

30 August 2019

## **Submission to Investigation into Earle Haven Retirement Village**

We would like to comment on Terms of Reference xii, the legislative framework. What happened at Earle Haven is a dramatic illustration of one of the major deficiencies and ill-considered policy and legislative changes made in 1997. We have raised the issue of probity and the unsuitability of the Approved Provider process that replaced probity legislation in 1997 with the department and ministers on multiple occasions since 1999. Probity is a measure of character and corporate culture.

Earle Haven is not simply another occasional 'bad apple'. It is a graphic example illustrating deep flaws in the system and ongoing problems. It would be a travesty if these were not confronted. What we cannot accept is more tinkering with regulations that seek to contain the symptoms without addressing the issues responsible for these ongoing failures.

To understand how badly regulation failed at Earle Haven and show that it is representative of a system that is failing, we review the background of the Approved Provider regulations and the consequences in Australia.

# Contents

|          |   |           |
|----------|---|-----------|
| <b>1</b> | <b>The Approved Provider process .....</b>                      | <b>3</b>  |
| <b>2</b> | <b>Background of the Approved Provider process .....</b>        | <b>4</b>  |
| 2.1      | Application for license in other sectors .....                  | 4         |
| 2.2      | 'Key Personnel' appointments .....                              | 5         |
| 2.3      | Examples of State Probity regulations .....                     | 5         |
| 2.4      | Probity in Aged Care - the federal Department of Health .....   | 6         |
| 2.5      | Aged Care Amendment Bill - December 2008 .....                  | 9         |
| 2.6      | Examples of problem owners .....                                | 10        |
| 2.7      | Consolidation, provider size and Approved Provider status ..... | 13        |
| 2.8      | Holding Government to ransom .....                              | 14        |
| 2.9      | Corporate webs and related party transactions .....             | 15        |
| 2.10     | Approved provider status and transactions between parties ..... | 16        |
| 2.11     | Poster example: Earle Haven .....                               | 17        |
| 2.12     | Finding a solution .....  | 18        |
| 2.13     | Moving the Approved Provider process to ACQSC .....             | 18        |
| <b>3</b> | <b>Recommendations .....</b>                                    | <b>19</b> |

# 1 The Approved Provider process

Vulnerable areas in health and aged care have been protected from unsuitable and untrustworthy people by giving the communities expectations legislative form in the nature of probity regulations. It was a community expectation that only people of good character who could be trusted not to exploit the vulnerability of others be allowed to provide services. At that time owners were of prime concern because of the risk of their to focusing on self-interest (sexual or financial) rather than the vulnerable people they were serving. The control they exerted was an important consideration. They were carefully evaluated and citizens were encouraged to research and supply that information.

Under the Approved Provider legislation, only the provider and its management were assessed and that was not nearly as rigorous. There have been several problems subsequently due to unsuitable owners.

The frequency of subcontracting and of related transactions within corporate webs has now become as serious a problem as owners. Earle Haven is a graphic illustration of this problem.

We include below an account of the way concern has been handled by the government over the years. It is adapted from a document we are supplying to the Royal Commission and it addresses Earle Haven specifically.

We have been urging that probity be reinstated and for the probity of any organisation seeking to provide aged care services be assessed by the communities where the service is to be provided. They have a prime interest in ensuring that those who provide that service to their spouses and parents are of good character. Government regulators should work with and support them.

Aged Care Crisis argues that, contrary to 1997 policy, it is not government or providers who are responsible for the care of the vulnerable in society. It is each of us and each of our communities. Anyone who provides care to our members is our agent and is doing it on our behalf. Government has taken away our ability to watch over our agents and see that they meet our expectations. We argue that structures should be created that enable us to control our agents and that government's role is to support us in doing that.

Prior to 1997, owners and providers of nursing homes were vetted under probity requirements to be sure that their past conduct showed that they were good citizens and could be trusted to care properly for vulnerable people. Citizens with knowledge of bad behavior by an applicant could supply it to the departmental vetting body, and object to the issuing of a license to operate.

In 1997, that system was replaced by a secretive behind closed doors *"Approved Provider"* process. Owners who bought an existing provider, and so came to control the purse strings, no longer needed to seek approval. All that is required is that the managers (*"key personnel"*) that they appoint to run the newly acquired subsidiary do not yet have a criminal conviction.

Any criminal or company that has harmed it's customers, can buy a company already owning approved facilities without seeking approval, and then appoint managers to do what they want them to do. Owners can appoint managers to do their bidding, provided those managers do not have a criminal record. An owner could require them to squeeze care in order to increase profits.

## 2 Background of the Approved Provider process

### The issue of ‘Probity’ and the consequences of abolishing it<sup>1</sup>

It has been a long standing social principle that only those who are considered to be responsible citizens and so can be trusted not to exploit the vulnerability of others, are permitted to provide care to vulnerable members of the community. This was described as being ‘of good standing’ or as ‘fit and proper’.

This expectation was objectified in probity regulations. Within the terms of the regulation, an organisation was considered to be a ‘person’ and its potential influence determined by its shareholding in the business. The standard of assessment was whether a reasonable person in possession of the information would trust that person to undertake that activity. The interest and welfare of the recipients of the service took precedence over the commercial rights of the business.

### 2.1 Application for license in other sectors

Many other businesses are subject to licensing and regulatory frameworks. including, gaming, pokies, restaurants and bars. These businesses are required by law to be open and transparent when applying for their licence.

Critically and unlike aged care, details of the application for a licence to operate a venue are made publicly available and community are given an opportunity to object.

### ‘Commercial in confidence’ provisions in aged care

There is no public disclosure of those applying for approval status in aged care. The community are not encouraged or given the opportunity to object or supply information.

Other licensing legislation (eg, Liquor or Gaming state licensee frameworks<sup>2</sup> throughout Australia) provide a suitability clause when investigating a licence applicant and its associates. The nominated regulatory process also determines the “*applicant’s character, honesty, integrity and business reputation*”. Eligibility requirements to obtain a hotel license<sup>3</sup>, for example, also have stringent requirements to obtain a license under the *Liquor Act 1992*. Requirements include “*Fit and proper or suitable person*”<sup>4</sup> and they must meet certain criteria.

