# Department of Health and Aged Care Quality and Safety Commission

## Response to Notices to Give Information and Produce Documents – NTG-0734 and NTG-0735

**2 March 2020**

**INTRODUCTION**

1 This is a response to the Notices to Produce Documents and Give Information or a Statement in Writing Nos NTG-0734 and NTG-0735 dated 20 February 2020 (the **Notices**), which have been issued by the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) to the Department of Health (the **Department**) and the Aged Care Quality and Safety Commission (the **ACQSC**) (collectively, the **Agencies**).

2 This information is produced to the Royal Commission on the basis that it will be tendered and received in evidence by the Royal Commission pursuant to Notices Nos NTG-0734 and NTG-0735 and on the basis the information be treated as evidence pursuant to section 6DD of the *Royal Commissions Act 1902* (Cth).

**FINANCIAL OVERSIGHT AND PRUDENTIAL REGULATION FUNCTIONS**

*Regulatory intention and architecture*

3 Failure of providers to repay refundable accommodation payments (**RADs**) and economic failure of providers themselves undermine public confidence in the aged care sector and the Government's role in regulating it. To ensure integrity of the system, the Commonwealth underwrites RADs paid by care recipients, and monitors the prudential risks associated with individual providers. Understanding the financial position of approved providers is important to the ongoing viability of service providers and their ability to deliver quality care to residents, and providing assurance to the Commonwealth that they will continue to comply with their prudential responsibilities.

4 The primary purpose of the prudential legislation is to protect and ensure the return of RADs to RAD paying residents by residential aged care providers. The financial and prudential responsibilities of approved providers, and the regulatory powers of the Department and the ACQSC in assessing and monitoring compliance with those responsibilities, are set out in the aged care regulatory framework, which includes:

(a) the *Aged Care Act 1997* (Cth) (the **Aged Care Act**);

(b) the *Aged Care Quality and Safety Commission Act 2018* (Cth) (the **ACQSC Act**);

(c) the *Accountability Principles 2014* (the **Accountability Principles**); and

(d) the *Fees and Payment Principles 2014 (No.2)* (the **Fees and Payment Principles**), which contain the four Prudential Standards:

(i) **Liquidity Standard**: An approved provider that holds a refundable deposit balance, accommodation bond balances or entry contribution balances, must implement and maintain a Liquidity Management Strategy and maintain, in the form specified in the strategy, the minimum level of liquidity.

(ii) **Records Standard**: An approved provider must establish and maintain a refundable deposit register containing information about refundable deposit balances, accommodation bond balances and entry contribution balances required in the Fees and Payment Principles.

(iii) **Governance Standard**: An approved provider that holds refundable deposit balances or accommodation bond balances must implement and maintain a governance system that ensures that the balances are only used for permitted uses and can be refunded as and when they fall due.

(iv) **Disclosure Standard**: An approved provider must provide:

(A) information about the refundable deposits, refundable deposit balances, accommodation bonds, accommodation bond balances, entry contributions and entry contribution balances held during the financial year;

(B) details of fees paid by residents;

(C) statements and other information required as part of their Annual Prudential Compliance Statement; and

(D) information about compliance with requirements to disclose information to residents.

5 Broadly, this regime sets out reporting requirements and obligations of approved providers to soundly govern and manage their business operations in relation to RADs.

6 The Agencies agree in principle that there is a need to strengthen the existing prudential regulatory framework. Recent reviews commissioned by the Department have recommended strengthening the Prudential Standards to improve the financial management of approved providers and to limit the risk of provider failures.[1] In 2019, the Department released a discussion paper, 'Managing Prudential Risk in Residential Care', which sets out the key policy issues for consideration in respect of enhancing the existing prudential regulatory framework (the **Discussion Paper**). The Department also held a public consultation on the Discussion Paper to engage with the aged care sector and the broader community on the issue of managing prudential risk in residential aged care (the **Prudential Standards Review**). A decision on the implementation of any proposed changes to the existing

[1] The Review of Legislation for Refundable Accommodation Payments in Residential Aged Care (**EY Review**); the Legislated Review of Aged Care 2017 (**Tune Review**).

prudential regulatory framework is ultimately a matter for Government.

*Question 3*

Describe the Department's and/or the Commission's functions with respect to financial oversight and prudential regulation of approved providers (as defined in Schedule 1 of the Aged Care Act 1997 (Cth)). In your response:

a. identify which area/s of the Department and/or the Commission perform each function
b. explain any changes to the Department's and/or the Commission's functions following the commencement of the Aged Care Legislation Amendment (New Commissioner Functions) Act 2019 (Cth) including any transition arrangements
c. describe any other planned changes.

*Question 4*

Provide an overview of the processes the Department and/or the Commission has for financial oversight and prudential regulation of approved providers. In your response, address the following:

a. Identify the information the Department and/or the Commission collects to inform these functions, and who provides that information.
b. Which area/s within the Department and/or the Commission receive the information and how is the information dealt with?
c. What formal and informal information sharing processes are in place (both internally and with the Department and/or the Commission)?
d. What internal reporting arrangements are in place, and which senior executives routinely receive reports on the financial health of the sector or individual providers?
e. Identify any differences in the approach taken to providers of home care and residential aged care services.

*Financial oversight and prudential regulation functions of the ACQSC*

7 The ACQSC is responsible for the regulation of approved providers in relation to their prudential responsibilities. The Prudential Compliance Section (**PCS**) of the ACQSC has primary responsibility for assessing and monitoring the performance of individual aged care providers against the Prudential Standards, and holding them to account for returning to full compliance where they are not meeting the Prudential Standards. This includes:

(a) assessing of prudential risk posed by individual providers;

(b) monitoring compliance by providers against the Prudential Standards;

(c) carrying out investigations; and

(d) taking action for non-compliance, such as revoking approval and / or imposing sanctions.

8 These functions were transferred to the ACQSC from the Department on 1 January 2020, in accordance with Schedules 1 to 4 to the *Aged Care Legislation Amendment (New Commissioner Functions) Act 2019* (Cth) (the **New Commissioner Functions Act**). Further information on this transfer of functions, including in respect of transition arrangements, is set out in paragraph 34 below. Details on each of these functions and how they are exercised by the ACQSC are also set out in further detail below.

*Financial oversight and prudential regulation functions of the Department*

9 The Department is responsible for collecting and assessing the financial and prudential information approved providers are obligated to provide to the Secretary of the Department.[2] The financial and prudential reports and statements submitted by approved providers to the Department, and their handling by the Department (and the ACQSC, where relevant), are described below.

10 The Prudential and Financial Analysis Section (**PFAS**) of the Department's Funding Policy and Prudential Branch (**FPPB**) manages contractual arrangements with Forms Administration, the Department's nominated third-party data collector (the **data collection contractor**), to collect these reports and statements. The PFAS is also charged with developing, revising and conducting risk assessment processes based on the financial and prudential data collected, in order to assess the prudential and financial viability risks of approved providers. These risk assessment processes are described in detail at paragraphs 15 and 17, and in response to question 7.

11 The Department also retains responsibility for development of policy in respect of prudential legislation and regulation. For example, the Department is currently managing the Prudential Standards Review referred to at paragraph 6 above.

*Information collection by the Department*

12 Financial and prudential information which approved providers of residential aged care are obligated to provide to the Secretary of the Department include:

(a) **Aged Care Financial Reports** (**ACFRs**). Under the Accountability Principles, providers of residential care, home care, and flexible care provided as short-term restorative care must lodge an ACFR with the Department within four months after the end of the financial year, setting out details about their finances.[3] A copy of the Aged Care Financial Report User Guide, which provides guidance to approved providers on completing ACFRs, is at Exhibit-1 [**CTH.1038.0003.3020**].

ACFRs are collected by the data collection contractor, which provides them to the PFAS for the purposes of assessing the prudential and financial viability risks of approved providers (as explained further below at paragraph 15 below).

[2] The financial reporting requirements of approved providers (excluding providers of Home Support or Commonwealth Home Support Programme) are contained within the Accountability Principles, while the prudential reporting requirements are set out within the Fees and Payment Principles.

[3] Division 2, Part 4 of the Accountability Principles.

(b) **Annual Prudential Compliance Statements** (**APCSs**). Under the Fees and Payment Principles, approved providers of residential aged care are required to complete an APCS if, at any point during the reporting for a financial year, they held refundable deposits, accommodation bonds or entry contributions. APCSs are a component of ACFRs, and are provided by the data collection contractor to both the PFAS of the Department and the PCS of the ACQSC for the purposes of their risk assessments. This is the primary mechanism by which approved providers routinely disclose information to the Department about compliance with their prudential responsibilities, and this information is provided to the ACQSC and is relied upon by the ACQSC in monitoring compliance with the Prudential Standards. APCSs must be audited and require approved providers of residential aged care to:

(i) disclose their RAD and bond payment holdings;

(ii) make declarations about their compliance with the statutory requirements (including the four Prudential Standards) for charging, managing and refunding of RADs;

(iii) disclose how they have used accommodation payments; and

(iv) disclose the accommodation payment balances of their care recipients.

