANAO suggests that, in order to improve providers' understanding of the regulatory framework and compliance issues, DoHA distributes information to providers on the outcome of its compliance program on a periodic basis.

## 5. Safeguarding bonds

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*This Chapter introduces the Accommodation Bond Guarantee Scheme and examines DoHA's administration of the Scheme.*

### Accommodation Bond Guarantee Scheme overview

**5.1** In 2006, the Australian Government established the Accommodation Bond Guarantee Scheme (the Scheme) to protect residents' bonds in circumstances where a provider becomes bankrupt or insolvent and has defaulted on its bond repayment obligations.

**5.2** The Scheme provides for the Government to repay bond balances (or entry contributions) owing to residents and any interest due on outstanding balances in the event that a provider is unable to repay bonds. In return, residents' rights to pursue the defaulting provider to recover the bond balance are automatically assigned to the Government upon the making of a refund declaration. If the Government is unable to recover the full amount from the defaulting provider, it may levy all providers holding accommodation bonds to recoup the shortfall. An overview of the Scheme is provided at Figure 5.1, with further information on the background and key elements of the Scheme provided at Appendix 2.

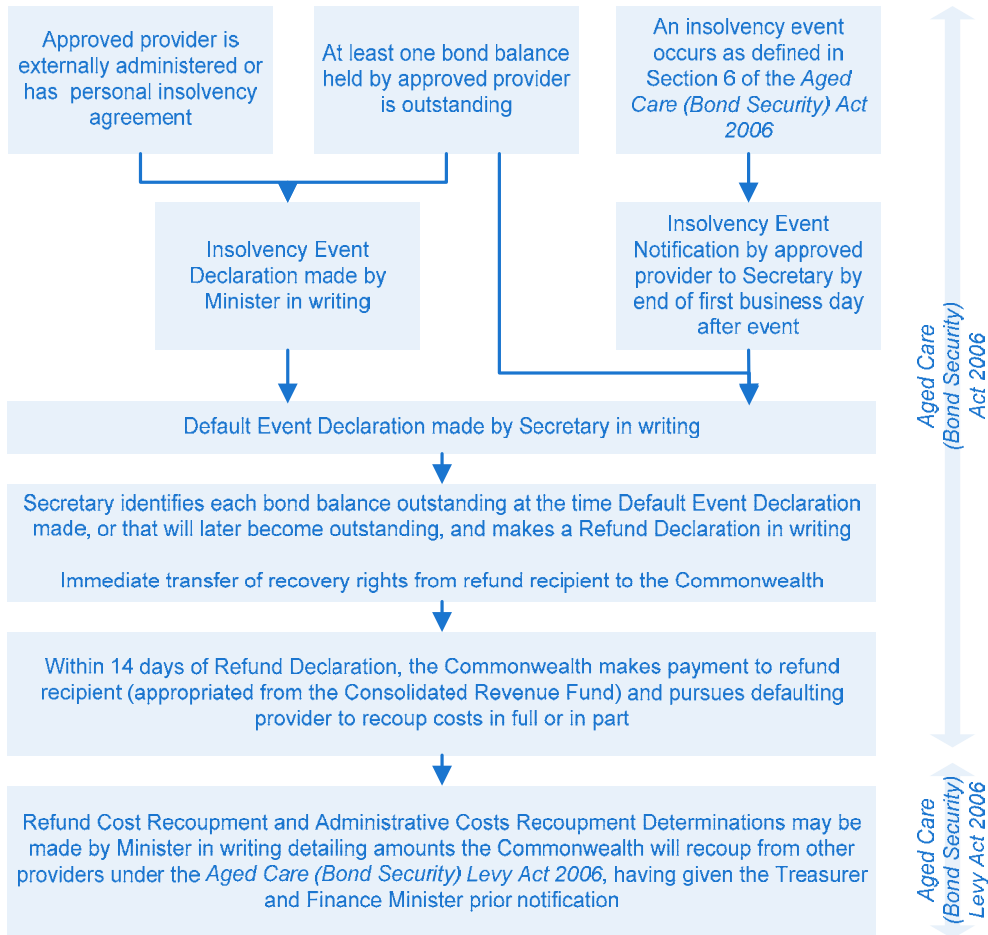
### Scheme activation

**5.3** At the time the Scheme was introduced there had not been a case where a provider had failed to repay a resident's bond. Since the Scheme's inception, the risk identified by the Hogan Review and acted upon by the Government has eventuated, with three instances where the Scheme has been triggered to repay outstanding bond balances to residents. Bond balances refunded or to be refunded by the Commonwealth under the Scheme total around \$19 million.

