

2013-2014-2015

EXPOSURE DRAFT

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PRIVATE HEALTH INSURANCE (PRUDENTIAL SUPERVISION) BILL 2015

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EXPLANATORY MATERIAL

(Circulated by the authority of the  
Assistant Treasurer, the Hon Josh Frydenberg MP)



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AAT	Administrative Appeals Tribunal
ADI	Authorised deposit-taking institution within the meaning of the <i>Banking Act 1959</i>
APRA	Australian Prudential Regulation Authority
APRA Act	<i>Australian Prudential Regulation Authority Act 1998</i>
Corporations Act	<i>Corporations Act 2001</i>
FS(CD) Act	<i>Financial Sector (Collection of Data) Act 2001</i>
Life Insurance Act	<i>Life Insurance Act 1995</i>
PHIAC	Private Health Insurance Administration Council
PHI Act	<i>Private Health Insurance Act 2007</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
The Exposure Draft	The Private Health Insurance (Prudential Supervision) Exposure Draft 2015



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# Chapter 1

## General Introduction

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### Context of amendments

1.1 The Private Health Insurance Administration Council (PHIAC) is the prudential regulator of the private health insurance industry in Australia. It was first established in 1989, under the *National Health Act 1953* and continues its operations under the *Private Health Insurance Act 2007* (PHI Act).

1.2 PHIAC is responsible for monitoring the prudential performance of registered private health insurers. PHIAC's role includes:

- registration of private health insurers;
- developing solvency, capital adequacy and other prudential standards for the industry;
- publishing circulars, statistics and reports on insurer activities and performance; and
- administering the Risk Equalisation Trust Fund.

1.3 As part of the *Smaller Government – additional reductions in the number of Australian Government bodies* initiative announced as part of the 2014-15 Budget, PHIAC will cease as a separate body, and its prudential supervisory functions will be transferred to the Australian Prudential Regulation Authority (APRA).

1.4 The transfer of PHIAC's prudential supervisory functions will be given effect by the Exposure Draft which represents a new Act for the prudential regulation of private health insurers, administered by APRA.

1.5 It is intended that the Exposure Draft will form part of a package of Bills which will also include:

- a transitional and consequential Bill; and
- the Private Health Insurance Amendment Bill (No. 1) 2015.

1.6 It is intended that the Transitional and Consequential Bill will relate to matters including the:

- transfer of registration of private health insurers, already registered under the PHI Act, so that they will be taken to be registered under the new Act as at 1 July 2015;
- continuation of health benefits funds conducted by a private health insurer under the PHI Act;
- the continued application of solvency, capital adequacy and prudential standards made under the PHI Act (and exemptions to these standards) as if made under the new Act (however, to avoid the need to cross-refer to PHIAC-made standards, it is likely that APRA will replace them with APRA-made standards, in substantially the same form as the PHIAC standards, effective 1 July 2015);
- continuation of actuary appointments;
- transition of any enforcement actions, disqualifications, directions and enforceable undertakings;
- arrangements for outstanding levies, returns and requests for information;
- the transfer of PHAIC staff, assets and liabilities and records from PHIAC to APRA;
- amendments to levy legislation so that the administration levy is renamed to reflect APRA's role, with that levy and the collapsed insurer levy to be collected under the *Financial Institutions Supervisory Levies Collection Act 1998*; and
- amendments to enable APRA to continue collection of returns and data from private health insurers by moving that function into the *Financial Sector (Collection of Data) Act 2001* (FS(CD) Act).

1.7 It is intended that the Private Health Insurance Amendment Bill (No. 1) 2015 will repeal provisions of the PHI Act relating to the establishment, functions and responsibilities of PHIAC (referred to in the PHI Act as the Council).

1.8 The PHI Act will retain provisions relating to private health insurance policy such as the establishment and administration of the premiums reduction scheme (the Australian Government Rebate on



private health insurance) and lifetime health cover and the rules for complying health insurance products (including the community rating principle). Enforcement provisions relevant for these provisions and certain reporting provisions required to support these obligations will also be retained in the PHI Act.

## Summary of new law

1.1 The Exposure Draft creates a regime for the prudential regulation of private health insurers to be administered by APRA. The Exposure Draft replicates elements of the regime currently set out in the PHI Act with some modifications to harmonise certain provisions with other legislation administered by APRA, reduce duplication, update investigation powers to bring them more into line with the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) and allow the regime to operate more efficiently.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>The Exposure Draft will establish APRA as the prudential regulator of the private health insurance industry.</p> <p>The Exposure Draft will provide for the:</p> <ul style="list-style-type: none"> <li>• registration of private health insurers and the prevention of entities not registered from carrying on a health related business (Part 2);</li> <li>• requirement for private health insurers to have health benefits funds and obligations relating to the operation of such funds (Part 3, Divisions 2 and 3);</li> <li>• restructure, merger, acquisition and termination of health benefits funds (Part 3, Divisions 4 and 5);</li> <li>• appointment of an external manager of a health benefit fund and the powers and duties of</li> </ul>	<p>The PHI Act establishes PHIAC as the prudential regulator for the private health insurance industry.</p> <p>The main provisions in the PHI Act that relate to PHIAC and its supervisory role include the:</p> <ul style="list-style-type: none"> <li>• registration of private health insurers and the prevention of entities not registered from carrying on a health insurance business (Parts 4-2 and 4-3);</li> <li>• requirement for private health insurers to have health benefits funds and obligations relating to the operation of such funds (Part 4-40);</li> <li>• establishment of solvency and capital adequacy standards and directions by PHIAC and the requirement for health benefits funds to comply with such standards and directions (Part 4-4);</li> </ul>

<p>external managers and terminating managers (Part 3, Divisions 6, 7 and 8);</p> <ul style="list-style-type: none"> <li>• duties and liabilities of directors (Part 3, Division 9);</li> <li>• establishment of prudential standards and directions by APRA and the requirements for health benefits funds to comply with such standards and directions (Part 4);</li> <li>• obligations of private health insurers such as the appointment of actuaries and reporting and notification requirements (Part 5, Divisions 2, 3 and 4);</li> <li>• APRA’s ability to supervise compliance by private health insurers with their obligations and APRA’s enforcement powers (Part 6);</li> <li>• enforceable undertakings (Part 7);</li> <li>• APRA’s ability to seek remedies for a contravention for an enforceable obligation (Part 8);</li> <li>• review of APRA’s decisions by the Administrative Appeals Tribunal (AAT) (Part 9); and</li> <li>• ability of APRA to give approvals and make determinations and rules (Part 9).</li> </ul>	<ul style="list-style-type: none"> <li>• establishment of prudential standards for private health insurers and the requirement for insurers to comply with such standards (Part 4-4);</li> <li>• restructure, merger, acquisition and termination of health benefit funds (Part 4-4 and 6-5);</li> <li>• obligations of private health insurers such as the appointment of actuaries and reporting and notification requirements (Part 4-5);</li> <li>• PHIAC’s ability to supervise compliance by private health insurers with their obligations (‘Council-supervised obligations’) (Parts 5-2 and 5-3);</li> <li>• PHAIC’s general enforcement powers (Part 5-2);</li> <li>• appoint an external manager of a health benefit fund and the powers and duties of external managers (Parts 5-3 and 6-5);</li> <li>• continuation, purpose, functions and administration of PHIAC (Chapter 6);</li> <li>• review of PHIAC decisions by the AAT (Part 6-9); and</li> <li>• ability of PHIAC to make Private Health Insurance Rules, via legislative instrument (Part 6-10).</li> </ul>
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## **Chapter 2**

### **Introduction**

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#### **Outline of chapter**

2.1 Part 1 of the Exposure Draft deals with the preliminary provisions of the Exposure Draft. This includes:

- the short title and commencement of the Exposure Draft;
- an outline of the Exposure Draft;
- the definition of terms used in the Exposure Draft; and
- the constitutional basis an application of the Exposure Draft.

#### **Detailed explanation of new law**

##### **Part 1 – Introduction**

###### *Division 1 - Preliminary*

###### *Short title*

2.2 The Act may be cited as the Private Health Insurance (Prudential Supervision) Act 2015. *[Part 1, Division 1, section 1]*

###### *Commencement*

2.3 The Exposure Draft commences on 1 July 2015. *[Part 1, Division 1, section 2]*

###### *Simplified outline of this Act*

2.4 A simplified outline of this Part will be inserted here once drafted. *[Part 1, Division 1, section 3]*

###### *Interpretation*

2.5 The dictionary to the Exposure Draft provides definitions of terms used in the Exposure Draft. In some cases, the definitions are signposts to other provisions within the Exposure Draft or refer to

definitions of terms in other Acts in which the meaning of the term is given. *[Part 1, Division 1, section 4]*

*General administration of the Act*

2.6 APRA will have responsibility for the general administration of the Act. *[Part 1, Division 1, section 5]*

*Division 2 - Constitutional matters*

2.7 Division 2 relates to the constitutional basis of the Exposure Draft and the Exposure Draft's application. The division is based on Division 5 of Part 1-1 of the PHI Act.

*Meaning of insurance*

2.8 A reference to **insurance** in the Exposure Draft is a reference to **insurance** within the meaning of paragraph 51(xiv) of the Constitution. *[Part 1, Division 2, section 6]*

*Act not to apply to State insurance within that State*

2.9 The Exposure Draft does not apply to State insurance that does not extend beyond that State. *[Part 1, Division 2, section 7]*

*Compensation for acquisition of property*

2.10 If the operation of the Exposure Draft would result in an unjust acquisition of property for a person otherwise than on just terms (within the meaning of paragraph 51(xxi) of the Constitution) the Commonwealth is liable to pay a reasonable amount of compensation to the person. If agreement cannot be reached on the amount of compensation, the person may take action in the Federal Court. *[Part 1, Division 2, section 8]*

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## **Chapter 3**

# **Registration of private health insurers**

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### **Outline of chapter**

3.1 Part 2 of the Exposure Draft provides a registration regime for private health insurers administered by APRA. It includes:

- a prohibition on carrying on health insurance business without being registered and the availability of injunctions to enforce breaches of this prohibition;
- arrangements for applying for registration and changes in registration status; and
- APRA's powers to grant or refuse applications and cancel a private health insurer's registration.

### **Summary of new law**

3.2 Part 2 is largely based on the existing registration provisions in Parts 4-2 and 4-3 of the PHI Act, with some modifications to simplify the provisions relating to APRA's decision whether or not to register an applicant and bring about consistency with other legislation administered by APRA.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Prohibition against carrying on health insurance business without registration and injunctions to enforce this prohibition (sections 10 and 11 of the Exposure Draft).	Prohibition against carrying on health insurance business without registration (sections 118-1 and 118-5 of the PHI Act).
Applying for registration (section 12 of the Exposure Draft).	Applying for registration (section 126-10 of the PHI Act).
Arrangements for applying for registration and changes in registration status and APRA's	Arrangements for applying for registration and changes in registration status (sections 126-10 to

powers to grant or refuse application and cancel a private health insurer's registration (sections 12 to 21 of the Exposure Draft).	126-42 of the PHI Act).
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## Detailed explanation of new law

### *Division 1 - Introduction*

#### *Simplified outline of this Part*

3.3 A simplified outline of this Part will be inserted here once drafted. *[Part 2, Division 1, section 9]*

### *Division 2 - Prohibition of carrying on health insurance business without registration*

#### *Carrying on business without registration*

3.4 It is an offence with a penalty of 40 penalty units to carry on a health insurance business without being registered. *[Part 2, Division 2, subsection 10(1)]*

3.5 A person who commits such an offence does so in respect of the first day the offence of committed and each day thereafter (including the day of conviction or later day). *[Part 2, Division 2, subsection 10(2)]*

3.6 The definition of health insurance business is provided by section 4 of the Exposure Draft which states the term has the same meaning as in the PHI Act.

#### *Injunctions*

3.7 If the Federal Court is satisfied a person has, or will, engage in conduct contravening the prohibition against carrying on health insurance business without being registered, it may, on the application of APRA grant an injunction. *[Part 2, Division 2, subsection 11(1)]*

3.8 Pending the determination of APRA's application, the Federal Court may grant an interim injunction, but must not require the applicant to give an undertaking as to damage as a condition of granting the interim injunction. *[Part 2, Division 2, subsections 11(2) and (3)]*

3.9 The Federal Court may also discharge or vary an injunction. *[Part 2, Division 2, subsection 11(4)]*

3.10 The Federal Court's restraining injunction power may be exercised whether or not it appears to the Federal Court that the person intends to engage again, or continue to engage in, the relevant conduct or whether the person has previously engaged in the conduct. *[Part 2, Division 2, subsection 11(5)]*

3.11 The court will also have power to grant an injunction requiring a person to do an act or thing whether or not the person intends to refuse or fail again, or continue to fail or refuse, to do the act or thing, and whether the person has previously refused to fail to do the act or thing. *[Part 2, Division 2, subsection 11(6)]*

### ***Division 3 - Registration***

#### *Applying for registration*

3.12 A body that is a company within the meaning of the *Corporations Act 2001* (Corporations Act), which is also a constitutional corporation, may apply to APRA for registration as a private health insurer. *[Part 2, Division 3, section 12(1)]*

3.13 The application must be in the approved form, accompanied by a copy of the applicant's proposed business rules and if the applicant is seeking to be registered as a for profit or restricted access insurer, state this. *[Part 2, Division 3, subsection 12(2)]*

#### *Requiring further information*

3.14 Within 90 days of the application, APRA may give an applicant written notice requiring them to give further information to APRA relating to an application. *[Part 2, Division 3, section 13]*

#### *Criteria for registration*

3.15 APRA may make rules setting out criteria for registration. *[Part 2, Division 3, section 14]*

#### *Deciding the application*

3.16 APRA may grant the application, subject to any terms and conditions it thinks fits. *[Part 2, Division 3, subsection 15(1)]*

3.17 A decision to refuse or to apply terms and conditions is reviewable under section 167.

3.18 If APRA grants the application then:

- the applicant is taken to have been registered as a private health insurer from the date specified by APRA; and
- if the registration is subject to terms and conditions, those are taken to have applied from the date on which the applicant is notified of the grant; and
- if the applicant sought registration as a for profit insurer it is taken to be registered as such; and
- if the applicant sought registration as a restricted access insurer it is taken to be registered as such subject to subsection (3). *[Part 2, Division 3, subsection 15(2)]*

3.19 An applicant's constitution or business rules satisfy subsection (3) if they :

- describe the restricted access group the insurer's complying health insurance products are, or will be, available to;
- prohibit the insurer issuing such a product to anyone outside of the group; and
- prohibit the insurer ceasing to insure a person because they no longer belong to the group. *[Part 2, Division 3, subsection 15(3)]*

3.20 A **restricted access group** is defined as a group of people belonging to a particular group due to being:

- employed in a particular profession, trade industry or calling;
- employed by a particular employer or employer belonging to a particular class of employer;
- a past or present member of:
  - a particular profession, professional association or union;  
or
  - the Defence Force (or part of the Defence Force); or
- currently or previously part of any group described in APRA rules; or



- currently or previously part of a group set out on APRA rules. These rules may describe a group as having one or more classes of people (whether or not they are described by reference to matters referred to in paragraphs 4(a) to (d).  
[Part 2, Division 3, subsections 15(4) and (5)]

3.21 A partner or dependent children of a person who belongs to such a group is also considered as belonging to the group.

