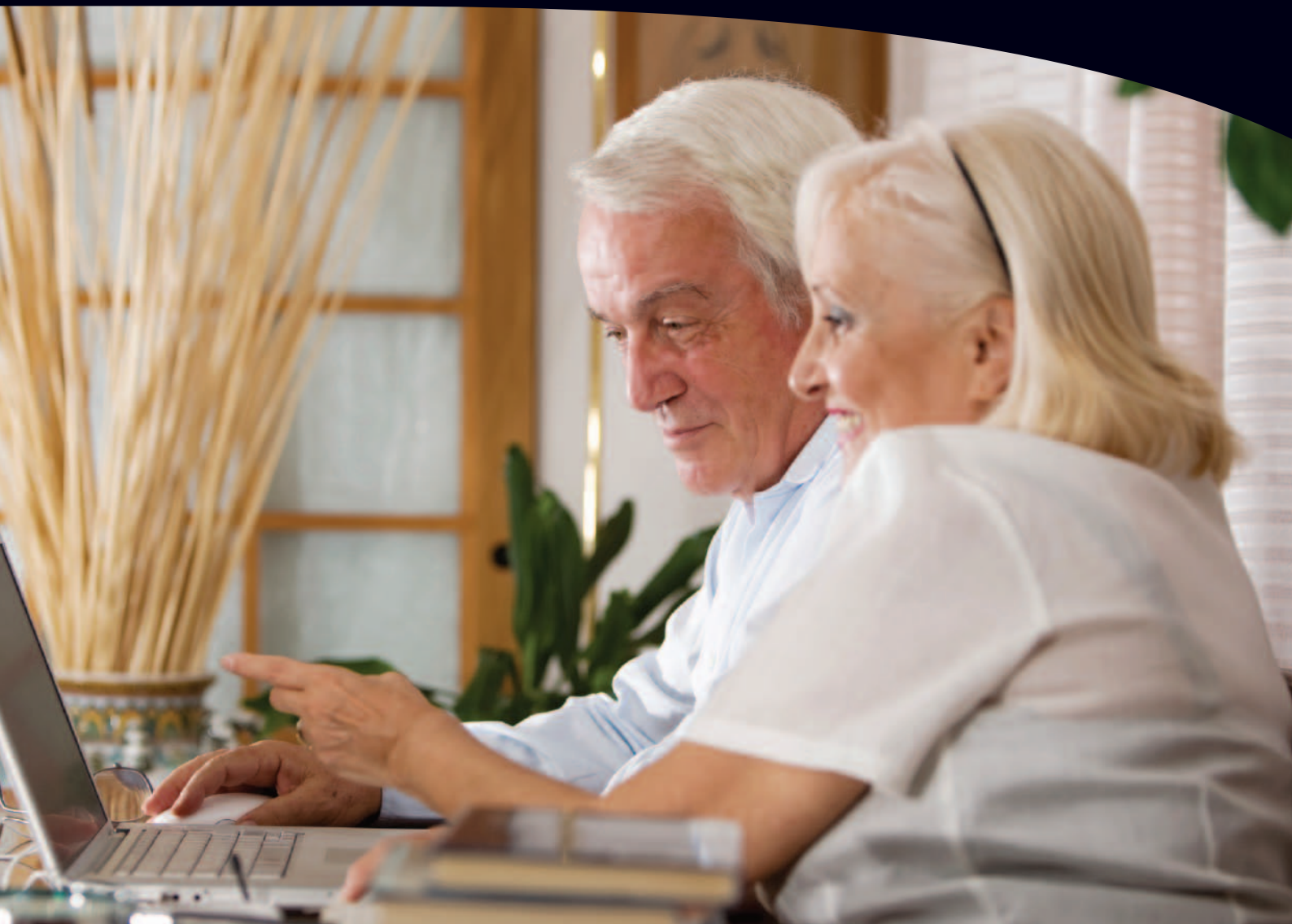
Blake Dawson

SUBMISSION TO PRODUCTIVITY COMMISSION

– Inquiry into Caring for Older Australians

October 2010



Contents

B

1. INTRODUCTION

B

PRODUCTIVITY COMMISSION - INQUIRY INTO CARING FOR OLDER AUSTRALIANS **8 October 2010**

Blake Dawson welcomes the opportunity to provide this submission to the Productivity Commission for its *Inquiry into Caring for Older Australians* (**Inquiry**).

Our submission focuses on the regulatory aspects of the Inquiry's terms of reference.

There is a pressing need to redesign the aged care regulatory system to meet the increasing and changing demand for services by and for older Australians.

A well regulated system must ensure adequate access to services for all older Australians and protect them from exploitation and poor standards of care services.

At the same time, it must be flexible enough to respond to changing consumer expectations and facilitate new approaches to service provision, funding and investment.

1.1 OUR SUBMISSION

We submit that the redesign of the aged care regulatory system should be based on a national senior living policy framework:

- that funds and regulates accommodation separately from care;
- that encourages senior living accommodation, care and other services according to market demand, not limited by government funding constraints;
- that provides government funding directly to care recipients on an assessed needs basis, rather than to allocated places;
- that encourages new sources of funding drawn from existing health insurance and superannuation models;
- that supports a wider range of accommodation options as part of a broader national housing policy;
- that maintains high quality, high care residential aged care facilities funded and regulated in a similar manner to private hospitals;
- that encourages investment through a more favourable depreciation regime and removal of GST disincentives; and
- that engenders trust and effective delivery through a new regulatory framework of licensing of providers, needs assessment,

senior living case management and community services, complaints resolution, and guardianship.

1.2 ABOUT BLAKE DAWSON

Blake Dawson is a full service Australian commercial law firm and a recognised leader in the senior living sector. Its team enjoys leading rankings in *Best Lawyers Australia* in the Health & Aged Care category.

Our senior living focus has provided our lawyers with opportunities to work with industry participants, investors and financiers on significant projects in the areas of strategic advice and reviews, mergers & acquisitions, taxation and structuring, financing, recapitalisations and restructuring, development and re-development of senior living assets, joint ventures, outsourcing, complaint investigation and dispute resolution. We regularly advise our clients on matters relating to aged care, community care and retirement villages regulation and issues arising out of the relevant statutory regimes.

1.3 THE PRODUCTIVITY COMMISSION'S TERMS OF REFERENCE

Our experience and expertise forms the basis for responding to the following aspects of the Productivity Commission's terms of reference in this submission:

- Systematic examination of the social, clinical and institutional aspects of aged care in Australia, building on the substantial base of existing reviews into this sector (Term of Reference 1).
- Developing regulatory and funding options for residential and community aged care (including services currently delivered under the Home and Community Care program for older people) (Term of Reference 2).
- Recommending a path for transitioning from the current regulatory arrangements to the new system that ensures continuity of care and allows the sector time to adjust (Term of Reference 4).
- Examining whether the regulation of retirement specific living options, including out-of-home services, retirement villages such as independent living units and serviced apartments should be aligned more closely with the rest of the aged care sector and if so, how this should be achieved (Term of Reference 5).

1.4 OVERVIEW OF OUR SUBMISSION

Our submission is divided into the following sections:

- Summary
- Industry commentary
- Key reform objectives
- A new regulatory framework
- Tax reform

We have also attached schedules with more detailed observations on issues arising under the Aged Care Act and Principles in relation to:

(Schedule 1) Accommodation bonds

(Schedule 2) Current assessment and funding provisions

(Schedule 3) Consumer and provider protection and standards.

2. SUMMARY

2.1 A NATIONAL POLICY FRAMEWORK

There is a pressing need to develop a coherent and consistent senior living policy framework across the Australian States and Territories and between the Australian Government and the Governments of each State and Territory. This will enable senior living needs across Australia to be addressed in a principled, efficient and innovative manner.

We submit that the national policy framework should:

(a) be person-centred, responding to the needs and wishes of older Australians; and

(b) facilitate and support private investment and co-contributions from users to ease the predicted increased burden of aged care costs on Australian taxpayers.

The national policy framework should not be limited to specific types of residential accommodation for older Australians such as aged care or retirement villages, and it should not be limited to fully or partially government funded services. It should extend beyond accommodation and care services to take into account the social needs and networks of older persons. These are significant determinants of their well-being and happiness. The national policy framework should support and facilitate the continued involvement of those older Australians who wish to remain active contributors to Australian society.

We see this as a need for a comprehensive policy framework underpinning what we refer to as **senior living**. A whole of government policy framework on senior living encompassing accommodation, health and personal care services, social infrastructure and networks for older Australians, is an appropriate focus for national policy reform to deliver a system that:

- allows greater flexibility to meet the expected needs and accommodate the wishes of Australian society and older Australians into the future;
- recognises the changing demography of the Australian population;
- recognises the limitations of government funding; and
- encourages private investment and co-contribution by service users.

2.2 SEPARATING ACCOMMODATION FROM CARE

To achieve the national policy objectives for person-centred senior living options the current aged care legislation needs to be refocussed.

The prescriptive requirements currently applying to aged care accommodation and care services need to be deregulated to facilitate greater competition to incentivise private investment and to provide greater choice and innovation in senior living.

Accommodation and care services provision should be decoupled in planning, regulating and funding senior living to:

(a) facilitate greater flexibility and consumer choice in care services and accommodation for older Australians in a variety of contexts;

(b) allow the development of innovative housing or accommodation for special needs groups such as older Australians with disabilities, those with mental illness, homeless persons and other marginalised or special needs groups;

(c) allow a broader and more specialised range of services to be funded that could be brought into the homes of older Australians, including disability and mental health services in addition to standard aged care services. The current legislation does not allow for differential funding for or the development of accommodation for these special groups;

(d) allow more emphasis on providing for older Australians' social needs and not just their medical or care needs in planning accommodation; and

(e) permit pricing and benchmarking of the real costs of providing aged care services. Such information is needed to reform subsidies and indexation formulas as well as to plan future workforce needs and to determine reasonable policies regarding co-payments by older Australians. The amount of subsidies that should or can be paid by the Australian Government (and Australian taxpayers) as well as costs that should be borne by those individuals having the capacity to pay, depend on having this information.

There will still be a need for regulation in certain areas, particularly in care services, to ensure sufficient protections for older Australians accessing or requiring such services. Security of tenure in accommodation is also an important consideration. However, these issues need to be addressed in a framework that also recognises the legitimate needs and objectives of providers of services and accommodation to older Australians and facilitates the viability of senior living offerings.

2.3 REFORM OF CARE SERVICES PROVISION

Industry feedback strongly indicates that the current regulatory system for the provision of aged care services is overly prescriptive and burdensome and detracts from the core business of approved providers – responding to the care needs of older Australians.

We submit that care services should not be tied to allocated places. This has unnecessarily constrained the provision of services to meet funding constraints and has stifled innovation. However, regulating for minimum standards in care services should remain.

In summary, we submit that:

(a) when decoupled from accommodation, care services can be provided on a person-centred, fully or partly funded or unfunded basis (according to need) by both government and non-government sectors, without being tied to accommodation funding options or requirements;

(b) funded care services should be made available to older Australians on the basis of assessed need, not funding constraints, although we submit that funding should remain means tested;

(c) person-centred funding should form a basis for opening service provision to the market, removing restrictions on service availability through allocated places;

(d) funding must be sufficient to enable providers of services to meet the standards of service provision that are required;

(e) for funded services, following assessment, the care recipient should be free to seek services in the manner and context of their choice, subject to availability;

(f) demand for community care services is likely to continue to increase, reflecting the preferences of older Australians. It will be important to ensure that the kinds of funded services, and the manner in which they are made available, are flexible to ensure that individuals do not "fall between the gaps" as is reportedly the case with

community aged care packages (**CACP**), extended aged care at home packages (**EACH**) and EACH-dementia packages (**EACH-D**). Integrating HACC funding with community aged care funding may assist this; and

(g) the current system of community services is inhibited by the funding system which is tied to needs assessments, allocation of resources by funded hours or items, and prescriptive accountability for specific services.

2.4 REFORM OF COMMUNITY SERVICES

A person-centred system will encourage the provision of services directed towards the social needs and networks of older persons. These are as important factors in their wellbeing and happiness alongside the accommodation and care services. It will also allow closer co-ordination with family, carers and others supporting the older person.

We submit that a government sponsored system of local "one stop shop" community service centres for older Australians, their families, and carers will be a critical element in facilitating an innovative and cost-efficient response to the changing needs of older Australians.

It will act as a resource and co-ordination hub for a range of funded and unfunded social, accommodation, care and other services. It will enable the development of best practice guidelines for delivering services and senior living offerings in place of prescriptive regulation. It will provide awareness and build confidence for older Australians and their families in dealing with the transitions involved as their social, health, accommodation and other needs change with age.

