The Senate

Economics References Committee

Financial and tax practices of for-profit aged care providers

November 2018

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Abbreviations and acronyms

AACQA	Australian Aged Care Quality Agency
The Act	*Aged Care Act 1997*
ACAR	Aged Care Approvals Round
ACFA	Aged Care Financing Authority
ACFA Report	*Sixth report on the Funding and Financing of the Aged Care Sector*
ACFR	Aged Care Financial Report
ACFPS	*Aged Care Financial Performance Survey*
ACFI	Aged Care Funding Instrument
ACIA	Aged Care Industry Association
APCS	Annual Prudential Compliance Statement
AAS	Australian Accounting Standards
AASB	Australian Accounting Standards Board
ACNC	Australian Charities and Not-for-profit Commission
ACCC	Australian Competition and Consumer Commission
ACTU	Australian Council of Trade Unions
ANMF	Australian Nursing and Midwifery Federation
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
CPSA	Combined Pensioners and Superannuants Association
CHSP	Commonwealth Home Support Programme
COTA	COTA Australia
DAP	Daily Accommodation Payment
The Department	Department of Health
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortisation
GPFR	General Purpose Financial Report
GPFS	General Purpose Financial Statement
GDP	Gross Domestic Product
HCP	Home Care Package
IASB	International Accounting Standards Board

LASA	Leading Aged Services Australia
MAAL	Multinational Anti-Avoidance Law
MEC group	Multiple entry-point consolidated group
NPBT	Net Profit Before Tax
NSWNMA	NSW Nurses and Midwives' Association
OECD	Organisation for Economic Cooperation and Development
p.r.p.a	per resident per annum
PSI	Public Services International
QNMU	Queensland Nurses and Midwives' Union
RAD	Refundable Accommodation Deposit
ROA	Return on Assets
SPFS	Special Purpose Financial Statement
TJN-Aus	Tax Justice Network-Australia
TJN-Aus Report	*Tax avoidance by for profit aged care companies: Profit shifting of public funds*
TTC	Tax Transparency Code

Executive summary

Residential aged care is a deeply personal subject for many Australians. It is an experience we have seen or can easily imagine for our parents, our friends, or indeed ourselves.

Australians have high expectations for this care. They rightly expect that they, and those they love, will be treated with dignity and decency at the end of their lives. The nation faces increasing challenges in meeting those expectations as Australia's ageing population places further demands on our aged care system.

Providers have been publicly vocal for some time that a further public investment of funds will be needed. These views were repeated during the course of this inquiry. In light of this, it is more important than ever to ensure that each dollar that is currently spent on care is used effectively and efficiently.

The sector that receives those funds, however, is undergoing a significant transformation itself. Whilst not-for-profits continue to be the largest group of providers, for-profits have steadily increased their presence. In 2016–17, for-profit providers held a share of operational residential aged care places that was more than fourteen per cent higher than they held in 2010–11.[1] The consequence of this is that for-profit providers represent a large and growing recipient of public funds.

Questions about financial practices

The report published by the Tax Justice Network-Australia (TJN-Aus) in May of this year raises a series of legitimate questions about how for-profit aged care providers are using this public money.[2] They are questions that merit investigation. Australians would be rightly appalled if it transpired that public money that had been provided to fund care for older Australians had been improperly diverted to other corporate purposes.

Chapter 3 of this report sets out the details of the TJN-Aus Report. The questions raised differ from provider to provider. In short, however, they relate to the use of stapled structures and related party transactions such as financing.

As is also set out in that chapter, the for-profit providers mentioned by TJN-Aus have denied that there is any evidence of malpractice on their part. The providers have objected to the assumptions and implications drawn by TJN-Aus in reaching its conclusions.

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1 See report, p. 12; Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

2 For further details, see report, pp. 3–4.

Leading Aged Services Australia, for instance, observed that:

> It is important to recognise that the Tax Justice Network Report relies solely on publicly available information in relation to the companies and identifies no evidence of tax avoidance. Rather, it infers that the scale of revenues and complexity of corporate structures implies improper dealings.[3]

For-profit providers and industry stakeholders have, in particular, objected to what they see as a conflation of revenue and profit. The Aged Care Guild, for example, argued that:

> The amount of tax payable by [for-profit] providers is based on the taxable income of the entity and not its revenue, so the reference to the low ratio between tax payable and revenue is irrelevant and is not grounds for claiming that there is endemic tax avoidance or use of accounting structuring to avoid tax.[4]

It is the committee's view that these objections miss the point. TJN-Aus, like every private citizen or entity, only has access to information that is publicly available. The conclusions drawn may well be incomplete to the extent that the information itself is incomplete.

The for-profit providers are correct that there is little publicly available evidence of tax avoidance on their part. It would be surprising if there were. Entities would need to be undertaking avoidance of such a brazen nature and scale for evidence of it to be just lying out in the open on their public accounts.

The committee cannot with any certainty conclude that for-profit providers are engaging in improper tax or financial practices. The problem, however, is that the committee is also unable to conclude that they are not.

We are not alone in our concerns about transparency. The Australian Taxation Office (ATO) advised that it had questions over the financing arrangements used by certain multinational entities. As one witness from the ATO observed:

> …in this market, it's often said the tax planning is in the expenses and not so much in the income…it is very hard to distinguish between tax planning through inflated expenses and just having high expenses and not being very profitable.[5]

Likewise, the ATO submitted that although some of the corporate structures adopted by entities in the aged care industry do not in and of themselves raise tax compliance concerns, they have 'the potential to obscure intra-group transactions for financial or public tax reporting'.[6]

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3 Leading Aged Services Australia, *Submission 15*, p. 11.

4 Aged Care Guild, *Submission 17*, p. 11.

5 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 32.

6 Australian Taxation Office, *Submission 14*, p. 7.

The industry may have difficulty convincing the community that financial opacity is appropriate from companies that are in receipt of large sums of public money, and are actively campaigning to receive more on the basis that current expenditure is insufficient.

The committee believes that both the industry and the public would be best served by strengthening the framework for transparency and accountability.

Recommendation 3

5.51 The committee recommends that the Australian Accounting Standards Board implement the necessary changes to apply the International Accounting Standards Board's revised Conceptual Framework as soon as practicable.

Recommendation 4

5.54 The committee recommends that the Australian Government investigate options to increase the public transparency of aged care providers' financial information held by the Department of Health.

Recommendation 5

5.57 The committee recommends that the Australian Government convert the existing voluntary Tax Transparency Code to a mandatory code for all large and medium corporations operating in Australia, or adopt other strong transparency measures like the publication of data from country-by-country reporting.

The link to quality of care

Throughout the inquiry, for-profit providers sought to reassure the committee that their financial practices would not have an impact on the quality of care received by older Australians. One would hope not.

The community would have an intuitive concern, however, that each dollar that is taken for corporate purposes is a dollar that is not spent on the provision of care.

This committee was not in a position to examine this question. We did not take evidence about failings in care on either an individual or systemic basis. The committee notes, however, that the Royal Commission into the aged care sector was announced after the commencement of this inquiry. The committee considers that the Royal Commission may be in a position to determine whether corporate financial practices were a factor in any of the case studies it investigates.

Recommendation 1

4.63 The committee recommends that, as part of its deliberations, the Royal Commission into Aged Care Quality and Safety consider the tax and financial structures of aged care providers.

The committee notes the concerns of a considerable number of stakeholders that for-profit providers would prioritise profits over care. The NSW Nurses and Midwives' Association, for instance, highlighted how this was apparent from the industrial practices of many providers:

> We represent workers employed in many for-profit healthcare settings. Our members have highlighted common concerns in relation to funding

> shortfalls in aged care facilities operated by large for-profit aged care providers. In recent years they have experienced shorter shifts, reduced staffing and been given additional duties, making workloads problematic and often unachievable. In turn, this creates higher absenteeism such as sick leave, which is not replaced. This compounds the issue. These combined factors create an environment where overworked staff cannot provide the quality of care that residents expect and deserve.[7]

Likewise, the Combined Pensioners and Superannuants Association argued that:

> The financial practices of for-profit aged care providers not only manifests in the avoidance of tax, but also in other cost cutting measures such as employing too few staff and staff with lower levels of qualifications.[8]

For-profit providers emphasised that in any event, competitive pressures acted as an active disincentive to cut services for profit. The Chief Executive of COTA Australia stated:

> …there are for-profit providers in this country who want to be around for a long time who believe that the way to stay around for a long time is to deliver a quality product…[9]

The committee remains concerned that aged care is not a sufficiently competitive market for this to be true. Older Australians in rural and regional areas face a paucity of choice. Even those in urban areas face real barriers to the exercise of choice once they are in a particular facility. There are real personal costs associated with moving an older person who may have complex health and care needs. Families and older people themselves often baulk at the prospect.

Given this, it is imperative that older Australians and their families have as much information as possible at the point where they can more easily exercise choice—the point of entry.

Recommendation 2

4.65 The committee recommends that the Australian Government explore opportunities to better share information about quality of care across the aged care sector, with the aim of increasing transparency and comparability, and supporting informed decision-making for aged care consumers and their families.

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7 NSW Nurses and Midwives' Association, *Submission 2*, p. 6.

8 Combined Pensioners and Superannuants Association, *Submission 1*, p. 4.

9 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 17 July 2018, p. 54.

Recommendations

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Chapter 1

Introduction

1.1 On 10 May 2018, the Senate referred an inquiry into the financial and tax practices of for-profit aged care providers to the Senate Economics References Committee for inquiry and report by 14 August 2018.[1] The committee received two extensions to report—initially to 20 September 2018; and finally to 27 November 2018.[2]

1.2 The terms of reference for the inquiry were:

> The financial and tax practices of for-profit aged care providers, with particular reference to:
>
> a) the use of any tax avoidance or aggressive tax minimisation strategies;
>
> b) the associated impacts on the quality of service delivery, the sustainability of the sector, or value for money for government;
>
> c) the adequacy of accountability and probity mechanisms for the expenditure of taxpayer money;
>
> d) whether current practices meet public expectations; and
>
> e) any other related matters.[3]

Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and wrote to relevant stakeholders and other interested parties to draw attention to the inquiry and invite them to make written submissions.

1.4 The committee received 32 submissions as well as additional information and answers to questions taken on notice, which are listed at Appendix 1.

1.5 The committee also received a large volume of correspondence from aged care workers and families of aged care residents citing concerns with staffing levels and/or quality of care.

1.6 The committee held two public hearings: Sydney on 17 July 2018 and Melbourne on 4 September 2018. The names of witnesses who appeared at the hearings are listed at Appendix 2.

1.7 References to the Committee Hansard are to the Proof Hansard and page numbers may vary between the Proof and Official Hansard transcripts.

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1 *Journals of the Senate*, No. 97, 10 May 2018, p. 3104.

2 See *Journals of the Senate*, No. 106, 13 August 2018, p. 3423; and *Journals of the Senate*, No. 114, 10 September 2018, p. 3654.

3 *Journals of the Senate*, No. 97, 10 May 2018, p. 3104.

1.8 The committee thanks all of the individuals and organisations that assisted with the inquiry, in particular those who made written submissions and appeared at the committee's public hearings.

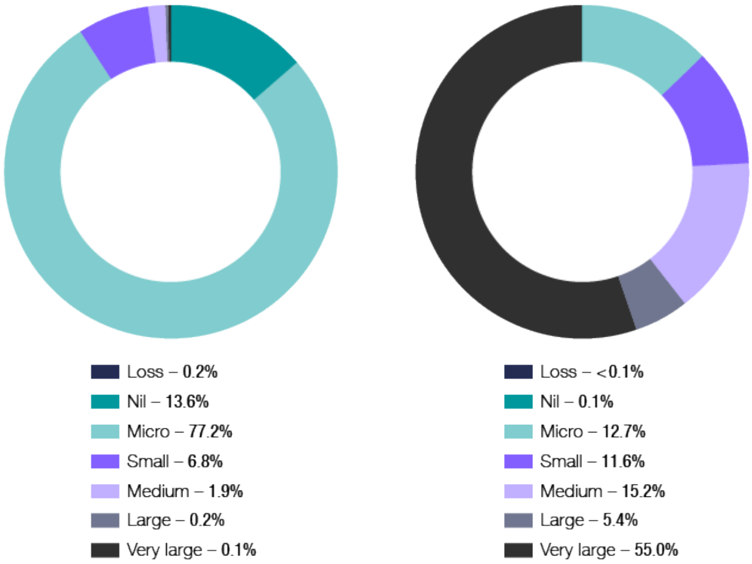
Background to the inquiry

1.9 Corporate income tax is an important contributor to Australia's tax base, and is the second largest contributor to Commonwealth tax revenue after personal income tax.

1.10 Australian corporations that are considered permanent establishments are required to pay corporate income tax on assessable income. The general rate of company taxation is 30 per cent.[4] Assessable income is defined as total revenue less allowable deductions that are associated with doing business.

1.11 Despite representing only a small proportion companies, large corporations account for the majority of net tax in Australia.[5] In 2015–16, 'very large' companies—that is, companies with total business income of $250 million or more—represented only 0.1 per cent of companies operating in Australia, but accounted for 55 per cent of net tax (see Figure 1).[6]

Figure 1: Number of companies and net tax, by size, 2015–16 income year



4 From the 2017–18 income year, companies that are 'base rate entities' must apply the lower 27.5 per cent company tax rate. See Australian Taxation Office, *Changes to company tax rates*, https://www.ato.gov.au/Rates/Changes-to-company-tax-rates/?page=1#Base_rate_entity_company_tax_rate (accessed 2 October 2018).

5 Net tax as defined by the ATO is essentially the amount of tax owed for the income year, before refundable credits are taken into consideration.

6 Australian Taxation Office, *Taxation statistics 2015–16*, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Taxation-statistics/Taxation-statistics-2015-16/ (accessed 2 October 2018).

Senate inquiry into corporate tax avoidance

1.12 The nature and prevalence of tax avoidance and aggressive tax minimisation among large corporations has been a matter of particular interest to this committee.

1.13 In October 2014, during the 44th Parliament, the Senate referred an inquiry into corporate tax avoidance to the committee. At that time, there were widespread concerns regarding the tax practices of large corporations and multinational enterprises operating in Australia, with a number of reports and investigations asserting that many corporations were not 'paying their fair share' of taxation revenue.

1.14 A consistent focus of the inquiry's work was the need to improve the transparency of corporate tax information for both administrators and the community more broadly. As emphasised in the final report for the inquiry:

> The public availability of corporate tax information allows researchers, journalists and the wider community to scrutinise and question the structure and operation of private companies and multinational enterprises operating in Australia. The public's ability to scrutinise and question tax affairs is vital to build and maintain confidence and trust in the integrity of the tax system.[7]

1.15 Since the referral of the inquiry into corporate tax avoidance in 2014, the Australian Government has announced a number of significant measures to address the issue of tax avoidance in four successive budgets from 2015–16 through to 2018–19.

Tax Justice Network-Australia Report

1.16 In early 2018, the Tax Justice Network-Australia (TJN-Aus) was commissioned by the Australian Nursing and Midwifery Federation (ANMF) to analyse possible tax avoidance by for-profit aged care companies and to provide recommendations for improving transparency on government spending on for-profit aged care. The subsequent report—*Tax avoidance by for-profit aged care companies: Profit shifting of public funds* (TJN-Aus Report)—was released in May 2018.

1.17 The TJN-Aus Report examined publicly available information on the six largest for-profit aged care providers—Bupa, Opal, Regis, Estia, Japara, and Allity—as well as a number of smaller for-profit aged care providers.

1.18 TJN-Aus argued that the 'evidence suggests that in this growing sector, which is highly dependent on government subsidies, for-profit companies have been deploying aggressive tax avoidance strategies'.[8] In particular, TJN-Aus cited concerns regarding the use of stapled structures and related corporate structures to divert income through an asset trust on which tax is assessed on a flow-through basis (that is, the ultimate beneficiary pays tax).

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7 Senate Economics References Committee, *Part III—Much heat, little light so far*, May 2018, p. 29.

8 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 7.

1.19 TJN-Aus acknowledged the significant recent social and political focus on tax avoidance by multinational companies, but contended that there has been 'little focus on companies providing social services'.[9] TJN-Aus also acknowledged recent corporate tax avoidance reform measures relating to stapled structures and the strengthening of Multinational Anti-Avoidance Law (MAAL), as being 'a step in the right direction'.[10] However, TJN-Aus argued that:

> …additional transparency measures are necessary and should be an urgent priority to restore integrity to the tax system and ensure accountability on government spending.[11]

Purpose and scope of inquiry

1.20 The aged care system in Australia has undergone major reform in recent years which has had the effect of opening up the sector to private, for-profit aged care providers. The operation, effectiveness, and quality of service provided by the aged care sector has also been, and is presently, the subject of numerous government and parliament-initiated inquiries and reviews.