**There are no similar provisions in the *Aged Care Act 1997* for owners, or those providing services under related party, subcontracting of franchising arrangements with the approved providers. The criteria for the suitability of providers seem to fall a long way short of the probity requirements that were once in place. The investigation of their suitability as revealed to the Royal Commission seems to be cursory and rushed.**

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<sup>1</sup> Becoming an Approved Provider - Who are key personnel? <https://agedcare.health.gov.au/funding/becoming-an-approved-provider#2.1>

<sup>2</sup> Gambling Regulation Act 2003 <http://bit.ly/2MKo4rx>

<sup>3</sup> Australian Business Licence and Information Service (ABLIS), Commercial hotel licence - Queensland, <http://bit.ly/2ZoyRP1>

<sup>4</sup> Guideline 07: Fit and proper or suitable person: <http://bit.ly/2zw87N1>

## 2.2 'Key Personnel' appointments

In 1997, federal aged care probity requirements were repealed and replaced with an 'in confidence' Approved Provider process. The process also required that 'key personnel', often appointed by owners could not have a criminal history. Anyone could own a nursing home so opening the sector to the free market.

Corporate owners whose conduct might well have raised probity concerns have been welcomed. Their suitability was not assessed when they bought a provider that already had Approved Provider status. The regulator was advised of concerns about some of these companies, but it no longer had the power to investigate them or act. In several instances of market failure, owners were responsible for the harm caused.

The Approved Provider process only evaluates the suitability of the 'key personnel' appointed to manage the provider. The provider is expected to check that they do not have a criminal record. It has been suggested by ministers and regulators that owners who appoint 'key personnel', would have no influence over them and no impact on the services provided. This flies in the face of common sense and overwhelming evidence to the contrary.

## 2.3 Examples of State Probity regulations

**The way state probity regulations have protected citizens in health care is a good illustration of their effectiveness. In most of these instances, information was supplied by concerned citizens in the community.**

**Victoria:** Company National Medical Enterprises (NME) had a 51% holding as well as a management contract over the Australian Company Australian Medical Enterprises (AME). A probity assessment bared AME from operating in Victoria in 1994 when it determined that NME was not a fit and proper person. Then in 1998 a probity review of the company Alpha Healthcare barred it from operating in Victoria because of a 30% holding by the US company Sun Healthcare. We understand that Victoria was the only state with the legislative support to fully protect it from legal challenge by wealthy multinationals.

**NSW:** NSW does not have as rigorous a legislative capacity but there is no restriction on the time it can take doing an investigation. In the case of NME, in 1993 it indicated its attention to delay its decision pending investigations in the USA. This was circumvented by the Health Minister who appointed a recently retired judge to make the decision. He had taken early retirement when the ICAC commenced an investigation to determine whether he was at risk of improper influence. When NSW Health received documentary confirmation of improper conduct in the USA, they indicated that there was now sufficient evidence to resist a court challenge and advised the licence application be rejected. The Judge granted the licence with conditions which the department had indicated they could not enforce.

When a Citigroup Private Equity Subsidiary and turnaround expert called CVC Asia Pacific led a multinational takeover on Mayne Health in 2002 to create Affinity Health, NSW reviewed its probity in the light of Citigroup's predatory activity and extensive fraud during the dotcom scandal. It conducted an 18-month investigation before granting hospital licenses with additional conditions shortly before the business was sold again to Ramsay Healthcare.

**WA:** The West Australian Department of Health advised its Minister for Health that in its view, NME was not a fit and proper person and posed a risk. It asked the state government to legislate in order to give it the power to act. The government did not do so.

## 2.4 Probity in Aged Care - the federal Department of Health

This section tracks significant events related to probity and the Department of Health.

**1994:** Like the states, the health department had a process which vetted potential owners of aged care services for probity. In 1994 the probity sector of the department was advised by one of us of the possibility that the company AME, which was promising its shareholders expansion but being blocked in the states because of its ownership by NME, might apply to operate in aged care. NME had previously owned the USA's largest nursing home company, 'Hillhaven'. In its faxed reply, a Mr Rainer Perring indicated that it had not received an application and boasted of its regulatory vigour indicating that approval *"involves checks of propriety, honesty, financial capacity and previous experience in the industry"*.

**1998/9:** There was no publicity when the aged care probity regulations were abolished, but the Foreign Investment and Review Board documents released under FOI in 1998/9, revealed that Sun Healthcare (whose problematic conduct we had first heard of in 1994) planned to enter aged care.

An objection to Sun Healthcare's plans to provide aged care and documentation of its conduct was sent to the same address at the Health Department. It did not acknowledge correspondence in spite of repeated requests.

When the matter was raised with the minister by the Health Minister in Queensland and the AMA president, this correspondence was acknowledged and further correspondence about the new regulations and other matters followed<sup>5</sup>. It was claimed that owners, who were described as 'passive investors' (2 Mar 1999), had no impact on care. In reply (9 Mar 1999), the department was reminded of the failures in care in the USA and the failure of regulators to address this. They had received extensive documentation during the 1990s.

The letter indicated:

*"... A corporatised health and aged care system cannot logically work in the long term. Once a corporate health and aged care system is established it is almost impossible to turn back. - - -"*

*Health care corporations have been exceptionally aggressive in their endeavours to circumvent the intention of regulations. They have happily defrauded government. They have placed the requirements of care second to their primary corporate responsibility to extract profits from that care. They have been genuinely indignant when their practices were challenged..."*

Documents describing what was happening had already been sent to the minister. On 26 June 1999 the department was sent some 400 pages of articles summaries and explanations illustrating the problems that had developed in the US corporatised aged care system and its regulation. At the time we did not realise that passive investors referred to owners and the distinction was not fully understood. This became clear in later correspondence.