*Notifying the decision*

3.22 If APRA grants the application, it must:

- notify the applicant in writing of the grant and any terms and conditions to which it is subject; and
- publish details of the grant in the Gazette within one month.  
[Part 2, Division 3, subsection 16(1)]

3.23 If APRA refuses the application, it must notify the applicant of this in writing. [Part 2, Division 3, subsection 16(2)]

*APRA can be taken to refuse application*

3.24 APRA is taken to have refused the application for the purposes of section 167 if it does not notify the applicant of its decision by the latest of:

- 90 days after the application was made; or
- 90 days after further information was provided to APRA under section 13. [Part 2, Division 3, section 17]

*APRA to ensure that up-to-date record of information about private health insurers is publicly available.*

3.25 APRA must maintain on its website an up to date record of private health insurers. The records must contain the insurer's status, name and contact details. [Part 2, Division 3, section 18]

*Changing registration status*

For profit insurer

3.26 Private health insurers may, by notifying APRA in the approved form, change their status from for profit insurer to not for profit insurer or, with the approval of APRA under section 20, from not for profit to for profit. [Part 2, Division 3, subsections 19(1) and (2)]

Restricted access insurer

3.27 Private health insurers may, by notifying APRA in the approved form, change their status from restricted access insurer to other insurer or change their status to restricted access insurer (subject to compliance with subsection 15(4)). *[Part 2, Division 3, subsection 19(4) and (5)]*

3.28 APRA must notify changes of status to the Health Secretary, the Private Health Insurance Ombudsman and (in relation to profit status) the Commissioner of Taxation. *[Part 2, Division 3, subsection 19(3) and (6)]*

*Conversion to for profit status*

3.29 A private health insurer may apply to APRA for approval to convert to for profit status. The application must be made in the approved form and be given to APRA least 90 days before the proposed date of effect. *[Part 2, Division 3, subsections 20(1) and (2)]*

3.30 APRA must approve the application within 30 days if it is satisfied that the application has been made in the approved form and the conversion scheme does not in substance involve a demutualisation of the insurer *[Part 2, Division 3, subsection 20(3)]*. If the scheme does in substance involve a demutualisation then the processes in subsections (4) and (5) will apply. Subsections (4) and (5) are discussed below.

3.31 APRA rules may set out criteria for deciding, for the purposes of subsection (3), if an application to convert to for profit status does not involve demutualisation. *[Part 2, Division 3, subsection 20(6)]*

3.32 If an application to convert to for-profit status is not approved through the operation of subsection 20(3), the application must be advertised publicly at least 45 days before the proposed date of effect. *[Part 2, Division 3, paragraph 20(4)(a)]*

3.33 APRA may seek further information on the application within 90 days of it being made. *[Part 2, Division 3, paragraph 20(4)(b)]*

3.34 Providing that the insurer has complied with subsection (2) and paragraph (4)(b), APRA must approve the application if satisfied that the conversion scheme:

- would not result in a financial benefit to a person (including a natural person and a corporate person) who is not a policy holder or not insured through a health benefits fund conducted by the insurer; and
- would not result in an inequitable distribution of financial benefits between policy holders and persons insured through

a health benefits fund conducted by the insurer. *[Part 2, Division 3, subsection 20(5)]*

3.35 APRA must provide written notice to the insurer on the outcome of the application. *[Part 2, Division 3, subsection 20(7)]*

*Cancellation of registration*

3.36 APRA must cancel the registration of a private health insurer if it has not conducted health insurance business for 12 months, its health benefits funds have been terminated under Division 149 or the insurer is no longer a company within the meaning of the Corporations Act. *[Part 2, Division 3, subsection 21(1)]*

3.37 APRA must notify the insurer in writing of the cancellation and publish in the Gazette a notification within a month. *[Part 2, Division 3, subsection 21(2)]*



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## **Chapter 4**

### **Health benefits funds**

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#### **Outline of chapter**

4.1 Part 3 of the Exposure Draft relates to the operation, external management and termination of health benefits funds. It provides for the:

- establishment and operation of health benefits funds;
- restructure, merger and acquisition of health benefits funds;
- termination and external management of health benefits funds; and
- APRA's ability to give notices to directors and remedies for non-compliance.

#### **Summary of new law**

4.2 Divisions 2, 3, 4, 5 and 9 of Part 3 are based on Part 4-4 of the PHI Act. However, they omit the special provisions for solvency standards and directions (currently in Division 140 of the PHI Act) and capital standards and directions (currently in Division 143 of the PHI Act) as these will be absorbed in APRA's general prudential standard-making and directions powers in Divisions 2 and 3 of Part 4 of the Exposure Draft.

4.3 Divisions 6, 7, and 8 are based on provisions in Parts 4-4 and 5-3 of the PHI Act. This will simplify the legislative regime by co-locating into Part 3 of the Exposure Draft all the provisions relating to the operation, merger and acquisition, external management and termination of health benefits funds that are located in various parts of the PHI Act.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Establishment and operation of health benefits funds (Divisions 2 and 3 of Part 3 of the Exposure Draft).	Establishment and operation of health benefits funds (sections 134-1 and 134-10, 137-1 to 137-20 of the PHI Act).
Restructure, merger and acquisition of health benefits funds (Division 4 of Part 3 of the Exposure Draft).	Restructure, merger and acquisition of health benefits funds (Division 146 of the PHI Act).
Termination and external management of health benefits funds (Divisions 5, 6, 7 and 8 of Part 3 of the Exposure Draft).	Termination and external management of health benefits funds (Divisions 149, 217, 290, 293, 296 and 299 of the PHI Act).
APRA's ability to give notices to directors and remedies for non-compliance (Division 9 of Part 3 of the Exposure Draft).	APRA's ability to give notices to directors and remedies for non-compliance (Division 152 of the PHI Act).

## Detailed explanation of new law

### Division 1 – Introduction

#### *Simplified outline of this Part*

4.4 A simplified outline of this Part will be included here once drafted. [Part 3, Division 1, section 22]

### Division 2 – The requirement to have a health benefits funds

#### *Private health insurers must have health benefits funds*

4.5 A private health insurer is required to have at least one health benefits fund at all times, in respect of:

- its health insurance business; or
- its health insurance business and some or all of its health-related businesses. [Part 3, Division 2, subsection 23(1)]

4.6 Section 4 of the Exposure Draft defines health benefit fund, health insurance business and health-related business as having the same meaning as in the PHI Act.

4.7 A private health insurer may have multiple health benefits funds, but no more than one in respect of a risk equalisation jurisdiction [*Part 3, Division 2, subsection 23(2)*]. Subsection 32(7) of the Exposure Draft provides that an area is a risk equalisation jurisdiction if the Private Health Insurance (Health Benefits Fund Policy) Rules so provide. Those rules will continue to be made by the Health Minister under the PHI Act.

4.8 An exemption to subsection 23(2) is provided if each fund in a risk equalisation jurisdiction (other than a fund established through a restructure under Division 4) is a fund that existed on 1 April 2007 and was conducted by a registered organization under the *National Health Act 1953*. This will allow an insurer to acquire the funds conducted by other insurers and continue to operate them as distinct bodies. [*Part 3, Division 2, subsection 23(3)*]

4.9 A further exemption to subsection 23(2) may be specified in the Private Health Insurance (Health Benefits Fund Policy) Rules. [*Part 3, Division 2, subsection 23(4)*]

#### ***Notifying APRA when health benefits funds are established***

4.10 A private health insurer establishing a health benefits fund must notify APRA, in the approved form, of the date of the establishment of the fund and anything else specified in the APRA rules, unless the fund is established under Division 4. [*Part 3, Division 2, section 24*]

#### ***Inclusion of health-related businesses in health benefits funds***

4.11 If a private health insurer has a health benefits fund for its health insurance business and health-related business, the dominant purpose of the fund must relate to the health insurance business. [*Part 3, Division 2, subsection 25(1)*]

4.12 If APRA is satisfied that an insurer is contravening subsection 25(1), it may direct the insurer to divest the fund of health-related business to the extent necessary to ensure compliance with the subsection. [*Part 3, Division 2, subsection 25(2)*]

4.13 APRA may also vary or revoke such a direction. A revoked direction will cease to have any effect. [*Part 3, Division 2, subsections 25(3) and (4)*]

4.14 Sections 97, 100, 101 and 102 of the Exposure Draft which relate to compliance with directions, other obligations, publication of directions and secrecy requirements also apply to directions given under subsection 25(2). [*Part 3, Division 2, subsection 25(5)*]

### Division 3 – The operation of health benefits funds

#### *Assets of health benefit funds to be kept separate from other assets*

4.15 A private health insurer must keep the assets of a health benefits fund distinct and separate from the assets of other health benefits funds and other assets of the insurer, and maintain a separate authorised deposit-taking institution (ADI) account for each health benefits fund. *[Part 3, Division 3, subsections 26(1) and (2)]*

#### *What are the assets of a health benefits fund*

4.16 The *assets* of a health benefits fund are:

- the balance of money credited to the fund under section 27;
- assets of the insurer obtained as a result of the expenditure or application of money credited to the fund;
- investments held by the insurer as a result of the expenditure or application of money credited to the fund; and
- other money, assets or investments of the insurer transferred to the fund. *[Part 3, Division 3, subsection 26(3)]*

4.17 Assets or investments obtained by the application of assets of a fund are themselves assets of the fund. *[Part 3, Division 3, subsection 26(4)]*

4.18 The definition of assets of a health benefits fund includes assets that are transferred into, and excludes assets transferred out of, the fund as the result of the operation of Division 4. *[Part 3, Division 3, subsection 26(5)]*

4.19 Assets or investments obtained by the expenditure or application of assets of the fund are not assets of the fund if the insurer conducting the fund is registered as a for profit insurer and the expenditure or application was not done for the purposes of the fund. This allows for profit insurers to draw money from the fund for other purposes, such as investment elsewhere or return to shareholders (subject to other relevant provisions of the Exposure Draft, prudential standard or APRA rules). *[Part 3, Division 3, subsection 26(6)]*

#### *This Act does not have effect of making insurer etc. a trustee of assets of a health benefits fund*

4.20 For the avoidance of doubt, it is clarified that nothing in the Exposure Draft is intended to make an insurer or its directors a trustee or trustees of the assets of a health benefits fund of the insurer. *[Part 3, Division 3, subsection 26(7)]*



***Payments to health benefits funds***

4.21 A private health insurer is required to credit to a health benefits fund particular amounts, including premiums payable for policies referable to the fund and income from investments of the assets of the fund. *[Part 3, Division 3, subsection 27(1)]*

4.22 A private health insurer may make a capital payment to a health benefits fund, being an amount that is not required to be paid to the fund under subsection 27(1). Assets of another health benefits fund cannot be credited to a fund without APRA's written approval. *[Part 3, Division 3, subsections 27(2) and (3)]*

***Expenditure and application of health benefits funds***

4.23 A private health insurer must not apply or deal with the assets of a health benefits fund except in accordance with Part 3, Division 3, and subsection 28(2) limits the application of the assets of a fund to:

- meeting liabilities or expenses incurred for the purpose of the business of the fund; or
- making investments under section 30; or
- a distribution when a fund is terminated under Division 5; or
- a purpose specified in the APRA rules. *[Part 3, Division 3, subsections 28(1) and 2)]*

4.24 An insurer is prohibited from mortgaging or charging the assets of a fund except to secure a bank overdraft or for purposes specified in the APRA rules. *[Part 3, Division 3, subsection 28(3)]*

4.25 An insurer is prohibited from borrowing money for the business of a fund except in accordance with the APRA rules. *[Part 3, Division 3, subsection 28(4)]*

4.26 Subsection 28(2) does not apply to an insurer registered as a for profit insurer, which may apply the assets of a fund for any purpose not inconsistent with prudential standards or a direction. *[Part 3, Division 3, subsection 28(5)]*

4.27 Section 28 does not apply to the transfer of assets from one health benefits fund to another under Division 4 or a divestiture of assets directed by APRA under subsection 25(2). *[Part 3, Division 3, subsection 28(6)]*

### ***Effect of non-compliance with section 28***

#### *General principle*

4.28 There is a general principle that a transaction entered into in contravention of section 28 is of no effect unless either:

- the Federal Court has made an order under subsection 28(2); or
- it is included in a class of transactions specified in the APRA rules. *[Part 3, Division 3, subsection 29(1)]*

#### *Order declaring the transaction to be effective*

4.29 The Federal Court, on application by a party to the transaction, may make an order declaring the transaction to be effective, provided the Federal Court is satisfied that the applicant entered into the transaction in good faith and without knowledge of the contravention. *[Part 3, Division 3, subsections 29(2) and (3)]*

4.30 The Federal Court in deciding on an application may have regard to any hardship that would be caused to the applicant if the order was not made, and may have regard to other matters. *[Part 3, Division 3, subsections 29(4) and (5)]*

#### *Order declaring the transaction to be of no effect*

4.31 The Federal Court, on application by APRA, may declare that a transaction that contravened section 28 but was included in APRA rules made under paragraph 29(1)(b) is of no effect. *[Part 3, Division 3, subsection 29(6)]*

4.32 The Federal Court may not make an order under subsection 29(6) if it is satisfied that the effect of the order would be to cause hardship to a person who entered into the transaction in good faith and without knowledge of the contravention. *[Part 3, Division 3, subsection 29(7)]*

### ***Investment of health benefits funds***

4.33 A private health insurer is allowed to invest assets of a health benefits fund in any way likely to further the business of the fund. However, nothing in the Act authorises a private health insurer to make an investment it would otherwise be prohibited from making or would not have the power to make. An insurer must not make or retain an investment prohibited by APRA rules. *[Part 3, Division 3, subsections 30(1) and (2)]*

4.34 A transaction is not ineffective because it contravenes paragraph 30(2)(c). [Part 3, Division 3, subsection 30(3)]

#### **Division 4 – Restructure, merger and acquisition of health benefits funds**

##### ***Restriction on restructure, merger, acquisition or termination of health benefits funds***

4.35 A private health insurer must not change the health benefits fund to which a policy is referable except under Division 4; [Part 3, Division 3, subsection 31(1)]

##### ***Section 31 does not prevent a liquidator from doing anything authorised or required by law.*** [Part 3, Division 3, subsection 31(2)]***Restructure of health benefits funds***

##### *When an insurer may restructure its health benefits funds*

4.36 A private health insurer is allowed to restructure its health benefits funds so that insurance policies that are referable to a fund become referable to one or more other funds (whether existing or proposed) of the insurer as long as:

- the effect of a restructure is that all insurance policies relating to one or more policy subgroups of the transferring health benefits fund become referable to the receiving fund(s);
- the insurer applies in writing, in the approved form, to APRA for approval;
- APRA approves the restructure in writing; and
- the insurer complies with any requirements imposed in the APRA rules in relation to the restructure. [Part 3, Division 4, subsection 32(1)]

##### *How APRA decides whether to approve the restructure*

4.37 APRA must approve the restructure if it is satisfied:

- that the proposed division of assets and liabilities between the transferring and receiving funds is a reasonable estimate of the net asset position of the transferring fund; and
- the assets and liabilities would be fairly distributed amongst those funds if there are more than one receiving fund; and

- and the restructure will not result in a breach of prudential standards. [Part 3, Division 4, subsection 32(2)]

4.38 In working out the net assets position of the transferring fund, it will be necessary to disregard the net asset position of the transferring fund to the extent that it relates to insurance policies that do not belong to a policy group(s) being transferred. [Part 3, Division 4, subsection 32(3)]