We have described this concept in more detail below as **Senior Living Centres**.

2.5 FUNDING INTO THE FUTURE

The current funding framework would need to be significantly restructured for a person-centred system. Funding will relate to assessed needs and be tied to the person needing care and not to providers through allocated places.

It is vital in developing a national policy that governments consider whether and what aged care services can and should be publicly funded and which services should be, at the very least, subject to co-contribution or fully self funded.

Strategies and regulation must be implemented to manage and control the impact on the public purse of the anticipated increased demand for aged care services as the baby boomers move into retirement.

We suggest that implementing a Medicare-type levy or increasing the current levy to accommodate aged care services, supplemented by private insurance products, is likely to be an equitable and also expeditious solution to providing increased funding for aged care services in the short to medium term. These strategies are already familiar to Australian taxpayers and it is not difficult to conceive of aged care services being an aspect of universal healthcare with additional services being privately funded.

2.6 REFORM OF ACCOMMODATION FOR OLDER AUSTRALIANS

Decoupled from the regulation of care services, accommodation for older Australians may be freed up to enable development of accommodation offerings and choices beyond institutionalised forms of accommodation in low care residential aged care facilities and high care nursing homes.

The Australian Government can help by:

(a) providing a coherent national housing or accommodation policy framework for senior living and coordinating strategies through the State Housing Ministers to:

  (i) remove disparities in standards and codes across the Australian States and Territories and between aged care facilities and retirement villages, and for senior accommodation generally, by supporting the development of and adherence to universal design principles[1] for senior accommodation;

  (ii) support mixed residential offerings in inner urban areas; and

  (iii) develop a framework for senior living in rural and remote areas, which may require giving taxation or other incentives to private providers (which would be offset through reduced funding costs to government) and/or grants to community housing providers and not for profit organisations;

(b) expanding upon the National Rental Affordability Scheme (**NRAS**);

(c) providing tax incentives for older Australians to transition from their family home to more appropriate senior living accommodation, for example removing stamp duty and removing tax barriers from investment into the sector;

(d) allowing funding to be provided from a variety of sources including from family members or by providing rental assistance in retirement villages which offer rental options;

(e) ensuring that the most vulnerable or disadvantaged older Australians have access to accommodation, including fully funded or purpose built accommodation where required; and

(f) providing or championing community education on senior living options.

2.7 RESIDENTIAL HIGH CARE AGED CARE FACILITIES

In our opinion, there is likely to be a continued need for high quality residential aged care facilities providing high care services for the frail aged and specialist care services for those suffering from dementia or other illnesses.

Licensing of sub-acute facilities could be carried out in a manner broadly similar to that for private hospitals. The number of beds and kinds of services offered should be determined by providers and by demand for the services rather than through restrictive allocated places.

Residential high care services could also be funded in a manner similar to private hospitals – through a Medicare type levy and private insurance products.

Any regulation should support the provision of services into facilities by medical practitioners and professional nursing staff.

2.8 A NEW REGULATORY FRAMEWORK

While we favour deregulating certain aspects of the aged care legislation, in particular abolishing allocated places and separating the regulation of care from accommodation, the

[1] Universal Design Principles have been developed by the Australian Network for Universal Housing Design (ANUHD) as an approach to building homes and living spaces which meet the needs of home occupants regardless of age or ability, are capable of adapting to meet the changing needs of home occupants and can be economically adapted to respond to the current and future needs of homes occupants (see *http://www.anuhd.org/*).

new policy framework will require supporting regulation to underpin trust and confidence in the accommodation, care and other services.

It will be important to continue to regulate:

(a) to ensure minimum quality standards are maintained in service provision and that there are sufficient protections for all older Australians accessing and using care services;

(b) to deliver accountable government funding; and

(c) to provide an economic framework that encourages investment and innovation.

There are five areas, broadly speaking, which are central aspects for regulating a new, national, person-centred framework of care for older Australians, namely:

(a) licensing of providers of aged care services;

(b) needs assessment for prospective fully or partly funded care recipients;

(c) community and case management services;

(d) managing complaints regarding the provision of services which would also include enabling providers to raise concerns or issues for resolution; and

(e) ensuring sufficient protection is in place to protect older Australians in care when they lack capacity and require substitute decision-making and protection from exploitation through guardianship or financial management.

In each case, regulation should not be overly prescriptive, stifling innovation and flexibility.

We have commented below in this submission on how the new regulatory framework might be designed in relation to each of the areas noted above.

2.9 TAX REFORM

Retirement villages and aged care facilities are capital intensive facilities which require significant outlays of capital for the construction and ongoing maintenance of buildings and facilities. However, under the current income tax regime minimal tax concessions are available.

The application of GST to the sale or lease of accommodation in a retirement village was thought by the industry to be relatively clear until the Australian Taxation Office (**ATO**) took a view contrary to how it had been applied by the industry. The ATO view results in extra unexpected costs to developers and purchasers. This issue is currently the subject of a draft GST ruling, GSTR 2010/D1.

Prior to the release of GSTR 2010/D1, there was already significant uncertainty in the aged care and retirement village industry in relation to the GST treatment of the supply of accommodation and any separate supply of services. While GSTR 2010/D1 addresses some aspects of this uncertainty it is very specific to particular types of accommodation.

Each of these issues currently affects development of retirement village accommodation and in our view, require consideration and review in order to facilitate investment into the senior living sector.

We consider that investment in the retirement villages sector could be improved by the adoption of more concessional income tax rules (ie, a more favourable depreciation regime). The income tax treatment of retirement villages should be aim to provide more certainty for owner/developers/operators.

With GSTR 2010/D1 due to be finalised in March 2011 and with ongoing changes to the industry, GST will continue to bring about challenges for investors in the senior living industry. If it is not properly designed, it has the potential to discourage investment and innovation. We submit this must be considered as part of any reforms.

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3. INDUSTRY COMMENTARY

3.1 KEY INDUSTRY THEMES

As background to this submission and as part of our ongoing strategic involvement with the senior living sector, Blake Dawson recently met with senior executives from a number of leading organisations having interests (either through direct service delivery or investment) in providing aged care, community care and retirement village services. We asked those industry leaders about their vision for senior living into the next decade and the current challenges and issues faced by the industry.

We summarise below some of the matters identified in our discussions with key participants as issues requiring urgent consideration or as driving the need for reform.

3.2 AGED CARE SERVICES

(a) Residential aged care providers report that people entering residential care are increasingly older, more frail and have significant care needs. Residents with dementia require higher levels of care and supervision, as well as specialised accommodation requirements.

This is supported by statistics showing that average age at entry to residential aged care is 78. The average resident age is 82. The average period of residential occupation is now relatively short.

(b) Demand for residential aged care services is increasingly trending away from low care and becoming focussed on high care services including palliative care, sub-acute services, managing the end stage of complex illnesses, dementia and respite services, with many residents occupying the facility only for a few months. This substantially increases the cost of providing residential aged care, challenging the financial viability of many facilities.

(c) Providers report that older Australians often do not transition into residential aged care early enough with detrimental consequences for their health and quality of life; for example, often they move only after an acute care crisis. Nutritional deficits and dehydration are not uncommon on entry to care and once in care the person's health may improve markedly.

(d) The political agenda for aged care at federal level is seen as narrow and defensive, heavily weighted towards an "inspector" role and funding minimisation. The government's contribution could benefit from realigning its focus to support providers in developing new and better aged care services, senior accommodation and social infrastructure.

(e) There is, and will continue to be, a significant shift in emphasis to in-home and community services based on consumer demand and expectations. This will be good for many but there will still be a growing need for new retirement village and residential aged care options.

(f) Government can shape responses to the expected increasing needs and demand for accommodation and care services through a co-ordinated and consistent national policy framework that supports this growth and the development of new accommodation and care options, including affordable accommodation options.

(g) The policy framework should be built on key principles which include that:

(i) the resident/client is at the centre of all policy – client choice and involvement in all decisions is expected and is fundamental;

(ii) accommodation and care should be decoupled to provide older Australians and their families with greater flexibility and choice;

(iii) social justice and the protection of disadvantaged or vulnerable Australians remain core considerations; and

(iv) private sector investment can assist in meeting the needs to provide innovative and diverse accommodation choices to respond to demand and to relieve the increasing burden on the public purse.

(h) Access to capital (both debt and equity) is a major problem for providers. The current framework, particularly in the area of high care residential aged care, is inadequate to attract private sector investment.

(i) Building and retaining a skilled and stable workforce is a major challenge. This will only be met through increased financial viability for service providers, particularly in residential aged care and will require changes to the current funding regime.

3.3 RETIREMENT VILLAGES

(a) Retirement villages offer housing solutions for older Australians across varied income levels to meet their needs for safety and security, social connection and access to services.

(b) Village operators report that commonly after their entry to a village, new residents say their quality of life, general well being and happiness have improved. Many say "I wish I had done this sooner." (Many residential aged care operators report the same for entry into their facilities.) Living in retirement villages generally increases longevity.

(c) Village operators value the long term relationships that they have with their residents. They are conscious of the wishes of older Australians to remain in independent accommodation for as long as possible and this is as true of residents of a retirement village as of people who remain in their family home.

(d) Retirement village operators are keen to distinguish retirement villages as a specialised housing offering for seniors that differs from aged care.

(e) Retirement villages, as a specialised accommodation offering for older Australians, does not suit all older Australians. In particular retirement villages, which generally require the payment of a substantial ingoing contribution for entry as well as payment of ongoing service and maintenance fees, are unlikely to be accessed by:

(i) persons with disabilities for whom independent living is not possible and who have received care services on an ongoing basis before requiring aged care services;

(ii) persons who have been in long-term rental accommodation and do not have sufficient assets to invest in retirement village accommodation once they move out of the paid workforce; and

(iii) homeless older Australians.

(f) Affordable housing projects should be co-ordinated (including co-location) with senior living to enable the senior care workforce to grow and be housed as needed for the industry. Planning laws that support multi-generational housing developments will ease the burden on workers, their families and in turn, increase workforce efficiencies for operators and investors.

(g) Publicly funded housing will remain a need for certain sections of the Australian population.

(h) All types of senior living accommodation must grow to meet predicted demand within the ageing demographic of Australia.

(i) Successful growth and increased diversity in senior living options will ease housing supply and affordability across the whole market. Seniors will be able to transition from family homes to purpose built senior living accommodation, allowing those family homes to be returned to the available housing stock.

(j) Senior living options must address emerging trends towards more complex mental health issues among older Australians, particularly regarding dementia and long term mental health disorders.

(k) Mainstream models for funding, developing and operating capital infrastructure are also less relevant in responding to the challenges of servicing seniors in rural and remote areas and poorer socio-economic areas. For example, where house sale prices do not meet the construction costs of senior living or long term renters are not able to pay an ingoing contribution or accommodation bond.

(l) Retirement villages and residential aged care are different industries, requiring different management and operational skill sets and having different financial dynamics. The trends to providing a continuum of care and ageing in place are to be supported but will require greater co-ordination between the care and accommodation aspects of senior living. The differences between the industries and their regulatory needs must be recognised and respected if they are to grow to meet demand.

(m) Retirement villages are capital intensive facilities. However, the current income tax regime minimises capital allowances for this sector because the expenditure is on buildings rather than plant or mines. The income tax regime, together with State/ Territory stamp duty, forces the use of alternative structures (loan/licence, loan/lease). The overlay of the GST without specific provision / consideration for the sector has also caused uncertainty and, more recently, major concerns (GST Draft Ruling GSTR 2010/D1).

(n) Transitions into and between the various stages of senior living are not currently well handled, causing unnecessary costs, distress and adverse effects on older Australians' quality of life.

(o) An education campaign is needed to enable families as well as older Australians to understand the choices that are available and assist them to make good choices at the right time from the available senior living options. Government can help with this.

3.4 THE NEED FOR CAPITAL FUNDING

(a) The primary concern of both village operators and residential aged care providers is access to capital for development or redevelopment purposes. Capital has been both difficult to obtain and expensive to acquire in the aftermath of the global economic and financial crisis in late 2008.

(b) Many providers and developers report that development of new villages and high care residential care facilities has all but ceased. Development approvals are being obtained but very few are pursued and little value is currently attributed to them on re-sale.

(c) There is a looming risk of undersupply. In broad terms, there are currently 110,000 retirement village dwellings in Australia and it is conservatively estimated that a further 50,000 dwellings will be needed over the next 10 years, costing about $17 billion.

