

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing

Terrorism and Cyclone Insurance Act 2003

Insurance Act 1973

Legislation Act 2003

*Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance
Pool) Regulations 2022*

The *Terrorism Insurance Act 2003* (now the *Terrorism and Cyclone Insurance Act 2003*) (the Act) was established following the terrorist attacks of 11 September 2001 and the withdrawal of terrorism insurance cover by insurance and reinsurance companies. The Act established the Australian Reinsurance Pool Corporation (ARPC) to provide reinsurance cover to insurers for eligible terrorism losses and to perform any other function prescribed in the *Terrorism Insurance Regulations 2003* (renamed the *Terrorism and Cyclone Insurance Regulations 2003*) (The TI Regulations).

The ARPC administers the terrorism reinsurance scheme, which involves providing primary insurers with reinsurance for commercial property and associated business interruption losses arising from a declared terrorist incident.

Section 43 of the Act, section 132 of the *Insurance Act 1973* (Insurance Act), and section 62 of the *Legislation Act 2003* (Legislation Act) provide that the Governor-General may make regulations prescribing matters required or permitted by those Acts to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to those Acts.

On 4 May 2021, the Government announced its intention to establish a reinsurance pool to cover cyclone and cyclone-related flood damage (the cyclone reinsurance scheme) to commence from 1 July 2022. The cyclone reinsurance scheme seeks to improve insurance access and affordability for households and small businesses in cyclone-prone areas by reinsuring the risk of property damage caused by cyclones and cyclone-related flood damage.

On 15 October 2021, the *Terrorism Insurance Amendment (Cyclones and Related Flood Damage Reinsurance Pool) Regulations 2021* amended the TI Regulations to confer on the ARPC the new function of preparing to operate the cyclone reinsurance scheme.

On 7 February 2022, the Government announced it had finalised the design of the cyclone reinsurance scheme, following consultation on the draft legislation.

The purpose of the *Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance Pool) Regulations 2022* (the Regulations) is to amend the

TI Regulations to accommodate the new cyclone reinsurance scheme established by Schedule 1 to the *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Act 2022* (Cyclone and Flood Damage Reinsurance Pool Act).

The Regulations prescribe the definition of key terms for the cyclone reinsurance scheme, such as the definition of ‘cyclone’, the duration for the end of the claims period for a cyclone event, ‘home building’, and ‘contents.’ The Regulations set the threshold amount for determining if an insurer has minimum exposure to policies with eligible cyclone risks, which determines whether an insurer is required to participate in the cyclone reinsurance scheme. The Regulations also set the threshold amount for the maximum sum insured test that applies when determining if certain policies are eligible for coverage under the cyclone reinsurance scheme.

The Act, Insurance Act and Legislation Act do not specify any conditions that need to be met before the power to make the Regulations is exercised.

Public consultation on an exposure draft instrument and explanatory materials was held between 3 December 2021 and 17 December 2021. Submissions were received in response to the consultation from stakeholders, including consumer and community advocacy groups, industry, government bodies and academic experts.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence the day after they are registered.

A Regulation Impact Statement was prepared for the cyclone reinsurance scheme and is available in Chapter 3 of the Explanatory Memorandum for the Cyclone and Flood Damage Reinsurance Pool Act.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

ATTACHMENT A

Details of the *Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance Pool) Regulations 2022*

Section 1 – Name of Regulations

This section provides that the name of the Regulations is the *Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance Pool) Regulations 2022* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Terrorism and Cyclone Insurance Act 2003* (the Act), the *Insurance Act 1973* and the *Legislation Act 2003* (Legislation Act).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedule to this instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Insurance Regulations 2002

Item 1

Item 1 amends paragraph 4C(2)(d) of the *Insurance Regulations 2002* to update the name of the Act from the ‘*Terrorism Insurance Act 2003*’ to the ‘*Terrorism and Cyclone Insurance Act 2003*’. This amendment ensures that a loss or liability arising from a terrorist act within the meaning of the Act continues to be considered a contract of insurance for an atypical risk.