1.21 Most notably, on 16 September 2018, the Prime Minister, the Hon Scott Morrison MP, announced that the Australian Government would ask the Governor-General to establish a Royal Commission into Aged Care Quality and Safety.[12] The Commission is required to provide an interim report by 31 October 2019, and a final report by 30 April 2020.[13]

1.22 The committee acknowledges this plethora of recent reviews into the aged care sector, and notes that it does not seek to traverse the breadth of matters examined through these processes. However, the committee is aware that many aspects of the aged care system—including quality of care, financial viability, workforce availability and regulatory oversight—are highly interconnected, and any analysis of one aspect is unlikely to be independent of other aspects.

1.23 That said, the scope of this inquiry, and discussion in this report, is primarily limited to examining the financial and tax practices of for-profit aged care providers, particularly in the residential aged care sector.

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9 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 8.

10 The Hon Scott Morrison MP, Treasurer, 'Levelling the playing field for Australian investors: Taxation of Stapled Structures', *Media Release*, 27 March 2018; The Hon Scott Morrison MP, Treasurer, 'Making sure multinationals pay their fair share', *Media Release*, 28 March 2018.

11 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 43. See also Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, p. 1.

12 The Hon Scott Morrison MP, Prime Minister of Australia, 'Royal Commission into aged care quality and safety', *Media Release*, 16 September 2018.

13 Information relating to the Royal Commission into Aged Care Quality and Safety, including the Commission's terms of reference, can be accessed at: https://agedcare.royalcommission.gov.au

1.24 Given the economic focus of this inquiry and the significant level of Australian Government expenditure on residential care, as compared to other aged care services, remaining discussion in this and following chapters is primarily focused on residential aged care.

1.25 Residential aged care is the largest part of the industry from a capital, funding and staffing perspective, and for-profit aged care providers are more involved in the provision of residential care which can be more profitable than the provision of services in an older person's home. Further, the nature of residential aged care can better lend itself to the use of stapled structures whereby property assets may be held separately to the business undertaking service delivery.

Structure of the report

1.26 This report comprises five chapters, including this introductory chapter:

- Chapter 2 provides an overview of the aged care system in Australia, including its legislative framework and regulatory oversight, the funding of aged care, and information and statistics relating to residential aged care providers.
- Chapter 3 examines stakeholder views regarding the allegations of tax avoidance by for-profit aged care providers presented in the TJN-Aus Report, as well as specific observations relating to the financial and tax practices of the six for-profit providers examined.
- Chapter 4 discusses broader stakeholder views regarding the analysis and conclusions presented by TJN-Aus.
- Chapter 5 explores financial transparency mechanisms and the adequacy of related regulation of aged care providers.

Chapter 2

Overview of aged care in Australia

2.1 The aged care system in Australia caters for all people aged 65 years or over, and Indigenous Australians aged 50 years or over, who can no longer live without support to access appropriate care in their home or in a residential care facility. Aged care services are delivered by not-for-profit, for-profit and government providers.

2.2 The sector provides services to over 1.3 million Australians. Eighty per cent of older people access some form of government subsidised aged care before death.[1] Generating annual revenues of approximately $22 billion, the aged care sector is a significant contributor to the Australian economy, currently representing one per cent of Gross Domestic Product (GDP).[2]

2.3 The demand for aged care services will grow as the population ages and care needs increase. The proportion of the Australian population aged 65 years and over is projected to increase from 15.3 per cent in 2017 to 21.8 per cent in 2056.[3] Over this same period, Australian Government expenditure on aged care is expected to nearly double as a share of the economy to around 1.7 per cent of GDP.[4]

2.4 This demographic shift in Australia's population will require significant investment in the aged care sector, particularly in the capital intensive residential care sector. It is estimated that an additional 88,110 residential care places will be required to meet supply targets over the next decade.[5]

Legislative framework and regulatory oversight

2.5 The *Aged Care Act 1997* (the Act) and the accompanying Aged Care Principles establish the legislative framework for the funding and regulation of aged care services in Australia. Regulation and policy oversight of aged care services is predominantly the role of the Australian Government, with the Department of Health (the Department) having responsibility for the operation of the Act.

2.6 The legislative framework sets out the subsidies paid by the Australian Government and the requirements to be an approved provider of aged care services

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1 Australian Institute of Health and Welfare, *Use of aged care services before death*, March 2015, p. 4.

2 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 2.

3 Productivity Commission, *Report on Government Services 2018—Chapter 14: Aged care services*, January 2018, p. 3.

4 Department of the Treasury, *2015 Intergenerational Report*, March 2015, pp. xvii and 71, https://treasury.gov.au/publication/2015-intergenerational-report/ (accessed 23 November 2018).

5 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, pp. 122–123.

under the Act. The framework encompasses provider responsibilities relating to the quality of care, classification and rights of care recipients, accountability and governance, and the allocation of aged care places.

2.7 Currently, there are three main regulatory and compliance bodies with responsibilities relating to the provision of aged care services:

- The Department of Health is responsible for aged care policy oversight and compliance with the Act. The Department takes appropriate regulatory action in response to non-compliance by aged care providers.
- The Australian Aged Care Quality Agency (AACQA) is an independent statutory agency responsible for accrediting, reviewing and monitoring aged care providers against the quality standards set out in the Act.
- The Aged Care Complaints Commissioner is a statutory office holder under the Act that examines complaints raised about Australian Government funded aged care providers.

2.8 In response to the 2017 *Review of National Aged Care Quality Regulatory Processes* (Carnell-Paterson Review), the Australian Government announced in the 2018–19 Budget that it would establish an independent Aged Care Quality and Safety Commission from 1 January 2019. The Commission will initially bring together the functions of the AACQA and Aged Care Complaints Commissioner, and from 1 January 2020, the regulatory functions of the Department.[6]

Types of aged care

2.9 The aged care system aims to promote the wellbeing and independence of older people by enabling them to stay in their own homes or by assisting them in residential care. To achieve this, the system offers a continuum of care under three main types of service:

- The Commonwealth Home Support Programme (CHSP) provides basic entry-level services on an ongoing or episodic basis to assist older people with undertaking tasks of daily living and to remain in their own homes.
- The Home Care Packages (HCP) Programme provides more structured, ongoing home support services for older people who have greater care needs and wish to remain living at home. Coordinated packages of care are provided over four levels based on an individual's care needs.
- Residential aged care provides personal care, support services and accommodation to people assessed as needing higher levels of care and who can no longer remain living independently at home. For people with greater

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6 Department of Health, *Better Quality of Care—establishing an Aged Care Quality and Safety Commission*, http://www.health.gov.au/internet/budget/publishing.nsf/Content/budget2018-factsheet81.htm (accessed 18 October 2018).

care needs, residential aged care can provide 24-hour nursing care. Residential care is provided on either a permanent or respite basis.[7]

2.10 Most people accessing aged care services receive home-based care and support. Seven percent of Australians aged 65 years and over accessed residential aged care during 2016–17.[8]

Funding of aged care

2.11 Aged care services are heavily reliant on government funding,[9] with aged care consumers also contributing to the cost of their care depending on their income and assets. In 2016–17, Australian Government expenditure on aged care totalled $17.1 billion. Funding for residential aged care makes up the largest proportion of Australian Government expenditure on aged care services at nearly 70 per cent.

2.12 Residential aged care funding is comprised of operational funding and capital financing. Operational funding provides for day-to-day service provision, such as living expenses, nursing and personal care. Capital financing supports the construction of new of aged care facilities as well as the refurbishment of existing facilities.

2.13 Of total provider revenue in 2016–17 ($17.7 billion), Australian Government funding accounted for 68.3 per cent ($12.1 billion), resident contributions accounted for 26.2 per cent ($4.6 billion), and income from other sources made up the remaining 5.5 per cent ($980 million).[10]

2.14 Basic care subsidies are the main Australian Government operational funding mechanism of residential aged care.[11] For each permanent resident, a basic care subsidy is calculated by providers using the Aged Care Funding Instrument (ACFI),[12]

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7 Residential aged care places are capped and increase annually through the Aged Care Approvals Round (ACAR).

8 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 15.

9 The Australian Government provides approximately 96 per cent of the government funding for aged care services. State and territory governments provide the remainder.

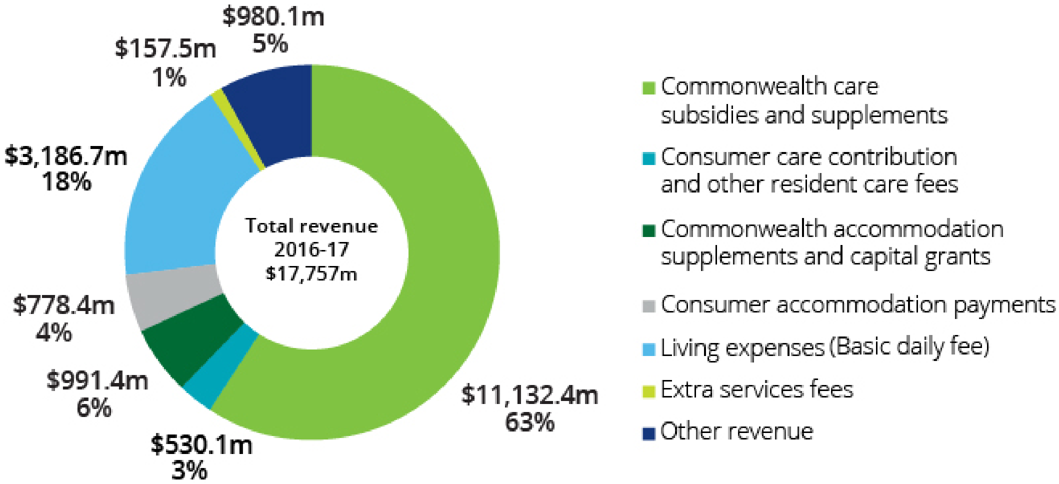
10 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, pp. 97–98.

11 The schedule of current Australian Government aged care subsidies and supplements (from 20 September 2018) is available at: https://agedcare.health.gov.au/funding/aged-care-subsidies-and-supplements/schedule-of-subsidies-and-supplements (accessed 12 November 2018).

12 During 2015–16, real growth in expenditure per resident per day through the basic care subsidy exceeded the Australian Government's budgeted growth by two per cent, resulting in an increase to forecasted expenditure over four years of $3.8 billion. In response to this higher than expected increase, the Government announced changes in the 2015–16 Mid-Year Economic and Fiscal Outlook (MYEFO) and the 2016–17 Budget to ACFI scoring and subsidy indexation.[12] These changes were complemented by a pause in indexation on all ACFI subsidies in 2017–18, and a partial pause on indexation in 2018–19.

a funding allocation tool to assess the care needs of a resident and the daily subsidy rate commensurate with those care needs.[13]

Figure 2.1: Proportions of total residential care provider revenue, 2016–17[14]



2.15 In 2016–17, direct Australian Government expenditure on residential aged care averaged $184.06 per resident per day. Of this, $163.07 (around 89 per cent) was from basic care (ACFI) subsidies.[15]

2.16 Most aged care residents also pay fees which contribute to the cost of their living expenses and day-to-day care. All residents contribute a basic daily fee set at 85 per cent of the single basic Age Pension (which currently equates to $709.24 per fortnight).[16]

2.17 In 2016–17, basic daily fees represented $3.1 billion of the $4.6 billion in resident contributions to provider revenue.[17]

2.18 Subject to means testing, some residents may also be required to pay additional fees toward their care and accommodation. Residents with greater means are required to pay the full cost of their accommodation either as a lump-sum Refundable Accommodation Deposit (RAD), a daily accommodation payment (DAP), or a combination of both.

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13 The current schedule of aged care subsidies and supplements are available from the Department of Health website at: https://agedcare.health.gov.au/funding/schedule-of-subsidies-and-supplements-from-20-september-2018

14 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 97.

15 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 99. Direct Australian Government expenditure does not include Age Pension payments.

16 Department of Human Services, *Payment rates for Age Pension*, https://www.humanservices.gov.au/individuals/enablers/payment-rates-age-pension/39901 (accessed 16 October 2018).

17 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 98.

2.19 Lump-sum RADs act as an interest free loan to residential aged care providers and are a significant source of capital financing for the industry. In terms of total liabilities, RADs represent 73 per cent ($24.6 billion as at 30 June 2017) of the capital financing of the sector.[18]

2.20 In addition to RADs, other sources of capital financing for residential aged care include:

- capital grants from government for eligible projects;
- loans from financial institutions;
- financing from equity investments; and
- equity investment and retained earnings.[19]

2.21 As noted in the Aged Care Financing Authority's *Sixth report on the Funding and Financing of the Aged Care Sector* (ACFA Report), related party loans make up 8 per cent ($2.6 billion) of total liabilities; however, the large majority ($2.3 billion) of this is held by for-profit providers.[20]

Providers of residential aged care

2.22 Residential aged care in Australia is delivered by providers that have been approved under the Act. Providers consist of those from the not-for-profit (comprising religious, charitable and community-based providers), for-profit and government sectors.

2.23 As at 30 June 2017, there were a total of 902 residential aged care providers and 200,689 operational residential aged care places (compared to 949 providers operating 195,825 places as at 30 June 2016).[21] Most residential aged care is delivered by non-government providers. Not-for-profit providers accounted for 56 per cent of operational residential places, followed by for-profit providers at 40 per cent, and government providers at 4 per cent.[22]

18 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 119.

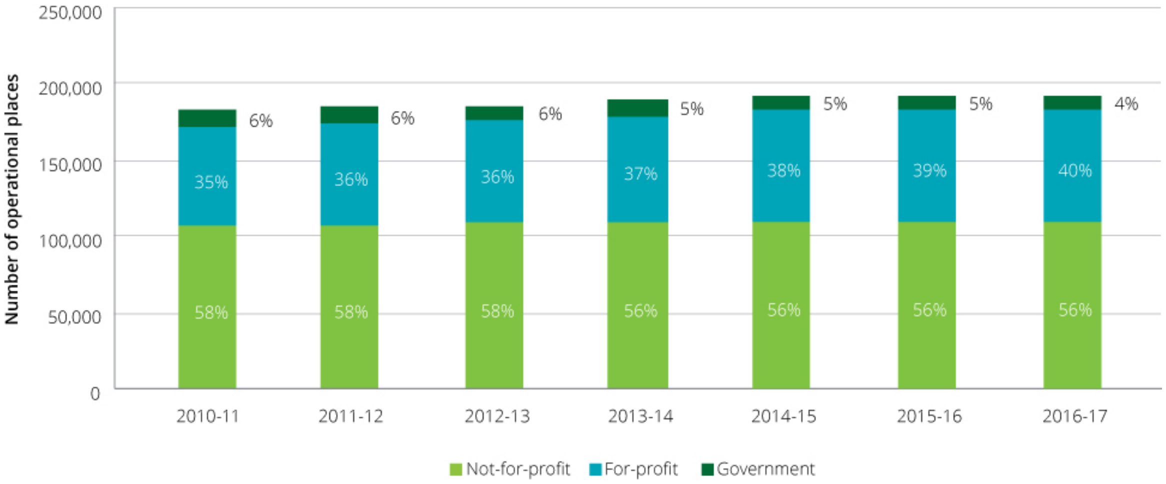
19 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 112.

20 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 120.

21 An operational place refers to a residential care place that was allocated to a provider and has since become available for a person to receive care. A provisionally allocated place refers to a residential care place allocated through Aged Care Approval Rounds (ACAR) that is not yet operational. As at 30 June 2017, there were a total of 247,907 allocated places for residential aged care, but only 200,689 of these were operational places.

22 Department of Health, *2016–17 Report on the Operation of the Aged Care Act 1997*, November 2017, p. 44; Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

Figure 2.2: Operational residential aged care places, 2010–11 to 2016–2017[23]



2.24 While the number of residential aged care places and residents has continued to increase, the number of providers has decreased each year through consolidation. The ACFA Report noted this trend, commenting that 'some providers are seeking to expand the scale of their businesses'.[24]

2.25 The ACFA Report also noted that, while not-for-profit providers continue to be the largest provider group, the proportion of operational residential care places held by for-profit providers has slowly increased over recent years. As at 30 June 2017, not-for-profit providers represented 56 per cent of providers and 56 per cent of operational places, whereas for-profit providers represented 33 per cent of providers and 40 per cent of places.[25]

2.26 The ACFA Report reasoned that:

> This reflects for-profit providers gradually increasing the scale of their operations through both acquisitions and greater success at gaining new allocations through the annual Aged Care Approvals Rounds (ACAR).[26]

2.27 Despite some recent consolidation of providers, residential aged care is still largely a cottage industry, with most providers (63 per cent) operating only a single residential aged care facility. As at 30 June 2017, there were only 21 providers (two per cent) operating more than 20 facilities. However, in terms of operational residential aged care places, single facility providers account for 21 per cent while providers with more than 20 facilities represent 31 per cent.[27]

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23 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

24 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

25 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

26 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 82.

27 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 83.