4.39 However, APRA cannot approve the restructure if it considers that it would result in unfairness to either the policy holders of a fund existing before the restructure or a fund as it would exist after the restructure, or if the insurer is being wound up when the application is made. A refusal to approve a restructure is reviewable under section 167. [Part 3, Division 4, subsection 32(4)]

*APRA rules may provide for various matters*

4.40 APRA rules may provide for:

- criteria for approving or refusing to approve applications under subsection 32(1);
- calculating reasonable estimates referred to in paragraph 32(2)(a);
- criteria for deciding whether assets and liabilities would be fairly distributed for the purposes of paragraph 32(2)(b);
- requirements to notify people of the outcomes of applications;
- a number of administrative matters; and
- requirements for insurers to provide information to APRA following restructures. [Part 3, Division 4, subsection 32(5)]

*Definitions*

4.41 A **policy group** is defined as all the insurance policies that are referable to the fund and whose policy holders have addresses located in the same risk equalisation jurisdiction. [Part 3, Division 4, subsection 32(6)]

4.42 The Private Health Insurance (Health Benefits Fund Policy) Rules, which will continue to be made by the Minister for Health under the PHI Act, may define an area as a **risk equalisation jurisdiction**. [Part 3, Division 4, subsection 32(7)]

***Merger and acquisition of health benefits funds***

*When an arrangement may be entered into*

4.43 A private health insurer may enter into an agreement with one or more transferee private health insurers under which all the insurance policies referable to a health benefits fund, or referable to one or more policy groups of the fund of the transferor insurer, are transferred to one or more transferee insurers. *[Part 3, Division 4, subsection 33(1)]*

4.44 A transfer under subsection 33(1) cannot take place without:

- the insurers jointly applying, in the approved form, to APRA for approval;
- APRA's written approval; and
- the insurers complying with any requirements in APRA rules. *[Part 3, Division 4, subsection 33(2)]*

*How APRA decides whether to approve the arrangement*

4.45 APRA must approve the transfer if it is satisfied that:

- the allocation of assets and liabilities to any new health benefits fund is a reasonable estimate of the net asset position of the fund (or funds);
- if there would be multiple receiving funds, that the distribution of assets and liabilities would be fairly distributed between those funds;
- if all the insurance policies that are referable to the transferring fund are transferred, the net asset position of the transferring fund after the arrangement takes effect will not be greater than zero; and
- the transfer will not result in a breach of any relevant prudential standard in relation to any solvency or capital adequacy. *[Part 3, Division 4, subsection 33(3)]*

4.46 A refusal to approve a transfer is reviewable under section 167.

4.47 In working out the net assets position of the transferring fund, it will be necessary to disregard the net asset position of the transferring fund to the extent that it relates to insurance policies that do not belong to a policy group transferred to the receiving fund(s). *[Part 3, Division 4, subsection 33(4)]*

*APRA rules may provide for various matters*

4.48 APRA rules may provide for:

- criteria for approving or refusing to approve applications under section 33;
- calculating reasonable estimates referred to in paragraph 33(3)(a);
- criteria for deciding whether assets and liabilities would be fairly distributed for the purposes of paragraph 33(3)(b);
- requirements to notify people of the outcomes of applications;
- a number of administrative matters;
- requirements for insurers to provide information to APRA following transfers. *[Part 3, Division 4, subsection 33(5)]*

*Notice to be given if arrangement takes effect*

4.49 The transferee insurer must notify APRA within 28 days after the transfer takes place, in a notice complying with any requirements in the APRA rules. *[Part 3, Division 4, subsection 33(6)]*

*Effect of arrangement*

4.50 If an insurance policy becomes referable to a fund conducted by an insurer other than the insurer that issued the policy, references in the Exposure Draft to an insurer that issued a policy are taken to be references to the transferee insurer. *[Part 3, Division 4, subsection 33(7)]*

***Consent of policy holders not required***

4.51 The consent of policy holders to a restructure under section 32 or an arrangement under section 33 is not required unless the insurer's constitution requires it. *[Part 3, Division 4, section 34]*

## Division 5 – Termination of health benefits funds

### *Subdivision A – Approving the termination of health benefits funds*

#### *Applying for termination*

4.52 A private health insurer can to apply to APRA in the approved form for approval of the termination of each of its health benefits funds. *[Part 3, Division 5, Subdivision A, section 35]*

#### *Requiring further information*

4.53 APRA may seek further information from the applicant within 28 days of receiving the application under section 35. *[Part 3, Division 5, Subdivision A, section 36]*

#### *Deciding the application*

4.54 APRA must approve the termination if it is satisfied that the insurer is not being wound up, each of its health benefits funds complies with all applicable prudential standards, the termination will not result in unfairness to the policy holders of the fund or funds, and it is satisfied as to any matters specified in the APRA rules. *[Part 3, Division 5, Subdivision A, subsection 37(1)]*

4.55 If APRA grants the application it must notify the insurer in writing. It may also appoint a person other than the insurer as the terminating manager of the funds, and if it does must also notify the insurer of the person appointed. *[Part 3, Division 5, Subdivision A, subsection 37(2)]*

4.56 APRA must notify the applicant if it refuses the application. *[Part 3, Division 5, Subdivision A, subsection 37(3)]*

4.57 A refusal to approve a termination is reviewable under section 167.

#### *APRA can be taken to refuse application*

4.58 APRA is taken to have refused the application for the purposes of section 167 if it does not notify the applicant of its decision within 90 days of the application, or within 90 days after receiving additional information sought under section 36. *[Part 3, Division 5, Subdivision A, section 38]*

***Subdivision B – Conducting the termination of health benefits funds***

*The basis of the law relating to termination*

4.59 Despite the provisions of any other law of the Commonwealth or a State or Territory a health benefits fund can only be wound up or terminated in accordance with Division 5 of Part 3. *[Part 3, Division 5, Subdivision B, section 39]*

*Conduct of funds during termination process*

4.60 After being notified that termination of its health benefits funds has been approved, an insurer is prohibited from:

- entering into an insurance policy with a person who it is not already insuring; or
- in the case of a for profit insurer, applying assets of the fund other than under subsection 28(2) (unless this prohibition does not apply because of section 45); or
- changing its registration status from not for profit to for profit. *[Part 3, Division 5, Subdivision B, subsection 40(1)]*

4.61 This prevents insurers from accepting new business or drawing money from the fund other than for meeting liabilities or expenses incurred for the purpose of the business of the fund or making investments under section 30.

4.62 Within 60 days of being notified that termination has been approved, an insurer must provide written notice of the termination day (after which it will not renew policies) to each policy holder of its funds and to APRA and notify the termination day in a national newspaper or newspaper circulating where the insurer carries on business. The termination day must be at least 90 days after any notice required in this subsection. *[Part 3, Division 5, Subdivision B, subsection 40(2)]*

4.63 The insurer is prohibited from renewing any insurance policies after the termination day. *[Part 3, Division 5, Subdivision B, subsection 40(3)]*

4.64 The insurer must accept any valid claim for benefits made up to 12 months after the expiry of the last policy referable to any of the funds being terminated. *[Part 3, Division 5, Subdivision B, subsection 40(4)]*

*Insurers etc. to give reports to APRA*

4.65 An insurer (or a terminating manager if one has been appointed) must report to APRA within 28 days after the termination day setting out



details of the assets and liabilities of the funds on that day. *[Part 3, Division 5, Subdivision B, section 41]*

*Terminating managers displace management of funds*

4.66 If a terminating manager has been appointed to a fund, management of the fund vests in the terminating manager for so long as the appointment is in force or until the termination is completed, and any officer of the insurer responsible for the management of the fund before the terminating manager was appointed is divested of that management. *[Part 3, Division 5, Subdivision B, section 42]*

***Subdivision C – Ending the termination of health benefits funds***

*Power to end termination*

4.67 During the termination of the health benefits funds of a private health insurer, APRA or the terminating manager may apply to the Federal Court for an order ending the termination. *[Part 3, Division 5, Subdivision C, subsections 43(1) and (2)]*

4.68 The Federal Court, before making an order, may direct the terminating manager to provide a report on a relevant fact or matter. *[Part 3, Division 5, Subdivision C, subsection 43(3)]*

4.69 The Federal Court in making an order ending the termination may give directions for the resumption of the management and control of the health benefits funds by the insurer. *[Part 3, Division 5, Subdivision C, subsection 43(4)]*

***Subdivision D – Completing the termination of health benefits funds***

*Completion of the termination process*

4.70 The termination of the health benefits funds of a private health insurer is complete if 12 months have passed since the expiry of the last policy referable to any of the funds being terminated and so far as possible having regard to the assets of the funds:

- liabilities to policy holders have been discharged;
- any amounts of collapsed insurer levy that APRA has paid to the insurer or the terminating manager have been repaid; and
- any other liabilities of the funds have been discharged.

*[Part 3, Division 5, Subdivision D, section 44]*

*Distribution of remaining assets after completion of the termination process*

4.71 If there are any residual assets of the funds after the termination process is completed, then:

- a for profit insurer may apply the assets other than for the purposes of the fund; and
- a not for profit insurer is liable to pay APRA an amount equal to the assets. *[Part 3, Division 5, Subdivision D, section 45]*

*Liability of officers of insurers for loss to terminated funds*

4.72 If an insurer contravenes the Exposure Draft in relation to a health benefits fund that it conducts in a way that results in a loss to the fund and the termination of the fund is completed, then the persons who were officers of the insurer when the contravention occurred are jointly and severally liable to pay to APRA (for payment to the Risk Equalisation Trust Fund) an amount equal to the loss. *[Part 3, Division 5, Subdivision D, subsection 46(1)]*

4.73 A person is not liable under subsection 46(1) if he or she can prove that he or she exercised due diligence to prevent the contravention. *[Part 3, Division 5, Subdivision D, subsection 46(2)]*

4.74 The Federal Court may, on application by APRA, order any person liable under subsection 46(1) to pay to APRA (for payment to the Risk Equalisation Trust Fund) the whole or any part of the loss. *[Part 3, Division 5, Subdivision D, subsection 46(3)]*

*Report of terminating manager*

4.75 A terminating manager may make a written report to APRA at any time and must make such a report as soon as practicable after the termination of the funds. *[Part 3, Division 5, Subdivision D, subsection 47(1)]*

4.76 If the manager considers that the insurer is no longer carrying on any business the manager may recommend that an application be made under section 48 for the winding up of the insurer. *[Part 3, Division 5, Subdivision D, subsection 47(2)]*

*Applying for winding up*

4.77 If a terminating manager's report recommends the winding up of an insurer, APRA or the terminating manager (if directed by APRA) may apply to the Federal Court for an order that a private health insurer be wound up. *[Part 3, Division 5, Subdivision D, subsections 48(1) and (2)]*

4.78 The Federal Court may make such an order if it is satisfied that this would be in the financial interests of the policy holders of the funds. *[Part 3, Division 5, Subdivision D, subsection 48(3)]*

4.79 The winding up is to be conducted in accordance with the Corporations Act. *[Part 3, Division 5, Subdivision D, subsection 48(4)]*

## **Division 6 - External management of health benefits funds**

### *Subdivision A – Preliminary*

#### *Purpose of Division*

4.80 The purpose of the Division is to permit a health benefits fund under external management to be managed so as to maximise the chances that the policy holders of the fund continue to be covered by that fund or another fund to which the business is transferred, and if that is not possible, safeguard the financial interests of the policy holders of the fund if the fund is terminated. *[Part 3, Division 6, Subdivision A, section 49]*

4.81 This Division, and the other provisions in the Exposure Draft relating to external management and terminating management (flowing from external management) of health benefits funds, are based on provisions currently in Divisions 217, 220 and Part 6.5 of the PHI Act.

4.82 The Exposure Draft does not alter the essential structure of these provisions, which focus on external management and terminating management of health benefits funds by applying certain provisions of Part 5.3A of the Corporations Act by reference.

4.83 However the Exposure Draft arranges the provisions to collocate them in consecutive divisions (Divisions 6, 7 and 8 of Part 3). There have been some changes to clarify the relationship between an external manager or terminating manager of a health benefits fund and other external administrators of a private health insurer, e.g. a liquidator. The guiding principle is that external management and terminating management of a health benefits fund should proceed independently of any other external administration that may be occurring in relation to the business of a private health insurer outside its health benefits funds.

#### *The basis of the law relating to external management*

4.84 The external management of a health benefits fund is regulated by Division 6 and by various provisions in the Corporation Act applying subject to modifications set out in the Act or APRA rules. *[Part 3, Division 6, Subdivision A, subsections 50(1) and (4)]*

4.85 The ability of APRA rules to modify the provisions of the Corporations Act listed in subparagraph 50(1)(b)(ii) is consistent with the ability of PHIAC to modify these provisions under subparagraph 217-1(1)(b)(ii) of the PHI Act. This ability provides flexibility to the external management regime by allowing APRA to modify the Corporations Act provisions listed in subparagraph 50(1)(b)(ii) as these provisions change or as external management practices change. It also allows APRA to appropriately tailor the operation of these provisions to the private health insurance context.

4.86 The external administration of a health benefits fund must only be administered in accordance with Part. Any other law of the Commonwealth or a State or Territory that would apply to the external management of a fund no longer applies. *[Part 3, Division 6, Subdivision A, subsections 50(2) and (3)]*

4.87 Any provisions of the Corporations Act listed in subsection 50(1) apply to the external management of a fund as if:

- a reference to the company were a reference to the fund;
- a reference to the administrator was a reference to the external manager appointed under the Act; and
- a reference to the Court were a reference to the Federal Court. *[Part 3, Division 6, Subdivision A, subsection 50(4)]*

#### ***Subdivision B – Appointment of external managers***

##### *APRA may appoint external managers*

4.88 APRA may appoint in writing an external manager to a health benefits fund if the grounds specified in subsections 52(1) and (2) are satisfied. *[Part 3, Division 6, Subdivision B, subsection 51(1)]*

4.89 The person appointed must be an official liquidator under the Corporations Act and must not be a person related to the fund. The appointment takes effect from the date specified in the appointment. *[Part 3, Division 6, Subdivision B, subsections 51(2) and (3)]*

##### *Preconditions for appointment of external managers*

4.90 APRA must not appoint an external manager to a health benefits fund unless APRA believes it is in the interests of the policy holders of the fund. *[Part 3, Division 6, Subdivision B, subsection 52(1)]*

4.91 In addition, APRA must not appoint an external manager to a health benefits fund unless:

- APRA is satisfied on reasonable grounds that the private health insurer has contravened, in relation to the relevant health benefits fund:
  - a prudential standard relating to capital adequacy or solvency; or
  - a direction; or
- a request for external management of the fund is made to APRA by a resolution of the directors of the insurer; or
- a ground specified in APRA rules applies in respect of the fund. *[Part 3, Division 6, Subdivision B, subsection 52(2)]*

*External managers to displace management of funds*

4.92 If an external manager has been appointed to a fund, management of the fund vests in the external manager for so long as the appointment is in force, and any officer of the insurer responsible for the management of the fund before the external manager was appointed is divested of that management. *[Part 3, Division 6, Subdivision B, section 53]*

***Subdivision C – Duties and powers of external managers***

*Duties of external managers*

4.93 The main duties of an external manager of a health benefits fund are:

- to examine the business, affairs and property of the fund and ascertain its assets and liabilities; and
- to apportion the assets and liabilities between the fund and the other business (if the business of the fund has been mixed with other business); and
- to form an opinion as to which course of action maximises the chance that the policy holders of the fund continue to be covered by that fund or another fund to which the business is transferred; and
- make a final report to APRA recommending that course of action. *[Part 3, Division 6, Subdivision C, section 54(1)]*