Legislation (Exemptions and Other Matters) Regulation 2015

Item 2

Disallowance

Item 2 repeals and replaces item 31 of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Legislation Regulation) to update the name of the Act from the ‘*Terrorism Insurance Act 2003*’ to the ‘*Terrorism and Cyclone Insurance Act 2003*’ and to ensure that a terrorist incident declaration under section 6 of the Act continues to be exempt from disallowance.

Section 6 of the Act provides that if a terrorist attack occurs, the Minister can invoke the operation of the terrorism reinsurance scheme by declaring a terrorist incident. Insurers that have voluntarily reinsured their terrorist incident risks with the Australian Reinsurance Pool Corporation (ARPC) would face significant business uncertainty if terrorist incident declarations were subject to disallowance, as they could not be certain whether they would be able to access the terrorism reinsurance scheme to pay claims arising from a terrorist incident. Moreover, if a declaration were capable of disallowance, this would undermine the purpose of subsection 6(5) of the Act, which provides that a declaration cannot be revoked.

The Regulations themselves are still subject to disallowance under section 42 of the Legislation Act.

Item 3

Sunsetting

Item 3 repeals and replaces item 63 of the table in section 12 of the Legislation Regulation to update the name of the Act from the ‘*Terrorism Insurance Act 2003*’ to the ‘*Terrorism and Cyclone Insurance Act 2003*’, and to ensure that terrorist incident declarations and regulations made under the Act continue to be exempt from sunsetting.

A terrorist incident declaration under section 6 of the Act continues to be exempt from sunsetting on the basis that sunsetting would give rise to significant business uncertainty for insurers who have voluntarily reinsured their terrorist incident risks with the ARPC. Moreover, if a declaration were capable of disallowance, this would undermine the purpose behind the rule in subsection 6(5), which provides that a declaration cannot be revoked.

The *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Act 2022* insert regulation-making powers for the cyclone reinsurance scheme. The amendment in item 3 extends the sunsetting exemption in section 12, item 63 of the Legislation Regulation to Regulations made for the purposes of the cyclone reinsurance scheme, ensuring certainty for insurers who are required to take out cyclone reinsurance with the ARPC.

It is appropriate for all Regulations made under the Act to be exempt from sunsetting as they will be subject to a more stringent statutory review process than is set out in the Legislation Act. The Regulations will be reviewed alongside the Act as they set out key details to support the operation of the cyclone reinsurance scheme. A review of the cyclone reinsurance scheme will be conducted initially three years after the commencement of the scheme and then, once aligned with the terrorism reinsurance scheme, every five years thereafter. Regular reviews will involve evaluating the performance of the cyclone reinsurance scheme to ensure it operates as intended and remains fit-for-purpose. Stakeholder feedback will be sought in years that require a review of the two schemes.

Terrorism Insurance Regulations 2003

Items 4 to 9

Name of Act and Regulations

Item 4 repeals and replaces regulation 1 to rename the *Terrorism Insurance Regulations 2003* as the *Terrorism and Cyclone Insurance Regulations 2003* (the TI Regulations), consistent with their expanded application to cyclone insurance.

Item 5 updates the short title of the Act to the *Terrorism and Cyclone Insurance Act 2003*.

Definitions

Item 6 updates the definition of ‘business’ in regulation 3 to refer to the *Competition and Consumer Act 2010*, which has replaced the *Trade Practices Act 1974*.

Item 7 provides that the definition of a ‘body corporate’ (in relation to a strata or community title development) is given by new subregulation 4A(5).

Item 8 repeals the existing definition of ‘contents’ in regulation 3. A replicated definition of ‘contents’ is given at new subregulation 5(2) for the purposes of determining ineligible insurance contracts for the terrorism reinsurance scheme under Schedule 1 of the TI Regulations. A new definition of ‘contents’ for the cyclone reinsurance scheme is given at new regulation 5B.