Financial performance

2.28 The residential aged care sector reported an overall profit of $1,006 million in 2016–17, a slight decrease from the $1,063 million reported in 2015–16 (Table 2.1). Sixty-eight per cent of providers reported a net profit in 2016–17.[28]

Table 2.1: Financial performance of residential aged care providers, 2016–17

	Total sector 2015–16	Total sector 2016–17	Not-for-profit	For-profit	Government
Revenue ($m)	$17,172	$17,757	$9,737	$7,143	$877
Expenses ($m)[29]	$16,109	$16,751	$9,209	$6,580	$962
Profit ($m)	$1,063	$1,006	$528	$563	-$85
EBITDA[30] ($m)	$1,985	$2,072	$1,174	$928	-$30
EBITDA p.r.p.a[31] ($)	$11,134	$11,481	$11,408	$13,316	$3,791
EBITDA margin	11.6%	11.7%	12.1%	13.0%	-3.4%
NPBT margin	6.2%	5.7%	5.4%	7.9%	-11.5%

Source: ACFA, July 2018, p. 95

2.29 As shown in Figure 2.1, income from other sources made up 5.5 per cent ($980 million) of total revenue earned by providers, forming a considerable proportion of the reported net profit for residential care providers of $1,006 million. Interest income, including that from lump-sum RADs, made up approximately one third ($313.8 million) of other income earned by providers.[32]

2.30 In terms of financial performance by provider type (measured by average EBITDA p.r.p.a), there was some representation of all provider types in each performance quartile in 2016–17. When examined by provider scale, 16 of the 21 providers operating more than 20 facilities performed in the top two quartiles (Figure 2.3).[33]

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28 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, pp. 95–96, and 103.

29 Employee costs (wages and management fees) represented 70 per cent ($11.8 billion) of the total expenses incurred by aged care providers in 2016–17, an increase from 67 per cent of total expenses in 2015–16.

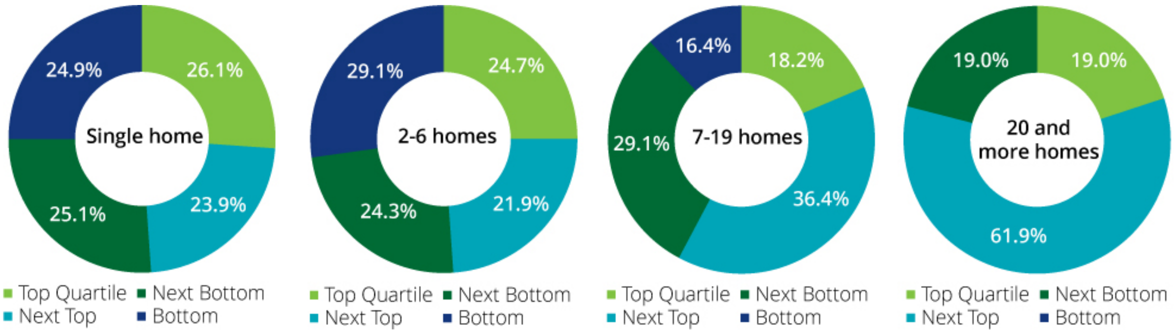
30 Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA)

31 EBITDA per resident per annum

32 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 96.

33 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 108.

Figure 2.3: Residential care provider distribution between quartile of average EBITDA p.r.p.a 2016–17, by provider scale[34]



34 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 109.

Chapter 3

Tax practices of for-profit aged care providers

3.1 As noted in Chapter 1, in early 2018, the Tax Justice Network-Australia (TJN-Aus) was commissioned by the Australian Nursing and Midwifery Federation (ANMF) to analyse possible tax avoidance by for-profit aged care companies and to provide recommendations for improving transparency on government spending on for-profit aged care. The subsequent report—*Tax avoidance by for-profit aged care companies: Profit shifting of public funds* (TJN-Aus Report)—was released in May 2018.

Findings of the Tax Justice Network-Australia Report

3.2 The TJN-Aus Report examined publicly available information on the six largest for-profit aged care providers operating in Australia—Bupa, Opal, Regis, Estia, Japara, and Allity.[1] TJN-Aus calculated that together these providers received over $2.17 billion in government subsidies for aged care services, representing 72 per cent of their total revenue of $3 billion. The TJN-Aus Report indicates that these companies reported after-tax profits of $210 million in the most recent financial years available.[2]

3.3 Using Australian Taxation Office (ATO) corporate tax transparency data, TJN-Aus calculated that the six largest for-profit providers examined paid around $154 million in tax in 2015–16.[3]

Table 3.1: ATO corporate tax transparency data 2015–16 and 2014–15

($ millions)	2015/16				2014/15			
Company	Total income	Taxable income	% Taxable	Tax payable	Total income	Taxable income	% Taxable	Tax payable
Bupa (total)	$7,484.9	$352.9	4.7%	$104.7	$6,743.4	$334.5	5.0%	$96.3
Opal	$527.2	$7.9	1.5%	$2.4	$236.9	$0.0	0.0%	$0.0
Regis	$484.4	$68.7	14.2%	$20.6	$481.5	$46.2	9.6%	$13.8
Estia	$447.4	$58.3	13.0%	$17.5	$285.8	$15.5	5.4%	$4.7
Japara	$333.9	$29.4	8.8%	$8.8	$285.6	$20.9	7.3%	$6.3
Allity	$315.6	$0.0	0.0%	$0.0	$298.8	$0.0	0.0%	$0.0
TOTALS	$9,593.0	$517.2	5.4%	$154.0	$8,332.0	$417.1	5.0%	$121.0

Source: TJN-Aus Report, May 2018, p. 11

1 Regis, Estia and Japara are aged care companies listed on the Australian Securities Exchange (ASX).

2 Data for BUPA is 2017, Opal is 2016 and all others are the 2017 financial year. Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 11.

3 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 11.

3.4 According to the ATO, the total combined income of all for-profit aged care providers was just over $5 billion in 2015–16, with a total profit of $529.3 million and after tax profit of $402 million.[4]

3.5 TJN-Aus argued that the 'evidence suggests that in this growing sector, which is highly dependent on government subsidies, for-profit companies have been deploying aggressive tax avoidance strategies'.[5] TJN-Aus asserted that for-profit aged care providers use various methods to reduce tax payable. In particular, TJN-Aus cited concerns regarding the use of stapled structures and related corporate structures:

> Companies can use various accounting methods to avoid paying tax. One method is when a company links (staples) two or more businesses (securities) they own together, each security is treated separately for tax purposes to reduce the amount of tax the company has to pay. Aged care companies are known to use this method as well as other tax avoiding practices. Another practice is by 'renting' their aged care homes from themselves (one security rents to another) or by providing loans between securities and shareholders.[6]

3.6 The TJN-Aus Report cited ATO concerns regarding the use of stapled securities and related corporate structures to divert income through an asset trust on which tax is assessed on a flow-through basis (that is, the ultimate beneficiary pays tax):

> …using stapled structures often have effective tax rates for foreign investors of between 0–5% and rarely over 10%.[7]

3.7 While TJN-Aus acknowledged recent government reforms to tighten the rules of stapled structures, it concluded that, to date, 'very little attention has been paid to the use of these practices in the for-profit aged care sector'.[8]

3.8 Elaborating on this point, Mr Jason Ward, Spokesperson for TJN-Aus and author of the TJN-Aus Report, told the committee that:

> What is different, and particularly alarming, about the for-profit aged care sector is that the profitability here is based on government funding or, to put

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4 Australian Taxation Office, *Submission 14*, p. 4.

5 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 7.

6 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 5.

7 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 37.

8 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 38.

> it differently, other businesses and people, including aged care residents and workers paying their share of taxes.[9]

3.9 TJN-Aus highlighted the lack of transparency in for-profit aged care providers' tax practices:

> It is difficult to get a detailed and complete picture of the full extent to which these heavily subsidised aged care companies are avoiding paying as much tax as they should, because Australian law is not currently strong enough to ensure that their financial records and accounting practices are publicly available and fully transparent.[10]

3.10 TJN-Aus expressed the view that there is an overarching need for greater transparency around the financial and tax practices of for-profit aged care providers. TJN-Aus argued that:

> As a basic principle, companies that receive millions of government subsidies must be held to a higher standard of transparency and must be publicly accountable.[11]

3.11 The TJN-Aus Report recommended two reform measures to 'restore integrity to the tax system and ensure public accountability' on government subsidies paid to for-profit companies:

- Any company that received Commonwealth funds over $10 million in any year must file complete audited annual financial statements with the Australian Securities and Investments Commission (ASIC) in full compliance with all Australian Accounting Standards and not be eligible for Reduced Disclosure Requirements.
- Public and private companies must fully disclose all transactions between trusts or similar parties that are part of stapled structures or similar corporate structures where most or all income is earned from a related party and where operating income is substantially reduced by lease and/or finance payments to related parties with beneficial tax treatment.[12]

3.12 The remainder of this chapter outlines stakeholder views regarding the allegations of tax avoidance by for-profit aged care providers presented in the TJN-Aus Report. Specific observations of TJN-Aus in relation to the financial and tax practices of the six largest for-profit aged care providers, as well as comments received from providers addressing those matters raised, are then discussed.

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9 Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, p. 1. See also Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 9.

10 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 6.

11 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 41.

12 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, pp. 6 and 43.

3.13 Other stakeholder views regarding the analysis and conclusions presented by TJN-Aus are discussed in Chapter 4. The recommendations made by TJN-Aus in its report, and broader discussion of the financial transparency and related regulation of aged care providers, are provided in Chapter 5.

Industry views on alleged tax avoidance

3.14 A number of industry stakeholders challenged the analysis in the TJN-Aus Report.[13]

3.15 For example, the Aged Care Industry Association (ACIA) observed that:

> The recent report by the Tax Justice Network found no evidence of tax avoidance by large private aged care providers. The tenor of the report makes it clear that the author sought to find such evidence; the failure to come up with evidence of tax avoidance strongly suggests that tax avoidance is not occurring.[14]

3.16 Likewise, the Aged Care Guild refuted assertions that for-profit aged care providers are engaging in tax avoidance, submitting that:

> …indeed the TJN/ANMF report itself shows that the rates of tax paid by aged care providers are at the higher end of tax rates paid by Australian companies.
>
> The report contains a variety of unsubstantiated assertions or inferences that are both factually wrong and objectionable.[15]

3.17 StewartBrown also contested the analysis presented in the TJN-Aus Report and characterised the terminology used in relation to for-profit providers accounting practices as 'misleading':

> The [TJN-Aus] Report strongly suggests that the six [for-profit] entities examined seemingly have legal structures designed to avoid company taxation. We noted that there was no actual evidence provided to support this contention...
>
> The Report's use of the terminology "using accounting methods to avoid tax" (or similar) is, in our opinion, misleading. The statutory and legal structures of entities dictate the appropriate accounting treatment, not the reverse.[16]

3.18 Leading Aged Services Australia (LASA) observed that:

> It is important to recognise that the Tax Justice Network Report relies solely on publicly available information in relation to the companies and

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13 See, for example, StewartBrown, *Submission* 3; Aged Care Industry Association, *Submission 9*; Leading Aged Services Australia, *Submission* 15; Aged Care Guild, *Submission 17*.

14 Aged Care Industry Association, *Submission 9*, p. 4.

15 Aged Care Guild, *Submission 17*, p. 2.

16 StewartBrown, *Submission 3*, p. 6. See also Aged Care Guild, *Submission 17*, p. 10; Mr Grant Corderoy, Senior Partner, StewartBrown, *Committee Hansard*, 17 July 2018, p. 34.

> identifies no evidence of tax avoidance. Rather, it infers that the scale of revenues and complexity of corporate structures implies improper dealings.[17]

3.19 With regard to inferences in the TJN-Aus Report that for-profit aged care providers use stapled structures to avoid paying tax, LASA asserted that 'stapled securities are a legitimate business structure'.[18] LASA explained that:

> It is not uncommon for operators to structure their business so that the operating business is separate to the property side business for residential aged care, given the different considerations in these two business categories.[19]

3.20 LASA also commented that the TJN-Aus analysis does not provide 'a coherent systematic link between the tax issues it raises and the quality of services'.[20]

3.21 When questioned as to how the findings of the TJN-Aus Report can be reconciled with this statement from the ATO, Ms Annie Butler, Federal Secretary of the ANMF, told the committee that:

> We're not suggesting that companies are doing things that are illegal. What we have suggested is that the way that the system currently exists provides for too many uses of sophisticated structures and moving money around, sharing it around through complicated structures for companies, rather than ensuring that the money goes to full care provision.[21]

3.22 Mr Ian Yates, Chief Executive at COTA Australia (COTA), also commented on the legality of tax strategies utilised by for-profit aged care providers:

> …we're sure that for-profits use all of the tax options that are legally available to them in the current tax system, but we don't have any evidence that they go further than that, and we're pretty confident that the ATO looks pretty closely at them.[22]

3.23 Similarly, Mr Sean Rooney, Chief Executive Officer of LASA, argued that '[l]egal tax minimisation strategies are a normal and acceptable element of business operations', further contending that '[b]usinesses should not be penalised for managing their financial affairs'.[23]

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17 Leading Aged Services Australia, *Submission 15*, p. 3.

18 Leading Aged Services Australia, *Submission 15*, p. 11.

19 Leading Aged Services Australia, *Submission 15*, p. 11.

20 Leading Aged Services Australia, *Submission 15*, p. 14.

21 Ms Annie Butler, Federal Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 4 September 2018, p. 2.

22 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 17 July 2018, p. 51.

23 Mr Sean Rooney, Chief Executive Officer, Leading Age Services Australia, *Committee Hansard*, p. 24.

3.24 Mr Rooney also reflected on the size of providers operating in the aged care industry, suggesting that the relatively small number of large for-profit providers—those with more than 20 residential facilities—should be kept in focus when examining the tax practices of those companies:

> There are around 900 approved providers of residential aged care in the aged-care system. Two-thirds of those would be single-site operators, so they are small businesses that are privately owned, community run et cetera. The number of organisations that would have more than 20 sites is less than two per cent—it's 19 organisations—and of those I think nine are for-profit. So rather than comment on the individual tax practices of any of those companies, I say again that we have a well-regulated corporate governance system and I presume it's their role to deal with the individual cases. Seeing the issue that's before this committee, knowing that there are 902 providers and only nine of them are of that scale is I think something to keep in focus.[24]

3.25 Indeed, the ATO submitted that it has 'no evidence to suggest the tax risk appetite of the for-profit aged care services industry differs from other industries'.[25]

Comments from for-profit providers

3.26 In addition to the general stakeholder views outlined above, the committee received evidence from the six for-profit aged care providers examined in the TJN-Aus Report**,** responding to the allegations of tax avoidance and tax minimisation made by TJN-Aus.

Bupa

3.27 In its analysis of Bupa—the largest aged care provider in Australia—TJN-Aus pointed to the 'minimal tax payments' made by the company in 2015–16, compared with its total income:

> In 2015/16 from nearly $7.5 billion in total income, taxable income was less than $352 million and tax paid was less than $105 million. According to the same ATO data, Medibank Private, the next largest health insurer, ranked 34th with $6.8 billion in total income. Medibank had a taxable income of $552 million and paid tax of $148 million, significantly higher than Bupa.[26]

3.28 TJN-Aus also stated that 'Bupa's corporate structure is highly complex', and went on to observe that:

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24 Mr Sean Rooney, Chief Executive Officer, Leading Age Services Australia, *Committee Hansard*, p. 24.

25 Australian Taxation Office, *Submission 14*, pp. 3 and 5. See also Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 31.

26 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 12.

> Complex corporate structures with extensive related party transactions are a hallmark of aggressive tax avoidance. Related party transactions are frequently used to shift profits to jurisdictions or entities with lower tax rates or other tax benefits. Bupa's lease payments and multiple loans between related parties are significant, but limited information is provided in Australian filings.[27]

3.29 Bupa disputed contentions that it engages in tax avoidance strategies, claiming that:

> Bupa Australia does not avoid paying tax. Our Australian operating businesses (which includes our health insurance, health services, and aged care businesses) are owned by Australian incorporated entities that are all tax residents in Australia.
>
> For the year ended 31 December 2016, Bupa Australia paid $114m in income tax in Australia on taxable income of $391m. Bupa Australia's effective income tax rate for the year was 28.5%. Within this, Bupa Aged Care paid $20m in income tax on taxable income of $67m. Bupa Aged Care's effective income tax rate was 28.7%.[28]

3.30 Bupa suggested that the TJN-Aus Report 'contains inaccuracies and misleading statements about Bupa Aged Care', including:

> - Using Bupa Australia's overall income for the year ended 31 December 2015 of $7.5b, rather than that of Bupa Aged Care ($573m), is incorrect. Bupa Aged Care represents less than 10% of Bupa Australia's revenue and profit.
> - Incorrect assumptions about Bupa Australia's corporate structure and wrongly suggesting stapled structures and related party lease arrangements are used to shift profits and avoid paying tax. Bupa Australia does not use any stapled structures and does not derive any tax benefit from our unit trusts or related party lease payments.[29]

3.31 With regard to assertions by TJN-Aus regarding the use of corporate structures, Bupa claimed that it does not generate beneficial income tax treatment from its unit trusts:

> Bupa Australia does not generate any beneficial income tax treatment from unit trusts. Bupa Australia's unit trusts were inherited through the acquisition of an aged care group. The unit trusts are members of our Bupa Australia income tax consolidated group and therefore all related party transactions are disregarded in line with the principles of Australia's tax consolidation regime.[30]

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27 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds,* May 2018, p. 15.