4.94 The external manager is required to manage the day-to-day administration of the fund as efficiently and economically as possible. *[Part 3, Division 6, Subdivision C, section 54(2)]*

*Additional powers of external managers*

4.95 The additional powers of an external manager under the provisions of Division 8 of Part 5.3A of Chapter 5 of the Corporations Act (conferred under section 50), do not include the power to remove or appoint directors of the private health insurer and execute a document, bring or defend proceedings, or do anything else, in an insurer's name (this is in part to avoid duplication as section 71, in Division 8 of the Exposure Draft, confers similar powers). *[Part 3, Division 6, Subdivision C, subsection 55(1)]*

4.96 For the purpose of the protection of people dealing with an external manager under section 442F of the Corporations Act, the assumptions contained in sections 128 and 129 of that Act are taken to apply, subject to any modifications in the APRA rules. What this means in practice is that a person dealing with an external manager is entitled to believe that the external manager has been duly appointed and is acting within his or her powers and functions and complying with the Act, unless the person dealing with the external manager knows or suspects that this is not in fact the case. The ability to modify the application of sections 128 and 129 allows APRA to appropriately tailor the operation of these provisions to the private health insurance context. *[Part 3, Division 6, Subdivision C, subsection 55(2)]*

*Protection of property during external management*

4.97 The provisions of Division 6 of Part 5.3A of Chapter 5 of the Corporations Act (conferred under section 50) relating to the protection of property during external management, do not include section 440A. Section 440A provides that a company under Part 5.3A administration (which translates for present purposes as a fund under external management) cannot be wound up voluntarily and any proceedings for the winding up of the company or the appointment of a provisional liquidator are to be adjourned, although the court has discretion to allow those proceedings to continue. *[Part 3, Division 6, Subdivision C, subsection 56(1)]*

4.98 The fact that section 440A is not applied does not mean that it is intended that a health benefits fund can be wound up by a liquidator when under external management. To the contrary, the intention is that an external management of a health benefits fund be isolated and protected from any winding up of the company and occur independently of the winding up. This intention is effected by other provisions in the Exposure Draft; accordingly, it is unnecessary for the relationship between external

management and winding up to be regulated by applied section 440A of the Corporations Act. *[Part 3, Division 6, Subdivision C, subsection 56(1)]*

4.99 Applied section 440D of the Corporations Act provides for a stay of any court proceedings against a company (which translates as the “fund”) in relation to any of its property without the administrator’s (i.e. external manager’s) written consent or the leave of the Federal Court. Where an external manager or Federal Court is considering (under applied section 440D of the Corporations Act) whether or not to allow a legal proceeding to continue while the fund is under external management, the external manager or the Federal Court must consider whether the action in question relates to the property of the fund and whether such proceedings would be materially detrimental to the interests of policy holders of the fund. *[Part 3, Division 6, Subdivision C, section 56(2)]*

*Rights of chargee, owner or lessor of property of fund under external management*

4.100 The provisions of Division 7 of Part 5.3A of Chapter 5 of the Corporations Act (conferred under section 51 relating to the rights of chargees, owners or lessors of the property of a fund during external management, do not include section 441A and selected words in subsection 441D(1) in the applied Division. Section 441A relates to situations where there is a charge over all, or substantially all, of the property of a company or there are two or more charges. *[Part 3, Division 6, Subdivision C, section 57(1)]*

4.101 It allows a secured creditor or receiver or controller acting for a secured creditor to enforce a security interest in certain circumstances, despite other provisions of Part 5.3A of the Corporations Act. The effect of not applying section 441A in relation to an external administration of a health benefits fund will be to protect the assets of a health benefits fund from potential action by secured creditors, while the external management is in force. The modification to section 44D is consequential upon the “disapplication” of section 441A. It should be noted that, under subsection 28(3) of the exposure draft it will continue to only be possible to give charges over benefits fund assets in very limited circumstances.

4.102 Nothing in the applied Division 7 prevents the external manager or the Federal Court from agreeing to the enforcement of a charge if satisfied that the charge does not relate to the property of the fund and enforcement of the charge would not be materially detrimental to the interests of the policy holders of the fund. *[Part 3, Division 6, Subdivision C, section 57(2)]*

***Subdivision D – Procedure relating to voluntary deeds of arrangement***

*Matters that may be included in the APRA rules*

- 4.103 The APRA rules may provide for:
- the external managers of health benefits funds to convene meetings of creditors and policy holders of funds to consider the possibility of the responsible insurers for those funds executing voluntary deeds of arrangement;
  - the details of how the meetings are to be convened or conducted; and
  - the kind of recommendations that may be made to APRA; and
  - the actions APRA may take in response. *[Part 3, Division 6, Subdivision D, subsection 58(1)]*

4.104 It is expected that, initially, the APRA Rules for the purpose of this Division will be in substantially the same form as those currently in force for the purposes of the external management provisions in the PHI Act.

4.105 This section does not limit the scope of the APRA rules for the purposes of other provisions in this Part. *[Part 3, Division 6, Subdivision D, subsection 58(2)]*

***Subdivision E – External managers' reports to APRA***

*External managers to give reports to APRA*

4.106 An external manager, as soon as practicable but within three months or such longer time as APRA determines, must conclude the examination of the health benefits fund and make a final written report to APRA. *[Part 3, Division 6, Subdivision E, subsections 59(1) and (2)]*

4.107 The external manager in the report to APRA is required to recommend a course of action that maximises the chance that the policy holders of the fund continue to be covered by that fund or another fund to which the business is transferred, and set out the reasons for that recommendation. *[Part 3, Division 6, Subdivision E, subsection 59(3)]*



4.108 Without limiting the courses of action he or she may recommend, an external manager may recommend that:

- subject to a Federal Court order, that the responsible insurer for the fund implement a scheme of arrangement concerning the business of the fund; or
- subject to a Federal Court order, that a terminating manager be appointed to the fund; or
- that the external management cease and the business of the fund be resumed by responsible insurer. *[Part 3, Division 6, Subdivision E, subsection 59(4)]*

4.109 The external manager must recommend that APRA approve the execution of a voluntary deed of arrangement if APRA rules so provide. *[Part 3, Division 6, Subdivision E, subsection 59(5)]*

4.110 Without limitation what a scheme or arrangement ordered by the Federal Court may provide for:

- the continuation of the business of the fund on terms set out in the scheme; or
- the transfer of the business of the fund on terms set out in the scheme to another private health insurer; or
- execution of a deed in the same form as a voluntary deed of arrangement rejected at a meeting of creditors and policy holders under section 58. *[Part 3, Division 6, Subdivision E, subsection 59(6)]*

*Dealing with reports given to APRA*

Deciding what to do in relation to a recommendation

4.111 In deciding whether or not to approve a course of action recommended in a report under subsection 59(3), APRA may seek further information from the external manager and engage any person to assist it in evaluating the assessments in the report. In reaching a decision APRA must have regard to the external manager's report and any additional information provided by the external manager or by any person engaged to assist APRA. *[Part 3, Division 6, Subdivision E, subsection 60(1)]*

APRA to inform manager if satisfied with a recommended course of action

4.112 If APRA is satisfied that a course of action recommended by the external manager will be in the interests of the policy holders of the health benefits fund, APRA must by written notice inform the external manager. If the course of action is to seek termination of the health benefits fund or a scheme of arrangement, APRA must direct him or her to apply to the Federal Court if required to obtain an order to give effect to the recommendation. *[Part 3, Division 6, Subdivision E, subsection 60(2)]*

Additional steps to be taken by APRA if satisfied with certain kinds of recommended course of action

4.113 If APRA is satisfied that the course of action recommended by the external manager will be in the interest of policy holders of the fund, it must direct the external manager to apply under subsection 61(1) to give effect to the action. APRA rules may provide for what needs to be done in relation to the action, if it is not an action specified in subsections 59(4) or (5). *[Part 3, Division 6, Subdivision E, subsections 60(3) and (5)]*

4.114 If the course of action is termination of the insurers health benefits funds, APRA must direct the external manager to apply under subsection 66(1) for a terminating managers appointment. *[Part 3, Division 6, Subdivision E, subsection 60(4)]*

If APRA is not satisfied with a recommended course of action

4.115 If APRA is not satisfied that a course of action recommended by the external manager will be in the interests of the policy holders of the fund, it may take a different course of action that it is satisfied will be in the interests of the policy holders of the fund. These courses of action include APRA applying to the Federal Court for orders giving effect to a scheme of arrangement for the business of the fund or appointing a terminating manager to the health benefits funds of the responsible insurer. *[Part 3, Division 6, Subdivision E, subsections 60(6) and (7)]*

*Federal Court orders in respect of schemes of arrangement*

4.116 An external manager is required to apply to the Federal Court for an order giving effect to a scheme of arrangement recommended under paragraph 59(4)(a) if directed to do so by APRA. *[Part 3, Division 6, Subdivision E, subsection 61(1)]*

4.117 On an application under subsection 61(1), or an application by APRA under paragraph 60(7)(a), for an order giving effect to a scheme of arrangement APRA and any other interested person are entitled to be heard, and the Federal Court may make such orders as it considers will be

in the interests of the policy holders of the health benefits fund concerned. *[Part 3, Division 6, Subdivision E, subsection 61(2)]*

***Subdivision F – Miscellaneous***

*When an external management begins and ends*

4.118 This clause provides that an external management of a health benefits fund begins when an external manager is appointed under section 51 to administer the fund, and ends when either:

- APRA terminates the appointment of the external manager and does not appoint a replacement; or
- a voluntary deed of arrangement relating to the fund is executed; or
- APRA notifies the external manager, under subsection 60(2), that it has accepted the external manager's recommendation, made under subsection 59(3) that the external management cease; or
- the Federal Court makes an order under section 61 giving effect to a scheme of arrangement for the business of the fund; or
- a terminating manager of the fund is appointed. *[Part 3, Division 6, Subdivision F, section 62]*

*Effect of things done during external management of health benefits funds*

4.119 Anything done in good faith by or with the consent of the external manager of a health benefits fund is valid and effectual and not liable to be set aside in a termination of a fund. *[Part 3, Division 6, Subdivision E, section 63]*

*Disclaimer of onerous property*

4.120 For the purpose of determining the power of an external manager to disclaim onerous property under the provisions of Division 7A of Part 5.6 of Chapter 5 of the Corporations Act, those provisions apply as if the external manager were the liquidator of the company and references to the company's creditors were references to the policy holders of a health benefits fund. *[Part 3, Division 6, Subdivision F subsection 64(1)]*

4.121 A disclaimer by an external manager has the same effect and the external manager is under the same obligations for the purposes of this Act as if the disclaimer had been made under Division 7A of Part 5.6 of

Chapter 5 of the Corporations Act. *[Part 3, Division 6, Subdivision F, subsection 64(2)]*

*Application of provisions of Corporations Act*

4.122 The application under the Act of sections in the Corporations Act includes application of relevant regulations and other instruments made under those sections (unless the contrary intention appears). *[Part 3, Division 6, Subdivision F, subsections 65(1), (2) and (3)]*

4.123 APRA rules made under the Act may for the purposes of the application of the sections modify regulations and other instruments made under the Corporations Act. *[Part 3, Division 6, Subdivision F, subsection 65(4)]*

4.124 The fact that the Act allows for a specific modification the Corporations Act does not imply that further modifications to that provision should not be made by APRA rules. *[Part 3, Division 6, Subdivision F, subsection 65(5)]*

4.125 The definitions and interpretations principles under the Corporations Act have effect on applied sections. *[Part 3, Division 6, Subdivision F, subsection 65(6)]*

4.126 Rules made under the Act may take the place of regulations and other instruments that could be made under the applied sections. *[Part 3, Division 6, Subdivision F, subsection 65(7)]*

## **Division 7 – Ordering the termination of health benefits funds**

*Applications by external managers to the Federal Court*

4.127 External managers are required to apply to the Federal Court for an order appointing a terminating manager if directed to do so by APRA. *[Part 3, Division 7, subsection 66(1)]*

4.128 APRA and any other person likely to be affected by the termination are entitled to be heard on the application. *[Part 3, Division 7, subsection 66(2)]*

*Orders made on applications for appointments of terminating managers*

4.129 The Federal Court may, on an application by the external manager under subsection 66(1) or APRA under paragraph 60(7)(b), make an order for the appointment of a terminating manager of the health benefits funds of a private health insurer and any related orders. The Federal Court must not make such an order unless it considers the order will be in the interests of the policy holders of the funds. *[Part 3, Division 7, section 67]*

*Notice of appointments*

4.130 If the Federal Court orders the appointment of a terminating manager of the health benefits funds of a private health insurer APRA must notify the insurer in writing of the person appointed. *[Part 3, Division 7, section 68]*

**Division 8 – External managers and terminating managers**

*Subdivision A – Powers of managers*

*Powers of managers*

4.131 While a health benefits fund is under external management or terminating management, the manager has power to:

- control, carry on and manage the business, affairs and property of the fund;
- terminate or dispose of all or any part of the business or dispose of any property;
- do anything (including executing documents or bringing or defending proceedings) in the name of the responsible private health insurer for the purpose of the business of the fund;
- appoint a lawyer or agent; and
- perform any other function or exercise any power that the insurer or its officers or employees could perform or exercise if the fund was not under external management or terminating management. *[Part 3, Division 8, Subdivision A, subsection 69(1)]*

4.132 Unless a manager provides written approval, whilst the fund is under external or terminating management the rights of the insurer or its officers to exercise the powers above are suspended. *[Part 3, Division 8, Subdivision A, subsection 69(2)]*

4.133 Division 8, sections 42 and 53 do not imply that an officer's of an insurer is removed from office. *[Part 3, Division 8, Subdivision A, subsection 69(3)]*

*Officers etc. not to perform functions etc. while fund is under management*

4.134 A person (other than the manager of a health benefits fund under external management or terminating management) commits an offence with a penalty of 30 penalty units, or imprisonment for six months, or both if:

- the person performs or exercises,
- purports to perform or exercise;
- any function or power of;
- an officer of the responsible insurer for the fund,
- a receiver, or receiver and manager of any assets of the fund;  
or
- if the function or power is a function or power of the manager and the person does it without the manager's written approval. *[Part 3, Division 9, Subdivision A, subsection 70(1)]*

*Managers act as agents of private health insurers*

4.135 A manager exercising a power as manager of a health benefits fund is taken to be acting as the agent of the responsible insurer for the fund. This section does not allow the insurer to direct the manager in the exercise of his or her powers. *[Part 3, Division 8, Subdivision A, subsections 71(1) and (2)]*

***Subdivision B – Information concerning, and records and property of, health benefits funds***

*Directors etc. to help managers*

4.136 Each director of the responsible insurer for a health benefits fund under external management or terminating management must as soon as practicable after the management:

- give the manager all records in the director's possession that relate to the business of the fund (other than records the director is entitled to retain against the manager or the insurer); and
- tell the manager of the location of other records known to the director. *[Part 3, Division 8, Subdivision B, subsection 72(1)]*

4.137 The above does not apply if the person is entitled to retain the records, against the manager and the responsible insurer of the fund. *[Part 3, Division 8, Subdivision B, subsection 72(6)]*