**Citigroup 2006:** In 2006, CVC Asia Pacific, the Citigroup private equity group purchased Australia's largest private nursing home provider Amity Health care from DCA<sup>6</sup>. An objection was lodged to the department regarding Approved Provider status but was not acknowledged<sup>7</sup>.

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<sup>5</sup> Correspondence about Aged Care 1998/9 Corporate Medicine web site 2006-7 [http://www.corpmedinfo.com/agedcorresp\\_1999.html](http://www.corpmedinfo.com/agedcorresp_1999.html)

<sup>6</sup> Citigroup Buys DCA Corporate Medicine web site 2007 [http://www.corpmedinfo.com/dca\\_sale.html](http://www.corpmedinfo.com/dca_sale.html)

<sup>7</sup> Objection Correspondence 2006 to the DCA Sale Corporate Medicine web site [http://www.corpmedinfo.com/dca\\_obj2006.html](http://www.corpmedinfo.com/dca_obj2006.html)

After a 3 month delay and another letter requesting information, a response from the department<sup>8</sup> finally made it clear that provided the FIRB (Foreign Investment Review Board) had allowed the company to enter Australia *“An application for Approved Provider status is currently not required under the Aged Care Act 1997 when an organisation acquires all or part of another company which has been granted Approved Provider status - - -”* It was difficult to describe a private equity group that marketed itself as a turnaround expert as a ‘passive investor.’ It was claimed that the accreditation process and the reforms after the rape scandal in 2006 would address any issues.

In reply this was challenged indicating *“As you are well aware those with the most economic power ultimately appoint management and determine what will happen to care. Responsible owners who wield ultimate power should not be excluded from regulatory scrutiny by a few phrases of neat but deceptive legal jargon”*. The department was reminded of the critical role that “owners” had played in the Riverside (kerosene baths) scandal.

The department was informed how the accreditation process in the USA had recently failed abysmally on multiple occasions and even overlooked one hospital that had performed 800 unnecessary high risk major heart operations.

After the issue of ownership had been raised publicly, then Minister for Aged Care the Hon Santo Santoro indicated<sup>9</sup>:

*It is through the accreditation system that the Government enforces quality standards in residential aged care, and ensures public funding is used appropriately,*

*The ownership structure of the home does not impact on the ability of the Aged Care Standards and Accreditation Agency to enforce these standards*

This was shortly before John Braithwaite published his book describing how regulators had been captured by this marketplace and its thinking.

It was clear that Australian corporations and international corporations that were already operating in Australia would not require FIRB approval. They could purchase and own an aged care entity with Approved Provider status without any assessment of their conduct however unsuitable they were.

**Responses by Ministers in 2007:** These matters were canvassed widely with politicians and they took this to the ministers. Both the Ministers for Health (Abbott) and Aged Care (Pyne) responded in June 2007, indicating that regulatory changes were being made but the nature of these was vague<sup>10</sup>.

In reply to the department (18 June 2007), the failures in the sector were emphasised and the unsuitability of the free market policies for aged care stressed:

*“... Nursing home care is primarily driven by a community's empathy and its Samaritan values. It is likely that such a system would be best structured within and around the community rather than operated by market or government. The challenge will be to develop community structures sophisticated enough to manage and integrate such a service. A major problem will be maintaining services during these changes as those concerned only with profits are likely to vacate the sector. We should avoid another dramatic change based on extraneous beliefs dressed as political policy ...”*

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<sup>8</sup> Objection Correspondence 2007 to the DCA Sale Corporate Medicine web site 2007 [http://www.corpmedinfo.com/dca\\_obj2007.html](http://www.corpmedinfo.com/dca_obj2007.html)

<sup>9</sup> Raiders on a roll with DCA bid The Australian September 26, 2006

<sup>10</sup> Australian Aged Care Regulations to be changed OR ARE THEY? (Ministerial correspondence) Corporate Medicine web site July 2007 [http://www.corpmedinfo.com/dca\\_min\\_coresp\\_7\\_07.html](http://www.corpmedinfo.com/dca_min_coresp_7_07.html)

Only 3 months later there was another scandal involving the owner of the repeat offender Belvedere Park Nursing Home<sup>11</sup>. In response to questions about ownership, the *Herald Sun* reported<sup>12</sup>:

“... But the owners of the Belvedere Park Nursing Home in Sydenham may be allowed to care for the elderly again, even if its closure goes ahead.

Aged Care Minister Christopher Pyne said owning a sub-standard home did not automatically disqualify players from the industry...”

**Not only had nothing been done, but clearly the assurances did not include addressing the issues that had been raised with parliamentarians.**

**BUPA buys Amity 2007:** In October 2007 a year after its purchase, Amity was sold on to BUPA, which was already a major owner of health insurance in Australia. It had been involved in an aggressive conflict with health care provider Healthscope<sup>13</sup> in 2003 in which the patients unfortunately became the meat in the sandwich.

Its operations in the UK had shown little loyalty to its customers and there were other issues<sup>14</sup>. A letter was sent to the department indicating the problems with BUPA and asking whether following the assurances given by the minister and the recent changes, BUPA would have to seek Approved Provider status<sup>15</sup>. There was no reply and an objection was therefore lodged and a follow up phone call made. There was an election and the Labor party were canvassed but did not respond. In reply to an FOI request the department indicated that there was no data as BUPA had not applied for Approved Provider status as it was buying a company that was approved.

**Canvassing Labor:** The 2007 inquiry by the Standing Committee on *Economics into the Private Equity Investment and its Effects on Capital Markets and the Australian Economy* had discounted two submissions warning of the likely adverse consequences of private equity for vulnerable sectors like aged care<sup>16</sup>.

One submission indicated that *“the explosion in private equity will potentate and exacerbate serious problems existing in vulnerable sectors of Australian society”*.

Within a few months, a *New York Times* investigation, the first of many reports and research findings described the major problems that had developed in nursing home companies acquired by private equity including the consequences for residents and the regulatory difficulties<sup>17</sup>. The potential for private equity to exploit the regulatory weaknesses were compounded and the matter was taken up in correspondence with the new minister for aged care.