A copy of the Annual Prudential Compliance Statement Guidelines is at Exhibit-2 [**CTH.1038.0003.3037**].

(c) **General Purpose Financial Statements** (**GPFSs**). Under the Accountability Principles, non-government approved providers of one or more residential aged care services are also required to submit an independently audited GPFS in addition to an ACFR and APCS.[4] The GPFS must give a true and fair view of the financial position and performance of the approved provider.

The GPFS must include a statement of financial position, a statement of comprehensive income, a statement of changes in equity, a statement of cash flows, a note summarising significant accounting policies, and other explanatory information specific to the approved provider. It must also disclose comparative information in respect of the period covered by the preceding GPFS submitted by the non-government provider.

The PFAS utilises information from GPFSs to facilitate its multilevel risk profiling process, including prioritising providers of highest financial and prudential risk.

*Home care providers*

13 While home care providers do not collect refundable accommodation payments and are therefore not regulated under the Prudential Standards, they are required to submit a Home Care Income and Expenses Statement (**HCIES**) to the Department on an annual basis. The HCIES is the only section of the ACFR that home care providers must complete. It is completed at the home care service or planning region level (where a provider has multiple services within a planning region). It requires

[4] Division 2 of Part 4 of the Accountability Principles.

providers to give data for key revenue and expense items to determine net profit for their home care operations for the financial year being reported on, and to give an unspent funds reconciliation which covers opening and closing unspent funds balances as well as key funding inflows and outflows.

14 Data collected through the HCIES is analysed by the Department primarily for the Aged Care Financing Authority's (**ACFA**) annual Reports on the Funding and Financing of the Aged Care Industry. The data may also be used for policy development within the home care program and to assist home care compliance activities where appropriate.

*Risk assessments conducted by the Department*

15 The PFAS is responsible for developing, revising and conducting risk assessment processes based on the financial and prudential data collected, to assess prudential and financial viability risks of all non-government approved providers of residential aged care. These risk assessments are:

(a) **First pass risk assessments.** First pass risk assessments involve the PFAS analysing ACFRs to rank approved providers of residential care in terms of risk of financial viability, from 'Low' to 'Severe'. A finalised first pass risk assessment report is provided to the PCS of the ACQSC, indicating the risk category of all approved residential providers, including those approved providers ranked as 'Severe'. The first pass risk assessment report of 2018-19 approved provider data was provided to the PCS in February 2020;

(b) **Detailed risk assessments.** All providers ranked as 'Severe' are subject to a second, detailed risk assessment process. The detailed risk assessment involves a close analysis of the approved provider's financial statements, and non-financial factors such as occupancy rates and non-compliance.

After completing a round of first pass risk assessments, the PFAS works with the PCS to identify providers to prioritise for detailed risk assessments. The PCS may also make an *ad hoc* request to the PFAS to carry out a detailed risk assessment of a particular provider, including one that has not been ranked as 'Severe' in a first pass risk assessment; and

(c) **Summary risk assessments.** The PFAS also carries out summary risk assessments, which are brief summaries of key risk information in a non-standardised format. Summary risk assessments are undertaken on an *ad hoc* basis when the PFAS receives internal requests from other areas of the Department and the ACQSC on the financial status of individual providers. This includes responding to requests from the home care area of the ACQSC for information in relation to approved providers that PCS identifies as having potential compliance or financial viability issues.

16 The risk matrix used by the Department to carry out its risk assessments (the **Department's Risk Matrix**) is described in response to question 7.

17 Upon finalisation, the risk assessments and recommendations of the PFAS are provided to the Delegate of the PFAS for approval. For each approved provider ranked through the first pass risk assessment as 'Severe', their first pass risk assessment and approved detailed risk assessment (and summary risk assessment, if one was completed) are provided by the PFAS to the PCS, to be considered by the PCS to determine the risk of potential breaches of the Prudential Standards and where identified, to ensure appropriate compliance action is undertaken and the results monitored.[5]

*Regulatory compliance*

18 The ACQSC carries out its regulatory functions in accordance with the legislative requirements, informed by its 2019-20 Prudential Compliance Operations Strategy & Annual Workplan (the **Prudential Compliance Strategy**) (exhibited at Confidential Exhibit-3 [**CTH.4000.0001.1239**]), and the Aged Care Quality and Safety Commission Regulatory Strategy (the **ACQSC Regulatory Strategy**) (exhibited at Exhibit-4 [**CTH.4000.0001.1210**]). Both are described in further detail below in response to question 5.

19 The PCS of the ACQSC identifies possible non-compliance with the Prudential Standards through:

(a) review of the APCS that all approved providers are required to submit (as described at paragraph 12(b) above), in order to understand and monitor approved providers' RADs and compliance with charging, managing and refunding of RADs against the legislative prudential requirements;

(b) consideration of risk assessments carried out and provided to the PCS by the PFAS, in particular detailed risk assessments (as described at paragraph 15 above); and

(c) investigation of referrals from other areas of the ACQSC (such as Quality Compliance Operations and Complaints Operations) and the Department (such as the Health State Network, the Department's network of state and territory offices).

20 Decisions on when and how specific compliance activities are to be undertaken require consideration of many factors that depend on the circumstances of each case, such as:

(a) analysis of data, intelligence and risk;

(b) the severity and scope of the alleged non-compliance;

(c) the compliance tools available in a particular situation; and

(d) an approved provider's compliance history and its attitude towards compliance.

[5] Generally, all detailed risk assessments are provided to the PCS, subject to exceptions such as where the approved provider in question is already subject to ongoing compliance action being taken, or if it has ceased operations.

21 Where the ACQSC identifies potential or actual non-compliance, it may undertake compliance activities including:

(a) **Education activities.** The ACQSC may provide education to approved providers via online guidance, educational prudential reviews, and engagement / feedback through compliance activities (for example, assessing an approved provider's APCS);

(b) **Administrative compliance activities.** Depending on the risks identified, the PCS may gather further information about the issue and engage with the provider to allow it the opportunity to explain and take remedial action. The ACQSC may also carry out increased or expanded monitoring of the provider in question;

(c) **Regulatory compliance activities.** More serious instances of potential or actual non-compliance may be the subject of formal information gathering, targeted compliance campaigns, on-site inspections, investigations, increased or extended monitoring, and reporting by the ACQSC;

(d) **Regulatory non-compliance actions.** In instances where the ACQSC confirms an approved provider's non-compliance with its aged care responsibilities (including those under the Prudential Standards), and engagement with the provider to return it to compliance is not appropriate or is unsuccessful, the ACQSC may impose sanctions. The kinds of sanctions that the ACQSC may impose on an approved provider include:

(i) revoking the approval of the provider, if the ACQSC is satisfied that it has ceased to be suitable to provide aged care, or varying or suspending their approved provider status;

(ii) restricting the payment of subsidies under the Aged Care Act to existing care recipients, such that the provider cannot receive subsidies for any new care recipients;

(iii) prohibiting the charging of accommodation payments or accommodation contributions;

(iv) prohibiting the charging of accommodation bonds or accommodation charges for the entry of care recipients; and

(v) restricting the use of the approved provider of RADs or accommodation bonds to specified uses;[6] and

(e) **Court action**. Under the Aged Care Act, a corporation and / or an individual commits an offence if an approved provider becomes insolvent and the RADs have been used for a non-permitted use.

22 If non-compliance with the Prudential Standards is self-reported by an approved provider through their APCS, or noted by an auditor, the ACQSC will take action to identify the reported non-compliance and assess if the corrective action taken (if any) was appropriate and satisfactory. The approved provider may provide evidence to demonstrate it has returned to full compliance. If the PCS considers that the evidence is insufficient to demonstrate full compliance, the ACQSC will

[6] ACQSC Act, section 63R; Division 4 of Part 7A.

request additional information from the approved provider. For example, the PCS may seek primary evidence such as receipts or bank statements confirming that correct refunds have been paid, copies of their internal policies and procedures, or minutes of board meetings. Regulatory non-compliance activities such as those described above at paragraph 21(d) may be initiated if the PCS is not satisfied there is evidence to show the approved provider has returned to full compliance.

23 The ACQSC is developing a risk matrix (the **ACQSC's Draft Risk Matrix**) to be applied when non-compliance with a provider's responsibilities under the Aged Care Act is identified. This includes a failure to comply with the Prudential Standards. The ACQSC's Draft Risk Matrix is described further in response to question 7 below.