4.138 Each director and officer of the responsible insurer for a fund under external management or terminating management must give the manager a statement about the business, property, affairs and financial circumstances of the fund. The statement must be made within seven days (or longer as allowed by the manager) and comply with the manager's requirements as to form and contents. *[Part 3, Division 8, Subdivision B, subsections 72(2) and (3)]*

4.139 A director or officer of the responsible insurer must attend on the manager and give them information about the business, property, affairs and financial circumstances of the fund as the manager reasonably requires. *[Part 3, Division 8, Subdivision B, subsection 72(4)]*

4.140 A person commits an offence with a penalty of 30 penalty units or imprisonment for six months or both if the person does not comply with the requirements of this section. *[Part 3, Division 8, Subdivision B, subsection 72(5)]*

*Managers' rights to certain records*

4.141 A person (other than a secured creditor of the responsible insurer for a health benefits fund) is not entitled to retain possession of records against the manager of the fund or enforce a lien on the records (although the lien otherwise stands). The manager is entitled to inspect and copy records held by a secured creditor at any reasonable time. *[Part 3, Division 8, Subdivision B, subsections 73(1) and (2)]*

4.142 A manager may give a person notice of at least three days to deliver to the manager specified records that are in the person's possession. *[Part 3, Division 8, Subdivision B, subsections 73(3) and (4)]*

4.143 A person commits an offence with a penalty of 30 penalty units or imprisonment for six months or both if the person does not comply with a notice under subsection (3), unless the person is entitled to retain the records against the manager and the insurer. *[Part 3, Division 8, Subdivision B, subsections 73(5) and (6)]*

*Only manager can deal with property of fund under management*

4.144 A transaction or dealing affecting the property of a health benefits fund under external management or terminating management entered into by the responsible insurer or a person purportedly on behalf of the fund or the insurer is void unless:

- it was entered into by the manager; or
- the manager consented to the transaction or dealing beforehand; or
- it was ordered by the Federal Court or a State or Territory Supreme Court. *[Part 3, Division 8, Subdivision B, subsection 74(1)]*

4.145 Subsection 74(1) does not apply to a payment by an ADI (such as a bank, building society or credit union) made in good faith and in the ordinary course of its banking business, out of the account of the relevant private health insurer, while the external management or terminating management is under way but before the first of:

- the ADI being notified by the manager of the external management or terminating management; or
- the manager advertising the external management or terminating management in a national newspaper or newspaper circulating where the insurer carries on business. *[Part 3, Division 8, Subdivision B, subsection 74(2)]*

4.146 A person commits an offence with a penalty of 30 penalty units or imprisonment for six months, or both if:

- the person is an officer of the responsible insurer for a fund under external management or terminating management, or the receiver, or receiver and manager of any of the assets of the fund; and
- the person purported to enter into a transaction or dealing on behalf of the responsible insurer that is void because of the operation of this clause, or was in any way concerned in or a party to the transaction or dealing. *[Part 3, Division 8, Subdivision B, subsection 74(4)]*

*Order for compensation where officer involved in void transaction*

4.147 If a court finds a person guilty of an offence against subsection 74(4) and is satisfied that the health benefits fund under external management or terminating management concerned has suffered a loss because of the transaction involved in the offence, the court may order the person to pay compensation to the responsible insurer for the fund. An order under subsection 75(1) may be enforced as a judgement of the court. *[Part 3, Division 8, Subdivision B, subsections 75(1) and (2)]*



4.148 The court may relieve a person wholly or partly from liability to pay compensation if it appears to the court that the person has acted honestly and ought fairly to be excused. *[Part 3, Division 8, Subdivision B, subsection 75(3)]*

4.149 A person who thinks that proceedings will or may be brought against them under subsection 74(4) may apply to the Federal Court for relief, and provide that the Federal Court may grant relief as if the proceedings had been begun. *[Part 3, Division 8, Subdivision B, subsections 75(4) and (5)]*

4.150 A reference in subsection 75(3) to the court is a reference to the judge alone for the purpose of a case tried by a judge and jury, and the relief that may be granted includes withdrawing the case in whole or part from the jury and directing judgement to be entered for the defendant. *[Part 3, Division 8, Subdivision B, subsection 75(6)]*

### ***Subdivision C - Provisions incidental to appointment of managers***

#### *Remuneration of managers*

4.151 APRA may, in writing, determine the remuneration and allowances for a manager. Unless APRA determines otherwise, the remuneration and allowances are to be paid out of the assets of the health benefits fund under external management or terminating management. *[Part 3, Division 8, Subdivision C, section 76]*

#### *APRA may give directions to managers*

4.152 APRA may give a manager written directions (with which the manager must comply) concerning the exercise of their powers. While the directions will usually be general, they may take into account the specific circumstances of the health benefits fund under external management or terminating management, and may include directions requiring the provision of interim reports. *[Part 3, Division 8, Subdivision C, subsections 77(1) and (2)]*

4.153 The manager must comply with a written direction. *[Part 3, Division 8, Subdivision C, section 77(3)]*

#### *Termination of appointments of managers*

4.154 APRA may terminate the appointment of a manager with effect from the date specified in the instrument. *[Part 3, Division 8, Subdivision C, subsection 78(1)]*

4.155 If the appointment of an external manager is terminated, APRA may appoint a replacement manager to carry on the external management. If it does not, then the power to control, carry on and manage the business,

affairs and property of the health benefits fund vests again in the officers of the responsible insurer. *[Part 3, Division 8, Subdivision C, subsections 78(2) and (3)]*

4.156 If the appointment of a terminating manager is terminated, APRA must appoint a replacement manager to carry on the terminating management unless the Federal Court has ordered an end to the termination under section 43 or the termination is complete and the manager has reported to APRA under section 47. *[Part 3, Division 8, Subdivision C, subsection 78(4)]*

*Act of managers valid etc.*

4.157 The acts of a manager of a health benefits fund are valid despite any defect or irregularity found later in his or her appointment. *[Part 3, Division 8, Subdivision C, subsection 79(1)]*

4.158 Persons dealing with the fund in good faith without any knowledge of the defect of irregularity in the appointment of the manager are protected from the invalidity of certain transaction. *[Part 3, Division 8, Subdivision C, subsection 79(2)]*

4.159 Persons making or permitting payment or disposition from the fund without any knowledge of the defect of irregularity in the appointment of the manager are protected and indemnified. *[Part 3, Division 8, Subdivision C, subsection 79(3)]*

*Indemnity*

4.160 A manager of a health benefits fund is indemnified against any action, claim or demand by a person in relation to anything done (or not done) in good faith in exercising the powers of a manager under the Act. *[Part 3, Division 8, Subdivision C, section 80]*

*Qualified privilege*

4.161 A manager of a health benefits fund is conferred qualified privilege in respect of any statement made by him or her for the performance of duties as a manager. *[Part 3, Division 8, Subdivision C, section 81]*

***Subdivision D – Miscellaneous***

*Time for doing act does not run while act prevented by this Division or other provisions*

4.162 If Divisions 5, 6 or 8 prevent an act from being done, the time for doing the act is extended by the time that those divisions prevented it from being done. *[Part 3, Division 8, Subdivision C, section 82]*

*Continued application of other provisions of Act*

4.163 In relation to the fund or the rights and obligations of persons in relation to the responsible insurer for the fund, the appointment of an external manager or terminating manager to a health benefits fund does not affect the continued application of the rest of the Act other than:

- in the case of external management, the provisions of Division 6; or
- in the case of terminating management, the provisions of Divisions 5 or 7. *[Part 3, Division 8, Subdivision D, section 83]*

*Modifications of this Act in relation to health benefits funds under management*

4.164 APRA rules may set out modifications of this Act or the PHI Act relating to how Chapter 3 of the PHI Act relates to health benefits funds under external management or terminating management, including different modifications according to the nature of the funds concerned, as long as the modifications do not modify a provision that creates an offence or include a new provision that creates an offence. The Act and the PHI Act operate subject to such modifications. *[Part 3, Division 8, Subdivision D, subsections 84(1), (2), (3) and (5)]*

4.165 This modification power will allow APRA to ensure that the external and terminating manager regimes can be appropriately tailored to those health benefit funds concerned.

4.166 APRA must consult with the Health Secretary prior to making any rules under this section. *[Part 3, Division 8, Subdivision D, subsection 84(4)]*

*Order of Federal Court to be binding on all persons*

4.167 This clause provides that an order of the Federal Court made under Divisions 5, 6 or 7 is binding on all persons and has effect notwithstanding anything in the constitution or rules of a private health insurer or health benefits fund to which the order relates. *[Part 3, Division 8, Subdivision D, section 85]*

*APRA rules dealing with various matters*

4.168 This clause provides that the APRA rules may:

- provide for matters in relation to meetings required or permitted to be held under Division 6; and
- stipulate the form and contents of any document required or permitted to be given to APRA or an external manager or

terminating manager of a health benefits fund under a provision of Division 5 or 6. *[Part 3, Division 8, Subdivision D, section 86]*

## **Division 9 – Duties and liabilities of directors etc.**

### ***Notices to remedy contravention***

4.169 APRA may give a private health insurer that has contravened this Part written notice requiring the insurer to take specific action within a specific period to remedy the contravention. The insurer is required to comply with the notice. *[Part 3, Division 9, subsections 87(1) and (5)]*

4.170 The specific period in the notice:

- must be a period ending not earlier than one month after the giving of the notice; and
- may be extended by APRA any time before the notice period end, for a period as APRA thinks fit. *[Part 3, Division 9, subsections 87(2) and (4)]*

4.171 The action specified in the notice is action APRA thinks appropriate and reasonable to overcome the effects of the contravention. *[Part 3, Division 9, subsection 87(3)]*

### ***Liability of directors in relation to non-compliance with notices***

4.172 If a private health insurer has been notified by APRA under section 87 in respect of a contravention that has resulted in a loss to a health benefits fund and has not complied with the notice, the persons who are directors of the insurer when the contravention occurred are jointly and severally liable to pay to the insurer an amount equal to the loss. *[Part 3, Division 9, subsection 88(1)]*

4.173 A person is not liable under subsection 88(1) if they can prove they exercised due diligence to ensure that the insurer complied with the notice. *[Part 3, Division 9, subsections 88(2)]*

4.174 An action to recover an amount under subsection 88(1) may be brought by the insurer or, with APRA's approval, a policy holder of the health benefits fund involved. APRA's approval may be conditional on the persons or number of persons who may join the action as plaintiffs. *[Part 3, Division 9, subsections 88(3) and (4)]*

***APRA may sue in the name of private health insurers***

4.175 APRA may bring an action in the name of a private health insurer to recover an amount the insurer is entitled to recover under this Division 9. *[Part 3, Division 9, section 89]*



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## **Chapter 5**

### ***Prudential standards and directions***

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#### **Outline of chapter**

5.1 Part 4 of the Exposure Draft establishes the prudential supervision of the private health insurance industry, via prudential standard and directions. Part 4 sets out:

- the ability of APRA to make prudential standards and give directions;
- the requirement for private health insurers to comply with prudential standards and directions and to notify APRA of any breach of prudential standards;
- how APRA may vary or revoke prudential standards and directions; and
- administrative arrangements relating to directions.

#### **Summary of new law**

5.2 Part 4 will simplify the existing legislative scheme by replacing the three standard-making powers currently in the PHI Act (solvency standards in Division 140, capital adequacy standards in Division 143 and prudential standards in Division 163) with a single prudential standard making power. Bringing these three standard-making powers into one will also harmonise the legislation with APRA's existing prudential standard-making powers in relation to ADIs, life insurers, general insurers and superannuation trustees.

5.3 The directions power will replace a number of powers currently in the PHI Act, to the extent that they have been exercisable by PHIAC:

- solvency directions under section 140-20, capital directions under section 143-20;
- general directions PHIAC can give under section 200-1 to require a private health insurer to modify its day to day operations (among other things); and

- a general power PHIAC currently has in section 172-1 to require a private health insurer to comply with such requirements PHIAC imposes.

5.4 The directions power in the Exposure Draft is based on directions powers APRA has in the *Life Insurance Act 1995* (Life Insurance Act); accordingly, it will promote harmonisation with other legislation administered by APRA in relation to financial sector entities.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Prudential standards and directions for private health insurers (sections 91 and 95 of the Exposure Draft).</p> <p>The prudential standards making powers in section 91 and directions provisions in sections 95, 96, 97, 98, 99 and 100 are modelled on sections 230A and 230B respectively of the Life Insurance Act.</p>	<p>Solvency and capital adequacy standards and directions for health benefits funds (Divisions 140 and 143 of the PHI Act); and</p> <p>Prudential standards and directions for private health insurers (Division 163 of the PHI Act).</p>

## Detailed explanation of new law

### Division 1 – Introduction

#### *Simplified outline of this Part*

5.5 A simplified outline of this Part will be included here once drafted. [Part 4, Division 1, section 90]

### Division 2 – Prudential standards

#### *Prudential standards*

##### *APRA may make prudential standards*

5.6 APRA may make *prudential standards* in writing relating to prudential matters. Such standards must be complied with private health insurers, or in relation to insurers. [Part 4, Division 2, subsection 91(1)]

5.7 *Prudential matters* are defined as matters relating to the conduct by private health insurers of their affairs so as to keep themselves in a





















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## **Chapter 6**

### **Other obligations of private health insurers**

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#### **Outline of chapter**

6.1 Part 5 of the Exposure Draft establishes other requirements which private health insurers must comply with. It provides for:

- the appointment of actuaries and the powers and obligations placed upon actuaries;
- disqualified persons provision, including covering actuaries;
- restrictions on payment of penalties for officers; and
- giving reports and details about officers to APRA.

#### **Summary of new law**

6.2 Part 5 is based on section sections 93 to 99 and sections 125 and 125A of the Life Insurance Act, rather than on the provisions currently in the PHI Act in relation to appointed actuaries. The purposes of this is to harmonise with APRA's existing legislation and ensure that actuaries are required to, and have the discretion to, provide information to APRA in appropriate circumstances.

#### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Appointed actuaries (Division 2 of Part 5 of the Exposure Draft modelled on sections 93 to 99 and sections 125 and 125A of the Life Insurance Act rather than Division 160 of the PHI Act).	Appointed actuaries (Division 160 of the PHI Act).
Disqualified persons (Division 3 of Part 5 of the Exposure draft modelled on Division 166 of the PHI Act with	Disqualified persons (Division 166 of the PHI Act).

adaptions to include sections 245A and 245C of the Life Insurance Act).	
Restrictions on payment of pecuniary penalties (section 122 of the Exposure Draft).	Restrictions on payment of pecuniary penalties (section 172-15 of the PHI Act).
Giving details about officers and reports to APRA (sections 123 and 124 of the Exposure Draft).	Private health insurers to notify Department and Council about current chief executive officer (section 169-15 of the PHI Act).