On 28 June 2008 another letter was sent to all members of parliament setting out the problems created by the Approved provider process and calling for action to address them<sup>18</sup>. New legislation was tabled in parliament that, it was claimed, would address the problems with ownership. If it was actually intended to do so, then it must have been watered down by industry stakeholders.

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<sup>11</sup> Saitta Pty Ltd and Neviskia Pty Ltd Kenilworth and Belvedere Park Nursing Homes Corporate Medicine web site 2006-8 [http://www.corpmedinfo.com/nh\\_sialto\\_neviskia.html](http://www.corpmedinfo.com/nh_sialto_neviskia.html)

<sup>12</sup> Belvedere Park Nursing Home covered in filth Herald Sun August 23, 2007

<sup>13</sup> Healthscope - The Battle with BUPA Corporate Medicine web site 2005 [http://www.corpmedinfo.com/healthscope\\_bupa.html](http://www.corpmedinfo.com/healthscope_bupa.html)

<sup>14</sup> BUPA Corporate Medicine web site 2007 <http://www.corpmedinfo.com/bupa.html>

<sup>15</sup> (Story and links to correspondence) Will BUPA seek Approved Provider status? [http://www.corpmedinfo.com/bupa\\_approval.html](http://www.corpmedinfo.com/bupa_approval.html)

<sup>16</sup> See links on Aged Care Crisis Publications page <https://www.agedcarecrisis.com/publications>

<sup>17</sup> More Profit and Less Nursing at Many Homes The New York Times, 23 Sep 2007 <http://nyti.ms/2gow6DA>

<sup>18</sup> Open Letter to Government: Probity <http://bit.ly/2UBGDPq>

## 2.5 Aged Care Amendment Bill - December 2008

We made submissions to the *Inquiry into Aged Care Amendment (2008 Measures No. 2) Bill 2008*. In this we explored the problems, particularly that of unsuitable owners in the sector<sup>19</sup>. We welcomed the intent of the legislation to expand the “*scope of scrutiny from the individual facility to include the corporations and their networks*”.

We considered it to be only a very small step in the right direction and that “*the bill falls short of the promises suggested in the minister’s press release*” and “*well short of what is required*”. It did not address the issues surrounding ownership and we suggested that “*the Bill still protects the interests of the providers more than the residents*”.

To test the Bill as it applied to existing owners in 1999, we wrote to the department about a company asking if it had the capacity to address the suitability of an Australian owner whom we considered to be very unsuited to the sector. The owner had a background in mining and in property where they were an aggressive entrepreneur. The company had major problems in its nursing homes during the 1990s and early 2000s<sup>20</sup>.

We believe these were the homes that a senior consultant who worked in the department, was very critical about in early 2018 stating<sup>21</sup>:

“... With the recent closure of two homes in Sydney, the fact it took the Department over 15 years to rid the sector of a provider everyone knew was a disgrace is appalling. That provider was on the list of undesirables back in 2000 when I first joined the Department and was still there when I rejoined the Department in 2011 and when I left again in 2015...”

These two homes were finally found to have multiple problems and closed by the department in December 2017 shortly before that comment was made<sup>22</sup>. There had been allegations in the early 2000s<sup>23</sup> about a relationship between the owner and a minister who had just retired in 2017.

At the time of our letter to the department, there had been major ongoing problems and problematic behaviour in the company’s retirement villages. Some elderly residents spent many of their retirement years in ongoing legal conflict with the owner who had purchased the village after they had entered it.

Correspondence and the department’s reply to our letter indicating that it did not have the power to address the issues are in the link in this footnote<sup>24</sup>.

One final attempt was made in 2011 when private equity group Blackstone was circling Japara Aged Care<sup>25</sup>. Blackstone<sup>26</sup> has been blamed for gutting the UK’s largest nursing home company Southern Cross and leaving it vulnerable to the first economic downturn when it entered bankruptcy.

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<sup>19</sup> Inquiry into Aged Care Amendment (2008 Measures No. 2) Bill 2008 <http://bit.ly/2Ue6b5m>  
Aged Care Crisis submission <http://bit.ly/2thKM14> Wynne Dr J M submission <http://bit.ly/2oS1NKb>

<sup>20</sup> Milstern Health Care, Corporate Medicine web site 2006-10 [http://www.corpmedinfo.com/nh\\_milstern.html](http://www.corpmedinfo.com/nh_milstern.html)

<sup>21</sup> The True Cost of Providing Quality Aged Care, LinkedIn <http://bit.ly/2BVYHww>

<sup>22</sup> Failed nursing home loses accreditation, Blue Mountains Gazette, 4 Dec 2017: <http://bit.ly/2NASR9X>

<sup>23</sup> Senate Hansard, Matters of urgency, Aged Care, 20 June 2001: <http://bit.ly/2Plvnlq>

<sup>24</sup> Aged Care Amendment (2008 Measures No. 2) Bill 2008, Milstern as a Test case [http://www.corpmedinfo.com/nhmilstern\\_obj.html](http://www.corpmedinfo.com/nhmilstern_obj.html)  
**Letter:** “Objection to and request for revocation of Approved Provider status” 23 Jan 2009 [http://www.corpmedinfo.com/Milstern\\_Obj.pdf](http://www.corpmedinfo.com/Milstern_Obj.pdf)  
**Reply:** Dept of Health 7 April 2009 [http://www.corpmedinfo.com/DeptHth\\_7Apr09.pdf](http://www.corpmedinfo.com/DeptHth_7Apr09.pdf)

<sup>25</sup> Blackstone’s attempted takeover of Japara Aged Care (Approved Provider Process) [http://www.corpmedinfo.com/blackstone\\_japara.html](http://www.corpmedinfo.com/blackstone_japara.html)

<sup>26</sup> Southern Cross’s incurably flawed business model let down the vulnerable, The Guardian, 16 Jul 2011: <http://bit.ly/2MLpGBa>

Once again, the department indicated that it did not play a role and that it was FIRB that vetted companies entering Australia.