(d) As indicated above in relation to retirement villages, the relatively disadvantageous capital allowance regime for the sector creates a barrier to investment through the negative impact on after tax return.

(e) Retirement villages require patient capital. They have to be viable on an IRR basis not cash yield. The financial dynamics now are at the lower end of commercially acceptable IRRs even for the larger providers. Any government settings which reduce profitability further will risk capital drying up completely.

(f) Superannuation funds are natural investors in the sector but must derive a commercial return. There is a concern that they will become increasingly reluctant to invest in residential aged care because of the poor return and increasing operational risk, under the current regulation.

(g) The current criteria for lending and repayment terms required by financial institutions are not seen as compatible with financial models of senior living offerings.

(h) Financier's expectations are not aligned with the expectations or financial capabilities of many retirement village operators, aged care providers or older Australians. For example there is some reluctance by financiers to fund:

  (i) retirement villages in which residents' occupation will be on a rental basis (even where there is a demand for such facilities);

  (ii) for the construction of serviced apartments;

  (iii) without at least 50% equity or 100% of pre-sales (which does not suit the staged development of many retirement villages) as well as increasing pressure to reduce the number of units in each stage of a development.

(i) The wishes of many older Australians to remain living in areas close to social connections and services is likely to drive demand for medium to high density senior living accommodation (such as tower blocks) in urban areas.

(j) These trends will require rethinking funding models because it is not possible (generally speaking) to fund a staged high rise development in which residents take up occupation and pay an ingoing contribution that enables paying down debt to fund further development.

(k) Retirement villages are under utilised in terms of providing care services. It is estimated that around 10,000 serviced apartments are vacant across Australia. Unassisted user pays services in this context may not be affordable for many older Australians. Providers also report a strong expectation in the community that care for older Australians will be publicly funded. Increased access to funded care packages specifically directed to these serviced apartments may increase uptake as well as reduce any regulatory burdens.

(l) Similarly serviced apartments may be ideally used for funded respite care services.

(m) Serviced apartments are not easily converted to residential aged or respite care (with federal funding under aged care legislation) for which they may be ideally suited because of the differing building certification requirements for retirement villages and residential aged care facilities.

(n) If Australian taxpayers are to avoid having to fund accommodation for older Australians, incentivising investment through taxation and other mechanisms is urgently required.

3.5 KEY ASPECTS OF POLICY AND LEGISLATIVE REFORM – THE CURRENT OPPORTUNITY

Looking to the future, creating options and greater choice for older Australians in the medium to long term, can be facilitated by government through:

(a) incentivising Australians to self-fund care services or contribute to their provision through superannuation or other schemes;

(b) reducing costs through more efficient and streamlined regulation;

(c) better coordinating health care, residential aged care and community care policies;

(d) better matching accommodation and housing for older people with access to care funding and services;

(e) removing planning rules that constrain multi-generational housing developments;

(f) land management policies that facilitate developing senior living options where the infrastructure and community support is located;

(g) uniform national requirements for accommodation standards for senior living;

(h) facilitating NRAS funding to apply to independent living units or serviced apartments that are no longer viable as traditional retirement village options (noting that there has been some provision for this in NRAS rounds 2 and 4); and

(i) facilitating flexible care (including multi-purpose service) models where a provider is accredited for integrated services. This option is likely to be particularly suitable for services in rural and remote areas where the pool of available labour is smaller.

A theme in the industry commentary is that it is by enhancing competition that the government can best achieve its outcomes, not by increasingly prescriptive regulation. Targeted incentives may be required to assist service provision in certain circumstances, such as in rural and remote areas, to special needs groups or for high care residential aged care services.

3.6 SPECIFIC LEGAL ISSUES FOR REFORM

The industry commentators also raised some specific regulatory issues for reform.

The regulation does not respond to the needs and wishes of older Australians

Regulation (for example, accreditation and certification requirements and the Aged Care Funding Instrument (**ACFI**)) is so prescriptive and narrow that it is causing the aged care industry to define and limit the services they provide by reference to the minutiae of bureaucratic requirements , rather than by the needs of older Australians.

In particular, the legislation does not cater well for those older persons needing special support or having special needs (such as homeless older persons, those without assets living in long term rental accommodation who move into retirement, older Australians with disabilities and older Australians who suffer chronic mental illnesses).

The legislation also does not facilitate those Australians with capacity to pay for their accommodation and services (or having family members who wish to contribute) to

determine and access the kinds of care and accommodation that they would like and are willing to contribute to receiving.

The need to incentivise non-government investment into senior living

There is great scope to lessen the burden on government spending through increasing both investment from the not-for-profit and private sector and co-contributions from consumers. However fundamental changes to the regulatory framework will be required to stimulate and permit these. The regulatory framework currently provides few incentives for non-government investment or for innovative approaches to service delivery.

The need to support and further develop an appropriate senior living workforce

The residential aged care workforce is increasingly "battle weary", spending more time on regulation-focused paperwork than on care; this poses a real risk of the culture of care dissipating. The current basis upon which services are funded (the inadequacy of subsidies and resident contributions) mean that providers cannot compete with the acute health services sector in terms of conditions and salaries for professional staff. As a result, insufficient numbers of qualified professionals are attracted to work in the sector.

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4. KEY REFORM OBJECTIVES

4.1 A UNIFIED NATIONAL POLICY FRAMEWORK – PERSON-CENTRED POLICIES AND LEGISLATION IN SENIOR LIVING

A national policy framework for senior living is needed to provide a consistent and coherent foundation for development of those sectors into the future.

Policies and legislation relating to residential aged care services, community care services and accommodation for older Australians are currently not consistent across the Australian States and Territories or across the kinds of services offered.

The needs of older Australians do not fit neatly within one area of government. They require a mixture of accommodation and social infrastructure, the latter principally through aged care and community services. Further difficulties arise in overcoming the Federal and State structures with differing, but often overlapping roles and responsibilities. The regulatory landscape is uncoordinated and lacks coherent and overarching policies as a foundation to develop strategies to meet the needs of older Australians and to fund those needs into the future.

The recent development of national policies in the areas of health and hospitals reform and mental health services by the Australian Government and the Council of Australian Ministers, are recent examples of cooperative national governmental policy driving reform. We note that the Productivity Commission is also currently undertaking an inquiry into a national disability long-term care and support scheme in Australia.

A national senior living policy platform will reduce the likelihood of service duplication and should provide efficiencies in costs and funding as well as in service delivery. Cost savings can be used to enhance existing services or to develop new services in response to emerging needs.

Person-centred policy

In our view, a national senior living policy should be person-centred, recognising that accommodation and services should be centred on and responsive to the needs of the older person. Regulation per se should not drive the policy. Funding constraints should also not be pre-eminent. Under a person-centred system, for example, funding is allocated to and is centred on the older person, not the services provider.

In our opinion, a person-centred national senior living policy should be built on principles that include:

(a) promoting the independence and wellbeing of older Australians;

(b) involving older Australians in all decisions concerning their care and accommodation;

(c) permitting a broad range of accommodation options and care services to provide greater choice and better options and outcomes for older Australians;

(d) maintaining and ensuring accessible and affordable services and accommodation for all older Australians requiring them;

(e) recognising that the needs of older Australians are broader than nursing and personal care services and accommodation and include maintaining and facilitating social networks and social inclusion; and

(f) recognising the value of carers.

Person-centred policies based on these principles would then provide a basis for regulation that is focussed on the needs and wishes of older Australians, while considering what

costs and services can and should be funded by Australian taxpayers. Arguably, consumers who are provided with greater choices in services and accommodation may be more willing (where they have capacity to do so) to contribute financially in order to have access to the kinds of services they prefer to receive.

Incentivising private investment

Any national senior living policy should recognise and encourage private sector investment in the senior living sector as a way of developing more specialised and innovative senior living offerings and of relieving the expected funding burden of services and accommodation for older persons by the Australian Government and Australian taxpayers.

Better integration with the acute health services sector

There is currently little integration or coordination between the acute health care and aged care sectors, principally due to the Federal and State divisions of responsibilities for these services.

Many home based services are jointly divided between and funded by the State and Federal Governments under the Home and Community Care (**HACC**) services, again with little integration with federally funded community aged care packages.

The division of responsibilities between Federal and State Governments also means that senior living in retirement villages is regulated separately by each State and Territory little consistency across the board and no integration between funded aged care services and retirement services.

These divisions have two principal consequences:

(a) creating inefficient systems due to overlapping or duplicating services; and

(b) giving rise to gaps in service provision which mean older Australians may not receive services they require or may not transition to other services when their needs change.

The delivery of medical services into residential facilities is poorly developed and leads to unfair burdens on nursing and care staff and unnecessary admissions of residents to hospital services.

We submit that there is a need to develop a model for medical services into residential care facilities. The benefits of such a model include:

(a) enabling older Australians to receive medical diagnosis and treatment in the facility where they live and are comfortable;

(b) reduce emergency admissions of older persons to hospital;

(c) relieve pressures on emergency departments and acute care facilities; and

(d) deliver medical services to older Australians residing in residential care facilities in a more cost effective manner.

The current agenda for reform of the health sector to give greater input into funding by the Australian Government and to create greater uniformity in health structures across the States and Territories, provides an opportunity to integrate senior living services with these reforms. This could provide greater efficiencies in service provision (particularly in rural and remote areas) and ensure that older Australians are able to transition more easily between services as their care needs change and aged care services and between different kinds of accommodation as required.

4.2 SEPARATING ACCOMMODATION AND CARE IN SENIOR LIVING

In our view, deregulating certain aspects of the aged care regulatory framework is fundamental to achieving the above stated policy objectives. Accommodation can and should be decoupled from the regulation of aged care services.

We do not consider that accommodation for older Australians inherently requires extensive government funding and prescriptive regulation, with the possible exception of high care residential aged care facilities which provide sub-acute nursing and personal care services for the frail aged who cannot live independently. Some dementia sufferers may also require residential aged care accommodation and service provision in specially developed facilities (we discuss these aspects further in paragraph 4.6 below).

At other stages of life, accommodation is funded through people buying or renting their own homes with publicly funded or partially funded housing arrangements as an alternative for disadvantaged Australians. The policy settings for senior living accommodation should recognise and facilitate the same range of choice.

We acknowledge that specialised accommodation may be required for subgroups of people within the broader community, particularly those with disabilities. However, the needs of these groups of older Australians do not arise specifically from ageing, and decoupling accommodation from care may assist in delivering ageing specific services (and additional funding) to purpose built accommodation for groups with special needs.

Trends in support of separating accommodation from aged care services regulation

There are significant current trends in the senior living sector that can be addressed through deregulating the regulatory framework for senior accommodation.

These trends include:

- Older Australians generally want to stay in accommodation close to the areas in which they have lived, have family and social relationships and access to services.
- There is increasing demand for community care services through which aged care services are brought into the home.
- As a consequence of the demand for community care services and their preference to remain in their own homes for as long as possible, fewer older Australians are entering low care residential aged care services.
- Residential aged care service providers tell us that older Australians are entering residential aged care services at a later stage and are usually frail and have complex care needs requiring high care services.
- Admission to residential aged care is typically precipitated by a health crisis, but there is little integration between the health sector and aged care sector, with older people remaining in hospital because suitable accommodation and services cannot be accessed because available community packages are capped in number. Similarly, aged residents of a residential care facility are unnecessarily hospitalised (at greater cost) because suitable medical services are not available in the facility.
- The costs of developing and providing high care residential aged care services are greater than can presently be recovered through the funding mechanisms and subsidies currently payable under the Aged Care Act and Principles. Self-funding arrangements are also capped for accommodation changes in high care facilities. Together these are a serious barrier to developing new services.

- Retirement village operators are increasingly open to having aged care services brought into the village for residents, but the current restriction and allocation of community care places does not facilitate the efficient provision of aged care services in villages. Rather, residents of a single village may receive services from a number of different community service providers.

- The current accommodation offerings for senior Australians focus on institutionalised care or retirement villages, both of which are specialised and do not cater for a broad range of persons. There is a lack of innovation in offerings.

In our view, deregulating accommodation and providing suitable housing and accommodation infrastructure for senior Australians with increased uptake of appropriate housing, will have beneficial flow-on effects for housing affordability and availability generally, particularly in urban areas and capital cities.

Problems with the current regulation

The *Aged Care Act 1997* (Cth) (**Aged Care Act**) and the *Aged Care Principles* (**Principles**) under which aged care services are established, funded and regulated by the Australian Government have developed over time in response to specific historical determinants. Those determinants are no longer the key drivers for aged care service provision in contemporary Australian society. The legislative framework is prescriptive and burdensome. It reflects an outdated view within which care services are delivered to older Australians in largely institutionalised forms and that does not easily accommodate or respond to the current and diverse needs and wishes of older Australians.