**5.4** In addition to Scheme events, DoHA reported to Parliament in February 2009 that in the preceding 12 months: '...around half a dozen approved providers have entered into external administration'.<sup>42</sup> While a provider's entry into voluntary administration does not, in itself, trigger the Scheme, it does significantly increase the risks to bond security.

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<sup>42</sup> Commonwealth of Australia, 2009, *Senate Standing Committee on Community Affairs—Estimates*, Canberra, p. CA74.

**Figure 5.1****Accommodation Bond Guarantee Scheme overview**

Source: ANAO from DoHA information

**5.5** Scheme activations have been administratively challenging for DoHA, particularly given the lack of precedent and the change in departmental focus from traditional quality of care issues to prudential considerations. DoHA has worked through these challenges in order to calculate outstanding bond balances and repay residents. The Government did not levy the industry in the first Scheme event and a decision is yet to be made in relation to subsequent events.

**5.6** The approach that DoHA has adopted to guide its administration of the Scheme is in keeping with its view that the Scheme is ‘relatively simple’ to administer. DoHA considers that the core Scheme processes are clearly set out

in the legislation, with the department managing these processes through: the development of a draft Scheme procedures manual; the establishment of task lists; the use of both internal and external legal advice; the formation of departmental taskforces to oversee home closures; tailored monitoring arrangements, such as daily progress reports from STOs; formal arrangements with administrators/liquidators to inform bond balance calculations; and a case management approach in PRB and in STOs.

**5.7** The ANAO's examination of the arrangements established by the department to govern its administration of the Scheme focused on:

- preparedness for Scheme activation in the form of guidance materials and training;
- engagement with key stakeholders during Scheme implementation; and
- evaluation of Scheme events and the development of lessons learned for internal and external stakeholders.

## Scheme preparedness

### Guidance for regulatory staff

**5.8** Key elements of the department's administrative arrangements for the Scheme are the draft *Accommodation Bond Guarantee Scheme Manual* and *Scheme Event Task List*. DoHA advised that the draft manual and task list have provided good guidance for events encountered to date and have facilitated the effective management of each event.

#### *Draft procedures manual*

**5.9** DoHA informed the ANAO that it had initiated work on the development of a comprehensive manual to support the activation of the Scheme in late 2006. The draft *Accommodation Bond Guarantee Scheme Manual-January 2007* initially provided to the ANAO included a broad range of information, such as: background information on the Scheme; roles and responsibilities; the framework; and the key administrative tasks as part of a Scheme event. The draft manual was not, however, in a form that would make it suitable as a resource for departmental staff involved in deploying the Scheme. The draft manual was substantially incomplete and did not provide comprehensive or complete information on procedures for administering the Scheme.

**5.10** DoHA subsequently informed the ANAO that it was continuing its work to finalise the draft manual, with the provision of a further draft dated May 2009. In particular, the department indicated that the significant effort over the last six months directed at updating the manual has been focused on the incorporation of knowledge gained from recent Scheme events and changes in the regulatory framework that commenced on 1 January 2009.

#### *Scheme event task list*

**5.11** The task list used to coordinate the department's administrative activities for Scheme events comprised a list of current and completed tasks. Information for each task consisted of a task number, a brief task description, deadlines and progress information, and assigned responsibility for the task. The inclusion of some additional performance information into the task list, such as milestones and details of their achievement, would provide the basis on which the department could assess the effectiveness and efficiency of its administrative efforts and inform an evaluation of Scheme events. In addition, the incorporation of the task list into the draft manual, in the form of a template, would also ensure its regular review as part of ongoing work to update the manual.

#### *Training*

**5.12** DoHA advised that training was not provided to staff responsible for activation of the Scheme. It was considered that the legislation was straightforward and that processes were clear. Furthermore, training was not considered necessary, as the officers with responsibility for delivering the Scheme were the same officers who were most knowledgeable about the Scheme within the department. This view does not, however, take into account the impact of staff turnover on the administration of future Scheme events.

**5.13** In order to effectively prepare for Scheme events and adequately support the department's staff involved in Scheme administration, the ANAO suggests that DoHA finalise its guidance materials as a priority and consider the merits of developing targeted training materials. The development of materials by existing officers with experience and knowledge of Scheme administration would lessen the risks that may eventuate through staff turnover.