## Detailed explanation of new law

### Division 1 – Introduction

#### *Simplified outline of this Part*

6.3 A simplified outline of this Part will be included here once drafted. *[Part 5, Division 1, section 104]*

### Division 2 – Appointed actuaries

#### *Appointment*

6.4 A private health insurer must have an appointed actuary. If a person ceases to be appointed, the insurer must appoint another actuary within six weeks. *[Part, 5 Division 2, subsections 105(1) and (2)]*

6.5 A private health insurer must not appoint a person as an actuary unless:

- the insurer is reasonably satisfied the person meets the eligibility criteria in the prudential standards relating to the appointment of actuaries; and
- the person is not disqualified by an order under section 119 from being or acting as an actuary of a private health insurer. *[Part 5, Division 2, subsections 105(3) and (4)]*

6.6 An actuary's appointment cannot take place if there is already an actuary appointed by the private health insurer. *[Part 5, Division 2, subsection 105(5)]*

### ***Ending an appointment as actuary***

6.7 A private health insurer must end a person's appointment as actuary if:

- the person does not meet the eligibility criteria in the prudential standards; or
- the insurer is satisfied that the person has failed to adequately and properly perform their duties under the this Act; or
- the person is subject to a disqualification order under section 119. *[Part 5, Division 2, subsection 106(1)]*

6.8 If a private health insurer ends an actuary's appointment under subsection 106(1) but the insurer's directors do not have the power (or exclusive power) to appoint another actuary, the directors may temporarily appoint a person who meets the requirements until an appointment can be made in accordance with the insurer's constitution or business rules. *[Part 5, Division 2, subsection 106(2)]*

### ***Notification of appointment etc.***

6.9 An insurer that appoints an actuary must, within 14 days, provide APRA in writing with certain details about the person and their appointment. *[Part 5, Division 2, subsections 107(1) and (2)]*

6.10 If an actuary's appointment ceases, within 14 days the insurer must notify APRA in writing that the person's appointment has ceased and the day on which it ceased. *[Part 5, Division 2, subsection 107(3)]*

### ***Role of appointed actuary***

6.11 An appointed actuary must perform for the insurer the functions set out in the prudential standards (which will contain requirements that apply directly to appointed actuaries) and reporting standards made by APRA under the FS(CD) Act. *[Part 5, Division 2, subsection 108(1)]*

6.12 The private health insurer must enable the appointed actuary to perform those functions, including providing them with documents, requiring officers and employees to answer questions and allowing the actuary to attend and speak at meetings. *[Part 5, Division 2, subsection 108(2)]*

### ***Actuary's obligation to report***

6.13 If an actuary thinks the insurer must take action to avoid a contravention of this Act, the PHI Act or the FS(CD) Act, or to avoid

prejudicing the interests of policy holders of a health benefits fund, the actuary must bring this to the attention of the insurer, the directors or an officer of the insurer. *[Part 5, Division 2, subsection 109(1)]*

6.14 If an actuary thinks the insurer or an officer of the insurer may have contravened this Act or other law and that the contravention may significantly affect policy holders' interests, the actuary must notify APRA. *[Part 5, Division 2, paragraphs 109(2)(a) and (b)]*

6.15 The notification must be in writing and inform APRA of their opinion and the information on which it is based. *[Part 5, Division 2, paragraphs 109(2)(c) and (d)]*

6.16 An actuary need not notify APRA if an officer of the private health insurer informs the actuary that the insurer has notified APRA in writing of the contravention and the actuary has no reason to disbelieve this. *[Part 5, Division 2, subsection 109(3)]*

6.17 It is an offence for an officer of the private health insurer to inform an actuary that the insurer has informed APRA in writing about a contravention, if APRA has not been informed. *[Part 5, Division 2, subsection 109(4)]*

6.18 If an actuary has drawn a matter to the insurer's attention and is satisfied the insurer has had reasonable time to take action but has failed to take action, the actuary must inform APRA about the matter in writing. *[Part 5, Division 2, subsection 109(5)]*

6.19 If a person is subject to an obligation under subsections 109(2) or (5) but their appointment ceases before they notify APRA, the person remains subject to the obligation as if they were still the insurer's appointed actuary. *[Part 5, Division 2, subsection 109(6)]*

***Appointed actuary may give information to APRA***

6.20 A current or previously appointed actuary may give information, books, accounts or documents about the private health insurer to APRA if they consider this will assist APRA in performing its functions under this Act. *[Part 5, Division 2, subsection 110(1)]*

6.21 A person who gives APRA information in accordance with section 110 in good faith and without negligence, cannot be subject to any action, claim, demand or liability in respect to the information. *[Part 5, Division 2, subsection 110(2)]*

***Duty of appointed actuary to give information when required***

6.22 If it considers it will assist in performing its duties under this Act or the FS(CD) Act, APRA may give a written notice to a current or previously appointed actuary requiring them to give APRA information, books, accounts or documents about the insurer. *[Part 5, Division 2, subsection 111(1)]*

6.23 The person must comply with the notice and not give APRA false or misleading information. Contravention of this subsection is an offence of strict liability. The imposition of a strict liability offence is considered appropriate in order to encourage accurate information to be provided to APRA. *[Part 5, Division 2, subsections 111(2), (3) and (4)]*

***Qualified privilege of appointed actuary***

6.24 A current or previously appointed actuary of a private health insurer has qualified privilege in certain circumstances. This privilege is in addition to any privilege conferred on a person by any other law. *[Part 5, Division 2, sections 112]*

***Referring matters to professional associations for actuaries***

6.25 APRA may refer a matter to an actuary's professional association for consideration of disciplinary or other action if APRA considers that the actuary failed to adequately perform their duties of functions or is not a fit and proper person to be an actuary. *[Part 5, Division 2, subsection 113(1)]*

6.26 If APRA refers such a matter, APRA must also give written notice of this to the actuary. *[Part 5, Division 2, subsection 113(2)]*

***APRA may direct removal of actuary***

6.27 If an actuary is disqualified under section 119, otherwise becomes disqualified, is not a fit and proper person to be an appointed actuary or has failed to adequately perform their duties of functions under this Act or the PHI Act, APRA may give a written direction to the private health insurer to end the person's appointment as actuary. *[Part 5, Division 2, subsection 114(2)]*

6.28 Before making such a direction, APRA must give a written notice to the insurer and actuary and give the actuary a reasonable opportunity to make submissions on the matter. The notice must include a statement that APRA may discuss any submission with other persons APRA considers appropriate *[Part 5, Division 2, subsections 114(3) and (4)]*

6.29 If a submission is made, APRA must consider it and may discuss it with persons APRA considers appropriate. *[Part 5, Division 2, subsection 114(5)]*

6.30 A direction ending an appointment takes effect on the day the direction specifies, which must be at least 7 days after the direction is made. APRA must give both the insurer and the actuary a copy of the direction *[Part 5, Division 2, subsections 114(6) and (7)]*

6.31 It is an offence of strict liability for a private health insurer to fail to comply with a direction given under section 114. *[Part 5, Division 2, subsection 114(8)]*

6.32 This strict liability is considered appropriate because requiring proof of fault would undermine deterrence and the effectiveness of the regulatory regime. This is considered necessary to ensure the integrity of the regulatory regime and in particular to protect the interests of policyholders. The offence does not include a penalty of imprisonment.

### **Division 3 – Disqualified persons**

6.33 The PHI Act currently includes an administrative disqualification regime in Division 166 under which PHIAC has power to make a determination in its own right that a person is disqualified. The disqualification regime in the Exposure Draft differs by requiring APRA to approach a court for a determination that a person is disqualified. As with the PHI Act, there will also be grounds upon which a person is automatically disqualified (e.g. when convicted of certain offences) although there will be capacity to approach the court and seek a declaration that the person should not be treated as disqualified.

#### ***Private health insurers not to allow disqualified persons to act as directors***

6.34 A private health insurer commits an offence with a penalty of 50 penalty units if it allows a disqualified person to act as an officer. *[Part 5, Division 3, subsection 115(1)]*

6.35 An offence is not committed under subsection 115(1) if the insurer contacted APRA a reasonable period before allowing the person to act as a director or senior manager and was advised that the person was not disqualified. *[Part 5, Division 3, subsection 115(2)]*

#### ***Disqualified persons must not act for private health insurers***

6.36 A disqualified person commits an offence, with a penalty of 120 penalty units or imprisonment for two years or both, if he or she is or

acts as an appointed actuary or officer of a private health insurer. [Part 5, Division 3, section 116]

***Effect of non-compliance***

6.37 A failure to comply with section 115 or 116 does not affect the validity of an appointment or transaction. [Part 5, Division 3, section 117]

***Who is a disqualified person?***

6.38 A person is a disqualified person if:

- the person has been convicted of an offence against or arising out of this Act, the PHI Act, the Corporations Act or former Corporations Law, or any corresponding law of a foreign country; or
- the person has been convicted of an offence against or arising out of a law in force in Australia, or any corresponding law of a foreign country, if the offence involves dishonest conduct, or an offence relating to a financial sector company; or
- the person has been or becomes bankrupt, applies for relief under a bankruptcy law or compounds with his or her creditor; or
- the person has been disqualified by the Federal Court on application by APRA. [Part 5, Division 3, subsection 118(1)]

6.39 A reference in subsection 118(1) to a person who has been convicted includes a reference to a person who has had an order made against them under section 19B of the *Crimes Act 1914* or any corresponding law of a foreign country. This section allows a court to find an offence proven but not proceed to enter a conviction as long as the person agrees to certain conditions. [Part 5, Division 3, subsection 118(2)]

6.40 Nothing in this clause affects the operation of Part VIIC of the *Crimes Act 1914* relating to spent convictions. [Part 5, Division 3, subsection 118(3)]

***Court power of disqualification***

6.41 Upon APRA's application, the Federal Court may disqualify a person from being or acting as an officer or appointed actuary of an insurer, or particular class of insurer for a period the Federal Court considers appropriate, if the Federal Court is satisfied the person is not a

fit an proper person and the disqualification is justified. *[Part 5, Division 3, subsection 119(1) and (2)]*

6.42 In deciding if a person is not fit and proper, the Federal Court may take into account the prudential standards (including any criteria for fitness and propriety the standards specify) and any other matters the Federal Court considers relevant. *[Part 5, Division 3, subsection 119(3)]*

6.43 In deciding if the disqualification is justified, the Federal Court may consider:

- if the application relates to an officer – the person’s conduct in the management, business or property of any corporation; and
- if the application relates to an actuary – the person conduct in relation to their functions or duties under this Act, the PHI Act, the *Insurance Act 1973*, the Life Insurance Act or the *Superannuation Industry (Supervision) Act 1993* (SIS Act); and
- any other matter the court considers relevant. *[Part 5, Division 3, subsection 119(4)]*

6.44 After the Federal Court disqualifies a person under section 119, APRA must give details of the disqualification to the private health insurer concerned and publish details of the disqualification in the Gazette. *[Part 5, Division 3, subsection 119(5)]*

***Court power to revoke or vary a disqualification etc.***

6.45 A disqualified person, or APRA, may apply to the Federal Court for a variation or revocation of an order made under section 119 or an order that he person is not disqualified. If the Federal Court makes either order, the person is not a disqualified person, despite section 118. *[Part 5, Division 3, subsections 120(1) and (2)]*

6.46 If APRA or a disqualified person makes an application, written notice of the application must be given by the applicant to the other at least 21 days before commencing proceedings. *[Part 5, Division 3, subsection 120(3)]*

6.47 An under given under paragraph (1)(b) may be subject to exceptions and conditions determined by the Federal Court. *[Part 5, Division 3, subsection 120(4)]*



***Privilege against exposure to penalty – disqualification under section 119***

*Proceedings*

6.48 In a proceeding under, or arising out of this Act, a person may not refuse or fail to comply with a requirement to provide answers, information, books, accounts or other documents or do to any other act, on the grounds that do to so may make them liable to disqualification under section 119. This applies regardless of whether a person is a defendant in, or party to a proceeding. *[Part 5, Division 3, subsections 121(1) and (2)]*

*Statutory requirements*

6.49 A person must not fail to comply with a requirement under this Act provide answers, information, books, accounts or other documents or do to any other act, on the grounds that do to so may make them liable to disqualification under section 119. *[Part 5, Division 3, subsection 121(3)]*

*Admissibility*

6.50 Section 148 which relates to self-incrimination does not apply to a disqualification proceeding under section 119. *[Part 5, Division 3, subsection 121(4)]*

*Other provisions*

6.51 The operation of subsections 121(1) and (3) are not affected by any other provisions of this Act, the PHI Act, or the *Administrative Appeals Tribunal Act 1975*. *[Part 5, Division 3, subsection 121(5)]*

***Restrictions on payment of pecuniary penalties etc.***

- 6.52 A private health insurer is prohibited from using its money for:
- payment of a pecuniary penalty imposed on an officer because of an offence under this Act; or
  - payment of an amount that an officer or former officer is liable to pay under Part 3 or 8; or
  - reimbursing an officer or former officer for payment of such penalties or amounts. *[Part 5, Division 4, section 122]*

***Giving APRA copies of reports made to policy holders***

6.53 APRA rules may require a private health insurer to give to APRA the reports it provides to policy holders of health benefits funds the insurer conducts. *[Part 5, Division 4, section 123]*

***Notifying APRA of name and contact details of officers***

6.54 APRA may also require a private health insurer to give the names and contact details of its officers to APRA. *[Part 5, Division 4, section 124]*

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## **Chapter 7**

# **Monitoring and investigation**

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### **Outline of chapter**

7.1 Part 6 of the Exposure Draft includes monitoring and investigation provisions, including:

- power for APRA to request information and documents for general supervisory purposes;
- power to seek an explanation from a private health insurer; and
- power to investigate a private health insurer, including the appointment of an inspector, obtaining information and warrants for entry of premises and the conduct of examinations.

### **Summary of new law**

7.2 These provisions use various aspects of different Acts, including Division 214 of the PHI Act as well as some provisions from the SIS Act and the Regulatory Powers Act.

7.3 In general, the Regulatory Powers Act is intended to provide a framework of standard powers that should be applied when considering new monitoring and information gathering provisions. However, the Regulatory Powers Act only applies where there has been a breach of an offence provision or a civil penalty provision.

7.4 The monitoring provisions are designed to ensure that APRA has power to require an insurer to provide information and documents without the need for suspecting the contravention of a provision. Similar provisions existing in APRA's current legislation (e.g. sections 254(2) and 255 of the SIS Act and section 62 of the *Banking Act 1959*). The inclusion of these provisions in the Exposure Draft will enable APRA to obtain information, where appropriate, for routine monitoring purposes and for other purposes. There is no equivalent of section 191-1 of the PHI Act (which provides that PHIAC may seek an explanation from a private health insurer) in the Exposure Draft, as that capacity will be covered by the monitoring provisions.

7.5 The investigation provisions replace, and update, for APRA's purposes, two overlapping investigation powers currently located in Divisions 194 and 214 of the PHI Act. This will avoid the duplication that currently exists in the PHI Act and the updating of certain provisions (e.g. in relation to warrants, obtaining consent to entry and identity cards) will bring the investigation powers more into line with Regulatory Powers Act. The investigation powers will cover matters relating to compliance with the risk equalisation fund provisions that will remain in the PHI Act (including relating to the levy, which APRA will collect).

### Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Monitoring of private health insurers (Division 2 of Part 6 of the Exposure Draft modelled on sections 254 and 255 of the SIS Act).	Council may seek an explanation from a private health insurer (section 191-1 of the PHI Act). There is no equivalent to this section in the Exposure Draft.
Investigation powers (Division 3 of Part 6 of the Exposure Draft modelled on Division 214 of the PHI Act and the Regulatory Powers Act).	Investigation into affairs of private health insurers (Division 214 of the PHI Act).
Other matters (Division 4 of Part 6 of the Exposure Draft modelled on various provisions of the PHI Act and Regulatory Powers Act).	No direct equivalent provisions in the PHI Act.