*Information sharing between the Department and the ACQSC*

24 Following the transfer of responsibilities from the Department to the ACQSC under the New Commissioner Functions Act, the Department and the ACQSC maintain information sharing and exchanges to support both organisations to carry out their day to day business and support the interface between regulation of approved providers by the ACQSC, and the collection and assessment of financial and prudential information by the Department. Information may also be shared between the Agencies to inform policy development by the Department.

25 Under the ACQSC Act, the Commissioner of the ACQSC and the Secretary of the Department are each required to give the other information that either party requires for the purposes of their respective functions or powers.[7] In relation to their financial oversight and prudential regulation functions or powers, information sharing between the Agencies includes:

(a) formal communications regarding prudential regulation, which occur through regular meetings involving senior executive and director level engagement. The focus of this engagement is to discuss risk issues specific to individual approved providers, as well as broader issues regarding prudential regulation, including current policy and program management issues;

(b) participation by delegates of the Department (from the FPPB and the PFAS) and the ACQSC (from the PCS) on the Financial and Prudential Standing Committee (**FPSC**). Members of the FPSC include a range of Senior Executives, such as delegates for the FPPB, the PCS, and the First Assistant Secretary, Residential and Flexible Aged Care Division. The First Assistant Secretary chairs meetings of the FPSC;

(c) regular information reports and statements, including:

(i) APCSs (described above at paragraph 12(b) above) which are provided by the Department's data collection contractor to the PCS. If non-compliance with the Prudential Standards is self-reported by an approved provider through their APCS, or noted by an auditor, the Department's data collection contractor will provide an early non-compliance report to the PCS;

[7] The Commissioner is required to give the Secretary of the Department information in accordance with section 56 of the ACQSC Act. The Secretary of the Department is required to give the Commissioner information in accordance with section 57 of the ACQSC Act.

(ii) the first pass risk assessment and individual detailed risk assessment (described at paragraph 15 above) for each approved provider ranked through the first pass risk assessment as 'Severe', which are provided by the PFAS to the PCS;

(iii) summary risk assessments, which are provided by the PFAS to the PCS on request (as described at paragraph 15 above);

(d) informal information sharing, such as informal meetings and telephone calls between officers from the PFAS and the PCS on provider level compliance or viability related matters. For example:

(i) after the PFAS provides the PCS with a detailed risk assessment, the PCS may seek clarification of technical issues raised in the assessment, or further information about the approved provider's activities (such as when the PFAS identifies that an approved provider potentially used RAD monies on non-permitted uses). In these circumstances, a meeting between the relevant directors and teams may take place, followed by further engagement in person and / or via email and telephone as further information is received or required by the PCS;

(ii) the PFAS responds to *ad hoc* requests from PCS (including the home care area) for information in relation to approved providers that PCS identifies as having potential financial viability issues; and

(e) referrals from the Health State Network to the PCS. The Health State Network may provide information it receives to the PCS for the purposes of informing the PCS's prudential regulation functions.

26 The Department and the ACQSC are also collaborating on the development of a new information portal as part of their broader Risk Based Targeting and Information Sharing Project.[8] The information portal will be a real-time, integrated information sharing system aimed at improving coordination of, and access to, approved provider information. It will consolidate data about approved providers from across both the Department and the ACQSC, including financial and prudential information as well as compliance, complaints and quality monitoring data. The ACQSC will access the portal to support its ability to identify and work with approved providers at greatest risk and help them improve their performance, while continuing regular monitoring of all aged care services.

27 This project is being funded under the 2019-20 Budget Measure '*More Choices for a Longer Life – Strengthened regulation through risk-based targeting and information sharing*'. The information portal is expected to come online in July 2020.

[8] See recommendation 2 of the 'Inquiry into Events at Earle Haven' report (the **Carnell Report**).

*Internal reporting and other information sharing mechanisms*

28 The Agencies also have mechanisms by which they report financial risk information internally (including the reports and statements described at paragraph 12 above) as well as additional means by which information relating to prudential and financial oversight is shared, either internally or to other government stakeholders. For example:

(a) internal reports on the financial health of the aged care sector are provided to the FPSC (which is described above at paragraph 25(b)), including agenda papers supplied by business areas such as the PFAS;

(b) day to day risk related information, including specific provider related information, is relayed as required on an informal reporting basis by PFAS staff to the PFAS Director and the FPPB Branch Head;

(c) risk assessment reports are provided by the PFAS to other areas of the Department in response to *ad hoc* requests from Health Grants & Network Division and the Health State Network (often regarding the financial viability of an individual provider); and

(d) information may be reported to the Minister's Office for briefing purposes, such as in the context of an adverse, high profile and / or sensitive event as described below at paragraphs 29 to 31 below;

(e) financial information is collated by the Department to provide externally to ACFA for use in producing its annual Reports on the Funding and Financing of the Aged Care Industry and respond to ad hoc requests from the Aged Care Pricing Commissioner for information about individual providers;[9] and

(f) information is provided through referrals to the PCS for investigation from other areas of the ACQSC, such as Quality Compliance Operations and Complaints Operations, if those areas believe a breach of the Prudential Standards has potentially occurred. Information provided through such referrals may include evidence of late or incorrect RAD refunds, or information about possible financial viability issues.

*Joint responsibilities in the case of adverse, high profile and / or sensitive events*

29 The Department and the ACQSC both have responsibilities in the event of adverse, high profile and / or sensitive events which pose a risk to the continuity of care for aged care recipients, and coordinate their responses to such events. Depending on the circumstances, ministerial engagement, critical response activities and liaison will be led by either the Department or the ACQSC, in coordination with the other agency.

[9] In accordance with the Memorandum of Understanding between the Department and the Aged Care Pricing Commissioner.

30 In the case of an adverse event where there is a planned exit of an approved provider due to insolvency or voluntary or involuntary appointment of an administrator under the *Corporations Act 2001* (Cth), if there is no failure in quality or safety identified, the Department takes lead responsibility for briefing the Minister's Office, in coordination with the ACQSC. If a failure in quality or safety is identified, the ACQSC takes lead responsibility, in coordination with the Department.

31 When responding to high profile and / or sensitive events, if the principal issue relates to quality and safety, the ACQSC is responsible for briefings to the Minister's Office, in consultation with the Department on the application of policy as required. If it does not relate primarily to quality and safety issues, the Department is responsible for briefings to the Minister's Office, with consultation with the ACQSC on relevant quality and safety aspects.

*Changes to financial oversight and prudential regulation responsibilities*

32 Following the transfer of responsibilities from the Department to the ACQSC under the New Commissioner Functions Act, responsibility for aged care compliance with prudential responsibilities was transferred to the ACQSC. As a result, the Department and the ACQSC now share responsibility for regulatory oversight of provider performance and risks to care recipients, as set out above. The transfer of responsibilities forms part of an ongoing effort by the Commonwealth to strengthen prudential oversight and governance in the aged care sector.

33 The transfers of responsibility provide the ACQSC with a centralised, broader range of regulatory functions and powers to oversee the provision of care by approved providers of Commonwealth-funded aged care services, from their entry to their exit (if required) from the regulatory system.[10]

*Transitional arrangements*

34 Schedule 4 of the New Commissioner Functions Act sets out transitional arrangements for the transfers of the Department's functions with respect to prudential regulation of approved providers to the ACQSC. In general, these transitional arrangements ensure the enforcement activities undertaken before the transition time under the Aged Care Act continue to have effect as if they were done under the amended ACQSC Act or Aged Care Act after the transition time, while also ensuring any non-compliance arising before the transition time, can be dealt with by the Commissioner in performing the transferred functions.

*Further changes to financial oversight and prudential regulation responsibilities*

35 The Department is currently carrying out activities which may lead to changes to its activities relating to financial analysis and oversight and to prudential regulation. These activities include the Department's Prudential Standards Review, and its project to review its financial analysis processes and activities, and the monitoring and understanding of financial and prudential risks in the sector. The Department has commissioned Mr Gary Barnier (Member of ACFA) to undertake this project, which is expected to be finalised in the first half of 2020.

[10] ACQSC Regulatory Strategy (1 January 2020), page 6.

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| *<u>Question 5</u>*<br><br>Describe or provide a copy of the Department's and/or the Commission's regulatory strategy with respect to its prudential regulation functions. |

*Regulatory strategies of the ACQSC*

36 The ACQSC's Prudential Compliance Strategy referred to at paragraph 18 above sets out the ACQSC's approach to prudential compliance activity and is at Confidential Exhibit-3 [**CTH.4000.0001.1239**]. The Prudential Compliance Strategy seeks to ensure the efficient use of regulatory resources while minimising regulatory burden, particularly for compliant providers. Its key objectives are to ensure that:

(a) providers have sufficient information to allow them to comply with their prudential responsibilities;

(b) the risk of non-compliance with these responsibilities is monitored; and

(c) appropriate and proportionate action is taken where non-compliance is identified.