## **Stakeholder engagement**

**5.14** The circumstances surrounding the failure of a residential aged care provider to repay accommodation bonds can be distressing to residents and

their carers, and also concerning to the aged care industry. The distress for residents and their carers is further compounded if they are also seeking alternative care arrangements without certainty regarding the security of their accommodation bonds. It is, therefore, important that stakeholders have access to timely, accurate information on the protections that are in place and the process that will be employed to refund their bond balances.

**5.15** DoHA's draft manual makes reference to a large number of stakeholders and participants in a Scheme event. These stakeholders include: the Minister; departmental officers (the Deputy Secretary, two aged care division heads, legal services, aged care branch managers and STO staff); insolvency practitioners; peak aged care organisations; other government agencies (the Department of Prime Minister and Cabinet, the Treasury, the Department of Finance and Deregulation and the Department of Education, Employment and Workplace Relations); defaulting providers; and residents. The manual also refers to a large number of template documents (not part of the draft manual in its present form) that include correspondence to stakeholders. Managing the needs of a large number of potentially disparate stakeholders and coordinating the flow of information to these groups is challenging.

**5.16** DoHA employs a number of mechanisms to provide stakeholders with information on the Scheme, including the department's attendance at resident meetings to respond to stakeholder questions, written updates to residents, publication of default event notices in the national press (as required by the legislation), general and Scheme-specific information via the Aged Care Information Line, and the assignment of dedicated case officers to manage the interface with residents and their carers.

**5.17** While a number of mechanisms have been adopted to keep residents and their carers informed, there is less information available to the aged care industry on the progress of Scheme events. The industry has access to publicly available information via the media, such as Ministerial media releases, but little direct information from DoHA. While acknowledging the limitations imposed by legislation, the department is encouraged to review its approach to the sharing of information on defaulting providers with affected parties, including the aged care industry. A commitment to greater sharing of information, where lawful, would recognise the mutual interest that DoHA and the industry have in ensuring the effective functioning of accommodation bond arrangements.



**5.18** The ANAO suggests that the department also consider, as part of its ongoing work to improve the Scheme manual, further coverage of stakeholder engagement. This additional information would assist departmental staff to better organise and coordinate Scheme-related communication materials and could include information on: key stakeholders; their information needs; the types of forums/meetings to be held; the timing of these meetings; standard briefing material for departmental representatives attending these forums/meetings; approved communication templates; and standard information for departmental communication channels, such as the Aged Care Information Line.

## Evaluation and lessons learned

**5.19** Key responsibilities of a regulator are, to the greatest extent possible, to minimise the likelihood of adverse events occurring, and if they do occur, to minimise the threats to regulatory objectives. Conducting a post-event evaluation is an integral component of a regulator's quality assurance system that assists in meeting this responsibility. By evaluating the causes of, and the response to, an adverse event, a regulator can identify improvements to the legislative framework and administrative processes.

**5.20** The key elements of an evaluation are:

- a systematic assessment of the causes of the event, which can include provider non-compliance with regulations, the realisation of a residual risk or deficient legislation; and
- the identification of any improvements to the department's administration of future events.

**5.21** DoHA is yet to comprehensively evaluate Scheme activations that have occurred. The department has, however, partially evaluated Scheme events to date. PRB officers have held informal discussions about the way in which the Scheme events have been administered and, as noted above, were working to include the outcomes of these discussions in draft procedures documentation. In addition, DoHA has acted to address deficiencies in the legislative framework for prudential regulation in response to the first Scheme event in 2007, with the department signalling its intent to further strengthen the legislation following more recent Scheme events.

**5.22** The ANAO suggests that DoHA finalise its draft manual and include a requirement for a documented post event evaluation. The identification of

lessons learned as part of an evaluation, and the timely communication of these lessons to stakeholders, is an important step in reducing the risk of further defaults in similar circumstances. Furthermore, the conduct of timely evaluations would provide useful insights into the department's handling of Scheme events, with the knowledge gained incorporated into guidance materials to inform the administration of future Scheme events.

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17 September 2009

# Appendices



## Appendix 1: Background to the Establishment of the Aged Care Accommodation Bond Trust

Under the *Aged Care Act 1997* (the Act) and in accordance with the User Rights Principles (the Principles), the Secretary of, the then, Department of Health and Family Services established the Aged Care Accommodation Bond Trust (the Trust) and the Aged Care Accommodation Bond Fund (the Fund) which was vested in the Trust. The Secretary also made the rules for the operation of the Trust and the Fund called the Aged Care Accommodation Bond Trust Rules (the Rules).

