

Permitted Use of Refundable Accommodation Deposits

The combined pool of lump sum accommodation deposits held by approved providers of residential care under the *Aged Care Act 1997* (Cth) (“Aged Care Act”) was reportedly \$24.8 billion as at 30 June 2017 (up from \$21.9 billion 12 months prior).¹

The average refundable accommodation deposit (“RAD”) currently being collected across Australia now sits somewhere around \$340,273.²

These figures illustrate the value of RADs, both to the sector and to individual providers. Even the smallest of providers could be expected to hold RADs totalling millions of dollars. The average total held by an individual provider sits around \$11.2 million.³

Against this backdrop, providers would do well to understand what they can and cannot do with RADs. Such an understanding can enable providers to maximise opportunities for their care facilities, whilst steering their organisations away from non-compliant treatment of RADs.

PERMISSIBLE USES OF RADS UNDER THE AGED CARE ACT

Under section 52N-1(1) of the Aged Care Act, an approved provider must not use a refundable accommodation deposit or accommodation bond (which we will continue to refer to collectively in this article simply as ‘RADs’) for anything other than a permitted use. A provider is permitted to use RADs for the following (as listed in section 52N-1(2)):

- for capital expenditure of a kind specified in the Fees and Payments Principles 2014 (No.2) (“Fees and Payments Principles”);
- to invest in a financial product covered by subsection (3);

- to make a loan in relation to which the following conditions are satisfied:
 - the loan is not made to an individual;
 - the loan is made on a commercial basis;
 - there is a written agreement in relation to the loan;
 - it is a condition of the agreement that the money loaned will only be used as mentioned in paragraph (a) or (b);
 - the agreement includes any other conditions specified in the Fees and Payments Principles;
- to refund, or to repay debt accrued for the purposes of refunding, refundable deposit balances, accommodation bond balances or entry contribution balances;
- to repay debt accrued for the purposes of capital expenditure of a kind specified in the Fees and Payments Principles;
- to repay debt that is accrued before 1 October 2011, if the debt is accrued for the purposes of providing aged care to care recipients;
- for a use permitted by the Fees and Payments Principles.

For the purpose of section 52N-1(2)(b), various permitted financial products are specified in section 52N-1(3). Further permitted uses are specified in sections 62 and 63 of the Fees and Payments Principles.

In short, a provider can potentially use a RAD for capital expenditure, investment in financial products (including certain deposit taking facilities; debentures; stocks or bonds; securities; interests in registered schemes; and interests in aged care investment schemes), making loans on a commercial basis for specific listed purposes, or refunding or paying certain debts.

¹ Aged Care Financing Authority, ‘Sixth report on the Funding and Financing of the Aged Care Sector July 2018’ url: <https://agedcare.health.gov.au/reform/aged-care-financing-authority/2018-acfa-annual-report-on-funding-and-financing-of-the-aged-care-sector>

² Stewart Brown, ‘Aged Care Financial Performance Survey, Residential Care Report – March 2018’ url: <http://www.stewartbrown.com.au/images/documents/StewartBrown---ACFPS-Residential-Care-Report-March-2018.pdf>

³ House of Representatives, Aged Care Amendment Bill 2011 Second Reading Speech (Thursday, 26 May 2011).

LEGISLATIVE HISTORY AND INTENT OF SECTION 52N-1 OF THE AGED CARE ACT

The permitted uses in section 52N-1 were introduced into the Aged Care Act by the *Aged Care Amendment Act 2011* ("2011 Legislation"). The (then) Minister's second reading speech of the 2011 Legislation explained (our emphasis):

*'... the reforms are structured to ensure that **crucial investment in aged-care infrastructure is maintained**. A broad approach is taken to capital expenditure and includes costs for activities directly associated with capital expenditure. The design of the reforms also ensures that **regulation does not unduly impact on effective corporate structuring and business arrangements**'.*

The Explanatory Memorandum to the 2011 Legislation further explains the intention that RADs should be able to be invested in a broad range of financial products, and should ultimately give approved providers 'a source of capital funding for investment in residential and flexible aged care infrastructure'. The 2011 Legislation, as carried through to the present day Aged Care Act, also recognises the wide range of corporate structures that are utilised within the aged care sector, ensuring flexibility to shift RADs between different related entities (provided appropriate safeguards are in place).

The permitted uses of RADs might therefore be thought of as being geared towards:

- allowing providers to earn income from RADs;
- facilitating ongoing capital investment in aged care infrastructure;
- preventing the misuse of funds; and
- ultimately, helping to ensure that providers are able to refund RADs when due.

IMPLICATIONS OF NON-PERMITTED USE

Non-permitted use of RADs can constitute an offence under section 52N-2 of the Act for up to 2 years post-use. Offence provisions aside, it is also a requirement of the prudential standards applying under the Fees and Payments Principles, that an approved provider who holds RADs must implement and maintain a governance system capable of detecting, recording and addressing non-compliance, in order to ensure RAD balances are used only for permitted purposes.

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CONCLUSION

The Aged Care Act permits the use of RADs for a range of beneficial purposes. With an understanding of the allowable parameters, providers can tap into the valuable RAD balances they hold, for the betterment of their care facilities and to the advantage of their care recipients.

Given the complexity of the relevant provisions of the Aged Care Act and the Fees and Payments Principles, providers should seek advice when making decisions about the use of RADs if unsure or in doubt.

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