37 As the Prudential Compliance Strategy sets out a responsive risk-based approach to regulation, the focus of the ACQSC's activities is on the areas of greatest potential harm to the safety, health and wellbeing (including financial wellbeing) of aged care recipients. A responsive approach to deciding appropriate action requires consideration of the context, conduct and culture of approved providers. The Prudential Compliance Strategy also calls for targeting resources to the highest priority compliance risks, which involves gathering intelligence on identified severe risk providers' compliance history, posture, complaints, and any known local challenges likely to impact on the performance of a provider.

38 More generally, the ACQSC Regulatory Strategy sets out the ACQSC's approach to delivering regulatory functions under the ACQSC Act and the *Aged Care Quality and Safety Commission Rules 2018*. A copy of the ACQSC Regulatory Strategy is at Exhibit-4 [**CTH.4000.0001.1210**].

39 The ACQSC Regulatory Strategy aims to:

(a) establish a consistent framework for operationalising policy across the ACQSC and for holding it accountable for its own performance;

(b) provide a clear statement of how aged care providers (and their representatives, such as peak bodies) can expect the ACQSC to undertake its regulatory functions; and

(c) allow care recipients, their families, and the Australian community more broadly to understand the way in which the ACQSC operates to deliver outcomes.

40 The ACQSC's compliance activities utilise the 'regulatory pyramid' model under the ACQSC Regulatory Strategy, which summarises the regulatory tools and powers available to the ACQSC in the context of the broader regulatory tools in aged care. The regulatory pyramid maps the ACQSC's compliance strategy against the compliance posture of approved providers. The more willing an

approved provider is to achieve and maintain full compliance, the lower the level of intervention by the ACQSC. For example, cooperative and persuasive approaches such as education and engagement are taken in respect of approved providers willing to do the right thing. Approved providers that demonstrate repeated and / or wilful non-compliance will warrant a higher level of intervention and use of specifically targeted and more interventionist regulatory tools such as sanctions.

*Aged Care Regulatory Design Strategy*

41 The Department, in consultation with the ACQSC, is developing a future Aged Care Regulatory Design Strategy (the **Regulatory Design Strategy**). This project aims to reflect a transparent and consumer focused aged care regulatory system that covers the quality, safety and financial aspects of care. It will include risk-based approaches to regulation and modern regulatory tools to ensure high quality care is provided to consumers, taking into consideration recommendations from recent reviews and the recommendations of the Royal Commission.

42 In developing the Regulatory Design Strategy, regulatory approaches taken in international jurisdictions and other similar social care sectors are also being examined. The Regulatory Design Strategy will take into account the current ACQSC Regulatory Strategy (described at paragraphs 38 to 40 above) and other projects underway to support regulation and compliance. These include (but are not limited to) the Department's Prudential Standards Review, and the development of risk profiling tools.

43 The Department has a three-phase project through which it is intending to design and operationalise the Regulatory Design Strategy:

(a) **Phase 1:** The development of the draft Regulatory Design Strategy, which is expected to be completed by 30 June 2020;

(b) **Phase 2:** An implementation roadmap will be developed early in the 2020-21 financial year; and

(c) **Phase 3:** Final development of the Regulatory Design Strategy and its implementation will follow the release of the Royal Commission's Final Report, allowing for findings and recommendations to be considered. This phase will likely commence in the first half of 2021.

*<u>Question 6</u>*

Provide an overview of any processes the Department and/or the Commission has for consulting with other prudential bodies for the purposes of undertaking its prudential regulation and financial oversight functions, including the Australian Prudential Regulation Authority. In your response, address any regular meetings or communication the Department has with these bodies.

44 The Agencies do not have processes for consulting with other prudential bodies for the purposes of their prudential regulation and financial oversight functions.

## ACCOMMODATION PAYMENT GUARANTEE SCHEME

45 The Royal Commission seeks the following information regarding the Accommodation Payment Guarantee Scheme (**Guarantee Scheme**), established under Part 4 of the *Aged Care Accommodation Payment Security Act 2006* (Cth) (**Accommodation Payment Security Act**).

*Question 10*

Confirm the data contained in the Aged Care Financing Authority's report 'The Protection of Residential Aged Care Lump Sum Accommodation Payments' at Table 5 on pages 57-58.

*Question 11*

Provide data in the form Table 5 for any additional trigger events not included in the table.

46 The Guarantee Scheme guarantees residential accommodation payments in the event that an approved provider that holds accommodation payments undergoes an insolvency event, as defined in the Accommodation Payment Security Act. A 'trigger event' under the Guarantee Scheme occurs when:

(a) an insolvency event has occurred in relation to an approved provider or former approved provider; and

(b) the approved provider or former approved provider has at least one outstanding accommodation payment balance (as defined in subsection 6(2) of the Accommodation Payment Security Act).

*Table 5*

47 Table 5 in the ACFA report outlines each trigger event under the Guarantee Scheme that occurred from the inception of the Guarantee Scheme in 2006 and up to March 2017.

48 The Department can confirm that the data contained in the ACFA report in Table 5 was accurate at the time that it was prepared, with the exception of the data provided on interest payable in respect to Lifestyle Care Providers Pty Ltd.

*Updated data for Table 5*

49 The Department has prepared the following table which:

(a) includes trigger events not included in the ACFA report (**additional trigger events**), as they occurred between March 2017 and the date the Notices were issued.[11] The additional trigger events relate to Woodhaven Lodge Pty Ltd and Murchison Community Care; and

[11] The Department is aware that a trigger event relating to one approved provider is likely to occur in the near future. The Department would be able to provide further information under a Notice if and when that trigger event occurs.

(b) provides updated figures in respect of:

(i) Lifestyle Care Providers Pty Ltd. This update is to correct the inaccuracy mentioned in paragraph 48 above; and

(ii) Kalinda Craft Pty Ltd. The changes in the entry for this entity reflect additional refunds that the Department processed after the finalisation of the ACFA report.

| Former Provider | Entered liquidation | Service | Number refunded | Lump sum balances | Interest payable | Total amount refunded |
|---|---|---|---|---|---|---|
| Lifestyle Care Providers Pty Ltd | 14/01/2008 | Lifestyle Carrara, 38 places | 5 | $528,793 | $27,192 | $555,985 |
| Vitality Care Commissioning Pty Ltd | 05/11/2008 | Bridgewater Aged Care Facility, 102 places | 50 | $8,164,871 | $249,432 | $8,414,304 |
| Kendalle Pty Ltd | 11/06/2009 | Gracedale Manor, 62 places | 54 | $9,624,445 | $181,549 | $9,805,994 |
| Drysdale Aged Care Hostel Pty Ltd | 25/11/2009 | Palmerston Court Hostel, 50 places | 20 | $2,715,611 | $64,579 | $2,780,190 |
| Hirange Management Pty Ltd | 24/12/2009 | Berwick Village Supportive Care Home, 38 places | 20 | $2,868,938 | $69,203 | $2,938,142 |
| Viva Care Pty Ltd | 27/11/2013 | Viva Care at Albion, 120 places | 30 | $4,788,801 | $290,475 | $5,079,277 |
| De' Ryan Pty Ltd | 14/11/2013 | Brunswick Manor, 60 places | 16 | $2,185,377 | $90,917 | $2,276,294 |
| Nepean Hospital Pty Ltd | 11/04/2014 | Alexander House, 46 places | 24 | $3,381,144 | $153,110 | $3,534,254 |
| | | Mount Martha Valley Lodge, 125 places | 35 | $6,680,932 | $602,103 | $7,283,086 |
| Kalinda Craft Pty Ltd | 03/02/2016 | Rosewood Mews, 60 places | 2 | $534,522 | $130,788 | $655,310 |
| D&R Community | 07/06/2016 | Hillside Haven, 12 places | 3 | $178,746 | $2,313 | $181,059 |
| Woodhaven Lodge Pty Ltd | 20/09/2017 | Woodhaven Lodge, 56 places | 1 | $65,820 | 16,979 | $82,798 |
| Murchison Community Care | 06/11/2019 | DP Jones Nursing Home, 40 places | 10 | $2,779,303 | $48,249 | $2,827,552 |
| **Total** | **N/A** | **N/A** | **270** | **$44,497,356** | **$1,926,888** | **$46,424,245** |

## DEPARTMENT'S DISCUSSION PAPER

50 The Royal Commission seeks the following information and documents in relation to the Department's Discussion Paper.

> *Question 12*
>
> What does the Department consider to be the key deficiencies in the current prudential regulation arrangements for approved providers?