The Trust and the Fund commenced operation on 1 October 1997 and were effectively terminated the following month after the Government announced on 6 November 1997 that high care residents would not have to pay bonds. Providers of low care services who had charged bonds (known as entry contributions) prior to the commencement of the Act, were allowed to continue with their previous prudential arrangements and were no longer required to deposit bonds in the Trust.

Over the period that the Trust and the Fund operated, it:

- received \$7 583 165 in payments representing bonds deposited by approved providers;
- generated investment returns of \$201 713;
- repaid bonds over the period from 1998 to 2005 (with the last bond repaid in May 2005); and
- did not fund any of the Scheme manager's administrative costs, as these were met entirely by DoHA.

The Commonwealth repealed provisions in the Principles under which the Trust and the Fund were established and the Trust was terminated by the User Rights Amendment Principles 2006 (No. 1).

## Appendix 2: Accommodation Bond Guarantee Scheme

### Scheme background

At the time that strengthened prudential arrangements were being considered, there had been no cases where a resident's bond balance had not been repaid. However, the risk of default was considered to be increasing because of providers' greater reliance on bonds and the growing value of bonds.

The main problems to be addressed by the proposed scheme were:

- the prudential arrangements in place to protect bonds at the time, while they were considered to have worked well, did not guarantee the full refund of residents' bond balances;
- bonds, which were uncapped fees in a market in which supply was constrained, could represent a significant proportion of residents' life savings;
- a range of risks may have arisen that prevented residents from receiving a refund of the bond moneys due to them on leaving a residential aged care home. A provider may fall into financial difficulty and be unable to repay residents' bonds, either because of short term liquidity problems or net financial default. If a provider became bankrupt or insolvent, residents who were owed bonds ranked with other unsecured creditors as bonds were classified as unsecured debts; and
- the large sums of money held in bonds and the lack of a comprehensive arrangement for the monitoring and supervision of the management of these funds were of concern to the Government and the community at the time.<sup>43</sup>

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<sup>43</sup> Commonwealth of Australia, 2005, *Aged Care (Bond Security) Bill 2005—Explanatory Memorandum*, Canberra.

## Scheme overview<sup>44</sup>

### Coverage

The Scheme applies to all approved providers of residential aged care services and Multi-Purpose Services that hold accommodation bonds (paid as a lump sum) or pre-1997 entry contributions.<sup>45</sup>

### Scheme triggers

Where an insolvency event occurs (as defined in the Bond Act), providers are required to notify DoHA in writing by the end of the business day after the day on which the event occurs. Failure to notify the department of an insolvency event can result in penalties.<sup>46</sup>

In addition to the Scheme being triggered when an insolvency event occurs (such as bankruptcy or winding up of a company), the Minister for Ageing may also activate the Scheme by declaring that an insolvency event has occurred under certain circumstances. This limited flexibility could be used in cases where, for example, a provider may be in serious financial difficulty and not expected to be able to repay bond balances, but is not yet insolvent or bankrupt. In these cases the Minister may activate the Scheme to ensure the timely repayment of residents' bonds.

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<sup>44</sup> Information in this section was sourced from the *Accommodation Bond—Provider Fact Sheet*, available from: <[www.health.gov.au](http://www.health.gov.au)> [accessed 17 March 2009].

<sup>45</sup> A Multi Purpose Service (MPS) brings together local health and aged care services under one management structure. The aim is to give small communities, having difficulty supporting a range of independently run services, the opportunity to develop a more coordinated and cost-effective approach to service delivery.

<sup>46</sup> Insolvency events include:

- the making of an order:
  - under section 459A or 459B of the *Corporations Act 2001*; or
  - under a provision of the law of a State or Territory which deals with the incorporation of associations;
- that the approved provider be wound up in insolvency;
- the passing of a special resolution:
  - under section 491 of the *Corporations Act 2001*; or
  - under a provision of the law of a State or Territory which deals with the incorporation of associations;
- that the approved provider be wound up voluntarily;
- the passing of a resolution under paragraph 439C(c) of the *Corporations Act 2001* by the creditors of the approved provider that the approved provider be wound up.

### *Stakeholder notification*

DoHA is responsible for notifying the provider, the residents who are entitled to receive a refund of an outstanding bond balance from the defaulting provider, and the public through a national newspaper.

Once a default event occurs, DoHA is responsible for gathering the details of any bond balance owed to residents and/or former residents. Payments must be made within 14 days of determining the amounts payable.

### *Recovery of Commonwealth bond repayments*

If the Government does not recover the full amount of bond repayments from the defaulting provider, it can recover any costs that have been incurred (including any associated administrative costs) from the aged care industry through a levy.