Item 9 provides that the definitions of ‘cyclone’, ‘end’ (of a cyclone), ‘reintensify’ (in relation to a cyclone), ‘strata or community title development’ and ‘unit’ (in relation to a strata or community title development) are given by new regulations 3A and 4A.

Item 10

Cyclone definitions

Item 10 inserts new regulation 3A, which provides the definitions of ‘cyclone’, ‘end’ and ‘reintensify’ for the purposes of section 3 of the Act.

Any subsequent amendments to the definitions of ‘cyclone’, ‘end’ and ‘reintensify’ will seek to minimise disruption to the operation of the cyclone reinsurance scheme and to industry. Appropriate consultation will be undertaken on any proposed amendments to the definitions in accordance with section 17 of the Legislation Act.

Cyclone

A ‘cyclone’ is a non-frontal low-pressure system of synoptic scale that:

- has developed over warm waters; and
- has organised convection; and

- has a maximum mean wind speed of 34 knots or greater that extends more than half-way around near the centre of the system and has persisted for at least 6 hours.

This definition of cyclone is derived from the Bureau of Meteorology's (BoM) existing definition and is based on the current scientific assessment of what constitutes a cyclone. The definition describes tropical cyclones, which are referred to in the Act and the Regulations as cyclones. 'Tropical cyclones' refer to intense low-pressure systems which form over warm ocean waters at low latitudes.

Under the Act, if the BoM observes a weather event that fits the description of a cyclone, the BoM will inform the ARPC within 24 hours of making this observation. Subsequently, within 24 hours of being notified by the BoM, the ARPC will declare the beginning of a cyclone event, effective from the time at which the BoM observed the cyclone. The cyclone reinsurance scheme will cover any eligible hazard damage arising from a cyclone that satisfies the definition of 'eligible cyclone loss' (see section 8C of the Act) from the start of the cyclone event, which marks the beginning of the claims period.

End (of a cyclone)

A cyclone 'ends' at the earliest time (the 'downgrade time') when the following conditions are satisfied:

- the low-pressure system concerned no longer has:
 - organised convection; or
 - a maximum wind speed of 34 knots or greater that extends more than half-way around near the centre of the system and has persisted for at least 6 hours
 and has been designated by the BoM as an ex-tropical cyclone or post-tropical cyclone;
- in the opinion of the BoM, the likelihood that the system will intensify to such an extent as to again have:
 - organised convection; and
 - a maximum wind speed of 34 knots or greater that extends more than half-way around near the centre of the system and has persisted for at least 6 hours

at some time within 48 hours after the downgrade time is less than the likelihood that it will not.

This definition is based on the current scientific assessment of what constitutes the end of a cyclone.

Under the Act, if the BoM observes that a declared cyclone now satisfies the above conditions, the BoM will inform the ARPC within 24 hours of making this observation. Subsequently, within 24 hours of being notified by the BoM, the ARPC will declare the end of a cyclone event, which will last for a fixed additional period of

48 hours (as provided for in new regulation 5D) after the time at which the BoM observed the end of a cyclone.

The cyclone reinsurance scheme will cover any eligible hazard damage arising from a cyclone that satisfies the definition of ‘eligible cyclone loss’ (see section 8C of the Act) until the end of the cyclone event, which marks the end of the claims period.

Reintensify (in relation to a cyclone)

After a cyclone is downgraded, it is taken to ‘reintensify’ (and becomes a cyclone once again) if it again meets the conditions involving convection and wind speed in paragraphs (2)(b) and (c) of the definition of a cyclone. In this case, the ARPC would declare the beginning of a new cyclone event on the advice of the BoM.

A reintensified cyclone ends at the downgrade time after it last reintensified when it again satisfies the conditions involving convection, wind speed and likelihood of reintensification in paragraphs (3)(a) and (b) of the definition of end (of a cyclone). In this instance, the BoM would notify the ARPC that the cyclone has ended, to enable the ARPC to declare the end of the new cyclone event.