51 The Department considers that the key deficiencies in the current prudential regulation arrangements for approved providers have been identified in the Discussion Paper, which include that:

(a) there is insufficient transparency in provider reporting;

(b) the Liquidity Standard does not provide for specific provider liquidity requirements and needs to be redefined;

(c) there should be more specific provider capital adequacy requirements;

(d) provider disclosures to the Department, and residents and families, are inadequate;

(e) the governance requirements of some providers, including financial risk management, are deficient; and

(f) the use of discretionary trusts by some providers does not provide a required level of transparency.

Each of these deficiencies are described in more detail in the Discussion Paper.

52 Changes to the current prudential regulatory framework could also seek to address the following issues:

(a) **Viability and risk.** Implementing minimum requirements for key financial metrics, such as a provider's liquidity, would be expected (over time and in conjunction with other reforms) to move individual providers and the aged care sector more generally to a more financially viable and sustainable footing;

(b) **Reporting frequency.** A more timely disclosure of provider financial and prudential information (including, for example, mandatory disclosure of when a provider becomes aware of substantial risks to their viability) would permit the Agencies to carry out earlier and more effective assessments of a provider's viability and their compliance with the Prudential Standards, particularly in respect of providers who are presenting as high risk;

(c) **Permitted uses of RADs.** Enhanced disclosure of RAD use, including evidence of the provider's compliance with permitted uses, would assist year on year reconciliation of RAD use and provide greater confidence to the Agencies and residents that providers are not using RADs for non-permitted uses, and that they have an ongoing ability to return RADs to residents when required; and

(d) **Corporate structure.** Greater transparency by providers, including making clear the relationships between different entities within their corporate structures and the transactions between the provider and those other entities, will assist the Agencies to better monitor financial viability and prudential compliance.

53 Any amendments to the current prudential regulatory framework to address these issues would require consideration on the impact they would have more broadly on the industry, including for example the compliance cost and the administrative burden that would be imposed on approved providers. The Department's consultations with the aged care sector, as described in detail at paragraph 63 below, have been, at least in part, informed by the need to consider these matters in designing amendments to the regulatory framework.

*Question 14*

Explain what the Department has done to advance the objective of strengthening the prudential framework since the public consultation period concluded in March 2019. In your response, address the following:

a. any advice the Department has provided to the Minister about the options in the Discussion Paper or the position the government should take in response to those options
b. any further consultations the Department has undertaken or is planning to undertake in relation to that areas the subject of the Discussion Paper
c. when the Government is planning to announce changes to strengthen the prudential framework.

54 The steps taken by the Department since March 2019 to advance the objective of strengthening the prudential framework, including current and ongoing consultations, are described in detail at paragraph 63 below.

55 The Department has provided advice to the Minister in respect of matters raised in the Discussion on a number of occasions. These are as follows:

(a) in January 2019, the Department provided an advice to the Minister which was primarily for the purposes of approval to release the Discussion Paper. The advice also summarised several issues relating to the currently prudential framework, including:

(i) the Government's 2018-19 budget announcement;

(ii) that consultation with the aged care sector would assist to settle details of potential changes to the prudential regulatory framework;

(iii) ongoing risks to the Guarantee Scheme;

(iv) key options within the Discussion paper (including strengthened or new requirements for liquidity and net asset ratios); and

(v) likely differences in support between not for-profit and for-profit providers on some of the options and in respect of the new levy arrangements;

(b) in March 2019, advice was provided to the Minister concerning:

(i) the introduction, operation and funding of the Business Improvement Fund:

(ii) an update on the Prudential Standards Review; and

(iii) the introduction of the Guarantee Scheme Levy;

(c) in December 2019 and January 2020, advice was provided to the Minister concerning:

(i) options to implement the Prudential Standards Review;

(ii) the operation of the Business Improvement Fund; and

(iii) enhancements to the prudential regulatory capability of the Department.

*Announcement of changes*

56 The timing of announcements concerning the form of changes that will strengthen the prudential framework is a matter for Government.

57 If a decision is made by Government to announcement new changes to the current legislative scheme governing prudential regulation and oversight, the Department will consult further with the aged care sector on implementation.

**2018-19 BUDGET AND 2019-2020 MID-YEAR ECONOMIC AND FISCAL OUTLOOK**

In relation to the announcement in the 2018-2019 Budget of $8.6 million over four years from 2018- 2019 to improve the management of prudential risk in residential aged care facilities including through the introduction of a levy to secure accommodation bonds, provide a summary of:

*<u>Question 15</u>*

the rationale for this announcement, including the specific deficiencies that this measure was intended to address

*<u>Question 16</u>*

the work done by the Department in relation to this Budget measure

*<u>Question 17</u>*

the timeline for implementing and the key deliverables of this Budget measure

58 The measure to improve the management of prudential risk in residential aged care facilities (the **Measure**), including but not limited to the introduction of a levy to secure accommodation bonds, was designed in response to recommendations of the Tune Review, specifically Recommendations 20 and 21.

*Guarantee Scheme Levy*

59 Recommendation 20 recommends that the Commonwealth Government retain the Guarantee Scheme, but reform it to improve certainty and to ensure that aged care providers make contributions where the benefits outweigh the costs.[12]

60 Currently all of the financial risk of the Guarantee Scheme is borne by the Commonwealth. As the pool of RADs grows, so too does the financial risk for the Commonwealth should a provider default.[13] Imposition of a compulsory levy across residential care providers where default events exceed $3 million in any fiscal year (the **Guarantee Scheme Levy**) is intended to ensure a fairer sharing of the costs of operating the Guarantee Scheme while taking account of administrative efficiency. The $3 million threshold sets a clear level below which the Government continues to meet all of the costs of the Guarantee Scheme. If the threshold is exceeded, then all of the Guarantee Scheme's costs for that financial year would be shared by the sector.

61 The Department has worked to develop primary legislative amendments to give effect to the Guarantee Scheme Levy.

*Reform of Prudential Standards and prudential oversight*

62 Recommendation 21 recommends that the Commonwealth Government reform the existing prudential regulatory framework, taking into account the recommendations made in the independent EY Review. Having regard to the findings of the EY Review, this component of the Measure is intended to:

(a) correct gaps in the prudential and financial information received from providers;

(b) strengthen the Prudential Standards;

(c) provide greater transparency of operating structures used by providers, their related party transfers, their corporate arrangements and shareholders; and

(d) enhance the Agencies' prudential and financial reporting regulatory capability, including the technical expertise required to assess provider financial information and the information systems used for this capability. This improved capability would assist in the early detection of prudential and viability concerns to further limit the Commonwealth Government's exposure to provider defaults.

[12] The Tune Report recommended a threshold of "say, $5 million". The Commonwealth Government accepted the overall recommendation of retaining the Guarantee Scheme while lowering the threshold to $3 million.

[13] ACFA's 2017 report (protection of lump sum payments) shows the value of lump sums in the sector growing from $2.4 billion in 2001-02 to $21.7 billion in 2015-16 (Chart 2). The pool has continued to grow and as at 30 June 2019 is estimated to be $30.2 billion.

63 The Department has undertaken a number of steps to help facilitate the enhancement of the existing prudential regulatory framework, as proposed by the Measure, a number of which are outlined below:

(a) In February 2018, the Department convened a technical workshop comprising experts in aged care financial and accounting practices to further the Department's understanding of the EY Review;

(b) In July 2018, informed by both the EY Review and the February 2018 workshop, the Department consulted with the Prudential Advisory Group on a range of options to strengthen the Prudential Standards. Further detail on the Department's engagement with the Prudential Advisory Group is provided in response to questions 24 to 27 below;

(c) In September 2018, the Department engaged Deloitte to provide additional advice on regulating the major prudential and financial challenges in residential aged care (the **Implementation Options Review**). Deloitte provided the final report of the Implementation Options Review in May 2019. A copy of the final report is exhibited at Exhibit-5 [**CTH.1038.0003.3302**], and a copy of the accompanying workbook is exhibited Exhibit-6 [**CTH.1038.0003.3350**].