### **Two additional matters were revealed by this final correspondence:**

1. It was confirmed that applicants for Approved Provider status were shielded by 'in confidence' provisions.

In keeping with neoliberal policy of protecting markets from control by citizens, there was no opportunity for anyone to know who was applying for a licence, to research their record and supply information. It is clear that the department does not do so when examining their suitability. They indicated that FIRB evaluated owners.

2. When we explored FIRB's website, we found that US companies have special privileges. Except for a few at risk sectors they are only required to seek FIRB's approval when making large investments in companies valued at over \$1005 million. For non-US companies, the figure is \$231 million.

The sensitive health and aged care sectors were not listed among the exceptions. Purchases of many, if not most, Australian aged care businesses would not be large enough for FIRB to evaluate. In any event FIRB is only an advisory body and its advice is confidential. It is politicians who decide whether to follow it.

## **2.6 Examples of problem owners**

**Example 1: Vladymir Martyniuk** was the owner of Riverside Nursing home<sup>27</sup>. He had been bankrupt but continued to own the company. Even when no longer on the board, he continued to exert influence. There were many problems in the company over the years culminating in the infamous Riverside (kerosene baths) scandal in 2000. He was later implicated in a court action in June 2016 by Consumer Affairs Victoria under the *Retirement Villages Act*<sup>28</sup>.

**Example 2: Graeme Menere** was both a majority owner and manager of Kenilworth and Belvedere Park Nursing Homes<sup>29</sup>. He had a criminal history. There were many problems with these nursing homes at the end of the 1990s and early 2000s.

Menere contested all attempts to penalise him or restrict his activities. Even when legislation was brought in to prevent owners of businesses with criminal records from being involved in the management of the facilities, it is likely that he did so in the background.

It was not until 2007 that both nursing homes were finally closed and even then the lawsuits by his companies Neviskia Pty Ltd, Saitta Pty Ltd dragged on for a long time<sup>30</sup>.

**Example 3: Kendalle Pty Ltd**<sup>31</sup> - Millissa Fischer was a major shareholder in three Victorian nursing homes which took a nosedive in a \$23 million dollar collapse in 2009. The provider allegedly, short-changed her staff. The homes failed accreditation standards. She did not pay her bills.

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<sup>27</sup> Illawong Retirement Equity Pty Ltd The Riverside Scandal (XL) [http://www.corpmedinfo.com/nh\\_riverside.html](http://www.corpmedinfo.com/nh_riverside.html)

<sup>28</sup> Illawong Lakeside Retirement Pty Ltd, Illawong Retirement Group Pty Ltd and Vladymir Martyniuk - Court action <http://bit.ly/2NLalLv>  
Austlii: <http://bit.ly/2JFnAB4>

<sup>29</sup> Saitta Pty Ltd and Neviskia Pty Ltd Kenilworth and Belvedere Park Nursing Homes(XLI) <http://bit.ly/34d2YY6>

<sup>30</sup> Austlii: <http://bit.ly/211Lw3G>

<sup>31</sup> Claim nursing home boss put soccer fever first, News.com.au, 17 Sep 2009, <http://bit.ly/2JJxsq9>

It was alleged that she transferred millions of dollars from her almost bankrupt aged-care homes *“to a soccer club in a misguided attempt to secure it a national A-League berth”*. Apparently *“the extent of its problems came to light only after aged care assessors discovered residents at one of the homes had bedsores and unchanged colostomy bags”*.

**Example 4: Peninsula Care Pty Ltd.** In this case the owners were prominent Victorians who, in 1999, were convicted and *“jailed for fraudulently claiming more than \$139,000 in federal subsidies”* in their four Queensland nursing homes.<sup>32</sup> They simply appointed members of their family as executives and then claimed that they *“were not ‘key personnel’ of the company and did not have any involvement in day-to-day running of the facilities”*<sup>33</sup>. That was perfectly legal.

**Example 5: Cambridge Aged Care:** A convicted criminal was able to gain control of 5 nursing homes. The department later explained that *“Cambridge was formed by the purchase of four Approved Providers and the Aged Care Act did not directly regulate such changes in ownership”*.

No one else would have known who the owner of Cambridge Aged Care was because the Approved Provider/s were a group of trust companies *“Manormay Approved Providers”*. Cambridge was the owner of Manormay and its owner was *“Stephen Snowden, a bankrupt and a convicted criminal with ties to underworld figures”*.

There were allegations in the press that he had been involved in fraud in 1993, and pleaded guilty to obtaining money by deception again in 2011. In spite of this history he had been responsible for the care of about 300 aged residents. When he realised that he was barred (*under the Approved Provider ‘key personnel’ requirements*), he simply appointed two of his fellow directors to be ‘Key Personnel’ of the trusts so was still in a position to control the facilities.

It is likely that money was funneled away from care. In February 2013 the *Herald Sun* reported that Snowden was being sued by Westpac in the Supreme Court for a \$7.7 million debt. Court transcripts confirms this as well.

By June 2013, Manormay was being chased in the federal court for \$180,000. It was alleged that Mr Snowden received \$1.8 million in payments from the nursing homes’ trust account and had been paid \$1 million in just one day.

By May 2013, two of the homes were in administration, nurses at one home had not been paid and it was so filthy that the agency had closed it. Cambridge Aged Care was soon in administration itself.

By September 2013, the Federal Police were involved, another home was closed for poor standards, and the only one remaining was no longer receiving its \$130,000 per month government funding.

## Groundhog Day

Incredibly in 2017, it happened all over again at Berkeley Living where it seems Snowden was still pulling the strings. Staff who had not been paid walked off the job and residents were left in the lurch. Snowden was *“accused of not paying out more than 30 families who have had apartments at Berkeley Living sold to new owners without ever receiving any of the sale proceeds. The residents are believed to be owed millions of dollars”*. The government appointed an advocate to go in and help the residents and their families’ sort out the mess.