Items 11 to 13

Definitions for strata or community title development and related terms

Strata or community title development

Item 11 inserts new regulation 4A, which sets out the types of arrangements covered under ‘strata or community title development’ for the purposes of section 3 of the Act.

Subregulation 4A(2) covers arrangements (commonly referred to as ‘strata title’) that exist under a State or Territory law, which incorporate the following features:

- the title to land (leasehold or freehold) is subdivided into different portions of land each with their own separate legal title, or where particular units of a single building are attached to separate legal titles (or a combination of the two); and
- the common areas are owned or managed by a body corporate (such as an owners corporation).

State and Territory laws have various names for these arrangements, such as ‘strata title’, ‘community title’, ‘unit title’, ‘cluster title’ or some other term that reflects the features above.

Subregulation 4A(3) covers arrangements (commonly referred to as ‘company title’) involving an interest in land, whether leasehold or freehold, owned by a body corporate and for which a holder of shares in the body has or may be granted a right to occupy or use some or all of the land. The body corporate is typically a company registered under the *Corporations Act 2001*.

Subregulation 4A(4) covers collective property arrangements that are structured by trust. Under these arrangements:

- an interest in land, whether freehold or leasehold, is held on trust and the trustee is a body corporate;
- under the terms of the trust, the holder of an interest in the trust has or may be granted a right to occupy or use part of the land; and
- there are at least 2 distinct parts of the land under the terms of that trust.

Body corporate

Item 11 defines ‘body corporate’ as the entity referred to in subregulation 4A(2), (3) or (4) of the definition of strata or community title development (as the case requires).

Unit

Item 11 defines ‘unit’ in relation to strata or community title developments, which may be in the form of subdivided portions of land or parts of a building, or land that may be occupied or used by a holder of shares in the body corporate or a particular interest in the trust (as relevant).

Contents

Items 12 and 13 create new subregulations 5(1) and (2) to define ‘contents’ for the purposes of Schedule 1 to the TI Regulations. Schedule 1 of the TI Regulations sets out contracts that are not eligible insurance contracts for the purposes of the terrorism reinsurance scheme (see subsection 7(2) of the Act). The definition of ‘contents’ for the terrorism reinsurance scheme has not been altered from its previous definition at regulation 3. Instead, it has been moved to a different section of the TI Regulations.

The definition of ‘contents’ in new subregulation 5(2) is distinct to the definition of ‘contents’ prescribed in new regulation 5B, which applies to contents in relation to the cyclone reinsurance scheme.

Item 14

Threshold for mandatory participation

Item 14 inserts new subregulation 5A(1), which prescribes \$10 million as the threshold for gross written premiums payable for the previous financial year ending before the current calendar year (for policies with eligible cyclone risks) for the purposes of determining mandatory participation under subsection 8A(5) of the Act. Subject to the application provisions, if a general insurer exceeds the \$10 million threshold, the general insurer is required to participate in the cyclone reinsurance scheme for the current calendar year and therefore must reinsure all eligible cyclone risks with the ARPC. If a general insurer is below this threshold, the insurer is not required to participate but may choose to do so.

Item 14 inserts new subregulation 5A(2), which prescribes the reporting standard for the purposes of subsection 8A(6) of the Act. The prescribed reporting standard is the one set out in Schedule 1 to the *Financial Sector (Collection of Data) (reporting*

standard) Determination No. 18 of 2013 as in force on 12 February 2013. This legislative instrument, made under the *Financial Sector (Collection of Data) Act 2001*, sets out requirements for the provision of information to the Australian Prudential Regulation Authority (APRA) relating to a general insurer's premium revenue and reinsurance expenses. The determination has applied to all general insurers since 1 January 2013 and is publicly available on the Federal Register of Legislation. The reference to the current APRA reporting standard, permitted under section 14 of the Legislation Act, is essential to precisely describe the threshold for total gross written premiums and to align with existing industry standards.