(d) In February 2019, the Department released the Discussion Paper for consultation with key stakeholders. As discussed in paragraph 6 above, the paper outlined the key findings of the EY Review and presented an expanded set of reform options and related analysis. After six weeks, the consultation closed, with 24 submissions received;

(e) In February 2019, the Department's first pass risk assessment process for residential providers was automated. The system was implemented in September 2019, as outlined in detail at paragraphs 83 and 84 below;

(f) In July 2019, the Department consulted with StewartBrown to provide additional advice on the proposals made in the EY Review and the Implementation Options Review, particularly on potential implementation and transition issues (the **Prudential Framework for RADs Report**). The Prudential Framework for RADs Report was accepted by the Department in December 2019. A copy of the report is exhibited at Exhibit-7 [**CTH.1038.0003.3433**];

(g) In December 2019, the Department engaged StewartBrown to design amendments to the ACFR. This followed StewartBrown's report to the Department in October 2019 including a recommended approach to capturing additional financial and prudential information from approved providers within an amended form of the ACFR. The Department expects to receive a proposed design and guidance material for an amended ACFR in March 2020; and

(h) In January 2020, the Department initiated the project referred to at paragraph 35 above to review the Department's financial analysis processes and activities, including the monitoring and understanding of the causes of financial and prudential risks in the sector. The project will be led by Mr Gary Barnier (Member of ACFA) and is expected to be finalised in the first half of 2020.

*Timeline for implementation of reform to prudential regulatory framework*

64 The timing of the implementation of any reforms to the current prudential regulatory framework, including the introduction of the Guarantee Scheme Levy, is a matter for the Commonwealth Government.

65 The Department recognises that it is likely that legislative changes would be required to implement the proposals identified through the various consultation processes described in paragraph 63 above and that some proposals would need to be phased in over time to provide for a smooth transition.

In relation to the announcement in the 2018-2019 Budget of $8.6 million over four years from 2018- 2019 to improve the management of prudential risk in residential aged care facilities including through the introduction of a levy to secure accommodation bonds, provide a summary of:

*Question 18*

the status and progress, if any, of the Aged Care (Accommodation Payment Security) Amendment Bill and Aged Care (Accommodation Payment Security) Levy Amendment Bill.

66 The *Aged Care (Accommodation Payment Security) Amendment Bill* and the *Aged Care (Accommodation Payment Security) Levy Amendment Bill* have not been introduced in Parliament. Any future legislative progress of both the *Aged Care (Accommodation Payment Security) Amendment Bill* and the *Aged Care (Accommodation Payment Security) Levy Amendment Bill* is a matter for the Commonwealth Government.

In relation to the statement in the 2019-2020 Mid-Year Economic and Fiscal Outlook of $1.1 million in forgone non-tax revenue in 2019-20 from deferring the implementation of a mandatory levy on residential care providers where the Guarantee Scheme is triggered (**mandatory levy**), explain:

*Question 19*

the rationale for deferring the mandatory levy, including any relevant submissions or other consultation process relating to the decision to defer the mandatory levy

*Question 20*

how long the mandatory levy has been deferred for, including, if relevant, a summary of any future work by the Department to implement a mandatory levy on residential care providers where the Guarantee Scheme is triggered.

67 In the 2019-2020 Mid-Year Economic and Fiscal Outlook, the Commonwealth Government confirmed that the introduction of the Guarantee Scheme Levy had been deferred. The timing of the implementation of the Guarantee Scheme Levy, including the length of any deferral period, is a matter for the Commonwealth Government. The full consequences of the implementation of the Guarantee Scheme Levy are however being considered as part of broader consideration of financial issues in the sector, noting a levy would impose additional costs on providers.

68 Whilst the Guarantee Scheme Levy has not yet been implemented, under the Accommodation Payment Security Act, regulations may still be made to impose a levy on approved providers to recoup the costs incurred by the Commonwealth under the Guarantee Scheme. Additionally, the Commonwealth Government has also announced the establishment of the Business Improvement Fund referred to at paragraph 55 above to support providers improve their operations including investing in more efficient business support systems or where also efficient, to restructure their operations. Improvements and changes that enhance business viability can assist limit risks of trigger events occurring under the existing Guarantee Scheme. Arrangements for the Business Improvement Fund, including as to how it will operate, are currently being finalised.[14]

**CARNELL REPORT**

*Question 22*

Provide a summary of the steps taken by the Department to date to respond to or implement any recommendations of the Carnell Report which relate to prudential regulation and/or financial oversight, in particular the following:

a. Recommendations 1 to 7
b. Recommendations 8 to 15
c. Recommendation 18
d. Recommendation 22.

69 The Commonwealth supports all 23 recommendations of the ‘Inquiry into Events at Earle Haven’ report (the **Carnell Report**), many of which align with work that was in train before the report was released. The Commonwealth has made significant progress on changes that support the recommendations of the Carnell Report, including those that relate to prudential regulation and/or financial oversight. These steps include:

(a) increasing the regulatory powers of the ACQSC;

(b) developing information sharing and risk profiling tools to better identify providers of concern;

(c) introducing business advice services to better support providers;

(d) strengthening prudential obligations and compliance activity; and

(e) updating requirements for service providers to notify the Department of changes in key personnel and management arrangements.

70 The table annexed at **Annexure A** summarises progress against recommendations of the Carnell Report.

[14] This in addition to the advisory services that became available to providers in 2019, described in further detail in Annexure A below.

## PRUDENTIAL ADVISORY GROUP

71 The Royal Commission seeks the following information in relation to the Prudential Advisory Group (**PAG**):

*Question 24*

when the PAG was commissioned and whether it is currently active

*Question 25*

an overview of the role, key responsibilities and reporting arrangements of the PAG

*Question 26*

the names and roles of members of the PAG for the last 2 years

*Question 27*

how often the PAG meet and copies of minutes of meetings for the last 2 years

*Overview of the PAG*

72 The PAG was first established in 2011, and the Department took joint secretariat function of the PAG from the Aged Care Industry Council in 2015. Since then, the Department has convened the PAG when it recognises opportunities to consult and engage with aged care stakeholders. The recent focus of the PAG has been on prudential legislation and policy, especially the financial reporting legislation aimed at protecting RADs.

73 As an industry advisory group, the primary role of the PAG is to provide a forum for discussion regarding current and emerging issues affecting the aged care sector, which may include (but are not limited to):

(a) reviews of the regulatory framework relating to financial oversight and prudential regulation;

(b) how legislation reflects the business practices and reporting of residential aged care providers;

(c) deregulation and opportunities to reduce red tape; and

(d) issues relating to the Guarantee Scheme.[15]

74 The input of the PAG informs legislative reviews and design of aged care financial and prudential policy. The PAG has previously provided industry expertise that informed the development of the rules and principles surrounding approved provider prudential management in the aged care sector. Past meetings of the PAG have discussed the 2017 ACFA review titled '*The Protection of Residential Accommodation Lump Sum Payments*', the EY Review, and the Tune Review.

[15] Matters relating to quality of care and complaints management are out of scope for the PAG.

75 Most recently, a meeting of the PAG on 23 July 2018 discussed the Prudential Standards Review being carried out by the Department. An overview of the discussion at the 2018 meeting is at Exhibit-8 [**CTH.1038.0003.3177**]. The feedback from the aged care stakeholders and industry experts at the 2018 meeting informed the development of the Department's Discussion Paper. Once a decision is made by the Commonwealth Government on the implementation of the recommendations of the Prudential Standards review, the Department expects to reconvene the PAG to discuss implementation of any changes to the existing Prudential Standards.

*Meetings of the PAG*

76 The PAG meets on an *ad hoc* basis as prudential and financial issues affecting the aged care sector arise. The most recent meetings of the PAG were in November 2017 and in July 2018. As an advisory group, the PAG is not subject to formal reporting arrangements and minutes of meetings are not kept.

*Names and roles of PAG members*

77 The membership of the PAG is not fixed. Ahead of each meeting of the PAG, the Department considers topics for discussion and the anticipated interest and expertise of organisations that operate in the aged care sector or advocate for older Australians. It issues invitations to organisations it considers will be able to provide views on the issues to be discussed at the meeting of the PAG, to request nominations of representatives to attend the meeting. The role of these representatives is to attend the PAG meeting and discuss topics proposed by the Department, which most recently have included reviewing the current Prudential Standards in Part 5 of the Fees and Payments Principles and financial reporting arrangements.

78 In the last two years, the PAG has met once, on 23 July 2018. At that meeting of the PAG:

(a) the following participants attended in person:

(i) Derek Dittrich (Aged & Community Services Australia);

(ii) John McNamara (Catholic Health Australia);

(iii) David Norton (Uniting Care Australia);

(iv) Ian Yates (COTA Australia);

(v) Sean Rooney (Leading Aged Services Australia);

(vi) Nigel Murray (Department);

(vii) Andrew Coll (Department);

(viii) Georgina McGrath (Department);[16]

(ix) Nicki Phelan (Department);

[16] Georgina McGrath was an employee of the Department at the time of the 23 July 2018 PAG meeting, but has since transferred to the ACQSC as a result of a Machinery of Government change.

