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For Better Health

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Mr Jerome Davidson
Manager
Insurance and Superannuation Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Davidson,

Thank you for the opportunity to review and provide feedback on the exposure draft of the Private Health Insurance (Prudential Supervision) Bill 2015.

Prudential supervision is of central importance to the smooth operation of the private health insurance industry and it is critical that the transition of this function from the Private Health Insurance Administration Council (PHIAC) to the Australian Prudential Regulation Authority (APRA) is correctly managed.

Medibank has reviewed the Bill and notes that in its description of the functions and powers of APRA to regulate prudential matters it extensively reflects the current prudential provisions within the Private Health Insurance Act 2007. Where there are changes, we recognise them as being relatively minor.

Medibank welcomes this consistency. We also welcome the commitment by the Australian Government and APRA to continue to apply the current principles based prudential standards, as recently developed by PHIAC, until at least July 2016, with any changes to standards that may occur after this date to be developed in consultation with the industry.

Should the Australian Government and APRA seek to develop new prudential standards in the future, Medibank strongly urges that they remain principles based and flexible to the circumstances of individual funds, rather than prescriptive and controlling.

By extension, we also recommend the Australian Government and APRA proceed with caution in any future moves to harmonise existing PHI prudential standards with those used in the supervision of other sectors and entities. In making this recommendation we are aware that PHI is considered by APRA and Treasury as a part of the financial services sector. However Medibank contends that with its strong healthcare focus PHI is better thought of as part of the health sector, making it of a fundamentally different nature to ADI's, general insurers and superannuation funds. These differences should be reflected in the prudential standards that govern the industry.

Medibank notes that in recent times the PHI industry has been very well served by a dedicated regulator in PHIAC. PHIAC has a deep knowledge of the private health insurance

industry and is strongly networked with it and the extended industry network, including the Department of Health and the broader health sector. This knowledge and network map is quite different to that of other financial institutions regulated by APRA and represents a real asset that should be maintained as much as possible within APRA.

Apart from these general comments, Medibank has prepared a list of technical comments relating to specific provisions of the Bill. These can be found in the attachment overleaf.

Should you wish to discuss any of these matters further, please contact James Connors on email at james.connors@medibank.com.au.

Yours sincerely,

George Savvides
Managing Director

**Attachment – Medibank technical comments and queries relating to the Exposure Draft of the Private Health Insurance (Prudential Supervision) Bill 2015**

| Provision | Consider for inclusion in Submission |
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| Section 12 | Please confirm that the 'rollover' of existing insurers' registrations will be *ongoing* and that it is not proposed that re-registration be obtained by some future date (as was done via section 18 of the *Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007*. |
| Paragraph 15(3)(b) | This should read: "prohibit the applicant from issuing a complying health insurance ***policy*** to a person who does not belong to the group". |
| Paragraph 15(4)(e) | Should this paragraph not also reference groups described in corresponding rules previously made by PHIAC? |
| Paragraph 28(3)(b) | Currently, the Private Health Insurance (Health Benefits Fund Administration) Rules 2007 supplement an insurer's abilities under section 137-10 of the PHI Act to mortgage or charge assets of its health benefits fund. Please confirm whether it is intended for these provisions to be incorporated into the contemplated 'APRA rules' (referenced in paragraph 28(3)(b) of the Exposure Draft) and whether they will be more restrictive. |
| Subsection 28(4) | Please confirm whether the APRA rules will replicate relevant provisions of the Private Health Insurance (Health Benefits Fund Administration) Rules 2007 and whether they are intended to be any more restrictive. |
| Subparagraph 91(2)(a)(ii) | We note and query the reference to the "Australian financial system" here when the corresponding reference in subparagraph 163-1(2)(a)(ii) of the PHI Act is to the "Australian private health insurance system". |
| Paragraph 96(1)(f), (g), (l), (n). | The terminology "financial accommodation" in paragraph (f) seems unnecessarily vague. (For example, does it include the granting of suspensions to policy cover and the waiving of waiting periods?)<br><br>Likewise, the terminology in paragraph (g), "undertake any liability under any policy" is unclear. (As it follows the words "issue or renew any policy", it would not be construed as identical in meaning to that term. And for policies that are already in force, the insurer does not "undertake" liability when it assesses and pays a benefit that it is contractually obligated to pay under the policy conditions.)<br><br>If it is intended that APRA should have the power to direct that an insurer *not* make payment of benefits that it is obliged to make under its policies, then this should be stated expressly. And if that is not intended, then it would be helpful for this to be stated more clearly as |