28 Bupa, *Submission 21*, p. 5.

29 Bupa, *Submission 21*, p. 4.

30 Bupa, *Submission 21*, p. 5.

Opal

3.32 In its report, TJN-Aus made a number of observations regarding the amount of company tax paid by Opal in recent years. TJN-Aus also made reference to Opal's corporate structure and related party loans, suggesting that these 'may explain how taxable profits disappear from Australia'.[31]

3.33 In particular, TJN-Aus observed that:

- Opal (DAC Finance Pty Ltd[32]) had zero taxable income and paid no tax on a total income of $236.9 million in 2014–15, and paid $2.4 million in tax on only $7.9 million of taxable income in 2015–16 (on a total income of $527.2 million).[33]
- Reported repayments of subordinated related party loans to the value of $83 million and $88 million were made by Opal in 2015 and 2016 respectively. TJN-Aus commented that 'this related party loan payment was likely the largest factor in reducing [Opal's] taxable income in Australia'.[34]
- G.K.Goh Holdings Limited (GKGoh), a Singapore listed entity with an almost 48 per cent interest share in Opal, received dividends in the order of $16 million from the company.[35]

3.34 Opal stated that it 'takes its tax compliance responsibilities seriously', expressing the view that:

> [The TJN-Aus] report was deficient in its analysis of Opal's state of tax affairs in the 2014, 2015 and 2016 financial years and misrepresented Opal's strong commitment to Australian corporate income tax compliance by not providing appropriate context behind the level of corporate income tax paid by Opal in those years.[36]

3.35 Opal claimed that the company's income tax paid was reduced in the years examined as a result of operating losses carried forward from previous years. Opal argued that these carry forward tax losses were 'incurred in the normal course of business and external debt refinancing activities'.[37]

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31 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 20.

32 DAC Finance Pty Ltd is Opal's operating company for its aged care services. See Opal Aged Care, *Opal Simplified Structure*, [p. 1] (tabled 4 September 2018).

33 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 19.

34 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 20.

35 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 22.

36 Opal Aged Care, *Submission 21*, p. 4.

37 Opal Aged Care, *Submission 21*, p. 4.

3.36 Mr Ben Feek from Opal Aged Care emphasised this point, telling the committee that:

> The use of tax loss carry forward is an essential feature of Australia's tax system and not a signal that an organisation has done anything wrong.[38]

3.37 Mr Feek also explained that:

> There are three separate components of the Opal group: DAC Finance…the Principal Healthcare Finance Trust; and a financing entity called ACIT Finance. These components do transact with each other but not in a way that reduces tax. For example, ACIT Finance is the financing entity, which borrows from four Australian banks and on-lends amounts borrowed within the Opal group as required. There are no offshore loan agreements. Principal Healthcare Finance Trust is a property trust which owns property assets, and DAC Finance is the operating business, which employs our people and provides care to our residents.[39]

3.38 With regard to observations made by TJN-Aus on related party loan repayments, Opal clarified that, during the years mentioned, 'related party borrowings were from Australian entities that were subject to the prevailing corporate tax rate'.[40] Further, Mr Feek advised the committee that the related party loan repayments cited by TJN-Aus had no impact on taxable income:

> The impact on the repayment of a loan to ACIT Finance in relation to DAC Finance's taxable income was nil. As I mentioned before, the repayment or borrowing of an amount does not directly impact taxable income. To clarify: in 2015, when DAC Finance repaid $83 million to ACIT Finance, it also borrowed $92 million from ACIT Finance and overall borrowings were little changed over the year. So what the Tax Justice Network has done is identified a specific line in the cash flow statement to highlight an[d] infer that some mischief has been realised when in fact that's not the case and, in the ordinary course of business, the entities that are operating will seek to borrow from ACIT Finance but also then seek to repay borrowings from ACIT Finance to minimise the level of interest expense they incur. So money revolves all the way in the cycle, but it does not generate any tax advantages for any participant in the structure.[41]

3.39 The committee questioned representatives from Opal as to how its operating company, DAC Finance, could have zero taxable income in 2015, yet in the same year make significant dividend payments ($16 million as cited by TJN-Aus) to a parent company. Mr Feek explained that:

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38 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 12.

39 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 11.

40 Opal Aged Care, *Submission 21*, p. 4.

41 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, pp. 13–14.

> The dividends that are paid by the group to its investors are a result of assessing the profitability of the three components in a combined way. It's both DAC Finance Pty Ltd and the profitability of Principal Healthcare Finance Trust that is considered when assessing the ability of the business to pay dividends.[42]

Allity

3.40 In its analysis of Allity, TJN-Aus stated that it is the only one of the six for-profit aged care providers examined to have paid no tax in 2014–15 or 2015–16. In those years, Allity reported zero taxable income on total revenue of $298.8 million and $315.6 million respectively.[43]

3.41 TJN-Aus stated that Allity's 'most recent annual financial statements [financial year 2016–17] indicate that some of the company's most aggressive tax avoidance tactics may have been curtailed'.[44] TJN-Aus pointed to a fall in Allity's reported interest expenses as a possible indication of reduced tax avoidance.

3.42 TJN-Aus stated that for 2015–16, Allity reported that the balance of a shareholder loan—to the value of approximately $18.7 million—with an interest rate of 15 per cent was extinguished in December 2015.[45] TJN-Aus concluded that:

> …it appears there is little doubt that the sole purpose of this shareholder loan at a 15% interest was to reduce taxable income on profits made in Australia from Australian government subsidies. While the loan may be extinguished, it appears that the impact on avoiding tax payments in Australia may be ongoing.[46]

3.43 Mr David Armstrong, Chief Executive Officer of Allity, rejected claims by TJN-Aus that Allity engages in aggressive tax planning and tax avoidance. Mr Armstrong stated that:

> All financing and acquisition structures adopted are conventional, and I can categorically state that Allity is fully compliant with all applicable tax laws and has satisfied all of its tax obligations by the relevant due dates. Contrary to the Tax Justice Network-Australia report, Allity does not and

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42 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 14.

43 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 23.

44 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 24.

45 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 26.

46 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 26.

> has not used stapled structures at any point nor does Allity make any rent payments to any related entities outside of the group.[47]

3.44 Mr Armstrong also highlighted that all entities within the Allity corporate structure are treated as a single taxpayer for Australian taxation purposes:

> In terms of our corporate structure, Allity is the trading name of a group of Australian entities of which Australian Aged Care Partners Holdings is the head company. This entity acquired the aged-care business known as Primelife from Lendlease in March 2013 and then ECH's residential aged-care homes in May 2014. All entities within the Allity group are incorporated in Australia. They are tax residents of Australia and they're treated as a single taxpayer for Australian taxation purposes. This effectively explains why there can be no motivation for avoiding paying tax in any transactions between entities in the Allity group.

3.45 Mr Armstrong went on to explain that Allity Pty Ltd, a company within the Allity group, functions as the operating company and approved provider of aged care services. With regard to the public availability of information on Allity's financial affairs, Mr Armstrong acknowledged that:

> Confusion can be created when referencing the accounts of this entity as it doesn't provide a consolidated view of the group's profitability or tax position. The only reason for publishing these accounts is because Allity Pty Ltd is the approved provider under the Aged Care Act and, as such, is required to do so. The relevant reference is the accounts of the tax consolidated group Australian Aged Care Partners Holdings Pty Ltd.[48]

3.46 In response to observations by TJN-Aus that Allity paid zero corporate income tax in 2014–15 or 2015–16, Allity explained that:

> Allity was in a tax loss position for its first two years of operation (FY14 and FY15). From Allity's establishment in March 2013, significant costs were incurred in respect of acquisition and investment activity to grow and improve the business and the services it provides.
>
> …
>
> Having absorbed tax losses from the peak acquisition and investment growth phase, we anticipate being in an income tax paying position from FY 18 onwards.[49]

3.47 On the matter of shareholder loans arising from Allity's acquisition of aged care services, the committee questioned representatives from Allity as to how such

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47 Mr David Armstrong, Chief Executive Officer, Allity Pty Ltd, *Committee Hansard*, 17 July 2018, p. 43.

48 Mr David Armstrong, Chief Executive Officer, Allity Pty Ltd, *Committee Hansard*, 17 July 2018, p. 43.

49 Allity, *Submission 20*, p. 5. See also Mr David Armstrong, Chief Executive Officer, Allity Pty Ltd, *Committee Hansard*, 17 July 2018, pp. 43–44 and 47.

loans could justifiably offer an interest rate of 15 per cent on a commercial basis. Mr Armstrong advised that:

> The balance of the initial acquisition cost was $128 million, which was provided through a mix of shareholder equity and shareholder loans. That was considered appropriate to reflect the risk and return requirements of investors at the time. The shareholder loans were certainly paid out at the absolute earliest opportunity that was available, so there was never an intention to include those shareholder loans as a part of the long-term capital structure. They were paid out in December 2015. Just to explain the shareholder loan, it's a form of mezzanine debt, so it's effectively riskier than bank debt because the rights of the note holders are subordinated to the bank's. Therefore, it requires a high rate of return to reflect that risk. The rate adopted on the notes was a rate that was researched by Archer and was a market rate at the time the notes were issued and reflected the risk-return characteristics of the investment.[50]

ASX listed providers—Regis, Estia and Japara

3.48 TJN-Aus' analysis found that together, the three ASX listed for-profit aged care providers—Regis, Estia and Japara—'received over $1 billion in the most recent year'.[51] TJN-Aus stated in its report that:

> Regis, Estia, and Japara are listed on the Australian Securities Exchange (ASX) but appear to be using methods to reduce the amount of tax they pay while earning large profits from over $1billion of government subsidies.[52]

3.49 TJN-Aus noted that:

> While these companies are not officially structured as stapled securities the internal ownership of properties through trust structures may provide the same tax advantages.[53]

3.50 TJN-Aus also queried the limited disclosure of information relating to the internal trust structures of the three ASX listed providers.[54]

3.51 In response to the observations made by TJN-Aus, Mr Sudholz, Chief Executive Officer of Japara Healthcare, told the committee:

> Whilst the report by the Tax Justice Network-Australia contains a blanket statement on Japara's apparent use of complex tax avoidance schemes, it

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50 Mr David Armstrong, Chief Executive Officer, Allity Pty Ltd, *Committee Hansard*, 17 July 2018, p. 44. See also Allity, *Submission 20*, p. 18.

51 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 29.

52 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 29.

53 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 29.

54 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 29.

> does not provide any support for that allegation. Japara respectfully disagrees with these allegations and that they could apply in any way to its operations. Japara is taxed as a company in Australia and has a very simple corporate structure.[55]

3.52 Regis also claimed that it does not use any tax avoidance or aggressive tax minimisation strategies. With regard to transactions between its internal subsidiary trusts, Regis submitted:

> Regis is the head company of a single income tax consolidated group, which comprises Regis and all of its subsidiaries. Transactions between internal subsidiary companies and trusts within the income tax consolidated group do not affect Regis' effective corporate income tax rate or income tax payable.
>
> Regis' internal trusts are unit trusts and do not have external beneficiaries. There is no tax advantage delivered to Regis via these trusts as they are all part of a single Regis tax consolidated group and are generally a result of historical acquisitions.[56]

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55 Mr Andrew Sudholz, Chief Executive Officer, Japara Healthcare, *Committee Hansard*, 4 September 2018, p. 17.

56 Regis Healthcare Limited, *Submission 7*, pp. 1–2.

Chapter 4

Broader stakeholder views

4.1 In addition to the views on alleged tax avoidance summarised in the previous chapter, some stakeholders outlined their objections to the Tax Justice Network-Australia's (TJN-Aus) analysis in other areas. In particular, stakeholders commented on the method used by TJN-Aus to calculate 'tax payable' by aged care, as well as claims made with regard to the profitability of large for-profit providers.

Concerns about the sector from the Australian Taxation Office

4.2 The Australian Taxation Office (ATO) raised the following areas of concern in relation to income tax regarding for-profit aged care providers: financing arrangements; use of tax consolidated groups; and use of trusts.

4.3 The ATO advised that it has concerns over the financing arrangements used by certain multinational entities in the aged care industry, particularly the conditions of their related party financing arrangements. The ATO noted that it is reviewing the application of the transfer pricing rules[1] to financing arrangements of entities in the aged care industry. In addition, the ATO noted that the OECD hybrid mismatch measure[2]—which received royal assent in August 2018 and will begin to come into effect from January 2019—will address concerns regarding hybrid mismatch arrangements.[3]

4.4 The ATO also raised concerns about the number of entities in the aged care industry operating through a multiple entry-point consolidated (MEC) group structure. The ATO submitted that such structures have 'the potential to obscure intra-group transactions for financial or public tax reporting'.[4]

4.5 The ATO further submitted that due to the nature of financial reporting obligations, MEC group structures 'can make it difficult for the public to understand

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1 Australia's transfer pricing rules seek to avoid the underpayment of tax in Australia by having businesses price related party international dealings according to what is expected from independent parties in the same situation. See ATO, *International transfer pricing—introduction to concepts and risk assessment*, https://www.ato.gov.au/print-publications/international-transfer-pricing---introduction-to-concepts-and-risk-assessment/?=top_10_publications (accessed 1 November 2018).

2 Announced in the 2016–17 Budget, the hybrid mismatch rules aim to prevent multinational companies from gaining an unfair competitive advantage by avoiding income tax or obtaining double tax benefits through hybrid mismatch arrangements. These arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions. See ATO, *Implementation of the OECD hybrid mismatch rules*, https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Implementation-of-the-OECD-hybrid-mismatch-rules/ (accessed 1 November 2018).

3 Australian Taxation Office, *Submission 14*, pp. 6–7.

4 Australian Taxation Office, *Submission 14*, p. 7.

the full operations of the foreign group in Australia'.[5] Accordingly, the ATO noted that:

> We encourage greater transparency by these groups through adoption of the Board of Taxation's Voluntary Tax Transparency Code and/or best practice adoption of the general purpose financial statements (GPFS) measure applicable to significant global entities (which recommends filing of an aggregated set of GPFS for the entire Australian operations of the foreign group).[6]

4.6 The ATO noted that the use of unit and discretionary trusts as vehicles to operate aged care facilities is a common feature of privately owned groups in the aged care industry, often explained by the desire to isolate the commercial risks of operating a particular facility from the broader group.[7]

4.7 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, ATO, reiterated this point:

> At the small end, we often see private groups, often around families, develop a business. That will often be through trust structures for the property side or for the entire business, and that is often aimed at pushing—in a sense, it doesn't change the tax necessarily, but it shifts the tax up a level and moves it away from the operating entity up a level. That may not be tax driven; trusts are subject to very different disclosure rules and corporate rules to companies. At some stage, there's aggregation.[8]

4.8 However, the ATO acknowledged that 'the use of trust structures means it is not possible to identify the tax payable based on publicly available information alone', and that private trusts are often not required to prepare financial statements.[9]

4.9 The ATO outlined its concerns with the use of such trust structures, stating that:

> In rare cases, trusts are used in conjunction with other tax planning or avoidance strategies to artificially reduce the tax payable on underlying business operations. There are a number of general and specific anti-avoidance rules we can apply to ensure the appropriate amount of tax is paid, in relevant circumstances.[10]

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5 Australian Taxation Office, *Submission 14*, p. 7. See also Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 33.

6 Australian Taxation Office, *Submission 14*, p. 8.

7 Australian Taxation Office, *Submission 14*, p. 7.

8 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 33.

9 Australian Taxation Office, *Submission 14*, p. 7.

10 Australian Taxation Office, *Submission 14*, p. 8.

4.10 The committee notes that the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018, which was introduced into the House of Representatives in September 2018, includes measures to improve the integrity of income tax law for arrangements involving stapled structures that deliver low tax rates to foreign investors.[11]

Maximising profit over care

4.11 A large number of stakeholders supported the conclusions of TJN-Aus and expressed concerns about the implications of the financial practices of for-profit aged care providers on the quality of care provided to residents.

4.12 The Australian Nursing and Midwifery Federation (ANMF) asserted that:

> Recent research commissioned by the ANMF demonstrated that aged care residents receive one and a half hours less care than they should, every day. Yet there are no rules to ensure that government subsidies given to aged care companies is spent directly on their care.[12]

4.13 Indeed, the ANMF considered that the TJN-Aus Report shows that for-profit aged care providers are maximising profits over the provision of better quality care:

> This research…revealed that these [for-profit] companies have the financial capacity to bridge the gap in care hours by employing more nurses and carers but are placing their profits and shareholders before safe, effective care for their residents.[13]

4.14 Similarly, the Combined Pensioners and Superannuants Association (CPSA) argued that the findings of the TJN-Aus Report 'demonstrates a trend that for-profit aged care companies are compromising on providing quality care services and are instead choosing to direct their attention towards maximising profit'.[14]

4.15 CPSA further argued that:

> The financial practices of for-profit aged care providers not only manifests in the avoidance of tax, but also in other cost cutting measures such as employing too few staff and staff with lower levels of qualifications.[15]

4.16 CPSA contended that this view is supported by the decrease in staff with higher levels of qualifications in residential aged care facilities:

> Attempts to cut staffing costs is evidenced in the decrease of RNs and ENs [Registered Nurses and Enrolled Nurses] employed in aged facilities, who

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11 Parliament of Australia, *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6192 (accessed 21 November 2018).