The Aged Care Act has as one of its objects, to provide Australian Government funding that encourages "diverse, flexible and responsive aged care services" that are "appropriate to meet the needs of older Australians and their carers" and that "facilitate the independence of and choices available to older Australians and their carers" (section 2-1).

The constraints on service provision implemented under the Aged Care Act and Principles to provide safeguards for consumers and to minimise funding costs have been, in our opinion, disproportionately given expression, in comparison to enabling choice and flexibility in aged care service provision.

We have set out in **Schedule 1** examples arising from our work with clients that we consider highlight the lack of flexibility under the current legislation.

As a direct result of the current regulation, aged care services are generally provided in large institutional style facilities meeting the accreditation and certification requirements of the legislation. With the exception of community care packages and a small number of multipurpose services, alternative kinds of accommodation are not only not supported under the aged care legislation, they are not recognisable for funding purposes.

However, residential care facilities are costly to develop and operate, even more so given consumer expectations of single room plus en-suite style accommodation. The current statutory framework has the effect of requiring consumers to provide increasingly large accommodation bond payments for entry into low care or extra services high care aged care facilities, or for operators to bear diminishing returns on their investment, threatening their viability.

The Australian Government has been unable or unwilling to fund residential high care facilities at a level that secures their continued viability and that encourages or incentivises private sector investment. At the same time co-contributions by care recipients of high care services are capped. Together, these must give rise to questions about whether this model of accommodation and service delivery is either viable or desirable. If it is, then fundamental regulatory changes are required. If it is not, then regulation must be loosened

to permit other forms of accommodation and service delivery to be developed, in particular for high care services.

Proposals for a new regulatory system

There is a greater capacity in some parts of the senior community (and their families) to contribute to the cost of senior accommodation and care. With the right policy framework, the provision of care to older Australians in their homes or in other senior living accommodation options is a serious alternative to hospital services and to residential care facilities.

As a response to the need to provide a broader range of accommodation types for older Australians as well to incentivise providers to develop and operate innovative aged care services (including residential care services), providers have raised the need to separately regulate aged care services and accommodation which are currently both regulated in an interdependent manner under the Aged Care Act and Principles.

We are of the view that, with the possible exception of high care residential aged care services, there is no requirement to legislate for accommodation for older Australians in a single statute that also regulates care services. The focus on institutional care and on the use of accommodation bonds for entry into residential aged care has stymied innovative approaches to funding and providing accommodation for older Australians. It has also obscured questions about when and in what circumstances accommodation should be publicly funded.

When separating accommodation from funding for the care of older Australians is integrated with the policy principle of person-centred and directed care and accommodation services (see paragraph 4.1 above), then the opportunity for older Australians to acquire accommodation and services (whether on a user pays basis or through government subsidies or both) can be opened up to the market. They may be accessed directly by the older person or negotiated through brokerage arrangements such as are currently in place for the "purchase" of disability services and accommodation.

Benchmarking care costs

Separating accommodation and care also allows for determining the actual costs of care and benchmarking those costs. This may also provide a means of developing and funding more innovative care offerings. For example, these could include more day centres and social networking services for older Australians, which would keep them linked to their families and preferred networks.

Providers have told us that the lack of independent information about the real costs of care means that subsidies are not matched with increases in those costs, particularly labour costs. Reliable information about costs is vital for planning and for ensuring the future viability of the aged care sector including securing and retaining a competent and professional workforce. The amount of subsidies that should or can be paid by the Australian Government (and Australian taxpayers) as well as costs that should be borne by those individuals having the capacity to pay, depend on having this information.

Any transition from the current framework will need to be carefully administered so that the industry has certainty for future planning.

In summary:

(a) Deregulating accommodation is required to facilitate greater competition and also greater choice and innovation in senior living.

(b) Accommodation and care service provision should be decoupled in planning, regulating and funding senior living, to:

(i) facilitate greater flexibility and consumer choice in care services and accommodation for older Australians in a variety of contexts. For example, it could open up the possibility of funding under the NRAS for accommodation with separate funding for care services provided by the Commonwealth;

(ii) allow more emphasis on providing for seniors' social needs and not just their medical or care needs in planning accommodation;

(iii) allow the development of innovative housing or accommodation for special needs groups such as older Australians with disabilities, those with mental illness, homeless persons and other marginalised or special needs groups, or permit more aged care services to be provided in existing specialised accommodation. The current legislation does not allow for differential funding or accommodation for these special groups; and

(iv) permit pricing and benchmarking of the real costs of providing aged care services.

4.3 DEREGULATION – CARE SERVICES

We consider that providing aged care services should be deregulated in terms of the number of available places (currently restricted by the requirement for an approved provider to only provide services and receive funding in respect of an allocated place under the Aged Care Act and Principles). Rather, services should be provided to older Australians on the basis of assessed need and not the availability of funding. Assessment processes should also be streamlined to ensure older persons do not experience unreasonable delays when accessing care services.

In our experience, approved providers overwhelmingly consider that aged care service provision is over regulated. The requirements of the Aged Care Act are found to be prescriptive and administratively burdensome and detract from providing care.

Recent economic events and circumstances have highlighted areas in which reform of care funding and services delivery are required. A number of key themes emerge in this context, including:

- Community expectations about the kind of care that is offered and the context in which services can be delivered is changing, with older Australians commonly wishing to have care services brought into their homes.
- There is a need for concurrent reform of the health sector to meet the increasing economic burden on the Australian Government and taxpayers of providing health care. The heaviest users of health care services are older Australians, and this trend is likely to continue with the predicted rise in chronic diseases and increased longevity of the Australian population. It is important, therefore, to be able to offer sufficient sub-acute aged care services in a timely manner to manage burgeoning acute health care costs and to create efficiencies and costs savings.
- There is difficulty in providing viable aged care services to certain groups in the Australian community, such as disabled persons and chronically mentally ill, without providers of aged care being able to access additional funding to cater for the special needs of these individuals.
- Government subsidies for residential aged care services provided do not sufficiently compensate approved providers for the regulatory burden imposed by the Aged Care Act and Principles and the costs in prioritising, managing and resourcing their operations of compliance. This increases risks both for operators and for older Australians who are residents of the facilities.

- The subsidies are also insufficient to enable approved providers to attract and retain a workforce with sufficient numbers of professionally trained personnel to coordinate providing care services, maintain and demonstrate continuous improvement and respond to the requests by the Department of Health and Ageing (**Department**) or the Aged Care Standards and Accreditation Agency (**Agency**).

- Current subsidies for accommodation and care services are insufficient to meet the requirements to develop and operate high care residential care services.

We consider that there are several aspects to providing care services to older Australians that require regulatory reform, including:

(a) incentivising the development of and maintaining access to high quality residential aged care services where these are needed by older Australians (typically at older ages and for shorter periods);

(b) ensuring that funding of aged care services also allows for additional funds and possibly the development of specialised services to cater for special needs groups of older Australians; including indigenous Australians, homeless Australians, those who suffer from chronic mental health issues (including dual diagnosis with substance abuse disorders) and older Australians with disabilities. Achieving this will require streamlining funding from the Federal Government as well as the State and Territory Governments, that is currently provided under HACC programs. Streamlining funding may minimise service duplication and also risks that certain older Australians may fall within gaps in funding and service provision criteria;

(c) implementing schemes that will facilitate and support a greater emphasis on user-pays services where individuals have the capacity to do so, to relieve the increasing burden of care costs on the public purse into the future;

(d) allowing for flexibility in care services provision that is not constrained by numbers of allocated places for community or residential care services.

Recent beneficial changes to policy and regulation

The implementation of CACP, EACH and EACH-D have been an important response to the wishes of older Australians to be able to retain their independence and remain in their own homes for as long as possible. Community care packages provide significant cost savings to the Australian Government and taxpayers because accommodation and associated services are not required to be subsidised. They also relieve pressure on acute care health services in hospitals. However the number of available community care packages is significantly less than the need. This means that older Australians may be forced into residential care due to the lack of available community care packages.

The need to expand community care options

Our clients commonly raise concerns that the current distinction between low care CACPs and the high care EACH and EACH-D packages does not provide for a seamless transition from one kind of care service to the next for older Australians. The number of hours available under a CACP is considerably lower then the available hours under an EACH Package. Those older Australians whose care needs sit somewhere between low care and high care are at risk of having their needs unmet. Again, this may precipitate early entry into residential aged care. Moreover, there is no certainty for a care recipient receiving low care CACP assistance that high care packages will be available when their care needs increase.

In our view, the regulatory framework should provide a seamless transition from CACPs to the EACH packages in a similar way to ageing in place as implemented in residential aged care. Bottlenecks preventing transition to higher levels of care arising from limitations in

the numbers of allocated places for each category could be addressed through abolishing allocated places (for community care and residential aged care) and by having further graduations of care service hours and kinds.

Care services would be funded on the basis of assessed need with such funding being tied to the person and not the service provider. Constraints arising under allocated places will be freed up by abolishing these so that the volume of services provided by any single provider will, in these circumstances be opened up to competition and market forces.

Funding would be provided in accordance with services required and on a means-tested basis. The person is free to use the funding to the specified limit for any form of service provision.

HACC services, co-funded by State Governments and the Australian Government should, in our view, be integrated and coordinated with the CACP and EACH funding to fill the gaps between the number of hours and kinds of services that are available under the low care CACP and high care EACH packages, and to persons with special needs, including where those needs are unrelated to ageing, per se.

Other innovative programs may also assist in the transition between CACP and EACH or admission to residential aged care. One such arrangement could include funding for or incentivising the development of day care centres in which older Australians can attend on a daily basis or on a number of days in any week and return to their homes or families in the evenings. This may also facilitate social support and connections for older Australians without requiring institutionalised care.

Issues arising from the ACFI funding model

Assessment for eligibility for aged care services by Aged Care Assessment Teams (**ACAT**) under the Aged Care Funding Instrument (**ACFI**) is, in our view, a blunt instrument for funding purposes rather than being focussed on the needs of the older Australian. A person-centred framework would, in our view, mean that any assessment is focussed on the self care and health care status of the person, identifying their care needs. Services could then be accessed by the older person in a number of ways subject to availability and their preferences.

We set out in **Schedule 2** some examples of the ways in which the ACFI funding disadvantages residents and impacts on the financial viability of operators.

Likely benefits of person-centred funding and the deregulation of services from allocated places

The benefits of more innovative and flexible delivery of community care services may be as follows:

(a) it will honour the wishes of older Australians to remain in their homes and maintain their independence and established social connections for as long as possible, and for the duration of their lifetime in many cases;

(b) it will result in considerable costs savings to the Australian Government; and

(c) it may assist the informal carers of older Australians, most notably family members, to remain in paid employment while still assisting with care for their family members and maintaining their connection with the daily lives of their family.

Moreover these outcomes would be in accordance with the express object of the Aged Care Act under section 2-1(1)(j)) to: "promote ageing in place through the linking of care and support services to the places where older people prefer to live."

In summary:

(a) funded care services, when decoupled from accommodation, should be available to older Australians on the basis of assessed needs, not funding constraints, although funding will remain means tested;

(b) following assessment, the care recipient should be free to seek services in the manner and context of their choice, subject to availability;

(c) person-centred funding should form a basis for opening service provision to the market, removing restrictions on service availability through allocated places;

(d) demand for community care services is likely to continue to increase, reflecting the preferences of older Australians. It will be important to ensure that the kinds of services and number of funded hours available are flexible to ensure that individuals do not "fall between the gaps" as is reportedly the case with CACP and EACH (or EACH-D) packages. Integrating HACC funding may assist.

We separately consider the requirements for licensing providers and maintaining care standards in deregulated services in paragraph 5.2 below.

4.4 SELF FUNDING SCHEMES FOR FUTURE CARE NEEDS

In our view, a deregulated system of care services will require introducing novel ways of funding aged care. The relatively high costs of aged care services make it unlikely that most Australians will have sufficient retirement savings to fully self fund these costs in the short to medium term.

As we have noted above (see paragraph 4.2), the industry focus on the use of accommodation bonds for entry to residential care services (and advocating these for high care) has, in our view, stymied thinking about alternative means of self funding for aged care services.

Self-funding for care costs, or co-contributions by persons to the costs of care, or building up a pool of funds for publicly funded aged care services, are, in our view, further necessary considerations and a pillar of regulatory reform in addition to:

(a) developing nationally consistent person-centred policies and regulation;

(b) decoupling accommodation from care; and

(c) removing allocated places for funding care and accommodation.