### Detailed explanation of new law

#### Part 6 – Monitoring and investigation

##### Division 1 – Introduction

###### *Simplified of this Part*

7.6 A simplified outline of this Part will be included here once drafted. [Part 6, Division 1, section 125]

## Division 2 – Monitoring

### *Purposes for which powers may be exercised etc.*

7.7 The powers in Division 2 may be exercised for the purposes of the Act or the risk equalisation levy legislation. Such powers cannot be exercised for another purpose. [Part 6, Division 2, subsection 126(1)]

7.8 The powers of Division 2 may be exercised in relation to a particular private health insurer, even if an investigation is being conducted in relation to the affairs of the insurer. [Part 6, Division 2, subsection 126(2)]

### *Power to require private health insurer to provide information and reports*

7.9 APRA may give a written notice requiring an insurer to give APRA particular information, or a report on particular matters, relating to the affairs of the insurer, by a specified time. [Part 6, Division 2, section 127]

7.10 A refusal or failure to comply with the notice is an offence.

### *Power to require production of documents*

7.11 APRA may give a written notice requiring a private health insurer or an officer of the insurer produce to APRA any documents relating to the insurers affairs at a reasonable time and place. APRA, or an APRA staff member, may inspect, take extracts or make copies of such a document. [Part 6, Division 2, subsections 128(1) and (3)]

7.12 APRA may require any such produced document which is not in English to be produced written English. [Part 6, Division 2, subsection 128(2)]

7.13 Refusal or failure to comply with this requirement is an offence.

## Division 3 – Investigation

### *Investigation of private health insurers by inspectors*

7.14 APRA may in writing appoint an APRA staff member to be an inspector to investigate the affairs of a private health insurer if APRA has reason to suspect:

- that the affairs of the insurer are not, or are about to be not be, carried on in the interests of the policy holders of a health benefits fund of the insurer; or

- a contravention of an enforceable obligation. *[Part 6, Division 3, subsection 129(1)]*

7.15 The inspectors instrument of appointment must specify:

- what APRA suspects and why; and
- the matters the investigation will relate to. *[Part 6, Division 3, subsection 129(2)]*

#### *Identity cards for inspectors*

7.16 APRA must issue an identity card to each inspector. The card must be in the form prescribed under APRA rules and contain a recent photograph *[Part 6, Division 3, subsection 130(3)]*. An inspector must carry the card at all times when exercising their powers under this Act. *[Part 6, Division 3, subsection 130 (7)]*

7.17 It is an offence of strict liability if a person who ceased to be an inspector does not return their identity card to APRA within 14 days after ceasing to be an inspector. This does not apply if the card was lost or destroyed. *[Part 6, Division 3, subsections 130(5) and (6)]*

7.18 Strict liability is justified as it is important that the card, which represents that the person concerned has statutory powers under the Division, not be lost or misused.

#### *Power of inspectors*

7.19 An inspector may by written notice require a person who the inspector believes to have some knowledge of the affairs of the private health insurer under investigation:

- to produce to the inspector any or all of the records under the person's custody or control that relate to the insurer; or
- to give the inspector all reasonable assistance in the person's power in connection with the investigation; or
- appear before the inspector for examination concerning relevant matters within the knowledge of the person. *[Part 6, Division 3, subsection 131(1)]*

7.20 The notice may specify the period within which person must comply with the notice (which must be 14 days or more). It is an offence to refuse or fail to comply with a notice. *[Part 6, Division 3, subsection 131(1)]*

7.21 An inspector may take possession of records produced under subsection 131(1) for as long as the inspector thinks necessary, and to take copies or extracts of the records. *[Part 6, Division 3, subsection 131(2)]*

7.22 An inspector must to allow a person to inspect the records if the person would have been able to inspect them if the insurer was not holding them. *[Part 6, Division 3, subsection 131(3)]*

***Person may be represented by lawyer when being examined***

7.23 A lawyer acting for a person being examined by an inspector may attend the examination and, as allowed by the inspector, address the inspector and examine the person in relation to matters on which the person has been questioned. *[Part 6, Division 3, section 132]*

***Access to premises***

*The functions of an inspector under this section*

7.24 An inspector who is empowered to investigate all or part of the affairs of a private health insurer and enters premises under subsections 133(3) or (4) may exercise search powers in relation to records that the inspector reasonably believes to relate to the affairs of the insurer. *[Part 6, Division 3, subsections 133(1) and (2)]*

*Entry with consent*

7.25 An inspector may enter any premises with the consent of the occupier to carry out their functions. *[Part 6, Division 3, subsection 133(3)]*

*Entry under warrant*

7.26 An inspector may apply for a warrant to enter premises if the inspector believes on reasonable grounds records are held there relating to the private health insurer whose affairs the inspector is investigating. *[Part 6, Division 3, subsection 133(4)]*

***General provisions relating to obtaining consent to enter premises***

7.27 Before obtaining an occupiers' consent for the purposes of subsection 133(3), an inspector must tell the occupier they can refuse consent. *[Part 6, Division 3, subsection 134(1)]*

7.28 Such consent is only valid if it is voluntary and the occupier remains free to withdraw consent at any time or to consent to entry only during a certain time period. *[Part 6, Division 3, subsections 134(2), (3) and (4)]*

7.29 An inspector or authorised person must leave the premises if consent is withdrawn. [Part 6, Division 3, subsection 134(5)]

***Investigation warrants***

7.30 An inspector may apply to a magistrate for an ***investigation warrant***. The magistrate may issue the warrant if satisfied there are reasonable grounds for suspecting there are documents at the premises about an insurer's affairs which the inspector is investigating. [Part 6, subsection 135(1) and (2)]

7.31 The warrant must not be issued by the magistrate unless the inspector (or another person) has given the magistrate orally or by affidavit any further information the magistrate requires about the reasons for the warrant. [Part 6, subsection 135(3)]

7.32 The warrant must state the details specified in subsection 135(4) regarding how it will be exercised. [Part 6, subsection 135(4)]

***Announcement before entry under investigation warrant***

7.33 Before entering a premises under an investigation warrant, the inspector must announce they are authorised to enter the premises, show their identity card to the occupier (or their representative) if present, and give opportunity to be given entry. [Part 6, subsection 136(1)]

7.34 An inspector need not do this if they believe on reasonable grounds they must immediately enter the premises to ensure the execution of the warrant is not frustrated. If the inspector does this, they must show the identity card to the occupier, or other person who apparently represents them. [Part 6, subsections 136(2) and (3)]

7.35 This is subject to an exception where the inspector believes on reasonable grounds that immediate entry is required, in which case the inspector must as soon as practicable after entering the premises show his or her identify card to the occupier or other person.

***Inspector to be in possession of investigation warrant***

7.36 When executing an investigation warrant, the inspector must have the warrant, or a copy of it. [Part 6, section 137]

***Details of warrant etc. to be given to occupier***

7.37 An authorised person is required to provide a copy of the warrant to the occupier of premises, or an occupier's apparent representative, if either are present, and to inform the person of their rights and responsibilities under sections 139 and 140. This obligation ensures



that occupiers and representatives, who are present when a warrant is executed, are granted an opportunity to examine the warrant and are explicitly informed about their rights and responsibilities. *[Part 6, section 138]*

*Right to observe execution of warrant*

7.38 The occupier of premises or their apparent representative, who is present when a warrant is executed, has a right to observe the execution of the warrant on their premises. This right does not limit how the warrant may be executed or require an occupier to witness all of an authorised person's activities, but it does recognise that a person should not be excluded during the execution of a warrant unless they attempt to obstruct the inspection. *[Part 6, subsections 139(1) and (2)]*

7.39 This right does not prevent an execution of warrants in more than one place at the same time. *[Part 6, subsection 139(3)]*

*Responsibility to provide facilities and assistance*

7.40 An occupier of premises, or their apparent representative has an obligation to provide reasonable facilities and assistance to the authorised person and any person assisting, required to effectively carry out the warrant powers. This obligation recognises that investigation powers are authorised by issuing officers for the purpose of determining whether laws are being complied with and should not be obstructed. The failure of an occupier or their representative to provide reasonable facilities and assistance carries a penalty of imprisonment for six months or 30 penalty units, or both. *[Part 6, section 140]*

*Concealing etc. records*

7.41 A person commits an offence with a penalty of 30 penalty units or imprisonment for six months or both if the person engages in conduct that results in the concealment, destruction, mutilation or alteration of the records of a private health insurer whose affairs are being investigated. *[Part 6, Division 3, subsection 141(1)]*

7.42 It is a defence if the person did not act with intent to defeat the purpose of the Exposure Draft or delay or obstruct the investigation. *[Part 6, Division 3, subsection 141(2)]*

*Reports of inspectors*

7.43 An inspector must report in writing to APRA on completion of the investigation and meet any directions of the APRA to provide reports. The section will also allow the inspector to make one or more additional

reports, at the inspector's discretion, during the investigation. *[Part 6, Division 3, section 142]*

7.44 The inspector may make any recommendation in the report they consider is appropriate, but is precluded from including in a report recommendations relating to criminal proceedings or opinions that a person has committed a criminal offence. The inspector must state an opinion that criminal proceedings ought to be instituted or that a person has committed a criminal offence in writing to APRA. *[Part 6, Division 3, subsections 142(3), (4) and (5)]*

#### ***Dissemination of reports***

7.45 APRA must give a copy of an inspector's report under paragraph 142(1)(a) to the private health insurer to which it relates, unless APRA thinks that a copy should not be provided having regard to proceedings that have been or might be instituted. *[Part 6, Division 3, subsections 143(1) and (2)]*

7.46 If APRA has given a copy of the report to the insurer it may, if it thinks it in the public interest, publish the whole or part of a report. *[Part 6, Division 3, subsection 143(3)]*

7.47 A court hearing proceedings against an insurer or another person in respect of matters dealt with in a report may order that a copy of the report be provided to the insurer or other person. *[Part 6, Division 3, subsection 143(4)]*

#### ***Liability for publishing reports etc.***

7.48 A person (excluding APRA or an APRA staff member) publishing in good faith a copy of, or a fair extract from, an inspector's report published under subsection 143(3) is protected from any action or proceeding. *[Part 6, Division 3, subsection 144(1)]*

7.49 An action is taken to have been made in good faith if the person making it is not actuated by ill will or any other improper motive. *[Part 6, Division 3, subsection 144(3)]*

7.50 APRA and its staff will be covered by the indemnity in section 58 of the APRA Act in relation to the above matters.

#### ***Powers of magistrates***

7.51 The power conferred on a magistrate under Division 3 is conferred on the magistrate in their personal capacity and not as a representative of the court. However, magistrates are granted the protection and immunities of the court and members of the court when

exercising these powers. This recognises that issuing a warrant is an executive function and not an exercise of judicial power. [Part 6, Division 3, section 145]

#### ***Delegation by inspectors***

7.52 An inspector may delegate in writing any of their powers under Division 3 to an APRA staff member. [Part 6, Division 3, subsection 146(1)]

7.53 A delegate must produce the instrument of delegation (or a copy) to any person who may be affected by the exercise of the delegated powers and who asks to see the instrument. [Part 6, Division 3, subsection 146(2)]

### **Division 4 – Other matters**

#### ***Refusing or failing to comply with requirements***

7.54 A person commits an offence with a penalty of 30 penalty units or imprisonment for six months, or both, if the person fails to comply with a requirement under section 127, 128 or 131. The person need only comply with such a requirement to the extent they are capable of doing so. [Part 6, Division 3, section 147]

#### ***Self-incrimination***

7.55 A person cannot fail to provide answers, information, report or document in an investigation on the ground that they may be incriminated or liable to a penalty because of providing such assistance. [Part 6, Division 3, subsection 148(1)]

7.56 However, if the person is an individual, any assistance provided by the person or any information, document or thing obtained because of a person's assistance are not admissible in evidence against them in any proceedings (either criminal or civil) except proceedings in relation to section 137.1 or 137.2 of the *Criminal Code* (which relate to the provision of false or misleading information). [Part 6, Division 3, subsection 148(2)]

#### ***Legal professional privilege***

7.57 The right of a person to claim legal professional privilege has not been abrogated under Part 6. This means that a person has the right to refuse to answer a question, give information, or produce a document on the ground that the answer, information or document would be subject to legal professional privilege. [Part 6, Division 4, section 149]

***Protection from liability***

7.58 A person's compliance with a requirement made of the person under Part 6 or of an inspector does not lead them to incur any liability to any other person because of that compliance. *[Part 6, Division 4, section 150]*

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## **Chapter 8**

### **Enforceable undertakings**

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#### **Outline of chapter**

8.1 Part of the Exposure Draft relates to APRA’s ability to accept enforceable undertakings.

#### **Summary of new law**

8.2 Part 7 is based on equivalent provisions in the Life Insurance Act. It will enable APRA to obtain an enforceable undertaking from an insurer or a person who has had involvement with an insurer (e.g. an actuary or officer), including in circumstances where lengthy legal action might otherwise need to be taken against that person.

#### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Enforceable undertakings (sections 151 and 152 of the Exposure Draft, modelled on section 133A of the Life Insurance Act)	Enforceable undertakings (Division 197 of the PHI Act).

#### **Detailed explanation of new law**

##### **Part 7 – Enforceable undertakings**

###### *Simplified outline of this Part*

8.3 A simplified outline of this Part will be included here once drafted. [*Part 7, Division 1, section 151*]

###### *Enforceable undertakings*

8.4 APRA may accept a written undertaking from a person for matters which APRA has a power or function under this Act (including

prudential standards or APRA rules) or the risk equalisation fund legislation. *[Part 7, subsection 152(1)]*

8.5 A decision by APRA to refuse consent is reviewable under section 167.

8.6 The enforceable undertaking may be withdrawn or varied at any time, if APRA consents. *[Part 7, subsection 152(2)]*

8.7 If APRA considers a person has breached an enforceable undertaking, it may apply to the Federal Court for various orders, including ordering:

- compliance with the undertaking;
- the person to pay to the Commonwealth any amount gained due to the breach; or
- compensation to any other person who has suffered loss due to the breach. *[Part 7, subsection 152(3) and (4)]*

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## **Chapter 9**

# **Remedies in the Federal Court**

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### **Outline of chapter**

9.1 Part 8 of the Exposure Draft relates to remedies available in the Federal Court for a private health insurers non-compliance with an enforceable obligations.

### **Summary of new law**

9.2 The provisions of Part 8 of the Exposure Draft are based on Division 203 of the PHI Act (other than section 203-20 relating to adverse publicity order).

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Remedies in the Federal Court (Part 8 of the Exposure Draft).	Remedies in the Federal Court (Division 203 of the PHI Act).