Pool insurance contract definitions

Home building, building and contents

Item 14 also inserts new regulation 5B which creates definitions to assist in determining whether a particular contract of insurance is a pool insurance contract for the purposes of subsection 8B(1) of the Act. A pool insurance contract is a contract of insurance that is eligible for reinsurance under the cyclone reinsurance scheme, where the contract provides cover:

- for loss of or damage to eligible property;
- for associated business interruption and consequential loss; or
- in respect of a home building, contents, or building as defined in regulation 5B.

Regulation 5B sets out definitions for 'home building', 'building' and 'contents' for each paragraph of subsection 8B(3) of the Act:

- For the purposes of paragraph 8B(3)(a) of the Act, the definition of 'home building' under subregulations 5B(1)-(3) covers:
 - residential buildings (for example, houses, duplexes and townhouses, including internal renovations if covered by the contract of insurance for the home building) and any related out-building, fixture or structural improvements used for domestic purposes (for example, a garage, deck or pergola);
 - moveable homes that are fixed to a site and used principally and primarily as a place of residence, such as caravans, in which the insured or another person lives; and
 - any fixed wall coverings, fixed ceiling covers, fixed floor coverings (other than carpets), certain services (whether underground or not), and fences or gates wholly or partly on the site.

Hotels, motels, boarding houses, aged care facilities, buildings that are being constructed, temporary buildings and structures, and demountable or moveable structures (apart from caravans and moveable homes fixed to a site) are excluded from the definition.

- For the purposes of paragraph 8B(3)(b) of the Act, the definition of ‘contents’ under subregulations 5B(4)-(5) includes:
 - contents of all types of home building properties (see above) located in the home building or elsewhere on the home building site specified by the insurance contract; and.
 - items that are usually so located and are still insured under the contract even when not so located (for example, a laptop or bicycle that is taken offsite, if covered by the contract of insurance).

Hotels, motels, boarding houses and aged care facilities are excluded from home building contents cover, except in circumstances where the relevant building is used by the insured principally and primarily as a place of residence.

- For the purposes of paragraph 8B(3)(c) of the Act, the definition of ‘building’ under subregulations 5B(6)-(7) includes:
 - any building or part of a building which is located on a specified site; and
 - structures such as out-buildings, fixtures, fixed wall and floor coverings (other than carpets), certain services (whether underground or not), and fences or gates wholly or partly on the site.

Buildings under construction, temporary buildings, and demountable or moveable structures are excluded from the definition.

Contents of a building includes all types of items of property owned by the insured and located either in the building or elsewhere on a site specified in the insurance contract and on which the building is located.

- For the purposes of paragraph 8B(3)(d) of the Act, the definition of ‘building’ under subregulations 5B(8)-(9) includes:
 - any building or part of a building, whether or not occupied by the insurer, which is located on a specified site (this could include hotels, motels, boarding houses or aged care facilities, for example);
 - caravans or moveable homes that are fixed to a site;
 - structures such as out-buildings, fixtures, fixed wall and floor coverings (other than carpets); and
 - fences or gates wholly or partly on the site.

Buildings under construction, temporary buildings, and demountable or moveable structures (apart from caravans and moveable homes fixed to a site) are excluded from the definition.

Contents of a building includes all types of items of property owned by the insured and located either in the building or elsewhere on a site specified in the insurance contract and on which the building is located.

Government entity

Item 14 inserts new subregulation 5B(11), which defines ‘government entity’ for the purposes of section 8B(5) of the Act. Where the insured is a government entity and the building is owned and managed by a government entity, the relevant insurance contract will be ineligible for cyclone reinsurance scheme coverage. ‘Government entity’ includes the Commonwealth, Commonwealth Government departments and agencies, Commonwealth entities, Corporations Act companies controlled by the Commonwealth, State and Territory governments and government departments, and local governing bodies.