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| | well – potentially by providing greater specificity as to the intended scope of terms such as 'financial accommodation'. |
| Subsections 98(1) & (2) - ***Notes*** | It would be preferable that the rights of an insurer, *implied* by the Notes to subsections 98(1) and (2), to ask that a direction be varied or revoked, and the obligation of APRA to consider and to decide upon such requests, should be the subject of express statement within the legislation. We did not note such provisions in our review of the Exposure Draft. |
| Subsection 106(3) | In this section 106, and in any similar provisions within the proposed legislation, it may be helpful for APRA to consider including a power for 'remaining directors' to make the relevant appointments even if the constitution of the private health insurer would otherwise constitute a bar to doing so on the basis of a lack of quorum; or, perhaps, to be able to make such an appointment on a provisional basis, subject to confirmation (or otherwise), as soon as practicable after any such lack of quorum has been remedied. At the moment, a provision such as 106(3) does not seem to grant them a power to appoint if the power *is* in fact vested in the directors but they cannot exercise it because of a lack of quorum. |
| Subsections 111(2) and (3) | It is not reasonable for a person to by liable under subsection (2) or (3) unless it was *possible* for the person to comply with the notice. If the notice is misconceived – e.g., APRA directs a person to produce something specific, yet the person does not have it and has no right to obtain it – then the person may still "[fail] to comply with the notice" (as per paragraph (b) of the subsection), completing all required elements of the offence.<br><br>These same provisions lack any specification of a time period, so the offence element in paragraphs (2)(b) and (3)(b) may be triggered if the person fails to provide the required materials within the timeframe specified in the notice – and yet there is not even a requirement that any such stipulated timeframe be a reasonable one. |
| Part 5 | Several provisions in Part 5 compelling the production of information or records – e.g., subsections 121(1) and (3) – lack any qualification that corresponds to section 149 in Part 6.<br><br>We consider that this qualification should apply in respect of all provisions of the proposed Act that compel production of records or the provision of information, and that it should be clear in each case that the legal professional privilege concerned need not be that of the person who is the subject of the obligation to make disclosure. (Such a person may merely be a person in the employ of an entity whose |

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| | privilege it is.)<br><br>We note that the common law[1] requires rights as to legal professional privilege to be abrogated by clear and unambiguous words in an Act (or by necessary implication of the provisions of an Act[2]) if they are to be abrogated at all; however, we consider it poor drafting to disclaim such an intention expressly in one Part and not to do so in another Part – as though to imply that the Parliament meant, by the absence of it in that other Part, not to mean for such privilege to be preserved. |
| Section 121 | Subsections 121(1) and (3) exclude the right to refuse to provide evidence that tends to criminate oneself. Subsection 121(4) says that section 148 does not apply to a proceeding for the imposition of a penalty by way of disqualification under section 119.<br><br>Since section 148(1) *also* says that a person is not excused from providing evidence that that may tend to criminate himself or herself, the express exclusion in subsection 121(4) is ambiguous.<br><br>Subsection 121(4) is presumably meant to exclude the operation not of subsection 148(1) but only of subsection 148(2) – so the reference in subsection 121(4) should perhaps be more exact.<br><br>However, there is additional ambiguity here that should be corrected *so as to ensure that any evidence the disclosure of which is compelled by subsections 121(1) and (3) may only be used against a person in respect of a proceeding for penalty by way of disqualification under section 119, and that that same evidence is inadmissible in relation to a proceeding for any other sort of offence or penalty against the person.* At present, this is unclear. The exclusion of the operation of subsection 148(2) also needs to be made more explicitly narrow. |
| Subparagraph 122(b)(ii) | Should not this paragraph be drafted so as to conclude "…in respect of a liability imposed on the officer or former officer…" so as also to reference the alternative direct object (*viz.,* a person who is not now an officer of the insurer but previously was)? |
| Section 123 | What 'reports' are intended to be covered by a provision such as this? |
| Subsection 129(1) | This power may be exercised in circumstances where APRA reasonably suspects that the affairs of the insurer are being carried on in a way "that is not in the interests of the policy holders of a health benefit fund" conducted by the insurer. This seems to be far too broadly worded when an insurer may, with perfect legality under the PHI Act and under the proposed Act here, do any of the following – each of which might reasonably be characterised as not being in the interests of policyholders: |

[1] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543

[2] Requiring 'a high degree of certainty as to legislative intention' (*Hamilton v Oades* (1989) 166 CLR 486 at 495)