Constraints to self funding for accommodation and care services for older Australians likely arise from a number of commonly held beliefs including:

(a) that older Australians, having worked and/or contributed to society in their earlier years are entitled to be cared for by that society in their later years;

(b) concerns that aged persons are a group vulnerable to exploitation and so should be provided with services in large residential care facilities in which providers must be tightly regulated; and

(c) that the family home is an asset that should be preserved for the next generation of family members, rather than used to provide accommodation and aged care services in residential facilities.

Each of these are beliefs that Australian society may wish to uphold, however they must be considered in the context of what is reasonable and affordable for that society. Public funding to maintain services may have to be met through increased rates of taxation on a

shrinking pool of workers. The choice for Australian society is which of these beliefs it can and is prepared to bear the costs of upholding.

Proposals for alternative or additional funding for aged care services

In our view, planning for the future of aged care service provision will need to consider alternate ways to fund these care services into the future and to ensure that individual older Australians have choices in care delivery.

The following schemes may assist funding aged care services in the longer term:

(a) imposing a levy similar to the Medicare Levy to fund high care aged care services, including in residential aged care facilities;

(b) introducing health insurance for aged care services through private health insurers. This could be on a 'stand-alone' basis but could also be used in addition to a levy (as suggested in paragraph (a));

(c) implementing a fund or funds through which working individuals can gradually accumulate assets for aged care in addition to superannuation;

(d) incentivising the use of superannuation to fund aged care services, for example through tax concessions; and

(e) developing other specialised financial products or annuity schemes which would be regulated under the financial services laws.

Decisions to establish appropriate systems for supporting self-funding and co-contributions for aged care services are urgently required, to set in train the necessary processes to fund and support the reform process but also to manage the looming increased demand for services as the baby-boomer generation moves into retirement.

We consider that imposing a levy (which could be less than the current level of 1.5% of taxable income set under the Medicare Levy) would be an equitable approach and would also immediately inject funds to implement needed reforms.

Other mechanisms could then be added to this regime, such as permitting aged care service health fund rebates through private health insurers and imposing an additional levy for high income earners who do not take out insurance (similar to existing funding for acute health care services).

If a new levy is unpalatable then consideration could be given to raising the current levies to factor in funding aged care services as a component of the health care system already in place. Australians are already familiar with this system and it is reasonable consider aged care services as another aspect of universal health care provision with additional privately funded services being available.

In summary:

(a) It is vital in developing a national policy that governments consider whether and what aged care services can and should be publicly funded and which services should be, at the very least, subject to co-contribution or be fully self funded.

(b) Strategies and regulation must be implemented to manage and control the impact on the public purse of the anticipated increased demand for aged care services as the baby boomers move into retirement.

(c) We consider that implementing a Medicare-type levy or increasing the current levy to accommodate aged care services, supplemented by private insurance products is likely to be an equitable and also expeditious solution.

4.5 CONSUMER CHOICE AND INNOVATION IN ACCOMMODATION FOR OLDER AUSTRALIANS

As we have noted in paragraph 4.2 above, we do not consider that accommodation for older Australians inherently requires extensive government funding and prescriptive regulation.

Accommodation should be accessible for older Australians in varying forms but which reflect the possibility of owning or renting such accommodation with publicly funded or supported accommodation services (including, where required, residential aged care services) remaining available to ensure that all older Australians have access to suitable accommodation.

There is a demand for, and (regulation permitting) there is likely to be, a wider mix of providers and options leading to greater choice and flexibility in senior living. We consider that the overlap of affordable housing needs with responding to care needs and providing appropriate support services for older Australians, requires new ways of conceiving and developing senior living options.

Focus on the use of accommodation bonds for residential aged care has stymied innovative approaches to funding accommodation. New approaches are required to recognise the choices desired by older Australians and the aged care regulatory regime needs to be more flexible to allow innovation. Providing suitable housing and accommodation infrastructure for older Australians and increasing the uptake of appropriate housing has obvious beneficial effects on housing affordability and availability particularly in urban areas and Australian capital cities.

The wishes of many older Australians to remain living in areas close to social and family networks and to services is likely to drive demand for medium to high density senior living accommodation (eg tower blocks particularly in urban areas and Australian capital cities where there is less availability of land other than at premium prices). This will require rethinking funding models because it is not possible (generally speaking) to fund a staged high rise development in which residents take up occupation and pay an ingoing contribution that enables paying down debt to fund further development (as is the case for traditional funding of retirement village developments).

With the right policy framework for both accommodation and care services providing care to older Australians in their homes or in other senior living specific accommodation options will be a serious alternative to hospitals for sub-acute care.

Transition to a new framework

Deregulating accommodation, and in particular decoupling it from care services provision, will result in structural adjustments. It will be important to carefully plan a process to handle the transition from the current structures to those new structures as smoothly as possible with as little impact on older Australians and current providers as is possible.

Models of accommodation are needed which will provide security of tenure but also permit repair and renovation by owners when required to preserve the value of the accommodation. This is currently difficult under the current State based retirement villages legislation.

Retirement villages are self funded and do not place additional burdens on government resources. However, we consider that retirement villages are under utilised in terms of providing care services. There is scope for increasing the government's commitment to funding care services into villages. Some operators are willing to consider being providers of these care services or to enter into partnerships with local community service providers.

Retirement village services would offer opportunities for economies of scale that should be supported by appropriate funding of community based services. Waiting lists and too few care packages being available restrict the reach and potential benefits of these arrangements.

The traditional deferred management fee (**DMF**) model remains a strong option for retirement villages but there is a need to add variations and new models of senior living. In particular rental accommodation is required, as well as a range of different mixes of DMF and other fees to suit different resident requirements and circumstances.

We are aware that around 100,000 serviced apartments remain vacant in retirement villages across Australia. The costs of fully self-funded care in serviced apartments is prohibitive for many older Australians. However, serviced apartments may be ideally used for funded respite care services or for guaranteed low care services where funding assistance is available. Currently, serviced apartments are not easily converted to residential aged or respite care attracting federal funding under aged care legislation (for which they may ideally suited) because of the differing building certification requirements for retirement villages and residential aged care facilities. Moreover, the retirement village owner or operator would, under the current legislation, be required to be an approved provider and to apply for allocated places that could be used to provide services in those serviced apartment. Residents of villages are therefore required to source community care packages themselves and it is provided on an individualised basis.

Building certification

We advocate a "best practice" approach to building standards for senior living. There should not, in our view, be prescriptively regulated standards for institutional type facilities over and above usual local council planning and building standards.

Accommodation for older Australians should be able to be delivered in a variety of forms. We support the expansion of universal design principles into senior living to promote a variety of accommodation solutions and options for older Australians. Standards may still be required for access requirements, safety and fire safety although these could be similar to those required in residential homes when the accommodation type supports this.

With the possible exception of high care residential aged care facilities or dementia specific facilities, we do not consider that regulating these aspects is necessarily a function of the Department of Health and Ageing. They may be more appropriately managed by the Department of Housing at a federal level.

As a complementary aspect of universal design principles, this Department may also deal with ways in which the accommodation of older Australians may be modified to enable the provision of care services into the home. It may be possible to facilitate access by older Australians or their representatives to certain services that assess existing premises and carry out such modifications. Consideration could be given to providing funding or subsidies for those modifications where that would prevent an older Australian from requiring institutionalised care, which is likely to offer costs savings compared to funding residential care.

In summary, the Australian Government can help by:

(a) providing a coherent national policy framework and coordinating strategies through the State Housing Ministers to:

    (i) remove disparities in standards and codes across the Australian States and Territories and between aged care facilities and retirement villages, and for senior accommodation generally by removing prescriptive codes for residential aged care facilities and by supporting the development of

universal design principles for senior accommodation which could take a variety of forms;

(ii) support mixed residential offerings in inner urban areas; and

(iii) develop a framework for senior living in rural and remote areas, which may require giving taxation or other incentives to private providers (which would be offset through reduced funding costs to government) and/or grants to community housing providers and not for profit organisations;

(b) expanding upon the NRAS scheme;

(c) providing tax incentives for older Australians to transition from their family home to senior living, for example removing stamp duty;

(d) allowing funding to be provided from a variety of sources including from family members or by providing rental assistance in retirement villages which offer rental options;

(e) ensuring that the most vulnerable or disadvantaged older Australians have access to accommodation, including fully funded or purpose built accommodation where required; and

(f) providing or championing community education on senior living options.

4.6 RESIDENTIAL HIGH CARE SERVICES AS A SPECIAL CASE

We consider there is likely to be a continued need for institutional type residential aged care facilities to provide high care services for those frail older Australians who have little or no capacity for self-care, including those suffering from advanced forms of dementia, although we acknowledge that deregulation may lead to the development of innovative offerings for such services that are currently precluded under the Aged Care Act and in particular by the certification and accreditation requirements.

Residential high care facilities are essentially similar to hospital services in a sub-acute setting, however, requiring higher levels of personal care services to be delivered to care recipients than may be the case in many hospitals. It is difficult to conceive that accommodation can be usefully separated from care in these circumstances and that we would also question the utility of the current separation of such accommodation and care costs for funded services.

The current system for providing residential high care services is in crisis. There is credible information to support provider's claims that it is no longer viable to construct and operate high care facilities on the current returns and funding. Capped accommodation fees regardless of a person's income status have, in our view substantially contributed to this crisis. There does not appear to be a sound policy rationale for capping accommodation charges for those individuals who have capacity to contribute (or whose families wish to support such payments). This is particularly significant in circumstances where it would appear that the Australian Government cannot afford to increase subsidies for accommodation payments to providers to a viable level, and where accommodation bonds cannot be charged (and we do not consider they should be). It is neither reasonable not rational to require providers to continue to absorb increased costs of providing residential high care (particularly labour costs) to the extent that they cannot afford to attract and retain competent professional staff in sufficient numbers, or cannot continue to operate the facility.

In our view there has been a misplaced overemphasis on prescriptively regulating for a "home like" environment in what are essentially sub acute hospital facilities, rather than for providing intensive nursing and care services by sufficient numbers of professional staff, in

particular, nursing staff. Increased costs also arise from the requirement for single or double-bedded rooms which are not efficient for delivery of nursing care services.

Medical services into nursing homes are currently not provided for in a consistent and coordinated way to minimise risks to residents and to staff who are expected to deal with difficult issues around nursing needs. In our view, this results in numerous preventable transfers to acute care hospitals, "bed blocks" in emergency departments and diversion of expensive acute health care resources.

The current regulatory framework is not flexible enough to respond to the concerns of providers around each of these issues, and the reality of admission to residential high care at older ages with complex needs and for shorter periods.

Accordingly there is no reason (particularly in the current context of national hospital and health care reform) to preclude the licensing and funding of high care residential facilities on a similar basis to the arrangements for the licensing of private hospitals in the Australian States and Territories.

For example, in New South Wales, a hospital operator licensed under the *Private Health Facilities Act 2007* (NSW) will be licensed to provide specific kinds of private hospital services, for example psychiatric services, for a certain number of beds (determined by the operator and not through any allocation of places). The operator of the hospital must satisfy certain conditions in order to be approved to hold a licence to operate a private health facility (not dissimilar to approval for an approved provider). Moreover, the facility itself must be operated in compliance with standards specified in the schedules to the Private Health Facilities Act. These standards are considerably less prescriptive than those specified for the current accreditation of residential aged care services. Notwithstanding this, private hospitals are generally well run, provide a good standard of services and have well appointed amenities.

Applying our earlier suggestion that residential aged care services could be funded through a combination of a Medicare-like levy payable by working Australians, as well as by private insurance rebates, then the funding for high care residential services could be similar to that for hospital patients.

In the private hospital sector, costs to patients are quasi-regulated by virtue of the refunds that private health insurers are prepared to pay to hospitals for the services provided. Moreover, while the Private Health Facilities Act itself does not prescribe accreditation standards beyond those set out in the schedules to the Act, the accreditation of private hospitals is essentially mandatory because private health funds will not provide rebates for hospital services if the hospital is not accredited. Such accreditation is carried out by independent bodies, such as the Australian Council on Healthcare Standards.

In order to avoid a resulting two-tier system of publicly funded and operated high care residential aged care facilities and separate private facilities, it will be important to ensure that any funding provided to older Australians who are in receipt of an aged pension or are self funded but have low incomes for services are sufficient to cover the real cost of providing residential aged care to those older Australians.

In this framework, while facilities would continue to be licensed to provide residential aged care services, the provision of such services would not be restricted to numbers of allocated places available for care. Service offerings in terms of the size of facilities and the range of services provided will therefore be determined by competition between providers and quasi-regulation by insurers to provide cost effective quality services to older Australians.