(x) Roger Hunt (Department);

(xi) Shehara Perera (Department);[17]

(b) the following participants attended by telephone:

(i) Stephen Oliver (ANZ);

(ii) Emma Jobson (Department);[18] and

(c) apologies were extended by Mathew Richter (Aged Care Guild).

[17] Shehara Perera was an employee of the Department at the time of the 23 July 2018 PAG meeting, but has since transferred to the ACQSC as a result of a Machinery of Government change.

[18] Emma Jobson was an employee of the Department at the time of the 23 July 2018 PAG meeting, but has since transferred to the ACQSC as a result of a Machinery of Government change.

**Annexure A**

**Summary of Progress against Recommendations of the Carnell Report**

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| **Greater regulatory capacity and coordination** | | |
| 1. | Progress as a priority the amalgamation of aged care regulatory functions in the Aged Care Quality and Safety Commission. This should include functions relating to approved providers compliance with prudential responsibilities. | **Complete.**<br>Responsibility for aged care compliance, including in respect of compliance with prudential responsibilities, was transferred to the ACQSC from the Department on 1 January 2020, in accordance with Schedules 1 to 4 to the New Commissioner Functions Act.[19] Further detail is provided in response to questions 3 and 4. |
| 2. | Ensure the planned delivery of an information portal which provides a single, real-time view of all information about approved providers which is available to both the Department of Health and the Commission. This should include financial and prudential information as well as complaints and quality monitoring data. | **In progress.**<br>An information portal that will consolidate data from the range of compliance, complaints and quality monitoring activity occurring across the Department and the ACQSC is currently under development. Further detail is provided at paragraphs 26 to 27. |
| 3. | Further invest in staff training and other resources to support a shared culture within the newly expanded Quality and Safety Commission which emphasises information sharing and cooperative action between the Commission's various functions. | **In progress.**<br>The ACQSC has commenced a program of work on organisational development. This includes a focus on communication, culture and shared purpose. As part of this work, the ACQSC is developing processes to engage staff across the ACQSC to inform the 2020-21 strategic plan, building on regular communication, and looking at options to feedback and recognise performance. The Commission has also taken steps to review learning and development needs in consultation with staff.<br><br>This program of work also closely links in with other activities underway to develop an integrated regulatory approach for the ACQSC that supports information sharing, risk assessment and a coordinated approach to case management. These activities have led to better regulatory intelligence sharing and more fulsome case coordination across the ACQSC, including through the uptake of more frequent case management meetings. |

[19] Schedules 1 to 4 to the New Commissioner Functions Act received assent on 11 November 2019.

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| 4. | The Quality and Safety Commission should appoint a Senior Responsible Officer or Case Manager for each high risk provider. This officer will have responsibility for ensuring effective information sharing and timely action. | **In progress.**<br>The ACQSC has commenced a project to establish a national case coordination approach for complex cases that considers all potential non-compliance sources as an input, coordinates responses from multiple regulatory functions of high risk and determines the appropriate response.<br>The business process model that has been developed sets out a model for case coordination, including its relationship with other ACQSC regulatory functions and governance arrangements, and details the principles for case coordination. Under the model, cases that are eligible for case coordination are identified by the ACQSC using set criteria. The National Case Coordination Committee and the regional case coordination committees are responsible for overseeing cases of whole-of-Commission significance and for case coordination policy and processes. These committees assign approved providers identified as high risk to Senior Responsible Officers, who act as case leads. The case leads lead the case coordination process, which involves defining the care coordination plan to set out assessment of risk, proposed steps for resolution, the required resources for action, and performance measures. |
| 5. | The Quality and Safety Commission should enhance its cooperation and intelligence sharing with other regulatory authorities and stakeholders. | **In progress.**<br>The ACQSC has established Memorandums of Understanding with:<br>• the Department, to describe how the Agencies will work together, and to recognise and support their linked work and responsibilities;<br>• the Australian Health Practitioner Regulation Agency, to share information in a timelier manner on issues relating to aged care, and support better communication between the agencies;<br>• the Office of the Health Ombudsman, Queensland Government; and<br>• the NSW Health Care Complaints Commission, to document the shared operational understandings and agreed protocols with respect to information sharing.<br>The ACQSC is in the process of finalising Memorandums of Understandings regarding information sharing with<br>• the NSW Ageing and Disability Commission; and<br>• the Heath and Community Services Complaints Commissioner, South Australia. |

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| | | The ACQSC is also currently negotiating Memorandum of Understandings with a number of other regulatory authorities and stakeholders to better share information and communication, including:<br>• the Health and Disability Services Complaints Office, Western Australia<br>• the Health Complaints Commissioner, Victoria;<br>• the Health Complaints Commissioner, Tasmania;<br>• the Health and Community Services Complaints Commissioner, Northern Territory; and<br>• the ACT Health Services Commissioner.<br>The ACQSC is also drafting letters of introduction for several federal and state organisations focusing on the sharing of information. |
| **Greater oversight of financial and commercial arrangements** | | |
| 6. | The Australian Government should finalise as a matter of priority reforms to aged care prudential arrangements, including to:<br>• revise metrics used for assessment of Annual Prudential Compliance Statements to incorporate measures which may indicate risk to quality of care<br>• introduce specific liquidity and capital requirements<br>• provide greater visibility of corporate structure and related-party transactions<br>• require updates to material changes in ownership or management arrangements<br>• allow regulators to request updated financial information at any time. | **In progress.**<br>The Department is undertaking the Prudential Standards Review, which has involved public consultation (as described at paragraph 6), to ensure that any amendments to the current prudential regulatory framework have considered the impact they would have more broadly on the aged care industry.<br>As outlined above, the Department has also commissioned a project led by Mr Gary Barnier to examine the Department's financial analysis processes and activities, and the monitoring and understanding of financial and prudential risks in the sector. The Department would seek to take into account the findings of this project in designing any further amendments to the prudential regulatory framework.<br>A decision on the implementation of any proposed changes to the existing prudential regulatory framework is however ultimately a matter for Government. |

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| 7. | Approved providers that do not meet the specified liquidity and capital requirements be automatically placed on a watch list and required to submit a detailed plan to rectify the situation. | **In progress.**<br>Approved providers are currently assessed by the Department based on their financial statements. Liquidity and balance sheet positions are elements that are considered by the Department in assessment of provider financial statements.<br>Possible changes to introduce new specific liquidity and capital adequacy requirements are being considered as part of the Prudential Standards Review. |
| 8. | Approved providers should be required to report to regulators the financial information of:<br>• any related parties providing guarantees for the approved provider<br>• any organisation sub-contracted to manage the delivery of aged care services. | **In progress.**<br>The ACFR is currently being redesigned to mandate the capture of approved provider data with respect to related party entities and sub-contracted arrangements. The enhanced ACFR may capture further provider financial and prudential information. The Department anticipates that the first draft of the enhanced ACFR will be completed by March 2020. |
| 9. | Update the Governance Standard in the *Fees and Payments Principles 2014 (No. 2)* to require approved providers to assess on a quarterly basis their liquidity and ability to continue as going concern. This should extend to any sub-contractor responsible for the management of care services. | **In progress.**<br>This is being considered as part of the Prudential Standards Review. |
| 10. | Clarify that the requirement in section 9-1 of the *Aged Care Act 1997* to advise aged care regulators of material changes would apply to any identified issues about an approved provider's ability to continue as a going concern. | **In progress.**<br>This is being considered as part of the Prudential Standards Review. |
| 11. | Ensure aged care regulators have the capacity to understand risks to quality of care that might arise from an approved provider's financial or contractual arrangements, including by:<br>• increasing the capacity of aged care regulators to effectively scrutinise financial information.<br>• providing the Quality and Safety Commission with the capacity to include people with expertise in contracts and accounting in the team undertaking assessment | **In progress.**<br>The ACQSC has developed a Prudential Compliance Strategy reflecting the priorities of the ACQSC Regulatory Strategy, which includes a focus on prudential review. The Prudential Compliance Strategy sets out the compliance monitoring and education priorities of the ACQSC to promote prudential compliance. Further detail is provided in response to question 5. |

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| | contacts where there is an indication that there are risks associated with the approved provider's financial or contractual arrangements. | As outlined at paragraph 35, the Department has also commissioned a project led by Mr Gary Barnier to examine the Department's financial analysis processes and activities, and the monitoring and understanding of financial and prudential risks in the sector. |
| 12. | The Australian Government make available business or financial advisory services to providers who voluntarily disclose significant financial and / or contractual risks which may impact on the stability of service delivery. | **Complete.**<br>*Business Advisory Service*<br>In February 2019, the Government announced it would provide approved providers of residential and home care services free accounting and business advisory services (the **Business Advisory Service**).<br>The Department commissioned PwC to provide the Business Advisory Service in October 2019. Under the Business Advisory Service program, accounting and business advisory services are provided by PwC to all eligible approved providers of residential and home care services to review and assess their organisation, including advice regarding business management and financial strategies to support operations.<br>The Business Advisory Service program is designed to offer free independent financial and business advice to residential and home care providers which require and are eligible for such services. This includes providers with financial viability concerns, providers that are in regional, rural or remote areas and providers that are relatively small.<br>Applications for the Business Advisory Service program opened in October 2019, and services will be available under this program until 30 June 2021. |