12 Australian Nursing and Midwifery Federation, *Submission 11*, p. 7.

13 Australian Nursing and Midwifery Federation, *Submission 11*, pp. 7 and 13.

14 Combined Pensioners and Superannuants Association, *Submission 1*, pp. 4 and 6.

15 Combined Pensioners and Superannuants Association, *Submission 1*, p. 4.

> receive higher wages, and the increase in personal care workers, who receive lower wages. In 2016, the gross median weekly wage reported by RNs was $1352 and by ENs it was between $1000 and $1050, compared to a median weekly wage of $689 for PCAs [Personal Care Assistants].[16]

4.17 The NSW Nurses and Midwives' Association (NSWNMA) highlighted similar concerns in relation to staff quantity and quality in residential aged care facilities operated by for-profit providers:

> We represent workers employed in many for-profit healthcare settings. Our members have highlighted common concerns in relation to funding shortfalls in aged care facilities operated by large for-profit aged care providers. In recent years they have experienced shorter shifts, reduced staffing and been given additional duties, making workloads problematic and often unachievable. In turn, this creates higher absenteeism such as sick leave, which is not replaced. This compounds the issue. These combined factors create an environment where overworked staff cannot provide the quality of care that residents expect and deserve.[17]

4.18 The NSWNMA further submitted that:

> It is our opinion this can only be feasibly explained as a cost-saving exercise by for-profit providers.[18]

4.19 Submissions from other state and territory nursing unions made similar claims about the quality of service provision, including staffing levels, by for-profit aged care providers.[19] The inquiry also received and reviewed a significant volume of correspondence from aged care staff and relatives of residents who expressed concerns over the level of staffing and quality of care.

4.20 Mr Ward from TJN-Aus acknowledged that the financial conditions for some providers in the industry, both not-for-profit and for-profit, are challenging. However, Mr Ward argued that the motivation of large, for-profit aged care providers is different to those of their not-for-profit counterparts:

> Several submissions generalise about conditions across the entire aged-care sector, without focusing on the large for-profit companies. Again, of course many of the smaller non-profits and some for-profit providers are struggling financially as they genuinely attempt to provide the best quality of care possible. These providers face challenging conditions, but the experience and motivation of the large for-profit companies is entirely different.[20]

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16 Department of Health, *The Aged Care Workforce 2016*, March 2017, p. 27, as cited in Combined Pensioners and Superannuants Association, *Submission 1*, p. 5.

17 NSW Nurses and Midwives' Association, *Submission 2*, p. 6.

18 NSW Nurses and Midwives' Association, *Submission 2*, p. 6.

19 See, for example, Australian Nursing and Midwifery Federation (TAS Branch), *Submission 4*; Australian Nursing and Midwifery Federation (SA Branch), *Submission 5*; Queensland Nurses and Midwives' Union, *Submission 6*.

20 Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, p. 2.

4.21 Similarly, Adjunct Associate Professor Michael West expressed the view that a culture of maximising profits within a corporation can result in a conflict of interest. Specifically, in the for-profit aged care sector, a conflict can arise between a company's duty to its shareholders and the provision of care:

> Every institution has a culture, and corporations all have their cultures too, and there's a huge diversity in these cultures. Generally, the culture comes from the top, is led from the top. Generally, over the years I've found if there's an aggressive culture in maximising profit at all costs then there's a fundamental conflict of interest. The government and most people and stakeholders want the elderly to be looked after. Of course there are the workers; you need to pay workers a reasonable amount to do that. It's a market. I agree that it is a market. It's not distorted in that sense, but there is a conflict of interest. If your duty is to your shareholders primarily, and your personal bonus rides on getting costs down and getting profits up, then all it needs is a bit of aggressive behaviour on the part of the executives, which we see all the time, and care is going to be sacrificed.[21]

4.22 Mr Ian Yates, Chief Executive at COTA Australia (COTA), disagreed with views that a profit motive necessarily places quality of care at risk:

> …it depends how the governance structure—the owners—and the senior management in that company set their culture. I say that because there are for-profit providers in this country who want to be around for a long time who believe that the way to stay around for a long time is to deliver a quality product, and there are not-for-profit providers in this country who turn in very substantial profits. They're just not distributing them as dividends.[22]

4.23 Mr David Armstrong, Chief Executive Officer at Allity, assured the committee that for-profit providers can obtain value for shareholders at the same time as providing high quality care:

> Absolutely. We get funded the same [as other providers] and we're accountable on the same basis for resident outcomes through the accreditation process and providing specified care and services. So we're absolutely accountable, and we compete on that basis to meet residents' expectations.[23]

4.24 Mr Grant Corderoy, Senior Partner at StewartBrown, reasoned that:

> …if they [for-profits] weren't providing the standard of care we would expect to see two things: we would expect to see their occupancy levels decline and we would expect to see major staff movements. We deal very

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21 Adjunct Associate Professor Michael West, Private Capacity, *Committee Hansard*, 17 July 2018, p. 13.

22 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 17 July 2018, p. 54.

23 Mr David Armstrong, Chief Executive Officer, Allity Pty Ltd, *Committee Hansard*, 17 July 2018, p. 48. See also Mr Sean Rooney, Chief Executive Officer, Leading Age Services Australia, *Committee Hansard*, pp. 25–26.

> strongly with the sector and we don't see a massive difference in occupancy levels—that's resident occupancy levels—and we're not seeing a major staff movement change where staff are visibly moving from for-profit to not-for-profit providers, because they've got access to providing the same quality care.[24]

4.25 The Aged Care Industry Association (ACIA) argued that a provider's ownership type does not predict quality of care outcomes:

> …a focus on ownership type is misleading and unhelpful. The key outcome from the Australian aged care system should be [the] provision of high-quality care to older Australians. There is no evidence that ownership structure is a predictor of care quality or of care outcomes for residents—focusing on ownership structure is a diversion from the key area of care quality.[25]

Stronger links between government subsidies and quality of care

4.26 Some inquiry participants advocated for stronger links between government subsidies and quality of care, as measured through legislated skills mixes and staffing ratios.[26]

4.27 The ANMF, for example, argued that 'taxpayers contributions to funding for-profit aged companies must be directed to ensuring the provision [of] safe and effective care for every resident'.[27] Accordingly, the ANMF recommended that:

> - Residential aged care companies must publicly and transparently report the staffing of all aged care facilities.
> - Residential aged care companies should provide proof that government funding is being spent directly on the care of residents. This should be mandated as a pre-requisite to receiving a subsidy. The best way of demonstrating this would be to implement mandated and legislated skills mixes and staffing.[28]

4.28 Likewise, CPSA contended that:

> For-profit aged care providers financial and tax practices that channel Australian Government subsidies into profits clearly do not provide value for money for the Government. Government aged care subsidies should be used for the purpose they are assigned for, that is caring for residents. Ring

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24 Mr Grant Corderoy, Senior Partner, StewartBrown, *Committee Hansard*, 17 July 2018, pp. 31–32.

25 Aged Care Industry Association, *Submission 9*, p. 7. See also COTA Australia, *Submission 23*, p. 5.

26 See, for example, Australian Nursing and Midwifery Federation, *Submission 11*, Combined Pensioners and Superannuants Association, *Submission 1*; NSW Nurses and Midwives' Association, *Submission 2*; Australian Nursing and Midwifery Federation (Tas Branch), *Submission 4*; Queensland Nurses and Midwives' Union, *Submission 6*.

27 Australian Nursing and Midwifery Federation, *Submission 11*, p. 13.

28 Australian Nursing and Midwifery Federation, *Submission 11*, p. 13.

> fenced funding and stricter monitoring needs to be put in place to ensure all Government funds are being used for this intended purpose. The [TJN-Aus] report highlights that there are currently inadequate safeguards in place to ensure that the $2.17 billion in Government subsidies given to for-profit providers is spent directly on care for residents.[29]

4.29 The Queensland Nurses and Midwives' Union (QNMU) submitted that there is considerable evidence linking the quality of care with the staff levels and skill mix of the aged care workforce. Referencing the TJN-Aus Report, the QNMU reasoned that, in light of the profits and attempts to minimise tax liabilities made by for-profit aged care providers, 'there seems significant capacity for improvements in staffing and skill mix to achieve evidence based minimum levels'.[30]

4.30 The NSWNMA took the stance that value for money in aged care is 'inextricably linked to personal safety'. Further, the NSWNMA argued that public expectations of sufficient protections must be guaranteed not only through accountability of providers' tax practices, but also through ensuring the appropriate allocation of government subsidies to the provision of quality care.[31]

4.31 The NSWNMA went on to emphasise that the aged care industry provides care to the most vulnerable, contending that:

> Therefore the same protections that are afforded to children, must also be afforded to the elderly. Mandated ratios of staffing and skills mix, determined by an evidence-based model of care, and regulated appropriately, must be applied to the sector.[32]

4.32 That view was supported by Ms Bronagh Power, Policy Officer at the CPSA:

> All older Australians should have access to safe, dignified care and taxpayers' contributions to funding aged-care companies must be directed to ensuring the provision of that care. CPSA believes that the accountability of aged-care providers and the quality of care for residents can be ensured by tying the provision of subsidies to adequate staffing ratios and the delivery of quality care. Profits must not come before the dignity, safety and wellbeing of older Australians.[33]

4.33 However, a number of submitters and witnesses cautioned that, without concurrent changes to the funding model for aged care, any mandated staff-to-resident changes would significantly impact the viability of all aged care providers, both

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29 Combined Pensioners and Superannuants Association, *Submission 1*, p. 7.

30 Queensland Nurses and Midwives' Union, *Submission 6*, p. 7.

31 NSW Nurses and Midwives' Association, *Submission 2*, p. 12.

32 NSW Nurses and Midwives' Association, *Submission 2*, p. 12.

33 Ms Bronagh Power, Policy Officer, Combined Pensioners and Superannuants Association, *Committee Hansard*, 17 July 2018, p. 17.

for-profit and not-for-profit. Some stakeholders also advised that such changes would inevitably result in an increased financial burden on government.[34]

Gap between revenue and profits

4.34 TJN-Aus observed that there is a significant gap between the reported revenue and profits of the for-profit aged care providers examined in its report.

4.35 Some stakeholders, including TJN-Aus, drew a number of conclusions from this gap. For example, Mr Ward argued that looking at revenue can be an important indication of the use of tax avoidance strategies to reduce taxable profit:

> Of course tax is based on profit. Of course the expense of running an aged-care business is significant. However, the primary trick in most corporate tax avoidance strategies is to reduce taxable profit through artificial means. This appears to be exactly what Allity, Bupa and others have done.[35]

4.36 Mr Hirschhorn from the ATO sympathised with TJN-Aus' reasoning, commenting that 'in this market, it's often said the tax planning is in the expenses and not so much in the income'. Mr Hirschhorn elaborated that:

> …it is very hard to distinguish between tax planning through inflated expenses and just having high expenses and not being very profitable. And I would say the failing of that [percentage taxable] metric is that it does not distinguish between tax minimisation techniques and companies which are struggling to make a significant profit. It also does not necessarily distinguish amounts which are reported as income in accounts—for example, revaluation gains—which are not taxable whilst they're unrealised. I understand why they look at that ratio, but it does fail to distinguish between economic performance and tax minimisation strategies.[36]

4.37 Conversely, industry groups tried to explain the gap on a number of fronts. For instance, StewartBrown submitted that it 'is generally understood that company tax is payable on taxable income not on revenue', and therefore:

> …assuming the quoted figures in Table 2 [see Table 3.1] are accurate, the combined tax payable ($154 million) as a percentage of taxable income ($517.2 million) represents an average income tax rate of 29.8%. We

34 See, for example, Mr Grant Corderoy, Senior Partner, StewartBrown, *Committee Hansard*, 17 July 2018, p. 35; Mr Matthew Richter, Chief Executive Officer, Aged Care Guild, *Committee Hansard*, 17 July 2018, p. 42; Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, pp. 12–13.

35 Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, p. 2. See also *Committee Hansard*, 17 July 2018, p. 3.

36 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 32.

suggest that such an average taxation rate is above the majority of listed or for-profit entities in all other industry sectors in Australia.[37]

4.38 The Aged Care Guild noted that not all businesses have the same ratio of profit to revenue, and argued that it is therefore 'inappropriate to compare the profitability of the aged care providers to revenue or, for that matter, to other unrelated industries'.[38] The Aged Care Guild went on to argue:

> The amount of tax payable by [for-profit] providers is based on the taxable income of the entity and not its revenue, so the reference to the low ratio between tax payable and revenue is irrelevant and is not grounds for claiming that there is endemic tax avoidance or use of accounting structuring to avoid tax.[39]

4.39 ACIA drew the committee's attention to total revenue and expense figures for the aged care industry, noting that incurred expenses, especially wages for the sector's workforce, make up a substantial portion of revenue. ACIA contended that:

> Conflating revenue with profit as a basis to allege under-payment of taxation is deeply misleading. Tax is payable on profit; to claim revenue provides any indication at all of taxable income is simply flawed. Taking figures from the Aged Care Financing Authority, the aged care sector in 2015–16 attracted revenues of $17.4 billion. However, the sector incurred expenses of $16.3 billion; any claim to determine taxable income based only on revenue can be no better than guesswork.[40]

4.40 Mr Ben Feek, Chief Financial Officer at Opal Aged Care, also told the committee:

> Opal had total income of $527.2 million as quoted on page 5 of the [TJN-Aus] report, and the report infers that, by only paying $2.4 million in tax in that year, it was by inference doing something wrong. Opal had in that year $511.5 million of expenses. Those expenses are incurred providing the services to our residents. Profit before tax was $15.6 million. So the level of profitability that is in fact taxable is far less than the revenue that has been realised by Opal.[41]

Profitability of large for-profit providers

4.41 Another key assertion made by TJN-Aus was in relation to the six largest for-profit aged care providers making large profits earned principally from government subsidies.

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37 StewartBrown, *Submission 3*, p. 5. See also Aged Care Guild, *Submission 17*, p. 11; Mr Grant Corderoy, Senior Partner, StewartBrown, *Committee Hansard*, 17 July 2018, pp. 33–34.

38 Aged Care Guild, *Submission 17*, p. 11.

39 Aged Care Guild, *Submission 17*, p. 11. See also StewartBrown, *Submission 3*, p. 5.

40 Aged Care Industry Association, *Submission 9*, pp. 6–7.

41 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 12.

4.42 Mr Ward from TJN-Aus argued that to obtain a true picture of the profitability of large for-profit aged care providers, the focus should be on individual providers rather than averaging across the sector:

> I think in some ways you have to look at the individual companies, because that's where the detailed information is. But I do think it's very important to take a look at the larger for-profit sectors as a separate trend entity and understand what patterns are going on with them versus other parts of the industry whether they be non-profit or for-profit.[42]

4.43 However, industry stakeholders rejected the TJN-Aus analysis. For example, StewartBrown commented that:

> An underlying theme of the Report appears to be in relation to FP [for-profit] entities making large profits gained substantially from recurrent government subsidy funding. The Report was silent regarding analysing the profitability or even making comparison to other industry sectors.[43]

4.44 Other industry stakeholders such as Bupa also claimed that it 'is a misconception that residential aged care providers are highly profitable'.[44]

4.45 StewartBrown noted results from its *Aged Care Financial Performance Survey* (ACFPS) which found that, for the six months to December 2017, 41.3 per cent of residential aged care facilities reported an operating loss.[45]

4.46 LASA pointed to the findings of Aged Care Financing Authority's (ACFA) *Fifth report on the Funding and Financing of the Aged Care Sector*, observing that:

> [ACFA's report] states that total profit for the sector was $1.1 billion, including $1.3 billion of 'other' income which suggests that operating profit is dependent upon 'other' income, as in previous years.
>
> The ACFA report makes specific mention of the inclusion of other (non-operating) income in the financial results with the observation that the overall profitability is dependent upon the other income.[46]

4.47 StewartBrown suggested that a more appropriate measure of financial performance of aged care providers is the Return on Assets (ROA) ratio, which relates to a provider's operating surplus as a measure of the total assets employed. The ROA ratio is used to assess what levels of real return providers are achieving in relation to the assets employed, irrespective of debt or equity.[47]

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42 Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, pp. 8–9.