Rural and remote residential high care services and funding

This system is unlikely to work well in rural and remote areas of Australia. We would support the continued funding and expansion of multi-purpose services for those areas as an efficient model for providing care services where the labour pool is smaller and market forces may not helpfully determine appropriate quality and levels of care.

In our opinion, there is likely to be a continued need for high quality residential aged care facilities providing high care services for the frail aged.

In summary, we suggest that:

(a) licensing of sub-acute facilities could be carried out in a manner similar to that for private hospitals and that the number of beds and kinds of services offered should be determined by providers rather than through restrictive allocated places;

(b) residential high care services could also be funded in a manner similar to private hospitals – through a Medicare-type levy and private insurance products; and

(c) any regulation should allow for or require the provision of services by medical practitioners and require sufficient numbers of professional nursing staff.

5. A NEW REGULATORY FRAMEWORK

5.1 THE NEED FOR REGULATION

Our support for deregulating certain aspects of the Aged Care Act and Principles does not mean that we consider there is no place at all for regulation. On the contrary, regulation is essential:

- to build trust and confidence in the integrity and standards of senior living services;
- to protect vulnerable older Australians;
- to delivery accountable government funding;
- to provide an economic framework that encourages investment and innovation.

We consider there are five key areas for senior living regulation:

- licensing providers of aged care services;
- needs assessment for prospective fully or partly funded care recipients;
- case management and community services – providing a broader range of senior living services to all older Australians and their families and carers based on the broader needs assessment and case management role required for person-centred funding;
- managing complaints regarding the provision of services – the complaints system should include enabling providers to raise concerns or issues for resolution; and
- guardianship services to ensure sufficient protection is in place to protect older Australians in care when they lack capacity and require substitute decision-making and protection from exploitation.

5.2 LICENSING CARE PROVIDERS

We consider there is a continuing and important role for the Commonwealth Department of Health and Ageing in licensing care service providers and in maintaining standards for care services delivery. We submit that the licensing of care providers could be regulated in a manner broadly comparable to licensing requirements in other areas, for example, licensing the operation of private hospitals and health facilities. Care providers would either be licensed to be able to provide community services or would be licensed as the proprietors of residential aged care facilities and dementia specific facilities, or both.

The Department would maintain a standard setting role as well as monitoring adherence to standards of care provided to older Australians, to the extent that these issues impact upon licensing. It would respond to any concerns about serious risks of harm to care recipients.

We do not consider that the current prescriptive regulatory regime should necessarily continue to apply to residential care services, particularly in relation to accommodation and certification standards. We consider that any regulation and monitoring of standards in this respect must be of a kind that will enable services to be provided in a variety of settings and forms, provided that broad standards are adhered to.

Regulating in detail every aspect of the care services provision stifles the ability of providers to deliver innovative yet high quality services. In a deregulated market, sub-standard facilities are unlikely to attract older Australians or their families. Private hospital services are a case in point where broad standards are imposed under the licensing regime but where services are, generally speaking delivered to high standards.

5.3 NEEDS ASSESSMENT

In a person centred framework, where funding follows the person rather than being tied to an allocated place, then there will be an important role for careful and skilled assessment so that the needs of older Australians are appropriately evaluated.

The regulatory framework for allocating funding through ACAT assessments will need to be adjusted where funding for care services is allocated to a person based on need rather than allocated by reference to allocated places. The framework should permit and encourage the application of funding to a wide range of care services with discretion in the recipient to choose between licensed care providers.

These adjustments should also take into account concerns that have been identified to us regarding the use of ACAT assessments as a means of determining funding subsidies rather than prioritising the care needs of individuals (see Schedule 2).

5.4 CASE MANAGEMENT AND COMMUNITY SERVICES

The new needs assessment regulatory framework will create a role for a service that conducts professional assessments of the care and accommodation needs of older Australians with a broader perspective on senior living options and needs than is available under the current framework.

We submit that there is an opportunity, and a need, to build a broader, more co-ordinated and more cost efficient package of case management and community services centred on this new professional role.

New services needed

It is essential for an effective senior living policy, and for the senior living regulatory framework to achieve its objectives, for case management and community services:

(a) (***awareness***) to promote awareness of senior living issues, options and services;

(b) (***information***) to provide, and encourage older Australians and their families and carers to access, information on senior living issues, options and services before an accommodation or care requirement becomes acute;

(c) (***transitions***) to help older Australians and their families and carers to deal with the transition into senior living options, and the transition from one option to another (whether driven by accommodation or care requirements or both), at an appropriate time without trauma;

(d) (***social needs***) to provide services that address the social needs of an older person as well as their direct health care and accommodation needs, and as an integral part of the senior living services provided by the community;

(e) (***trust***) to build trust in the provision of the services, particularly in the security of tenure in senior living accommodation while facilitating appropriate transitions between different types of accommodation; and

(f) (***accessible and co-ordinated***) to provide these services and mechanisms in a way that is fully accessible to older Australians and their families and carers, and is co-ordinated as a single package.

The other regulatory mechanisms discussed in this submission – including licensing providers, a person-centred needs assessment framework, a more developed complaints resolution system, and a more developed guardianship model – will all help to implement and build a level of confidence in the senior living policy. However, from a policy and

regulatory perspective they will fall short in 3 key respects if they do not address the issues noted above:

(a) the policy measures will largely be limited to the fully or partly government funded services, failing to engage and access the resources of the older Australians and their families who do not qualify for accommodation or care services under the needs assessment guidelines;

(b) they will result in services only being accessed when the situation is acute which is not cost efficient and does not draw on the significant benefits of preventative health measures (including the preventative health benefits of addressing an older person's social needs); and

(c) they will result in the complaints resolution and guardianship mechanisms being overburdened and possibly losing the confidence of some of those involved due to the lack of effective earlier discussion and intermediation.

Existing services

It is important to recognise that there are many services currently provided by or through ACAT teams, local councils and licensed providers of current aged care funded services that seek as part of their work to address many of the issues noted above. However, they are hampered by the current focus of the ACAT regulatory framework and the related funding constraints.

Most importantly, they are not easily accessible or co-ordinated from an older person's perspective. Frequently, they are limited to only one location in a local government area and limited to the sporadic provision of one or two care-focussed services. There is no single, local centre that has information and advice on what services are available (whether funded or unfunded) or can provide assistance in assembling and arranging the delivery of the required services.

New model of services

We submit that the service that conducts professional assessments of the care and accommodation needs of older Australians should form the base for a broader service that also provides:

(a) case management services, for those individuals who qualify for fully or partly funded services and their families and carers on an on-going basis;

(b) information and advice for all older Australians and their families and carers who are considering senior living issues, options and services (irrespective of whether any qualify for fully or partly funded services);

(c) introduction and assistance with access to senior living social activities and networks;

(d) introduction and assistance with access to accommodation and care providers.

These services should be provided as a local shopfront or corner store type of service which is connected to the local community. This will enable the service personnel to develop relationships with local service providers and provide meaningful information to potential users of the system. For ease of reference in this submission these locally focussed case management and community service centres are called **Senior Living Centres**.

Promoting awareness and providing information

Through our experiences with clients and in speaking to industry leaders, it is clear that the broader Australian community does not, generally speaking, understand aged care service provision, the distinctions between aged care and retirement villages, or the distinctions between funding for community aged care packages and HACC services.

Many older Australians must rely upon the resourcefulness of family members to navigate this confusing and difficult maze. Frequently the family member is called upon to do this when they are responding to the health crisis of an older family member or are grappling with their own concerns and feelings about moving an older person, for example a parent, into care.

Senior Living Centres would enable all older Australians and their families and carers to get up-to-date and relevant information and advice when needed. If the centres have a sufficient profile, the community will be able to access this information and advice before a situation becomes acute which will be less traumatic for the individuals and more cost efficient for the community.

The Senior Living Centres will be able to act as a resource and co-ordination hub for a range of funded and unfunded social, accommodation, care and other services. Through their comprehensive knowledge of the available senior living options, they will enable the development of best practice guidelines for delivering services and senior living offerings in place of prescriptive regulation.

Introductory and on-going services

Senior Living Centres would be able not only to advise on the range of accommodation and care options that are available for senior living but also to have a role in brokering services for older Australians in a manner similar to brokering disability services. The needs assessment (where applicable) could take into account the preferences of the person and their family for the kinds of services and how they are delivered and their wishes to maintain social connections.

The same service would also be able to advise on transitions to further services when care needs change, such as a deterioration in physical health or in cognitive capacity and behaviours as a result of dementia, or related disorders. This is an area that is frequently identified by providers as one that is not well managed by older Australians and their representatives. That is, the services may be needed not only at entry but also on an ongoing manner. For example, funding may provide for regular contact and review at appropriate intervals and could include case management services with semi-annual or annual review and consultation.

it will be important to ensure that there is consistency in case management so that older Australians and their families and carers can be confident that (as much as is reasonably possible) a person or organisation with knowledge of their circumstances will be able to provide them with case management assistance for a considerable period of time. This will help build trust in the system which will be an important ingredient in helping to address difficult issues (such as reconciling the transition between accommodation options and security of tenure) without resorting to the complaints or guardianship systems. To this end, we submit that tendered services should be subject to longer term contracts.

It will also be important to ensure that the range of services provided through the Senior Living Centres is available to all older Australians and their families and carers, not just to those older Australians who are assessed as eligible for government funded services or assistance. The most effective and most cost efficient system is one with which people engage before a situation becomes acute and which promotes and delivers the benefits of innovation and preventative health policies, including addressing social needs and

encouraging innovative financial, accommodation and care options. This system requires the engagement of the full range of older Australians and their families and carers.

Interface with providers of care services and accommodation

Senior Living Centres will also perform an important liaison role between those who receive senior living services and those that provide them. That is, the centres would be equally receptive to approaches from service providers when they encounter issues that would benefit from input from a third party not directly involved in day-to-day service delivery or the regulation of the service provider. In this sense, the centres will perform a facilitative role and enhance consumer and provider confidence in the overall delivery of senior living services.

Implementation

As outlined above, the Senior Living Centres are a service concept rather than a program. The most appropriate mechanism for delivery of the Senior Living Centres requires further policy development.

We note in this regard that the centres could be operated by non-government entities (either for profit or not-for-profit) who tender to be able offer these services to older Australians in a manner similar, for example, to the jobs network or community health centres.

Whatever method of delivery is used, it will be important that they are not centralised services that are difficult to access and intimidating for individuals to navigate.

5.5 COMPLAINTS MANAGEMENT AND INVESTIGATION

It is an open question as to whether investigations would continue to be conducted by the Department of Health and Ageing (**Department**) or, for example, by another agency. In our view, there is merit in investigation processes being independent of the Department's monitoring processes in order to ensure a perception of fairness and lack of bias. There may also be less pressure on the Department to respond to concerns raised by the media or other political pressures in relation to the investigation of complaints.

We recommend the establishment of a statutory body separate from the Department to manage complaints. It may therefore be helpful to consider incorporating the office of the Aged Care Commissioner as that statutory body and appropriately resourcing it, although this is not the only possibility that is open to government.

In our opinion, replacing the previous complaints scheme under the Aged Care Act, which permitted mediation or conciliation of issues, with the current investigation scheme in 2007, has resulted in an unsatisfactory and skewed system. The only possible responses to a complaint are an investigation or the exercise of the Secretary's discretion not to investigate the complaint (which we understand rarely occurs).

We have set out in **Schedule 3** specific examples of difficulties our clients have experienced with the current system.

The need for a broader framework for responding to complaints and complaints resolution

Mediation or conciliation facilitated by an independent body may be a more appropriate means of dealing with certain kinds of complaints, particularly where the issues have arisen from a lack of understanding of aspects of care provision, or the operation of the service. Moreover, these processes may increase the complainant's satisfaction that their concerns have been heard and acted upon, rather than, for example, receiving notice that

the complaint will not be investigated or a finding that no breach of the provider's obligations has occurred at some length of time after the complaint was lodged.

In our view, a broader range of responses should be able to be implemented after receiving a complaint so that while it remains possible to conduct an investigation of serious issues, other means of dispute resolution are also available where appropriate.

The statutory body charged with responding to complaints would assess each complaint when received before determining an appropriate channel for resolution. We consider that a range of resolution options should be permissible under any regulation. Such options would include:

(a) informal resolution, including giving an apology;

(b) mediation;

(a) conciliation;

(c) formal investigation; and

(d) referral to the Department of Health and Ageing or registration bodies (where the complaint concerns registered professional staff) for action following an investigation.