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| | (a) alter a private health insurance product so that it will no longer cover a particular treatment;<br>(b) reduce the benefits that apply under a particular product for a particular treatment that it covers;<br>(c) cease to offer insurance under particular products and force current policyholders to take up policies in different products offered by the insurer (i.e., 'forced migration');<br>(d) make payments out of the health benefits fund in circumstances that take advantage of and comply with the conditions in subsection 137-10(5) of the PHI Act;<br>(e) the introduction of risk-rating for health-related business comprising the insuring of persons who are not eligible persons under the Medicare regime (excluding, of course, holders of overseas student health cover policies); or<br>(f) changes in the *non-regulated business affairs* of the entity that is the private health insurer, i.e., activities undertaken by the same entity that are neither health insurance business nor health-related business and which have no connection to the insurer's health benefits fund(s).<br><br>We recommend that consideration be given to the articulation of further conditions to be satisfied before investigation powers may be invoked: for example, where there is suspicion of acts or omissions that would comprise breaches of the proposed Act or the PHI Act.<br><br>In circumstances where those further conditions are not satisfied, we would not seek to exclude APRA's having the power to ask questions and require answers – but the more interventionist powers of an investigation do not seem warranted. |
| Subsection 141(1) | As presently drafted, the term "affairs of a private health insurer" is insufficiently specific and the two references in paragraphs (b) and (c) of the subsection are inadequately linked, with the result that the destruction of information that is *irrelevant to the matters under investigation constitutes an offence*. Please consider revising this, potentially along the following lines:<br><br>*A person commits an offence if:*<br><br>*(a) specific aspects of the affairs of an insurer are being investigated under this Division;*<br>*(b) the person is aware of the circumstances specified in paragraph (a);*<br>*(c) the person does an act; and*<br>*(d) the act results in the concealment, destruction, mutilation or alteration of documents relating to those aspects of the affairs of an insurer that are being investigated under this Division.*<br><br>The presence of subsection (2) as currently drafted is no adequate answer to the criticism given above with respect to the present |

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| | drafting of subsection (1), for a person should not be put to the burden of proof that because the materials that he or she has destroyed, etc., are not relevant to the specific aspects of the insurer's affairs that are being investigated, he or she did not act with the relevant intent referred to in subsection (2). |
| Explanatory materials, page 93. | With historically low interest rates currently prevailing, it is remarkable that APRA should be given the authority to charge late payment penalties in respect of private health insurance levies of 20%. Even the current rate charged by PHIAC seems unreasonably high at 15%. What is the reason for such an increase? Have projections on increased receipts due to the higher interest charge been incorporated into the 'savings' that the change in regulator is anticipated making? If so, these seem not to be savings but a transfer of administrative costs to be borne by the regulated industry through increased 'statutory charges' for being regulated. |
| Explanatory materials, page 94: paragraph 10.25 | What is the justification for the addition of the 0.03 to the indexation factor? |
| Explanatory materials, page 95: paragraph 10.27 | This paragraph says that the risk equalisation levy will be imposed quarterly on private health insurers ***by APRA***. We assume that this is a mistake: the levy is actually imposed by Parliament under the relevant Act, with administrative aspects of its calculation and 'billing' being determined by the Minister and APRA. |

## Additional general comment

Various provisions of the Exposure Draft create offences, and these are commonly followed by a 'Note' that draws attention to subsection 4B(3) of the *Crimes Act 1914*. We recommend that all such Notes be reconsidered. Subsection 4B(3) of the *Crimes Act* is capable of applying *only* if the offence is described in such terms as to be capable of being committed by either an individual or a body corporate; and it is only in the latter case that the maximum penalty as prescribed for the offence may be 'multiplied out'. In any situation where either (a) the offence can *only* be committed by a natural person or (b) the offence can *only* be committed by a body corporate, there is no potential application of that provision in the *Crimes Act*.

In the Exposure Draft, a number of offences are described in such terms that they can only be committed by private health insurers. Since private health insurers can *only* be bodies corporate, there is no potential application of subsection 4B(3) of the *Crimes Act*. See, for example, subsection 94(1) of the Exposure Draft.

Some other provisions refer to offences committed by 'persons' but seem to be incapable of being committed by anyone other than a *natural* person. See, for example, section 111: the Note to subsection (2) and Note 1 to subsection (3); we had understood that an appointed actuary would need to be a natural person.

We note that some of these offences can only be committed by an *officer* of a private health insurer. Unless you are confident that there is jurisprudence to the effect that the concept of shadow directors can result in a body corporate being found to be a director – or unless

APRA proposes to define 'senior management responsibilities' under the prudential standards in a particularly broad fashion — there seems to be no way that the person who commits such an offence could be other than a natural person. And in these circumstances, nothing warrants a Note that references the potential application of subsection 4B(3) of the *Crimes Act*. See subsection 103(3), Note 1, by way of an example.

We commend all these Notes and offence provisions to the further consideration of the Office of Parliamentary Counsel.