Maximum sum insured for non-residential policies

Item 14 inserts new subregulation 5B(10), which prescribes \$5 million per policy as the maximum sum insured threshold for non-residential policies for the purposes of paragraph 8B(3)(d) of the Act. This threshold is inclusive of the total of the property sum insured, contents sum insured, and business interruption sum insured. The threshold applies to buildings, contents or both that are not used principally and primarily as a place of residence. The definition of ‘sum insured’ will be included in the ARPC reinsurance contracts.

If an insurer has a combined non-residential building, contents or business interruption insurance policy sum insured of more than \$5 million, then the risk under that policy cannot be reinsured by the insurer with the ARPC under the cyclone reinsurance scheme.

Hazard coverage definitions

Item 14 inserts new regulation 5C, which defines ‘storm surge’ for the purposes of paragraph 8C(2)(b)(ii) of the Act and is derived from the BoM’s existing definition. A loss that arises from a storm surge caused by a cyclone (for the duration of the claims period) will be an eligible cyclone loss and therefore covered by the scheme.

Item 14 defines ‘flood’ for the purposes of paragraph 8C(2)(b)(iii) of the Act as a flood defined by subsection 34(1) of the *Insurance Contract Regulations 2017*. A loss that arises from flooding caused by a cyclone (for the duration of the claims period) will be an eligible cyclone loss and therefore covered by the scheme.

End of claims period in second declaration

Item 14 inserts new regulation 5D, which provides that, for the purposes of subsection 8F(3) of the Act, the period of time between the end of a cyclone and the time at which the claims period ceases is 48 hours. The end of the cyclone event (including the day and time when the claims period for that cyclone event ends) will be specified in the declaration made by the ARPC under subsection 8F(2) of the Act.

Content of the Financial Outlook Report

Item 14 also inserts new regulation 5E, which provides that, for the purposes of the Financial Outlook Report under subsection 40A(1) of the Act, the ARPC must report

on the matters prescribed. The ARPC is required to provide yearly reports on the operation of the cyclone reinsurance scheme to ensure it operates in a transparent and publicly accountable manner.

Item 15

ARPC functions

Item 15 repeals regulation 6, which prescribes additional ARPC functions that are no longer necessary nor required. The National Insurance Affordability Initiative is no longer operational, making subregulation 6(1) redundant. Further, as the Act establishes ARPC's new function of administering the cyclone reinsurance scheme, subregulation 6(2) is not necessary.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance Pool) Regulations 2022

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

On 4 May 2021, the Government announced its intention to establish a reinsurance pool to cover cyclone and cyclone-related flood damage (the cyclone reinsurance scheme) to commence from 1 July 2022. The cyclone reinsurance scheme seeks to improve insurance access and affordability for households and small businesses in cyclone-prone areas by reinsuring the risk of property damage caused by cyclones and cyclone-related flood damage.

The *Terrorism Insurance Amendment (Cyclone and Related Flood Damage Reinsurance Pool) Regulations 2022* (the Regulations) amend the *Terrorism Insurance Regulations 2003* (TI Regulations) to accommodate the new cyclone reinsurance scheme established by the *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Act 2022*.

The Regulations prescribe the definition of key terms for the cyclone reinsurance scheme, such as the definition of ‘cyclone’, the duration for the end of the claims period for a cyclone event, ‘home building’, and ‘contents.’ The Regulations set the threshold amount for determining if an insurer has minimum exposure to policies with eligible cyclone risks, which determines whether an insurer is required to participate in the cyclone reinsurance scheme. The Regulations also set the threshold amount for the maximum sum insured test that applies when determining if certain policies are eligible for coverage under the cyclone reinsurance scheme.

The *Terrorism and Cyclone Insurance Act 2003*, *Insurance Act 1973* and *Legislation Act 2003* do not specify any conditions that need to be met before the power to make the Regulations is exercised.

Human rights implications

The Regulations do not engage any of the applicable human rights or freedoms as the amendments are to further amend the framework for the ARPC to operate the scheme, and only apply to insurance companies, not individuals.

Conclusion

The Regulations are compatible with human rights as it does not raise any human rights issues.