The legislation should provide for prompt response to potentially serious complaints and immediate referral to the Department.

Our proposal for a possible dispute resolution route (rather than immediate investigation of a complaint) in relation to complaints about care services may be likened to the triage system in a hospital emergency department where the seriousness of the concerns raised will dictate the kind of response that is warranted in the circumstances. Similarly, professional registration bodies also commonly review complaints to decide the most appropriate action or method of resolution before directing the complaint to one of several avenues. A similar system has been implemented for dealing with complaints against health professionals or health services in New South Wales by the Health Care Complaints Commission (**HCCC**). The HCCC must liaise with service providers or with professional registration bodies where warranted.

Legislation relating to the statutory complaints process should continue to provide means of appeal should any participant (including the complainant, a provider or an individual health care professional) not be satisfied with the outcome of any mediation or dispute resolution processes or with a decision arising from an investigation. The appeal should be *de novo* to allow new information (if available) to be provided and for the decision to be confirmed or set aside, including where the Department has issued a notice of required action or non-compliance notice (or their equivalent) to a provider.

In our opinion, this framework would provide greater flexibility than is currently available (the Secretary must either investigate or decline to investigate) as well as potentially reducing the burden on approved providers in responding to the investigation of complaints that may be vexatious or minor, or where the complainant is simply seeking more information or an acknowledgment of their concerns, or where little is likely to be achieved by investigating the complaint.

Security of tenure

Providers have raised with us on a number of occasions their concerns that the current system does not enable them to seek redress. In particular they are concerned that the security of tenure provisions do not allow them to request a resident be relocated in circumstances where the resident or their family are causing significant disruption to the

operation of the facility and all efforts at resolving this have failed, or where the facility is unable to adequately accommodate the behaviours of the resident which give rise to concerns about the safety of staff or other residents.

Residential services providers are not "one size fits all" and while ageing in place should be supported, there may be circumstances where the change in a resident's health status or services would support relocation. The permissible circumstances for relocation are, in our view, unreasonably limited and there is scope for an independent body to consider these needs. The body may, for example, require a provider to demonstrate that they have taken all reasonable steps to address the situation, but these have not enabled them to resolve the situation.

The body could be empowered to consider whether a determination should be made enabling a resident to be relocated in certain specific circumstances. Again, a variety of options may be available to resolve these issues.

As noted above, one function of the Senior Living Centres would be to facilitate discussion and understanding of issues of this kind with older Australians, their families and carers and the accommodation and care providers. It is expected that this will help resolve may of these issues before they fall within the complaints or guardianship systems.

5.6 GUARDIANSHIP

Service providers have raised concerns about how to manage issues arising from a lack of capacity in the older person receiving services that is not acknowledged or is denied by family members or where family members may themselves be exploiting the older person, particularly regarding access to their finances or assets.

In our experience, it is often unclear as to how and in what circumstances an approved provider can or should bring proceedings before a guardianship tribunal or board.

We submit that consideration should be given to legislating for facilitating recourse to or access to such bodies by approved providers (without fear, for example, of reprisal from family members) or in establishing a national body that can deal with these issues in the context of providing aged care services.

Senior living centres could also perform a role in this regard, either through being conferred powers to refer matters to existing guardianship mechanisms or by playing a greater role in direct advocacy and intervention.

6. TAX REFORM

6.1 INCOME TAX

Retirement villages and aged care facilities are capital intensive facilities which require significant outlays of capital for the construction and ongoing maintenance of buildings and facilities. However, under the current income tax regime, minimal tax concessions are available for these outlays and rates of depreciation are very modest (especially in the first few years of operation).

Consequently, owners/developers/operators suffer significant initial outlays which are generally only recouped over a relatively long period of time (via depreciation/capital allowances). This delay in the recovery of capital costs and the general lack of income tax concessions (which are enjoyed by other segments of the economy – for example, the mining industry) is one factor that impacts on investment in the senior living market.

The precise income tax treatment of retirement village owners/developers/operators varies depending on the owner/developer/operator's intended use of the facility. However, as a general rule, the costs incurred by retirement village operators in developing or acquiring a village to conduct the business of granting occupancy rights to residents have been specifically ruled to be capital, and are therefore non-deductible under the general deduction provisions. Accordingly, great reliance is placed on the depreciation regime to provide income tax recognition for these initial costs.

However, owners/developers/operators are disadvantaged by the existing unfavourable depreciation regime. That is, while retirement villages are depreciable, the rate of depreciation for buildings (which generally comprise the vast majority of initial capital costs) is extremely modest (generally 2.5%), as compared to the significantly higher rates of depreciation available for other depreciable assets such as plant and equipment.

This less favourable income tax treatment has resulted in the use of various types of alternative structures in the retirement village sector, including loan / licence and loan / lease arrangements to develop and operate retirement villages. Clearly, the use of these structures has added another layer of complexity and uncertainty to the legal, regulatory and tax treatment of the industry.

We consider that investment in the retirement villages sector could be improved by the adoption of more concessional income tax rules (ie, a more favourable depreciation regime). In particular, the current income tax treatment of retirement villages should be subject to a thorough review, with an aim to providing more certainty for owner/developers/operators and encouraging greater investment in the industry.

6.2 GST ISSUES FOR THE DEVELOPMENT AND SALE OF RETIREMENT VILLAGES

The application of GST to the sale or lease of accommodation in a retirement village was thought by the industry to be relatively clear, until the Australian Taxation Office (**ATO**) took a view contrary to how it had been applied by the industry. This issue is currently the subject of a draft GST ruling, GSTR 2010/D1.

The lease or licence of residential accommodation is an input taxed supply for GST purposes. This means there is no GST liability arising from the supply of accommodation to residents. However, the owner of a retirement village is not entitled to claim back the GST it incurs on its costs that relate to providing the accommodation to residents.

For a developer, the significant costs are the building and development costs. Based on the ATO draft ruling, the developer will be denied the ability to claim a significant portion of the GST incurred on its building and development costs, even if it intends to sell the retirement village, if the developer begins to lease the accommodation to residents before the sale.

The draft ruling also applies to when a developer of a retirement village sells the retirement village as a taxable supply to another entity as "new residential premises" and the sale results in the purchaser being responsible for repayment of the outstanding ingoing contributions to existing residents. A benefit (the "repayment benefit") is said to arise for the vendor (developer) as a result of this transaction because the purchaser assumes responsibility for repaying the ingoing contributions received by the vendor. The repayment benefit is included by the ATO in the consideration for the supply of the retirement village.

The increased consideration results in a greater GST liability for the vendor. Often, the vendor will have the contractual right to recover the additional GST amount from the purchaser. However, this will form part of the cost to the purchaser as the purchaser will not be able to claim this GST amount back as input tax credits, given that it will be using the retirement village to make, predominately, input taxed supplies of residential accommodation to the residents.

6.3 GST ON THE SUPPLY OF SERVICES TO RESIDENTS

Prior to the release of GSTR 2010/D1, there was already significant uncertainty in the aged care and retirement village industry in relation to the GST treatment of the supply of accommodation and any separate supply of services.

Generally, residential care is GST-free if the services are provided to one or more aged or disabled people in a "residential setting". In 2004, very specific amendments were made to ensure that a resident that occupied a serviced apartment in a retirement village was also in a residential setting. Even though it was always the policy intention that the GST-free status would apply to services provided to a resident in a serviced apartment in a retirement village, these amendments were made to fix a perceived uncertainty in the legislation. Nevertheless, the amendments are very specific and do not extend to other types of care services provided at retirement villages to residents that do not occupy a serviced apartment.

With GSTR 2010/D1 due to be finalised in March 2011 and with ongoing changes to the industry, GST will continue to bring about challenges for investors in the senior living industry. If it is not properly designed it has the potential to discourage investment and innovation. We consider this must be considered as part of any reforms.

B

SCHEDULES

B

Schedule 1

ACCOMMODATION BONDS

(a) Co-contributions by third parties

The Aged Care Act does not appear to prohibit the payment of an accommodation bond by a third party, although this is not entirely clear (see section 57-2(1)(f)). However, it constrains the likelihood of such payments being made by a third party because the accommodation bond balance must be refunded to the care recipient and not to the person who provided the funds (section 57-21).

We are aware of situations where care recipients may not have sufficient means to access certain services, but their adult children wish to contribute to the costs of care and accommodation for their parents.

We consider it is possible for providers to facilitate such arrangements under the current legislation, for example by permitting care recipients to assign the refund of an accommodation bond balance to another person under a binding instrument. However this is cumbersome, governed by legal principles that differ across the States and Territories, and not without risk for the provider.

While it is important to ensure that older Australians with limited assets can access affordable services, the legislation should not prevent care recipients or their families from being able to organise funding and contribute to the costs of care and accommodation as they see fit and as suits their financial circumstances. Moreover, this may decrease the burden on government funding.

(b) Restrictions on accommodation bond payments arising from transfer

When a resident transfers from one residential aged care service to another, the approved provider of the second service cannot charge an accommodation bond that is higher than the balance of the accommodation bond that is refundable by the first provider (section 57-13).

If the care recipient or a family member of a care recipient wishes to pay an additional amount so that the person can move to another facility, the approved provider cannot accept the payment of a higher bond amount.

A care recipient may wish to relocate for a number of reasons including because:

(i) a facility is closer to their family;

(ii) a facility is new and offers a better range of services or amenities; or

(iii) the person is not satisfied with the first facility.

For approved providers, there are a number of imperatives (including those of financiers) which impact upon their economic model and provide a basis for requiring accommodation bonds of a certain value for entry to the facility.

The effect of the Aged Care Act requirements is to defeat a person's wishes to relocate if it is not economically viable for the second provider to accept the care recipient on transfer of the existing accommodation bond balance. However, if the person leaves residential care for at least 28 days, they can subsequently re-enter care at a new facility and pay a higher bond amount. This requirement is arbitrary and the basis for maintaining it is not clear. This does not reflect the environment that should exist in a well-regulated but competitive market for services.

Schedule 2

CURRENT ASSESSMENT AND FUNDING PROVISIONS

(a) RCS Saved Rates

A key issue in relation to Commonwealth funding to approved providers under the Aged Care Act is the continued payment of Resident Classification Scale (**RCS**) rates for certain residents following the introduction of the Aged Care Funding instrument (**ACFI**) on 20 March 2008 (**RCS Saved Rates**). Approved providers may therefore provide a service to certain residents at a higher level of care than is funded through subsidies received from the Commonwealth.

The problem arises for approved providers where a resident:

(i) entered a facility for permanent residential care prior to 20 March 2008;

(ii) has aged in place (with increasing care needs); and

(iii) is ACFI appraised but the appraisal results in a rate of subsidy under ACFI that is less than $15 above the existing RCS rate.

An object of the ACFI reforms was to ensure that no approved provider was worse off financially, and this is undermined by the payment of RCS Saved Rates. In our view, there may be grounds to challenge the determination which sets out the RCS Saved Rates (*Aged Care (Residential Care Subsidy – Basic Subsidy Amount) Determination 2010 (No.1)*) as being ultra vires because the conferral of power on the Minister under the Aged Care Act to make the Determination (in section 44-3-(3)) does not refer specifically to previous classification levels of residents. It is arguable that the section only makes sense if it is read in the context of current (ACFI) classifications.

In any event, seeking redress through advancing complex legal arguments is not an efficient way to ensure that funding operates consistently with one of the key objects of the reforms.

(b) Low care limited ACAT Assessments

We are aware of situations where care recipients are entering residential care services with an ACAT approval limited to low level care, but are assessed by the approved provider as having a high care ACFI classification. Despite providing high care services to these care recipients, care subsidies default to low care payment levels.

While providers may avail themselves of certain review and reappraisal mechanisms under the Aged Care Act, there is no means for an approved provider to expeditiously or efficiently move care recipients in this situation to a high care classification (and attract the higher subsidies).

Section 25-1(2) of the Aged Care Act provides that the Classification Principles may specify methods or procedures that the Secretary must follow in determining the appropriate classification level for a care recipient. In classifying a resident, the Secretary must take into account the appraisal made by the approved provider. The Classification Principles then provide that if the ACAT approval has specifically been limited to low care under the Aged Care Act, the Secretary **must** classify the resident at the interim low level (section 9.3B(3)(b)).

However, section 25-1(2) of the Aged Care Act only enables the Classification Principles to set out the matters to be taken into account when classifying a care recipient and the

procedure to be followed in determining the appropriate classification. On the express wording of section 25-1, as a matter of statutory interpretation, it is our view that this does not necessarily mean that the Secretary is to be mandatorily bound to arrive at a particular conclusion or outcome as to a person's care needs by operation of the Classification Principles.