All providers holding accommodation bonds (or pre-1997 entry contributions) ten days before the day on which a default event is declared and who are still operational at the time the levy is imposed, are potentially liable to pay the levy. New providers who enter the industry after a default event has occurred would not be liable to pay the levy.

A provider's liability for the levy is incurred when the Government imposes the levy through the making of Regulations. The Regulations set out the details of who is liable to pay a levy, how much is to be paid by each provider, when the levy must be paid and the way in which the levy must be paid.

In general, the policy intention is that the levy will be based on a provider's total bond holdings as a proportion of total bond balances across the residential aged care industry. For example:

If total bond holdings across the aged care industry is \$10 million and approved provider Y holds \$1 million in bonds (10 per cent of total bond holdings across the industry) provider Y would be levied 10 per cent of the total costs being recovered via the levy. If provider Z holds \$500 000 in bonds (five per cent of total bond holdings across the industry) provider Z would be levied five per cent of the total costs being recovered via the levy.

In determining the appropriate structure for any levy, the Government has indicated that consideration will be given to a range of factors, including the size of the default and providers' percentage bond holdings, and the capacity of the industry to pay a levy. The Government has stated its commitment to ensuring that the imposition of any levy does not compromise the quality of aged care services.



The Government has stated that the process for both imposing the levy and recovering the levy will be open and transparent, and following a default event, detailed information about the administration of the levy will be provided to the industry on an ongoing basis.

#### Estimated annual average Scheme repayments

While the amount of a levy can only be determined with reference to the bond repayments to be recouped for a given Scheme activation, DoHA informed the Community Affairs Legislation Committee of the Senate in 2006 that, in order to estimate the likely costs to industry, the department commissioned a consultant to analyse the financial risk profile of the residential aged care industry. The analysis reported to the committee was that:

...in any given financial year the average value of accommodation bonds that may need to be repaid by the guarantee arrangements, and consequently recovered from providers, would be in the order of 0.2% of the value of the industry's accommodation bond holdings.<sup>47</sup>

Based on the department's earlier modelling work, and current bond holdings of around \$8 billion, the amount at risk would be approximately \$16 million per annum. DoHA did, however, advise the committee that the model used to calculate the repayments was: '...incredibly conservative...'. In addition, the department advised that further modelling, not only indicated that on average repayments would be 0.2 per cent per annum, but repayments would be more than 0.8 per cent of bond holdings once in 20 years.

The suggested conservative nature of the modelling appears to have been supported by experience since the Scheme was established, with events to date involving significantly less defaulted bond holdings than the \$16 million per annum suggested by DoHA's modelling work.

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<sup>47</sup> Commonwealth of Australia, 2006, *Senate Community Affairs Legislation Committee—Aged Care (Bond Security) Bill 2006; Aged Care (Bond Security) Levy Bill 2006; Aged Care Amendment (2005 Measures No. 1) Bill 2006*, Canberra, p. CA37.

## Appendix 3: Information Gathering Powers

### Extracts from the *Aged Care Act 1997*

#### *Secretary's power to obtain information and documents*

#### **Division 93—What powers are there to examine people and obtain documents?**

##### **93-1 Secretary's power to obtain information and documents**

- (1) The Secretary may, by written notice, require any person whom the Secretary believes on reasonable grounds to be capable of giving information relevant to any of the matters set out in subsection (2), to attend before an authorised officer specified in the notice, at a time and place specified in the notice:

- (a) to answer any questions put by the officer; and
- (b) to produce to the officer such documents, or copies of documents, as are referred to in the notice.

Note: Sections 28A and 29 of the Acts Interpretation Act 1901 (which deal with service of documents) apply to notice given under this section.

- (2) The Secretary may act as provided for under subsection (1) in relation to any of the following matters:

- (a) assessing whether a person who is or has been an approved provider is complying with its responsibilities under Chapter 4;
- (b) assessing whether an approved provider's claims for payments under Chapter 3 or other payments under this Act have been properly made;
- (c) assessing whether appraisals or reappraisals made under Part 2.4 have been properly made;
- (d) assessing whether conditions of a grant under Chapter 5 have been complied with;
- (e) assessing whether records have been kept as required under Part 6.3;
- (f) assessing any application made under this Act.

- (3) A person may refuse to comply with a requirement under subsection (1) that does not relate to:

- (a) the affairs of an approved provider that is a corporation; or
- (b) the payment of subsidy under Chapter 3.