43 StewartBrown, *Submission 3*, p. 6. See also Aged Care Guild, *Submission 17*, p. 11.

44 Bupa, *Submission 21*, p. 3.

45 StewartBrown, *Submission 3*, p. 9. The StewartBrown December 2017 *Aged Care Financial Performance Survey* incorporated financial data from over 915 residential aged care facilities across Australia.

46 Leading Aged Services Australia, *Submission 15*, p. 9.

47 StewartBrown, *Submission 3*, pp. 6 and 14.

4.48 StewartBrown advised that:

> Using this relevant ratio, the ROA for year-end 2016 was approximately 1.7%, and this declined to approximately 1.2% for FY17 and we expect it to be around 0.5% for FY18. This is hardly a viable return for aged care provider organisations.[48]

4.49 The Aged Care Guild noted StewartBrown's ROA analysis, and also calculated the ROA for its own members—which comprise the eight largest private residential aged care providers (including five of those providers examined in the TJN-Aus Report). The Guild submitted that:

> Already, the financial condition of aged care has deteriorated to a level overall that will deter investment that is essential to meet the future needs of elderly Australians. Stewart Brown estimated that in the period to December 2017 aged care overall showed a return on assets of only 0.5%—whereas six months earlier it was at 1.3%. For Guild members, return on assets fell from 3.8% to 2.6% in the same period.[49]

4.50 The Aged Care Guild also proposed that it is 'informative to compare the returns of Guild members and the sector generally to those being achieved by other sectors of the economy' (Table 4.1).[50] The Guild elaborated that:

> By any measure, to say that Guild members are reaping large profits through taxpayer subsidies is incorrect. In fact, taxpayer subsidies are used to fund residents' care—not profits—and the returns in the aged care sector are far less than many other sectors…[51]

Table 4.1: Return on Asset comparisons to other industry groups[52]

ASX GICS industry group	**2017 %**	**2018 (*est*) %**
Commercial and professional services	12.01	11.56
Consumer services	17.41	15.37
Food and staples retailing	10.28	10.57
Health care equipment and services	14.87	16.95
Media	19.43	16.85
Retailing	13.10	13.67
Software and services	29.77	31.70
Telecommunication services	11.01	11.44
Transportation	4.65	5.11
Guild members (*average*)	3.80	2.60

48 StewartBrown, *Submission 3*, p. 6.

49 Aged Care Guild, *Submission 17*, p. 2.

50 Aged Care Guild, *Submission 17*, p. 7.

51 Aged Care Guild, *Submission 17*, p. 7.

52 Aged Care Guild, *Submission 17*, p. 7. GICS refers to the ASX classification system for industry sector groupings based on Global Industry Classification Standards.

4.51 Mr Andrew Sudholz, Chief Executive Officer of Japara Healthcare, indicated that aged care is not a highly profitable sector, irrespective of provider ownership type:

> It's important to understand that everyone in this industry is trying to make a profit that sustainable, but the industry now has quite a few places not making a profit, and that is both the church and charity and the privately owned people.
>
> The question about what is inadequate profit has to do with the return on invested capital, and we're currently running in the very low single-digit range. The evidence is there; it's one or two per cent.[53]

4.52 The Aged Care Guild acknowledged that its members do compare well with other aged care providers in relation to the level of returns, particularly when compared against the not-for-profit sector. However, the Guild observed that there are a number of reasons for this, including: the provision of 'additional services' in its members' facilities (fees for which have previously been reported as 'other income' by providers)[54]; and the concentration of Guild member providers in major cities or large regional centres, therefore attracting higher accommodation payments.[55]

4.53 This reasoning was supported by Mr Corderoy from StewartBrown in explaining the difference between the ROA calculations provided by the Aged Care Guild and StewartBrown:

> In the for-profit sector, the vast majority of their facilities are in the metropolitan areas and a smaller amount are in the inner regional areas. Of course the not-for-profit sector and the government have a much greater spread, including taking the burden, as it were, for the outer regional and remote areas. If you look at say the metropolitan sector, the return on assets would be greater, but remember that our figures are looking at the whole geographic sector…So when you're looking at an overall average, the not-for-profits clearly will have a lower result. But if we just do a return on assets on metropolitan Sydney and metropolitan Melbourne, yes, they would be higher than our figures, but our figures are looking at the sector as a whole.[56]

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53 Mr Andrew Sudholz, Chief Executive Officer, Japara Healthcare, *Committee Hansard*, 4 September 2018, pp. 19–20.

54 In its sixth annual report, ACFA noted that '[s]ome items previously classified as "other revenue" have now been apportioned to more appropriate revenue items. This means that reported "other" income is 26 per cent less in 2016–17 compared with 2015–16'. Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 97.

55 Aged Care Guild, *Submission 17*, p. 6. See also Mr Matthew Richter, Chief Executive Officer, Aged Care Guild, *Committee Hansard*, 17 July 2018, p. 40.

56 Mr Grant Corderoy, Senior Partner, StewartBrown, *Committee Hansard*, 17 July 2018, p. 32.

Consumer choice in the sector

4.54 Regulatory constraints on the provision of aged care services mean that consumers are limited when it comes to choosing a service. While for-profit providers contend that they compete based on the quality of the services provided, a lack of transparency and accountability means that consumers are limited in their ability to make informed decisions about their care. Further, the reluctance of many residents and their families to change residential settings means that appropriate information to make an informed decision regarding residential care entry is essential.

4.55 On this point, Aged Care Crisis Inc., a not-for-profit consumer-based advocacy group, submitted that:

> [For consumers to] exert choice in the marketplace requires information, the knowledge to assess and use it, as well as the confidence and power to use it. Without this citizens are at high risk of being exploited.
>
> During the 20 years of this system Australia has been the most opaque of all countries in collecting and supplying data to those who need it. Providers won't even tell us how many staff they have let alone supply any data about the care they provide.[57]

4.57 These concerns were also raised by Public Services International (PSI), who suggested the current nature of funding for aged care is harming the community and leading to worse consumer outcomes.[58] PSI stated that:

> The current funding model for aged care services, as with other government funded services that utilise for-profit provision of the service, is open to rent seeking behaviour, as:
>
> …
>
> There is limited ability for the user of the service to gain experience and knowledge of the sector, or the provider, prior to the need for the service arsing, and, changing provider once engaged is difficult. This creates a significant power imbalance and makes 'choice' an abstract construct for the consumer. This is made worse by the current lack of public information on service providers.[59]

4.56 In regional Australia, consumer choice is more limited than in metropolitan centres:

> **ACTING CHAIR:** I suppose that, when we look at competitiveness in markets, there's always that question about what we are competing for. I think there are some real questions about the extent to which aged care is a genuinely competitive market, not least because, once a patient enters a home, moving them is, as I know from personal experience, so immensely traumatic that the idea that you will decide you don't like that choice and

57 Aged Care Crisis Inc., *Submission 32*, p. 35.

58 Public Services International, *Submission 13*, [pp. 3–4].

59 Public Services International, *Submission 13*, [p. 3].

make another choice is really limited by the practical realities of moving a frail aged person with dementia.

Another analysis of this market might be that, at least for those people who are reliant on private capital, the battle really is competition for private capital rather than competition for clients. Do you think that's a fair characterisation of how this market operates?

Norah Barlow: I definitely believe that it's a competitive sector at the point of getting a resident into your home and providing the type of services and environment that you would want. That does require capital, because you are actually building. So I definitely see that point. I understand your point that, once they're in a home, for lots of reasons they generally don't move.

ACTING CHAIR: My personal experience, to be honest with you, is mostly in regional Australia, so it's not very competitive at the point of entry either.

Norah Barlow: No, being location specific would suggest that that's pretty difficult. In metros, it's a very big difference.[60]

4.57 Chapter 5 provides a broader discussion of financial transparency and related regulation of aged care providers, as well as suggested measures to enhance the integrity and public visibility of providers' financial and tax practices. By extension, the measures proposed also go some way to enhancing consumers' ability to make informed decisions about their care.

Committee view

4.58 The committee acknowledges that aged care is a sector where expenses are characteristically high and profit margins are low.

4.59 However, the committee considers that the insights provided by TJN-Aus, and in turn through this inquiry, demonstrate that current frameworks—in particular, the ability to use stapled and other complex corporate structures—provide scope for providers to potentially avoid, or at the very least minimise, their tax obligations.

4.60 The committee is concerned by the apparent difficulty in obtaining a complete picture of these practices by for-profit aged care providers. The committee contends that—in an industry that is tasked with caring for those who are highly vulnerable, and indeed, is heavily reliant on government subsidies to do so—such limited visibility is unacceptable to the public.

4.61 Further, the committee notes evidence from the ATO that it has some concerns over the financing arrangements used by certain entities in the aged care industry, particularly the conditions of their related party financing arrangements.

4.62 In light of this, the committee considers that greater investigation of the tax and financial structures of aged care providers is warranted.

60 *Committee Hansard*, 4 September 2018, pp. 28–29.

Recommendation 1

4.63 The committee recommends that, as part of its deliberations, the Royal Commission into Aged Care Quality and Safety consider the tax and financial structures of aged care providers.

4.64 While not the focus of this inquiry, the committee acknowledges stakeholder concerns regarding quality of care by for-profit aged care providers, as well as calls to implement safeguards to ensure government subsidies are spent directly on care provision. The public justifiably expects assurance that government funding is appropriately allocated to the provision of quality care and, as such, concerns about getting value for money from government subsidies are inseparable from the personal safety of aged care consumers. The committee contends that more can be done to increase the transparency and comparability of information relating to quality of care across the aged care sector to support aged care consumers and their families.

Recommendation 2

4.65 The committee recommends that the Australian Government explore opportunities to better share information about quality of care across the aged care sector, with the aim of increasing transparency and comparability, and supporting informed decision-making for aged care consumers and their families.

Chapter 5

Transparency

5.1 A key focus throughout the inquiry was the transparency of the financial and tax practices of for-profit aged care providers and whether the accountability and probity mechanisms currently in place for the expenditure of government subsidies are adequate.

Recommendations of the Tax Justice Network-Australia

5.2 As noted in Chapter 3, the Tax Justice Network-Australia (TJN-Aus) highlighted in its recent report—*Tax avoidance by for-profit aged care companies: Profit shifting of public funds* (TJN-Aus Report)—the need for greater transparency around the financial and tax practices of for-profit aged care providers (paragraphs 3.9–3.10).

5.3 TJN-Aus expressed the view that regulation is not currently strong enough to ensure that the financial records and accounting practices of for-profit aged care providers are publicly available and fully transparent.[1] Indeed, TJN-Aus argued that 'companies that receive millions of government subsidies must be held to a higher standard of transparency and must be publicly accountable'.[2]

5.4 TJN-Aus recommended two reform measures to 'restore integrity to the tax system and ensure public accountability' on government subsidies paid to for-profit aged care providers:

- Any company that received Commonwealth funds over $10 million in any year must file complete audited annual financial statements with the Australian Securities and Investments Commission (ASIC) in full compliance with all Australian Accounting Standards and not be eligible for Reduced Disclosure Requirements.[3]
- Public and private companies must fully disclose all transactions between trusts or similar parties that are part of stapled structures or similar corporate structures where most or all income is earned from a related party and where

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1 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 6.

2 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 41.

3 Australian Accounting Standards allow entities that do not classify themselves as 'reporting entities' to utilise reduced disclosure requirements, namely through the preparation of Special Purpose Financial Statements (SPFS). These SPFS can still be lodged with ASIC in satisfaction of legislative lodgement requirements.

operating income is substantially reduced by lease and/or finance payments to related parties with beneficial tax treatment.[4]

5.5 Mr Jason Ward, Spokesperson for TJN-Aus and author of the TJN-Aus Report, contended that these measures would add to recent tax avoidance reforms proposed by the Australian Government:

> This proposal adds transparency measures to the recent reforms proposed by the government and the concerns around tax avoidance addressed by both the ATO and Treasury. If, as for-profit companies suggest, there is nothing of concern about tax practices or corporate structures in the sector, then what is the harm in increasing transparency on the use of public funding?[5]

5.6 Stakeholders broadly agreed with the principle that aged care providers, as companies in receipt of significant government subsidies, should be held to a high standard of transparency and accountability. However, stakeholders differed in their views with respect to the adequacy of current accountability and probity mechanisms.

Support for increased transparency

5.7 The Combined Pensioners and Superannuants Association (CPSA) expressed concern at the apparent difficulty in obtaining a complete picture of the tax practices of for-profit aged care providers, as demonstrated by the TJN-Aus Report. CPSA asserted that:

> For-profit companies that receive Australian Government subsidies must be held to a higher standard of transparency and public accountability to ensure that they fulfil their tax obligations and provide quality care to residents.[6]

5.8 Professor Richard Eccelston and Mr Lachlan Johnson concurred with the recommendations of TJN-Aus, submitting that inaction on financial disclosure will be detrimental to the public's perceptions of Australia's tax system and the sustainability of the aged care industry:

> The role of government should centre largely on promoting transparency and disclosure of transactions between related parties. Allowing the current level of opacity around such disclosure regimes to persist in for-profit aged care provision will be injurious to both the public's perception of the integrity of the tax system and the long-term sustainability of the aged care sector.[7]

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4 Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, pp. 6 and 43.

5 Mr Jason Ward, Spokesperson, Tax Justice Network-Australia, *Committee Hansard*, 17 July 2018, p. 1.

6 Combined Pensioners and Superannuants Association, *Submission 1*, p. 8.

7 Professor Richard Eccelston and Mr Lachlan Johnson, *Submission 8*, [p. 4].

5.9 The Australian Council of Trade Unions (ACTU) also supported the reform measures proposed by TJN-Aus:

> Companies which receive significant Commonwealth funds should be required to fully disclose their tax practices through the filing of annual financial statements. It is a matter of principle that large companies which receive government subsidies should be held to the highest standard of transparency and accountability.[8]

5.10 Likewise, COTA Australia (COTA) expressed the view that any organisation receiving government subsidies must be held to standards of transparency in financial reporting and be publicly accountable. COTA acknowledged that, while aged care providers are presently required to report to government, the quality of the information reported 'has often been less than perfect'.[9]

5.11 The committee heard from representatives of the Australian Nursing and Midwifery Federation (ANMF) that, when taxpayers fund something, they should be able to see very clearly how that money is being used. Elaborating on this point, Ms Annie Butler, Federal Secretary of the ANMF, took the stance that aged care providers:

> …ought to be showing that the taxpayers' money is going to its intended use. And they [taxpayers] should be able to see the path the money travels; if it is not getting to the resident, where actually in that complicated path is it travelling?[10]

5.12 Highlighting the vulnerability of aged care consumers, Adjunct Associate Professor Michael West took the view that a high level of financial transparency and regulatory oversight is particularly important in aged care as compared to other sectors:

> I think you're [aged care providers] in a cherished position. Also, you're dealing with people and families in times of turmoil, when they're putting their loved ones into homes. How many people are financially literate anyway, let alone if they're 75 years of age and they may be suffering failing health and so on? I think there is there is a duty of care. I don't think we can expect corporations particularly—that's not their job. Their job is to maximize their profits, so it needs the stewardship of the department and the regulators, and of course transparency I think is the best.[11]

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8 Australian Council of Trade Unions, *Submission 10*, pp. 1–2.

9 COTA Australia, *Submission 23*, p. 7.

10 Ms Annie Butler, Federal Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 4 September 2018, p. 7.

11 Adjunct Associate Professor Michael West, Private Capacity, *Committee Hansard*, 17 July 2018, p. 13.

Scope of transparency measures

5.13 While supportive of calls for increased transparency, Mr Ian Yates, Chief Executive at COTA, asserted that financial accountability and probity mechanisms should apply to all aged care providers:

> [COTA] would support calls for increased transparency, while respecting that there is a degree of commercial confidentiality about the finances of any aged-care provider. But that degree of transparency should apply across the sector. It should apply to all for-profits and to not-for-profits and government providers as well. I have to say that there's quite a bit that we don't really know about the detailed operations—the drill-down operations—of some of the providers in the sector.[12]

5.14 Adjunct Associate Professor Michael West echoed this view, but argued that increased financial transparency measures should not be restricted to aged care providers, and ought to apply to any company in receipt of government subsidies:

> Absolutely. I think there should be far more transparency—I've been battling on about this for ages—of all public companies receiving government assistance of any kind. This is corporate welfare we're talking about here, and if you want to get taxpayers' money you should be accountable and transparent. I think it should apply to everybody, not just in aged care.[13]

5.15 Mr Matthew Richter, Chief Executive Officer of the Aged Care Guild, expressed support for any transparency mechanisms that improve the ability of aged care consumers to make informed choices about their care. However, Mr Richter also cautioned against the introduction of unnecessary regulatory burden for the sake of both aged care providers and consumers:

> Just to clarify, what we want to be careful of is unnecessary additional red tape and regulatory burden in this space because there's a high level of it already. Whether you're an industry operator or, particularly, a consumer—the consumers probably feel the burden of the regulatory red tape that's in place most of all—it's a very difficult system to navigate. We would just caution against anything which complicates it even further.[14]

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12 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 17 July 2018, p. 51.