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<sup>32</sup> Peninsula Care Pty Ltd (XLII) [http://www.corpmedinfo.com/nh\\_peninsula.html](http://www.corpmedinfo.com/nh_peninsula.html)

<sup>33</sup> Aged care report link Herald Sun 15 March 2006

Snowden defended himself on Chanel 9's A Current Affair, claiming that under the current law and the contracts the *"Strata Title Owners are legally liable for the monies owed by 'Departed Relatives.' Mr Snowden is not liable for these debts"*.

The residents were still in limbo in November 2017 when the place had been condemned and they did not have the money to repair it. They were having to move out.

## Related:

| Date         | Details  |
|--------------|--|
| 13 Feb 2013  | <b>Officials 'asleep' on nursing care</b> , <i>Sydney Morning Herald</i> , <a href="http://bit.ly/2kZ74Oi">http://bit.ly/2kZ74Oi</a>   |
| 7 May 2013   | <b>Nurses offered petty cash instead of wages at Viva Care in Essendon as it faces closure</b> , <i>Herald Sun</i> <a href="http://bit.ly/2MgLv8r">http://bit.ly/2MgLv8r</a>   |
| 8 Sept 2017  | <b>Residents at retirement village run by convicted criminal forced to fend for themselves</b> , <i>Sydney Morning Herald</i> <a href="http://bit.ly/2HBiQr7">http://bit.ly/2HBiQr7</a>  |
| 16 Sept 2017 | <b>Staff at Melbourne retirement village walk out amid unpaid wage claims</b> , <i>ABC News</i> , <a href="http://ab.co/2wiYnXd">http://ab.co/2wiYnXd</a>  |
| 16 Sept 2017 | <b>Police, state government intervene at Berkeley Village after staff walk</b> , <i>Sydney Morning Herald</i> <a href="http://bit.ly/2MeBNmO">http://bit.ly/2MeBNmO</a>  |
| 27 Sept 2017 | <b>Government appoints advocate for residents and picks up tab at troubled retirement village</b> , <i>Sydney Morning Herald</i> , <a href="http://bit.ly/2sTQ40v">http://bit.ly/2sTQ40v</a>   |
| 18 Sept 2017 | <b>Retirement village rorts</b> , <i>Channel 9 Current affair</i> , <a href="http://bit.ly/2JL0KYJ">http://bit.ly/2JL0KYJ</a>  |
| 19 Sep 2017  | <b>'Steer clear': abandoned residents spark village warning</b> , <i>Sydney Morning Herald</i> <a href="http://bit.ly/2y9a7ga">http://bit.ly/2y9a7ga</a>   |
| 15 Nov 2017  | <b>Retirement village residents to lose homes before Christmas</b> , <i>The Senior</i> <a href="https://www.thesenior.com.au/story/5416723/retirement-village-residents-to-lose-homes-before-christmas/">https://www.thesenior.com.au/story/5416723/retirement-village-residents-to-lose-homes-before-christmas/</a> |

## 2.7 Consolidation, provider size and Approved Provider status

Under the *Aged Care Act* the regulators can threaten or actually revoke either accreditation or Approved Provider status. In our submission to the Royal Commission, we have already dealt with the problems created when a large owner and provider has the resources to continue operating after accreditation has been revoked.

The revocation of Approved Provider status under section 10.3 of the 1997 act is based on the provider no longer being 'suitable' under the terms of the act. In fact **“the department is required to revoke Approved Provider status under the provisions set out in the Act”** if they no longer meet the 'suitability' criteria. It's not a choice.

Clearly if an Approved Provider is unsuitable, then this must apply to all the facilities it operates. It has been quite common for the regulator to threaten revocation of Approved Provider status unless certain conditions are complied. In most instances these are met.

The annual reports on the *Report on the Operation of the Aged Care Act* between 2004/5 and 2017/18 show that Approved Provider status has been revoked on only 11 occasions and these seem to have been small operators. We are not aware of a large operator being put out of business in this way.

The policy of consolidation pursued by government is creating larger and larger entities and they are all competing to gain market share. International data shows that these large profit focused providers have fewer staff and more failures in care. An analysis of five years of recent data, which we are supplying to the Royal Commission, examines failed accreditations standards and sanctions. This confirms that, contrary to claims, for-profit owned nursing homes failed two to three times more often than non-profit and government owned facilities.

The perverse pressures to keep costs down impacts services so this is not surprising. Sooner or later we will be faced by a large provider that is either unsuitable or no longer financially viable.

In our submission to the Royal Commission we addressed the problem created by BUPA when it planned to continue operating Eden nursing home after accreditation was revoked.

The Approved Provider of all seventy BUPA nursing homes is *'Bupa Aged Care Australia Pty Ltd'*. BUPA did not need to seek Approved Provider status when it bought the business so either its subsidiary Amity was renamed 'Bupa Aged Care Australia Pty Ltd' or it subsequently sought approval. We will never know because the entire approvals process is confidential.

If BUPA ceases to be an Approved Provider, it will not receive government funding and will not be viable. The government will be faced with responsibility for the residents in these 70 BUPA homes and for recovering their bonds if it does not want the taxpayer to fund the several billion dollars in bonds BUPA holds. The Combined Pensioner's and Superannuant's Association (CPSA) in NSW has researched this and reports<sup>34</sup>:

“... Of Bupa's 72 nursing homes Australia-wide, 11 are currently subject to compliance action, and 5 of those 11 are repeat offenders. In total, out of Bupa's 72 nursing homes Australia-wide, 34 (47 per cent) have recently been or are currently in trouble with the regulator ...”

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<sup>34</sup> Rogue Bupa Eden nursing home in 11th hour escape CPSA 19 Aug 2019 <https://cpsa.org.au/article/rogue-bupa-eden-nursing-home-in-11th-hour-escape/>

We have referred to some concerns about BUPA's probity (suitability) in 2007. Since then, there have been some serious problems in BUPA's UK and Scottish aged care services. Its nursing homes have been among those that have occasioned publicity. It sold off its home care business a few years ago and more recently about half of its nursing homes **in the UK**. The issue of its suitability should be considered.