### **Detailed explanation of new law**

#### **Part 8 – Remedies in the Federal Court**

##### *Simplified outline of this Part*

9.3 A simplified outline of this Part will be included here once drafted. [*Part 8, Division 1, section 153*]

***APRA may apply to the Federal Court***

9.4 If APRA is satisfied that a private health insurer has contravened an enforceable obligation, APRA may apply to the Federal Court for a declaration of the contravention, and one or more of:

- an order imposing a civil penalty under section 156;
- a compensation order under section 157;
- any other order that APRA considers will redress the contravention. *[Part 8, subsection 154(1)]*

9.5 Such an application must be made within 4 years of the alleged contravention. *[Part 8, subsection 154(2)]*

***Declarations of contravention***

9.6 If the Federal Court is satisfied a private health insurer has contravened an enforceable obligation it must make a declaration of contravention specifying the enforceable obligation that was contravened, the insurer that contravened, the conduct that constituted the contravention and, if the Federal Court is satisfied that an officer of the insurer failed to take reasonable steps to prevent the contravention, the officer. The Federal Court's declaration is conclusive evidence of these matters. *[Part 8, section 155]*

***Civil penalty order***

9.7 If the Federal Court has made a declaration of contravention that specifies an officer, it may order the officer to pay the Commonwealth a pecuniary penalty of up to 1,000 penalty units. *[Part 8, subsection 156(1)]*

9.8 Such an order is a civil penalty order and civil debt due to the Commonwealth. *[Part 8, subsections 156(2) and (4)]*

9.9 The Federal Court must not make an order if it is satisfied that a court has ordered the officer to pay damages in the nature of punitive damages in respect of the contravention or the officer's failure to take reasonable steps to prevent the contravention. *[Part 8, subsection 156(3)]*

9.10 The Commonwealth may enforce the order it would an order made in civil proceedings against the officer the recover the officers debt. The debt is taken to be a judgement debt. *[Part 8, subsection 156(5)]*



***Compensation order***

9.11 If the Federal Court has made a declaration of contravention, the Federal Court may order the private health insurer specified to compensate an individual for any injury or loss suffered as a result of the contravention. *[Part 8, subsection 157(1)]*

9.12 The order must specify the amount of compensation and that it may be enforced as if it were a judgment of the Federal Court. *[Part 8, subsections 157(2) and (3)]*

***Other order***

9.13 If the Federal Court has made a declaration of contravention, the Federal Court may make any order APRA seeks, and it may be enforced as if it were a judgement of the Federal Court. *[Part 8, section 158]*

***Civil evidence and procedure rules for declarations and orders***

9.14 The Federal Court must apply the rules of evidence and procedure for civil matters in proceedings under this Division. *[Part 8, section 159]*

***Civil proceedings after criminal proceedings***

9.15 The Federal Court must not make a pecuniary penalty order against an officer of a private health insurer if the officer has been convicted of an offence constituted by conduct substantially the same as the conduct which would have led the Federal Court to impose a pecuniary penalty. *[Part 8, section 160]*

***Criminal proceedings during civil proceedings***

9.16 Proceedings for a civil penalty order against an officer are stayed if criminal proceedings are started against the officer for an offence constituted by conduct substantially the same as the conduct which would lead the Federal Court to impose a civil penalty. *[Part 8, subsection 161(1)]*

9.17 The proceedings are dismissed if the officer is convicted of the offence but may otherwise be resumed. *[Part 8, subsection 161(2)]*

***Criminal proceedings after civil proceedings***

9.18 Criminal proceedings may be started against a person for conduct substantially the same as the conduct constituting a contravention of an enforceable obligation regardless of whether a declaration of contravention has been made that specifies the person or an order has been made against the person under this Division. *[Part 8, section 162]*

***Evidence given in proceedings for penalty not admissible in criminal proceedings***

9.19 Evidence of information given or documents produced by an officer of a private health insurer is not admissible in criminal proceedings against the officer if:

- the officer previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the officer; and
- the conduct alleged to constitute the offence is substantially the same as the conduct to which the Federal Court had regard in satisfying itself that the officer failed to take reasonable steps to prevent the insurer contravening an enforceable obligation. *[Part 8, section 163]*

9.20 This protection does not apply to criminal proceedings against the officer for providing false evidence in the proceedings for the pecuniary penalty order. *[Part 8, section 163]*

***APRA may require person to assist***

9.21 APRA may, in writing, require a person to give all reasonable assistance in connection with an application by APRA:

- for a declaration of contravention in relation to a private health insurer; or
- for a declaration of contravention that specifies an officer of a private health insurer; or
- for a civil penalty order in relation to an officer of a private health insurer. *[Part 8, subsection 164(1)]*

9.22 A person commits an offence with a penalty of 5 penalty units if they do not comply with a requirement under subsection 164(1). *[Part 8, subsection 164(2)]*

9.23 APRA must not require the person to assist in connection with an application for a declaration or order under paragraph (1)(a) unless:

- it appears to APRA that someone other than the person required to assist may have contravened an enforceable obligation;

- APRA reasonably suspects or believes the person required to assist can give relevant information. *[Part 8, subsection 164(3)]*

9.24 APRA may require a person to assist regardless of whether an application for a declaration of contravention or order has been made or criminal proceedings have begun. *[Part 8, subsection 164(4)]*

9.25 A person who is or has been a lawyer for a person suspected of a contravention or a likely defendant in criminal proceedings cannot be required to assist. *[Part 8, subsection 164(5)]*

9.26 APRA may apply to the Federal Court to order the person to comply with the requirement to assist in a specific way. Only APRA may apply for such an order. *[Part 8, subsection 164(6)]*

***Relief from liability for contravening an enforceable obligation***

9.27 The Federal Court may relieve a person wholly or partly from liability arising out of a contravention or a failure to take reasonable steps to prevent a contravention if it appears to the Federal Court that the person has acted honestly and ought fairly to be excused. *[Part 8, subsection 165(1)]*

9.28 A person who thinks that proceedings will or may be brought against them under this Division may apply to the Federal Court for relief, and provide that the Federal Court may grant relief as if the proceedings had been begun. *[Part 8, subsections 165(2) and (3)]*

9.29 A reference in subsection 165(1) to the Federal Court is a reference to the judge alone for the purpose of a case tried by a judge and jury, and the relief granted includes withdrawing the case in whole or part from the jury and directing judgement to be entered for the defendant. *[Part 8, subsection 165(4)]*



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## **Chapter 10**

### **Miscellaneous**

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#### **Outline of chapter**

10.1 Part 9 of the Exposure Draft relates to:

- the decisions of APRA that are reviewable by the AAT;
- APRA’s authority to give approvals, make determinations and rules, or do other things;
- powers of the Federal Court; and
- approved forms.

#### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
AAT review of decisions (section 167 of the Exposure Draft).	AAT review of decisions (section 328-5 of the PHI Act).
Approvals and determinations by APRA (section 168 of the Exposure Draft based on section 11 of the SIS Act).	No analogous provision in the PHI Act.
Powers of the Federal Court (section 169 of the Exposure Draft).	Powers of the Federal Court (section 203-70 of the PHI Act).
Approved forms (section 170 of the Exposure Draft).	Approved forms (section 333-10 of the PHI Act).

## Detailed explanation of new law

### Part 10 – Miscellaneous

#### *Simplified outline of this Part*

10.2 A simplified outline of this Part will be included here once drafted. [Part 9, Division 1, section 166]

#### *AAT review of decisions*

10.3 An application may be made to the AAT for review of the decisions made under the provisions of this Act set out in the table in section 167. [Part 9, section 167]

<b>Reviewable decisions</b>		
<b>Item</b>	<b>Decision</b>	<b>Provision under which decision is made</b>
1	to refuse an application for registration as a private health insurer	section 15
2	to grant an application, subject to terms and conditions, for registration as a private health insurer	section 15
3	to refuse an application for approval for a private health insurer to convert to being registered as a for profit insurer	section 20
4	to refuse to approve the crediting of an amount to a health benefits fund of a private health insurer	subparagraph 27(3)(b)(ii)
5	to refuse to approve a restructure of the health benefits funds of a private health insurer	section 32
6	to refuse to approve a transfer of the health benefits funds of one or more private health insurers	section 33
7	to refuse to approve a termination of the health benefits funds of a private health insurer	section 37
8	to make, vary or revoke a prudential standard referred to in paragraph 91(3)(c)	section 91
9	to give a direction under section 95 on the ground specified in paragraph 95(1)(a), (b) or (c)	section 95
10	to refuse to vary or revoke a direction that was given under section 95 on the ground	section 98

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<b>Reviewable decisions</b>		
<b>Item</b>	<b>Decision</b>	<b>Provision under which decision is made</b>
	specified in paragraph 95(1)(a), (b) or (c)	
11	to give a direction to end the appointment of a person as appointed actuary	section 114
12	to refuse to consent to the variation or revocation of an undertaking given under section 152	section 152

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***Approvals, determinations etc. by APRA***

10.4 APRA is authorised to give approval, make a determination or do an act under a provision of this Act, if the Act refers to such actions but does not expressly authorise APRA to take those actions. *[Part 9, section 168]*

***Powers of Federal Court***

10.5 The powers conferred on the Federal Court by this Exposure Draft do not affect any other power of the Federal Court. *[Part 9, section 169]*

***Approved forms, and giving documents not required to be in approved forms***

10.6 A notice, statement, application or other document is in the approved form if:

- it is in the form approved in writing by APRA;
- contains information that the form requires (including being accompanied by other documentation that the form requires);
- is signed by a person in accordance with any applicable requirements specified in the form or APRA rules; and
- the giving of the form is in accordance with any applicable requirements specified in the form or APRA rules. *[Part 9, subsection 170(1)]*

10.7 Requirement for the giving of forms electronically may be specified in the form or APRA rules. *[Part 9, subsection 170(2)]*

***Delegation by Minister***

10.8 The Minister may delegate their powers under the Exposure Draft to an SES employee (or acting SES employee) in the Department. *[Part 9, section 171]*

***APRA rules***

10.9 APRA may, by legislative instrument, make rules which prescribing matters with the Act requires or permits APRA to make, or is necessary or convenient for APRA to make for carrying out or giving effect to the Act. *[Part 10, subsection 172(1)]*

10.10 Such rules may provide for APRA to exercise powers and discretions under the rules. *[Part 10, subsection 172(2)]*

10.11 APRA's rules may not create an offence or civil penalty, appropriate an amount from the Consolidated Revenue Fund or amend this Act. *[Part 10, subsection 172(3)]*

10.12 Under section 15 of the APRA Act, APRA may delegate its power make. Vary or revoke APRA rules. Such a delegation must be limited to an APRA member (within the meaning of the APRA Act) or an APRA staff member who is an executive general manager or equivalent. *[Part 9, subsection 172(4)]*



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## ***Additional Information: Private Health Insurance Levies***

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10.13 Consistent with the existing regime under the PHI Act, APRA will have the power to impose three levies on private health insurance providers: an annual Private Health Insurance Supervisory Levy; the quarterly Risk Equalisation Levy; and in the case of a private health insurer's collapse, the Collapsed Insurer Levy.

10.14 Legislative amendments to transfer the levy collection functions from PHIAC to APRA are yet to be drafted but will be included as part of the Exposure Draft. The information below gives an indication of what is proposed in the absence of an exposure draft Exposure Draft on these amendments.

10.15 APRA will have the power to impose a late payment penalty on private health insurers in respect of each of these levies in line with Section 10 of the *Financial Institutions Supervisory Levies Collection Act 1998*.

### **Administration Levy**

#### **Key Changes between new levy and current levy**

<i>New levy</i>	<i>Current levy</i>
The Private Health Insurance Supervisory levy will be imposed annually by APRA.	The Private Health Insurance (Council Administration) Levy is imposed quarterly by PHIAC.
APRA will have the power to impose a late payment penalty determined at the rate of 20 per cent per annum.	PHIAC has the power to impose a late payment penalty determined at the rate of 15 per cent per annum.
The annual levy will be subject to an annual cap of \$2.25 million in 2015-16, indexed to the All Groups Consumer Price Index in subsequent years.	The current annual levy cannot exceed \$2 for policies under which only one person is insured and \$4 otherwise.
The levy base, levy rate, and annual maximum and minimum amount payable will be determined annually by the Minister.	The levy base and levy rate is contained in the enabling Act, not the rules determined by the Minister.

10.16 The Private Health Insurance Supervisory Levy will be imposed annually by APRA on private health insurance entities to recover the costs incurred in providing prudential supervision.

10.17 The levy payable will be issued to private health insurance entities on 1 July each year and payable at least 28 days later.

10.18 The Supervisory Levy will be imposed through an amendment to the *Financial Institutions Supervisory Levies Collection Act 1998*.

10.19 This amendment will provide APRA with the power to collect levies under the new *Private Health Insurance Supervisory Levy Imposition Act 2014*.

10.20 The levy base, levy rate, annual maximum and annual minimum to be applied will be determined annually in the Minister's *Private Health Insurance Supervisory Levy Imposition Determination*.

10.21 In 2015-16 the levy base and levy rate will be unchanged from those contained in the existing *Private Health Insurance (Council Administration Levy) Act 2003* and the *Private Health Insurance (Council Administration Levy) Rules 2007*.

10.22 The levy base and levy rate may be revised in future years by the Minister (in consultation with APRA, the Treasury, and the private health insurance industry) to ensure that APRA's costs are recovered in the most efficient and effective way possible.

10.23 The levy will comply with the Government's Cost Recovery Guidelines and will allocate costs to entities in line with the resources APRA expends in regulating them.

10.24 The levy will be subject to a statutory cap of \$2.25 million in 2015-16, and in relation to a later financial year the amount calculated by multiplying the statutory upper limit for the previous financial year by the indexation factor for the later financial year.

10.25 The indexation factor for a financial year will be the number worked out by dividing the All Groups Consumer Price Index number for the March quarter preceding the financial year by the All Groups Consumer Price Index number for the March quarter of the year prior, plus 0.03.

## Risk Equalisation Levy

### Key changes between new levy and current levy

<i>New levy</i>	<i>Current levy</i>
The Risk Equalisation Levy will be imposed quarterly by APRA.	The Risk Equalisation Levy is imposed quarterly by PHIAC
APRA will have the power to impose a late payment penalty determined at the rate of 20 per cent per annum.	PHIAC has the power to impose a late payment penalty determined at the rate of 15 per cent per annum.

10.26 The operation of the risk equalisation trust fund (RETF) remains an important part of the Government's overall health policy framework.

10.27 The Risk Equalisation Levy will be imposed quarterly on eligible private health insurers by APRA. This will be achieved through amendments to the *Financial Institutions Supervisory Levies Collection Act 1998*.

10.28 The rules dictating how the RETF is to operate, including the methodology for working out the amount to be paid into or out of the Fund by each insurer, are determined by the Private Health Insurance (Risk Equalisation Policy) Rules 2007.

10.29 The overall structure of the RETF, the risk equalisation levy, and the way in which private health insurance entities engage with them, will not change.

## Collapsed Insurer Levy

### Key changes between new levy and current levy

<i>New law</i>	<i>Current law</i>
A Minister in the Treasury portfolio may make a determination to impose a levy to help meet a collapsed insurers' liabilities to the people insured under its complying health insurance policies that it is unable to meet itself.	A Minister in the health portfolio may make a determination to impose a levy to help meet a collapsed insurers' liabilities to the people insured under its complying health insurance policies that it is unable to meet itself.
APRA will have the power to impose a late payment penalty determined at the rate of 20 per cent per annum.	PHIAC has the power to impose a late payment penalty determined at the rate of 15 per cent per annum.

10.30 The Government will continue to have provision to collect a levy from all private health insurers (except for exempt insurers) in the case of a private health insurance entity's collapse.

10.31 This levy would be imposed to cover a collapsed insurer's liabilities to the people insured under its complying health insurance policies that it is unable to meet on its own.

10.32 The imposition of a levy to cover the liabilities of a collapsed private health insurer is currently outlined under the *Private Health Insurance (Collapsed Insurer Levy) Act 2003*. The Act specifies that the Minister has the power to make a determination specifying the levy day and the rate of the levy to be imposed.

10.33 From 1 July 2015, APRA will become responsible for the administration and collection of any future collapsed insurer levy imposed under the *Private Health Insurance (Collapsed Insurer Levy) Act 2003*

10.34 This will be completed through amendments to the *Financial Institutions Supervisory Levies Collection Act 1998*.