13 Adjunct Associate Professor Michael West, Private Capacity, *Committee Hansard*, 17 July 2018, p. 16.

14 Mr Matthew Richter, Chief Executive Officer, Aged Care Guild, *Committee Hansard*, 17 July 2018, p. 41.

Comments from aged care providers

5.16 While aged care providers adamantly disputed the assertions of tax avoidance made by TJN-Aus, some industry representatives noted merit in the recommendations in the TJN-Aus Report. Indeed, some aged care providers advised that they already comply with the financial transparency measures proposed.[15]

5.17 For example, Ms Norah Barlow, Chief Executive Officer and Managing Director, Estia Health, told the committee that:

> We agree that accounts should be filed with ASIC and that the ability to have reduced disclosure for organisations receiving public funding should be removed. As a principle, this should apply, in my opinion, to all such entities, not simply the for-profit sector and not simply in aged care. It is clear that the revenues Estia receives from the government are directed to the provision of residential aged care. That is what we do. It is not so clear how others, including the very large and the small not-for-profit providers, utilise the subsidies they receive.
>
> We also agree that related-party transactions must be fully disclosed. This is not foreign to us, because as a listed provider we provide publicly available and very detailed financial reports, including the remuneration of our senior executives.[16]

5.18 Similarly, Japara noted that, as a publicly listed company on the Australian Securities Exchange (ASX), it is already subject to disclosure requirements for related party transactions. Japara also commented that:

> The audited financial statements of Japara Healthcare Limited and its Consolidated Entities are already lodged with ASIC and the ASX in full compliance with all Australian Accounting Standards (and International Financial Reporting Standards) and are not eligible for Reduced Disclosure Requirements. The audited financial statements include the results of all the entities within the Japara Healthcare group which includes those entities that are classed as Approved Providers (and receive Commonwealth subsidies and supplements) and full disclosure of all related party transactions.[17]

5.19 Japara agreed with the recommendation that the eligibility for Reduced Disclosure Requirements should be removed, but considered this measure should apply to all aged care providers, not just those receiving funds over a certain amount (i.e. $10 million).[18]

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15 See, for example, Bupa, *Submission 21*, p. 6; Japara Healthcare Limited, answers to questions on notice, 4 September 2018 (received 19 September 2018), [p. 2].

16 Ms Norah Barlow, Chief Executive Officer and Managing Director, Estia Health Ltd, *Committee Hansard*, 4 September 2018, p. 25.

17 Japara Healthcare Limited, answers to questions on notice, 4 September 2018 (received 19 September 2018), [p. 2].

18 Japara Healthcare Limited, answers to questions on notice, 4 September 2018 (received 19 September 2018), [p. 2].

Adequacy of current regulation

5.20 The *Aged Care Act 1997* (the Act) and associated principles mandate the financial accountability and reporting requirements of approved aged care providers. Under the Act, aged care providers are required to lodge annual financial returns with the Department of Health (the Department).

5.21 As explained by the Department:

> These [annual returns] provide information on the provider's revenue and expenditure and balance sheet. The Department undertakes a risk analysis of the financial information submitted by residential aged care providers to determine if there are any issues of financial concern with the provider which may affect their ability to continue to operate and repay accommodation deposits. This information is also used in a de-identified form by the Aged Care Financing Authority in preparation of its annual reports on the sector.[19]

5.22 The Aged Care Guild summarised the existing financial reporting requirements that residential aged care providers are subject to under the Act, including:

- Audited General Purpose Financial Reports (GPFR), which are prepared by all provides, lodged with the Department of Health and furnished to prospective and existing residents who request them.
- Aged Care Financial Reports [ACFR], which must be lodged with the Department of Health.
- Annual Prudential Compliance Statements [APCS], which must be lodged annually with the Department of Health and extracts furnished to residents that have paid a refundable deposit and prospective residents should they request it.[20]

5.23 The ACFR[21] became mandatory for all residential aged care providers in 2016–17. The Aged Care Financing Authority (ACFA) recommended the introduction of the ACFR in its September 2014 report—*Improving the Collection of Financial Data from Aged Care Providers*—with the aim of improving the consistency, quality and usability of financial data being received.[22]

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19 Department of Health, *Submission 26*, p. 3.

20 Aged Care Guild, *Submission 17*, pp. 8–9.

21 The ACFR involves a single template which consolidates the Annual Prudential Compliance Statement (APCS), Survey of Aged Care Homes, Home Care Financial Report, and Short Term Restorative Care Financial Report. Aged care providers must submit their stand-alone audited General Purpose Financial Report (GPFR) and audited opinion of their APCS at the same time as their ACFR. See Department of Health, *Changes to financial reporting arrangements for residential and home care providers*, https://agedcare.health.gov.au/programs/residential-care/changes-to-financial-reporting-arrangements-for-residential-and-home-care-providers (accessed 9 November 2018).

22 Aged Care Financing Authority, *Sixth report on the Funding and Financing of the Aged Care Sector*, July 2018, p. 93.

5.24 In addition to the mandated financial reporting regime under the Act, aged care providers have additional statutory reporting obligations relating to their company structures. Specifically, for-profit providers who satisfy the definition of a 'public company' or a 'large proprietary company' under the *Corporations Act 2001* must lodge their GPFR with ASIC. Conversely, not-for-profit providers must lodge their GPFR with the Australian Charities and Not-for-profits Commission (ACNC). Aged care providers publicly listed on ASX are also bound by the Australian Stock Exchange reporting requirements.

Stakeholder views

5.25 A number of industry stakeholders expressed the view that the current regulatory requirements of aged care providers relating to financial accountability and reporting are appropriate and adequate.[23]

5.26 Allity, for example, submitted that:

> Allity and other for-profit aged care providers are subject to a comprehensive and rigorous set of regulatory requirements for accountability and reporting of relevant financial and non-financial information…[24]

5.27 StewartBrown commented that it would not support the proposal of TJN-Aus requiring the lodgement of audited annual financial statements with ASIC for 'any company that receives Commonwealth funds over $10 million in any financial year' given that there are already two existing reporting regimes (that is, to ASIC in the case of for-profit aged care providers, and to the ACNC for not-for-profit providers).[25]

5.28 The Aged Care Industry Association (ACIA) noted that, in addition to ASIC regulation and the accountability regime administered by the Department, aged care providers are subject to oversight by the Australian Taxation Office (ATO). ACIA asserted that:

> Given these layers of oversight regarding adherence to taxation obligations—ACIA believes that existing accountability and probity mechanisms applying to aged care providers are more than adequate.[26]

5.29 Similarly, Leading Aged Services Australia (LASA) argued:

> Overall, the ATO, the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) provide a suitable regulatory framework to deal with business practices in the for-profit sector. As noted, for the aged care sector, there is also the

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23 See, for example, Allity, *Submission 20*; StewartBrown, *Submission 3*; Aged Care Industry Association, *Submission 9*; Leading Aged Services Australia, *Submission 15*.

24 Allity, *Submission 20*, p. 6.

25 StewartBrown, *Submission 3*, p. 12.

26 Aged Care Industry Association, *Submission 9*, pp. 5–6.

reporting to the Department of Health and ACFA is the appropriate body to review and advise on the financing of aged care.[27]

5.30 LASA described existing financial reporting requirements as being 'already onerous', and contended that any additional financial reporting 'should not be considered outside the context of a review of the overall reporting requirements for the residential aged care sector'.[28] LASA further submitted that:

> Inefficient and onerous reporting, only adds to the administrative costs of aged care, whereas some of these costs could be better directed to funding direct care.[29]

5.31 ACIA cautioned that increased financial reporting obligations could impact the willingness of aged care providers to invest and operate in the industry, with potential flow on consequences for competition and value for money:

> Aged care subsidies are not grants, subject to repayment or reporting. Similar activities occur in many areas of the economy. Should all suppliers to government be subject to increased financial reporting obligations, government is likely to find that fewer organisations are willing to act as suppliers. This reduction in competition, in turn, may well lead to increased pricing—and reduced value for taxpayer money.[30]

Availability and usability of data

5.32 Submitters and witnesses also reflected on the financial data already provided by aged care providers to the Department. Some inquiry participants contended that the transparency of providers' financial and tax practices could be improved through greater public availability and better use of existing data.

5.33 For instance, Dr Richard Cumpston noted that, under the Act, the Secretary of the Department has the discretion to publicly disclose information in relation to an aged care provider if it is deemed as necessary in the public interest to do so.[31] Dr Cumpston continued that:

> This discretion has apparently been used since 2003 to publish electronic lists of aged care services, showing their locations, providers, approved places and Commonwealth subsidies. Publication of the general purpose accounts spreadsheet summaries would allow comparative analyses, a better informed market and better advice to individuals seeking care.[32]

5.34 Adjunct Associate Professor Michael West also expressed the view that there is a need for greater public availability of financial information, arguing that annual

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27 Leading Aged Services Australia, *Submission 15*, p. 14.

28 Leading Aged Services Australia, *Submission 15*, p. 14.

29 Leading Aged Services Australia, *Submission 15*, p. 14.

30 Aged Care Industry Association, *Submission 9*, p. 5.

31 See *Aged Care Act 1997*, s. 86-3.

32 Dr Richard Cumpston, *Submission 24*, [p. 2].

financial statements of aged care providers should be accessible free-of-charge through the Department:

> All companies over a certain revenue threshold should report to the department. Instead of having to go to ASIC—you have to pay 38 bucks a pop to look around, search around for the correct entity. Some of these may have had 10 or 20 entities. It could be 380 bucks before you've even found the right company—if you know what you're looking for. People can't be expected to do this. These players are in this cherished position of looking after Australia's elderly. If they [aged care providers] want government money, they should be transparent…They're on the department website—perhaps the businesses should have it on their own websites too, but it should be free.[33]

5.35 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, ATO, drew the committee's attention to the fact that the transparency of aged care providers' financial data differs between regulators and the public:

> I'd say it's very important around transparency to distinguish between transparency to the tax office and transparency to the public, which might be through financial statements. These companies have full transparency to us. We can require them to lodge tax returns and supporting schedules, and we can ask for any information that we would require.[34]

5.36 In the same vein, Mr Sean Rooney, Chief Executive Officer at LASA, suggested that sufficient financial information is already reported, but that perhaps 'it's just not being pulled together or shared to the degree that might meet the needs of others'.[35] Mr Rooney observed that:

> …this is an industry that's data rich and information and knowledge poor, I'd suggest, because there is any number of data that is collected and reported. I think, at times, that seems to be the end in itself, rather than actually using that data and applying that in ways that help us understand the system, the dynamics and the demands, and the emerging needs in order to then allocate resources or interventions into that system to respond to what that data and information is telling us. And that's across the system, whether it be information regarding the compliance with the quality standards, whether it be validations through the Aged Care Funding Instrument, whether it be the ACFA reporting or whether it be any other of the compliance requirements that are required by providers.[36]

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33 Adjunct Associate Professor Michael West, Private Capacity, *Committee Hansard*, 17 July 2018, p. 12.

34 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 31.

35 Mr Sean Rooney, Chief Executive Officer, Leading Age Services Australia, *Committee Hansard*, 17 July 2018, p. 27.

36 Mr Sean Rooney, Chief Executive Officer, Leading Age Services Australia, *Committee Hansard*, 17 July 2018, p. 25.

5.37 Mr Yates from COTA acknowledged the recent work by ACFA to improve the utility of financial reporting relating to aged care; however, considered that there is still room for improvement with regard to the comparability of financial information between providers:

> …in the financial area it would be useful if we had a stricter set of controls about comparable finances. You may not be aware, but in its relatively brief life the Aged Care Financing Authority [ACFA]…has put a lot of work into trying to get better financial reporting out of the sector that was more useful, so we know that we're looking at apples to apples, but there still could be a way to go in that.[37]

Voluntary Tax Transparency Code

5.38 The Tax Transparency Code (TTC) is a set of principles and minimum standards to guide medium and large businesses on public disclosure of tax information. Adoption of the TTC is voluntary. The TTC is intended to complement Australia's existing tax transparency measures and enhance public understanding of the corporate sector's compliance with tax laws.[38]

5.39 As previously noted (paragraph 4.5), the ATO encourages greater transparency by entities in the aged care industry—in particular, those with multiple entry-point consolidated (MEC) group structures—through adoption of the TTC.[39]

5.40 The committee questioned representatives from the ATO as to the take-up of the TTC by the broader corporate sector. Mr Hirschhorn advised that:

> …because our tax base is so concentrated, with 1,100 companies paying two-thirds of all corporate tax and 100 paying a half and 10 paying a third, you don't need many taxpayers to sign up to have a huge amount of our corporate activity and tax in that code. There has been very significant sign-up by Australian listeds [sic] and there is increasing sign-up by foreign owned companies.[40]

5.41 However, the committee heard from some industry representatives that they do not presently implement the TTC. For instance, Mr Ben Feek, Chief Financial Officer of Opal Aged Care, advised the committee that:

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37 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 17 July 2018, p. 53. See also COTA Australia, *Submission 23*, p. 7.

38 Australian Taxation Office, *Voluntary Tax Transparency Code*, https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Voluntary-Tax-Transparency-Code/ (accessed 8 November 2018).

39 See Australian Taxation Office, *Submission 14*, p. 8.

40 Mr Jeremy Hirschhorn, Deputy Commissioner, Public Groups and International, Australian Taxation Office, *Committee Hansard*, 4 September 2018, p. 38.

> We are looking at and reviewing the voluntary outlines that the Australian tax office has prepared, but we don't currently comply with those requirements.[41]

5.42 Mr Feek further advised that Opal sees merit in what the TTC seeks to do, and expects the company's deliberations of the TTC's implications to conclude within the next nine months.[42]

5.43 Japara also noted that it has not formally implemented the TTC; however, it reported that it effectively complies with most of the relevant disclosures suggested by the code:

> For Japara Healthcare Limited, as a medium business, the TTC suggests that Part A should be adopted, which requires disclosure of, for example, a reconciliation of accounting profit to tax expense and to income tax paid or payable. Whilst Japara has not formally implemented the voluntary TTC, it effectively already complies with most of the suggested disclosures of Part A of the voluntary TTC, as disclosed in its financial statements. Nevertheless, it is presently reviewing the minimal additional disclosure requirements.[43]

Committee view

5.44 A consistent theme throughout this inquiry has been the transparency of aged care providers' financial practices; in particular, the lack of public information regarding the tax affairs of large for-profit providers.

5.45 The committee considers that recent corporate tax reforms are a good start, but contends that the evidence received during this inquiry strongly suggests that more needs to be done with regard to the transparency of company tax affairs. The committee reiterates its position highlighted in its previous inquiry into corporate tax avoidance—that greater transparency in tax affairs is integral for both addressing tax avoidance and minimisation practices and maintaining public confidence in the integrity of the tax system.

5.46 While the focus of this inquiry was on large for-profit aged care providers, the committee acknowledges that all providers in the aged care sector currently operate under broadly the same funding and regulatory environment. Accordingly, the committee agrees with stakeholders that any company in receipt of government subsidies should be held to a high standard of transparency and accountability. That said, the committee considers it important that regulation acknowledge and appropriately account for the varying motivations of different provider types.

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41 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 15.

42 Mr Ben Feek, Chief Financial Officer, Opal Aged Care, *Committee Hansard*, 4 September 2018, p. 15.

43 Japara Healthcare Limited, answers to questions on notice, 4 September 2018 (received 19 September 2018), [p. 3].

5.47 Publicly lodged financial statements form the cornerstone of a transparent and accountable tax system. The committee is concerned that some for-profit aged care providers are able to use current accounting standards to obscure public scrutiny of their financial activities. Private for-profit entities are not required to provide the same level of disclosure through financial statements as their publicly listed counterparts. The committee believes that it is in the public interest that all companies in receipt of government subsidies, including aged care providers, should be required to lodge General Purpose Financial Statements (GPFS) with ASIC.

5.48 The committee notes that the Australian Accounting Standards Board (AASB) is currently exploring how to improve the consistency, comparability and transparency of financial reports prepared in accordance with Australian Accounting Standards (AAS). The AASB has initiated this process in response to the International Accounting Standards Board's (IASB) revised *Conceptual Framework for Financial Reporting,* which was issued in March 2018.

5.49 In order to apply the IASB's revised Conceptual Framework in Australia, the committee notes that the AASB has recognised that it has to address the 'Australian reporting entity concept'—whereby for-profit entities are able to self-assess as a non-reporting entity and, in doing so, elect to utilise reduced disclosure requirements. Removing the reporting entity concept as it is currently defined in the AAS would remove the ability for entities to use reduced disclosure by preparing Special Purpose Financial Statements (SPFS). To maintain consistency with international standards, the AASB has noted its preference for a two-phased approach to applying the IASB's revised Conceptual Framework; including removing the Australian reporting entity concept and SPFS from the AAS in the medium-term (Phase 2—from 2021 onwards).[44]

5.50 The committee supports the intent of the AASB to align Australian Accounting Standards with international reporting standards, and fully endorses the proposed removal of the Australian reporting entity concept and ability for companies to utilise reduced disclosure requirements. The committee encourages the AASB in its deliberation to ensure that there are no other means by which companies who are in receipt of government subsidies are able to unnecessarily reduce the financial information disclosed in their financial statements.