**This is a daunting prospect. When large corporations are involved the industry, or even single large providers like BUPA, are in a position to extort relief from government and so get what they want.**

We are aware of two similar situations in the USA where the industry were able to hold government to ransom because the consequences of corporate collapse were so great. It is unlikely that our regulators would accept this challenge and revoke **Approved Provider** status. Like US regulators, they would roll over. This is a major weakness in current legislation that needs attention.

We are aware that in the USA, probably on two occasions, providers were in a position to hold government to ransom because the consequences of their failure would have been catastrophic for residents. The UK has had two massive bankruptcies. In the case of Southern Cross, the UK's largest private nursing home company, it had been structured as a REIT (Real Estate Investment Trusts).

Although the way this was structured by a private equity owner using a REIT was blamed for the bankruptcy, this structure allowed the facilities to continue to operate. The UK subsequently set up a special body to monitor the financial state of large providers so that they could prepare for corporate failures well in advance.

**When a large provider that is not fit for purpose enters the aged care sector, it can become a huge problem - worse than a massive bankruptcy because so much harm is done before it collapses.**

Despite their lack of government support, state probity regulators protected Australia from some of the worst examples during the 1990s. The situation potentially created by BUPA might have been prevented had a proper probity assessment of the provider's track record been done in 2007. A political philosophy that saw any restraint on the freedom of the market as dysfunctional saw the passage of legislation in 1997 that prevented it.

## **2.8 Holding Government to ransom**

The current market failure of our aged care system has similarities to what happened in the USA during the late 1990s. Several corporate entities had generated large incomes by exploiting a loophole in the DRG funding that allowed step-down care provided in nursing homes to be overcharged and over-serviced. They recruited allied health professionals from around the world. They paid much less attention to the less profitable elderly. They also rorted the system in other ways. They borrowed heavily on this income and rapidly consolidated as they competed to gain market share.

When at the end of the 1990s, the US government realised what was happening they blocked the funding opportunities and commenced actions alleging fraud in order to recover the money. Companies found themselves without the money to service their loans. Care across much of the USA deteriorated and some companies entered Chapter 11 Bankruptcy. They were likely to go out of business leaving many thousands without care.

The government was forced to find ways of refunding the companies and they were allowed to negotiate token fines and so trade out of bankruptcy. One of those companies, Sun Healthcare had been welcomed into Australia in 1997 but failed our probity regulations.

In his 1992 book "Marketplace Medicine", Dave Lindorff referred to an earlier occasion where nursing home corporations in the USA had been able to hold government to ransom.

**REITs as a solution:** We argue that the risks and so the power of large commercial operators to hold government to ransom would be mitigated by using a model based on REITs. Infrastructure remains and providers are more readily changed without impacting residents or staff.

## 2.9 Corporate webs and related party transactions

The problem of unsuitable people operating in the sector has been compounded by the development of complex corporate webs. This was something that initially characterised private equity. It has now become a part of the structure of aged care. By 2017, almost three quarters of all nursing homes (over 11,000) in the USA were using these corporate webs and indulging in 'related party transactions'. That profitable strategy has been followed in most other countries including Australia.

These webs can be used to move funds, hide profits, evade tax, reduce staffing and particularly in the USA, limit liability. Different companies in the webs can be contracted to provide different services. Money can be moved out of the registered provider by overpaying into the web and so not only limiting tax, but leaving the company responsible for care without the funds to pay those who sue it for damages or the fines imposed by regulators.

The Tax Justice Network report identified several aged care related companies in Australia using corporate webs to hide their activities and suggested that major reason for this was tax evasion.

A 2017 US study of related party transactions analysed the massive aged care data bases in the USA has found that companies using webs and related party transactions have *"8 percent fewer nurses and aides – are 9 percent more likely to have hurt residents or put them in immediate jeopardy of harm – have 53 validated complaints per thousand beds compared to 32 – were fined 22 percent more often for serious health violations, and penalties were 7 percent higher"*.

We explored these issues and the companies adopting these strategies in greater depth in our submission to the senate *'Inquiry into the Financial and tax practices of for-profit aged care providers June 2018'*.

### Useful resource material includes:

- **Tax Avoidance By For-Profit Aged Care Companies: Profit Shifting On Public Funds**, The Tax Justice Network May 2018 <http://bit.ly/2JqLfpg>
- **Aged Care Crisis submission to Senate Economics References Committee Inquiry** into the Financial and tax practices of for-profit aged care providers <http://bit.ly/2LfjUEN>
- **Self-dealing by nursing home owners threatens patient care – Editorial** St Louis Post-Dispatch Jan 14, 2018 <http://bit.ly/2rG5a8p>
- **Hidden Owners, Hidden Profits, and Poor Nursing Home Care: A Case Study** Harrington C, RossL, and Kang T, International Journal of Health Services 2015, Vol. 45(4) 779–800 (a detailed analysis of one company showing the impact on care)
- **Unmasked: Who owns California's nursing homes?** The Sacramento Bee 9 Nov 2014 <http://media.sacbee.com/static/sinclair/Nursing2/index.html> (the consequences for care as money is siphoned away)

- **Care Suffers As More Nursing Homes Feed Money Into Corporate Webs** Kaiser Health News 31 Dec 2017 <http://bit.ly/2GSKLDT> (*related party transactions in the USA*)
- **Marketization in Long-Term Care: A Cross-Country Comparison of Large For-Profit Nursing Home Chains** Harrington C et al Health Services Insights Volume 10: 1–23 2017 (Similar practices across Canada, Norway, Sweden, United Kingdom, and the United States)
- **Britain's care homes are being turned into complex financial instruments** Open Democracy UK 11 March 2016 <http://bit.ly/2rG65FM>

The difficulties in oversight and in determining suitability and probity are compounded as there are multiple entities involved. Any one of them may create problems. More often the policies and practices of the controlling entity impact on the way the members of the web perform their services and their ability to express their humanity.