Note: Approved providers have a responsibility under paragraph 63-1(1)(b) to co-operate with a person exercising powers under this Part and to comply with this Part in relation to the person's exercise of those powers. An approved provider who does not comply with a requirement under subsection (1) may not be complying with that responsibility. Failure to comply with a responsibility can result in a sanction being imposed under Part 4.4.

- (4) A person is guilty of an offence if:
  - (a) the person refuses or fails to comply with a requirement under subsection (1); and
  - (b) the requirement relates to:
    - (i) the affairs of a corporation that is or has been an approved provider; or
    - (ii) the payment of subsidy under Chapter 3.

Penalty: 30 penalty units.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

- (5) The powers of an authorised officer under this section are to be exercised subject to the requirements of Information Privacy Principles 1, 2 and 3 of the *Privacy Act 1988*.
- (6) A person is entitled to be paid by the Commonwealth reasonable compensation for complying with a request covered by paragraph (1)(b).

### *Obligations arising from being an approved provider*

#### **Division 9—What obligations arise from being an approved provider?**

##### **9-2 Obligation to give information relevant to an approved provider's status when requested**

- (1) The Secretary may, at any time, request an approved provider to give the Secretary such information, relevant to the approved provider's suitability to be a provider of aged care (see section 8 3), as is specified in the request. The request must be in writing.
- (2) The approved provider must comply with the request within 28 days after the request was made, or within such shorter period as is specified in the notice.

Note: Approved providers have a responsibility under Part 4.3 to comply with this obligation. Failure to comply with a responsibility can result in a sanction being imposed under Part 4.4.

(2A) If:

- (a) a person has been approved under section 8 1 as a provider of aged care; and
- (b) the approval has not yet begun to be in force because:
  - (i) no allocation of a place to the person in respect of the aged care service or services through which it provides aged care is in effect; and
  - (ii) no provisional allocation of a place to the person in respect of the aged care service or services through which it provides, or proposes to provide, aged care is in force; and
  - (iii) the transfer day has not occurred for any transfer under Division 16 of a place to the person for the provision of aged care through the aged care service or services through which it provides, or proposes to provide, aged care;

this section has effect in respect of the person in the same way as it has effect in respect of an approved provider.

- (3) An approved provider that is a corporation is guilty of an offence if it fails to comply with the request within the period referred to in subsection (2).

Penalty: 30 penalty units.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

- (4) The request must contain a statement setting out the effect of subsections (2) and (3).

### **9-3 Obligation to give information relevant to payments under this Act**

- (1) The Secretary may, at any time, request an approved provider to give to the Secretary such information relating to payments made under this Act as is specified in the request. The request must be in writing.
- (2) The approved provider must comply with the request within 28 days after the request was made, or within such shorter period as is specified in the notice.

Note: Approved providers have a responsibility under Part 4.3 to comply with this obligation. Failure to comply with a responsibility can result in a sanction being imposed under Part 4.4.

- (3) The request must contain a statement setting out the effect of subsection (2).

### **9-3A Obligation to give information relating to accommodation bonds, entry contributions etc.**

- (1) The Secretary may, at any time, request a person who is or has been an approved provider to give to the Secretary specified information relating to any of the following:
  - (a) accommodation bonds charged by the person;
  - (b) the amount of one or more accommodation bond balances at a particular time;
  - (c) the amount equal to the total of the accommodation bond balances that the person would have had to refund at a specified earlier time if certain assumptions specified in the request were made;
  - (d) entry contributions given or loaned under a formal agreement binding the person;
  - (e) the amount of one or more entry contribution balances at a particular time;
  - (f) the amount equal to the total of the entry contribution balances that the person would have had to refund at a specified earlier time if certain assumptions specified in the request were made;
  - (g) unregulated lump sums paid to the person;
  - (h) the amount of one or more unregulated lump sum balances at a particular time.

The request must be in writing.

- (2) The person must comply with the request within 28 days after the request was made, or within such shorter period as is specified in the request.

Note: Approved providers have a responsibility under Part 4.3 to comply with this obligation. Failure to comply with a responsibility can result in a sanction being imposed under Part 4.4.

- (3) A person commits an offence if:
  - (a) the Secretary requests the person to give information under subsection (1); and
  - (b) the person is required under subsection (2) to comply with the request within a period; and
  - (c) the person fails to comply with the request within the period; and
  - (d) the person is a corporation.

Penalty: 30 penalty units.

- (4) The request must contain a statement setting out the effect of subsections (2) and (3).

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