Recommendation 3

5.51 The committee recommends that the Australian Accounting Standards Board implement the necessary changes to apply the International Accounting Standards Board's revised Conceptual Framework as soon as practicable.

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44 See AASB, *Consultation Paper—Applying the IASB's Revised Conceptual Framework and Solving the Reporting Entity and Special Purpose Financial Statement Problems*, May 2018, https://www.aasb.gov.au/admin/file/content105/c9/ITC39_05_18.pdf (accessed 13 November 2018).

5.52 The committee acknowledges the views of some industry representatives that the current regulatory requirements relating to financial accountability and reporting are adequate, and that an increase in reporting requirements would add to administrative costs for aged care providers. However, the committee considers that such costs should be outweighed by the benefits of increased access to, and comparability of, providers' financial information for consumers and other stakeholders in the sector.

5.53 Nonetheless, the committee recognises that aged care providers are currently required to provide a considerable volume of financial information to regulators, particularly to the Department of Health. The committee also notes comments from the ATO that it has transparent access to the financial information it requires of providers. Therefore, the committee shares the view of some stakeholders that more can be done—and indeed, that it is in the public interest—to enhance the availability and usability of financial information supplied by aged care providers.

Recommendation 4

5.54 The committee recommends that the Australian Government investigate options to increase the public transparency of aged care providers' financial information held by the Department of Health.

5.55 Notwithstanding that the recommendations above will increase transparency of aged care providers' financial and tax practices over time, the committee is of the opinion that existing mechanisms can be better utilised.

5.56 The committee is disappointed that, despite being introduced for large and medium businesses from the 2015–16 financial year, participation by for-profit aged care providers in the Tax Transparency Code (TTC) is underwhelming. While some providers noted that they are presently considering implementation of the TTC, the committee considers this delay an indication that providers are not wholly committed to the voluntary disclosure of their tax affairs. To bolster community confidence and demonstrate compliance with Australia's corporate tax laws, the committee argues—as it has in its previous inquiry into corporate tax avoidance—that the TTC be converted to a mandatory code for all large and medium corporations operating in Australia.

Recommendation 5

5.57 The committee recommends that the Australian Government convert the existing voluntary Tax Transparency Code to a mandatory code for all large and medium corporations operating in Australia, or adopt other strong transparency measures like the publication of data from country-by-country reporting.

Senator Chris Ketter	**Senator Jenny McAllister**
Chair	**Senator for New South Wales**

Coalition Senators Dissenting Report

General comments

1.1 Coalition Senators emphasise that they share the committee's view on the importance of aged care, especially given its deeply personal nature. Moreover, quality aged care is something that almost all Australians depend on, either for themselves or for those close to them.

1.2 Coalition Senators commend the government for deciding to hold a Royal Commission into Aged Care Quality and Safety, in recognition of the systemic problems in our aged care sector.

Conduct and Findings of inquiry

1.3 Coalition Senators note that this inquiry was announced in response to a report by the Tax Justice Network-Australia ('TJN-Aus'), which found no evidence of illegal tax avoidance. The report, commissioned by the Australian Nursing and Midwifery Federation (AMNF), was released on 2 May 2018, and this inquiry was subsequently opened on 10 May 2018 in response to this report.

1.4 Coalition Senators note that the decision to hold this inquiry was highly irresponsible. Instead of being a fact-finding mission about the financial and tax practices of for-profit aged care providers, this inquiry was conducted with a predetermined conclusion front of mind, but not the evidence to support that conclusion.

1.5 Indeed, the TJN-Aus report found that the companies in question paid corporate tax at a rate of 29.02 per cent and 29.78 per cent for financial years 2014–15 and 2015–16 respectively.[1] This is very close to the headline corporate tax rate in Australia of 30 per cent for companies with turnover greater than $50 million (applicable to all the companies in question). More importantly, these companies paid tax at a significantly higher rate than the average corporate tax rate in Australia, which is just 17 per cent.[2]

1.6 Coalition Senators are concerned by the intentionally misleading representation of data in the TJN-Aus report, where there is an emphasis on the proportion of income that is taxable. This measure is irrelevant, both to accountants and the ATO, and is used to create the illusion of tax avoidance.

1.7 Of further concern is the criticism of companies such as Allity which have legitimately deducted interest expense and used carry-forward losses to decrease their taxable income. Deduction of interest expense and the ability to carry forward losses

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1 See Table 2, Tax Justice Network-Australia, *Tax avoidance by for-profit aged care companies: Profit shifting of public funds*, May 2018, p. 11.

2 Congress of the United States Congressional Budget Office, *International Comparisons of Corporate Income Tax Rates*, March 2017, p. 2, https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52419-internationaltaxratecomp.pdf (accessed 27 November 2018).

are long standing features of our tax code and are in no way forms of illegitimate tax minimisation.

1.8 Coalition Senators are at pains to highlight that, despite receiving 32 public submissions and holding almost two full days of public hearings, this inquiry has made no substantive findings of systemic tax avoidance in this sector whatsoever. This inquiry was a waste of time and public money.

1.9 Coalition Senators believe that this inquiry was a 'Trojan horse': it was ostensibly an inquiry into the financial and tax practices of for-profit aged care providers, but the TJN-Aus report's 'findings' were used by the ANMF to advocate for mandated nurse-to-patient ratios. Any inquiry into such ratios has no place being conducted by the Senate Economics References Committee. Any investigation of matters relating to staffing ratios would be best examined by the Senate Community Affairs References Committee.

Chapter 4—'Broader stakeholder views' (Recommendations 1–2)

1.10 Coalition Senators wholeheartedly agree with the Chair's report's assertion that 'the public justifiably expects assurance that government funding is appropriately allocated to the provision of quality care'.

1.11 Coalition Senators agree with Recommendation 2 of the Chair's report, which aims to increase transparency of and comparability between aged care providers, so that families are more easily able to make informed choices about aged care.

Chapter 5—'Transparency' (Recommendations 3–5)

1.12 Coalition Senators note that the government has legislated to ensure that companies are required to provide the Australian Taxation Office with the information it requires to determine the right amount of tax that companies should pay.

1.13 Coalition Senators agree that transparency is important to ensure that companies pay the right amount of tax; however, a balance must be struck between taxpayer confidentiality and the need for any information made public to be well understood and relevant.

1.14 Coalition Senators note that the government is pressing ahead with tougher rules to prevent multinationals from avoiding tax, and will increase transparency and improve enforcement by giving tax whistle-blowers greater protection.

1.15 With reference to Recommendation 3, Coalition Senators note that the Australian Accounting Standards Board (AASB) is currently consulting on how to introduce the International Accounting Standards Board's revised Conceptual Framework for Financial Reporting into Australia and improve the consistency, comparability and transparency of financial reports prepared in accordance with the Australian Accounting Standards. The consultation paper addresses the special purpose financial statement problem caused by Australia's unique accounting requirements that allow entities to self-assess as 'non-reporting entities'.

1.16 Coalition Senators reject Recommendation 5 of the Chair's Report, which recommends that 'the Australian Government convert the existing voluntary Tax Transparency Code to a mandatory code for all large and medium corporations operating in Australia, or adopt other strong transparency measures like the publication of data from country-by-country reporting'.

1.17 The OECD's Base Erosion Profit Shifting (BEPS) recommendation on country-by-country reports explicitly states that jurisdictions should enforce legal protections of the confidentiality of the reported information.

1.18 Coalition Senators note that the purpose of country-by-country reporting is to increase revenue authorities' access to and understanding of the global tax position of multinational corporations. The country-by-country reporting program allows the tax administrations of participating countries, including Australia, to leverage the information contained in country-by-country reports to better identify potential tax risks—particularly in respect of transfer pricing matters.

1.19 The Australian Taxation Office condemns the proposal that country-by-country documentation be publicly released. The Commissioner of Taxation stated in his evidence before Senate Estimates on 25 October 2017:

> The arrangement, through the OECD—we signed a multilateral agreement. That agreement is based on the information that is exchanged. The information is to be kept within the confines of the relevant tax authorities. If people call for this to be made public—no-one would give us anything, so there'd be nothing to make public. We've signed up to an international agreement, as with the others, to say that this will occur as long as the information is only provided to tax authorities.[3]

1.20 Coalition Senators note the immense value of this country-by-country reporting, and reaffirm its transformative power. As the Commissioner of the Australian Taxation Office noted in his evidence before the Senate Economics Legislation Committee at Senate Estimates on 25 October 2017:

> …our people think this is of enormous benefit to get the level of detail that we've never had before in a proactive way…this is transformational in our international tax work.[4]

1.21 Coalition Senators note that Australia is bound by an international multilateral agreement. As noted by Mr Mark Konza, Deputy Commissioner, International, in evidence before the Economics Legislation Committee at Senate Estimates of 28 February 2018:

> We're a party to a global deal where all the countries got together, examined the issue and agreed that these files would be transferred between the countries, as long as confidentiality was maintained. For Australia to move unilaterally to publish them would be to break a deal that we've made as a country.[5]

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3 Mr Chris Jordan, Commissioner of Taxation, *Committee Hansard*, 25 October 2017, p. 109.

4 Mr Chris Jordan, Commissioner of Taxation, *Committee Hansard*, 25 October 2017, p. 109.

5 Mr Mark Konza, Deputy Commissioner, International, *Committee Hansard*, 28 February 2018, p. 114.

1.22 Coalition Senators do not support public release of information gained through country-by-country reporting.

Review of National Aged Care Quality Regulatory Processes—'Carnell-Paterson Review'

1.23 Coalition Senators note that the government has been consistently working to reform the aged care sector. On 1 May 2017, the Minister for Aged Care commissioned a Review of National Aged Care Quality Regulatory Processes (Carnell-Paterson Review).

1.24 Receiving over 400 submissions and conducting over 40 consultations, the review highlighted the need for better coordination in regulatory functions, expanded intelligence-gathering capacity and a better system for sharing information on provider performance with the public and aged care service providers, to promote service improvement.

Establishment of the Aged Care Quality and Safety Commission

1.25 Coalition Senators commend the government for its work to establish the Aged Care Quality and Safety Commission, a one-stop-shop which will replace the existing Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner from 1 January 2019. The establishment of the Commission forms an integral part of the government's response to the Carnell-Paterson Review.

Maintaining the integrity of the tax system

1.26 Coalition Senators note that the Government has been working consistently to reform our tax system to ensure that it maintains a broad base, and is not susceptible to tax avoidance, particularly by multinational corporations.

1.27 Coalition Senators wish to draw attention to the 2018–19 Budget, in which the government announced further measures to ensure businesses are paying their fair share of tax. These include:

- Strengthening the rules that limit interest deductibility to stop companies shifting profits out of Australia, including requiring companies to align the value of their assets with the value included in their financial statements; and
- Broadening the scope of large multinationals being subject to the Multinational Anti-Avoidance Law (MAAL) and the Diverted Profits Tax (DPT).

1.28 Coalition Senators also note that the 2018–19 Budget strengthens the definitions of a large multinational (or Significant Global Entity) to ensure that it operates as intended. This will ensure that large multinational businesses that are ultimately owned by private entities or investment entities are not inadvertently excluded from the application of tax integrity rules such as the DPT and MAAL.

1.29 Furthermore, Coalition Senators note that the government is introducing tough new laws to prevent multinationals from avoiding tax by addressing hybrid mismatch arrangements.

Concluding remarks

1.30 Whatever mechanisms are identified to address these issues and concerns, consideration must be given to ensure that any requirement does not unreasonably add burden and red-tape to businesses, noting the majority of businesses are law-abiding corporations. Accordingly, any disclosure obligation built into the reporting process should consistently capture any forms of serious illegal behaviour, not just corporate tax avoidance in isolation. It would not be best regulatory practice to impose red-tape on law-abiding firms requiring them to establish internal processes to prevent remote likelihood events.

1.31 Coalition Senators stress the importance of care, choice and sustainability in the aged care sector. With an ageing population, more and more Australians will need to rely on the aged care sector to look after themselves and their loved ones. Australians will continue to rely on the government, not-for-profit and for-profit aged care sectors working in concert with one another.

1.32 As such, Coalition Senators warn that any punitive measures intended to impact one sector (e.g. the for-profit sector) may have unintended and potentially dire consequences for other sectors. Coalition Senators encourage caution.

Senator Jane Hume
Deputy Chair

Appendix 1
Submissions and additional documents

Submissions

1 Combined Pensioners and Superannuants Association
2 NSW Nurses and Midwives' Association
3 StewartBrown
4 Australian Nursing and Midwifery Federation (TAS Branch)
5 Australian Nursing and Midwifery Federation (SA Branch)
6 Queensland Nurses and Midwives' Union
7 Regis Healthcare Limited
8 Professor Richard Eccelston and Mr Lachlan Johnson
9 Aged Care Industry Association
10 Australian Council of Trade Unions
11 Australian Nursing & Midwifery Federation
12 Mr Michael West and Mr Jason Ward
13 Public Services International
14 Australian Taxation Office
15 Leading Age Services Australia Ltd
16 Health Care Consumersâ€™ Association
17 Aged Care Guild
18 Aged Care Complaints Commissioner
19 Japara Healthcare Limited
20 Allity
21 Bupa
22 Opal Aged Care
23 COTA Australia
24 Dr Richard Cumpston
25 Tax Justice Network Australia
26 Department of Health
27 Ms Jenny Bond
28 Confidential
29 Name Withheld

30 Confidential

31 Ms Mary Bruinink

32 Aged Care Crisis Inc.

Tabled documents

1 Document tabled by Tax Justice Network Australia at a public hearing in Sydney on 17 July 2018.

2 Document tabled by Opal Aged Care at a public hearing in Melbourne on 4 September 2018.

Answers to questions on notice

1 Michael West: Answers to questions taken on notice at a public hearing in Sydney on 17 July 2018, received on 17 July 2018.

2 Michael West: Answers to questions taken on notice at a public hearing in Sydney on 17 July 2018, received on 17 July 2018.

3 Combined Pensioners and Superannuants Association: Answers to questions taken on notice at a public hearing in Sydney on 17 July 2018, received on 30 July 2018.

4 Allity: Answers to questions taken on notice at a public hearing in Sydney on 17 July 2018, received on 13 August 2018.

5 Tax Justice Network Australia: Answers to questions taken on notice at a public hearing in Sydney on 17 July 2018, received on 14 August 2018.

6 Opal Aged Care: Answers to questions taken on notice at a public hearing in Melbourne on 4 September 2018, received on 19 September 2018.

7 Japara: Answers to questions taken on notice at a public hearing in Melbourne on 4 September 2018, received on 19 September 2018.

8 Australian Taxation Office: Answers to questions taken on notice at a public hearing in Melbourne on 4 September 2018, received on 19 September 2018.

Additional information

1 Additional information provided by Dr Richard Cumpston on 29 August 2018.

Additional hearing information

1 Additional information provided by Leading Age Services Australia Ltd following a public hearing in Sydney on 17 July 2018.

2 Correction of evidence provided by the Australian Taxation Office following a public hearing in Melbourne on 4 September 2018.

Appendix 2
Public hearings

Sydney, 17 July 2018

Members in attendance: Senators Hume, McAllister, Siewert, Storer.

ARMSTRONG, Mr David, Chief Executive Officer, Allity Pty Ltd

CORDEROY, Mr Grant, Senior Partner, StewartBrown

HUTCHEON, Mr Stuart, Managing Partner, StewartBrown

POWER, Ms Bronagh, Policy Officer, Combined Pensioners and Superannuants Association

RICHTER, Mr Matthew, Chief Executive Officer, Aged Care Guild

ROONEY, Mr Sean, Chief Executive Officer, Leading Age Services Australia

VERSTEEGE, Mr Paul, Policy Coordinator, Combined Pensioners and Superannuants Association

WARD, Mr Jason, Spokesperson, Tax Justice Network Australia

WEST, Adjunct Associate Professor Michael, Private capacity

YATES, Mr Ian, Chief Executive Officer, Council of the Ageing Australia

Melbourne, 4 September 2018

Members in attendance: Senators Brockman, Hume, McAllister, Siewert.

BARLOW, Norah, Chief Executive Officer and Managing Director, Estia Health Ltd

BUTLER, Ms Annie, Federal Secretary, Australian Nursing and Midwifery Federation

FEEK, Mr Ben, Chief Financial Officer, Opal Aged Care

HIRSCHHORN, Mr Jeremy, Deputy Commissioner, Public Groups and International, Australian Taxation Office

PARKINSON, Mr Scott, Assistant Commissioner, Private Groups and High Wealth Individuals, Australian Taxation Office

SAINT, Ms Rebecca, Assistant Commissioner, Public Groups and International, Australian Taxation Office

SHARP, Ms Lori-Anne, Assistant Federal Secretary, Australian Nursing and Midwifery Federation

SUDHOLZ, Mr Andrew, Chief Executive Officer, Japara Healthcare