## 2.10 Approved provider status and transactions between parties

Transactions are increasingly not restricted to related parties. Commercial entities can act as managers and contract aspects of, or even all, of the services they provide. They are likely to contract to the cheapest regardless of their suitability and the need for humanity can readily become an expendable issue in financial dealings.

Franchising arrangements have been responsible for the exploitation of staff on multiple occasions in Australia. It is very worrying that several companies employing the franchising model are moving into the home care sector. Such practices will impact on care.

It is clear that the original Approved Provider process was structured within neoliberal thinking. It was unsuited to the sector. It has been a dismal failure and true to its theoretical underpinnings arrogantly dismissive of community and its insights.

### 2.10.1 The utility of the Approved Provider process

It is clear that in the current marketplace, the concept and the process of Approved Provider status has become redundant because the Approved Provider may play little part in provision of care and the service provided be a product of contracts and processes rather than the needs of residents and the humanity required to deal with them. This applies to transactions whether they are with a related party, independent parties as happened at Earle Haven or by franchising.

## 2.11 Poster example: Earle Haven

It is difficult to imagine an example that better illustrates what has gone wrong with this system than Earle Haven. This was glaringly apparent when the executives from Peoplecare and Helpstreet appeared before the Royal Commission on 5 August 2019.

Would any group of responsible community members involved in finding and approving someone to care for their parents have chosen either of these? If they had and then had to work with them as their agents, how soon before they terminated this and found someone more suitable. Would they have considered that these people were qualified or had the empathy and insight to provide care to the frail elderly? This is a graphic illustration of the sort of thing that has been going on in aged care since at least 1997 and since community were pushed aside.

The responses of the regulators are equally revealing. The evidence at the Royal Commission of Tracey Rees and Anthony Speed and others from the government's new *'tough new cop on the beat'* shows how a myriad legislative processes and protocols imposed by a managerial belief system without insight into the needs of the sector or the human issues at stake, reduces each person to a cog and the whole is lost in the process.

We also note further evidence that the Red Tape Reduction program and the 2016 Omnibus Bill shredded the regulatory process and made it ineffective.

There seem to be multiple complex avenues and legislative processes into which any problem has to fit if it is to be addressed and resolved. If it has to use multiple avenues it can be lost. It seems to be a very poor way of managing the implementation and expression of our humanity.

Fusing three failed regulators into one simply saddles the new body with the problems of all three. The single format will certainly make it easier to contain disturbing findings and so keep the public in the dark. In our view this new regulator remains an exceedingly poor or even crude way of supervising the day-to-day expression of our humanity by individuals across a country like Australia. It makes it more vulnerable to capture

We argue that it is essential that the management and oversight of aged care be returned to local communities to manage. When there are issues that need attention they can be packaged into an understandable whole and dealt with by the regulators.

## 2.12 Finding a solution

Earle Haven illustrates the importance of taking the primary oversight and management of aged care services out of the hands of centralised managers and regulators' and returning them to local areas - and then involving the community in this.

It is the role of government to build and support community and to develop structures that enable them to:

- evaluate who will provide care in their communities,
- work with those they choose to ensure it is done properly, and
- readily replace them if they are unsuitable without harming the residents.

When problems develop then government should work with the community in supporting them and taking action.

If activities are to be subcontracted to others, then the community needs to be involved and able to satisfy themselves that they are fit and proper people who can be trusted to provide that service empathically.

Probity legislation and regulatory support can be reinstated once it has become integral to the way the community manages its affairs. Its role is to objectify the nature of the service and the expectations of those who provide that service. It should be seldom needed.

## 2.13 Moving the Approved Provider process to ACQSC

From 1 January 2020, Aged Care Quality and Safety Commission will take over the aged care regulatory functions of the department which includes the approval of providers of aged care, compliance and compulsory reports of assaults. It is also the body that is claimed to be the *“tough new cop on the beat”*.

Without a major restructuring of the process that involves transparency and community involvement in decision making, it is unlikely to address the problems.

### 3 Recommendations

**Problem 1:** The existence in the sector of unsuitable corporate bodies and individuals who do not have the skills or who cannot be trusted to provide empathic care. These include complex webs, related parties, subcontracting and franchising.

**Recommendation 1a:** That community have a major input in deciding who is to provide caring services in their communities and that they be in a position to assess the suitability and trustworthiness of those who provide care on their behalf.

**Recommendation 1b:** Once patterns of probity requirements have been tried and tested in real life situations they can be given legislative and regulatory support.

**Problem 2:** An aged care system based on a neoliberal belief system that introduces unopposed perverse incentives into aged care. It devalues the role of an involved community in overseeing the welfare of their members and enforcing the sort of conduct that they expect from the market. Central regulation is a complex, crude and inflexible system, incapable of adequately managing aged care or regulating the sector.

Aged Care Crisis urges that the care of vulnerable people in everyone's responsibility and the responsibility of every community. It is provided through caring relationships that can respond to individual situations. It cannot be simply delegated to a market. Any one providing care, whether for-profit or non-profit is acting as the community's agent and is responsible to them. Neoliberalism has pushed community aside and prevented them from holding their agents to account. That must be addressed if we are to see effective change.

**Recommendation 2.** That the Earle Haven investigation considers the role that flawed regulation played in this failure. That it presses and supports the Royal Commission in the long overdue restructuring of the aged care system. We are urging the Royal Commission to advise the development of local empowered visitors and advocates drawn from local community groups working with local councils. Government should as much as possible, deliver their services including funding, management, data collection and oversight through these, often on site, local organisations.

This would ensure total transparency so that these community organisations can work with their agents in providing services and hold them to account when that is required. This will create the flexibility and responsiveness that is so lacking. It will allow rationing to meet need in a fair and equitable way. Funding is going to be tight into the foreseeable future. The present system is very poorly suited to doing that. Government should support with education, mentoring and sanctions when required.