We consider that there is a reasonable basis for asserting that section 9.3B(3) of the Classification Principles is invalid because it is ultra vires. That is, its effect is to direct the Secretary to arrive at a particular outcome rather than to specify matters that must be taken into account or a procedure to be followed. The result is that there may be a legal basis for challenging decisions of the Secretary to give precedence to ACAT appraisals which are inconsistent with the approved provider's own assessments.

In any event, as a matter of policy, if it is seen appropriate to develop a co-ordinated national policy framework that supports the growth of innovative and responsive accommodation and care options, there is merit in moving to a system where a care recipient can move through the continuum of care (whether that be community based care, low or high level residential care) without artificial restrictions such as that embodied in section 9.3B(3) of the Classification Principles.

(c) **Staffing**

Getting the right workforce is an issue for most providers. Registered nurses working in aged care are paid less than those working in acute care. Training and service needs are increasing but the ability of facilities to pay adequate wages is decreasing. The existing workforce is ageing and it is hard to attract new entrants even to maintain current numbers at a time when there is a need to grow the workforce.

An aged care worker earns less than a person at the check-out of a supermarket, but works less predictable hours, with more stress and requires more skills.

The recent 1.7% funding adjustment to annual funding for aged care services is manifestly inadequate. Staff costs represent about 75% of budgets. Staff costs have gone up by substantially more than 1.7% in the last 12 months; for example: minimum wages increased by 4.8%; average wages increased by 3%; ordinary time earnings increased by 5.8%. (This is a false economy when the relative cost of a hospital bed compared to the cost of accommodating a person in an aged care facility is taken into account).

It is particularly difficult to build a workforce in country areas and to find enough GPs who are interested in aged care.

The community care workforce is so casualised that it does not support a career or a first income for a family – it is a second income. This inhibits the growth of a professional carer industry.

There is a change in the mix of staff skills needed. There has been a tradition of relying on the acute care trained staff (ie registered nurses) to act as managers of facilities. This addresses the care side of the business but not always the social and lifestyle aspects. Moreover, in many cases the current funding regime does not support costs associated with training staff and ensuring that they are supported to develop appropriate management skills.

Schedule 3

CONSUMER AND PROVIDER PROTECTION AND STANDARDS

(a) Security of tenure – rights of approved providers

The security of tenure provisions in the Aged Care Act and the *User Rights Principles 1997* provide an important safeguard for care recipients. Care recipients cannot be asked to leave arbitrarily at the whim of an approved provider or even to be moved within a facility without their agreement (in most circumstances).

Our clients experience a number of difficulties with the security of tenure provisions as set out in Part 2 Division 1 of the User Rights Principles. The Principles do not provide sufficient flexibility for an approved provider to ask a care recipient to leave the residential care service in certain circumstances, including:

(i) where the approved provider's relationship with the care recipient and/or his or her family have deteriorated to such an extent that the continued provision of care to the care recipient is untenable for the provider or its staff (and ultimately not in the interests of the care recipient); or

(ii) where a care recipient develops dementia-related behaviours that pose a significant risk of harm to care staff and/or other residents, but the care recipient's conduct does not come within the provisions of section 23.5(3)(c) of the User Rights Principles such that the person could be said to have **intentionally** caused serious damage to the residential care service, **serious** injury to the approved provider (if the provider is an individual), or **serious** injury to an employee of the approved provider.

A person who develops significant dementia related behavioural problems arguably may never have sufficient capacity or cognitive insight to be said to have "intentionally" caused harm or injury. More commonly, the behaviour has not resulted in harm or injury that can be characterised as "serious" although the risk of this may be high. This leaves an approved provider in a difficult situation where they have an obligation to provide a safe place of work for staff and a safe environment for residents, but are unable to require the care recipient to be transferred to a more appropriate facility.

In these circumstances, the provider must then seek to demonstrate that the facility can no longer meet the person's care needs, as supported by independent medical assessment. This is further complicated when families having decision-making powers on behalf of the care recipient refuse to cooperate with or permit any assessment, which we understand is not uncommon. In the meantime the provider may be liable to prosecution and significant penalties in the event that an employee suffers harm resulting from the conduct of a resident or to notices of non-compliance or sanctions under the Aged Care Act for failing to provide a safe environment for residents.

In our view, it is not reasonable to require an approved provider to have to wait for the risk to crystallise in serious injury to a staff member or another resident before it can take action to transfer the resident to another service, such as a dementia specific facility. It is also not reasonable to expose staff and residents to such risk of harm.

One specific example provided by a client relates to a situation where a family member raised ongoing complaints about the behaviour of a resident sharing the room with their family member in a residential care facility. The family member alleged frequent assaults of their relative by the other care recipient. In order to facilitate a resolution, an alternate room in the facility was offered to each of the occupants. Neither resident (or their

representatives) agreed to relocate to another room. However a complaint was lodged and the incidents were required to be reported to the Department and the approved provider was found to be in breach of its obligations under the Aged Care Act to provide a safe environment for residents.

The legislation should permit a provider of residential care services to be able to seek a determination that a care recipient can be relocated in circumstances where that is demonstrably in the best interests of the care recipient or is necessary for the safety of staff and residents. The legislation could specify the kinds of factors that must be taken into account in making such a determination, such as:

- what efforts the provider has made to manage the situation;
- whether a risk assessment and behaviour management process have been tried;
- whether the provider has endeavoured to resolve any conflict.

(b) Complaints investigation

The Complaints Investigation Scheme (**CIS**) was implemented in 2007, replacing the previous complaints resolution provisions under the Aged Care Act.

We are frequently told about the significant burden that is imposed on an approved provider in responding to an investigation by the CIS. In many cases this appears to us to be disproportionate to the seriousness of the complaint. Generally on receipt of a complaint there is an extensive request to provide care records, policies and procedures to investigating officers and to facilitate interviews with care staff and the manager of the facility. We have encountered examples where matters are included in complaints and not investigated (either adequately or at all) notwithstanding the provision of extensive information by the provider and then re-visited several months later when the matter comes before the Office of the Aged Care Commissioner on appeal.

Another common concern is that the approved provider does not have any opportunity to request that the investigation is timed or delayed in order to ensure sufficient resources are made available at the facility to respond to requests. The time required to respond to the demands of investigators diverts significant resources away from the core business of the service – to provide care to residents. This may increase risks to residents.

We are also told that in many cases, an approved provider's senior key personnel (other than the facility manager) are not formally informed of or consulted by the investigating officers. In some circumstances a copy of the complaint or detailed particulars of the complaint have not been provided in writing to the approved provider.

The lack of opportunity to provide a considered and comprehensive response beyond those that are able to be provided by staff on the spot or within a short time frame, concerns approved providers. In these circumstances it can be difficult for the approved provider to be certain that all relevant material has been provided and that the allegations have been responded to in a comprehensive manner and by the appropriate personnel with knowledge of the circumstances and of the provider's procedures.

(c) Office of the Aged Care Commissioner

The CIS implemented under the Aged Care Act and set out in the Investigation Principles 2007 allows for an examination of the Secretary's decisions under the CIS by the Aged Care Commissioner (**Commissioner**) where a complainant or the approved provider is dissatisfied with Secretary's decision.

The Commissioner is also empowered to receive and deal with complaints about:

(a) the Secretary's processes for handling matters under the *Investigation Principles 2007*;

(b) the conduct of accreditation bodies relating to their responsibilities under the *Accreditation Grant Principles 1999*; or

(c) the conduct of persons carrying out audits, or making support contacts under those Principles.

A number of concerns have come to our attention in assisting our clients to request a review of a decision or responding to the Commissioner following a complainant's request for a review of a decision by the Secretary. We deal with each of these below.

Lack of flexibility in the statutory time periods for the Commissioner's review processes

A request for the examination of a decision by the Secretary must be made within 14 days of being told of the decision (sections 16A.21 and 16A.22 of the *Investigation Principles*). This time frame is relatively short from a provider's perspective when they are required to:

(a) consider the findings and decision of the Secretary (particularly where a complaint may raise a number of separate issues);

(b) consider its own internal material and records;

(c) seek advice regarding the decision; and

(d) formulate a written response which sets out reasons why an examination is sought (as required by section 16A.23).

The Commissioner is of the view that there is no discretion under the Principles to extend the statutory period.

A period of 28 days is commonly allowed for lodging an appeal in a court or other administrative forums. This raises questions of procedural fairness whereby in being given an opportunity to be heard on the disputed matters, a person must be afforded a reasonable period of time to provide a response to the allegations or findings.

The Commissioner then has 60 days after receiving an application for examination to give the Secretary:

(a) a recommendation about the examinable decision; or

(b) a report about a refusal under sub-section 3 to examine the examinable decision (Principle 16A.24(4)).

The Commissioner provides its proposed recommendation to the approved provider who must respond in a short period of time so that the Commissioner can report to the Department within the stated period. In our view, as with the time limits upon lodging an application for review, we consider the Commissioner's lack of discretion to extend the period in which a response must be given to the Secretary, may similarly result in the approved provider being accorded procedural fairness.

We have experienced circumstances where a complainant has made a detailed complaint or a complaint that comprises a number of separate issues. The approved provider has found it difficult to be able to respond to each of the issues of concern that have been put before the Commissioner.

The inability of an approved provider to have access to the material that the Secretary has relied upon in coming to its decision

We are aware of circumstances where a provider was not provided with complete details of the complaint by the investigating officers. It was not until a written notice of the findings of the Secretary was given to the approved provider that it became aware of the number and extent of the allegations. It then struggled to collate all of the relevant information that it considered could have been provided to the Secretary, and that would have been produced had the approved provider been aware of the full extent of the allegations.

A request was made to the Commissioner that the approved provider be provided with copies of the information relied upon by the Secretary in coming to the decisions on the complaint that the approved provider had breached the Aged care act requirements. The Commissioner declined that request on the grounds that:

(a) the approved provider could make a request under Freedom of Information legislation for access to the those documents; and

(b) it was not in the habit of providing such material to approved providers.

It is unlikely that a response to any FOI request could have been given within the statutory time that an approved provider is required to respond to the Commissioner. The Commissioner's response was, in our view, unreasonable. A person who is the subject of an administrative decision that may have adverse consequences should be entitled to be fully apprised of the decision making processes and the material considered in a transparent and fair manner.

The time taken to provide a response to a complaint

As noted above, the Investigation Principles also provide a mechanism for making a complaint to the Commissioner about:

(a) the Secretary's processes for handling matters under the Investigation Principles;

(b) the conduct of accreditation bodies relating to their responsibilities under the *Accreditation Grant Principles 1999*; or

(c) the conduct of persons carrying out audits or making support contacts under those Principles.

In our experience, the Commissioner has not responded in a timely manner to complaints. We understand from discussions with the Office of the Aged Care Commissioner that delays in responding to complaints are common because:

(a) the Office does not have sufficient resources to examine decisions of the Secretary within the statutory timeframe as well as to respond to complaints (where there is no time for responding prescribed under the Principles); and

(b) the requirement for the Commissioner to make a recommendation to the Secretary within 60 days of receiving an application for examination means that the consideration of a complaint is frequently put aside because the Office needs to deal with an application for examination.

We are aware of a complaint lodged with the Commissioner in mid 2009 to which a response was only recently given (more than 12 months after the complaint was lodged). The lack of timely response to a complaint is likely to render the process ineffectual as well as unfair to all the parties.

We consider that, if the current framework for complaints is maintained:

(a) The time for lodging an application with the Commissioner for examination of a decision by the Secretary should be extended to at least 28 days and that the Commissioner be given a discretionary power to receive an application for review out of time in exceptional circumstances (for example, where a refusal to do so may result in a denial of procedural fairness to a party).

(b) The Commissioner should be given a statutory discretion to extend the period in which the recommendation must be given to the Secretary beyond 60 days in certain circumstances (for example where an inability to do so may result in a denial of procedural fairness). The Investigation Principles could specify the circumstances the Commissioner must be required to consider in deciding whether to exercise the discretion, so that an extension of time is not automatically granted.

(c) Subject to any express concerns about the safety of any person, or any material prejudice arising from disclosure, the Commissioner should be required to make available to the approved provider the documents or information that have been relied on by the Secretary in making its decision. If material is to be accessed under freedom of information legislation, then the Commissioner must have a discretion to delay providing its recommendation to the Secretary until the approved provider has been granted access to the documents and has had time to consider its response.

(d) The Office of the Aged Care Commissioner must be fully resourced in order that it is able to perform all of its statutory functions including responding to complaints in a timely manner.

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