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| **Greater oversight of the purchasing and sub-contracting of approved provider status** | | |
| 13. | The Australian Government amend the Aged Care Act so that management of care services can only be sub-contracted to an approved provider. | **In planning.**<br>The Department has commenced initial policy consideration in relation to changes to oversight of purchasing and subcontracting arrangements, in line with Recommendations 13, 14 and 15. The Department is still planning how it will proceed, including further development of the potential design of any changes, consultation with the sector, and implementation steps (including legislative amendments). Changes related to approved provider oversight must be considered in the context of other possible reforms relating to provider governance arrangements. |
| 14. | The Aged Care Act be amended to require notification of sub-contracting of management of care and/or sale of a business with approved provider status before they take effect. | |
| 15. | The amended Act require the Secretary of the Department to consider whether the proposed arrangement is in the best interest of care recipients and provide the power to veto the arrangements. | |
| 18. | The risk profiling tool being developed for use by the Quality and Safety Commission should consider:<br>• the responsiveness of approved providers to feedback from consumers and the manner of their response to identified cases of non-compliance<br>• the nature of sub-contracting in relation to management of care services<br>• the relationship between parties responsible for care, especially when management of care services has been sub-contracted<br>• intelligence from other regulators. | **In progress.**<br>One of the initiatives announced in the 2019-20 Budget Measure '*Strengthened regulation through risk-based targeting and information sharing*' was the development of a risk profiling tool to identify residential care providers at a high risk of failing to provide quality care, which has the flexibility to add extra risk information sources as they become available.<br>The Department has recently approved the system modifications to the relevant databases necessary to support that additional data capture. |

| Rec | Earle Haven Measure | Implementation Status |
|---|---|---|
| **Sanction options which better balance the need for decisive action with the desire of people to remain in their homes** | | |
| 22. | Aged care regulators should have the power to appoint an independent manager to stabilise an aged care service at imminent risk of collapse | **In planning.**<br>The initial focus of the Department is on Recommendation 4 and the project to establish a national case coordination approach.<br>The Department is subsequently planning to develop options on the role of the independent manager, and to determine the legislative changes that would be required. Consideration of the factors that lead to risk of collapse and what new or existing powers may be available for intervention will require careful consideration. |

**Confidential Annexure 1**

**Response to Question 7**

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| *Question 7* |
| Provide an overview of any risk matrixes the Department and/or the Commission has developed for the purposes of undertaking its prudential regulation and financial oversight functions. In your response, identify any differences in risks associated with approved providers of residential care and home care services. |

*Department risk matrix*

79 Since 2010, the Department has undertaken risk profiling activities on residential aged care providers, which includes the risk assessments described at paragraph 15 above. To facilitate these activities, the Department has developed a risk profiling model which incorporates indicators of risk to analyse the financial position of an approved provider. The Department's risk matrix of financial and prudential risk ratings is a key component of this model (the **Department's Risk Matrix**). A copy of the Department's approved risk matrix for 2018-19 is at Confidential Exhibit-9 [**CTH.1038.0003.3029**].

80 The Department's Risk Matrix sets out the process for first pass risk assessments and detailed risk assessments carried out by the PFAS to identify and prioritise residential care providers of highest financial and prudential risk. The Department's Risk Matrix involves using data submitted by providers annually through their ACFR (which contains the APCS) and GPFS, and data collected in the Department's internal databases.

81 The risk rating produced through the Department's Risk Matrix is based on the assessment of an approved provider's operating performance, financial position, and metrics relating to prudential standards legislation. For first pass risk assessments, a risk rating is calculated using a set of weighted percentile based indicators, which together make up a risk score. Some indicators are weighted based on the level of risk and severity of risk impact, while others are weighted based on the approved provider's ranking relative to other providers. The scores for each indicator are further weighted before contributing to a total risk score for the provider, which determines the provider's risk rating.

82 In addition to the above indicators, the data used for detailed risk assessments and summary risk assessments includes:

(a) additional indicators of operational performance and financial position;

(b) information from the provider's ACFR, APCS, and GPFS; and

(c) additional data sources, including (but not limited to) information held in the National Approved Provider System and the National Complaints and Compliance Information System, and publicly available sources.

83 The Department automated the first pass risk assessment process in 2019 by systematising the risk matrix in its Aged Care Risk Analysis Modelling and Reporting System (**Risk Analysis System**). Automation of first pass risk assessment via the Risk Analysis System enables and supports:

(a) the earlier identification of approved providers of residential care exhibiting financial distress signals (and potentially, earlier engagement with those providers);

(b) the collection and storage of data in one database, which provides capacity to undertake more value-added analysis of the residential and home care sectors; and

(c) the ability to load data from other Departmental databases to process risk assessments.

84 The system was implemented in September 2019 and has been tested for accuracy and quality in producing first pass risk assessments. Automation of first pass risk assessments has increased the capacity of the PFAS to focus on conducting detailed risk assessments.

85 The Department annually reviews its approach to first pass risk assessments and detailed risk assessments, and considers its risk matrix, the indicators and their weightings. When appropriate, it updates the risk assessment model to ensure it reflects the business drivers of aged care for each year and changing risk factors.

86 While residential care providers are subject to legislative requirements specific to prudential risk, no equivalent requirements exist for providers of home care. The risk matrix utilised by the PFAS uses inputs specific to prudential risks captured by the legislative regime for residential care providers.

*ACQSC draft risk matrix*

87 The PCS since 1 January 2020 has been using the ACQSC risk matrix (which was expanded to accommodate the prudential regulatory activity). This is an interim matrix only while the ACQSC develops and finalises the ACQSC's Draft Risk Matrix. A copy of the interim matrix is at Confidential Exhibit-10 [**CTH.4000.0001.1372**].

88 In advancing an integrated operating model, the ACQSC is currently developing a single risk matrix for use across all functions within the organisation. The ACQSC's Draft Risk Matrix is part of its efforts to strengthen its approaches to respond to and manage non-compliance with provider responsibilities, including under the Prudential Standards.

89 The ACQSC's Draft Risk Matrix is intended to be used when non-compliance with a provider's responsibilities under the Aged Care Act is identified. The risk rating generated through the ACQSC's Draft Risk Matrix will be used to inform decision-making and regulatory response. The ACQSC's Draft Risk Matrix, once finalised, will be applied in determining the level of risk, the extent of harm to consumers, and likelihood the harm will be mitigated or prevented from reoccurring, as well as assisting to identify where further information is needed from the approved provider to enable a more robust assessment of the approved provider's capacity to manage harms.

90 In particular, the ACQSC's Draft Risk Matrix will provide guidance on:

(a) how to assess the level of risk to aged care recipients as 'Low', 'Medium', 'High', or 'Severe', which involves consideration of both:

(i) the likelihood the approved provider is able to manage and mitigate harms, based on provider capacity, adequacy of response and provider / service history; and

(ii) the consequences of a failure in care, services or governance, such as the harm to the safety, health, well-being and quality of life of aged care recipients and the impact on care delivery. In assessing risk of harm related to failures to comply with the Prudential Standards, prudential harm to aged care recipients is considered in terms of the degree of financial harm suffered by aged care recipients, the extent to which financial management is needed, and the extent to which governance intervention is needed;

(b) the regulatory posture with respect to each risk rating (that is, the ACQSC's objectives when a certain category of risk is applied to an approved provider);

(c) the prudential compliance pathways for each risk rating, which include the issue of directions and Non-Compliance Notices; and

(d) details of the monitoring plans that apply with respect to each risk rating.

91 As stated at paragraph 13 above, home care providers do not collect refundable accommodation payments and are therefore not regulated under the Prudential Standards. Under the ACQSC's Draft Risk Matrix, the factors to be taken into consideration in assessing home care providers include:

(a) the approved provider's previous history of non-compliance;

(b) the specific risks in question, which may relate to the approved provider's expenditure on excluded items, unspent funds, failure to return funds to the Commonwealth or transfer funds to a new approved provider, or non-compliant monthly statements; and

(c) the level of prudential harm that may be posed by a home care provider (as described at paragraph 90(a)(ii) above).

92 Risk ratings are to be reassessed when new information becomes available that may change the rating, including real time intelligence from other regulatory activities and information about the service or provider.